



Proposals for a Saskatchewan Land Charges Act

A project by the Law Reform Commission of Saskatchewan
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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 2018 the Commission published Tentative Proposals for a *Land Charges Act* and associated commentaries along with questions designed to elicit responses to the Tentative Proposals
- In 2019 the proposals were modified based on responses provided and Commission's final report has been prepared
- It is expected that the final report to the Minister of Justice will be submitted in late 2019 or early 2020.



Why is a Land Charges Act required?

- Current real property security law is contained in case law and in seven different statutes and the Queen's Bench Rules of Court, and is unnecessarily complex and increasingly inaccessible
- The conceptual features of this area of law have not been assessed since their formulation in the courts of medieval England
 - Statutory features have not been examined for over 80 years.
- Inefficient enforcement
 - Many aspect of existing law are in efficient resulting in unnecessary costs and use of judicial facilities.



Highlights of The *Land Charges Act*

➤ **“Complete” Code of Real Property Security Law**

- Provides clear statutory guidance to enhance understanding and legal predictability
- Applicable to all consensual and non-consensual real property security transactions
- Displaces provisions of at least six current statutes affecting mortgages and agreements for sale
- Codifies most non-statutory rules of equity affecting mortgages.

➤ **System based on concept of “charge”**

Provides a consistent conceptual structure based on the concept of a charge

Displaces traditional terminology with charge terminology: mortgage, agreement for sale, equity of redemption, right of redemption, order nisi, and foreclosure

➤ **Incorporates public policies of existing mortgage law that have contemporary relevance**



Highlights of *The Land Charges Act*

- **Provides fair and balanced rules regulating the contractual relations between parties to charge agreements**
- **Differences in treatment of charges on residential and non-residential property**
 - Restrictions on charge agreement provisions
 - Recovery of deficiency
 - Permission to proceed with enforcement
 - Sale of land by chargee
- **Order Nisi procedure eliminated**
 - Opportunity to re-instate or discharge obligation precedes court involvement
- **Broad scope for court involvement (on application by a party)**
- **Interface with the current features of *The Land Titles Act 2000* relating to registration and priority of “interests”**



Part 1: Definitions and Scope of Act

“Charge Agreement”

- S. 2(1)(d) “charge agreement” means an agreement providing for a charge.
 - This definition encompasses what is either a mortgage contract or an agreement for sale under existing law
 - Parties are free to use current terminology including “mortgage”, mortgagor, mortgagee etc. rather than charge, chargor and chargee.
 - The Act rejects the common law characterization of an agreement for sale as simply a contract for the sale of land

“Charge”

- S. 2(1)(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 seller under an agreement for sale of land
 - this definition implicitly sets the scope of the Act by enumerating the types of interests that are treated as charges under its provisions
 - A charge provides an alternative source of recovery of the obligation owing by the chargor to the chargee in the event of default by the chargor



Part 1: Definitions and Scope of Act

“Residential Land” & “Residence”

- S. 2(1)(1) “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 will be used at any time during the period of the agreement in whole or in part by the chargor as his or her residence
 - The distinction between charges on residential land or a residence and commercial land (non-residential) land is very important in the context of the Act
 - A underlying assumption of the Act is that there is more societal justification for extensive regulation of charges on residential land than on commercial land
 - One significant difference between charges on residential land and land used for commercial purposes is the extent of judicial involvement in enforcing charges.



Part 1: Definitions and Scope of Act

Application

- S. 3: Parts 1 – 11 and 14 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, rent charge; and
 - (b) a lease, or trust of an interest in land that secures discharge of an obligation

Statutory Obligation of Good Faith and Commercial Reasonableness

- Section 5(1) requires that all rights, duties and obligations that arise pursuant to a charge agreement, the Act or any other applicable law must be exercised or discharged in good faith and in a commercially reasonable manner.

Charges on After-Acquired Property

- Section 7 provides that a charge agreement may provide for a charge on “future property”. However, the charge cannot be registered in Land Titles Registry until the chargor acquires an interest in the property.



