SASKATCHEWAN LAW REVIEW

The Case for Modernization of Saskatchewan Real Property Security Law

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I. INTRODUCTION

The Saskatchewan Legislature has enacted codes of personal property security law[1] and enforcement of money judgments law[2] that are some of the most advanced of their kind in the world. They have provided patterns for modernization of the laws of other jurisdictions in Canada and elsewhere in the world. As codes, they are highly integrated and conceptually consistent. More importantly, they reflect contemporary social standards and address current commercial practices.

In stark contrast to these codes, Saskatchewan real property security law is a collage of principles, concepts, and rules that, over a period of 900 years, "grow'd" as did Topsy in Harriet Beecher Stowe's novel, *Uncle Tom's Cabin*.[3] In some important respects, it reflects social attitudes and economic conditions that existed when wealth was based principally on land and most debtors were seen as highly vulnerable to creditors. Some features of it can be understood only as *ad hoc* reactions by the Saskatchewan Legislature to economic conditions resulting from the collapse in world markets for agricultural products and the ecological disaster that together nearly destroyed the entire economic structure of the province over eight decades ago.

The first attempt to provide significant statutory regulation of mortgage law in what would later become Saskatchewan was embodied in the 1886 *Territories Real Property Act*,[4] which formally recognized

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1 *The Personal Property Security Act, 1993*, SS 1993, c P-6.2 [*PPSA*]. See Ronald CC Cuming, Catherine Walsh & Roderick J Wood, *Personal Property Security Law*, 2nd ed (Toronto: Irwin Law, 2012).

2 *The Enforcement of Money Judgments Act*, SS 2010, c E-9.22 [*EMJA*]. See Ronald CC Cuming & Donald H Layh, *The Saskatchewan Enforcement of Money Judgments Act: Commentary and Analysis* (Regina: Queen's Printer, 2012).

3 *Uncle Tom's Cabin: Or, Life Among the Lowly* (Boston: John P Jewett & Company, 1852) at 38.

4 SC 1886, c 26.

what, in effect, equity had established two hundred years earlier—a mortgage is a charge securing an obligation and not a transfer of ownership of the mortgaged land.[5] However, thereafter, with the possible exception of changes contained in *The Land Titles Act, 2000*,[6] only peripheral changes were made in Saskatchewan real property security law.[7]

It is the view of the author that the time has come to consider modernization of Saskatchewan real property security law. The Board of Directors of the Law Reform Commission of Saskatchewan share this view and, as a result, the Commission has undertaken a study of this area of the law with the ultimate goal of developing a modern code of real property security law.

II. RELUCTANCE TO MODERNIZE REAL PROPERTY SECURITY LAW

While the Western provinces that share a common heritage of real property security law have made *ad hoc* changes to address particular issues that have arisen from time to time, no jurisdiction has undertaken to modernize or codify this area of the law or even to take measures to reduce the fragmentation that characterizes it.[8] One can only speculate as to the reasons for this.

Perhaps one reason is the application in this context of the universal principle: "If it ain't broke, don't fix it." This approach accepts that a body of law that developed in a piecemeal fashion over several hundred years, and was last superficially examined in Western Canada 130 years ago, is so good that it does not need significant change. Maybe features designed to deal with the economically desperate situation in which Saskatchewan found itself during the 1930s[9] continue to work well now that the economy is much more urbanized and strong and many farms are asset-rich corporations. Maybe it is acceptable to deal with issues that arise on a purely *ad hoc* basis through judicial rulings or through legislative changes sprinkled throughout a wide range of disparate statutes.[10] Maybe it is acceptable

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5 *Ibid*, ss 3 ("mortgage"), 77.

6 SS 2000, c L-5.1 [*LTA, 2000*].

7 See Ronald CC Cuming, *Overview of Saskatchewan Real Property Security Law* (Regina: Queen's Printer, 2016) at 1-11 to 2-2.

8 The 1994 report of the Alberta Law Reform Institute entitled *Mortgage Remedies in Alberta* (Report No 70 (Edmonton: Alberta Law Reform Institute, 1994)) contains recommendations for change in Alberta law as it relates to enforcement of mortgages. However, the recommendations focus on *ad hoc* changes to the existing law and do not involve reconceptualizing or restructuring it.

9 See Cuming, *supra* note 7 at 2-2 to 2-7. See also Bill Waiser, *Saskatchewan: A New History* (Calgary: Fifth House, 2005) at 278-302.

10 There are at least seven Saskatchewan Acts containing provisions that directly affect mortgages and agreements for sale.

to retain a system of law that assumes the application of principles of equity established when a mortgage was at law a conditional feoffment, without providing guidance as to how those principles function in the context of a system under which a mortgage is a hypothec. Maybe it is acceptable to retain a system that is so complex that a full understanding of it is reposed in a few legal "high priests" who know the secrets on which important aspects of society are based. Maybe it is acceptable to retain terminology that dates from medieval England and that currently means something quite different from what it meant hundreds of years ago.[11] There is no harm in retaining legal jargon composed of obsolete and misleading terms; we all know, or at least think we know, what those terms mean.

