Law Reform Commission of Saskatchewan

Tentative Proposals for a *Land Charges Act*

The Law Reform Commission of Saskatchewan

September 2018

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

The Commission is incorporated by an Act of the Saskatchewan Legislature. Commissioners are appointed by Order in Council. The Commission's recommendations are independent and are submitted to the Minister of Justice and Attorney General of Saskatchewan for consideration.
Projects are initiated by the Commission in response to suggestions from the public and the legal community, or at the request of the Minister of Justice and Attorney General.

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

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

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TABLE OF CONTENTS

I. Introduction 1
II. Changes in the Concept of Mortgage 2
1. Mortgage as a Devise 2
2. The Characteristic of an Equitable Charge 4
3. Mortgage as a Charge 5
III. Agreements for Sale of Land 6
IV. Interests in Accounts Associated with Land 7
V. The Principal Problems with Current Real Property Security Law 7
1. Lack of Conceptual Unity and Structural Coherence 7
2. Inefficient Enforcement 7
3. Unnecessary Use of Court Resources 8
VI. A Modern Precedent: *The Personal Property Security Act, 1993* 9
VII. Goals of the Project 10

THE (DRAFT) *LAND CHARGES ACT* 12

PART 1: DEFINITIONS AND SCOPE 12
Section 2 Definitions 12
Section 3: Scope 18
Section 4: Agreement for Sale 19
Section 5: Effect of Charge Agreement 19
Section 6: Exclusions from Scope of Act 20
Section 7: When Charge Comes into Existence 20
Part 1 Consultation Questions 22

PART 2: FORM AND CONTENT OF A CHARGE AGREEMENT 23
Section 8: Form of Charge Agreement 23
Section 9: Income from Land 26
Section 10: Obligations Deemed Secured 26
Sections 11: Provision not Applicable to Commercial Land 27
Section 12: Prohibited Provisions 28
Section 13: Allocation of Insurance Proceeds 29
Section 14: Relief Against Acceleration 30
Section 15: Right to Pre-Pay Obligation 31
Section 16: Due-on-Sale or Encumbrance Clauses 32
Section 17: Novation 33
Section 18: Discharge by Payment to Joint Chargee 35
Part 2 Consultation Questions 35

PART 3: RECOVERY OF UNSECURED OBLIGATION OF CHARGOR 37
Section 19: Enforcement of Judgment 37
Section 20: Liability of Transferees 41

Section 21: Consolidation of Obligations 42
Section 22: Time Limitation on Deficiency Recovery 43
Part 3 Consultation Questions 46

PART 4: CONSOLIDATION AND MERGER 47
Section 23: Consolidation Prohibited 47
Section 24: Merger 48
Part 4 Consultation Question 49

PART 5: TRANSFER AND CHARGES OF INTERESTS 49
Section 25: Transfer of Chargor's Interest 49
Section 26: Recovery by Chargee against Transferee 51
Section 27: Transfer of Chargee's Interest 52
Section 28: A Charge of a Charge 53
Section 29: Compulsory Transfer of Chargee's Interest 54
Part 5 Consultation Questions 56

PART 6: PRIORITY RULES 57
Section 30: Priority of Leasehold Interests 57
Section 31: Priority – General 57
Section 32: Tacking 58
Section 33: Marshalling 60
Part 6 Consultation Questions 63

PART 7: ENFORCEMENT AGAINST COMMERCIAL LAND 64
Section 34: Application of this Part 64
Section 35: Default for Enforcement Purposes 65
Section 36: Notice of Enforcement 66
Section 37: Time Before Sale 68
Section 38: Conditions of Sale 68
Section 39: Transfer of Title 69
Section 40: Proceeds of Sale 70
Section 41: Charges on Real and Personal Property 71
Part 7 Consultation Questions 71

PART 8: SURRENDER OR EXTINGUISHMENT OF CHARGOR'S INTEREST 72
Section 42: Agreed Surrender of Chargor's Interest 72
Part 8 Consultation Questions 76

PART 9: PERMISSION FOR ENFORCEMENT AGAINST RESIDENTIAL LAND BY SALE 77
Section 43: Meaning of "Land" and Judgment Pre-requisite 77
Section 44: Notice of Application 78
Section 45: Court Orders 79
Part 9 Consultation Questions 81

PART 10: ENFORCEMENT BY COURT ORDER 81
Section 46: Order for Sale 81
Section 47: Conditions of Sale 83
Section 48: Proceeds of Court-ordered Sale 83
Part 10 Consultation Questions 84

PART 11: ENFORCEMENT AGAINST ACCOUNTS 85
Section 49: Definitions 85
Section 50: Charge Agreement 87
Section 51: Payment by Account Debtor 88
Section 52: Default by Chargor 89
Section 53: Conflicting Priority Claims 90
Part 11 Consultation Questions 90

PART 12: ENFORCEMENT OF NON-CONSENSUAL LIENS 91
Section 54: Definitions 91
Section 55: Actions and Applications to the Court 91
Part 12 Consultation Questions 93

PART 13: GENERAL PROVISIONS 94
Section 56: Court Supervisory Jurisdiction 94
Section 57: Possession of Charged Land Given to Chargee 96
Section 58: Limitation of Actions 97
Section 59: Chargor or Chargee Cannot be Found 97
Section 60: Service of Notices and other Documents 97
Section 61: References to Mortgage Terms 98
Section 62: Act Binding on Crown 98
Section 63: Transition 98
Section 64: Power to Make Regulations 98
Part 13 Consultation Questions 98

Acts and Provisions of Acts that would be repealed 99

CALL FOR RESPONSES

The Law Reform Commission of Saskatchewan is interested in your response to this report. Your comments and opinions on the topic are welcome.

How to Respond

Responses may be sent **no later than February 15, 2019:**

By email - director@lawreformcommission.sk.ca

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To assist in writing your response, a document containing the consultation questions posed in this paper is available for download on the Commission's website:

https://lawreformcommission.sk.ca/.

I. Introduction

There are few areas of Saskatchewan commercial law that are more antiquated and complex than the law dealing with real property security. By comparison, *The Personal Property Security Act, 1993*[1] and *The Enforcement of Money Judgment Act*[2] - codes dealing respectively with security interests in personal property and the enforcement of money judgments - implement systems that are among the most modern and sophisticated of their kind in the world. Since its creation as a province, Saskatchewan has paid little attention to the codification of real property security law. This area of the law is based on the rich heritage of hundreds of years of legal developments.[3] As a result, there are few issues that can arise in the context of mortgage contracts or agreements for sale and their enforcement for which no guidance can be found in statute or case law. However, this advantage comes at a cost of complexity and associated inaccessibility. This complexity is exacerbated by the multiplicity and disparity of statutory instruments through which its features must be accessed.

The statutory provisions that address fundamental features of mortgage law and the rights of vendors and purchasers under agreements for sale are found in at least seven different statutes. With notable exceptions, many of these provisions are modifications of prior law that do not change basic concepts and structures that have endured for centuries. The result is that, notwithstanding the importance of real property financing to the economic life of Saskatchewan residents, there are few, whether laypersons or practitioners of the law, who have anything other than a superficial understanding of real property security law.

There is little evidence that Saskatchewan's real property security law is non-functional, and there is no statistical evidence that its features are such as to result in secured financing facilities involving real property interest being less available in Saskatchewan than in neighbouring jurisdictions. However, there are several factors that justify a project designed to develop a code of real property security law which, if enacted, would result in a modern, integrated and efficient real property security law. Apart from the re-conceptualization of a mortgage that occurred with the enactment of *The Territories Real Property Act* in 1886, the conceptual and functional features of this area of law have not been assessed since their formulation in the courts of medieval England. This alone is sufficient inducement to re-examine it in a modern context.

In 2010, the Law Reform Commission decided to undertake a study of Saskatchewan real property security law with the ultimate goal of developing a modern code paralleling *The Personal Property Security Act, 1993.* The first stage in the project involved asking Professor Cuming of the College of Law, University of Saskatchewan to prepare a study of existing real

[1] *The Personal Property Security Act, 1993,* SS 1993, c P-6.2.

[2] *The Enforcement of Money Judgment Act*, SS 2010, c E-9.22.

[3] As a result of provisions of the *North-West Territories Act, 1886*, RSC 1886, c 50, s 48 and *The Saskatchewan Act,* 4-5 Edw VII, c 42 (Canada), RSC 1905, c 42, s 18, (see *The Queen's Bench Act*, SS 1998, c Q-1.01, s 51.2), the common law and statutory law of England that existed as of July 15, 1870 continue to be the law of Saskatchewan except to the extent they are repealed, abolished or altered by the Saskatchewan Legislature.

property security law. It was understood that any opinions set out in the study would not reflect the views or conclusions of the Law Reform Commission. In 2016 Professor Cuming published *Overview of Saskatchewan Real Property Security Law*.[4] In this publication, the author provides a detailed description of current real property security law along with some of the conclusions he reached while carrying out research for the publication.

This report addresses the background to and important conceptual, structural and functional features of modern real property security law. In addition, it records many of the perceived problems associated with it. This is followed by a draft statute entitled "The Land Charges Act" that is designed to provide the basis for modern, efficient real property security law. Each provision of the draft is followed by a brief explanation of the intended effect of the provision.

A series of questions follows each Part of the draft Act. These are designed to elicit response from interested persons. While the questions permit the reader to focus on the substance of the provisions to which they related, response in any form is welcome.

The tentative conclusions set out in the report are of general relevance to all real property security transactions occurring in Saskatchewan. However, the procedural features of *The Saskatchewan Farm Security Act*[5] are not addressed.

II. Changes in the Concept of Mortgage

1. Mortgage as a Devise

By the end of the 15th century, it was accepted that the term "mortgage" was understood as denoting a transaction under which the mortgagor (feoffor) conveyed his fee to the mortgagee (feofee) and, unless the contract provided otherwise, possession as well.[6] By the end of the sixteenth century, it was common for the mortgagor to remain in possession of the land as a tenant at the will of the mortgagee. If the mortgagor failed to perform the contract by discharge of the debt on the date set for payment, the mortgagee's estate became absolute. However, the mortgagor remained liable to repay the debt. The injustice that this permitted induced the intervention of the Chancellor.[7]

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[4] Regina, Office of the Queen's Printer (Now Publications Saskatchewan), 2016, ISBN:978-0-9953478-0-9.

[5] *The Saskatchewan Farm Security Act*, SS 1988-89, c S-15.1.

[6] For a brief description of the development of mortgage law prior to this time, see Cuming, *Overview of Saskatchewan Real Property Security Law, supra* note 4, at 1-8 to 1-11.

[7] By the beginning of the fifteenth century, the Chancellor, who as secretary to the king's council and keeper of the Great Seal, received petitions seeking redress against the Crown (which could not be sued in a common law court), was prepared in addition to address bills of complaint relating to matters that could not be or were not being adequately addressed in the common law courts, and to provide on an *ad hoc* basis remedies not otherwise available to petitioners. Chancery was not bound in any way by the rigid rules of the common law or the prolix and costly procedures of the common law courts. Its remedies were initially effective only *in personam* and were not binding on anyone other than the litigants. However, by the mid-sixteenth century the volume of petitions and the importance of producing predictable outcomes led to the recognition of a set of substantive rules

The intervention of equity resulted in a fundamental change in the practical effect but not the formal basis of mortgage law. Although it outwardly preserved respect for the whole common law edifice based on the mortgagee's ownership of the fee, the Court of Chancery changed the legal incidents of a mortgage contract.[8]

The intervention of Chancery in mortgage law came as a feature of its approach to penalties. The Chancellor took the position that a person should not be entitled to profit unconscionably from a contract that provided penal consequences upon default. During the reign of Henry VIII, the Chancellor began ordering recalcitrant mortgagees to re-convey title when their mortgagors had timely tendered payment of the debts secured by the mortgages. The intervention came in a form of an injunction (*in personam* and punishable as contempt) issued by the Chancellor against the mortgagee precluding him from treating the mortgage land as being free from the opportunity of the mortgagor to discharge the mortgage debt. During the reign of Elizabeth I, the Chancellor began ordering reconveyance when the mortgagor's failure to tender payment on the due date was as a result of special circumstances such as mistake, accident or the fraud of the mortgagee. The final step (taken in the mid-seventeenth century) was to dispense with the necessity on the part of the mortgagor to demonstrate special circumstances when petitioning for equitable intervention.

The ultimate effect of the Chancellor's intervention was the conclusion that the mortgagor was in equity the "true owner" of the mortgaged land and that "the principal right of the mortgagee is to the money, and his right to the land is only as a security for the money."[9] Even if the condition of mortgage contract under which the mortgagee could at law treat the land as his own was met, the mortgagor was entitled to reconveyance upon tendering the principal, interest and damages (costs) within a reasonable time after default. Upon tender of payment, the mortgagee was treated as trustee of the property for the benefit of the mortgagor. Furthermore, even though the debt was not discharged by the mortgagor, his "interest" could be extinguished only by an order of the court "foreclosing" the mortgagor's right to reconveyance of the land. This became known as the mortgagor's "right of redemption."

The mortgagee retained the right to enforce the mortgage agreement. However, this required an application to the Chancery Court (a bill for foreclosure) for an order extinguishing the personal right and equitable interest of the mortgagor. This order was available only on the court giving to the mortgagor the opportunity to repay (an order *nisi*) even at the last moment (and, in appropriate situations, even after the foreclosure order) if the mortgagor demonstrated a willingness and ability to do so.

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generally referred to as the law of equity. This resulted in the Chancery beginning to function as a separate court with its own procedures and remedies.

[8] *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* (1913), [1914] AC 25 at 35 per Lord Haldane.

[9] *Thornborough v Baker,* (1675) 3 Swan 628 at 630 per Lord Nottingham.

The 1852 *Chancery Procedure Amendment Act*[10] empowered the court to order a judicial sale as an alternative to foreclosure. Still later, equity recognized the efficacy of a clause in the mortgage deed granting to the mortgagee the power to sell the land free from the equity of redemption.[11] However, in both contexts, the mortgagee was treated only as a secured creditor and, as such, was entitled to retain only sufficient proceeds to discharge the obligation of the mortgagor and the costs of disposition. With leave of the court, the mortgagee could bid at the sale and, in that way, become full owner of the property.

The conceptual basis of the mortgage as a security for debt notwithstanding conveyance of the debtor's ownership to the mortgagee dictated the conclusion that with or without default under the mortgage contract, the mortgagor was the owner in equity (beneficial owner) of the mortgaged property. The *in personam* equitable right to redeem that arose upon failure to exercise the contractual right of redemption over time expanded to an *in rem* "equity of redemption", a limited estate in equity that remained in the mortgagor from the beginning of the relationship between the mortgagor and mortgagee. As such, it could be subdivided, conveyed, mortgaged and devised.

Equity's involvement in the development of mortgage law was not confined to measures that protected the property interests of defaulting mortgagors. Proceeding from the basic insistence on fairness that characterized the intervention of equity in contractual relations and remedies, courts of equity developed a range of principles affecting relationships between mortgagees and mortgagors and between competing mortgagees that became fundamental features of the current law of mortgages. However, these principles did not become rules of law; their availability is always within the discretion of the court.

2. The Characteristic of an Equitable Charge

An equitable charge has very little in common with a common law, equitable, or statutory mortgage. Indeed, notwithstanding the widespread use of the term "charge", it is a financing device that has received little consistent recognition in Anglo-Canadian law. The feature that distinguishes an equitable charge from a mortgage is that it does not involve a transfer of any interest from the chargor (debtor) to the chargee (creditor). The chargee acquires an "interest" in the property charged, not as a result of a transfer, but as a result of operation of law. The interest is invoked by an agreement between the chargor and the chargee that specified property of the former is subject to a charge. The chargee acquires a right to look to the property for recovery in the event the chargor fails to discharge specified obligations owing by the chargor or a third party to the chargee.[12] The chargee's interest in the charged property

[10] (1852) 15 & 16 Vict. X. 86, s. 48. See *The Queen's Bench Act, 1988*, SS 1988 c Q 1.01, s. 70.

[11] However, such clauses are not enforceable under current Saskatchewan law. *Co-operative Trust Company of Canada Ltd. v. Target 21 Industries Ltd.* [1988] 3 WWR 97 (Sask CA)

[12] *Mathews v Goodday* (1861) 31 LJ Ch 282. "Thus the essence of an equitable charge is that, without any conveyance or assignment to the chargee, specific property of the chargor is expressly or constructively appropriated to or made answerable for payment of a debt, and the chargee is given the right to resort to the property for the purpose of having it realised and applied in or towards payment of the debt. The availability of

invokes the common law principle of *nemo dat quod non habet;* however, since the chargee does not acquire a legal interest in the property, it is technically incorrect to apply the mortgage concepts of "redemption" or "foreclosure" to enforcement of charges. There is no title or interest to redeem and no equitable interest to foreclose. The existence of the charge is dependent on the existence of the obligation it secures. Once the obligation is discharged, the charge disappears. The only remedy available to a chargee at equity was a court ordered sale of the charged property or the appointment of a receiver.

3. Mortgage as a Charge

When the decision was made to implement a Torrens land titles system in the Northwest Territories (that later became Saskatchewan and Alberta) it was recognized that the devise pattern of English mortgage law was inconsistent with fundamental features of a land titles system.[13] *The Territories Real Property Act* 1886[14] that implemented a Torrens system defined a mortgage as a charge and not a conveyance. This approach was perpetuated in *The Land Titles Act, 1906*[15] of Saskatchewan and continues to the present.[16] Until the enactment of *The Land Titles Act, 2000*, a mortgage was a creature (in the formal sense) of a Torrens system,[17] with functional characteristics very similar to those of a common law mortgage other than transfer of title to the mortgagee.[18] Many of the trappings of traditional mortgage law that were retained included mortgage terminology and concepts such as redemption, order *nisi,* foreclosure order and equity of redemption.[19] "[T]he statute commences by stating that the 'mortgage' in the case of Torrens title land is a charge but then proceeds to introduce rights and remedies which are part of the composite structure which equity and the common law built around the general law mortgage. The gap between mortgage s*tricto sensu* and hypothecation is therefore narrowed at both ends. The device of foreclosure, rendered

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equitable remedies has the effect of giving the chargee a proprietary interest by way of security in the property charged." *National Provincial and Union Bank of England v Charnley* [1924] 1 KB 431 Atkin LJ at 449–450.

[13] English mortgage law was changed in 1925 by the *Law of Property Act 1925,* s. 85(1) of which provides that a legal mortgage must be made by deed either by demise for a terms of years absolute, subject to a provision for cesser or redemption, or by a legal charge.

[14] SC 1886, c 26.

[15] *The Land Titles Act,* SS 1906, c 24, s 102.

[16] *The Land Titles Act, 2000*, SS 2000, c L-5.1, provides:

> 2(1)(cc), "mortgage" means a charge on land created for securing payment of money, and includes a hypothecation of that charge and a charge created for securing payment of any annuity, rent charge or sum of money other than a debt or loan;
>
> 123 A mortgage has effect as security but does not operate as a transfer of the land charged.

[17] Until implementation of *The Land Titles Act, 2000,* a distinction existed between a statutory mortgage, the existence of which depended upon registration as a mortgage and a mortgage (often referred to as an equitable mortgage) registered as an interest protected by a caveat. Under the 2000 *Act* this distinction was eliminated. All mortgages are treated as "interests" and are registered as such. The *Act* makes no provision for registration of statutory mortgages.

[18] In addition, much of the priority structure of the common law and equity was replaced by rules based on registration.

[19] The interface between statutory mortgage law and the principles of the common law was described by Duff J. in the Supreme Court of Canada decision of *Smith v National Trust* [1912] 45 SCR 618 at 640-641.

necessary by the particular legal form of the old law mortgage over land, becomes a factor of confusion when transferred to securities the formal structure of which is that of a legal charge."[20]

The Land Titles Act, *2000* ended some of the conceptual inconsistency of prior statutes as they related to mortgages by eliminating the category of statutory mortgage and by applying much of the conceptual structure of the caveat system to all mortgages.[21] Under the current *Act*, the concept of "mortgage" for the most part has been freed from the constraints of the land titles system and is now to be determined only "according to the terms of the instrument or law on which the interest is based."[22] However, the *Act* retained features and terminology of traditional mortgage law based on devise.

III. Agreements for Sale of Land

While an agreement for sale is the functional equivalent of a purchase money mortgage, (a structure for the financing the purchase price of lands), it has a very different historic background. Mortgage law developed over several hundred years and was largely settled in the 18th century. However, it was only in the 20th century that the legal structure defining the range of remedies of unpaid vendors under agreements for sale of land was settled in Saskatchewan law. Much of the complexity (and confusion) in the law applicable to the contractual and proprietary rights of parties to agreements for sale resulted from the necessity to reconcile common law and equitable principles. The vendor is the legal owner of the property until the purchaser's obligations under the contract are performed. In addition, the vendor has an equitable lien that makes the equitable remedy of judicial sale available. The purchaser, however, has an "equitable interest" in the land being purchased that is commensurate only with amount of the purchase price paid to the vendor. In this respect, the purchaser is not the direct equivalent of a mortgagor under either a common law or statutory concept of mortgage, where the mortgagor is the "owner" of the mortgaged property.

Notwithstanding the very different historic background and conceptual differences between mortgages and agreements for sale, it became established practice in unpaid vendors' actions relating to agreements for sale to use terminology, procedures and forms applicable to mortgage enforcement proceedings. As was the case with aspects of the law applicable to mortgages, *ad hoc* statutory intervention has changed some of the features of the law applicable to agreements for sale. Many of these changes have reduced the practical difference between the remedies of mortgagees and vendors. The cumulative effect of these legislative measures was to further align vendors' default remedies with those of mortgagees. In practice, notwithstanding that the vendor under an agreement for sale is the owner of the land, an

[20] Edward Sykes and Sally Walker, *The Law of Securities: An account of the law pertaining to securities over real and personal property under the laws of the Australian states,* 5th ed (Sydney: The Law Book Company, 1993), at 20.
[21] *The Land Titles Act, 2000, supra* note 16 at Part VIII.
[22] *Ibid* at s 54(4).

agreement for sale under Saskatchewan law is little different from a consensual charge held by the vendor on a defaulting purchaser's interest in the land protected by an equitable charge on the land.

IV. Interests in Accounts Associated with Land

An area of law that lacks coherence deals with assignments of payments associated with interests in land such as rental payments. While these payments are choses-in-action and, consequently, personal property, they are excluded from the scope of *The Personal Property Security Act, 1993*. Assignments of rental and easement payments are deemed by section 144 of *The Land Titles Act 2000* to be interests in land with the result that the priority regime of the *Act* applies to them. However, regulation of enforcement of charges on these types of payments is governed by antiquated laws of equity.

V. The Principal Problems with Current Real Property Security Law

1. Lack of Conceptual Unity and Structural Coherence

A striking feature of current Saskatchewan real property security law is its multiplicity of sources. A complete picture of this area of the law necessitates consideration of common law principles, equitable principles that either modify the common law or function independently of it, seven disparate provincial statutes, some of which were *ad hoc* measures designed to deal with particular social or economic issues, and the Queen's Bench Court Rules that provide for enforcement of mortgages using archaic procedures and terminology.[23] As might be expected, there is very little coordination among these sources with the result that this area of the law is unnecessarily complex and inefficient.

Many of the special discretionary remedies devised by the courts of equity such as consolidation, apportionment, subrogation and marshalling were developed in the context of the traditional form of mortgage under which the mortgagee was the owner of the mortgaged property and must be modified on an *ad hoc* basis by the courts to fit the hypothec structure.

2. Inefficient Enforcement

The most important role played by equity in the development of mortgage law was in the regulation of enforcement rights of mortgagees. Initially, equitable intervention was based on the Chancellor's hostility to penalties. The summary loss of the mortgagor's contractual right to obtain retransfer of his or her interest in the land was viewed as penal. This potential injustice was addressed through the imposition of procedural requirements designed to give defaulting mortgagors every reasonable opportunity to regain ownership by discharging their

[23] See, *e.g., Rules of The Queen' Bench*, Part 10, Division 5 and Forms 10-40, 10-40A, 1043A1, 10-43A2 and 10-43B.

mortgage obligations. These requirements were soon recognized as being an aspect of the mortgagor's equity of redemption. However, the requirements ossified into rules, some of which no longer reflect the context in which they were developed and policies they were designed to implement.

