

# PROPOSED LAND CHARGES ACT: PRACTITIONER PERSPECTIVES

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# INTRODUCTION

Bob Kasian is a partner in MLT Aikins' Saskatoon office.

- *Bob maintains a corporate commercial practice with a focus on commercial real estate and secured lending.*

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- *Paul maintains a litigation practice with a focus on insolvency, including enforcement of security interests in real and personal property.*

## Proposal to use “charge” terminology – “mortgage” to no longer be term of art

### Definitions

*2(1) In this Act; ...*

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

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

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

## Proposal to use “charge” terminology – “mortgage” to no longer be term of art

### Definitions

*2(1) In this Act; ...*

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

## Proposal to use “charge” terminology – “mortgage” to no longer be term of art

### Definitions

2(1) *In this Act; ...*

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

*(g) “chargor” includes:*

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

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

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

## Proposal to use “charge” terminology – “mortgage” to no longer be term of art

### Scope

*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 or rent charge; and*

*(b) a lease, or trust of an interest in land, that secures discharge of an obligation.*

## Distinction between Residential and Commercial Land

*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 were aware at the time of the agreement it would be used at any time during the period of the agreement, in whole or in part by the chargor as his or her residence...*

## Distinction between Residential and Commercial Land

*“residential land” ... does not include:*

*(i) periodically occupied recreational land; or*

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

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



## Good Faith and Commercial Reasonableness Standard

*5(2) All rights, duties and obligations that arise pursuant to a charge agreement, this Act or any other applicable law must be exercised or discharged in good faith and in a commercially reasonable manner.*

## Only specifically enumerated breaches give rise to rights of enforcement

### Obligations Deemed Secured

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

*(a) the obligation of the chargor to make payment of the principal amount to the chargee as provided in the charge agreement;*

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

## Only specifically enumerated breaches give rise to rights of enforcement

*(c) expenditures incurred by the chargee to protect buildings or attachments to the land from deterioration;*

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

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

## Only specifically enumerated breaches give rise to rights of enforcement

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

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

## Only specifically enumerated breaches give rise to rights of enforcement

*10(2) A charge does not secure the items referred to in clauses (c), (d), or, (e) when the charge agreement provides that these are obligations of the chargee.*

*10(3) The charge agreement may contain covenants of the chargor the breach of which are answerable in damages that are not secured obligations as provided in subsection (1).*

## Only specifically enumerated breaches give rise to rights of enforcement

### Default for Enforcement Purposes

*35(1) For the purposes of this Part and Parts 8, 9, 10 and 11, default means:*

- (a) failure to discharge an obligation secured by the charge as provided in subsection 10(1);*
- (b) failure to take measures required by the charge agreement to protect the charged land from serious damage;*

## Only specifically enumerated breaches give rise to rights of enforcement

- (c) failure to take measures required by the charge agreement to obtain the discharge of an interest that has priority over the charge;*
- (d) failure to provide information required by the charge agreement;*
- (e) failure to perform covenants relating to assurances of the charged property;*
- (f) failure after reasonable notice to decrease from conducting activity on the charged land that is prohibited by the charge agreement*

## Only specifically enumerated breaches give rise to rights of enforcement

*(g) transfer of the chargor's interest in the land in violation of a term in the charge agreement prohibiting transfer without the consent of the charge; or*

*(h) expropriation of the charged land.*



## Limitation on ability to restrict transfers

### Due-on-Sale or Encumbrance Clauses

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

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

## Limitation on ability to restrict transfer

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

# Mortgage Default Insurers Barred from Subrogated Recovery

## Enforcement of Judgment

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

## Treatment of Purchase-Money Mortgages on Residential Land

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

# Treatment of Purchase-Money Mortgages on Residential Land

## Enforcement of Judgment

*19...(4) On application, the court may order that subsection (2) or (3) does not preclude a chargee from recovering:*

*(a) damages from the chargor or accommodation guarantor where the charged land or a building or other facility on the charged land is seriously damaged, destroyed or its value significantly diminished as a result of neglect or intentional conduct of the chargor and the chargee cannot recover compensation for the damage from insurance on the building or facility; or*

*(b) an amount of the obligation of the chargor provided in the charge agreement where the court concludes that because the conduct of the chargor during the negotiations preceding charge agreement or thereafter falls below the standard required by subsection 5(2), it is inequitable for subsection (2) or (3) to apply.*

## Judgments on "accommodation guarantees" in relation to residential mortgages unenforceable

*19(2) When a charge secures:*

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

## Judgments on "accommodation guarantees" in relation to residential mortgages unenforceable

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

*and, in the case of loans referred to in clauses (b),(c) or (d), the chargee was aware at the date of the charge agreement:*

*(e) the intended use of the loan; and*

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

## Judgments on "accommodation guarantees" in relation to residential mortgages unenforceable

*the chargee may not enforce:*

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

*(h) a charge on any residential land of the chargor or accommodation guarantor;*

*for an amount of the obligation secured by a charge on the land other than through enforcement of the charge as provided in Parts 9 or 10.*



## **Chargee can be forced to reduce principal sum to amount advanced**

*32(7) A chargee that refuses a request of the chargor to make advances up to the specific principal sum set out in the charge agreement creating the charge shall amend the charge agreement within 30 days from the date of the request to reduce the specific principal sum to the amount advanced as of the date of the request.*

## Initiation of Mortgage Enforcement

### Part 7 – Enforcement Against Commercial Land

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

## Initiation of Mortgage Enforcement

### Part 7 – Enforcement Against Commercial Land

**LRCS Comment:** Before exercising the power of sale, the chargee is required to obtain a judgment of the court (including a default judgment) which establishes that the chargor is in “default.” After the sale, it is necessary to get an order from the court requiring the Registrar of Land Titles to transfer title in the purchaser from the chargee. Otherwise, there is no requirement for direct court intervention in the process unless the chargor or other affected interest holder bring an application to the court as provided in Part 14 and rule 10-13 of the *Queen’s Bench Rules of Court*, or unless the circumstances are such that section 33 (marshalling) applies.