It may be acceptable to retain a system that is based on a form of contract described by Professor Maitland as "one long *suppressio veri* and *suggestio falsi* [that] does not in the least explain the rights of the parties; [but] suggests that they are other than really they are,"[12] and described more recently by Justice Southin of the British Columbia Supreme Court in *Mikulic v. Calvillo*[13] as follows:

> A mortgagor…is the only person of full age and understanding in our society who, when he makes a solemn considered bargain, is not obliged to keep it: he promises to pay as of a certain date but if he fails to keep the bargain, he gets usually at least another six months (and, in practice, a longer time) to make good his breach; he agrees that the mortgagee may sell the lands if he is in default but [in some jurisdictions the law] says the mortgagee may not sell [it]; he promises that he will pay the mortgagee the real costs of collecting the debt but now, by statute, he may not have to; he promises that if he is in default, all the money will be due but he may be let off his bargain.[14]

Similar observations could be made with respect to many features of the law applicable to agreements for sale of land.

There may be other reasons why real property security law reform has received little attention. One might be cynical and suggest that the legal community has a vested interest in keeping it in its present

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11 For example, *The Queen's Bench Rules* still refer to the mortgagor's interest in land as his or her "equity of redemption" (Saskatchewan, *The Queen's Bench Rules*, r 10-37(1)(a)). At equity, an equity of redemption was the equitable proprietary interest of a defaulting mortgagor who had transferred his or her legal title to the mortgagee.

12 FW Maitland, *Equity: Also the Forms of Action at Common Law, Two Courses of Lectures* (Cambridge: Cambridge University Press, 1910) at 269.

13 [1986] 6 WWR 516, 6 BCLR (2d) 200 (SC) [cited to WWR].

14 *Ibid* at 517.

form, just as the medieval guilds guarded the secrets of their trades. I do not think this is the case, but it is a possible factor that cannot be dismissed out of hand.[15] There is another factor that is more important. Some very important social and economic issues are endemic to real property security law, particularly in Saskatchewan. There is little inducement for politicians to undertake reform. Any significant change can be a "no-win" situation for them because of the age-old tension between lenders and borrowers, particularly when many lenders are large out-of-province financial institutions and borrowers are farmers.[16] The operational principle here is not "if it ain't broke, don't fix it," it is "let sleeping dogs lie."

Whatever the reason for the dearth of reform activity, it is not unreasonable to conclude that only a *Don Quixote de la Saskatchewan* would be naïve enough to try to "sweep the Augean stables" by investing time and effort into developing proposals for significant change to Saskatchewan real property security law. But law reform is a fickle process and on rare occasions serendipity supervenes. Who would have predicted that the Saskatchewan Legislature would be prepared to sweep aside hundreds of years of judgment enforcement law by enacting *The Enforcement of Money Judgments Act*[17] in 2010?

III. AN (INADVERTENT?) INVITATION TO REFORM

An unheralded but very important development in Saskatchewan law dealing with mortgages occurred in 2000 with the enactment of the *LTA, 2000*. In a bold move, the Saskatchewan Legislature freed mortgage law from the suffocating influence of former land titles systems. Under the *LTA, 2000*, the concept of the statutory land titles

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15 For an analysis of the reasons for the failure of a very similar undertaking in the United States, see Ronald Benton Brown, "Whatever Happened to the Uniform Land Transactions Act?" (1996) 20:3 Nova L Rev 1017. The author undertook an unscientific survey of the reasons for lack of support for this undertaking. Of the reasons for the failure he identified, the following may be important in the context of an undertaking in Saskatchewan:

> [1.] The project was only another boondoggle by law professors.
> [2.] Almost no one understood it.
> [3.] Real property lawyers were afraid that the new system might hurt them economically.
> [4.] Real property lawyers did not want to learn anything new.

(*ibid* at 1019).

16 "The Canadian residential mortgage market is dominated by banks, which together hold approximately 75 percent of the value of outstanding mortgages…In turn, bank lending is dominated by the five large banks, which account for 65 per cent of the total market" (Allan Crawford, Césaire Meh & Jie Zhou, "The Residential Mortgage Market in Canada: A Primer" (December 2013) Bank of Canada, Financial System Review, online: <http://www.bankofcanada.ca/wp-content/uploads/2013/12/fsr-december13-crawford.pdf>, archived: <https://perma.cc/625Z-QBHX>).

17 *Supra* note 2.

mortgage was eliminated. What is or is not a mortgage is now to be determined under the conceptual structure of equity. By itself, this move was not radical since, under prior Acts, so-called equitable (non-statutory) mortgages were recognized as creating interests in land that could be protected by caveat.[18] The effect of the 2000 change was to take mortgage law entirely out of the conceptual structure of the land titles system except to ensure that mortgages were to be treated as interests in land in the form of charges.[19] This left the field open for the law of real property security to develop on its own. The result is that only minor changes in the *LTA, 2000* would be required to accommodate a code of real property security law based on the charge concept.

IV. PRECEDENT FOR A NEW APPROACH TO REAL PROPERTY SECURITY LAW

There is no need to reconceptualize mortgage law. A mortgage, whatever its form, is viewed in equity as a security agreement creating a charge.[20] What the mortgagee acquires under the mortgage contract is a hypothecary right—a charge that is commensurate with the value of the obligation it secures. The entire remedial structure imposed by equity was designed to recognize this. Consequently, the "heavy lifting" is done. What is needed now is to put this well-established conceptual structure into a modern, unified context.