The basis of the concept of post-default redemption developed in equity was that a defaulting mortgagor might be able to discharge the mortgage obligation if given a reasonable opportunity to do so through an extension of time to discharge the secured obligation. The current manifestation of this is the order *nisi* under which mortgagors are given additional time (usually several months) to discharge the mortgage obligation.

The policy of tilting the balance in favour of mortgagors (and purchasers under agreements for sale) continues to be a feature of Saskatchewan real property security law. There are historic and economic reasons for this. Agricultural production and resource extraction, both of which are cyclical and subject to unpredictable world markets, are central to the Saskatchewan economy. The result is that over time many residents experience wide fluctuations of incomes. A system that adopts a generous variation of the policy of equity designed to preclude avoidable loss of ownership of mortgagors can be justified when applied in appropriate circumstances. However, if the basis of the policy is to give a defaulting mortgagor or purchaser every reasonable opportunity to discharge the secured obligation, the rights of creditors to enforce their security should not be delayed when there is no likelihood that the mortgage or purchase obligation can be discharged any time in the foreseeable future. While measures principally designed to delay mortgagors' or purchasers' loss of their property interests when they cannot discharge their mortgage or purchase obligations, notwithstanding their short-term effect, can be socially justified in some contexts, their indiscriminate application cannot. It results in unproductive delay in returning mortgaged property to the market.

Most protective measures apply a "one size fits all" approach with the result that they operate in circumstances where they cannot be socially or commercially justified. For example, there is little justification for giving a defaulting business mortgagor that has charged its commercial property the same measure of protection as is given to an owner of residential property. Unlike individuals, business mortgagors and purchasers have available elaborate insolvency systems[24] through which they can invoke very substantial stays to the enforcement of mortgages or agreements for sale. A business debtor that fails to succeed under one of these systems is hopelessly insolvent, and there can be no justification for court intervention to delay enforcement of mortgages on its property.

3. Unnecessary Use of Court Resources

The legal system of the province is highly subsidized. Court costs do not permit the recovery of governmental expenditures on facilities, court staff, and judges. Currently, the courts are

[24] See *Companies Creditors' Arrangement Act,* RSC 1985 c C-25; and *Bankruptcy and Insolvency Act* RSC 1985, c. B-3, Part III, Division 1.

backlogged to the point that access to justice has become a major concern. There can be no justification for unnecessary use of the system.

Current law requires that all enforcement proceedings be administered in a very "hands-on" way by the Queen's Bench Court whether the mortgagor or purchaser is an individual or a corporation and whether the mortgaged property is a home or is used for commercial purposes. The historic justification for intervention of courts of equity in enforcement was to protect mortgagors from summary loss of their land. While this remains an important policy consideration, it is important to consider approaches that can be implemented in a more efficient manner and applied in the appropriate context. It is one thing to provide full protection of the interest of an individual in her or his home through court supervision of enforcement; it is another to give the same degree of protection to a business enterprise that has granted a mortgage on its assets to secure business credit or is a purchaser of property used for business purposes.

VI. A Modern Precedent: The Personal Property Security Act, 1993

Until 1980, Saskatchewan law applicable to personal property security transactions could be equated with current real property security law. It was composed of uncoordinated conceptual structures and statutory provisions that made it complex and inefficient. This all ended with the enactment of *The Personal Property Security Act* [25] (*PPSA*) which, although not employing the term "charge", was conceptually based on equitable charge law. The current *PPSA*[26] retains the conceptual structure of the earlier *PPSA.* The *PPSA* is a modern, integrated source of almost all aspects of this area of the law. It is one of the best systems of its kind in the world and has been adopted as a precedent for legislation in most other jurisdictions in Canada and several other countries.

A central feature of the *PPSA* is conceptual unity. It is a highly integrated "code" that builds personal property security law on a single concept: the security interest.[27] All agreements, whatever their form, that provide for an interest in personal property that secures payment of an obligation are security agreements creating security interests that are subject to a unified set of rules dealing with priority and enforcement. [28]

While there are many important differences between security transactions involving land as collateral and those involving personal property as collateral, the approach contained in the *PPSA,* provides a conceptual structure on which a modern code of real property security law can be developed.

[25] SS 1979-80, c P-6.1 (assented to June 17, 1980).
[26] *The Personal Property Security Act, 1993, supra* note 1.
[27] *Ibid* at ss. 2(1)(qq) and 2(1(pp).
[28] *Ibid* at s 3(1).

Under the definition of "mortgage" in clause 2(1)(cc) and section 123 of *The Land Titles Act 2000,* a mortgage is a charge in the sense that it does not involve the transfer of title from the mortgagor to the mortgagee. Presumably this is so even though, given the elimination of statutory mortgages, what constitutes a mortgage is determined under otherwise applicable law. However, the *Act* retains many of the features and terminology of traditional mortgage law. In addition, the concept of mortgage as defined in the *Act* was not designed to capture other types of transactions that are charges or that function as charges.

By comparison, the *PPSA* eschews use of the structures and terminology of the personal property systems it replaced. If it is to be treated as a pattern to be followed in the development of a code of real property security law based on the concept of charge, charge concepts and terminology should be consistently employed.

Part V of the *PPSA* provides an efficient system for enforcing security interests in the event of default by debtors that involves very little court intervention. However, the efficiency does not come at the cost of sacrificing protection to debtors.

VII. Goals of the Project

The ultimate goal of this project is to develop a code of Saskatchewan real property security law addressing the matters set out above. The approach employed is to provide a complete draft statute with comments to each provision that describe the intended effect of the provision and how it would address one or more of these matters. Should the Legislature decide to enact legislation dealing with this area of the law, the specific wording of the legislation will be determined by the legislative drafting department of the Ministry of Justice and the members of the Saskatchewan Legislature. However, it is the view of the author of the report that proposals for a new system dealing with a complex and multifaceted area such as real property security law can be more efficiently presented in the form of statutory language accompanied by an explanation designed to give context to that language.

The Land Charges Act set out in this report has been designed to achieve several specific goals:

- Provide a code of real property security law addressing the great bulk of legal issues that arise in the context of real property security transactions.

- Provide a consistent conceptual structure for real property security law based on the concept of charge.

- Provide fair and balanced rules regulating the contractual relations between the parties to charge agreements.

- Provide clear statutory guidance with respect a wide range of matters endemic to real property security transactions thereby enhancing understanding and legal

predictability for parties to these transactions and other persons affected by them.

- Provide a structure containing the appropriate balance between protection of the interests of defaulting chargors (mortgagors and purchasers) and efficient enforcement of the rights of chargees (mortgagees and vendors).

- Incorporate public policies of existing mortgage law that have contemporary relevance.

- Provide a focus for the extensive consultation process that will be undertaken by the Law Reform Commission.

THE (DRAFT) LAND CHARGES ACT

1 This Act may be cited as The Land Charges Act.

PART 1
DEFINITIONS AND SCOPE OF ACT

Definitions

2(1) In this Act;

(a) "accommodation guarantor" means a surety of the chargor's obligation under a charge agreement:

(i) who is a related person to the chargor as set out in clauses 4(3)(e)-(g) of The Bankruptcy and Insolvency Act (Canada); and

(ii) who receives no consideration in return for agreeing to accept liability for the the obligation;

Comment: This definition is relevant in the context of sections 19 and 22.

(b) "application" means an originating application as provided by the Queen's Bench Rules of Court.

Comment: The Court of Queen's Bench is given very broad supervisory power to ensure fair and efficient application of the Act. See Comment to clause 2(1)(i).

(c) "agreement for sale" means a contract for the sale of land pursuant to which:

(i) the purchaser agrees to pay the purchase price over a period of time in the manner stated in the contract or in an amendment to the contract; and

(ii) on payment of the purchase price mentioned in clause (i), the vendor is obliged to convey the title to the land to the purchaser;

but does not include a contract pursuant to which the purchase price is payable in less than six months from the date of possession as set out in the contract or in an amendment to the contract.

Comment: The definition of "agreement for sale" relates to clause 2(1)(e) and subsection 4(2). The effect of these provisions is to reject the common law characterization of an agreement for sale as simply a contract for the sale of land. While the sale element of the contract remains unaffected, the remedies of vendor are not those of a vendor, but those of a chargee. This feature of the draft Act provides a conceptual basis for the treatment of agreements for sale. This approach is also found in *The Personal Property Security Act, 1993* as it deals with conditional sales contracts. Existing statutory provisions such as section 2 of *The Limitation of Civil Rights Act* and section 2(a) of *The Land Contracts (Actions) Act* draw direct parallels between mortgages and agreements for sale when prescribing the rights of vendors in the event of default by purchasers. This legislation embodies the practical reality that an agreement for sale is a legal mechanism for financing the purchase of land. It is the functional equivalent of a purchase money mortgage. The vendor remains owner of the land until the purchase price is paid for the sole purpose of providing the two central features of any security arrangement: priority and an alternative source of recovery of a debt. The approach of the draft Act is to provide a conceptual basis consistent with the practical role of agreements for sale under existing law.

(d) "charge agreement" means an agreement providing for a charge and, where the context permits:

(i) a renewal or modification of an agreement providing for a charge; and

(ii) an agreement related to an agreement providing for a charge;

Comment: This definition encompasses, but is not limited to, what under existing law is either a mortgage contract or an agreement for sale. However, the form of the transaction that gives rise to a charge is not determinative. See section 3. The charge agreement defines the relations between the chargor and the chargee and, within the parameters set by the draft Act, regulates that relationship. A central feature of the charge agreement is the "charging clause" which is a recognition by the chargor that he or she is agreeing that his or her property interest described in the agreement is charged with the obligation or obligations set out in the agreement or in a related agreement. The chargor need not be the obligor. What is important is that he or she has agreed to a charge on his or her property interest to secure a specified obligation owing to the chargee. See clause 2(1)(g).

(e) "charge" means an interest in land that secures performance of an obligation and, where the context permits, is deemed to include the interest of a vendor under an agreement for sale of land;

Comment: This definition implicitly sets the scope of the draft Act when read along with section 3.

The concept of "charge" was developed in equity. An equitable charge has very little in common with a common law or equitable mortgage. The feature that distinguishes a charge from a mortgage is that it does not involve a transfer of any interest from the chargor (debtor) to the chargee (creditor). The chargee acquires an "interest" in the property charged, not as a result of a transfer, but as a result of operation of law. This effect is invoked by an agreement between the chargor and the chargee that specified property of the former is subject to a charge. It entails a right given to the chargee to look to the property for recovery in the event the chargor fails to discharge specified obligations owing by the chargor or a third party to the chargee. It results in the chargee having an interest in the charged property that invokes the common law principle of *nemo dat quod non habet.*[29] However, since the chargee does not acquire a legal interest in the property, it is technically incorrect to apply the mortgage concepts of "redemption" or "foreclosure" to enforcement of charges. There is no title or interest to redeem and no equitable interest to foreclose. The existence of the charge is dependent on the existence of the obligation it secures.

The Land Charges Act is built entirely around the concept of "charge". As a result, it eschews the approach of *The Land Titles Act, 2000* which treats a mortgage as a charge but describes its characteristics in term that suggest it is a conveyance.

The definition of "charge" does not describe the conceptual structure of a charge on land. It implicitly adopts the hypothecary conceptual structure of a charge developed by equity. In this respect, it parallels the concept of "security interest" basic to *The Personal Property Security Act, 1993.* The terminology of equitable charge law is employed throughout *The Land Charges Act*: the owner of the interest charged is the chargor [clause 2(1)(g)]; the person to whom the contractual obligation secured by the charge is owed is the chargee [clause 2(1)(f)]. The essential relationship between the chargor and chargee is that of creditor and debtor. In some circumstances, there can be two chargors, a person who owes the obligation and the owner of the land charged [clause 2(1)(g)]. The role of the charge is to provide an alternative source of recovery of the obligation owing by the chargor to the chargee in the event of default by the chargor. The obligation can exist without the charge; the charge cannot exist independently of the obligation. The "quantum" of a charge is coextensive with the obligation it secures. Once the obligation is discharged, the charge disappears. A minor statutory exception to this principle is set out in section 32.

The term "interest in land" is defined in clause 2(1)(j). What constitutes an interest is determined under common law or equitable principles. While in other contexts, the interest of a vendor under an agreement for sale is generally title or ownership, in the context of

[29] *Mathews v Goodday* (1861) 31 LJ Ch 282. "Thus the essence of an equitable charge is that, without any conveyance or assignment to the chargee, specific property of the chargor is expressly or constructively appropriated to or made answerable for payment of a debt, and the chargee is given the right to resort to the property for the purpose of having it realised and applied in or towards payment of the debt. The availability of equitable remedies has the effect of giving the chargee a proprietary interest by way of security in the property charged." *National Provincial and Union Bank of England v Charnley* [1924] 1 KB 431 Atkin LJ at 449–450.

The Land Charges Act it is deemed to be as a charge on the purchaser's interest. See subsection 4(2).

(f) "chargee" means a person in whose favour a charge exists, and, where the context permits, includes a transferee of the interest of a chargee and successor of the chargee;

Comment: The essential relationship between the chargor and chargee is that of creditor and debtor. The *Land Charges Act* employs the terminology of equitable charge law: the person to whom the contractual obligations secured by the charge are owed is the chargee, and the owner of the charged land is the chargor.

(g) "chargor" includes:

(i) the person who is contractually required to perform the obligation secured by a charge;

(ii) a transferee of the interest of a chargor and a successor of a chargor; and

(iii) where the context permits, the owner of the land subject to the charge;

Comment: In most situations, the chargor is a debtor in the debtor-creditor relationship that is basic to a charge agreement. However, in some circumstances, there can be two chargors: a person who owes the obligation secured, and the owner of the land charged. In these cases, the owner of the land charged has agreed to provide a charge on his or her land to secure the obligation to the chargee of a non-owning chargor.

(h) "commercial land" means land that is not residential land;

Comment: "Residential land" is defined in clause 2(1)(l).

(i) "court" means the Court of Queen's Bench or a judge of the Court of Queen's Bench;

Comment: An important feature of *Land Charges Act* is the supervisory role of the Court. However, for the most part, this supervision is invoked by applications to the Court rather than mandatory court involvement in all aspects of enforcement. In the great bulk of cases, matters would be addressed in simple, inexpensive and expeditious proceedings. See Part 13. This approach has proven to be very effective in the context of matters addressed in *The Personal Property Security Act, 1993* and *The Enforcement of Money Judgments Act.*

(j) "land" and "interest in land", except as provided in any other Act, includes any legal or equitable right, interest or estate in land, and includes:

(i) installations on or fixtures to the land; and

(ii) a condominium unit as defined in clause 2(1)(f) of The Land Titles Act, 2000;

Comment: With notable exceptions, *The Land Charges Act* defers to the common law and equity with respect to the meaning of "land" and "interest in land". The term "interest in land" has a broader meaning in the context of *The Land Charges Act* than the term "interest" defined in clause 2(1)(s) of *The Land Titles Act, 2000* as *"any right, interest or estate, whether legal or equitable, in, over or under land recognized at law that is less than title".* The necessity to draw a distinction between "title" and "interest" in *The Land Titles Act, 2000* does not exist in the context of *The Land Charges Act*. Under *The Land Charges Act*, the holder of a title issued under *The Land Titles Act, 2000* has an "interest in land."

The definition accommodates interests that are "land" or "interests in land" at common law or equity but that are treated by specialized legislation as having characteristics of personal property. Under section 36 of *The Personal Property Security Act, 1993,* goods affixed to real property in such a way and under circumstances as to result in them being part of the real property to which they are affixed are treated for the purposes of the *PPSA* as personal property that can be collateral subject to security interests regulated by that *Act*. However, a charge on the land to which the goods are affixed (including the goods) may be subject to a charge. The priority between interests in the fixtures as goods and interests in the land, including a charge, are determined under the rules of the *PPSA.*

A similar approach applies to naturally growing crops and some types of uncut trees. Under the common law, planted crops are personal property. However, uncut naturally growing crops (*e.g.,* wild hay) and trees are part of the land on which they are growing. Section 37 of the *PPSA* treats all interests in uncut crops and trees grown under prescribed circumstances as personal property subject to the registration and priority regime of the *PPSA.* Clause 2(1)(l) of the *PPSA* defines "crops" to mean:

crops, whether matured or otherwise, and whether naturally grown or planted, attached to land by roots or forming part of trees or plants attached to land, and includes trees only if they:
(i) are being grown as nursery stock;
(ii) are being grown for uses other than the production of lumber and wood products; or
(iii) are intended to be replanted in another location for the purpose of reforestation;

The effect of section 37 of the *PPSA* is to treat planted crops as land for the purposes of subsection 37(4).

(k) "obligation" means the obligation secured by a charge the breach of which is compensable with money;

Comment: In the great bulk of cases, obligations secured by a charge will be payment of debt. However, other obligations may be secured by a charge so long as breach of those obligations gives a right to damages or other remedies in the form of payment of money.

(l) "residential land" and "residence" means land that at the date that the charge agreement comes into effect is being used or the parties to the agreement had reasonable grounds to conclude that it would be used at any time during the period of the agreement or any extension of the period, in whole or in part by the chargor as his or her residence, but does not include:

(i) periodically occupied recreational land; or

(ii) land on which a building comprising three or more attached or semi-detached units is located or is being constructed when only one of the units is being used or the parties to the agreement had reasonable grounds to conclude that it would be used at any time during the period of the agreement by the chargor as a residence;

(iii) land that was residential land at the date the charge agreement came into effect but ceased to be residential land thereafter as a result of a change of use of the land as a residence by the chargor for a period of two years or more.

Comment: The distinction between charges on residential land or a residence and commercial land is very important in the context of *The Land Charges Act*. An assumption underlying several features of *The Land Charges Act* is that there is more societal justification for extensive regulation of charges on residential land than on commercial land. Most commercial chargors have the financial capacity to obtain independent legal guidance when entering into charge agreements and when taking measures to protect their interests. In addition, they have available federal insolvency regimes not available to non-commercial debtors contained in the *Companies Creditors' Arrangement Act,* RSC 1985 c C-25 and the *Bankruptcy and Insolvency Act* RSC 1985, c. B-3, Part III, Division 1 under which they can invoke protective judicial involvement in the event of default (amounting to insolvency) under charge agreements. The social policies on which protective measures provided to chargors of residential land do not apply to chargors of recreational land such as a cabin or cottage at a lake that is periodically occupied by the chargor and his or her family.

The circumstances may be such that the land is used principally for commercial purposes, but a portion of it is used as the chargor's residence. This will occur when the building on the land is composed of several units and one of the units is occupied by the chargor as his or her residence. The effect of the qualification to the definition is to treat the entire building as

commercial property if the building or prospective building is composed of three or more units. If the building is composed of two units, one of which is the residence of the chargor, the property is treated as residential land.

If the land was residential land at the date of the agreement, but thereafter the chargor ceases to reside on it for a period of two years or more, it is no longer residential land. The two year period recognizes that chargors may find it necessary to be away from their homes during which they lease the homes until their return.

(2) A reference in this Act to "discharge of an obligation" includes partial discharge of an obligation; and discharge or termination of a charge means discharge or termination of the charge in proportion to the obligation discharged.

Scope

3 Parts 1-10 of this Act apply to:

> *(a) an agreement, regardless of its form, that in substance creates a charge on land including, but not limited to a mortgage, agreement for sale, floating charge, pledge, trust indenture or rent charge; and*
>
> *(b) a lease, or trust of an interest in land, that secures discharge of an obligation.*

Comment: This provision requires the application of a "substance test" when determining whether a transaction is a charge agreement subject to *The Land Charges Act*. The form of the agreement is not determinative. In this respect it parallels section 3 of *The Personal Property Security Act, 1993*. As is the case with the *PPSA* security agreements, there will be situations in which an agreement has characteristics of both a charge agreement and an agreement involving another type of interest. For example, an agreement in the form of a sale with option to repurchase or lease may be in substance a charge agreement. As is the case in the context of characterization of transactions under the *PPSA* there is no universal formula that can be applied in this context. The characterization will be influenced by the terms of the agreement and the circumstances surrounding its creation. See *Wilson v Ward* (1929), [1930] SCR 212, and compare *Kreick v Wansborough*, [1973] SCR 588. A contract in the form of a lease may be "in substance" an agreement for sale. *Andrejcin v W5 Pins Bowling Ltd*, 2005 SKCA 68; *Nadeau v Clement*, 2004 SKQB 11.

The characterization of a relation between parties as that of trustee and beneficiary does not preclude the legal conclusion that the agreement creating the trust is also a charge agreement.

Those features of *The Land Charges Act* that deal with "consensual" charges do not apply to charges that arise by operation of equity. Part 12 provides a structure for the enforcement of equitable vendors' liens and prescribed liens that arise by operation of law.

Agreement for Sale – Deemed Features

4(1) Subject to subsection (2), the rights of the parties to an agreement for sale are governed by the law otherwise applicable to the contract.

(2) Except as otherwise provided in this Act:

(a) the ownership of a vendor under an agreement for sale is deemed to be a charge on the land being purchased;

(b) the vendor is deemed to be a chargee;

(c) the purchaser is deemed to be a chargor; and

(d) the interest of a purchaser under an agreement for sale is deemed to be equivalent to that of an owner of the land being purchased.

Comment: The role of subsections 4(1) and (2) is to segregate the sale aspects of an agreement for sale from the secured financing aspect of the contract. All matters arising out of an agreement for sale that do not involve enforcement rights of the vendor in the event of default by the purchaser are governed by the common law and otherwise applicable statutes. In this context, the vendor is the owner of the interest that is the subject-matter of the contract. However, the enforcement measures available to the vendor are those available to a vendor who has transferred title to the land to the purchaser and has a charge on the land to secure the unpaid purchase price of the land. The vendor is deemed to be a chargee and the purchaser is deemed to be the chargor who has entered into a charge contract. Subsection 4(2) provides the conceptual basis for outcomes currently produced by provisions of *The Land Contracts (Actions) Act, 2017* and *The Limitation of Civil Rights Act* that, in important resects, apply the same approach to agreements for sale that is applied to mortgages.

Effect of Charge Agreement

5(1) Except as otherwise provided in this Act, a charge agreement is effective according to its terms.

(2) All rights, duties and obligations that arise pursuant to a charge agreement, this Act or any other applicable law must be exercised or discharged in good faith and in a commercially reasonable manner.

Comment: A charge agreement would define most aspects of the relationship between a chargor and a chargee. However, this generalization must be qualified. For the most part, the rights of the parties to a charge agreement in the event of default by the chargor are codified in *The Land Charges Act* and are not be subject to modification by agreement.

Subsection (2) prescribes the standards of good faith and commercial reasonableness in the exercise of all rights, duties, and obligations set out in a charge agreement or arising under *The Land Charges Act* and any law applicable to a charge agreement. The provision imports into *The Land Charges Act* the concept of good faith developed by the courts in the context of contract law. See especially, *Bhasin v Hrynew* [2014] 3 SCR 494. The subsection parallels subsection 65(3) of the *PPSA.*

The term "commercially reasonable" is not defined in *The Land Charges Act*. The reason is that the concept implies a relative standard of conduct. What is commercially reasonable conduct in the context of a charge agreement between sophisticated commercial parties may not be commercially reasonable in the context of a charge agreement between a commercial finance organization and a consumer or an agreement between a chargor and chargee, both of whom have little expertise or experience with secured lending practices.

Exclusions from Scope of Act

6 Except as prescribed, this Act does not apply to:

(a) a lien or charge created by a statute;

(b) a security agreement governed by an Act of the Parliament of Canada that deals with the rights of parties to the agreement or the priority rights of third parties including an agreement governed by sections 426 or 427 of the Bank Act (Canada).

Comment: Under subsection 426(1) and clauses 427(1)(d),(f),(l) and (m) of the *Bank Act,* SC 1991, c 46, a bank may take security in types of property that would be interests in land to which *The Land Charges Act* applies. The effect of section 6 is to preclude the conclusion that an agreement taken under either section 426 or 427 of the *Bank Act* is a charge agreement to which *The Land Charges Act* applies.