Part 2: Form and Content of a Charge Agreement

Charges on Accounts Associated with Land

- Section 9(1) provides that a 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.
 - The Act provides a separate Part dealing with the charge of payments associated with land such as rental payments made by a tenant.
 - Charges on or sales of payments associated with land are treated as “interests in land” under *The Land Titles Act, 2000* subject to separate registration and priority rules
 - However, a charge on such payments can be included in a charge agreement relating to the land associated with the payments
 - Subsection 12(2) negates clauses in charge agreements under which the chargor agrees to become tenant of the chargee.



Part 2: Form and Content of a Charge Agreement

Prohibited Provisions in Charge Agreements

- Sections 12 and 13 essentially replicate sections 7,8, 10 and 13 of *The Limitation of Civil Rights Act* as well as contract provisions that, under the common law, provide “clogs on the equity of redemption.”
- The sections prohibits charge agreements containing provisions requiring chargors to:
 - Pay premises or land inspection fees other than a fee associated with an application for a loan secured by the charge, or renewal of an agreement
 - Pay fees, costs, charges or expenses, other than costs ordered by the court, in respect of the collection of any money due pursuant to the agreement
 - 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 charge's acceptance of such payment



Part 2: Form and Content of a Charge Agreement

Relief Against Acceleration

- Section 14(1) refines the principle in ss 61 and 62 of *The Queen's Bench Act* – the rights of reinstatement.
 - The chargor seeking protection under s. 14(1) would be required to pay to the chargee an amount specified in regulations. The amount should provide reasonable compensation for administrative costs associated with default
 - The right of reinstatement may not be exercised after enforcement proceedings have reached an advanced stage
 - Section 14(4) gives the court the power to limit the number of times a debtor rely on s. 14(1) – no more than twice in one year
 - Section 14(5) provides that the exercise of the right of reinstatement would suspend further enforcement proceedings but would not terminate them



Part 2: Form and Content of a Charge Agreement

Right to Pre-Pay Obligation

As a result of subsection 15:

- 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 except as otherwise provided in this Act or in the Interest Act (Canada),
- 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:
 - Demands payment of the accelerated amount of the obligation secured by the charge;
 - 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;
 - Brings an action to enforce the charge.
- The amount tendered by the chargor to obtain discharge is the unpaid amount principal amount secured by the charge, interest to the date of such payment and reasonable costs as provided in the charge agreement.



Part 2: Form and Content of a Charge Agreement

Due-On-Sale, Lease, or Encumbrance Clauses

- Section 16 gives the court the power to override a due-on-sale, lease, or encumbrance clause when it finds that the risk associated with sale of the chargor's interest is very low or when the chargor provides security to the charge to address the risk

Novation

- Section 17 is a “skeletal” codification of the common law relating to novation set out in the Supreme Court in *National Trust v. Mead*
- Novation arises where 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
- The section provides a non-exclusive list of factors for a court to consider when determining whether or not novation has occurred
- There must be clear evidence of the intention of the charge to release the chargor
- A clause in the charge agreement designed to preclude novation is not determinative



Part 3: Recovery of Unsecured Obligations of Chargor

Recovery of Unsecured Obligation of Chargor: Deficiency Claims

- Under s. 19(1) an insurer that agrees to insure 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. Since the chargor has paid for the insurance, he or she should have the benefit of it
- This limitation applies only to charges on residential property defined as:
 - S. 2(1)(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 will be used at any time during the period of the agreement in whole or in part by the chargor as his or her residence.
 - S. 2(1)(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(30(e)-(g)) of the *Bankruptcy and Insolvency Act*
 - (ii) who received no consideration in return for agreeing to accept liability for the obligation



Part 3: Recovery of Unsecured Obligations of Chargor

Recovery of Deficiency Claims (Continued)

- Subsection 19(2) embodies the effect of s. 2 of *The Limitation of Civil Rights Act* in the context of charges on residential land (i.e., bar on recovery of the deficiency). However, it extends the effect where:
 - 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 on the land;
 - A loan used all or in substantial part by the chargor to discharge a loan used by the chargor to purchase land or build a residence.
- The section also extends the protection to an accommodation guarantor.
- The section codifies the decision of the Supreme Court in *National Trust v. Mead*. It applies to an action by a chargee against a transferee of charged land that the date of the charge agreement:
 - 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
 - Was not residential land, where the chargee knew or has reasonable ground to know at the date of the charge agreement that:
 - (i) The chargor intended to transfer the charged land to a transferee who would assume the obligations of the chargor to the chargee under the charge agreement; and
 - (ii) The transferee would or would be likely to use the charged land as residential land.