There is also no need to search far and wide for a precedent to use in this process. One is available on our doorstep: *The Personal Property Security Act*.[21] The conceptual underpinnings of the *PPSA* are directly parallel to those applicable to mortgages in equity. A mortgage in equity is a charge; a *PPSA* security interest is a charge. In both cases,

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18 See e.g. *Canadian Imperial Bank of Commerce v Wicijowski, Wenaus & Co.* (1979), 107 DLR (3d) 40, [1980] 2 WWR 6 (Sask QB); *Imperial Elevator v Olive* (1914), 19 DLR 248, 6 WWR 1562 (Sask CA); *Coast Lumber Co. v McLeod* (1914), 20 DLR 343, 7 WWR 113 (Sask SC(AD)).

19 *LTA, 2000*, *supra* note 6, ss 2(1)(s), (cc), 49-54; *The Land Titles Regulations, 2001*, RRS, c L-5.1, Reg 1, s 36.

20 The term "charge" is used in a generic sense to refer to a contract providing for a hypothec but not an "equitable charge." While an equitable charge is of the genus hypothec, it is enforceable only through a court-ordered sale or appointment of a receiver. Foreclosure is not available. The interest of the chargeholder, being equitable only, can be defeated by a good faith transferee for value of a legal interest in the charged property.

21 *Supra* note 1. This suggestion is not original. See generally Norman Siebrasse & Catherine Walsh, *Proposal for a New Brunswick Land Security Act*, 2nd rev (Fredericton, NB: New Brunswick Geographic Information Corporation, 1996); Norman Siebrasse & Catherine Walsh, "The Influence of the ULSIA on the Proposed New Brunswick Land Security Act" (1996) 20:3 Nova L Rev 1133; National Conference of Commissioners on Uniform State Law, *Uniform Land Security Interest Act*, 7A ULA 220 (Supp 1995).

they are interests in property that secure performance of a monetary obligation.

A purist would insist that if the conceptual structure of the *PPSA* is the pattern to follow, the label "mortgage" should be replaced by "security interest." All of the old forms of security involving personal property interests were merged in the unitary concept of "security interest" in the *PPSA*.[22] Over the years, the word "mortgage" has had several meanings and, as a result, there is a serious risk that its retention in a modern code will carry with it unwanted conceptual baggage that might corrupt the new system.[23] Furthermore, some types of transactions to which the code would apply, such as agreements for sale, are not viewed as mortgages under current law. However, there is no term that is more embedded in a common law system than "mortgage." To some, substitution of another word for mortgage would be the equivalent of replacing "contract" with a new word describing consensual commercial relationships. Nevertheless, the baggage problem cannot be dismissed out of hand. Possible alternatives are "charge," even though it is not without its own historic baggage,[24] or "hypothec," even though it was foreign to the common law.[25]

Whether or not the label mortgage is retained or either charge or hypothec is substituted, the substance test of the *PPSA* must be adopted. What is important is that substance, not form, be the *indicium* of the applicable substantive law. This is the approach that has been applied in equity for hundreds of years. One can envision a provision in the proposed code along the following lines:

> This Act applies to a transaction, regardless of its form including, but not limited to, a mortgage, an agreement for sale, a charge, a floating charge, a trust indenture, a lease,

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22 See Cuming, Walsh & Wood, *supra* note 1 at 116-18, 122-43.

23 The term has had many meanings over the years depending on the context: a conditional transfer of legal title to the mortgagee (legal mortgage), the security transfer of an interest in an equitable interest (equitable mortgage), a form prescribed by Land Titles Acts (statutory mortgage), an unregisterable or unregistered mortgage (equitable mortgage) registerable by caveat under prior Land Titles Acts and a hypothecation (charge).

24 See *supra* note 20.

25 Under Roman Law, a *hypotheca* was an arrangement in which it was agreed between the parties that the debtor could remain in possession of property taken as security. When, upon default, the creditor took possession of the property, a *pignus* (a possessory pledge) arose. Initially a *hypotheca* could not be enforced against a third party. However, its value as a secured transaction, under which the creditor obtained a real right, was established when the Praetor made available an action under which the property could be taken from a third party. See Paul Van Warmelo, *An Introduction to the Principles of Roman Civil Law* (Capetown: Juta and Co, 1976) at 116-19.

> a rent charge or a trust that secures payment or performance of a monetized obligation; and includes an equitable vendor's lien and an assignment of rights to payment arising in connection with interests in land.

A feature of this approach is the elimination of the conceptual and functional confusion that currently surrounds agreements for sale of land. An agreement for sale functionally, but not conceptually, provides for a security interest, in the form of the seller's retained ownership, that secures performance of the buyer's payment obligation. Equity did not take the same approach to agreements for sale as it took to mortgage contracts. At most, it recognized that the buyer acquires an "equitable lien" on the land being purchased commensurate with the amount of the purchase price paid to the seller.[26] However, this lien could easily be lost in ways not involving court intervention. It took extensive *ad hoc* legislative measures to force aspects of agreement for sale law—primarily those dealing with sellers' enforcement remedies—into the mortgage mould.[27] While some bifurcation would be required for the purposes of the priority structure of the *LTA, 2000*,[28] this would not preclude full formal recognition of the *inter partes* role of an agreement for sale as a security agreement.[29]

There is no conceptual or functional reason to limit the scope of a code to charges created by agreement. A so-called vendor's equitable lien creates a charge that, when enforced, gives rise to many of same

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26 There was considerable inconclusive debate in the early cases as to whether the vendor should be viewed in equity as a trustee of the legal title or interest in the land subject to the agreement. However, the generally accepted view is that only when the purchaser has totally performed the contract is the vendor a bare trustee. Until that point is reached, the purchaser is treated as having an equitable interest to the extent of the amount of the purchase price paid. For a detailed examination of the prior judicial approach to the position of a vendor, see *Re Church*, [1923] 1 DLR 203, [1922] 3 WWR 1207 (Alta SC(AD)), Stuart JA, rev'd on other grounds [1923] SCR 642, [1923] 3 DLR 1045.