When Charge Comes into Existence

7(1) A charge arising under a charge agreement comes into existence when:

(a) value, including antecedent debt, has been received by the chargor pursuant to the terms of the charge agreement;

(b) the chargor has or acquires an interest in the land charged; and

(c) except for the purposes of enforcing rights of the parties to the charge agreement, the requirements of section 8 have been met.

(2) Subject to section 8, when the charge agreement provides for a charge on land to be acquired by the chargor after the charge agreement is effective, the land is subject to the charge as soon as the chargor acquires an interest in the land described in the agreement.

Comment: A consensual charge to which *The Land Charges Act* applies would be a creature of contract (the charge agreement). It does not involve one party transferring an interest to another party. Unless the parties agree to postpone its existence, a charge arises automatically (by operation of law) when the requirements of section 7 have been met. A charge would result from an agreement under which the chargor receives value (consideration) for his or her acceptance that property owned by the chargor is subject to the charge. Clause 7(1)(a) qualifies the common law concept of consideration by recognizing that "past consideration" is "value." Consequently, a charge could secure an obligation that arises in a relationship that existed before the charge agreement came into existence so long as this is specifically recognized in the charge agreement. Otherwise, the law of contract would determine if the person identified as chargor is treated as having received value. When the chargee gives value to a third party a charge pursuant to the terms of a charge agreement, value is treated as having been given to the chargor.

A charge has no independent existence. By definition, it exists only when it affects property of the chargor. However, there is no requirement in subsection 7(1) that the charge agreement and the charge be contemporaneous. The charge agreement could predate the charge. This would be the case when the parties agree that the charge will come into existence at a future time or when the chargor acquires the property to be charged that is described the charge agreement (after-acquired property). In the latter context, unless the parties have agreed otherwise, the charge comes into existence automatically when the chargor acquires an interest in property described in the charge agreement. No appropriation of the property to the contract is required. However, an "equity" that is recognized under equitable principles arising out of contract that gives priority with respect to after-acquired property does not result in the creation of an inchoate right at the time of the contract that can be subject to a charge.[30]

[30] *In Royal Bank of Canada v Radius Credit Union Ltd*, 2010 SCC 48 the Court concluded at para 34 that "at the time of execution of its (PPSA) security agreement, the Credit Union acquired an incohate statutory interest in the nature of a fixed charge over the debtor's assigned after-acquired property". It was on this basis that the Court concluded that a Credit Union's PPSA security interest had priority over a later acquired inchoate section 427 *Bank Act* security with respect to property acquired by the common debtor after both security agreements were signed. The Court did not expressly apply equitable principles. The decision left open the issue as to whether, in other contexts, the mere existence of an agreement to give a security interest in future property results in an "inchoate" statutory interest in that future property before it is acquired by the debtor.

In order for the charge to exist, it must affect an extant interest in land held by the chargor. An "equity" is not an extant interest.

Although *The Land Charges Act* accommodates the intention of the parties to provide for a charge on future property, it does not follow that the chargee can be assured of having priority to that property through registration in the land titles registry effected before the chargor acquired an interest in the property. Under subsection 50(1) *The Land Titles Act, 2000*, a registration in the land titles registry relating to a charge on an interest may be effected "only if the interest, at the time of registration, is recognized at law as an interest in land." While there is some ambiguity in the wording of the *Act*, the prevailing view is that an efficacious registration (*i.e.,* one that gives priority under the priority rules of the *Act*) cannot exist unless it relates to an interest existing at the date of the registration. An interest in the form of a charge cannot come into existence until the chargor acquires an interest the land subject to the charge. Under this approach, a registration of a charge on a specified parcel of land or an interest in that land to be acquired by the debtor after the registration is effected is invalid. In order to avoid this result, the chargee must effect the registration after the chargor acquires an interest in the property to be charged.

Part 1: Consultation Questions

The Law Reform Commission would appreciate your responses or suggestions with respect to any aspects of the tentative proposals contained in this Part. More specifically, your views on of the following matters are being solicited:

1. The proposal to base Saskatchewan real property security law on the concept of "charge" including elimination of terminology associated with traditional mortgage law.

2. The proposal to employ a "substance test" (section 3) that would bring within the scope of the Act mortgages, agreements for sale, floating charges, pledges, trust indentures, rent charges along with leases and trusts that secure discharge of an obligation.

3. The proposal to treat all enforcement matters associated with agreements for sale as creating charges but to leave all other aspects to the common law of contract (section 4).

4. The proposal to impose a standard of good faith and commercial reasonableness on all relationships involving or associated with charges (subsection 5(2)).

5. The proposal to exclude *Bank Act* security agreements from the scope of the Draft Act (section 6).

PART 2
FORM AND CONTENT OF A CHARGE AGREEMENT

Form of Charge Agreement

8(1) Except as otherwise provided in this Act, a charge agreement does not create a charge that is opposable to a person other than the parties to the agreement unless it is in a writing or writings that contain the following:

(a) the name of the chargor and the chargee;

(b) a description:

(i) of the land charged sufficient to identified it through a search of the land titles registry, or, in the case of land not located in a land registration district, the registry for interests of that kind; or

(ii) in the form of a statement that the charge affects:

A. all of the land in which the chargor has an interest; or

B. all of the land in which the chargor has an interest and land in which the chargor acquires an interest during the term of the agreement;

(c) the principal amount of the obligation secured or to be secured by the charge and, in the case of an obligation other than a debt, a description of the obligation and an estimate of its monetary value;

(d) the events that permit the chargee to treat the chargor as being in default; and

(e) authentication of the terms of the agreement by the chargor.

(2) When a charge agreement expressly adopts the implied covenants set out in Schedule A to this Act or a standard form charge agreement is filed with the Registrar of Land Titles as provided in The Land Titles Act, 2000, the covenants in Schedule A or the covenants in the standard form charge agreement are deemed to have been included in the charge agreement except to the extent that:

(a) one or more of the covenants are excluded or qualified by the terms of the charge agreement; or

(b) there is conflict or inconsistency between a covenant in the charge agreement and a covenant set out in Schedule A or the standard form charge agreement.

(3) The Statute of Frauds 1677 does not apply to charge agreement to which this Act applies.

(4) Upon request of a person referred to in subsection 57(3) of The Land Titles Act, 2000, the chargee must provide a copy of the charge agreement in hardcopy format to such person.

(5) Subsections 57(4)-(8) of The Land Titles Act, 2000 apply with necessary modifications to the chargee to whom a request under subsection (4) has been made.

Comment: Under the approach contained in this section, a distinction is drawn between an oral agreement (*i.e.,* as agreement for which there is no or insufficient "written" record of its terms) and an agreement that is in writing or in electronic form that in law is the equivalent of writing as provided in *The Electronic Information and Documents Act 2000*, SS 2000, c E-7.22. The former would be enforceable between the parties if there is sufficient evidence to convince a court of its existence, but it would not affect the rights of anyone else who has or acquires and interest in the property charged.

The section accommodates charge agreements providing for charges on property to be acquired by chargor after the date the charge agreement comes into effect. In this context, the charge comes into existence automatically as soon as the chargor acquires an interest in the property described in the contract. As to the registration and priority of such a charge, see Comment to section 7.

The writing requirements of the provision could be met through the use of two or more separate documents. However, the chargor must have authenticated each of the documents. This could be done by reference in the authenticated document to the other document or documents containing one or more of the required terms.

Subsection (3) dispenses with the *Statute of Frauds 1677* and the 340 years of case law that built up around the *Statute.* There is no writing requirement for charge agreements between parties.

The system for disclosure to the mortgagor and third parties contained in section 57 of *The Land Titles Act, 2000* would apply where the charge agreement is in electronic form. This section provides as follows:

57(1) In this section, "interest holder" includes the assignee of an interest, where the assignment has been registered in accordance with this Act.

(2) This section applies where the instrument on which an interest is based was not disclosed by way of an attachment to the application for registration of the interest.

(3) Any person may, by written demand, request the holder of an interest described in subsection (2) to provide a copy of the instrument on which the interest is based.

(4) The interest holder to whom the demand mentioned in subsection (3) is directed shall reply to a demand within 15 days after the demand is made.

(5) A person who makes a demand pursuant to subsection (3) may, in addition to any other remedy provided by this Act, apply to the court for an order requiring the interest holder to whom the demand is directed to comply with the demand where that interest holder, without reasonable excuse:
(a) fails to comply with the demand within the time specified in subsection (4); or
(b) provides an incomplete or incorrect reply to the demand.

(6) Where the applicant pursuant to subsection (5) is the registered owner of a title or the holder of an interest against which an interest described in subsection (2) is registered, the court may make any or all of the following orders:
(a) an order requiring the interest holder to comply with the demand;
(b) any other order that the court considers necessary to ensure compliance with the demand;
(c) an order as to costs against an interest holder who refuses to comply with the demand;
(d) an order extending the time for complying with the demand.

(7) Where the applicant pursuant to subsection (5) is a person other than the registered owner of a title or the holder of an interest against which an interest described in subsection (2) is registered, the court may make any or all of the following orders:
(a) an order requiring the interest holder to disclose the instrument to the applicant, on any terms and conditions that the court considers appropriate;
(b) an order as to costs against an interest holder who refuses to comply with the demand;
(c) an order extending the time for complying with the demand;
(d) an order exempting the interest holder from disclosing the instrument where, in the opinion of the court, the applicant has failed to establish a legitimate legal concern in the disclosure of the instrument.
(8) In the event of non-compliance with an order of the court made pursuant to subsection (6) or (7), the court may make an order authorizing the person who made the demand to apply to the Registrar to discharge the registration of the interest.

Section 129 of *The Land Titles Act, 2000* provides:
129(1) Every mortgage must contain:
(a) an accurate statement of the estate or interest intended to be mortgaged; and
(b) a description:
(i) of the land for which title has issued and pursuant to which the estate or interest is held; or
(ii) that otherwise identifies the land.

(2) When a mortgage is given as security against a future or contingent liability, it must set forth by recital or otherwise the nature and extent of the liability and the conditions or contingencies on which it is to accrue.

Section 129 would be deleted from *The Land Titles Act, 2000* when *The Land Charges Act* comes into force. Since there is no category of statutory mortgage recognized in *The Land Titles Act, 2000,* the reference to "mortgage" in section 129 necessarily applies to mortgages referred to in various sections of the *Act* that employ the term and to interests in the form of mortgages registered under Division I of Part VIII of the *Act*.

The role of the provision is unclear. Subsection 129(1) cannot be viewed as a codification of the *Statute of Frauds, 1677* since it does not require a reference to a number of material terms and does not expressly require that the writing be "signed by the party to be charged." There is no requirement that the form of mortgage to which a registration relates be submitted with the application for registration. This being the case, it is clear that the Registrar does not rely on the terms of the mortgage when determining the title or interest that is to be subject to the mortgage.

Income from Land

9(1) A charge agreement providing for an charge on land does not charge rents or other income from the land other than the right to insurance payments for loss or damage to the land or a fixture to the land.

(2) A charge agreement referred to in subsection (1) may provide for a charge to which Part 11 applies.

Comment: Rental payments are items of property which, by themselves, can be charged (See Part 11). Consequently, a charge on land does not include a charge on them. Section 8 of *The Distress Act* RSS 1978, c D-31 that provides otherwise would be repealed. If a chargee wants to have a charge on these payments there must be a specific provision in the charge agreement that complies with Part 11. In order to have priority over competing interests in the payments, a separate registration relating to the charge would have to be effected in the Land Titles Registry.

The chargee or someone else may enter into a separate agreement that complies with Part 11 and effect a registration relating to the charge in the Land Titles Registry.

Obligations Deemed Secured

10(1) Except as otherwise provided in the charge agreement, a charge secures:

> *(a) the obligation of the chargor to make payment of the principal amount to the chargee as provided in the charge agreement and, in the case of an agreement for sale, the purchase price of the land;*

(b) the amount of interest payable by the chargor to the chargee as provided in the charge agreement;

(c) expenditures made by the chargee for the protection, insurance, maintenance, preservation or repair of the charged land;

(d) an amount paid by the chargee to remedy any default by the chargor in respect of any other charge or encumbrance relating to the charged land to the extent that the charge or encumbrance has priority over the chargee's charge;

(e) an amount paid by the chargee to discharge taxes levied on the charged land;

(f) taxable costs and expenditures made by the chargee to enforce the charge as provided in this Act; and

(g) interest on amounts paid or advanced referred to in clauses (c), (d) and (e) at the rate at which interest is payable on the principal amount secured by the charge.

(2) A charge does not secure the items referred to in clauses (c), (d), or, (e) when the charge agreement provides that these are obligations of the chargee.

(3) The charge agreement may contain covenants of the chargor the breach of which are answerable in damages that are not secured obligations as provided in subsection (1).

Comment: While it would be unusual for a charge agreement not to specify the obligations secured by the charge, this section makes it clear what types of obligations are secured whether or not mentioned in the agreement.

The breach of any obligation contained in the charge agreement gives to the chargee a right to bring an action for breach of contract. However, not all covenants in the charge agreement are ones that, when breached, give rise to the right to enforce the charge. This distinction is further addressed later in *The Land Charges Act*. See section 35.

Provisions not Applicable to Commercial Land

11 Unless the agreement otherwise provides, sections 12-14, 16 and 18 do not apply to a charge agreement providing for a charge on commercial land.

Comment: Sections 12-14,16 and 18 specify features that are necessarily implied in a charge agreement affecting residential property. However, the parties may include the provisions where the land charged is other than residential property.

Prohibited Provisions

12(1) A charge agreement shall not contain a provision pursuant to which the chargor is required to:

> *(a) pay premises or land inspection fees other than a fee associated with an application for a loan secured by the charge, or renewal of a charge agreement;*
>
> *(b) pay fees, costs, charges or expenses, other than those provided by statute, Rules of Court, including tariffs of costs or ordered by the court, in respect of the collection of any money due pursuant to the charge agreement;*
>
> *(c) give to the chargee notice of his or her intention to pay the overdue amounts secured by the charge or to pay any bonus or other additional sum in lieu of such notice as a condition of the chargee's acceptance of such payment; or*
>
> *(d) as a condition of being entitled to discharge the obligation, grant to the chargee an interest or right that, under the law of mortgages, would be an unenforceable clog on a right of a mortgagor to redeem a mortgage.*

(2) A covenant contained in a charge agreement pursuant to which the chargor agrees to become the tenant of the chargee is void.

Comment: Clauses 12(1) (a)-(c) replicate features found in *The Limitation of Civil Rights Act.* Sections 7, 8 and 10 of *The Limitation of Civil Rights Act* would be repealed when *The Land Charges Act* comes into force.

Clause 12(1)(c) implements the policy of section 10 of *The Limitation of Civil Rights Act* which renders void any provision in a mortgage under which the mortgagor is obligated to pay any amount as a penalty for non-payment or "any other additional sum" as a condition of the mortgagee's accepting payment of any portion of overdue principal secured by the mortgage or to receive notice of the mortgagor's intention to make the payment. Read in conjunction with section 14, the clause gives to the chargor the right to reinstate the payment schedule of the charge agreement without paying anything other than the amount set out in regulations as provided in section 14.

Clause 12(1)(c) is not limited to situations in which the chargee has exercised its right to accelerate payment of the obligation. It negates an equity rule under which a mortgagor, who after default but before the mortgagee resorts to his or her security offered to redeem, was required to either give 6 months' notice of his or her intention to redeem or pay interest for a 6 month period in lieu of the notice.

Clause 12(1)(d) addresses what is referred in existing mortgage law to as "clogs on the equity of redemption". It incorporates by reference the case law dealing with clogs. *See Hoar v Mills (No 2)*, [1935] 1 WWR 433 (Sask CA); *Kreglinger v New Patagonia Meat & Cold Storage Co Ltd*,

[1914] AC 25; and *Dical Investments Ltd, v Morrison* (1990), 75 DLR (4th) 497 (Ont CA) leave to appeal to SCC denied [1991] 3 SCR v (note).

Subsection 12(2) renders void any provision in a charge agreement under which the chargor attorns tenant to the chargee. In this respect, it rejects the policy that induced section 137 of *The Land Titles Act, 2000. The Land Charges Act*, not the *Landlord and Tenant Act*, RSS 1978, c L-6, would be the source of remedies available to the chargee. The concept of attornment is a hang-over from the time when the mortgagee was the legal owner of the property with the associated right to possession of it. As such the mortgagee could "lease" the land to the mortgagor. This approach is inconsistent with a system under which the chargee does not have ownership but has only a charge.

Section 137 of *The Land Titles Act, 2000* would be repealed when *The Land Charges Act* come into force.

Allocation of Insurance Proceeds

13(1) Any money received or receivable by a chargor or chargee under an insurance policy in respect of damage to or destruction of a building or other facility that is a fixture to the land charged shall be applied to replacing, restoring or repairing the building or facility damaged or destroyed.

(2) The money referred to in subsection (1) may be applied in a manner otherwise than provided in subsection (1) if:

> *(a) after the date of the money becomes payable by the insurer, the chargor and chargee entered into an agreement providing that subsection (1) does not apply; or*
>
> *(b) on application, the court orders application of the money in diminution or discharge of the chargee's obligation under the charge agreement.*

Comment: The origins of the policy that implemented by this provision are found in section 13 of *The Limitation of Civil Rights Act.* However, the approach is different. Unlike section 13, this provision provides a presumption that insurance proceeds are to be used to replace, restore, or repair destroyed or damages buildings or facilities on land subject to a charge. The presumption could be reversed by agreement between the chargor and the chargee made after the insurance money becomes payable by the insurer. A clause in the charge agreement would not qualify as such an agreement. Alternatively, on application of either party to the charge agreement, a court could order that the insurance money be applied to the obligation secured by the charge. The chargee is required to accept the payment even though it amounts to a pre-payment of the principal not provided for in the charge agreement.

Section 13 of *The Limitation of Civil Rights Act* would be repealed when *Land Charges Act* come into force.

Relief Against Acceleration

14(1) Subject to subsection (4), w*hen a chargee decides to enforce a provision in a charge agreement providing that the payment of all or any portion of the unpaid principal money or interest is accelerated by reason of default in the performance of a covenant contained in the charge agreement, and the chargor:*

(a) tenders to the chargee the amount of the payment or payments in default otherwise than as a result of the acceleration provision; or

(b) tenders performance of any other covenant the breach of which resulted in the decision of the chargee to accelerate payment of the obligation; and

(c) tenders to the chargee the amount prescribed;

before:

(d) issue of an order pursuant to subsection 42(8); or

(e) the expiry of the 50 day period referred to in section 37 or subsection 47(1);

the chargor is deemed to be no longer in default and is relieved from immediate payment of the portion of the money secured by the charge that would not be payable had the default not occurred.

(2) The chargor may, by notice in writing, require the chargee to deliver to the chargor a statement in writing setting out:

(a) the amount of principal or interest with respect to which default has occurred;

(b) the nature of the breach of any covenant that was the basis for the chargee's decision to accelerate payment of the obligation, and

(c) the prescribed amount payable to the chargee.

(3) Subject to subsection (4), until compliance with the requirements of subsection (2), the chargee's rights to enforce the charge agreement are suspended.

(4) Upon application of the chargee, the court may by order limit the number of times in excess of two times in a 12 month period a chargor can exercise the right set out in subsection (1).

(5) Except as provided in subsection (1), proceedings that have been taken as provided in Parts 7, 8, 9 or 10 prior to the time a chargor exercises the right set out in subsection (1) are suspended and may be revived when the chargor is again in default in performance of a covenant and:

> *(a) has not exercised his or her right under subsection (1) with respect to that covenant; or*
>
> *(b) the chargor is precluded from further exercise of his or her right under subsection (1) by an order of the court as provided in subsection (4).*

Comment: Section 14 replicates the principle in sections 61 and 62 of *The Queen's Bench Act, 1989*, SS 1989 c Q-1.01. However, it provides important refinements to the principle.

Subsections (1)-(3) implement the policy of section 61 of *The Queen's Bench Act 1989* that relieves mortgagors from the effects of acceleration clauses in mortgage contracts.

Subsection (2) provides a mechanism through which a chargor may obtain the information necessary to exercise the right of reinstatement under subsection (1).

The chargor who seeks the protection of subsection (1) is required to pay to the chargee an amount specified in regulations. This amount should provide reasonable compensation to the chargee for administrative costs associated with having to deal with default.

The right of reinstatement may not be exercised by the chargor after enforcement proceedings have reached the advanced stage described in clauses (1)(d) or (e). Furthermore, subsection (4) gives to the court on application of the chargee the power to limit the number of times a debtor can access the benefit of subsection (1).

Subsection (5) recognizes that the exercise of the right of reinstatement suspends further enforcement proceedings but does not terminate them. They can be revived should chargor after further default not comply with subsection (1) or be precluded from doing so as a result of an order made under subsection (4). However, enforcement notices that were served prior to the reinstatement would have to be served again since some of the information contained in the first version of the notices may be no longer be correct.

Sections 61 and 62 of *The Queen's Bench Act, 1989* would be repealed when *The Land Charges Act* comes into effect.

Right to Pre-Pay Obligation

15(1) Except as otherwise provide in this Act or in the Interest Act (Canada), a chargee is not required to accept payment of the obligation secured by the charge other than in accordance with the terms of the charge agreement.

(2) Notwithstanding the provisions of a charge agreement, a chargor is entitled to tender full performance of the obligation secured by a charge and to effect termination or transfer of the charge when the chargee:

> *(a) demands payment of the accelerated amount of the obligation secured by the charge;*
>
> *(b) demands payment of any amount of the obligation in excess of the portion that is payable without regard to a clause giving the chargee the right to accelerate the payment of the obligation;*
>
> *(c) brings an action to enforce the charge; or*
>
> *(d) demonstrates the chargee's intention to bring action to enforce the charge.*

(3) For the purposes of subsection (2), the amount tendered by the chargor shall be the unpaid principal amount secured by the charge, interest to the date of such payment and reasonable costs as provided in the charge agreement.

Comment: This provision codifies existing case law dealing with the circumstances in which a mortgagor can discharge a mortgage obligation prior to the time set in the mortgage. See *Associates Mortgage Corp v Chau,* 2001 SKQB 169; *CIBC Mortgages Inc v Kjarsgaard*, 2015 SKQB 411.

Exercise by the chargee of the right to accelerate payment of the entire obligation gives the corresponding right to the chargor to obtain discharge of the charge. When the chargor has defaulted in making one or more instalment payments, the chargee has the right, but not the obligation, to accelerate payment of the obligation. Demand for payment of or action to recover the payments in arrears does not give to the chargor the right to pay out the entire obligation. However, any indication on the part of the chargee that it is seeking payment of the entire obligation is treated as an election to accelerate payment of the obligation. This includes taking any preliminary enforcement steps.

Due-on-Sale or Encumbrance Clauses

16 Upon application, the court may declare unenforceable a provision in a charge agreement pursuant to which a chargor is deemed to be in default when the chargor transfers or encumbers his or her interest in the land if:

> *(a) the transfer or encumbrance has not increased, or during the term of the charge agreement is not likely to increase, the risk that the obligation secured will not be discharged in whole or that the value of the land is or is likely to be jeopardized; or*

(b) the chargor provides adequate security for the risks referred to in clause (a).

Comment: One of the concerns of a chargee is that the risk assessment it has made in the context of its decision to grant a secured loan to a chargor will become inapplicable should the chargor transfer his or her interest in the charged land to a purchaser who assumes the chargor's obligations under the charge. While it is possible to include detailed provisions in the charge agreement to address this risk, it is much more efficient to include in the contract a provision under which sale or encumbering the charged land without the consent of the chargee amounts to default by the chargor that triggers a payment or acceleration clause requiring the chargor to discharge the secured obligation. Such a provision is enforceable in Saskatchewan. *Marine Water Wells Ltd v Dobson & Co Refrigeration & Air Conditioning Ltd* (1982), 25 RPR 240 (Sask QB).

