

# UNCERTAINTY OVER THE SCOPE OF BORROWER PROTECTIONS IN MORTGAGE ENFORCEMENT PROCEEDINGS IN ALBERTA: THE PROBLEMS AND POTENTIAL SOLUTIONS

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*This article analyzes the complex legal framework surrounding protections for borrowers in mortgage enforcement proceedings in Alberta. It examines two statutory protections — default redemption periods and protection from deficiency judgments — as well as the applicability of non-recourse protection to non-purchase money loans and how Crown immunity has previously curtailed the protections. Homeowners are often unable to navigate the system due to its complexity and the power imbalance between lenders and borrowers.*

*The article advances several possible solutions to this issue, including education initiatives aimed at borrowers, enhanced disclosure obligations for lenders, and reforms to the scope of the borrower protections. These changes aim to assist homeowners in claiming the protections they are legally entitled to and to ensure that Albertans are not needlessly unhoused.*

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## I. UNCERTAINTY OVER THE SCOPE OF BORROWER PROTECTIONS

During mortgage enforcement proceedings, a secured lender enforces against real property provided as collateral by a borrower. In Alberta, under the *Law of Property Act*, individual

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borrowers benefit from two key protections during mortgage enforcement proceedings: a statutory redemption period and protection from personal liability if the amount outstanding on the mortgage exceeds the value of the property.<sup>1</sup> The redemption period gives a borrower time to address their financial defaults and thereby avoid the loss of their property; the protection from personal liability ensures that people facing financial difficulties are not encumbered by debt following the loss of their property.

Not all borrowers benefit from these protections. The statute excludes corporate borrowers. Individual borrowers are excluded if they hold a high-ratio, insured mortgage, or a mortgage securing a loan under the *National Housing Act*.<sup>2</sup> The scope of protections is also shaped by less obvious legal principles. Individuals borrowing money secured against their home may have more protection than they realize: they may be protected from a deficiency judgment on a secured credit card or line of credit or similar credit product. Crown agencies have historically argued that they are not bound by the protections in the *Law of Property Act*; however current case law holds that they are.

This area of law is complex. Many residential homeowners facing mortgage enforcement proceedings do not have the resources to retain counsel to represent them and thus must navigate this area as self-represented litigants. They may be unaware of the legal principles governing their entitlement to protections, and they may also be unaware of key facts that impact the scope of their entitlements. For example, they may not know whether they have entered into a high-ratio, insured mortgage or one that was made under the *National Housing Act*. As a result, they may fail to claim their legal entitlements. Then, whether borrowers are afforded the protections to which they are entitled depends on the lender's counsel not overclaiming and on Applications Judges<sup>3</sup> catching them if they do.<sup>4</sup>

This article describes the statutory protections under the *Law of Property Act* that are available to residential homeowners in Alberta during mortgage enforcement proceedings. It draws out the complexity around when these protections apply, including the statutory exceptions to the protections, the surprisingly wide scope of the protection from personal liability, and the doctrine of Crown immunity. It evaluates possible interventions to ensure that borrowers are aware of their legal entitlements including: (1) education initiatives for borrowers; (2) disclosure requirements on lenders; and (3) changes to the scope of borrowers who benefit from the protections under the *Law of Property Act*. It concludes by evaluating these interventions against two criteria: the law should be as straightforward as possible and should be designed to make protections for homeowners the default, with limited exceptions.

This article is concerned with the impact of mortgage enforcement proceedings on borrowers who are using the secured property as a residence. Mortgage enforcement proceedings can result in the loss of their home. A growing body of evidence shows that

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<sup>1</sup> RSA 2000, c L-7.

<sup>2</sup> The exclusion applies to mortgages under the *National Housing Act*, RSC 1985, c N-11 and the *National Housing Act*, RSC 1952, c 188.

<sup>3</sup> As of 1 September 2022, Masters of the Court of Queen's Bench of Alberta (as it then was) were renamed Applications Judges, Alta Reg 137/2022. This was passed pursuant to *Court of King's Bench Act*, RSA 2000, c C-31, s 27(1).