27 See *The Agreement of Sale Cancellation Act*, RSS 1978, c A-7; *The Limitation of Civil Rights Act*, RSS 1978, c L-16, s 2 [*Limitation Act*]; *The Land Contracts (Actions) Act*, RSS 1978, c L-3; *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01 [*Queen's Bench Act*]. The *Queen's Bench Rules* provides that Division V (applicable to enforcement of mortgagee's *in rem* remedies) applies "with necessary modification, to actions by vendors…for specific performance or cancellation of agreements for the sale of land…for sale or possession of the land sold pursuant to any agreement for the sale of land; or…for any other remedy that may be granted pursuant to the provisions of any agreement for the sale of land" (*supra* note 11, r 10-45(1) [numbering omitted]).

28 In most cases, the seller is the registered owner of the title to the land and not just the holder of an interest as is a mortgagee.

29 In the balance of this article, a reference to "mortgage" can be treated as including an agreement for sale except in the context of descriptions of historic developments.

considerations applicable to other types of charge on land.[30] For functional reasons, interests arising under assignments of payments associated with interests in land, such as lease payments, should be included in the central concept of the new law even though these interests are characterized as personal property for other purposes.[31]

V. ENFORCEMENT

A. SOCIAL AND ECONOMIC CONSIDERATIONS

Once it is recognized that the core concept of the new law is charge or hypothec, the basic features of the structure applicable to enforcement become apparent. The quantum of the charge (interest in the land) is commensurate with the value of the obligation secured. In the event of default by the chargor, the chargee has the right to compulsory alternative performance of the chargor's obligation through disposition of the collateral. Proceeds in excess of that required to discharge the obligation are paid to holders of subordinate interests or the chargor.

Most of the remaining elements of the tableau would be filled with statutory measures largely dictated, not by the conceptual structure, but by the context in which charges are used. These elements would reflect social and economic policy choices rather than conceptually determined rules of law. Indeed, implementation of some of these choices may necessitate significant modification to, or departure from, the conceptual structure. Only the most committed neoliberal would contend that critical elements in the relationship between mortgagors and mortgagees should fall entirely within the free market paradigm. The reality is that market forces favouring borrowers in the mortgage market are very weak. Left unregulated, financial institutions would have the power to assign disproportionate risk to borrowers through standardized adhesion contracts. This feature of the market has been recognized for many years by Saskatchewan legislators of all stripes. Real property security law is realpolitik.

Tension between two conflicting public policies has been and continues to be endemic to the law of mortgages. On the one hand is the commercial and societal importance of honouring arrangements between mortgagors and mortgagees that give mortgagees the right, in the event of default by mortgagors, to look to his or her security as an alternative source of recovery. On the other is the need to implement measures designed to give mortgagors reasonable opportunities to avoid

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30 The concept of equitable lien developed as a feature of the principle of equity that its special remedies should be available to do justice between parties to a contract involving land. The result is the recognition that a lien on land arises without court order protecting the vendor's right to be paid. See e.g. *Hagblom v Bosshart*, 2000 SKQB 99, 194 Sask R 157.

31 See *PPSA*, *supra* note 1, s 4(f); *LTA, 2000*, *supra* note 6, s 144.

loss of their interests in mortgaged property through enforcement of the charges granted to mortgagees. A collateral matter is the need to ensure that, given the context of the relationship between the parties, the contractual terms of the mortgage that do not deal with default are fair.

A range of factors come into this picture, including the nature of the parties to mortgage contracts, the kind of land that is taken as security, and the potential for extreme changes in the economy of the area in which the land is located.[32]

B. RETURNING TO THE MODEL

A feature of the *PPSA* important to its success is the way it addresses the enforcement of security interests. It prescribes minimal procedural impediments and avoids heavy-handed state intervention in the seizure and sale of collateral, thereby minimizing the delay and cost associated with enforcement. At the same time, it dictates standards that secured creditors must meet when enforcing security interests, and provides mechanisms through which defaulting debtors can address deviations from those standards.

However, it would be naïve to suggest that a system for enforcing real property security interests can be closely patterned on Part V of the *PPSA* except, perhaps, in the context of real property security transactions under which both the creditor and the debtor are commercial organizations. Nevertheless, the design of a modern system of enforcement should be influenced as much by the *PPSA* approach as by features of traditional mortgage enforcement law that developed incrementally and haphazardly and that, in some respects, were originally designed to deal with circumstances that no longer prevail.

C. POSSIBLE CONFUSION OF POLICY OBJECTIVES

The most important role played by equity in the development of mortgage law was in the regulation of enforcement. One might well conclude that equity went overboard in protecting the interests of mortgagors.[33] However, its approach should be viewed in historical context. Initially, equitable intervention was based on the Chancellor's hostility to penalties and a policy of preventing a creditor from gaining a benefit through unconscionable dealings. 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

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32 Similar considerations arise in the context of agreements for sale of land.