The willingness of the law to recognize the efficacy of a due-on-sale clause is a matter of considerable policy debate. One of the most convincing arguments put forward in favour of legislative or judicial intervention to prevent recognition of this type of clause or to modify its effect is that there is no way to ensure that a change in risk is the basis on which a chargee elects to treat the transfer of the charged land as default. There is no requirement under existing law that the chargee disclose the basis on which it decides to exercise the right to accelerate the obligation. The decision may well be motivated by a desire to force the chargor or transferee to pay a higher rate of interest than that provided in the charge agreement. This can be an important factor at a time when general mortgage interest rates increase and chargors are persons who, because of personal factors such as employment opportunities elsewhere, are required to sell their homes before they are entitled to discharge their mortgage debts under the *Interest Act*, RSC 1985, c I-15.

Section 16 provides the court the power to override a due-on-sale clause when it finds that the risk associated with sale or encumbering the chargor's interest is very low or when the chargor provides security to the chargee to address the risk.

Novation

17(1) A chargor is released from the obligation secured by a charge where there is clear evidence that the chargee has released the chargor from his or her obligations secured by the charge and treats the transferee of the chargor's interest in the land as a replacement chargor and not as an agent or guarantor of the chargor's obligation under the charge agreement.

(2) Without limiting the factors that indicate the chargee's intentions referred to in subsection (1), the following factors may be taken into account in determining whether a chargee has released the chargor:

(a) the chargee has entered into an agreement with the transferee of the land pursuant to which the transferee assumes all of the obligations of the chargor as provided in the charge agreement;

(b) the obligations of the transferee under the agreement referred to in (a) differ in a material respect from those of the chargor as provided in the charge agreement;

(c) the chargor is not party to the agreement referred to in (a) and has not consented to the agreement;

(d) conduct of the chargee occurring after transfer of the land to a transferee that is indicative of the intention of the chargee.

(3) A provision in the charge agreement under which the chargor acknowledges that the chargee may enter into an agreement referred to in clause 2(a) without prejudice to the rights of the chargee against the chargor is a relevant, but not conclusive, indication of the chargee's intentions.

(4) A provision in an agreement between the chargee and the transferee that the agreement does not prejudice the rights of the chargee against the chargor is a relevant, but not conclusive, indication of the chargee's intentions.

Comment: The common law concept of novation as applied in the context of mortgage law addresses a situation in which the mortgagee looks to a third party, usually a purchaser of the mortgagor's interest in the mortgaged property, in place of the original mortgagor for recovery of the mortgage obligation. In legal effect, the purchaser becomes the mortgagor; the original mortgagor is released from his or her obligations under the mortgage agreement in accordance with the implied or expressed intentions of the mortgagee.

The case law on novation in the context of mortgages was examined by the Supreme Court of Canada in *National Trust Co v Mead* [1990] 2 SCR 410. The following requirements were cited with approval by the Court as pre-requisites to a finding of novation: (i) the purchaser must have assumed complete liability for the mortgage debt; (ii) the mortgagee must have accepted the purchaser as the new principal debtor and not as a mere agent of the original chargor or as a guarantor of the original chargor's obligation; and (iii) the mortgagee must be taken to have accepted the new contract with the purchaser in full satisfaction and in substitution for the old contract.

However, the fundamental question is: given all of the surrounding circumstances, including the terms of the original agreement, an assumption agreement (if any) between the mortgagee and the transferee of the mortgagor's interest in the mortgaged land and the conduct of the mortgagee before and after the transfer by the mortgagor, is there sufficient evidence to convince the court that the mortgagee has signalled its intention to release the original

mortgagor from his or her obligation under the covenant in the mortgage agreement to discharge the mortgage obligation?

Section 17 is a "skeletal" codification of the common law relating to novation. It recognizes the effect of novation and provides a non-exclusive list of factors that the court may take into consideration when determining whether or not novation has occurred.

The provision requires "clear evidence" of the intention of the chargee to release the chargor and look to the transferee for recovery. However, it also provides that a clause in the charge agreement designed to preclude novation is not determinative. The reason for this is that it is the intention of the chargee after the charged land has been transferred by the original chargor that is important and not the chargee's intention at the date the original charge agreement was entered into. By the same token, a clause in an agreement with the transferee relating to novation is relevant but not determinative of the intention of the chargee.

Where the facts do not support novation, subsection 26(2) may provide a defence to the chargor.

Discharge by Payment to Joint Chargee

18(1) When a charge agreement creating a charge on residential property provides that all or part of the amounts secured by a charge are owing to two or more persons jointly, an amount paid or tendered by the chargor to any one of the joint owners or a transferee of one of the owners discharges the obligation whether or not the joint ownership has become ownership in common.

(2) Subsection (1) applies even if the payer has notice of the severance of the joint ownership.

Comment: This provision places the chargor of residential land in the position of being able to make payment to any one of two or more chargees who have co-ownership of rights to payment of the obligation or to a transferee of the interest of one of them. A change in the ownership structure from joint owners to ownership in common does not affect the right to the chargor to make payment to any one of the co-owners even if the chargor becomes aware of the severance.

Part 2: Consultation Questions

The Law Reform Commission would appreciate your responses or suggestions with respect to any aspects of the tentative proposals contained in this Part. More specifically, your views on of the following matters are being solicited:

6. The proposal that an oral agreement be effective between a chargor and a chargee but not with respect to third party interests in the charged property (subsection 8(1)).

7. The proposal that it would be sufficient for the purposes of a charge agreement to describe the land charged as "all of the land in which the chargor has an interest; or all of the land in which the chargor has an interest and land in which the chargor acquires an interest during the term of the contract" (clause 8(1)(b)).

8. The proposal that the Statute of Frauds not apply to charge agreements (subsection 8(3)).

9. The proposal that the *Land Charges Act* set out covenants that the parties my incorporate by reference in their charge agreements and a form charge agreement that the parties may adopt with or without modification (subsection 8(2)).

10. The proposal that section 129 of *The Land Titles Act, 2000* be repealed.

11. The proposal that a chargee not be entitled to rental payments related to leases of charged land as provided in section 8 of *The Distress Act* and that this provision be repealed (section 9).

12. The proposal that *The Land Charges Ac*t enumerate obligations that are deemed secured by a charge (subsection 10(1)). The breach of any other obligation would give rise to the right to recover damages for breach of contract.

13. The proposal (section 11) that any items referred to in sections 12-14, 16 or 18 do not apply to charge agreements providing for charges on commercial property unless the parties agree otherwise.

14. The proposal that there be a limit on the number of times a chargor may reinstate a payment schedule after default (section 14).

15. The proposal that *The Land Charges Act* set out the circumstances in which a chargor is entitled to tender full performance of the obligation secured by a charge and to effect termination or transfer of the charge (section 15).

16. The proposal that the court be given power to override a due-on-sale or encumbrance clause in a charge agreement where the transfer or encumbrance of the chargor's interest does not affect the security position of the charge (section 16).

17. The proposal that the principal factors relevant to novation be set out in *The Land Charges* Act (section 17).

18. The proposal that chargors of residential property be entitled to discharge an obligation owed jointly to two or more chargees by making payment to one of the chargees (section 18).

PART 3
RECOVERY OF UNSECURED OBLIGATION OF CHARGOR

Enforcement of Judgment

19(1) A person, who, for consideration paid by a chargee or chargor, agrees to compensate the chargee for any amount not recovered from the chargor, may not recover any amount of the obligation secured by the charge on residential land in an action against the chargor or an accommodation guarantor of the obligation.

(2) Subject to subsection (7), after expiry of the 24 month from the date of a judgment referred to in subsection 36(1), the balance of the obligation owing to the chargee by a chargor pursuant to an agreement providing a charge on residential land or a judgment against an accommodation guarantor of the obligation becomes unenforceable other than through enforcement of the charge as provided in Parts 8, 9 or 10.

(3) When a charge secures:

(a) all or part of the purchase price of residential land;

(b) a loan used all or in part by the chargor to purchase the land charged;

(c) a loan secured by a charge on land owned by the chargor where the loan was used all or in substantial part by the chargor to construct or have constructed a residence or the substantial part of a residence on the land;

(d) a loan used all or in substantial part by the chargor to discharge a loan referred to in clauses (a)-(c);

and, in the case of loans referred to in clauses (b),(c) or (d), the chargee knew or had to reasonable grounds to know at the date of the charge agreement:

(e) the intended use of the loan; and

(f) that the land charged was residential land of the chargor;

after service of the notice referred to in subsection 42(1) or 45(2), the chargee may not enforce:

(g) a judgment obtained in an action against the chargor or an accommodation guarantor; or

(h) a security interest in any residential land of the chargor or accommodation guarantor;

for any amount of the obligation secured by a charge on residential land other than through enforcement of the charge as provided in Parts 8, 9 or 10.

(4) Nothing in subsection (3) precludes a chargee from recovering amounts referred to in clauses 10(1)(c) or (e) expended by the chargee when the charge agreement provides that these are obligations of the chargor.

(5) On application, the court may order that subsection (3) does not preclude a chargee from recovering damages from the chargor or accommodation guarantor where the charged land or a building or other facility on the charged land is seriously damaged, destroyed or its value significantly diminished as a result of neglect or intentional conduct of the chargor and the chargee cannot recover compensation for the damage from insurance on the building or facility.

(6) When a judgment becomes unenforceable as provided in subsections (2) or (3), the chargee:

(a) shall not register the judgment in the Judgment Registry or the Land Titles Registry relating to the judgment;

(b) shall discharge a registration in the Judgment Registry or the Land Titles Registry relating to the judgment; and

(c) is barred from sharing in a distribution of a fund under section 108 of The Enforcement of Money Judgments Act relating to enforcement of a judgment against the judgment debtor or accommodation guarantor.

(7) On application of a chargor or chargee, the court may reduce or extend the period of time referred to in subsection (2) during which a judgment is enforceable taking into account one or more of the following:

(a) conduct of the chargor or chargee that is not within the standard of conduct required by subsection 5(2);

(b) any harsh or unconscionable term in the charge agreement; or

(c) the effect of enforcement of the judgment on the chargor and his or her dependants or on the accommodation guarantor and his or her dependants.

(8) Nothing in this section precludes the recovery of a judgment:

(a) that provides the basis for determining the existence and extent of liability of a person other than the chargor or accommodation guarantor; or

(b) relating to a covenant referred to in subsection 10(3).

Comment: Subsection 19(1) eliminates an anomaly in existing law. Frequently, the chargee acquires insurance against non-recovery of the deficiency and requires the chargor to pay the cost of the coverage. When the insurer pays the chargee, it then is entitled to be subrogated to the chargee's right to recover the deficiency from the chargor. Alternatively, the chargee may assign to the insurer its recovery rights under the charge agreement. The effect of subsection (1) is to preclude recovery of the deficiency from the chargor. Since the chargor has paid for the insurance, he or she should have the benefit of it. Even if the chargee "pays" for the insurance, there is a very strong likelihood that this cost will be included in the charge payments. The protection given to the chargor is extended to an accommodation guarantor who is likely to be a family member of the chargor.

It has been a central feature of Saskatchewan mortgage and agreement for sale law for nearly 80 years to preclude judgments against mortgagors who have granted mortgages to secure the purchase price of land (whether the mortgagee is a seller or lender) and against purchasers under agreements for sale. In 1983, the law was changed to allow corporate mortgagors and purchasers to contract out of this protection. The historic context in which of section 2 of *The Limitation of Civil Rights Act* was originally enacted indicates that the Legislature concluded that it was necessary to protect mortgagors and purchasers from deficiency judgments that resulted from an unprecedented drop in the value of land caused by the environmental and economic circumstances that prevailed in Saskatchewan at the time. While a case can be made that current economic conditions do not warrant legislative intervention of this kind, its total repeal could only be justified if it can be established that significant benefits to chargors, such as reduced interest rates or enhanced availability of loans for the purchase of residential land, would result. There is no evidence that this would be the case. However, it is necessary to address the anomalies and inconsistencies in its application. Section 19 has this effect.

Subsection 19(3) replicates the effect of section 2 of *The Limitation of Civil Rights Act* but limits the scope of the protection to situations involving charges on residential land. It extends the effect to charges on land securing loans made to permit the land owner of land to build a residence on the land and to situations in which the loan secured by a charge on one parcel is used to discharge a loan secured on another parcel with respect to which a deficiency cannot be recovered. The subsection reverses the effect of *Montreal Trust Co v Dahl* (1992), 99 Sask R 182 (QB) and *Royal Bank of Canada v Kerpan* (1994), 120 Sask R 163 (QB). Unlike section 2 of *The Limitation of Civil Rights Act,* the protection of subsection 19(2) extends to an accommodation guarantor who is likely to be a family member.

While preserving the policy basis of section 2 of *The Limitation of Civil Rights Act,* section 19 departs from it in one respect. Section 2 precludes recovery of any part of the undischarged obligation. This is not a feature of section 19.

Under section 19, the pattern of recovery for a chargee is first to get a judgment for the amount of the undischarged obligation. Once the chargee obtains a judgment as provided in subsection 36(1), it would be able to forgo or delay enforcing the charge and seek to recover through enforcement of its judgment through *The Enforcement of Money Judgments Act.* Should the chargee decide to follow this approach, the chargor, as a judgment debtor, would be entitled to the exemptions provided by *The Enforcement of Money Judgments Act* and otherwise applicable law (*The Registered Plan (Retirement Income) Exemption Act* SS 2002, c. R-13.01; *The Pension Benefits Act* SS 1992, c. P-6.001 and *The Saskatchewan Insurance Act,* RSS 1978, c. S-26, ss. 2(k) and 158), including the right to preclude enforcement of the judgment against the chargor's residence.

The principal concern of the mortgagor during the 24 month period during which the judgment can be enforced by seizure of the non-exempt portion of her or his employment income. Subsection 95(2) of *The Enforcement of Money Judgments Act* and subsection 23(7) of the Regulations to the Act (c E-9.22, Reg 1, 2012) currently provide that a judgment debtor is entitled to retain as exempt from seizure the greater of 70% of net employment remuneration or $1500 plus $300 for each dependent. Subsection 95(3) provides that the judgment debtor may apply to the court to increase the employment exemption to account for special circumstances of the judgment debtor or her or his dependants. In addition, the chargor is able to make an application to the court under subsection 19(7) of *The Land Charges Act* for an order reducing or eliminating the 24 month period during which the judgment is enforceable. The chargee is able to make an application to the court to extend the 24 month period where the chargor has been able to preclude enforcement through conduct that does not meet the standard set out in subsection 5(2).

The essential difference between section 19 and section 2 of *The Limitation of Civil Rights Act* is that the chargee is given the opportunity to recover from a chargor who has significant non-exempt assets, some or all of the obligation charged through judgment enforcement measures. However, the chargor receives the full protection of exemptions law and the judgment ceases to be enforceable after 24 months. While the chargee is given two methods of recovery, in fact, the result would be very similar to the outcome under existing law. Any amounts recovered from judgment enforcement would reduce the amount of the obligation secured by the charge and, consequently, increase the possibility that the unpaid portion of the obligation is less than the value of the charged land. Since there is no possibility of "foreclosure" other than as provided in Part 8, any surplus always accrues to the chargor or subordinate interests.

This departure from the approach contained in section 2 of *The Limitation of Civil Rights Act* is based on the conclusion that if the chargor is able to pay some or all of the obligation secured by the charge within a 24 month period, he or she should be required by law to do so. The policy basis for the 24 month limit on the enforceability the chargee's judgment is that it avoids placing

a defaulting chargor in the position of being subject to a judgment for a large unsecured debt for at least 10 years as provided in section 7.1 of *The Limitations Act*, SS 2004, c L-16, s 7.1.

Under the proposed approach, a chargor who has or can acquire during the 24 month period the resources to pay the deficiency can be forced to do so through the judgment enforcement system. However, thereafter the judgment ceases to be enforceable. The 24 month limitation on the enforcement of a judgment should have little effect on the risk assessment made by a potential chargee. A chargor against whom a deficiency judgment cannot be enforced during a 24 month period after the date of the judgment is very likely to be insolvent. A chargee is not likely to pursue enforcement of a judgment unless there is a strong likelihood of recovery. During the 24 month period the chargor remains in possession of the charged property. The chargee will be concerned that during this period of time buildings on the property may lose value through deterioration.

A chargee who has a security interest in property of the chargor or accommodation guarantor in addition to a charge on land referred to in subsection 19(3) is not be precluded from enforcing the security interest any time during the 24 month period following sale of the land. However, thereafter the security interest would be unenforceable.

There is no equivalent to draft subsection (5) in *The Limitation of Civil Rights Act* as it applies to land. However, there is a rough equivalent to it in subsection 18(6) of *The Limitation of Civil Rights Act* that applies to security interests in goods.

Subsection (7) clarifies that subsection (3) does not preclude recovery of a judgment against the chargor for breach of a covenant that is not related to the secured obligation or that is the basis for determining the liability of a third party such as a guarantor (other than an accommodation guarantor) of the chargor's obligation.

Section 2 of *The Limitation of Civil Rights Act* would be repealed when *The Land Charges Act* come into force.

Liability of Transferees

20(1) Section 19 applies to an action by a chargee against a transferee of charged land that at the date of the charge agreement:

> *(a) was used or was to be used by the chargor as residential land if the transferee uses or intends to use the land as residential land; and*
>
> *(b) was not residential land, where the chargee knew or had reasonable grounds to know at the date of the charge agreement a transferee would or would be likely to use the charged land as residential land.*

(2) The word "transferee" in subsection (1) includes a transferee from a transferee.

(3) Section 19 does not apply to an action by a chargee against a transferee where the charged land is not used by the transferee as residential land.

Comment: Section 20(1) addresses the issue settled in the Supreme Court in *National Trust Co v Mead* [1990] 2 SCR 410 in the context of section 2 of *The Limitation of Civil Rights Act* - the situation where the chargor does not have the protection of section 19 but transfers its interest to a transferee. The transferee would get the protection of section 19 if at the date of the charge agreement the chargee knew or had reasonable grounds to conclude that the charged land would be transferred to a transferee who would use it as a residence. The provision addresses the common situation in which a contractor-chargor obtains financing to acquire land and construct a building. The contractor-chargor constructs the building and transfers the land to a transferee who uses it as a residence. The effect of the provision would be to treat the transferee as an original chargor. Given the context, the chargee is fully aware of the contractor-chargor's intention to sell the land.

As a result of subsection (3), the protection of section 19 would not apply where a chargor of land used as the chargor's residence transfers his or her interest to a transferee that uses the land for commercial purposes. However, should this transferee transfer the land to a second transferee who uses it as his or her residence, section 19 protects the second transferee. Since the land was residential land at the date of the charge agreement, section 19 applies as a result of the definition of transferee in subsection (2). The word "transferee" in subsection (2) includes a transferee from the chargor or a transferee from a transferee of the chargor that did not use the land as residential land.

Consolidation of Obligations

21(1) When a charge agreement referred to in subsection 19(3):

> *(a) is amended by agreement of the parties to provide for an increase of an amount that is not referred to in clauses 19(3)(a)-(d); or*
>
> *(b) is replaced by a charge agreement providing for a charge on the land referred to in subsection 19(3) securing an amount in addition to an amount referred to in clauses 19(3)(a)-(d):*
>
> > *(i) the limitation on enforcement of a judgment referred to in subsection 19(3) does not apply to enforcement of a judgment for an amount in excess of the amount referred to in clauses 19((3)(a)-(d); and*

(ii) all payments made by the chargor pursuant to the amended or replacing charge agreement must be allocated as directed by the chargor to either the original obligation or the increased amount of the obligation whether or not the amount owing under the amended or replaced agreement is to be treated under the terms of the agreement as a consolidated obligation.

(2) If after giving 30 days written notice to the chargor of his or her right as provided in clause (1)(b)(ii) the chargor does not allocate the payments, the payments are deemed to have been allocated proportionately to the first amount loaned to the chargor and the amount of the increase in the obligation secured by the charge.

(3) Subsection 19(3) applies to an agreement entered into after a charge agreement referred to in subsection 19(3) the effect of which is to increase the obligation secured by the charge in an amount up to the amount of the obligation originally secured by the agreement referred to in subsection 19(3).

Comment: Section 21 applies to situations in which a charge agreement initially subject to subsection 19(3) is amended or replaced by a charge agreement providing for the advance of additional amounts to be secured by a charge. The limitations on the enforcement of a judgment for amounts referred to in subsection 19(3) do not apply to the additional amounts. However, when the amended or new charge agreement provides for a "consolidation" of the original and new amount it is important to the chargor whether the payments made by him or her are allocated to the original amounts to which subsection 19(3) applies, to the new amounts or to both on a prorated basis. In this situation, the chargor is likely (but not always) to want the payments allocated to the new amount that is not subject to a limitations of subsection 19(3).

Clause 21(1)(b)(ii) gives to the chargor the right to allocate the payments to the part of the debt in a manner most advantageous to him or her. If, after having been given notice of his or her right to allocate the payment, the chargor does not elect to do so, all payments would be allocated proportionately to the two amounts**.**

Subsection (3) addresses so-called HELOCs [home owner equity line of credit] arrangements under which a chargee loans to a chargor an amount that is essentially replacement of the amount of the obligations secured when the charge agreement was executed that has been repaid. The effect of such an agreement is to place the chargee in the position of being able to rely on its charge to secure a "new" loan to the chargor. Section 19(3) applies because this loan generally replaces amounts paid by the chargor since the original charge agreement came into effect.

Time Limitation on Deficiency Recovery

22(1) Except as provided in sections 19 and 20, when residential land subject to a charge is sold as provided in this Act and the amount recovered in the sale is less than the obligation secured in

whole or in part by the charge, the balance of the obligation owing to the chargee by the chargor or an accommodation guarantor becomes unenforceable against the chargor or guarantor 48 months after the date of the sale.

(2) On application of a chargor or chargee, the court may reduce or extend the period of time referred to in subsection (2) during which a judgment is enforceable taking into account one or more of the following:

(a) conduct of the chargor or chargee that is not within the standard of conduct required by subsection 5(2);

(b) any harsh or unconscionable term in the charge agreement; or

(c) the effect of enforcement of the judgment on the chargor and his or her dependants or on the accommodation guarantor and his or her dependants.

(3) Nothing in this section precludes the recovery of a judgment:

(a) that provides the basis for determining the existence and extent of liability of a person other than the chargor or accommodation guarantor; or

(b) relating to a covenant referred to in subsection 10(3).

Comment: Section 2 of *The Limitation of Civil Rights Act* applies only to mortgage transactions under which the mortgage loan is used to finance the acquisition of the mortgaged land. It does not apply where the mortgagor owns the land prior to the date of the mortgage. The historic reason for this inconsistency is not clear. These mortgagors could also experience dramatic reduction in the value their property resulting in liability for large deficiency judgments. In addition, they are exposed to a risk not experienced by purchase money mortgagors. If at the date the mortgage is executed there is a very large discrepancy between the value of the land and the amount of the loan (referred to as high-ratio mortgage), default in repaying the mortgage loan will almost inevitably result in a large deficiency. One approach, applied in Alberta, is to preclude deficiency judgments in the context of all high-ratio mortgages other than those granted by corporations.[31] However, the extension of the bar to non-purchase money mortgages brings its own problems. A high-ratio mortgage test fails to address situations in which the value of the mortgage land depreciates dramatically after the mortgage is signed with the result that a low-ratio mortgage becomes a high-ratio mortgage by the time it is enforced.

Furthermore, if the amount loaned by the mortgagee and the amount secured by the mortgage are identical, it is not difficult to view the amount of the loan as being secured by the mortgage. There is only one obligation, not two separate obligations. However, where it is not possible to find direct parallels between the mortgage obligation and a debt represented by a promissory

[31] See Alberta *Law of Property Act,* RSA 1980, c L-8, ss.40(1) and 43(4) and (4.1) . Reg. 89/2004, s. 1.

note, it is not clear that the mortgage secures the debt. The difficulty in finding this parallel has resulted in a large amount of litigation in the Alberta courts that has provided little certainty except in the most obvious cases.[32]

Section 22 addresses deficiency claims under non-purchase money charge agreements affecting residential land (*e.g.,* secured home improvement or home equity loans). It does not bar recovery of the deficiency, but renders the obligation unenforceable against the chargor or an accommodation guarantor of the obligation after 48 months from the date of the sale of the charged property. The policy basis for section 22 is to avoid placing a defaulting debtor in the position of being subject to a judgment for a large unsecured debt for at least 10 years as provided in section 7.1 of *The Limitations Act* SS 2004, c L-16.