<sup>4</sup> Lender's counsel may unintentionally overclaim as the result of inadvertence or error, such as when a lender's counsel receives erroneous instructions from their client.

losing a home has serious, negative impacts on the person who becomes unhoused, especially when the process is involuntary. The person experiences stress as they look for a new place to live. Their work life may be disrupted. Children living in the home may need to relocate to a different school, which disrupts their education.<sup>5</sup> The loss of a house has been associated with mental and physical health problems, including death by suicide.<sup>6</sup> People who undergo foreclosure experience stigma, shame, and ostracism.<sup>7</sup> The forced relocation severs the relationships that a person has with their neighbours, depriving them of social supports, and eroding the broader community's sense of cohesion and security.<sup>8</sup> There are many compelling reasons to avoid unnecessarily unhousing individuals. Thus one aim of this article is to better enable residential borrowers to take advantage of the statutory protections available to them.

This article is aimed at two audiences. First, for lawyers and legal intermediaries who may be assisting residential homeowners facing mortgage enforcement proceedings; this article is intended to provide them with the knowledge necessary to help their clients take full advantage of the available legal protections. Second, it provides a number of recommendations for policy-makers who may be contemplating reforms to the legislation that governs mortgage enforcement proceedings in Alberta.

## II. THE STATUTORY PROTECTIONS

The statutory provisions governing mortgages and mortgage enforcement proceedings are primarily located in the *Law of Property Act*.<sup>9</sup> This statute was created in 1980, by combining provisions from a number of other statutes including the *Judicature Act*, the *Land Titles Act*, and the *National Housing Loans Act*.<sup>10</sup> In its current form, the *Law of Property Act* contains two key protections for residential homeowners who are facing mortgage enforcement proceedings: redemption periods and a bar against deficiency judgments. This section describes the purpose, origin, and operation of these two protections.

### A. STATUTORY REDEMPTION PERIODS

A redemption period gives a homeowner, who has defaulted on their mortgage, time to explore their options. They may use the redemption period to avoid the loss of a home. For

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<sup>5</sup> Matthew Desmond, *Evicted: Poverty and Profit in the American City* (New York: Broadway Books, 2016) at 296.

<sup>6</sup> In the context of foreclosures, see: Jason N Houle & Danya E Keene, "Getting Sick and Falling Behind: Health and the Risk of Mortgage Default and Home Foreclosure" (2015) 69:4 J Epidemiology & Community Health 382; Theresa L Ospyuk et al, "The Consequences of Foreclosure for Depressive Symptomatology" (2012) 22:6 Annals Epidemiology 379. In the context of other unhousing processes see: Anna Jane Lund, "Tenant Protections in Mobile Home Park Closures" (2021) 53:3 UBC L Rev 759 at 771; Esther Sullivan, *Manufactured Insecurity: Mobile Home Parks and Americans' Tenuous Right to Place* (Oakland: University of California Press, 2018) at 8, 122–24, 147, 150.

<sup>7</sup> Kathryn Marie Dudley, *Debt and Dispossession: Farm Loss in America's Heartland* (Chicago: University of Chicago Press, 2000) at 129–36.

<sup>8</sup> David H Kaplan & Gail G Sommers, "An Analysis of the Relationship Between Housing Foreclosures, Lending Practices, and Neighborhood Ecology: Evidence from a Distressed County" (2009) 61:1 Professional Geographer 101. See also Lund, *supra* note 6 at 776–77; Sullivan, *supra* note 6 at 117–18, 145; Desmond, *supra* note 5 at 70.

<sup>9</sup> *Law of Property Act*, *supra* note 1.

<sup>10</sup> *Judicature Act*, RSA 1970, c 193; *The Land Titles Act*, RSA 1970, c 198 [*Land Titles Act*]; *The National Housing Loans Act*, RSA 1970, c 255.

example, they may locate funds to remedy their default and bring the mortgage into good standing or they may refinance with a new lender.<sup>11</sup> Where there is no financial solution that will allow them to keep their home, the redemption period allows them to protect their investment in their home by maximizing its sale price. The conventional thinking is that a borrower will get a better price for their property if they sell it themselves than if it is sold as part of the mortgage enforcement process.<sup>12</sup> Some borrowers will use the redemption period to ‘live out their equity,’ meaning they remain in the home without making further payments. The amount outstanding on the mortgage accrues interest during the redemption period thereby reducing any amount the borrower would be entitled to receive upon the sale of the home.