33 For example, a court may give a mortgagor the opportunity to redeem after an order of foreclosure is made in favour of the mortgagee. See *Campbell v Holyland* (1877), 7 Ch D 166.

through the imposition of procedural requirements designed to give mortgagors every reasonable opportunity to regain ownership by discharging their mortgage obligations after default and loss of the contractual right to obtain retransfer of the fee. These requirements were soon recognized as creating an equitable proprietary interest: the equity of redemption. However, the requirements ossified into rules, some of which no longer reflect the context in which they were developed and the policies they were designed to implement.

The assumption on which equity intervened to protect mortgagors from loss of their land through default 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 redeem. The *ad hominem* determination of the Chancellor that this was the case was replaced by a rule under which all mortgagors were given, through an order *nisi*, additional time to discharge the mortgage obligation. This policy was dramatically expanded in most Canadian jurisdictions by statute, under which a defaulting mortgagor can reverse the effect of an acceleration of payment provision in the mortgage by paying any instalments that are in arrears or by correcting any other default that gave the mortgagee the right to demand full discharge of the mortgage obligation.[34]

This aspect of mortgage law has been and continues to be very important in Saskatchewan. As an essentially agrarian society, ownership of land has been and continues to be an important economic and cultural feature. This is no longer a feature confined to agricultural land, but one that extends to urban property as well. Because of its resource-based nature, the province's economy has always been cyclical, which results in wide fluctuations of income for many Saskatchewanians over periods of time. Historically, there were times when a significant percentage of mortgagors were in default in making mortgage payments.[35] A system that adopts a generous variation of the policy of equity, designed to preclude wide-spread loss of mortgagors' ownership through foreclosure and sale, can be very important during these times. However, it is the view of the author that the relevance of such a system is highly contextual. The economic conditions that create the problem are inevitably temporary. Current law fails to recognize this. The result is that measures designed to address severe economic conditions are applied when those conditions do not exist. Their effect is to maximize the time defaulting mortgagors can retain possession of mortgaged land after default, even though there is little or no likelihood that the mortgage obligation can be discharged in the foreseeable future.

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34 *Queen's Bench Act*, *supra* note 27, ss 61-62.

35 See Waiser, *supra* note 9 at 278-302.

These measures, while socially justified in some contexts, distort the enforcement system, are inefficient, and are, in most cases, ineffective because of their short-term nature. Another problem is that they apply a "one size fits all" approach with the result that they operate in circumstances where they cannot be socially or commercially justified.

Where general economic conditions result in wide-spread default by mortgagors, measures that are much more effective than short-term judicial postponement of creditors' enforcement rights are warranted. There is ample precedent for such measures. *The Home Owners' Protection Act*[36] of 1981 was a temporary measure designed to give protection to home owners against loss of their principal residence through mortgage foreclosure or agreement for sale cancellation. During the period from December 31, 1981 to December 31, 1982, the Act prevented creditors from beginning or continuing actions for foreclosure or cancellation of agreements for sale unless the court granted leave. It applied to all mortgages on principal residences (one per home owner). The Act expired on December 31, 1982.

D. MORE EFFICIENT ENFORCEMENT PROCEDURES

There are a range of features in existing Saskatchewan law that warrant reconsideration as part of an undertaking to inject efficiency and cost reduction into the system without jeopardizing the protection the law should give to mortgagors. At a minimum, these include the following.

1. Reconsideration of *The Land Contracts (Actions) Act*

The Land Contracts (Actions) Act[37] requires that, before beginning a regular action to enforce his or her security, a mortgagee or seller under an agreement for sale must give thirty days' notice to the Provincial Mediation Board.[38] At the end of this period, the mortgagee

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36 SS 1981-82, c H-4.2, s 3.

37 *Supra* note 27. The Saskatchewan Law Reform Commission recommended in 2014 that *The Land Contracts (Actions) Act* be retained but be amended (*Reform of* The Land Contracts (Actions) Act: *Final Report* (Regina: Law Reform Commission of Saskatchewan, 2014) at 37). The Commission recommended, *inter alia*, that the Act not apply to properties used for solely commercial purposes at the time of default (*ibid* at 40); that the notice of intention to the Provincial Mediation Board should be removed as a preliminary and separate step (*ibid* at 44); and that the application for an appointment should be eliminated (*ibid* at 45). However, the Commission recommended retention of the requirement that the mortgagee or seller make application for permission to bring an enforcement action and that, in the hearing, the judge have complete discretion to grant adjournments or grant or refuse the application to start an action (*ibid*). It is likely that these amendments will be made at the 2017 sitting of the Legislature.

38 *The Land Contracts (Actions) Act*, *ibid*, s 3(1).

or seller must make an application to a judge for a hearing seeking permission to commence the action.[39] In the hearing, the judge is given extremely wide discretionary power to allow the action to proceed or postpone it for successive periods not exceeding eight months.[40] When permission to bring the action is granted and the action is started, on application of the mortgagor or buyer, the court may stay the action, postpone payment of any moneys due, prescribe terms and conditions to which an order made shall be subject, and, from time to time, vary an order.[41]

No jurisdiction in Canada has equivalent legislation. The Act was passed by the Legislature in 1943 when the effects of the Great Depression had not fully abated and the provincial economy was affected by war conditions. One might well conclude that the extensive opportunities it provides for unregulated judicial intervention are not warranted in 2017. There remains a need to empower a court to invoke measures during the course of the action to ensure that a mortgagor likely to be able to discharge mortgage debt obligations is given additional time to do so and avoid loss of his or her interest in the property mortgaged. In its present form, the Act appears to confuse two policies: protection of mortgagors who need temporary forbearance, on one hand, and the social importance of ensuring that defaulting debtors are able to remain in their homes as long as possible, on the other. This mixes secured financing law and housing policy.