# Initiation of Mortgage Enforcement

## Part 7 – Enforcement Against Commercial Land

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

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

## Initiation of Mortgage Enforcement

### Default for Enforcement Purposes

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

## Initiation of Mortgage Enforcement

### Time Before Sale

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

## Initiation of Mortgage Enforcement

### Conditions of Sale

*38(1) The land charged may be sold by public auction, closed tender administered by an independent person, or through listing with an independent licenced real estate agent.*

## Initiation of Mortgage Enforcement

### Part 9 – Application for Enforcement Against Residential Land

**LRCS Comment:** A judgment stating that the chargor is in default under the charge agreement as provided in one or more of clauses 35(1) and requiring the chargor to perform the undischarged obligation secured by the charge is a pre-requisite to enforcement of a charge against the residential land.



## New Equivalents to Foreclosure and Judicial Sale

### Part 8 – Surrender or Extinguishment of Chargor's Interest (Commercial and Residential Land)

**LRCS Comment: [Section 42]** replicates the policy of section 61 of *The Personal Property Security Act, 1993*. The policy on which it is based is the value in providing a procedure under which the same result as a “foreclosure order” under existing law can be obtained without the necessity to incur the costs and delay involved obtaining such an order from the court.

## New Equivalents to Foreclosure and Judicial Sale

**LRCS Comment (*cont'd*):** ... the chargee may seek to avoid the necessity for sale of the charged land by proposing to the chargor and the holders of subordinate interests in the land that would be affected by enforcement proceedings that the chargee will take the land in full satisfaction of the obligation owing by the chargor as provided by the charge agreement and the costs of obtaining the judgment. The details of the proposal would be set out in a notice delivered to the chargor and the holder of a subordinate interest affected by enforcement measures. ... Under subsection (4), failure by the chargor to expressly accept the proposal is deemed rejection of it. ... A rejection of the chargee's proposal by a subordinate interest holder need not force the chargee to proceed to sell the property. As a result of subsection (6), the court, on application of the chargee, may override the expressed objection of the holder of a subordinate interest on one of two grounds: (i) the objection of the interest holder was not based on a desire to protect an interest in the land; or (ii) or the amount of the obligation owing by the chargor to the chargee as provided in the charge agreement is conspicuously greater than the value of the land charged.

## **New Equivalents to Foreclosure and Judicial Sale**

### **Part 9 – Application for Enforcement against Residential Land**

#### **Action to Enforce**

*44(1) Upon expiry of 30 days from the date of default by the chargor, a chargee who intends to enforce a charge agreement shall:*

- (a) start an action for enforcement of the agreement by statement of claim as provided in the Rules of Court; and*
- (b) apply to the court for permission to proceed with the action as provided in this Part.*

## New Equivalents to Foreclosure and Judicial Sale

### Part 10 – Enforcement Against Residential Land

**LRCS Comment:** Sections 47 prescribes the procedure involved in the application to the court for sale of the charged residential land. The court is given power equivalent to an order nisi order under current law. There is no directly equivalent to a “foreclosure order” under existing law. However, the same effect is provided under the Act by giving the court power under subsection (3)(d) to order sale of the charged land to the chargee on the condition that the chargee agrees to take the charged land in full satisfaction the obligations secured by the charge agreement and costs.

## New Equivalents to Foreclosure and Judicial Sale

### Enforcement Order and Transfer of Title

*47(1) Upon expiry of 50 days from the date of services of the notices referred to in subsection 46(3), the chargee may apply to the court for an enforcement order.*

## **New Equivalents to Foreclosure and Judicial Sale**

*47(4) A sale ordered by the court shall be by public auction, closed tender, through listing with licenced real estate agent or any other manner determined by the court that, in the opinion of the court, is likely to result in payment of a purchase price that reflects the market value of the land at the time of the sale.*

*47(5) The chargee may purchase the charged land in a sale referred to in subsection (2).*

## **New Equivalents to Foreclosure and Judicial Sale**

### **Part 11 – Court Ordered Enforcement Against Commercial Land**

**LRCS Comment:** Sections 49-50 function in a context different from that of a sale referred to in Part 7. Unlike sales that would be effected under section 38, sales under this Part would be under the direct control of the court and the proceeds are paid into court and distributed by the court.

## Costs

## Costs

**59** *In relation to any aspect of proceedings under this Act, the court has the same discretion in setting costs, fees, charges or other amounts payable by the chargor to the chargee or other person as provided in the charge agreement or otherwise as it has with respect to costs as provided in Part 11 of the Rules of Court.*



# Q & A

# THANK YOU



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