The redemption period was, initially, an equitable remedy granted by the English Courts of Chancery.<sup>13</sup> At common law, when a borrower granted a lender a mortgage over their property, they conveyed title to their property to the lender. The borrower retained the right to have their property conveyed back to them if they paid the mortgage debt by its due date. If a borrower failed to pay the mortgage by the due date, then the lender kept the property.<sup>14</sup> The English Courts of Chancery developed the right of redemption as protection against the harshness of this result: the homeowner could have the property conveyed back to them as long as they paid off the mortgage debt prior to a court granting an order foreclosing their right of redemption.<sup>15</sup>

In Alberta, the right of redemption has been modified by legislation. The *Land Titles Act* has transformed the fundamental nature of the mortgage transaction: a borrower no longer transfers title to a lender when they grant the mortgage, rather the mortgage is an encumbrance on the title to the land, which remains in the borrower’s name.<sup>16</sup> Yet, despite this fundamental change to the nature of a mortgage, the borrower retains a right of redemption, which provides them with time after a default on a mortgage to avoid the loss of their property.

How a borrower remedies a default depends on the facts of the case. Under the equitable right of redemption, a borrower had to pay the entire amount owing on the mortgage before the lender would convey title back to the borrower. This aspect of the right has been

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<sup>11</sup> Ronald CC Cuming, *Overview of Saskatchewan Real Property Security Law* (Regina: Office of the Queen’s Printer, 2016) at 11–14 [Cuming, *Overview*] (distinguishing between the reinstatement of a mortgage, by bringing it back into good standing, and redemption, where the borrower retires the entire debt).

<sup>12</sup> Joseph E Roach, *The Canadian Law of Mortgages*, 2nd ed (Markham: LexisNexis, 2010) at 53; however, as soon as foreclosure proceedings are commenced, a certificate of *lis pendens* is registered against title to the home and this can impact the price a purchaser is willing to pay for the property.

<sup>13</sup> Francis CR Price & Marguerite J Trussler, *Mortgage Actions in Alberta* (Calgary: Carswell Legal, Western Division, 1985) at 183; Cuming, *Overview*, *supra* note 11 at (1–9–1–10).

<sup>14</sup> Roach, *supra* note 12 at 39–41; Alberta Law Reform Institute, *Mortgage Remedies in Alberta: Report No 70* (Edmonton: Alberta Law Reform Institute, 1994) at 15–16. See also Cuming, *Overview*, *supra* note 11 at 1–8 (describing two other early forms of mortgages that were superseded by the mortgage as transfer of title).

<sup>15</sup> WB Rayner & RH McLaren, *Falconbridge on Mortgages*, 4th ed (Agincourt, Ont: Canada Law Books, 1977) at 447; Roach, *supra* note 12 at 54–57; Jim Reich, “Tips, Traps, and Secrets in the Foreclosure Sale Process” in Denise Hendrix, Chair, *Foreclosures: Beyond the Basics* (Edmonton: Legal Education Society of Alberta, 2021) at 10 [Hendrix, *Beyond the Basics*].

<sup>16</sup> *Land Titles Act*, *supra* note 10, s 103. This was initially achieved through *The Territories Real Property Act*, SC 1886, c 26 which applied in the territories that now comprise Alberta and Saskatchewan: see Cuming, *Overview*, *supra* note 11 at 1–11.