2. Reduction of "Hands-on" Court Administration of Enforcement

Current law requires that all enforcement proceedings be administered in a very "hands-on" way by the Court of Queen's Bench whether the mortgagor is an individual or a corporation, and whether the mortgaged property is a home or is used for commercial purposes.[42] This is so even though cases involving matters within the jurisdiction of the Court are backlogged to the point that denial of justice has become a major concern. The negative effects of current law are unnecessary cost, use of court time required for other matters, and delay in returning productive property to the market. The historic justification for intervention by courts of equity in enforcement was to protect mortgagors from summary loss of their land. One might well conclude that, while this remains an important policy consideration, it should be implemented in a more efficient manner and applied in

39 *Ibid*, s 3(2).
40 *Ibid*, s 3(9).
41 *Ibid*, s 4.
42 *LTA, 2000*, *supra* note 6, s 132.

the appropriate context. It is one thing to protect the interest of an individual in his or her home; 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. Unlike individuals, commercial mortgagors have access to elaborate insolvency systems[43] through which they can invoke very substantial stays to the enforcement of mortgages. If a commercial mortgagor fails to restructure under one of these systems, it is hopelessly insolvent and there can be no justification for court intervention to delay enforcement of mortgages on its property.

Here the *PPSA* pattern is instructive. The *PPSA* gives significant leeway to secured parties[44] to enforce their security interests in collateral after giving defaulting buyers notice of sale and details of how the sale is to be effected.[45] Secured parties must follow statutory procedural requirements and meet a standard of good faith and commercial reasonableness when carrying out the sale.[46] Failure to meet this standard may result in loss of the right to claim a deficiency and a judgment for actual and deemed damages suffered by the debtor.[47]

3. Sale by Mortgagees and Sellers

The mortgage law of all common law provinces other than Saskatchewan, Alberta, British Columbia, and Nova Scotia[48] permits parties to a mortgage contract to agree that, in the event of default, the mortgagee has the power to sell the mortgaged property.[49] While in the past this was possible in Saskatchewan,[50] this has not been the

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43 See *Companies' Creditors Arrangement Act*, RSC 1985 c C-36; *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, Part III, Division 1.

44 See generally *PPSA*, *supra* note 1, Part V.

45 *Ibid*, s 59.

46 *Ibid*, ss 58-62, 65(3).

47 *Ibid*, ss 65(5)-(9).

48 For an overview of the enforcement systems of several provinces, see Law Reform Commission of Saskatchewan, *supra* note 37 at 18-24.

49 This was not permitted by equity, but recognized in England by *An Act to give to Trustees, Mortgagees, and others certain Powers now commonly inserted in Settlements, Mortgages, and Wills* ((UK), 23 & 24 Vict, c 145, ss 11-15).

50 An amendment to *The Land Titles Act* (*An Act to amend The Land Titles Act*, SS 1908-09, c 9, s 7, amending *The Land Titles Act*, SS 1906, c 24, s 103) provided that enforcement proceedings 'may' be taken in court, but allowed sale by the mortgagee under the direction of the registrar of land titles. After a default of one month, notice could be filed in the land titles office and the mortgagee could enter into possession of the lands. If the default continued for a further two months, the mortgagee could sell the land in any manner approved by the registrar. If the highest bid for the land was insufficient to pay the debt and expenses and the default continued for six months, the registrar could issue a foreclosure order, vesting the land in the mortgagee free from the right of redemption. This

case for many years.[51] A strong case can be made for significant court control of enforcement sales of property where debtors are unlikely to be in the position to protect themselves against the effect of incompetent or fraudulent sales practices of mortgagees or sellers. However, where commercial mortgagors are involved, the case for judicial supervision of sales is much weaker. As is the case with all aspects of non-judicial enforcement of mortgages, statutory standards for enforcement by mortgagees or sellers would need to be established. Again, the *PPSA* is instructive in this respect.

4. Purchase by Mortgagees

Current law does not contain an explicit procedure through which a court may permit the mortgagee to purchase the mortgaged property, other than through a public listing, and avoid having the sale treated as foreclosure that bars an action for the deficiency. It has yet to be settled as to whether there is a Saskatchewan equivalent to the so-called Rice order[52] available under Alberta mortgage enforcement law. In simple terms, a Rice order authorizes 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.[53] The mortgagee presents to the court a valuation of the property as part of the application for the order. If a defendant 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 defendant to get a purchase offer higher than that of the mortgagee, or make a determination of the fair market value of the property.[54]

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approach was made inapplicable in 1934 (*An Act to amend The Limitation of Civil Rights Act, 1933*, SS 1934-35, c 89, s 3, amending *The Limitation of Civil Rights Act, 1933*, SS 1933, c 83, s 6) to mortgages involving persons who were protected by *The Debt Adjustment Act, 1934* (SS 1934-35, c 88) and was generally rejected in 1938 (*The Land Titles Act, 1938*, SS 1938, c 20, s 113), resulting in reinstatement of the requirement that all mortgagee enforcement rights must be through the court.

51 *Cooperative Trust Co. of Canada v Target 21 Industries Ltd.* (1988), 47 DLR (4th) 349 at 358-59, [1988] 3 WWR 97 (Sask CA).