Under the approach contained in section 22, a chargor who has or can acquire during the 48 month period the resources to pay the deficiency would be forced to do so through the judgment enforcement system. However, thereafter the judgment ceases to be enforceable and the chargor can return to a productive status.

This provision should have little effect on the risk assessment made by a potential chargee. A chargor against whom a deficiency judgment cannot be enforced during a 48 month period after the date of the sale of the charged property is very likely to be insolvent. As such he or she is able to make an assignment under the *Bankruptcy and Insolvency Act* RSC 1985, c B-3, with the result that the debt represented by the judgment would be discharged. The effect of the provision would be to allow the chargor to avoid this measure. Furthermore, during the 48 month period of enforceability of the judgment, the chargor retains his or her exemptions provided by *The Enforcement of Money Judgments Act* and otherwise applicable law (*The Registered Plan (Retirement Income) Exemption Act* SS 2002, c. R-13.01; *The Pension Benefits Act* SS 1992, c. P-6.001 and *The Saskatchewan Insurance Act,* RSS 1978, c. S-26, ss. 2(k) and 158), including the right to preclude enforcement of the judgment against the chargor's residence.

In addition, the chargor would be able to make an application to the court under subsection 22(3) for an order reducing or eliminating the 48 month period during which the judgment is enforceable. The chargee would be able to make an application to the court to extend the 48 month period where the chargor has been able to preclude enforcement through conduct that does not meet the standard set out in subsection 5(2).

The protection given to the chargor is extended to an accommodation guarantor who is likely to be a family member who has agreed to be a guarantor of the chargor's obligation as a personal obligation.

A chargee who has a security interest in personal or property of the chargor or accommodation guarantor in addition to a charge on land is not precluded from enforcing the security interest any time during the 48 month period following sale of the land. However, if the charge on land

[32] See, e.g., *Canadian Imperial Bank of Commerce v. Andrejcsik,* 30 Alta. L.R. (2d) 109 (Q.B.)

is enforced through sale, the security interest becomes unenforceable against the personal property after the expiry of the 48 month period.

Part 3: Consultation Questions

The Law Reform Commission would appreciate your responses or suggestions with respect to any aspects of the tentative proposals contained in this Part. More specifically, your views on of the following matters are being solicited:

19. The proposal that an insurer of a chargee's loss resulting from inability to collect a deficiency from and chargor should be barred from recovering from the chargor on the basis of subrogation or assignment; (subsection 19(1)).

20. The proposal that the bar to recovery of a deficiency should apply to charge agreements relating to the following:
    (i) the purchase of the residential land subject to the charge;
    (ii) a loan used all or in part by the chargor to purchase the land to be used as residential land;
    (iii) a loan secured by a charge on land use all or in substantial part to construct a resident on the land;
    (iv) a loan used in all or substantial part to discharge one of the loans mentioned above
    when the chargee know or had reasonable grounds to know at the date of the charge agreement the chargor's intention to use the loan in relation to a residential land (section 19(3)).

21. The proposal that a chargee may enforce a judgment against the chargor or accommodation guarantor or recover under a security interest in other property of the chargor or guarantor until the chargee initiate enforcement proceedings against the charged land (subsection 19(3)) or the expiry of 24 months from the date of the judgment, whichever is earlier (subsection 19(3).

22. The proposal that either the chargor or the chargee be entitled to make application to the court for the increase or decrease of the 24 month period during which the judgment is enforceable (subsection 19(7)).

23. The proposal that a court should have the power to order that a chargee may recover damages from the chargor or accommodation guarantor when it is established that the land or a building on the charged land is seriously damaged, destroyed, or its value significantly diminished as a result of neglect or intentional conduct of the chargor and the amount of the damages is not recoverable from insurance on the building (subsection 19(5)).

24. The proposal that the bars to recovery apply to accommodation guarantors (subsections 19(1)-(2)).

25. The proposal that the bars to recovery apply to a transferee from the chargor when the chargee knew or had reasonable ground to know at the date of the charge agreement that the chargor intends to transfer his or interest in charged land to a transferee who would or would likely use it as residential land (section 20).

26. The proposal that payments made under an agreement providing for consolidation of obligations to which a bar applies with obligations to which a bar does not apply be allocated in the manner determined by the chargor. if the chargor does not allocate the payments, they are allocated pro-rata and not on the basis that the chargee decides. (section 21).

27. The proposal that the bar to recover applies to loans made under "home equity line of credit" arrangements (subsection 21(3).

28. The proposal that obligations secured by a charge other than one created by a charge agreement referred to in sections 19 and 20 be unenforceable after 48 months from the date of sale of the charged property (section 22).

29. The proposal that either the chargor or the chargee be entitled to make application to the court for the increase or decrease of the 48 month period during which the judgment is enforceable. (subsection 22(3))

PART 4
CONSOLIDATION AND MERGER

Consolidation Prohibited

23 A chargor or transferee of the chargor's interest may discharge an obligation secured by the charge on residential land without paying any amounts owing under any separate charge or security agreement providing for a charge on other land or a security interest in personal property of the chargor in favour of the chargee or transferee of the chargee that was entered into by the chargor or a former chargor.

Comment: At equity, when a mortgagee held mortgages on separate parcels of land of a single mortgagor, the mortgagee was entitled to "consolidate" the obligations under the two mortgages and treat them as a single obligation. The effect was to place the mortgagee in the position of being able to refuse redemption of only one of the mortgages and require payment of the entire obligation. The effect of section 22 is to confirm that the equitable principle is

inapplicable in the context of charges on land. *Bank of Nova Scotia v Bartrop* (1983), 145 DLR (3d) 558 (Sask QB).

The provision would not affect a charge agreement under which a single obligation is secured by charges on two or more parcels of land. Neither of the charges could be discharged unless the chargor fully performed the entire obligation secured by the charges. Where the value of one or each of the parcels is sufficient for this purpose, the chargee would be entitled to exercise rights referred to in section 33.

Merger

24(1) A charge does not merge and is not discharged when the chargee acquires the interest of the chargor unless the chargor and chargee agree otherwise.

(2) Subject to The Land Titles Act, 2000, where a chargee acquires the interest of the chargor, unless the chargee agrees otherwise, the holder of an interest that has a subordinate priority status to that of the chargee may enforce the holder's interest only subject to the charge.

Comment: A chargor will generally be the owner of the title to or an interest in the charged land. A transfer by the chargor of the title or interest to a third party will carry with it the charge. However, should the chargor transfer his or her title or interest in the land to the chargee, the chargee becomes both a chargee and the owner of the charged land. The charge, being the subordinate interest, is treated under the common law as merging in the title or interest in the land with the result that it disappears as a separate interest.

The common law concept of merger produces unexpected results where the land was subject to an encumbrance that, prior to the transfer to the chargee, was subordinate to the charge. If the charge merges, the priority structure changes. The subordinate encumbrance is now a first charge on the land.

This provision reflects the position of equity that merger of an encumbrance with title acquired by the chargee is inappropriate in cases where the parties or the surrounding circumstances indicated an intention that the minor interest remain unaffected by the transaction. Merger should be recognized only when there was evidence that this was the intention of the parties. *Ethier v Nolle* (1924), 18 Sask LR 213 (CA); *Reeves v Konschur* (1909) 2 Sask LR 125 (CA).

The approach of equity is currently reflected in section 57 of *The Queen's Bench Act, 1998* SS 1998, c Q-1.1 which provides that, where the beneficial interest in an estate would not be deemed to be merged or extinguished in equity, there shall not be any merger of the estate by operation of law only. Subsection 24(1) is a more direct statement of the principle. Section 57 of *The Queen's Bench Act* would be repealed when *The Land Charges Act* comes into effect.

Subsection 24(2) reinforces subsection (1) by making to clear that, although a first priority chargee may be treated under *The Land Titles Act 2000* as registered owner of the charged land, that chargee retains its priority status in relation to subordinate interests in the charged

land existing at the date the chargee acquired the chargor's interest. However, unless the chargee (now owner) retains registration of its charge as a registered interest in its land (which is technically possible), merger would operate to extinguish the charge in relation to a subsequently acquired registered interest in the land.

Part 4: Consultation Question

The Law Reform Commission would appreciate your responses or suggestions with respect to any aspects of the tentative proposals contained in this Part. More specifically, your views on of the following matters are being solicited:

30. The proposal that the equitable principle of consolidation be rejected (section 23) and that the principle of merger be recognized only in circumstances where it would be recognized in equity (section 24).

PART 5
TRANSFER AND CHARGES OF INTERESTS

Transfer of Chargor's Interest

25(1) A chargor may transfer his or her interest in charged land.

(2) The transferee of a chargor's interest in land:

(a) is deemed to assume the obligations secured by a charge affecting the land;

(b) is deemed to covenant with the chargor that the transferee will:

(i) discharge any undischarged obligations of the chargor secured by the charge on the land; and

(ii) indemnify and keep harmless the chargor from any liability with respect to any of the covenants contained in the charge agreement creating the charge referred to in (i).

(3) Subsection (2)(b) does not apply where:

(a) the chargor and the transferee have agreed otherwise;

(b) the circumstances of the transfer indicate that the chargee did not intend to acquire the right to recover from the transferee; or

(c) the court concludes that it would be inequitable for it to apply.

(4) Subsection (2) does not apply after service of a notice referred to in subsections 36(2), 42(1), 45(2) or 46(2).

(5) In this section, "chargor" includes a transferee who has transferred his or her interest in the land.

Comment: Subsection 25(1) codifies a fundamental principle of property law: *Quia Emptores Terrarum*, 18 Edw 1, c 1 (1289). A chargor who is the title holder or owner of an interest in the charged land has the unrestrained right to dispose of his or her title or interest.

Subsection 25(2) replicates the substance of subsection 135(2) of *The Land Titles Act, 2000.* It recognizes the basic principle of property law: *nemo dat quod non habet.* A chargor does not have the power to transfer its interest in the charged land without the charge on the land. The transferee implicitly undertakes to discharge the obligations secured by the charge.

The assumption on which clause (2)(b) is based is that the chargor remains liable to the chargee under the charge agreement. Except in a case of novation (section 17), the chargee retains the right to enforce against the chargor the obligation under the charge agreement. If the chargor is released from obligations under the charge agreement as a result of novation, the provision has no relevance.

Unlike subsection 135(2) of *The Land Titles Act, 2000,* subsection (3) recognizes that the right of indemnification is based on equitable principles. It should not be an immutable rule, particularly where the transferor has agreed to surrender the right to indemnification in return for some benefit under the transfer contract. Furthermore, full indemnification should not be required when the transferee assumes only a part of the debt secured by the charge. This includes purchasers of units in a condominium project subject to a charge on the entire project securing construction costs of the project.

Clause 135(3)(b)(ii) of *The Land Titles Act, 2000,* provides that the transferee "shall indemnify and keep harmless the transferor from and against….(ii) all liability with respect to any of the covenants contained in the instrument or implied pursuant to this Act on the part of the transferor or assignor." This provision appears to require the transferee to indemnify the transferor against liability for payment of all amounts specified in the mortgage contract. The apparent effect of the provision is to require the transferee to indemnify the transferor with respect to amounts specified in the mortgage that exceed the value of the mortgaged property. In effect, the transferee of the mortgage land is liable to discharge the personal covenants of the transferor-mortgagor in addition to his or her obligations that can be enforced through

enforcement of the mortgage. In this respect, the provision appears to go beyond the principle that a transfer of an interest in land carries with it the obligations associated with the land.

Unlike clause 135(3)(b)(ii) of *The Land Titles Act, 2000,* subsection 25(2) does not impose on the transferee all the personal obligations of the transferor arising under the charge agreement. The discharge or indemnity obligation under subsection 25(2), is limited to "obligations secured by the charge." This does not include any amount owing to the chargee in excess of the value of the charged land, including any deficiency between the amount owing to the chargee and the value of the charged land.

Section 135(2) of *The Land Titles Act, 2000* would be repealed or modified when section 25 comes into effect.

Recovery by Chargee Against Transferee

26(1) When an interest in charged land has been transferred to a transferee, the chargee has the right to recover from the transferee who is the owner of the transferred interest the amount of the undischarged portion of the obligation secured by the charge in respect of which a transferee is obligated to indemnify the chargor as provided in section 25.

(2) Any arrangement between the chargee and a transferee to which the chargor is not a party that prejudices the chargor's rights under the charge agreement discharges the chargor to the extent of the prejudice.

(3) Subsections (1)-(2) do not apply after service of a notice referred to in subsections 36(2), 42(1), 45(2) or 46(2).

Comment: Section 26 provides for the enforcement of remedies of the chargee directly against a transferee without the necessity of privity between the two. This is not provided in subsection 135(2) of *The Land Titles Act, 2000.* Under current law, when the chargee recovers from the chargor, he or she must claim over against the transferee.

Section 26 gives to the chargee a right to recover only from a transferee who is owner of the transferred interest. The chargee would have no right of recovery from any intervening transferee. Furthermore, the right of recovery against the transferee would be directly dependent upon the right of the chargor to obligation discharge or indemnification has under section 25.

Subsection (2) addresses a situation that falls short of novation in which the chargee and transferee modify the charge agreement in a manner prejudicial to the chargor.

Transfer of a Chargee's Interest

27 (1) A transfer of the rights of a chargee under a charge agreement transfers to the transferee to the extent of the obligation transferred:

(a) all or part the interest of the chargee in the charged land commensurate with the obligation transferred;

(b) subject to this Act, all rights of the chargee provided in the charge agreement; and

(c) all of the rights and remedies of the chargee provided in this Act.

(2) The transferee of an obligation secured by a charge is deemed to be the transferee of the charge to the extent of the obligation transferred.

(3) Discharge of the obligation referred to in subsection (2) results in the termination of the charge to which the obligation relates.

(4) Subject to subsection (5), the rights of the chargor including the right to discharge the obligation under the charge agreement between him or her and the chargee are not affected by a transfer of the charge to the transferee as provided in subsection (1).

(5) When a chargee's rights pursuant to a charge agreement are transferred to a transferee as provided in subsection (1), the chargor may make payments pursuant to the charge agreement to the original chargee before the chargor is served with a written notice by the chargee stating:

(a) the amount due or payable that is to be made to the transferee;

(b) the mail or street address of the transferee to whom the payments are to be made.

(6) Payments made to the chargee before the chargor receives the notice referred to in subsection (5) discharge the obligation secured by the charge to the extent of the amount paid.

Comment: This section replicates section 127 of *The Land Titles Act, 2000.* It states the principle of equity: a mortgagee may assign all or part of the sum secured by the mortgage interest and the portion of the debt assigned continues to be secured by a mortgage interest. While under current law it is conceptually possible to transfer the right to an obligation without the security (which is held in trust by the transferor), the provision states a common assumption that a transfer of a portion of the debt carries with it the accessory interest.

Section 60 of *The Land Titles Act 2000* provides for the registration of an assignment of an interest. Section 61 provides that where fractional interests in an obligation are transferred to different persons, the new interests created retains the priority of the original interest and rank

equally with the remaining interests. In effect, each share becomes a separate interest. Consequently, there can be no priority competition between the holders of the shares.

Section 127 of *The Land Titles Act, 2000* would be repealed or modified when section 27 becomes law.

A Charge of a Charge

28(1) When a chargee, referred to in this section as the first chargee, charges his or her interest in land:

(a) the rights of the chargor are not affected;

(b) the chargor may make payments pursuant to the charge agreement to the first chargee before the chargor is served with a written notice from the first chargee stating:

(i) the amount due or payable that is to be made to the second chargee;

(ii) the mail or street address of the second chargee to whom the payments are to be made.

(2) Payments made to the first chargee before the chargor receives the notice referred to in subsection (1) discharge the obligation secured by the charge to the extent of the amount paid.

(3) The first chargee may not discharge the registration relating to the first charge without the written consent of the second chargee unless the chargor has discharged his or her obligations under the charge agreement with the first chargee.

Comment: This provision addresses situations referred to in section 126 of *The Land Titles Act, 2000* which provides:

126 If a mortgagee charges his or her interest in a mortgage, the person in whose favour the charge is created:

(a) is deemed to be the assignee of the interest; and

(b) has all rights and powers of an assignee, subject to the provisos and conditions expressed or implied in the instrument creating the charge.

The approach contained in section 126 is inappropriate in the context of charges of charges. Section 126 deems the mortgagee of a mortgage interest to be an assignee of the interest who acquires all rights and powers of an assignor. However, a charge of a charge is an interest in the charge and related obligation and would be registered as such; it is not an assignment of the

charged interest (*i.e.,* the interest in that subject to a charge). This is recognized by subsection (28(1)).

A charge of a charged interest and related obligation that is recognized by subsection (1) creates the relationship of chargor (first chargee) and chargee with respect to that interest (second chargee). Default by the first chargee (chargor) results in the second chargee having enforcement rights with respect to the charged interest as provided elsewhere in this Act. This may involve sale of the charged interest or surrender of it to the second chargee.

It is conceptually possible to create several separate charges on the charged interest. However, the exercise of enforcement rights of one or more of the chargees would create logistical difficulties.

Where a charged interest in the land is charged, it is necessary to protect the chargor of the land with respect to payments made by chargor. Subsections 28(1) and (2) place the chargor, who has not been notified of the charge of a charge, in the position of being able to discharge the charge on the land without having to be concerned with who is entitled to those payments.

A logistical problem will arise in cases where a charge is taken on a registered charge. Subsections 50(3) and (3.1) of *The Land Titles Act 2000* provide that an interest in another interest may be registered only against the other interest and not against the title. Consequently, a charge of the charge can be registered only against the charge that is collateral. The first chargee may apply for discharge of the registration relating to the collateral charge as provided in section 64 of *The Land Titles Act 2000*. Under section 66 of the Act, the original chargor is entitled to require discharge of the registration once he or she has performed the obligations in the charge agreement. There is no mechanism under which the chargee of the charge can prevent the discharge of the first charge. Subsection 28(3) precludes the first chargee from discharging the registration relating to the first charge where the chargor has been notified to make payment to the second chargee. However, this provision is not binding on the Registrar of Land Titles. At best, it would make the first chargee liable to the second chargee for damages he or she suffered as a result of the unauthorized discharge.

When *The Land Charges Act* become law, section 126 of *The Land Titles Act, 2000* should be re-examined to determine whether it should be amended or repealed.

Compulsory Transfer of Chargee's Interest

29(1) Notwithstanding section 66 of The Land Titles Act, 2000, a chargor who tenders or on whose behalf someone tenders to the chargee performance of the obligation secured by a charge, may require the chargee to transfer the chargee's interest in the charged land to a third person designated in writing by the chargor.

(2) A guarantor of the obligation secured by the charge on land who is subrogated to the rights of the chargee is deemed to be a designated third person referred to in subsection (1) unless the chargor otherwise informs the chargee in writing.

(3) A person who has an interest in the land subject to the charge referred to in subsection (1) and who tenders to the chargee performance of the obligation secured by a charge, may require the chargee to transfer to the person the chargee's interest in the charged land and rights under a contract of guarantee relating to the obligation secured if:

> *(a) the person notifies the chargor and a guarantor in writing of their rights as provided subsection (1);*
>
> *(b) the chargor or guarantor referred to in clause (a) fails to notify the chargee of his or her intention to exercise the right as provided in subsection (1) within 15 days following receipt of the notice referred to in (a); and*
>
> *(c) the person serves on the chargee a copy of the notice referred to in (a) before or along with the demand to the chargee referred to in subsection (1).*

(4) On request of a person referred to in subsection (3), the chargee shall disclose the name and mailing address of a guarantor of the obligation secured by the charge.

(5) As between persons referred to in subsection (3), a request of a prior interest holder who complies with the requirements of the subsection prevails over a requisition of a subsequent interest holder.

(6) The notices referred to in subsection (3) may be delivered to the mailing or communication addresses as set out in the charge agreement and guarantee contract, as the case may be.

Comment: This provision replicates section 125 of *The Land Titles Act, 2000.* Its effect is to give to a chargor the right to require the chargee, upon tender by the chargor of the amount secured by the charge, to transfer the chargee's rights under the charge agreement to a third party nominee. The section rejects the approach of equity that allowed a mortgagee in possession to refuse to transfer the mortgage to the mortgagor without obtaining the permission of a later mortgage holder. Unlike subsection 125, this provision makes it clear that the grantor has the first priority right to require the transfer.

Unlike section 125 of *The Land Titles Act, 2000*, subsection (2) deems a guarantor who is subrogated to the rights of the chargee to be a person designated by the chargor pursuant to subsection (1).

Subsection (3), which replicates the principle subsection 125(2), gives to a subsequent interest holder the right to a transfer of the chargee's interests under the charge agreement if the chargor or guarantor does not exercise his or her rights under subsection (1). However, it

would ensure that the chargor is given notice of his or her rights under subsection (1). When two or more interest holders comply with subsection (3) and the chargor or guarantor does not exercise his or her right under subsection (1), priority amongst them would be determined on the basis of date when the requisitions to the chargee were made.

Section 125 of *The Land Titles Act, 2000* would be repealed or modified when section 29 comes into effect.

Part 5: Consultation Questions

The Law Reform Commission would appreciate your responses or suggestions with respect to any aspects of the tentative proposals contained in this Part. More specifically, your views on of the following matters are being solicited:

31. The proposal that a transferee of a chargor's interest is deemed to assume the chargor's obligations under a charge agreement relating to the transferred interest unless the chargor and transferee agree otherwise or a court concludes that this would be inequitable (subsections 25(2)-(3)).

32. The proposal that subsection 135(2) of *The Land Titles Act, 2000* be repealed or modified.

33. The proposal that a chargee have a right of action against the transferee from the chargor to the extent that the transferee is obligated to indemnify the transferor (section 26).

34. The proposal that the transfer of a chargee's rights under a charge agreement entails transfer of the obligation secured by the charge and the enforcement rights of the transferor, and that discharge of the secured obligation automatically result in termination of the charge securing that obligation (subsections 27(1)-(3)).

35. The proposal that *The Land Charges Act* specifically provide for a charge of a charge and the relationships that arise out of this arrangement (section 28). This would require repeal of or modification to section 126 of *The Land Titles Act, 2000.*

36. The proposal that section 125 of *The Land Titles Act, 2000* be replaced with a provision in *The Land Charges Act* replicating but refining the essential features of that section. One such refinement is to deem a subrogated guarantor of the obligation secured by a charge to be a person designated by the chargor as the person to whom the charge is to be transferred (subsection 29(2)). Another refinement is the requirement of a notice given to the chargor or his or right to designate a transferee of the charge (subsections 29(3)).

PART 6
PRIORITY RULES

Priority of Leasehold Interests
30 A charge is subordinate to:

(a) a subsisting tenancy within the meaning of The Residential Tenancies Act, 2006; and

(b) an interest created by a lease of land for a term of three years or less entered into before registration of a charge affecting the land where the land is occupied by the lessee.

Comment: This provision replicates the effect of clauses 18(1)(d) and (e) of *The Land Titles Act, 2000.* Since subsections 18(1)(d) and (e) have general application, they apply to charges. For this reason, technically it is not necessary to include section 30 in *The Land Charges Act*. However, provisions in other Acts that directly affect charges should be included in *The Land Charges Act* in order to maintain the "code" feature of it.

Section 139 of *The Land Titles Act, 2000* provides:

139 No lease for a term of more than three years of mortgaged land is valid as against the mortgagee unless the mortgagee:

(a) has consented in writing to the lease before registration of the lease; or

(b) subsequently adopts the lease.

There is some justification for giving a chargee a veto on a mortgagor's right to lease mortgaged land if, as a result of the lease, the chargee's security position is jeopardized. However, this is a matter that the charge agreement can address.

It is proposed that section 139 of *The Land Titles Act,* 2000 be repealed.

