



Proposals for a Saskatchewan *Land Charges Act*

A project by the Law Reform Commission of Saskatchewan, led by
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The Commission's Real Property Security Law Project

- ▶ In 2010 the Commission decided to undertake a study of Saskatchewan's real property security law with the ultimate goal of developing a modern code paralleling *The Personal Property Security Act, 1993*
- ▶ In 2016 Professor Cuming published *Overview of Saskatchewan Real Property Security Law* which provides a detailed description of current real property security law.
- ▶ In 2018 the Commission will publish a series of consultation papers, containing tentative proposals for a *Land Charges Act* and associated commentaries.
- ▶ In the first half of 2018 the Commission will be seeking input on these proposals.
- ▶ The Commission expects its final report containing its proposals for a *Land Charges Act* will be completed and submitted to the Minister of Justice in 2019



Why is a *Land Charges Act* Required?

- ▶ Current mortgage law lacks a consistent conceptual basis. A mortgage is defined in the LTA as a charge but the trappings and terminology of traditional title-transfer law has been retained.
- ▶ 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 such as the Great Depression; and
 - ▶ The rules of the Queen's Bench Court that provide for enforcement of mortgages using archaic procedures and terminology.



Why is a *Land Charges Act* required? (Cont'd)

- ▶ 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.
- ▶ The traditional policy of Equity to give a defaulting mortgagors or purchasers every reasonable opportunity to discharge the secured obligation is applied when there is no likelihood that the mortgage or purchase obligation can be discharged any time in the foreseeable future. This results in unproductive delay in returning mortgaged property to the market.



Why is a *Land Charges Act* required? (Cont'd)

- ▶ Most protective measures apply a “one size fits all” approach. 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. Incorporated business mortgagors and buyers have available elaborate insolvency systems through which they can obtain delay in enforcement of mortgages against their property. See *Companies Creditors' Arrangement Act*, RSC 1985 c C-25; and *Bankruptcy and Insolvency Act* RSC 1985, c. B-3, Part III, Division 1.



Goals of the Proposed *Land Charges Act*

- Provide an integrated code of real property security law addressing the majority of legal issues arising out of real property security transactions.
- Provide a consistent conceptual structure based on the concept of a charge.
- Provide fair and balanced rules regulating the contractual relations between parties to charge agreements.
- Provide clear statutory guidance to enhance understanding and legal predictability for parties to real property charge transactions.
- Provide a structure balancing protection of the interests of defaulting chargors and efficient enforcement of the rights of chargees.
- Incorporate public policies of existing mortgage law that have contemporary relevance.



Conceptual Basis and Scope

The proposed *Land Charges Act*:

- ▶ employs the conceptual structure of The Personal Property Security Act;
- ▶ is based on the concept of “charge”. It eliminates terminology associated with traditional mortgage law;
- ▶ employs a “substance test” 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;
- ▶ treats all enforcement matters associated with agreements for sale as creating charges but leaves all other aspects to the common law of contract;
- ▶ imposes a standard of good faith and commercial reasonableness on all relationships involving or associated with charges.



Form and Content of a Charge Agreement

The tentative proposal provides that:

- ▶ it would be sufficient for the purposes of a charge agreement to describe the land charged as including land owned or to be owned by the chargor;
- ▶ the *Statute of Frauds* would not apply to charge agreements;
- ▶ the limitation on recovery of costs and charges prohibited by *The Limitation of Civil Rights Act* would be mandatory for agreements providing for charges on residential land, but be excludable in agreements providing for charges on commercial property;
- ▶ the right of reinstatement as provided in sections 61 and 62 of The Queen's Bench Act would be retained but that there would be a limit on the number of times a chargor may reinstate a payment schedule after default.



Form and Content of a Charge Agreement (cont,d)

The tentative proposal provides that:

- ▶ the proposed Act would 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;
- ▶ the principal factors relevant to novation would be set out in the proposed Act;
- ▶ the court would be given power to override a due-on-sale, lease or encumbrance clause in a charge agreement where the transfer, lease or encumbering the chargor's interest does not affect the security position of the chargee.