52 See *Trust & Guarantee Co. Ltd. v Rice*, [1924] 3 DLR 352, [1924] 2 WWR 691 (Alta SC(AD)) [*Rice* cited to DLR]; *Canada Permanent Trust Co. v King Art Developments Ltd.* (1984), 12 DLR (4th) 161, [1984] 4 WWR 587 (Alta CA).

53 It is often used to expedite proceedings involving insured mortgages. Canada Mortgage and Housing Corporation ("CMHC") does not pay the mortgagee under the policy until it has obtained vacant possession of the mortgaged land.

54 *Rice*, *supra* note 52 at 355.

VI. DISTORTION OF THE CREDITOR-DEBTOR RELATIONSHIP: ANTI-DEFICIENCY LAWS

The conceptual structure of a relationship giving rise to a hypothec separates the obligation secured from the interest that secures the obligation. Of the two, the obligation is fundamental; the security is collateral to the obligation. The obligation can exist without the security; the security cannot exist without the obligation. If the value of the security is less than the amount of the obligation, the portion of the obligation not discharged through enforcement of the security remains. Generally, the extent to which the amount recovered through enforcement is deficient in discharging the obligation is referred to as the deficiency.

For over eighty years, Saskatchewan real property security law has not applied this approach and has forced mortgagees who provide purchase-money financing for the acquisition of land to rely exclusively on their security for recovery in the event of default by mortgagors. It is relevant to note that provisions of *The Limitation of Civil Rights Act*[55] that preclude the recovery of deficiencies in this context were first enacted in 1934, a time when the value of agricultural land dropped precipitously because of wide-spread drought in the grain-growing regions of Saskatchewan and the world prices for agricultural commodities had collapsed.[56] The Legislature concluded that it was necessary to preclude the possibility that deficiency claims arising out of purchase-money mortgages could be enforced against unencumbered land or other assets of farmers.

If a case can be made for an anti-deficiency law, it is in the context of situations where the risk is high that there may be a deficiency should the mortgagor default and the mortgagee or seller enforce its security. There are two contexts in which anti-deficiency law is thought to be important. The first is where the amount loaned under the mortgage is close to the value of the land at the time the mortgage is signed (i.e. a high-ratio mortgage).[57] The second is when,

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55 *Supra* note 27.

56 1934 amendments to *The Limitation of Civil Rights Act, 1933* (*supra* note 50) implemented a range of measures designed to protect mortgagors and buyers under agreements for sale. Section 3 placed a statutory bar on any action on the payment covenant in a mortgage securing the purchase price of land or in an agreement for sale. A 1983 amendment (*The Limitation of Civil Rights Amendment Act, 1984*, SS 1983-84, c 44, s 2) extended the bar to situations where the mortgage money is used to buy property even though the mortgagee is not the vendor. Other protection measures included s. 9 that required the court to set an upset price or reserve bid when mortgaged property was sold to enforce the mortgage debt. As a result of s. 10, a final order for foreclosure had to be treated as full satisfaction of the debt secured by the mortgage. All of these features are found in the current Act.

57 See e.g. *Law of Property Act*, RSA 2000, c L-7, s 43(4.1); *Law of Property Regulation*, Alta Reg 89/2004, ss 1-2.

during the term of the mortgage contract or agreement for sale, the market value of land drops dramatically due to unpredicted economic circumstances.

A project to modernize Saskatchewan real property security law should involve an assessment of the continued relevance and efficacy of current anti-deficiency law. An aspect of this undertaking is to consider alternatives that may be more effective or that supplement existing law in implementing the public policy on which the legislation is based. As a practical matter, s. 2 of the *Limitation Act* applies only to purchase money mortgages and agreements for sale. It does not apply to "home equity" or "home improvement" mortgages. Nor does it apply to a mortgage where the loan is used to finance the construction of a building on land owned by the mortgagor or to discharge a mortgage to which the Act applies.[58] It does not preclude recovery from a guarantor of the mortgagor's obligation.[59]

If, as a matter of social policy, it is important to protect mortgagors, there is no reason to limit application of the law, as is the case under s. 2 of the *Limitation Act*, to mortgages securing the purchase price of the land subject to the mortgage. If the enforcement of deficiency claims is a social problem, deficiency protection should extend to secured construction, home equity, and home improvement loans. Whether it should be extended to non-corporate commercial mortgagors involves additional considerations. Currently, s. 2 can only be excluded by a corporation, but not by an individual who is using the property for commercial purposes.[60]

The extension of the bar to non-purchase money mortgages brings its own problems. Of particular difficulty is the application of the limitation where the mortgage is only one part of a larger transaction providing for a loan obligation partly secured by a

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58 *Tisdale Credit Union v Fettes* (1993), [1994] 3 WWR 655, 117 Sask R 82 (QB).

59 *Co-operative Trust Co. of Canada v Lobstick Village Townhouse Ltd.*, [1991] 4 WWR 363, 95 Sask R 6 (QB).