Priority – General
31(1) Subject to The Land Titles Act, 2000, the priority of a charge extends to all amounts referred to in section 10.

(2) Upon failure of the holder of a charge having an earlier priority to:

(a) make necessary expenditures for the protection, insurance, maintenance, preservation, or repair of land or facilities on the charged land;

(b) remedy any default by the chargor in respect of any other charge or encumbrance relating to the charged land to the extent that the charge or encumbrance has priority over the chargee having an earlier priority; or

(c) to discharge taxes levied on the land;

the holder of a lower priority charge may make the expenditures and payments not made by the chargor.

(3) Notwithstanding The Land Titles Act, 2000, the charge of the chargee who makes the expenditures or payments referred to in subsection (2) is deemed:

(a) to have first priority to the extent of the expenditures and payments referred to in clauses (2)(a) and (2)(c) over all prior changes and encumbrance; and

(b) is subrogated to the rights of a chargee or encumbrancer referred to in clause (2)(b) to the extent of expenditures or payments made to the chargee or encumbrancer.

Comment: Section 31 has two functions. The first is to state the priority status of a charge with respect to the amounts referred to in section 10. The second is to give priority to any one of the competing chargees, regardless of its priority status with respect to the land charged, that makes the payments referred to in clauses (2)(a)-(c) when those obligations have not been discharged by the chargor or a chargee with a higher priority status. The policy basis of subsection (2) is that the expenditures that are necessary for the protection of the charged land benefit all chargees and, as such, should have a first priority regardless of which chargee incurs them. Clause (3)(b) subrogates a chargee to the priority status of a prior chargee to whom the subordinate chargee has made payments to the prior chargee that the chargor has failed to make.

The priority given to a subordinate charge in clause 3(a) is not dependent upon being the first interest registered against the land in the Land Titles Registry.

Tacking

32(1) Except as provided in this or any other Act, a charge has priority over an interest in the same land with a lower priority to the extent of advances, future advances, re-advances or other monetized obligation up to a specific principal sum set out in the charge agreement creating the charge notwithstanding that:

(a) the advances, future advances or re-advances are made or a monetized obligation is performed after the interest with the lower priority arises;

(b) the chargee has knowledge of the existence of the interest with the lower priority prior to or at the time the advances, future advances or re-advances are made or the obligation is performed;

(c) at any time during the term of the charge agreement no amounts are owing by the chargor to the chargee.

(2) When determining the "specific principal sum" referred to in subsection (1), amounts referred to in subsection 10(1)(b)-(g) shall not be included.

(3) Subsection (1) applies only when the charge agreement or the conduct of the parties indicates the continuation of the charge agreement after all amounts owing by the chargor have been paid.

(4) The priority of a charge is not affected by the renewal of the charge agreement as provided in the agreement that does not involve an increase in the specific principal sum set out in the security agreement.

(5) A charge referred to in subsection (1) does not have priority over a subsequent interest with respect to an increase in the specific principal amount provided in an amendment to the charge agreement made after the subsequent interest is registered.

(6) The priority referred to in subsection (1) does not extend to an obligation owing by the chargor to a transferee of the chargee's interest prior to the transfer.

(7) A chargee that refuses a request of the chargor to make advances up to the specific principal sum set out in the charge agreement creating the charge shall amend the charge agreement within 30 days from the date of the request to reduce the specific principal sum to the amount advanced as of the date of the request.

(8) Nothing in this section affects any right acquired pursuant to The Builders' Lien Act or The Personal Property Security Act, 1993.

Comment: These provisions implement the policy of subsections 27(1)-(3) of *The Land Titles Act, 2000.*

The wording of subsection (1) refers to advances made and obligations secured after registration of another interest. If at the date of registration the charge does not qualify as one that is "for a specific principal sum" no priority is granted. A agreement may provide for a "specific principal sum" greater than the amount the chargee is committed under the charge agreement to advance to the chargor. However, an "all obligations" charge agreement would not qualify unless a specific upper limit on the value of the obligations is set in the agreement. Any amount advanced after an intervening interest is registered that exceeds the specific principal sum secured by the charge would not have priority over the intervening interest. If the unamended charge agreement provides for renewal (with or without a change in the rate of interest), the priority of the charge is not affected so long as no new amount of principal that

exceeds the specified principal sum is involved and the renewal is purusant to a term in the unamended charge agreement.

The priority provided by subsection (1) would not be affected by the complete discharge of payments obligations by the chargor during the period of the charge agreement so long as the agreement or the circumstances associated with the relationship between the chargor and chargee indicate an intention to maintain the efficacy of the charge agreement. This feature would be important where the charge agreement provides for a revolving line of credit provided by the chargee.

Subsection 31(6) rejects the conclusion of the Court in *Canora Credit Union Ltd. v. Mattison*, 2007 SKQB 323 in which the Court held that a transferee of a mortgage could tack prior unsecured debt to the obligation secured by the transferred mortgage so as to give priority to the transferee over subsequent interest holders in the mortgaged land.

Subsection (6) addresses another issue. A form of tacking that raises some difficulty is one exemplified where an owner of land gives three successive charges to A, B and C. Assume that A chargee assigns its charge to C chargee without chargee B's consent. C chargee then claims priority over B chargee to the extent of the obligations owing under both charge A and C. Subsection (6) precludes the amount secured by charge C being treated as an obligation secured by charge A even though the amount paid to buy charge A and the amount secured by charge C does not exceed the principal sum set out in charge agreement A.

Subsection (7) applies where a chargor who has entered into a charge agreement with a chargee under which the chargee has the discretion to advance funds up to the specific principal amount but refuses to advance funds up to this amount. It places the chargor in the position of requiring the chargee to reduce the specified principal amount to the amount advanced. This permits the chargor to grant another charge on the land to a chargee who would not be subordinated should the first chargee thereafter advance addition funds up to the original specific principal sum.

Priority for future advances is governed by different rules where the intervening interest is a builder's lien registered against the land or a security interest in a fixture to the charged land.

Subsections 27(1)-(3) of *The Land Titles Act, 2000* would be repealed or modified when section 31 comes into effect.

Marshalling

33(1) When a chargee holds a charge on two or more parcels of land securing one obligation and the value of at least one of the parcels is sufficient to discharge the obligation, the chargee may enforce a charge against any parcel notwithstanding that to do so results in prejudicing

the interest of someone who has an interest in the parcel that has an inferior priority status to that of the charge.

(2) When the chargee enforces the charge as provided in subsection (1), the charge against the other parcel or parcels cease to exist and may not be the subject of subrogation in favour of the person who has an interest in the parcel against which the charge was enforced that has an inferior priority status to that of the charge.

(3) When a chargee holds a charge on two or more parcels of land securing one obligation and the chargee enforces a charge or charges against more than one of the parcels with the result that the amount recovered exceeds the amount of the obligation secured by the charge or charges;

> *(a)) the court may order that the amount exceeding the amount required to discharge the obligation secured by the charge be allocated to someone who has an interest in one of the parcels against which the charge was enforced that has an inferior priority status to that of the charge;*
>
> *(b) the court may order that the amount exceeding the amount required to discharge the charge be apportioned between persons who have interests in separate parcels subject to the charge.*

(4) A court may not make an order pursuant to subsection (3) that would have the effect of:

> *(a) prejudicing a person, other than a person referred to subsection (3), who has an interest in the charged land; or*
>
> *(b) affecting the priority status of an enforcement charge provided in The Enforcement of Money Judgments Act, The Land Titles Act, 2000 or a registered maintenance order.*

Comment: In its most basic form, marshalling involves the intervention of equity in the following context. Chargor grants a charge on Parcels A and B to Chargee 1. Chargor grants a charge on Parcel B to Chargee 2. The value of either Parcel A or Parcel B is sufficient to discharge Chargor's obligations to Chargee 1. Chargor defaults under his or her obligation to Chargee 1 who is placed in the position of full recovery by enforcing its charge against Parcel A or Parcel B or both parcels.

Where there is sufficient value in Parcel A to discharge Chargor's obligations to Chargee 1, some courts applying marshalling have concluded that they have the power as courts of equity to preclude Chargee 1 from enforcing its charge against Parcel B since this prejudices Chargee 2 who, without court intervention, would be reduced to the position of an unsecured creditor of Chargor. This approach appears to contradict the often stated feature of marshalling that nothing is to be done to interfere with the paramount right of Chargee 1 to pursue its remedy

against either Parcel A or Parcel B. See *St Gregor Credit Union Ltd v Zimmer*, 2004 SKQB 75. In addition, it contradicts the contractual and proprietary rights of a chargee to enforce in the manner set out in section 132 of *The Land Titles Act, 2000.*

Another approach employed by some courts when applying marshalling in the context of mortgages, respects Mortgagee 1's right to choose the parcel against which to enforce its security. However, if Mortgagee 1 decides to enforce its charge against Parcel B, Mortgagee 2 is "subrogated" to Mortgagee 1's security interest in Parcel A. Under this approach, once Mortgagee 1 has satisfied its claim against Parcel B, a court of equity will preclude it from discharging its mortgage against Parcel A so that it is available by subrogation to Mortgagee 2. Subrogation of a second mortgagee to the rights of a first mortgagee is a feature developed by the courts of equity at a time when the mortgagees held title to mortgaged land. Even though the obligation owing to the first mortgagee is discharged through enforcement against Parcel B, the mortgagee still has title to Parcel A which it holds in trust for the second mortgagee who is subrogated to the mortgagee's (former) right to enforce its claim against Parcel A. However, this approach cannot be applied in the context of a charge system. Chargee 1 can have no greater interest in Parcels A or Parcel B (or both) than is necessary to secure the amount of debt owing by Chargor to it. A charge exists only as an accessory to the debt it secures; it has no independent existence. If there is sufficient value in Parcel B to secure this obligation and Chargee 1 elects to enforce its claim against Parcel B, Chargee 1 no longer has any interest in Parcel A to which Chargee 2 can be subrogated. There is nothing for Chargee 1 to hold in trust for Chargee 2.

There can be little policy justication for the application of this form of marshalling. Before taking a charge on Parcel B, Chargee 2 has the facility through a search the Land Titles Rregistry to determine what prior charges affect the land and the extent to which it assumes the risk that Chargee 1 may proceed to enforce its charge against that Parcel. Chargee 2 can protect its interest by paying Chargee 1 and obtaining an assignment of Chargee 1's charge on the parcel. For these reasons, subsection 32(2) precludes marshalling by subrogation.

The form of marshalling that notionally does not involve having to choose which of the two approaches described above arises in the following context. Chargor grants a charge on Parcels A and B to Chargee 1. Chargor grants a charge on Parcel B to Chargee 2. The value of either parcel by itself is not sufficient to discharge Chargor's obligations to Chargee 1; however, the cumulative value of Parcel A and Parcel B is greater than the amount required to discharge those obligations. Chargor defaults under both charges and Chargee 1 proceeds in a single action to enforce its charge against both parcels. Another context in which this approach might be applied is where there is sufficient value in Parcel B to discharge Chargee 1's claim but Chargee 1 voluntarily proceeds to enforce its rights proportionally against both parcels in a single action. When enforcement by sale is possible only under the supervision of a court, the proceeds of the sale of the two parcels will be received by the court and Chargee 1's claim will be paid out of these proceeds. Any suplus would be allocated to the obligation owing to Chargee 2. Marshalling in this context does not require treating Chargee 1's claim as having been paid out of the proceeds of either Parcel A or Parcel B specifically; it is paid out of the

amount held by the court. There is no allocation of the proceeds as having been obtained from the sale of one or other of the parcels. Both Chargee 1 and Chargee 2 have claims to the proceeds, with Chargee 1 having first priority. It is possible under this approach to conclude that Chargee 1's rights have not been affected in any way. It is entitled to be paid out of the proceeds. The problems of subrogation can be ignored since there is no need to conclude that Chargee 1's interest in Parcel A have been transferred to Chargee 2. This approach isembodied in clause 33(1)(a).

A basic feature of marshalling is that it is not available where it would prejudice the rights of a third party. This would be the effect of clause 33(4)(a). The third party most frequently referred to as being protected is a purchaser of the Parcel A from Chargor whether or not he or she is aware that Chargor has given to Chargee 2 a charge on Parcel B. However, if the third party is Chargee 3 who has a charge on Parcel A, it may be appropriate for the court to apportion the surplus from the sale of Parcel A and B between Chargee 2 and 3. This approach is embodied in clause 33(3)(b).

One issue that has arisen in the context of marshalling is whether unsecured judgment creditors who have invoked the judgment enforcement system qualify as protected third parties. The effect of clause 33(4)(b) is to eliminate any doubt in this matter.

6: Consultation Questions

The Law Reform Commission would appreciate your responses or suggestions with respect to any aspects of the tentative proposals contained in this Part. More specifically, your views on of the following matters are being solicited:

37. The proposal that section 139 of *The Land Titles Act, 2000* be repealed and replaced by a provision (section 30) in *The Land Charges Act* that would subordinate a charge to prior leases of the charged land having a term of three years or less and to all tenancies falling with *The Residential Tenancies Act, 2006.*

38. The proposal to give priority to a chargee with a subordinate priority position to the extent that the chargee incurs costs involving in protecting the charged land, paying taxes on the land or remedying a default by the chargor in respect of a charge or encumbrance having a higher priority (subsection 31(2)).

39. The proposal that tacking rights should not be extended to secure an obligation owner by the chargor to a transferee of the chargee's interest prior to the transfer (subsection 32(6)).

40. The proposal that a chargee who refuses to advance money to the chargor up to the specific principal sum can be required to amend the charge agreement to reduce the specific principal sum to the amount advanced (subsection 32(7)).

41. The proposal that subsections 27(2)-(3) of *The Land Titles Act, 2000* be repealed or appropriately modified.

42. The proposal that a chargee having charges on two parcels of land to secure a single debt be free to select the parcel against which to enforce its charge notwithstanding that this choice negatively affects another interest in the parcel chosen by the chargee (subsection 33(1)).

43. The proposal that marshalling by subrogation not be permitted (subsection 33(2)).

44. The proposal that a court may marshal the proceeds of the sale of two or more parcels of land where the chargee has enforced its charge against all the parcels and the proceeds from the sale of the parcels is greater than the amount required to discharge the obligations owing to the chargee (subsection 33(3)).

PART 7
ENFORCEMENT AGAINST COMMERCIAL LAND

Enforcement Against Commercial Land through Sale by Chargee

Application of this Part

34 This Part applies:

(a) if the charge agreement provides that the chargee may enforce the charge on commercial land through sale of the charged land by chargee; or

(b) unless a court orders otherwise, the charge is being enforced by a receiver or receiver and manager.

Comment: This Part represents a dramatic departure from existing law in that it permits the parties to a charge agreement providing for a charge on land, other than residential land, to agree that, upon default, the chargee may sell the land. This approach is not novel; it is found in the mortgage law of other Canadian common law jurisdictions. See, *e.g., Mortgages Act* RSO 1990, c M.40, s. 24; *Land Titles Act* RSO 1990, c. L.5, s. 99(1).

Before exercising the power of sale, the chargee is required to obtain a judgment of the court (including a default judgment) which establishes that the chargor is in "default." After the sale, it is necessary to get an order from the court requiring the Registrar of Land Titles to transfer

title in the purchaser from the chargee. Otherwise, there is no requirement for direct court intervention in the process unless the chargor or other affected interest holder bring an application to the court as provided in subsection 36(5) or unless the circumstances were such that section 33 applies.

A sale effected under this Part would be by public auction, closed tender administered by an independent person, or listing with an independent licenced real estate agent. Consequently, the chargee could not buy the property from itself, and the amount realized from the sale will be market value of the property.

The policy basis for permitting sale by the chargee of commercial land is that there is much less need for extensive court supervision of enforcement by a court than where residential land is charged. The chargor will be a corporation or someone who is carrying on a business and, as such, more likely to be is a position to ensure that its interests are protected and to invoke court intervention when those interests are affected.

Default for Enforcement Purposes

35(1) For the purposes of this Part and Parts 8, 9 and 10, default means:

(a), subject to section 14, failure to discharge an obligation secured by the charge as provided in subsections 10(1)-(2);

(b) failure to take measures required by the charge agreement to protect the charged land from serious damage;

(c) failure to take measures required by the charge agreement to obtain the discharge of an interest that has priority over the charge; or

(d) subject to section 16, transfer of the chargor's interest in the land in violation of a term in the charge agreement prohibiting transfer without the consent of the chargee.

(2) Except as otherwise provided in this Act, nothing in this Part or Parts 8, 9 or 10 affects the right of a chargee to bring action against a chargor for breach of contract that is not a default as provided in subsection (1).

Comment: This provision defines default for the purpose of this and the following Parts. Not every event listed in the charge agreement as default would be a default that triggers the right to enforce against land. In the action leading to the judgment referred to in subsection 36(1) and similar provisions in other Parts, the court may conclude that the chargor is in default with respect to one of the events of default not included in section 35 and give judgment in damages for breach of this aspect of the charge agreement.

Notice of Enforcement

36(1) Where a chargor is in default as provided in subsection 35(1), a chargee may enforce a charge against land upon entry of judgment of the court, including a default judgment, stating that the chargor is in default and requiring the chargor to perform the undischarged obligation secured by the charge and costs of the proceedings.

(2) After service of the judgment referred to in subsection (1) on the chargor, the chargee who intends to enforce the charge shall serve a written notice of the chargee's intention to sell the charged land on:

(a) the chargor;

(b) a person with a registered interest in the charged land that is subordinate to the interest of the chargee;

(c) any person known to the chargee who has an interest in the charged land that would be negatively affected by a sale of the charged land.

(3) The notice referred to in subsection (2) to be served on the chargor must contain:

(a) a description of the land charged;

(b) a description of the default;

(c) a statement of account setting out the full particulars of the amount claimed by the chargee and secured by the charge and the amount of interest that accrues daily;

(d) if applicable to the charge agreement, a copy of section 14;

(e) where the default is that described in clause 35(1)(d)), a copy of section 16 if applicable;

(f) a statement that, unless the default is corrected or all monetary obligations are discharged before a specified date, the charged land will be sold and the chargor may be required to pay to the chargee the difference between the amount recovered in the sale and the value of the obligations that remain owing at the date of the sale and prescribed costs;

(g) the intended manner of sale;

(h) the name, address and telephone number of the chargee and of an agent of the chargee with responsibility for the administration of the charge agreement; and

(i) in the case of a default judgment obtained against the chargor, a statement that the recipient of the notice may apply to the court for a determination as to whether the chargor is in default.

(4) The notice referred to in subsection (2) served on a person referred to in subsections (2)(b) and (2)(c) shall contain the information referred to in subsections (3)(a), (3)(b), (3)(c),3(g) and 3(h).

Comment: Sections 36-40 prescribe an enforcement system that, for the most part avoids involvement of the court except where the chargor or holder of a subordinate interest affected by the enforcement brings an application to the court alleging non-compliance by the chargee with a statutory requirement or where the circumstances are such that a marshalling order might be applied by the court. The policy basis for the approach contained in section 36 is elimination of the necessity to have the court directly involved in all enforcement proceeds, as is required under current law with respect to enforcement of mortgage obligations. In the great bulk of cases, a default judgment will be obtained against the chargor who does not have nor claim to have a defence. Generally, issues of priority do not arise since the priority rules of *The Land Titles Act, 2000* are clear. In these cases, no court time would be used and costs are avoided. However, it would always be open for the chargor or other person whose interest in the land would be affected by the enforcement to obtain court intervention under section 56.

The first step in the procedure to enforce a charge on commercial land by sale is to obtain a judgment of the court stating that the chargor is in default as provided in one or more of clauses 35(1)(a)-(d) and requiring the chargor to perform the undischarged obligation secured by the charge. This may be a default judgment. This judgment is entered in the records of the court. If it is a default judgment, the chargor could have it set aside as provided in section 56 and rule 10-13 of the *Queen's Bench Rules of Court.*

The next step in the procedure is to serve a notice of the chargee's intention to sell the charged land on the chargor, a person with a registered interest in the charged land that is subordinate to the interest of the chargee, and any person known to the chargee to have an interest in the charged land that would be negatively affected by a sale of the charged land. The notice must contain the prescribed information that a chargor or other person whose interest would be affected by the sale would need if he or she were to discharge the obligations secured by the charge.

Upon receipt of the notice of intention of the chargee, the chargor would be able to stay further enforcement by making an application to the court under section 56 when the judgment was obtained by default and the chargor asserts that he or she has valid defence or when for any other reason, the right of the chargee to sell the charged land is contested.

The sale by the chargee must be preceded by a notice that informs the chargor and anyone holding a subordinate interest as to matters that will be of interest to them should they decide

to pay out the obligation secured by the charge or "police" the sale. This gives the chargor against whom a default judgment has been obtained, an opportunity to raise matters associated with the judgment.

Under subsections 56(2) and (7) the chargor and subordinate interest holders are given the right to question a judgment and all aspects of the proposed sale and the priority position of the charge being enforced relative to interests affected by the sale.

Time Before Sale

37 Unless the court orders otherwise, the land charged shall not be sold prior to the expiry of 50 days following service of the notices referred to in subsections 36(2)-(3).

Comment: Section 37 provides the equivalent of the order *nisi* under existing law - a period during which a mortgagor may "redeem" by discharging the mortgage obligation and costs. However, section 37 provides for a discharge period before any significant measures are taken (and costs incurred) to enforce the charge. During this period the chargor or other person affected by the proposed sale may "pay out" the charge agreement and obtain a discharge of the charge, or choose to exercise the right under section 28 to have the charge agreement transferred to someone else.

The court has the power under section 56 to abridge or extend the 50-day period.

Conditions of Sale

38(1) The land charged may be sold:

> *(a) by public auction, closed tender administered by an independent person, or through listing with an independent licenced real estate agent; or*
>
> *(b) as ordered by the court.*

(2) A sale of the charged land must be effected in a manner that results in payment of a purchase price that reflects the market value of the land at the time of the sale.

(3) The chargee or person referred to in subsection (1) shall have access to the charged land to the extent necessary to effect the sale.

(4) The chargee may purchase the charged land when the sale is effected by auction or closed tender or when ordered by the court.

Comment: Sections 38 prescribes the manner of sale and the conditions under which the sale would take place. The sale must be by public auction, closed tender administered by an

independent person, through listing with an independent licenced real estate agent or as ordered by the court. In most cases, the chargee will determine the method that is most appropriate in the circumstances. However, all aspects of the sale must be commercially reasonable (subsection 5(2)), and the purchase must reflect the market value of the land at the time of the sale.

Subsections 38(1) and (4) give the court power to allow sale through a process described in Alberta as involving a "Rice Order." In simple terms, a Rice Order is one authorizing sale of the mortgage property to the mortgagee at "fair market value." The effect is to treat the mortgagee as having bought the land at a judicial sale. Rice orders are often granted in cases where the mortgagor has not entered an appearance opposing issue of the order or where the mortgagor has little or no equity in the property. The mortgagee presents to the court a valuation of the property as part of the application for the order. If a mortgagor or other interested person involved in the proceedings contends that the market value of the property is higher than that presented by the mortgagee, the court may require that the land be offered for sale in the usual way, postpone the order to allow the person to get an offer of purchase higher than that offered by the mortgagee, or make a determination as to the fair market value of the property.[33]

Transfer of Title

39(1) Upon completion of the sale, the chargee or purchaser may make an application to the court for an order requiring the Registrar of Land Titles to transfer to the purchaser the chargor's interest in the land sold free from interests subordinate to the charge being enforced.

(2) In the application referred to in subsection (1), the court shall make an order pursuant to subsection (1) only if it is satisfied that the requirements of this Part have been met.

(3) Upon issue of the order referred to in subsection (1), the chargor or any person in possession of the charged land who does not have a legal right to remain in possession shall surrender possession of the charged land to the purchaser.

Comment: The chargee or purchaser makes the application to the court for an order requiring the Registrar of Land Titles to transfer the chargor's interest to the purchaser. Subsection (2) requires the court that issues the order to be satisfied that the requirements of this Part have been met. The purchaser of the charged land takes free from the interest of the chargor and any subordinate interest under the principle of indefeasibility of *The Land Titles Act 2000.*

[33] The valuation of mortgaged land for the purposes of Rice orders has been a source of some confusion in Alberta. See *Manufacturer's Life Insurance Company v Daon Development Corp and Price Waterhouse Limited* (1989), 65 Alta LR (2d) 40 (CA).