Obligations

The tentative proposal provides that:

- ▶ an insurer of a chargee's loss resulting from inability to collect a deficiency from a chargor would be barred from recovering from the chargor on the basis of subrogation;
- ▶ Bars on the recovery of a deficiency would apply to charge agreements relating to the following:
 - ▶ the purchase of the residential land subject to the charge;
 - ▶ a loan used all or in part by the chargor to purchase the land to be used as residential land;
 - ▶ a loan secured by a charge on land used all or in substantial part to construct a residence on the land
 - ▶ a loan used in all or substantial part to discharge one of the loans mentioned above;
- ▶ the protection given to chargors would extend to accommodation guarantors;

Obligations (cont'd)

The tentative proposal provides that:

- ▶ a court would be given the power to order that a bar to recovery of a deficiency not apply when it is established that 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;
- ▶ any obligations secured by a charge relating to residential land be unenforceable after 24 months from the date of sale of the charged property.



Transfer of Interests

The tentative proposals provide that:

- ▶ Section 125 of the *LTA, 2000* would be replaced with a provision replicating but refining the essential features of that section including:
 - ▶ deeming 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; and
 - ▶ the requirement of a notice given to the chargor of his or her right to designate a transferee of the charge.



Priority Rules

The tentative proposals provide that:

- ▶ first priority would be given to a chargee with a subordinate priority position to the extent that the chargee incurs costs involved 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.
- ▶ tacking rights should not be extended to secure an obligation owned by the chargor to a transferee of the chargee's interest prior to the transfer.
- ▶ 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.
- ▶ marshalling by subrogation not be permitted.
- ▶ a court could 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.



Enforcement – General Principles


- ▶ The tentative proposals provide that:
 - ▶ before any enforcement measure is employed, the chargee would be required to obtain a judgment of the Court (including a default judgment) stating that the chargor is in default under the charge agreement;
 - ▶ after the judgment is obtained and a copy of it is served on the chargor, no enforcement measure could be undertaken until the expiry of 50 days after a notice of intention to seek or employ and enforcement measure is given to the chargor and holders of subordinate interests;
 - ▶ the notice must include specified information relating to the rights of the chargor and subordinate interest holders.



Enforcement Against Commercial Land

The tentative proposals provide that:

- ▶ the 50 day period following service of the notice of enforcement would be 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;
- ▶ any time after receipt of the notice of enforcement, the chargor or subordinate interest holder would be entitled to make application to the court questioning the chargee's right to enforce the judgment or staying further enforcement for a time specified by the court;
- ▶ upon compliance with all pre-requisites, the chargee would have the power to arrange for sale of the charged property without court order but subject to conditions designed to ensure the sale is carried out in such a way that the market value of the charged property is received;
- ▶ the chargee would be able to purchase the charged land when the sale is conducted by auction or closed tender or when the court orders.



Surrender or Extinguishment of Chargor's Interest Commercial and Residential Land

The tentative proposals provide that:

- the proposed Act would contain a procedure (similar to that contained in section 61 of the PPSA) under which the chargor and chargee may expressly or implicitly agree that the chargee take the charged property in full satisfaction of the obligation secured by the charge and all costs. The procedure would be a substitute for "foreclosure" under current law;
- the procedure would be invoked by the chargee only after the chargee has obtained a judgment against the chargor;
- the chargee would 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;
- the chargee may be ordered by the court to provide more precise details with the respect to current market value of the land, the unpaid amount of the obligation secured by the charge and costs of obtaining the judgment against the chargor.



Surrender or Extinguishment of Chargor's Interest Commercial and Residential Land (cont'd)

The tentative proposals provide that:

- ▶ the chargor would be deemed to have rejected the chargee's proposal to take the charged land in full satisfaction of the obligation secured and all 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.
- ▶ 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 if such person does not reject the proposal within 20 days from service of notice of the proposal.
- ▶ On application, the court would have the power to override the express or deemed rejection of the proposal by the chargor or subordinate interest holder when it finds that an obligation was made for a purpose other than to protect an interest in the charged land or when the market value of the land charge is significantly less than the amount secured.