60 The ability to exclude its application where a corporate mortgagor is involved results in it rarely applying in this context (*Limitation Act*, *supra* note 27, s 40(2)). The case law in both Saskatchewan and Alberta courts demonstrates the difficulties in applying anti-deficiency legislation applicable to individuals in cases where the mortgage executed by a corporation to which the bar to recovery does not apply is assigned to an individual (*National Trust Co. v Mead*, [1990] 2 SCR 410, 71 DLR (4th) 488; *First City Trust v Tilford* (1992), [1993] 3 WWR 714, 32 WAC 186 (Sask CA)) or where the mortgagor is an individual who assigns the mortgage to a corporation and the corporation renews the mortgage (*Standard Trust Co. v Steel* (1991), 83 DLR (4th) 130, (*sub nom Standard Trust Co. v 100762 Canada Ltd.*) 2 WAC 241 (Alta CA)). There is the additional problem of determining whether the test for application of the protection should be the nature of the mortgagor (individual or corporation) or the use of the property at the time the mortgage contract is made or during the period of the contract.

mortgage on land. In this context, it is necessary to either determine the central feature of the arrangement or arbitrarily allocate a portion of the debt to the mortgage obligation.[61] Furthermore, application *simpliciter* of a "low-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.

The difficulties associated with designing a fair, effective, and defensible anti-deficiency structure may encourage a search for alternative measures that implement public policies anti-deficiency laws are designed to advance. If these measures can be found, the complexity and distorting effect of existing laws can be minimized. A starting point is to preclude recovery of a deficiency in any situation where the mortgagor has been required to pay for default insurance benefiting only the mortgagee.[62] Apart from this, one might focus on the law regulating the enforcement of money judgments for deficiencies. This includes exemptions and limitation of actions laws.

A large deficiency judgment hanging over the head of a defaulting mortgagor interferes with the mortgagor's efforts to recover economic health and return to productive activity. Bankruptcy or consumer insolvency proceedings are theoretically available, but they are cumbersome and expensive, with the result that they are not accessible by everyone. Other approaches may be warranted. One such approach is to place a short time limitation, such as two years, on the enforceability of deficiency judgments. If during this period the mortgagor is unable to discharge the judgment, its unenforceability thereafter may well be important to efforts of the mortgagor to rebuild his or her financial stability. During the period of enforceability, the mortgagor would have the protection of the *EMJA*[63] and *The Saskatchewan Farm Security Act*,[64] which provide some of the most generous exemptions from seizure to enforce a judgment found anywhere in Canada.[65]

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61 The issue is whether the gravamen of the transaction was a land mortgage with other collateral security or whether the reality of the transaction was a personal debt to which the second mortgage was merely collateral security. See *Russell v Ipsco Inc.* (1989), 100 AR 77, 71 Alta LR (2d) 59 (CA); *Merit Mortgage Group Ltd. v Sicoli* (1983), 1 DLR (4th) 421, 75 AR 204 (CA).

62 The mortgage insurance provided by CMHC or non-government insurers insures only the mortgagee against deficiency loss. The mortgagor remains liable to the insurer even though the insurance was bought with an extra charge paid by the mortgagor.

63 *Supra* note 2, ss 93-97.

64 SS 1988-89, c S-17.1, ss 65-67.

65 See also *The Registered Plan (Retirement Income) Exemption Act*, SS 2002, c R-13.01, ss 2-4; *The Pension Benefits Act, 1992*, SS 1992, c P-6.001, s 63; *The Saskatchewan Insurance Act*, RSS 1978, c S-26, s 159.

VII. OTHER MATTERS INFLUENCED BY THE CONCEPTUAL STRUCTURE

The involvement of equity in the early development of mortgage law was not confined to *inter partes* matters involving mortgagors and mortgagees. In addition, equity developed a number of "principles" generally relating to issues of priority among mortgages and other interests in mortgaged property. Many of these principles have been displaced by priority rules contained in the *LTA, 2000* that base priority on registration in the registry.[66] However, there are others that continue to apply through operation of s. 16 of *The Saskatchewan Act*,[67] which provides that the common law and statutory law of England that existed as of July 15, 1870 continue to be law of Saskatchewan except to the extent they are repealed, abolished, or altered by the Saskatchewan Legislature.

A drafter of a modern code of real property security law is faced with the dilemma of how to address these principles. One approach is to use a non-specific adoption of the principles and leave it to the courts to determine which principles are compatible with the system of the code. While this is by far the simplest approach, it prevents full realization of one of the benefits of a code: completeness. Although there will always be features of "background law" that cannot be included in a code, they should be supplementary only.

The alternative approach involves two steps. The first is to determine which of the principles are consistent with the structure of the code and have contemporary relevance. Some of the principles of equity were developed when rights were different depending on whether the person asserting those rights held legal title or an equitable interest. Consequently, they have no relevance in the context of a system based entirely on the hypothec concept. The second step is to convert those principles that should be retained to statutory language. This step must take into account that the principles of equity are not rules. It is always open to a court in exercise of its equitable discretionary power to refuse to apply a principle or to apply it in a manner that results in greater equity.

VIII. CONCLUSION

Current Saskatchewan law dealing with rights under mortgage contracts and agreements for sale is outdated and in need of modernization. Change need not involve departure from the conceptual structure of mortgage law that was established in equity and that has prevailed for hundreds of years. The *PPSA*, a modern code of secured transactions

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66 *Supra* note 6, s 27.

67 SC 1905, c 42. See *Queen's Bench Act*, *supra* note 27.

law that embodies these features, provides a useful, but not sufficient, pattern to follow in this undertaking. It is necessary to re-examine the public policies endemic to mortgage law, including those that over the years have ceased to be relevant but have induced laws that have encrusted the current system. Policy obsolescence is not the only dragon to slay. It is necessary to address inefficiency and associated wasted time and cost endemic to the current system.