Part 3: Recovery of Unsecured Obligations of Chargor

Recovery of Deficiency Claims (Continued)

- As is the case under current law, there is no bar against recovering the deficiency from a guarantor other than an accommodation guarantor
- Subsection 19(4) provides a measure not available to a mortgagee under *The Limitation of Civil Rights Act*.
 - It empowers the court to order that the anti-deficiency features of the Act do not preclude the chargee from recovering damages from the chargor or accommodation guarantor where the charged land or facilities on the land has been seriously damaged, destroyed or its value significantly diminished as a result of neglect or intentional conduct of the chargor and the loss is not recoverable through insurance
 - It also empowers the court to allow the chargee to recover the deficiency when, during the negotiations for the charge agreement, the chargor has failed to act honestly or when it is inequitable for the chargee to be barred from recovering the deficiency



Part 3: Recovery of Unsecured Obligations of Chargor

Recovery of Unsecured Obligation of Chargor: Consolidation of Obligations

- Section 21 codifies the central features of the decision of the Court of Appeal in *Walker v. Bank of Montreal*. It applies to situations in which a charge agreement initially subject to s. 19(2) (no recovery of deficiency) is amended or replaced by a charge agreement that provides for the advance of additional amounts to be secured by the charge resulting in a consolidated debt that is to be reduced by a single payment each period
 - The section gives the chargor the right to allocate the payments to the part of the debt in a manner most advantageous to him or her
 - If the chargor does not elect to do this, all payments would be allocated proportionately to the two amounts



Part 3: Recovery of Unsecured Obligations of Chargor

Deficiency Recovery: Non-Purchase Money Charges

- Section 22 provides that, in situations not falling within section 20, when residential land subject to a charge is sold and a deficiency the balance of the obligation owing to the chargee by the chargor or an accommodation guarantor becomes unenforceable against the assets of the chargor or guarantor 48 months after the date of the sale.
- The court is given the power to reduce or extend the 48 month period on the basis that:
 - (a) the conduct of the chargor or chargee does not meet the standard of good faith and commercial reasonableness;
 - (b) the charge agreement contained harsh or unconscionable terms; or
 - (c) enforcement of a judgment for the deficiency would result in hardship to the chargor or his or her family or an accommodation guarantor or his or her family.



Part 5: Transfer and Charges of Interests

A Charge of a Charge

- Section 28 addresses situations referred to in s. 126 of the *LTA, 2000*; but *removes uncertainty associated with that section.*
- Under section 28 a charge can be taken on a charge (under existing law, a mortgage of a mortgage)
- The Act ensures that the rights of a chargor under the first charge are not affected and the chargor may make payments pursuant to the charge agreement to the first chargee before the chargor is served with a written notice of the second charge setting out the amount due or payable that is to be made to the second charge and details as to the place of payment.
- Payments made to the first chargee before the chargor receives the notice discharge the obligation secured by the charge to the extent of the amount paid
- The first charge may not discharge the registration relating to the first charge without the written consent of the second charge unless the notice referred to in subsection (1) has not been given to the chargor and the chargor has discharged his or her obligations under the charge agreement with the first chargee



Part 5: Transfer and Charges of Interests

Compulsory Transfer of Chargee's Interest

- Section 29 replicates and expands aspects of s. 125 of the *LTA, 2000* as applied in *FCC v. Nelson*.
- Section 29(1) gives to the chargor the primary 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.
- A guarantor is deemed a guarantor who is subrogated to the rights of the chargee to be a person designated by the chargor.
- A subsequent interest holder has the right to the chargee's interests if the chargor or guarantor does not exercise his or her rights.