Permission for Enforcement Against Residential Land

The tentative proposals provide a structure designed to implement the policies of the *Land Contracts (Actions) Act* in a much more efficient manner:

- ▶ the chargee would not need permission to bring an action to obtain a judgment;
- ▶ 30 days after serving a judgment stating that the chargor is in default under the charge agreement and requiring the chargor to perform the undischarged obligation secured by the charge, the chargee could apply to the court for permission to enforce the charge;
- ▶ the court would be given very broad discretionary power to refuse or grant permission to proceed with enforcement of the charge with or without condition nor grant permission but suspend its effectiveness for not more than 6 months.



Court Ordered Sale

The tentative proposals provide that Court-ordered enforcement of a charge be required where:

- ▶ (i) the charged land is residential land and the Court has given permission to the chargee to enforce the charge;
- ▶ (ii), the charge agreement relating to non-residential land does not provide that upon default by the chargor the chargee may enforce the charge through sale;
- ▶ (iii), the court concludes that it is inappropriate that non-residential charged land be sold by the chargee; or
- ▶ (iv) the court refuses to make an order rejecting the chargee proposal to take the charged land in full satisfaction.



Court Ordered Sale (Cont'd)

The tentative proposals provide that:

- ▶ upon expiry of 50 days after delivery of the chargee's notice of intention the chargee may apply for an order for sale, the court may order sale of the charged property;
- ▶ 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;
- ▶ the court would have power to extend the time period between the date of the notice of enforcement and the date of the sale of the land;
- ▶ the court be empowered to order sale of the charged property but not order the equivalent of "foreclosure".



Enforcement Against Accounts

The tentative proposals provide that:

- ▶ the proposed Act would contain a separate part dealing exclusively with both charges and transfers of accounts payable under leases of land, easement agreements or prescribed agreements relating to land and subsection 144(1) of *The Land Titles Act* be amended accordingly.
- ▶ an agreement may provide for a charge on or transfer of an existing or future account associated with land but must contain a description of the land, the amount secured by the charge (or the value paid by the charge) and the authentication of the chargor.
- ▶ an account debtor would be entitled to make payments to the chargor until he or she is given written notice of charge or transfer of an account.
- ▶ a chargee would 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.



Enforcement of Non-Consensual Liens

The tentative proposals provide that:

- ▶ the enforcement of equitable vendors' liens would be codified and not left to traditional equitable principles.
- ▶ a judgment finding that a vendor is in default under the purchase agreement would be a pre-requisite to the enforcement of a vendor's lien on land being purchase.
- ▶ not less than 30 days after obtaining a judgment against the buyer, the vendor who intends to seek enforcement of a vendor's lien would be required to give the buyer a notice of application to the court for enforcement of the lien.
- ▶ The requirements of sale be very similar to those applicable to sale of land subject to an agreement for sale.



Powers of the Court

The tentative proposals provide that the Court of Queen's Bench would be given:

- ▶ very broad supervisory powers with respect to matters addressed in the proposed Act similar to those given to the Court by section 63 of *The PPSA, 1993*.
- ▶ the power to extend or abridge time periods contained in provisions of the proposed Act except the limitation of action period.
- ▶ The power to relieve a court-appointed receiver or receiver-manager from complying with procedural features of enforcement.
- ▶ power to place the chargee in temporary possession of charged land when the chargor has abandoned the land or has failed to protect the land from serious damage or deterioration, statutory notices cannot be served because he or she cannot be found, or for any other reason, the court concludes that the interest of the charge in the land charged is in jeopardy.



Consultation Opportunities

- ▶ In the spring of 2018, Professor Cuming will travel to various locations in Saskatchewan to discuss the proposed *Land Charges Act* with practitioners
 - ▶ If you are interested in participating, please contact Leah Howie, Director of the Law Reform Commission, at director@lawreformcommission.sk.ca
- ▶ Following these consultations, the Commission will post consultation papers on its website
 - ▶ Responses to the consultation papers can be sent via email to Leah Howie
 - ▶ There will also be surveys and online forms available
 - ▶ Please email Leah Howie if you would like to be added to a mailing list for this project – you will be notified when the papers are available online for comment.



Questions?

Thank you