Proceeds of Sale

40(1) Money received from the sale of the land shall be applied by the chargee to the following items in the following order:

> *(a) expenses associated with the sale and costs secured by the charge or ordered by the court;*
>
> *(b) expenses incurred prior to the sale in protecting the property from deterioration;*
>
> *(c) unpaid taxes or charges against the property if not assumed by the purchaser;*
>
> *(d) interest payable to the date of the sale;*
>
> *(e) the principal money then due secured by the charge;*
>
> *(f) subject to subsection (2), amounts due to subordinate holders according to their priorities;*
>
> *(g) the amount remaining to the chargor.*

(3) Upon application of the chargor or person referred in clause 36(2)(b) or (c), the court shall determine the amount of items referred to in clauses(1)(a)-(e).

(4) Where there is a question as to who is entitled to receive payment pursuant to clauses (1)(f) or (g), the chargee may pay the surplus into court, and the surplus shall not be paid out except pursuant to an application by a person claiming an entitlement to it.

(5) When the chargee has sold two or more parcels of land to secure a single obligation and one or more parcels are subject to subordinate interests, if the money received from the sale exceeds the total of the amounts referred to in clauses (1)(a)-(e), the chargee shall pay into court the amount received from the sale after deducting the amounts referred to in clauses (1)(a)-(e).

(6) Money paid into court pursuant to subsection (3) may be allocated by the court as provided in section 33.

(7*) Upon request of the chargor or person referred to in subsection 36(2)(b) or (c), the chargee shall give a written accounting of:*

> *(a) the manner in which the chargor's interest was sold;*
>
> *(b) the amount of proceeds received from the disposition of the chargor's interest in the charged land;*

(c) the amount of items referred to in clauses (1)(a) –(f);

(d) the amount of any surplus; and

(e) the amount paid into court as provided in subsection (3)

within 15 days of receipt of the request.

Comment: Under subsection (1) the obligation to disperse the proceeds from the sale of the land is that of the chargee. However, under subsection (5) the proceeds must be paid into court in order to facilitate the possibility of a marshalling order under section 33. Subsection (7) requires the chargee to give to the chargor and the holders of subordinate interests an accounting of the items listed in the subsection when this is requested. As a result of subsection (3) a recipient of the account is entitled to bring an application to the court to determine the appropriateness of the chargee's distribution.

Charges on Real and Personal Property

41 Unless a court orders otherwise, subsections 55(4)-(6) and section 64 of The Personal Property Security Act, 1993 apply with necessary modifications to proceedings to which this Part applies.

Comment: The sections of *The Personal Property Security Act, 1993* referred to in section 41 deal with a situation where a charge agreement relates to both personal property and land. The effect of the provisions is that compliance with the procedures relating to enforcement against the land is sufficient for both types of property.

Part 7: Consultation Questions

The Law Reform Commission would appreciate your responses or suggestions with respect to any aspects of the tentative proposals contained in this Part. More specifically, your views on of the following matters are being solicited:

45. The proposal that *The Land Charges Act* distinguish between events of default that give rise to the right to enforce a charge and events of default that give rise only to an action in damages for breach of the charge agreement (subsections 35(1) and 36(1)).

46. The proposal that a judgment against the chargor for recovery of the secured obligation be a pre-requisite to enforcement of the charge, but not an integral feature of enforcement measures (subsection 36(1)).

47. The proposal that the chargor and subordinate interest holders be given notice of the chargee's intention to enforce the charge (subsections 36(2)-(4)).

48. The proposal that upon expiry of 50 days from delivery of a judgment to the chargor, the chargee may proceed with sale of the charged property after giving to the chargor and subordinate interests in the charged property a prescribed notice of the chargee's intention to sell the charged property (section 37).

49. The proposal that the 50 days following service of the notice of enforcement be treated as the substitute for the *nisi* period provided by existing law during which the chargor or subordinate interest holder can exercise rights provided by the Act for protection of the recipients of the notice (section 37).

50. The proposal that at any time after receipt of the notice of enforcement, the chargor or subordinate interest holder be entitled to make application to the court questioning the chargee's right to sell the charged land or the enforceability of the judgment against the chargor or seek a court order staying further enforcement for a time specified by the court (subsections 56(6) and (7)).

51. The proposal that the court have power to extend the time period between the date of the notice of enforcement and the date of the sale of the land (subsections 37 and 56(3)).

52. The proposal that upon compliance with all pre-requisites, the chargee be given the power to arrange for sale of the charged property without court order but subject to conditions designed to ensure that the sale is carried out in such a way that the market value of the charged property is received (sections 38 and 39).

53. The proposal that the chargee may purchase the charged land when the sale is conducted by auction or closed tender or when the court orders. (subsection 38(4)).

PART 8

SURRENDER OR EXTINGUISHMENT OF CHARGOR'S INTEREST (COMMERCIAL AND RESIDENTIAL LAND)

Agreed Surrender of Chargor's Interest

42(1) After service of the judgment referred to in subsection 36(1) or subsection 43(2) on the chargor, the chargee may propose to take the charged land in full satisfaction of the obligation owing by the chargor to the chargee as provided in the charge agreement and costs in obtaining the judgment by serving a notice of the proposal on:

(a) the chargor; and

(b) any person with a registered interest in the charged land that is subordinate to the interest of the chargee; and

(c) any person known to the chargee who has an interest in the charged land that would be negatively affected by the proposal.

(2) The notice referred to in subsection (1) to be served on the chargor must contain:

(a) a description of the land charged;

(b) a description of the default;

(c) a statement of account setting out the full particulars of the amount claimed by the chargee and secured by the charge and the amount of interest that accrues daily;

(d) if applicable to the charge agreement, a copy of section 14;

(e) if the default is that described in clause 35(1)(d), a copy of section 16 if applicable;

(f) a statement that the chargee agrees that all obligations owing by the chargor to the chargee as provided in the charge agreement will be terminated if the chargor agrees to the proposal of the chargee to take the charged land in full satisfaction the obligations and costs in obtaining the judgment;

(g) the name, address and telephone number of the chargee and of an agent of the chargee with responsibility for the administration of the charge agreement;

(h) a statement that the recipient of the notice may apply to the court for a determination of the value of the charged land and the unpaid amount of the obligation secured by the charge.

(3) The notice referred to in subsection (1) served on a person referred to in subsections (1)(b) and (1)(c) shall contain the information referred to in subsections (2)(a), 2(b), 2(c), 2(g) and, 2(h).

(4) Upon application of the chargor or a person referred to in subsections (1)(b) or 1(c), the court shall require the chargee to provide evidence as to the current market value of the land, the unpaid amount of the obligation secured by the charge and the costs of obtaining the judgment against the chargor.

(5) The proposal of the chargee is deemed to have been rejected by the chargor if he or she:

(a) expressly rejects the proposal; or

(b) does not agree in writing to accept the proposal within 30 days from receipt of the notice referred in subsection (2).

(6) If any person other than the chargor who is entitled to a notice pursuant to subsection (1) and whose interest in the charged land would be adversely affected by the proposal serves on the chargee a notice of objection to the proposal within 20 days from service of the notice, the proposal is deemed to have been rejected.

(7) If the chargor accepts the proposal and no notice of objection referred to in subsection (6) is served on the chargee before the expiry of 20 days after service of the notice referred to in subsection (1) or the court has ordered that an objection referred to in subsection (6) is ineffective:

(a) the agreement of the chargor to accept the chargee's proposal is binding;

(b) the chargee is deemed to have irrevocably elected to take the charged land in full satisfaction of all obligations owing by the chargor to the chargee as provided in the charge agreement and court costs in obtaining the judgment;

(c) all obligations of the chargor referred to in clause (b) are deemed to be discharged; and

(d) the chargee is entitled to hold charged land free from all rights and interests of:

(i) the chargor;

(ii) any person other than the chargor entitled to receive notice pursuant to subsection (1); and

(iii) all interests in the land subordinate to the interest of the chargee.

(8) On application by the chargee, the court may order that:

(a) the deemed or expressed rejection of the chargor; and

(b) an objection to the proposal of the chargee served by a person referred to in subsection 1(b) or 1(c);

is ineffective if the court finds that:

(c) the market value of the land is significantly less than the amount secured by the charge and the estimated costs of disposition of the land; or

(d) the chargor or a person referred to in subsection 1(b) or 1(c) made the objection for a purpose other than the protection of that person's interest in the charged land.

(9) When an application referred to in subsection (8) relates to residential land, the court shall treat it as an application under section 45 for permission to enforce a charge.

(10) When the court refuses to issue an order pursuant to subsection (8), the chargee may enforce the charge as provided in Part 7 or 10, and in the case of residential land, Part 9 and 10.

(11) Subject to subsection (9), the court may order the Registrar of Land Titles to transfer the chargor's interest in the charged land to the chargee free from any interest subordinate to the charge if:

(a) the chargor has accepted the chargee's proposal; and

(b after the expiry of 30 days from the date of service of the notice referred subsection (1) no notice of objection has been received by the chargee as provided in the subsection (6), or

(c) an order has been made pursuant to subsection (8).

(12) Upon issue of the order referred to in subsection (11), the chargor or any person in possession of the charged land who does not have a legal right to remain in possession shall surrender possession of the charged land to the chargee.

Comment: This section replicates the policy of section 61 of *The Personal Property Security Act, 1993.* It is the only context in which "foreclosure" of the chargor's interest is possible under *The Land Charges Act*. The policy on which it is based is the value in providing a procedure under which the same result as a "foreclosure order" under existing law can be obtained without the necessity to incur the costs and delay involved obtaining such an order. It is always possible under existing law for the chargor or subordinate interest holder to "quitclaim" his or her interest in favour of a chargee. However, section 42 provides a structured approach in which this could occur that provides protection to chargors and subordinate interest holders not available where unregulated surrender occurs. It also provides for deemed quitclaims in the circumstances set out in subsection (8).

The first step in the procedure provided by this provision would be to obtain a judgment, which could be a default judgment of the court, stating that the chargor is in default as provided in one or more of clauses 35(1)(a)-(d) and requiring the chargor to perform the undischarged obligation secured by the charge.

At this stage, the chargee may seek to avoid the necessity for sale of the charged land by proposing to the chargor and the holders of subordinate interests in the land that would be

affected by enforcement proceedings that the chargee will take the land in full satisfaction of the obligation owing by the chargor as provided by the charge agreement and the costs of obtaining the judgment. The details of the proposal would be set out in a notice delivered to the chargor and the holder of a subordinate interest affected by enforcement measures. These details are prescribed in subsection (2).

Under subsection (5), failure by the chargor to expressly accept the proposal is deemed rejection of it. However, as a result of subsection (6), a person other than the chargor who receives notice of the proposal is deemed to accept it unless that person delivers a notice of objection within the prescribed time.

A rejection of the chargee's proposal by the chargor or subordinate interest holder need not force the chargee to proceed to sell the property. As a result of subsection (8), the court, on application of the chargee, may override the expressed or deemed objection of the chargor or the expressed objection of the holder of a subordinate interest on the grounds that, in the case of objection by a subordinate interest holder, the objection was not based on a desire to protect an interest in the land, and, in the case of objection by the chargor or a subordinate interest holder, the amount of the obligation secured by the charge is significantly greater than the value of the land charged. The circumstances in which subsections (8) applies are equivalent to those in which a foreclosure order would be made under current law.

When the charge affects residential land, the application under subsection (8) is deemed to be an application under section 45.

In many cases where the obligation secured by the charge is greater than the value of the land, the chargor and subordinate interest holders are likely to agree to the chargee's proposal. This would be beneficial to the chargor should the circumstances be such that sale of the land would result in a deficiency the chargor would be required to pay. The benefit to a subordinate interest holder would be less obvious. However, the chargee may decide to offer some compensation to the chargor and the subordinate interest holder to encourage them to accept the proposal. The amount involved would likely be less than the cost and delay for the chargee in enforcing the charge by sale of the land.

Part 8: Consultation Questions

The Law Reform Commission would appreciate your responses or suggestions with respect to any aspects of the tentative proposals contained in this Part. More specifically, your views on of the following matters are being solicited:

54. The proposal that *The Land Charges Act* contain a procedure under which the chargor and chargee may expressly or implicitly agree that the chargee takes the charged property in full satisfaction of the obligations of the chargor as provided in the charge

agreement and costs. The procedure would be a substitute for foreclosure under current law.

55. The proposal that the procedure would be invoked by the chargee only after the chargee has obtained a judgment against the chargor (subsection 42(1)).

56. The proposal that the chargee may make the proposal in the form of a notice served on the chargor and holders of subordinate interests in the charged property that contained statutorily prescribed information (subsections 42(1)-(3)).

57. The proposal that the chargee may be ordered by the court to provide more precise details with respect to the current market value of the land, the unpaid amount of the obligation secured by the charge, and the costs of obtaining the judgment against the chargor (subsection 42(4)).

58. The proposal that the chargor be deemed to have rejected the chargee's proposal to take the charged land in full satisfaction of the obligations owing to the chargee costs when the chargor fails to agree in writing to accept the proposal within 30 days for the date of receipt of the proposal by the chargor (subsection 42(5)).

59. The proposal that, should the chargor accept the chargee's proposal, the proposal is deemed to be accepted by a person other than the chargor whose interest would be affected by the proposal if such person does not reject the proposal in writing within 20 days from service of notice of the proposal on such person (subsections 42(6)-(7)).

60. The proposal that, on application the court may override the express or deemed rejection of the chargor or a subordinate interest holder when it finds that an objection was made for a purpose other than to protect the rejecter's interest in the charged land, or when the market value of the land charge is significantly less than the amount secured by the charge and the estimated costs of disposition (subsection 42(8)).

61. The proposal that when the charged land is residential land and the court rejects the chargee application to the court to override the rejection of the chargor, the court must treat the application as one under section 45 (special measures relating to charges on residential land).

PART 9
PERMISSION FOR ENFORCEMENT AGAINST RESIDENTIAL LAND

Meaning of "Land" and Application for Permission

43(1) In this Part, land means residential land.

(2) Where a chargor is in default as provided in subsection 35(1), a chargee may enforce a charge against land upon entry of judgment of the court, including a default judgment, stating that the chargor is in default and requiring the chargor to perform the undischarged obligation secured by the charge and costs of the proceedings.

(3)*. Upon expiry of 30 days from the date of service of the judgment referred to in subsection (1) on the chargor, a chargee who intends to enforce the judgment against the charged land shall apply to the court for permission to enforce the charge as provided for in this Part.*

Comment: A judgment stating that the chargor is in default under the charge agreement as provided in one or more of clauses 35(1) and requiring the chargor to perform the undischarged obligation secured by the charge is a pre-requisite to enforcement of a charge against the residential land. This can be default judgment, but the chargor is given the opportunity as provided in section 56 and rule 10-13 of the *Queen's Bench Rules of Court* to have the judgment set aside so that the chargor can raise defences he or she may have against the claim of the chargee that the chargor is in default under the charge agreement, including tender of performance as provided in section 14 or relief from default as provided in section 16**.**

Notice of Application

44(1) Not less than 30 days prior to the hearing of the application referred to in subsection 43(3), the chargee shall serve a written notice of the chargee's intention to apply to the court for permission to enforce the charge against the land to:

(a) the chargor;

(b) any person with a registered interest in the charged land that is subordinate to the interest of the chargee;

(c) any person known to the chargee who has an interest in the charged land that would be negatively affected by enforcement proceedings; and

(d) the Provincial Mediation Board.

(2) The notice referred to in subsection (1) served on the chargor must contain:

(a) a description of the land charged;

(b) a copy of the charge agreement;

(c) a description of the default;

(d) a statement of account setting out the full particulars of the amount claimed by the chargee and secured by the charge and the amount of interest that accrues daily;

(e) a copy of section 14;

(f) if the default is that described in clause 35(1)(d), a copy of section 16;

(g) a statement that unless the default is corrected or all monetary obligations are discharged before a specified date, the charged land may be sold and the chargor may be required to pay to the chargee the difference between the amount recovered in the sale and the value of the obligations that remain owing at the date of the sale and prescribed costs except as otherwise provided in sections 19-22 of this Act;

(h) the name, address and telephone number of the chargee and of an agent of the chargee with responsibility for the administration of the charge agreement.

(3) The statement referred to in clause (2)(g) shall not refer to a requirement to pay to the chargee the difference between the amount recovered in the sale and the value of the obligations that remain owing at the date of the sale and prescribed costs if the application is for an order provided in subsection 42(11).

(4) The notice referred to in subsection (1) served on a person referred to in subsections (1)(b), (1)(c) and the Provincial Mediation Board shall contain the information referred to in subsections (2)(a)-(d) and 2(h).

(5) The notice referred to in subsection (1) served on the Provincial Mediation Board shall be deemed to be an application in writing within the meaning of subsection 6(1) of The Provincial Mediation Board Act.

(6) The chargee shall file with the court not more than 10 days and not less than five days before the hearing date of the application an appraisal of the value of the land;

(7) The court may require the chargee or chargor to provide to the court information with respect to:

(a) the income and assets of the chargor; and

(b prevailing economic conditions and other factors that may have affected the chargor's ability to discharge his or her obligations pursuant to the charge agreement.

Court Orders

45(1) In the application, the court may:

(a) refuse to grant permission to proceed with enforcement of the charge or

(b) grant permission to proceed with enforcement of the charge

(i) unconditionally;
(ii) subject to such conditions as the court orders; or
(iii) but suspend the effectiveness of the order for a period of time determined by the court not exceeding 6 months;

(c) make an order requiring the Registrar of Land Titles to transfer the chargor's interest to the chargee if the market value of the land is significantly less than the amount secured by the charge and the estimated costs of disposing of the land;

(d) make any other order that the court considers appropriate;

(e) on further application of the chargee, the chargor or a person referred to in 44(1)(b) or (c) vary an order made under this subsection; and

(f) order any party other than the chargor to pay all or any portion of the costs of the application.

(2) If an application is refused pursuant to clause (1)(a), the dismissal is not a bar to a future application for leave to enforce the charge.

(3) Any proceedings to enforce a charge taken in the absence of an order referred to in subsection (1) or in disregard of the requirements of this Part are a nullity.

Comment: This provision is designed to implement the policies of *The Land Contracts (Actions) Act* but in a more efficient manner. However, unlike *The Land Contracts (Actions) Act,* this provision deals only with enforcement of the charge. The chargee need not get permission to bring an action to enforce payment without relying on enforcement. See subsection 35(2).

Once a judgment referred to in subsection 36(1) has been obtained, the chargee who intends to enforce the charge would be required to apply to the court for permission to proceed with enforcement. In this application, the court has the discretionary power as he or she has under *The Land Contracts (Actions) Act.* Indeed, subsection 45(9) gives greater scope as to the type of order that is permitted by that Act. This includes granting an order requiring the Registrar of Land Titles to transfer the chargor's interest in the land to the chargee. This is the only circumstance in which The Land Charges Act provides for the equivalent of "foreclosure" under existing law.

Part 9: Consultation Questions

The Law Reform Commission would appreciate your responses or suggestions with respect to any aspects of the tentative proposals contained in this Part. More specifically, your views on of the following matters are being solicited:

62. The proposal that the Land Charges Act incorporate the public policy on which *The Land Contracts (Actions) Act* is based in a more efficient form.

63. The proposal that proceedings to obtain a judgment against a defaulting chargor precede and be separate from an application to the court for permission to enforce the charge so as to separate the matter of default of the chargor from enforcement of the charge (subsection 43(2)).

64. The proposal that the chargor and any person with a subordinate registered interest in the charged land and the Provincial Mediation Board be served with a notice of the application not less than 30 days prior to the hearing setting out information relevant to the hearing (subsections 44(1)-(6)).

65. The proposal that the court have the power to require additional information from the chargee or chargor relating to the income and assets of the chargor and the prevailing economic conditions and other factors that may have affected the chargor's ability to discharge his or her obligations pursuant to the charge agreement (subsection 44(7)).

66. The proposal that the court be given very broad discretionary power to refuse or grant permission to proceed with enforcement of the charge with or without conditions but suspend its effectiveness for not more than 6 months or order that the chargor's interest be transferred to the chargee (subsection 45(9)).

PART 10
ENFORCEMENT BY COURT ORDERED SALE OF COMMERCIAL LAND OR RESIDENTIAL LAND

Order for Sale

46(1) This Part applies when:

(a) the charged land is residential land;

(b) the charge agreement does not provide that upon default by the chargor the chargee may enforce the charge through sale of the commercial land by chargee;

(c) the court concludes that it is inappropriate that commercial charged land be sold by the chargee; or

(d) the court refuses to make an order under section 42(8).

(2) After 30 days from the date of service of a judgment referred to in section 36(1) on the chargor, or where the charged land is residential land, after the court has granted permission to the chargee pursuant to Part 9 to enforce the charge by sale, the chargee who intends to enforce the charge shall serve a written notice of the sale of the charged land on:

(a) the chargor;

(b) a person with a registered interest in the charged land that is subordinate to the interest of the chargee; and

(c) any person known to the chargee who has an interest in the charged land that would be negatively affected by a sale of the land.

(3) The notice referred to in subsection (2) to be served on the chargor must contain:

(a) a description of the land charged;

(b) a description of the default;

(c) a statement of account setting out the full particulars of the amount claimed by the chargee and secured by the charge current to the date of the notice;

(d) if applicable to the charge agreement, a copy of section 14;

(e) if the default is that described in subsection 35(1)(d) a copy of section 16 if applicable;

(f) a statement that, unless the default is corrected or all monetary obligations are discharged before a specified date not less than 30 days from the date of service of the notice, the charged land may be sold and the chargor may be required to pay to the chargee the difference between the amount recovered in the sale and the value of the obligations that remain owing at the date of the sale and prescribed costs except as otherwise provided in sections 19- 22 of this Act;

(g) the name, address and telephone number of the chargee and of an agent of the chargee with responsibility for the administration of the charge agreement; and

(h) a statement that the recipient of the notice may apply to the court for a determination of the unpaid amount of the obligation secured by the charge.

(4) The notice referred to in subsection (2) served on a person referred to in subsections (2)(b) and (2)(c) shall contain the information referred to in subsections (3)(a)-(c) and 3(g) and (h).

Comment: The procedures set out in this Part apply to four situations: (1) the charge is on residential land; (2) the charge agreement does not provide for sale on commercial land by the chargee; (3) the court refuses to make an order under subsection 42(8); or (4) a court decides that the charge is to be enforced through a court-ordered sale.

Conditions of Sale and Transfer of Title

47(1) Upon expiry of expiry of 50 days following service of the notices referred to in subsection 46(2), the chargee may apply to the court for an order for sale of the charged land subject to the conditions set in this Part upon when:

(a) the land charged is commercial land; or:

(b), permission to proceed with enforcement has been granted as provided in subsection 45(9).

(2) A sale ordered by the court shall be by public auction, closed tender, through listing with licenced real estate agent or any other manner determined by the court that, in the opinion of the court, is likely to result in payment of a purchase price that reflects the market value of the land at the time of the sale.

(3) The chargee may purchase the charged land in a sale referred to in subsection (2).

(4) Upon completion of the sale, the chargee or purchaser may make an application to the court for an order requiring the Registrar of Land Titles to transfer to the purchaser the chargor's interest in the land sold free from interests subordinate to the charge being enforced.

(5) Upon issue of an order as provided in subsection (4), the chargor or any person in possession of the charged land who does not have a legal right to remain in possession shall surrender possession of the charged land to the purchaser.

Comment: This section gives the court power to direct the sale of the charged property and provide guidance as to how that power might be exercised.

Proceeds of Court-ordered Sale

48 Unless the court otherwise orders, sections 40 and 41 apply to a sale order by the court under this Part.

Comment: Sections 47 and 48 function in a context different from that of a sale referred to in Part 7. However, the requirements of sections 40 and 41 apply to sale under both Parts.