Part 6: Priority Rules

Tacking

- Section 32 implements the policy of ss 27(1) and (2) of the *LTA, 2000*
- If at the date of registration, the charge qualifies as one that is “for a specified principal sum”, it has priority over any amount advanced after an intervening interest is registered that does not exceed the specific principal sum secured by the charge.
- If charge agreement provides for renewal (other than through an amendment to the agreement), 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 pursuant to a term in the charge agreement.
- The section rejects the decision in *Canora Credit Union v Mattison* where 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.
- A chargee who is entitled to but refuses to make additional advances is required to reduce the specified principal amount to the amount actually advanced .
- 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



Part 6: Priority Rules

Marshalling

Section 33 addresses the controversial issue of marshalling in the context of charges. Its effect is as follows:

- A court may not force marshalling on a chargee who has charges on two parcels of land one of which is subject to a subordinate charge.
- A court may not subrogate the claim of the subordinate charge holder to the interest of a prior charge holder.
- However, where 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;
 - the court may order that the amount exceeding the amount required to discharge the obligation secured by the charge be allocated to the subordinate charge holder;
 - If there are subordinate charges each of different parcels of land subject to the first charge, the court may order that the amount exceeding the amount required to discharge the charge be apportioned between these charge holders.



Enforcement Against Commercial Land by Chargee

- Sections 34 – 40 provide a method of enforcement against non-residential land that, for the most part, avoids involvement of the court except where the circumstances are such that a marshalling order might be applied by the court
- Enforcement by the chargee through court proceedings is required if:
 - the charge agreement does not provide for sale by the chargee
 - the court decides that sale by the chargee is inappropriate



Enforcement Procedure Steps

1. Chargee obtains a judgment of the court (which can be a default judgment).
2. After 30 days, the chargee serves on the chargor and subordinate interest holders a statutory notice of the chargee's intention to sell the charged land.
3. Unless reduced by the court, a period of 50 days must elapse before chargee can sell the land. At the end of this period the chargee can sell the land if the obligation secured by the charge is not paid.
4. Conditions of sale prescribed by the Act must be met.
5. Chargee can buy when sale is effected through auction or closed tender administered by independent agency.
6. Buyer applies for court order requiring transfer of the chargor's interest to the buyer.
7. Chargee disperses the proceeds from the sale in accordance with Act.
8. Chargor or subordinate interest holder may require the chargee to give an account of the sale and disposition of the proceeds.



AGREED SURRENDER OF CHARGOR'S AND SUBORDINATE INTERESTS

- Section 42 provides the context in which “voluntary foreclosure” of the chargor’s interest and subordinate interests can occur
 - Upon default of the chargor, the chargee may seek to avoid the necessity for sale by proposing to the chargor and holders of subordinate interests in the land that the chargee will take the land in full satisfaction of the obligation secured by the charge plus costs free from the chargor’s and subordinate interests
 - The proposal is rejected by the chargor by express rejection or by failure to accept proposal within 20 day of notice.
 - A subordinate interest holder is deemed to accept unless the proposal is expressly rejected within 20 days of the notice.
 - The court can override the objections of a subordinate interest holder if:
 - the market value of the land is conspicuously less than the amount secured by the charge and costs of disposition; or
 - the objection was not based on a desire to protect an interest in land
 - If the proposal is accepted or deemed accepted:
 - the chargee hold the title free from interest of chargor and subordinate interests; and
 - the obligation secured by the charge and all associated costs are deemed paid



Court Ordered Sale of Commercial Land

Steps in the procedure:

1. Chargee obtains a judgment of the court (which can be a default judgment)
 2. After 30 days, the chargee serve a statutory notice on the chargor and subordinate interest holder of the charge's intention to apply to the court for an order for sale
 - The sale may not take place until 50 days after delivery of the notice of intention to apply to the court for an order for sale
 - The court is given unfettered discretion in s. 56 to give additional time to the chargor to discharge the obligation
- Other requirements are very similar to those applicable to a court ordered sale of residential property.



Enforcement Against Residential Land

- Where there is default in discharging an obligation secured by a charge on residential land:
 1. The chargee starts an action for enforcement of the charge and, at the same time, applies to the court for permission to proceed with the action
 2. Not less than 30 prior to the hearing of the application, the chargee serves a statutory notice on the chargor, other interest holders and Mediation Board
 3. In the hearing, the court essentially has the same powers currently held by the court under *The Land Contracts (Actions) Act*
 4. If permission is granted, the chargee proceeds with the enforcement action
 5. Not less than 30 days from service of a judgment on the chargor, the chargee serves a statutory notice on the chargor and subordinate interests stating the chargee's intention to enforce the charge
 6. Upon expiry of 50 days from the date of service of the notice, the chargee may apply to the court for an order for sale
 7. A copy of the application is served on the judgment debtor and subordinate interest holders along with an appraisal of the value of the charged property 30 days prior to the hearing



Enforcement Against Residential Land (continued)

- In dealing with the application, the court may:
 - order sale of the charged property as prescribed in the Act;
 - when the value of the land is conspicuously less than the obligation secured by the charge and the chargee agrees, order that the chargee take the land in full satisfaction of the obligation secured by the charge and costs; or
 - make any other the court considers appropriate in exercise of its jurisdiction as a court of equity.
- When a sale is ordered, the proceeds are allocated in accordance with the Act
- The chargor or subordinate interest holder may require the chargee to give an account of the sale and disposition of the proceeds



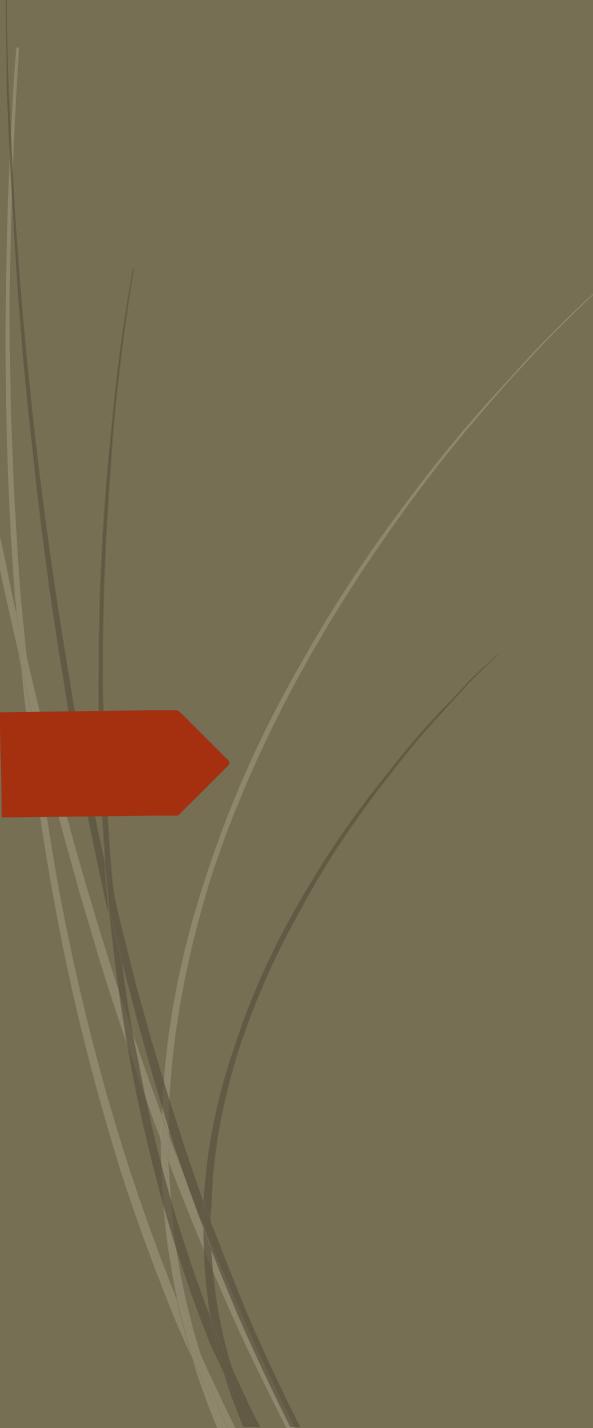
Powers of the Court

- The court is given very broad supervisory powers including authority to:
 - Issue injunctions
 - Extending time periods
 - Appoint a receiver
 - Set costs
 - Make possession orders.



Other Matters Addressed

- The Act provides a separate Part for the regulation of charges on (and sale of) accounts that arise in connection with land such as lease payments or payments under easements
- The Act provides a separate Part for regulation of non-consensual liens on land (unpaid vendors' liens)



Questions?