Part 10: Consultation Questions

The Law Reform Commission would appreciate your responses or suggestions with respect to any aspects of the tentative proposals contained in this Part. More specifically, your views on of the following matters are being solicited:

67. The proposal that court-ordered enforcement of a charge be required where the charged land is residential land, the charge agreement relating to commercial land does not provide that upon default by the chargor the chargee may enforce the charge through sale, the court concludes that it is inappropriate that commercial charged land be sold by the chargee, or the court refuses to make an order under section 42(8) rejecting the chargee proposal to take the charged land in full satisfaction (subsection 46(1)).

68. The proposal that a judgment against the chargor for recovery of the secured obligation be a pre-requisite to enforcement of the charge, but not an integral feature of enforcement measures (subsections 46(2) and 36(1)).

69. The proposal that an order under Part 9 be a prerequisite to court enforcement of charge on residential land (subsection 46(2) and clause 47(1)(b)).

70. The proposal that the chargor and subordinate interest holders be given notice of the chargee's intention to enforce the charge (subsections 46(2)-(4)).

71. The proposal that upon expiry of 50 days after delivery of the chargee's notice of intention to apply for an order for sale, the court may order sale of the charged property (subsection 47(1)).

72. The proposal that any time after receipt of the notice of enforcement, the chargor or subordinate interest holder be entitled to make application to the court questioning the chargee's right to sell the charged land or the enforceability of the judgment against the chargor or seek a court order staying further enforcement for a time specified by the court (subsections 56(7)-(8)).

73. The proposal that the court have power to extend the time period between the date of the notice of enforcement and the date of the sale of the land (subsection 56(3)).

74. The proposal that the court be empowered to order sale of the charged property but not extinguishment ("foreclosure") of the chargor's interest in the land.

PART 11

ENFORCEMENT AGAINST ACCOUNTS

Definitions
49(1) In this Part:

(a) "account" means an amount payable or to be paid in the future pursuant to:

(i) a lease, including a lease mentioned in section 139 of The Land Titles Act, 2000 and a lease to which The Residential Tenancies Act, 2006 applies;

(ii) an easement as defined in section 144 of The Land Titles Act, 2000;

(iii) an agreement relating to a prescribed interest.

(b) "account debtor" means a person who is obligated to make payment of an account;

(c) "charge" includes:

(i) a charge on an account; and

(ii) a transfer of an account under a transaction that does not create a charge in the form of a security interest in the account;

(d) "chargee" includes a person to whom an account is transferred under a transaction referred to in (c);

(e) "chargor" includes a chargor or transferor of an account;

(f) "obligation secured or to be secured" includes the value paid or to be paid by a transferee of an account.

(2) Sections 14 and 16, with necessary modifications, apply to an agreement providing for a charge referred to in subsection (1)(c)(i).

(3) Except as otherwise provided in the Part, the rights of a chargor, chargee and account debtor are determined in accordance with the law applicable to assignment of choses in action.

Comment: This Part addresses "charges" on accounts in the form of payments associated with land, including rents, easement payments and prescribed payments. It applies to both security

interests in the payments and to sales of the right to collect the payments. The provision of this Part addresses the following situations:

(1) An owner of land subject to a charge leases the land to a tenant and assigns the rental payment to the chargee. The charge agreement affecting the land does not implicitly give to the chargee a charge on the rental payments. See section 9. If the chargee wants additional security in the form of a charge on the rental payments, he or she must provide for this is in the charge agreement or in separate agreement. In this context, the owner of the land is a chargor of the rental payments, the chargee of the land is a chargee of the rental payments, and the tenant is the account debtor. The charge on the rental payments is an interest in land and priority to the rental payments will be determined under *The Land Titles Act, 2000.*

(2) An owner of land subject to a charge leases the land to a tenant and assigns (as security or pursuant to a contract of sale) the rental payment to a chargee who is not the chargee under the charge agreement affecting the land. In this context the owner of the land is a chargor of the rental payments, the chargee is the person to whom the interest in the rental payments has been transferred, and the tenant is the account debtor. The charge on the rental payments is an interest in land and priority to the rental payments will be determined under *The Land Titles Act, 2000.*

This Part does not apply to an attempted transfer by a chargee of rights to payment provided for in a charge agreement relating to land apart from the charge on the land. Conceptually, it is not possible to separate a payment secured by a charge from the charge. A charge has no independent existence; it is accessory to the obligation it secures. Consequently, a contract providing for the transfer of payments to be made pursuant to a charge agreement relating to land necessarily entails an assignment of the charge on the land that secures the payments. The transferee of the payments is either a transferee of the chargee's interest under the charge agreement or the holder of a charge on the charge and associated obligation of the transferor. See sections 27 and 28. If the charge is not expressly transferred with the right to payment it secures, in equity, the transferor holds the charge as trustee of the transferee.

The definition of "account" includes a future account. In many cases, charges on accounts are of commercial value only to the extent that they affect "future accounts", that is, accounts that become due after the assignment agreement is executed.

Generally it is not possible to register in the land titles registry a right to an interest in future property. However, section 144 of *The Land Titles Act, 2000* would appear to be an exception. It addresses assignments of existing and future "rents". It deems the interest arising from such an assignment of rents to be an interest in land with the result that priority is determined under the priority rules of the Act applying to other interests in land. Section 144 of the Act provides as follows:

144(1) In this section:
(a)"assignee" includes a secured party;

(b) "assignment" includes a security agreement;
(c) "easement" means….
(d) "rents" means:
(i) amounts payable or to be paid pursuant to a lease, including a lease mentioned in section 139 and a lease to which The Residential Tenancies Act, 2006 applies; or
ii) amounts payable for or to be paid pursuant to an easement.

(2) For the purposes of determining priority among successive holders of rights in rents, an interest that arises pursuant to an assignment of rents is deemed to be an interest in land and may be registered.

While there is some ambiguity in the provision, clause 144(1)(d) would appear to treat as a registerable interest in land an interest created through an assignment of future rights to payment in the form of rents. However, the section does not address charges of accounts associated with land in any other context. An interest in these payments is not a registerable interest in land.

It is recommended that the uncertainty associated with registration of interests in the form of assignments (whether charges or sales) of rentals and payments to be made under other agreements relating to prescribed interests in land be specifically addressed through an amendment to subsection 144 of *The Land Titles Act, 2000* as follows:

144(1) In this section:
(a) "account" means an amount payable or to be paid in the future pursuant to:
(i) a lease, including a lease mentioned in section 139 and a lease to which The Residential Tenancies Act, 2006 applies;
(ii) an easement;
(iii) an agreement relating to a prescribed interest.
(b)" easement" means….
(2) An account payable or to be paid in the future is deemed for the purposes of this Act to be a present interest in land when the agreement providing for account comes into existence.

Charge Agreement
50(1) Except as otherwise provided in this Act, an agreement providing for a charge of an existing or future account is not enforceable unless it is in a writing or writings that contain the following:

(a) the name of the chargor and the chargee;

(b) a description of the account;

(c) a description of the land to which the account relates:

(i) sufficient to identify it through a search of the land titles registry, and in the case of land not located in a land registration district, the registry for interests of that kind; or

(ii) in the form of a statement that the account relates to:

A. all of the land in which the chargor has an interest; or

B. all of the land in which the chargor has an interest and land in which the chargor acquires an interest during the term of the contract;

(d) where the charge secures an obligation:

(i) the principal amount of the obligation secured or to be secured by the charge and, in the case of an obligation other than a debt, a description of the obligation and an estimate of its monetary value;

(ii) in the case of a charge that secures an obligation, the events that permit the charge to treat the chargor as being in default; and

(e) authentication of the terms of the agreement by the chargor.

(2) Upon request of a person referred to in subsection 57(3) of The Land Titles Act, 2000, the chargee must provide a copy of the charge agreement in hardcopy format to such person.

Comment: This provision specifies the writing requirement necessary for an agreement providing for the charge or transfer of an account to be effective in giving to the chargee or transferee an enforceable interest in the account. A charge that falls within this Part would be an interest in land. Consequently, the charge agreement must include a description of the land to which the charged account relates. The charge agreement may provide for a charge on accounts associated with land in which the chargor acquires an interest during the term of the contract. However, unless the land is described, the charge cannot be registered in the Land Titles Registry.

Payment by Account Debtor

51(1) An account debtor may make payments pursuant to the charge agreement to the chargor before the account debtor is served with a written notice from the chargor stating:

(a) the amount due or payable that is to be made to the chargee;

(b) the mail or street address of the chargee to whom the payments are to be made.

(2) A payment made by the account debtor to the chargor before receiving the written notice referred to in subsection (1) discharges the obligation of the account debtor to the extent of the payment.

Comment: As in all situations involving the assignment of accounts, the account debtor must be given information as to whom the account is to be paid. This provision protects the account debtor in cases when payment is made to the chargor before the account debtor is informed in writing of the right of the chargee or transferee to be paid.

Default by Chargor

52(1) This provision does not apply to a transfer of an account pursuant to a contract for the sale of the account.

(2) When a chargor is in breach of a term of the charge agreement, the chargee who intends to enforce a charge against accounts or collects the accounts shall serve a notice on:

(a) the chargor; and

(b) any person with a registered interest in the charged account that is subordinate to the interest of the chargee.

(3) The notice referred to in subsection (1) must contain:

(a) a description of the account;

(b) a description of the default;

(c) a statement of account setting out the full particulars of the amount claimed by the chargee and secured by the charge; and

(d) the name, address and telephone number of the chargee and of an agent of the chargee with responsibility for the administration of the charge agreement.

(4) Upon expiry of 10 days from date the notice referred to in subsection (1) is served, the chargee may:

(a) notify the account debtor to make payment to the chargee;

(b) apply amounts received from the account debtor to reasonable expenses of collection and the balance toward discharge of the obligation secured by the charge.

(5) Payment made by the account debtor to the chargee pursuant to a notice referred to in subsection (3) discharges the obligation of the account debtor to the extent of the payments.

Comment: This provision addresses enforcement of the charge on the account. The chargor is given only 10 days to discharge the obligation secured by the charge. The provision recognizes that accounts are an unstable form of collateral that can become less valuable in a short period of time. Subsection (3) gives protection to the account debtor by giving him or her reliable information as to who is entitled to payment of the account**.**

Conflicting Priority Claims

53(1) An account debtor who has been notified of conflicting priority claims to an account may obtain a discharge of his or her obligations as account debtor by paying the amount of the account into court.

(2) On application of a chargee of an account, the court shall determine the priority of conflicting interests in an account that has been paid into court pursuant to subsection (1).

Comment: This provision relieves an account debtor who is faced with competing claims to payment of an account from the obligation to determine which of the competing claimants has the first priority right to be paid.

Part 11: Consultation Questions

The Law Reform Commission would appreciate your responses or suggestions with respect to any aspects of the tentative proposals contained in this Part. More specifically, your views on of the following matters are being solicited:

75. The proposal that the *Land Charges Act* contain a separate part dealing exclusively with both charges and transfers of accounts payable under leases of land, easement payments, and prescribed payments (section 49).

76. The proposal that the uncertainty associated with registration of interests in the form of assignments (whether charges or sales) of rentals and payments to be made under other agreements relating to prescribed interests in land be specifically addressed through an amendment to subsection 144(1) of *The Land Titles Act, 2000*.

77. The proposal that an agreement providing for a charge on or transfer of an existing or future account associated with land contain a description of the land, the amount

secured by the charge (or the value paid by the chargee), and the authentication of the chargor (section 50).

78. The proposal that an account debtor be entitled to make payments to the chargor until he or she is given written notice of charge or transfer of an account (section 51).

79. The proposal that a chargee be required to give a notice of default to a chargor setting out information relating to the account that will be important to the chargor should he or she intend and be able to discharge the charge on the account (subsections 52 (1)-(3)).

80. The proposal that, upon 10 days from the date of service of a notice of default on the chargor, the chargee is entitled to notify the account debtor to make payment to him or her (subsection 52(4)).

81. The proposal that conflicting claims to an account be determined in an application to the court (section 53).

PART 12
ENFORCEMENT OF NON-CONSENSUAL LIENS

Definitions

54(1) In this Part,

(a) "charge" means:

(i) a vendor's lien on land; and

(ii) a prescribed non-consensual lien or charge on land;

(b) "chargor" means the owner of the land subject to a charge;

(c) "chargee" means the person for whose benefit the charge exists;

(d) "obligation" includes the value paid or to be paid by a transferee of an account.

Actions and Applications to the Court

55 (1) Where a chargor is in default in discharging obligations secured by the charge referred to in clauses 10(1)(a),(b),(c), (f) or (g), a chargee may enforce a charge against land upon entry of judgment of the court, including a default judgment, stating that

the chargor is in default and requiring the chargor to perform the undischarged obligation secured by the charge and costs of the proceedings.

(2) A chargee who intends to enforce the charge shall serve a written notice of the chargee's intention to apply to the court for enforcement of the charge to:

(a) the chargor;

(b) any person with a registered interest in the charged land that is subordinate to the interest of the chargee; and

(c) any person known to the chargee who has an interest in the charged land that would be negatively affected by enforcement proceedings.

(3) The notice referred to in subsection (2) to be served on the chargor must contain:

(a) a description of the land charged;

(b) a description of the default;

(c) a statement of account setting out the full particulars of the amount claimed by the chargee and secured by the charge;

(d) a statement that, unless the default is corrected or all monetary obligations are discharged before a specified date, the charged land may be sold and the chargor, except in the case of enforcement of an equitable vendor's lien, may be required to pay to the chargee the difference between the amount recovered in the sale and the value of the obligations that remain owing at the date of the sale and prescribed costs; and

(e) the name, address and telephone number of the chargee and of an agent of the chargee with responsibility for the administration of the charge agreement.

(4) The chargee shall file with the court not more than 10 days and not less than 5 days before the hearing date of the application:

(*a) a copy of each of the notices referred served on the chargor or a person referred to in subsection (3); and*

(b) the appraised value of the land.

(5) Upon expiry of expiry of 50 days following service of the notices referred to in subsections (2) and (3), the chargee may make application to the court for an order for sale.

(6) *On application of the chargee, the court may:*

(a) order sale of the land subject to such conditions as the court orders;

(b) order sale of the land but suspend effectiveness of the order for a period of time determined by the court;

(c) make any other order that the court considers appropriate; or

(d) on further application the chargee, the chargor or a person referred to in subsection (2) vary an order made under this subsection.

(7) Sections 40 and 41 and subsections 47(2)-(6)) apply with necessary modifications to a sale ordered by the court pursuant to subsection (6).

(8) Sections 14 and 16 apply with necessary modifications to agreements to which is Part applies.

(9) A chargee who takes proceedings under this Part to enforce an equitable vendor's lien may not recover from the chargor any amount of the obligation secured by the charge other than the amount received in a court ordered sale of the charged land and costs.

Comment: This Part provides measures that for the most part parallel those applicable to the enforcement of a charge in the form of an agreement for sale of land. Nothing in this Part precludes the vendor from surrendering his or her vendor's lien and seeking to recover the unpaid portion of the purchase price of the land through regular judgment enforcement proceedings.

Part 12: Consultation Questions

The Law Reform Commission would appreciate your responses or suggestions with respect to any aspects of the tentative proposals contained in this Part. More specifically, your views on of the following matters are being solicited:

82. The proposal that the enforcement of equitable vendors' liens be codified and not left to traditional equitable principles.

83. The proposal that a judgment finding that a purchaser is in default under the purchase agreement be a pre-requisite to the enforcement of a vendor's lien on land being purchased (subsection 55(1)).

84. The proposal that the vendor who intends to seek enforcement of a vendor's lien must give notice of application to the court for enforcement of the lien (subsections 55(2)-(3)).

85. The proposal that the court be given discretion to impose conditions on sale (subsection 55(5)).

86. The proposal that the requirements of sale be very similar to those applicable to sale of land subject to an agreement for sale (subsection 55(7)).

87. The proposal that section 14 (relief against acceleration) and section 16 (control of due on sale clauses) apply to charge agreements to which this Part applies

88. The proposal that the vendor not be entitled to recover more than the proceeds of sale of the land (subsection 55(9).

PART 13
GENERAL PROVISIONS APPLICABLE TO ALL PARTS

Court Supervisory Jurisdiction

56(1) Except as otherwise ordered by the court, proceedings to enforce an obligation secured by a charge on land or a charge of an account related to land shall be brought in the court at the judicial centre nearest to which the land or the largest part of the land exists.

(2) On application by a chargor, chargee or a person with an interest in land subject to a charge to which this Act applies, the court may make one or more of the following orders:

(a) an order, including a binding declaration of a right and an order for injunctive relief, that is necessary to ensure compliance with the provisions of a charge agreement or this Act;

(b) an order giving directions to any person regarding the exercise of rights or the discharge of obligations pursuant to the provisions of a charge agreement or this Act;

(c) an order staying enforcement of rights provided in this Act;

(d) any order that is necessary to ensure protection of an interest in land charged;

(e) an order determining questions of priority or entitlement to land; or

(f) direct an action to be brought or an issue to be tried.

(3) Where, in this Act a time is specified for doing an act or thing, other than as provided in section 58, the court, on an application made before or after the time has expired, may extend or abridge, conditionally or otherwise, the time for compliance.

(4) On application, court may:

(a) relieve a receiver, or receiver and manager appointed by a court, from compliance with some or all of the requirements of Parts 7, 11 or 12, and, in the case of a charge on commercial land, Part 10; and

(b) place the receiver, or receiver and manager in temporary possession of land subject to a charge.

(5) An order pursuant to subsection (4)(a) shall require that:

(a) all parties affected by the order are given opportunity to appears in the application; and

(b) the interests of the parties mentioned in (a) receive protection equivalent to the protection they would receive if Parts 7, 11 and, where the charge is on commercial land, Part 10.

(6) An appeal lies to the Court of Appeal from an order, judgment or direction of a court made pursuant to this Act.

(7) When the chargor or a person with an interest in charged land subordinate to a charge makes an application to the court relating to the priority status of the charge or the amount claimed by the chargee and secured by the charge, enforcement proceedings are suspended unless the court orders otherwise.

(8) In the application referred to in subsection (7), the court may rule on the matter or matters raised in the application or direct an action to be brought and an issue to be tried.

(9) The court may order that an applicant or person whose rights are addressed in an application pay court costs and party-and-party costs and, in so doing, take into account the merits of the application.

(10) Notwithstanding any agreement between the chargee and chargor, the chargor may bring a proceeding against the chargee without first offering to discharge the obligation secured by a charge.

(11) When a requirement of this Act has not been met, any person who suffered damage as a result may recover from any other person who failed to meet the requirement:

> *(a) damages that are reasonably foreseeable as a result of the failure to meet the requirement; and,*
>
> *(b) where appropriate, exemplary damages.*

(12) In this Part, "court" includes a court referred to in subsection 243(1) of the Bankruptcy and Insolvency Act (Canada).

Comment: This provision addresses a range of matters relating generally to the involvement of the court as provided in the Act. The court is given very broad supervisory powers to ensure fair and efficient application of the Act. Of particular significance are subsections (4) and (5) that give to the power to permit enforcement by a court appointed receiver or receiver and manager without the necessity to comply with the requirements of Parts 7, 10 (as it applies to charges on commercial property) and 11.

Possession of Charged Land Given to Chargee

57(1) On application of a chargee, the court may place the chargee in temporary possession of land subject to a charge when:

> *(a) the chargor has abandoned the land;*
>
> *(b) the chargor has failed to protect the land from serious damage or deterioration;*
>
> *(c) notices cannot be served on the chargor because he or she cannot be found; or*
>
> *(d) for any other reason, the court concludes that a person's interest in the land charged is in jeopardy.*

(2) Except as otherwise provided in this Act and unless otherwise ordered by the court, when a chargee goes into possession of land pursuant to subsection (1), the chargee has the rights and obligations with respect to the land of a mortgagee in possession at equity.

Comment: *The Land Charges Act* rejects the concept of a mortgagee going into possession of land except for the purposes referred to in subsection 57(1). Possession or deemed possession for the purposes of attornment by the mortgagor or creation of a lessor-lessee relationship between a mortgagee and a tenant occupying the mortgaged land is a hang-over from the time when the mortgagee was the legal owner of the land and, as such, had the right to possession of the land, even as against the mortgagor. This approach is inapplicable where the only rights the chargee has are those incidental to a charge that does not include a right to possession.

Limitation of Actions

58(1) A chargee, other than a chargee in possession, may not take proceedings as provided in this Act to enforce a charge on land or account if an action for a judgment requiring the chargor to discharge the obligation secured by the charge may not be commenced as a result of The Limitations Act.

(2) Upon application of a chargor, the court may order that a charge on land ceases to exist when the chargee is precluded from bringing an action as provided in subsection (1).

(3) An order referred to in subsection (2) is sufficient authority to the Registrar of Land Titles that the charge no longer exists, and, in the case of a charge agreement in the form of an agreement for sale, the chargee's ownership interest ceases to exist.

Comment: In the absence of provisions in *The Limitations Act* dealing with the rights of chargors and chargees, it is necessary to address the effect of limitation on the rights of chargors and chargee.

Chargor or Chargee Cannot be Found

59(1) When a chargor cannot be located, on application of a chargee the court may appoint a person to act as a fiduciary of the interest of the chargor with power to act in the place of the chargor unless the court concludes that the interest of the chargor is of such small value that the costs involved are likely to exceed the value of that interest.

(2) When a chargee cannot be located, on application of a chargor, the court may order that a charge on land of the chargor is discharged upon by payment to the Public Trustee of the unpaid amount of the obligation secured by the charge specified in the order.

(3) The certificate of the Public Trustee that the amount specified by the court as provided in subsection (2) has been received is sufficient authority to the Registrar of Land Titles that the charge no longer exists.

Service of Notices and other Documents

60(1) In this Act, service of a notice or documents shall be effected as provided in Part 12 of the Queen's Bench Rules of Court.

(2) Any notice or document may be served by an alternative mode as provided in Rule 12-4 of the Queen's Bench Rules of Court.

61 The principles of equity and the common law continue to apply except to the extent they are inconsistent with a provision of the Act.

References to Mortgage Terms

62 Unless the context indicates otherwise, a reference in any agreement, statute or regulation to:

(a)" agreement for sale" shall, subject to section 4, be interpreted as "charge" as defined in this Act;

(b) "mortgage" shall be interpreted as "charge" as defined in this Act;

(c) "mortgagee" shall be interpreted as "chargee" as defined in this Act; and

(c) "mortgagor" shall be interpreted as "chargor" as defined in this Act.

Act Binding on the Crown

62 The Crown is bound by this Act.

Transition

63……

Power to Make Regulations

64….

Part 13: Consultation Questions

The Law Reform Commission would appreciate your responses or suggestions with respect to any aspects of the tentative proposals contained in this Part. More specifically, your views on of the following matters are being solicited:

89. The proposal that the Queen's Bench Court be given broad supervisory powers (section 56).

90. The proposal that the court have power to grant possession of the charged land only in specified circumstances (section 57).

91. The proposal that The Land Charges Act give the power to the Court to declare extinguishment of a charge when the obligation the charge secures is barred by *The Limitations Act* (subsection 58(2)-(3)).

92. The proposal that the specific provisions be included in The Land Charges Act dealing with situations where either the chargor or the chargee cannot be found (Section 59).

Acts and Provisions of Existing Acts that would be repealed when The Land Charges Act becomes law:

The Land Contracts (Actions) Act, RSS 1978, c L-3

The Agreement for Sale Cancellation Act RSS 1978 c. A-7

The Land Titles Act, 2000, SS 2000, L-5.1
Clauses 2(1)(p.1)(iii), 2(1)(cc), 2(1)(dd), 2(1)(ee), ss. 27(2)-(4), 124, 125, 126, 127(1)-(3), 129, 131, 131.1, 132, 133, 135, 136, 137, 139, 160.2, and 187(1)(s).

The Limitation of Civil Rights Act RSS 1978, c. L-16
Sections 2, 3, 5, 6, 7, 8, 10, 11, 12, 13 and 16.

The Queen's Bench Act, 1998, SS 1998, c. Q-1.01
Sections 57, 6 and 62.

The Distress Act RSS 1989, c. D-31, Section 8.