amended by legislation in Alberta. A borrower will usually only need to pay any outstanding arrears (such as missed payments and interest thereon) as well as the costs the lender has incurred in the enforcement proceedings. Once these payments are made, the action will be stayed.<sup>17</sup> Situations where the borrower must pay the entire amount outstanding on the mortgage include: (1) if the mortgage has matured (that is, has come to the end of its term);<sup>18</sup> (2) if the mortgage is payable on demand and a demand has been made;<sup>19</sup> or (3) once a court had granted an order declaring the full amount of the mortgage owing.<sup>20</sup> While a redemption order declares the amount owing under the mortgage, an Alberta court has directed that a borrower can redeem by paying arrears and costs up until the time of closing.<sup>21</sup>

Alberta's *Law of Property Act* sets out default redemption periods of 12 months for farm land and six months for other property.<sup>22</sup> The courts can extend or shorten the default redemption period and the statute lists considerations that a court should weigh when it is asked to vary the default period.<sup>23</sup> The list of relevant circumstances includes:

- the ability of the debtor to pay;
- the value of the land;
- the nature, extent, and value of the creditor's security;
- whether the land has been abandoned; and
- whether the debtor's default on the mortgage occurred as a result of factors beyond the debtor's control.

This list has been described as exhaustive: “[G]rounds other than those set out in [the *Law of Property Act*] cannot be considered by the Court.”<sup>24</sup>

In some circumstances, there will be no redemption period. No redemption period is required if the homeowner consents to immediate enforcement proceedings.<sup>25</sup> Additionally, the court can grant an immediate vesting order, allowing a lender to avoid a redemption period, where the land is abandoned or undeveloped, or where the land had been sold while the mortgage was in default or shortly before a default occurred.<sup>26</sup> This last exception, which

<sup>17</sup> “Redemption Order: Listing (with Covid Provisions)” (3 October 2022) at para 7, online: *Alberta Court of King’s Bench* <albertacourts.ca/docs/default-source/qb/template---redemption-order---listing.docx?sfvrsn=9bb0ad80\_16>; *762126 Alberta Ltd v Sims*, 2007 ABQB 550 at para 35.

<sup>18</sup> *Law of Property Act*, *supra* note 1, s 38(1), as discussed in Price & Trussler, *supra* note 13 at 194.

<sup>19</sup> Francis Taman & Ksenia Court, “Follow the Yellow Brick Road: A Guide Through the Foreclosure Process” in Denise Hendrix, Chair, *Foreclosure Fundamentals* (Edmonton: Legal Education Society of Alberta, 2017) at 11.

<sup>20</sup> Price & Trussler, *supra* note 13 at 195–96.

<sup>21</sup> *Alberta Treasury Branches v Yaremko*, 2002 ABQB 479 at para 12 [*Yaremko*] (note that “order nisi,” as used in *Yaremko*, is an old term for a redemption order). See also “Redemption Order: Listing (with Covid Provisions),” *supra* note 17 at para 3.

<sup>22</sup> *Law of Property Act*, *supra* note 1, s 41(1). When initially enacted in 1942, there was a statutory redemption period of 12 months for all borrowers: *The Judicature Amendment Act, 1942*, SA 1942, c 37. The bifurcated protections based for farmland and other land was adopted in 1954: *An Act to Amend the Judicature Act*, SA 1954, c 49.

<sup>23</sup> *Law of Property Act*, *supra* note 1, s 41(2).

<sup>24</sup> Price & Trussler, *supra* note 13 at 187. See also Alberta Law Reform Institute, *supra* note 14 at 115–16 citing *Stady v Patel* (1982), 48 AR 27 at para 13 [*Stady*]. In *Canadian Imperial Bank of Commerce v Nemeth*, 2013 ABQB 290 at paras 21–22, the Court affirmed the holding in *Stady*, *ibid*, that the statutory list of considerations was exhaustive, but noted that a Court could always grant a stay under section 17 of the *Judicature Act*, RSA 2000, c J-2.

<sup>25</sup> *Law of Property Act*, *supra* note 1, s 41(3).

<sup>26</sup> *Ibid*, s 42 (a sale within four months of the default can trigger this section); Alberta Law Reform Institute, *supra* note 14 at 116; Price & Trussler, *supra* note 13 at 15–16.

allows for speedy enforcement when a borrower transferred their land following or shortly before a default, was added by the legislature in 1984 to address the problem of “dollar dealers.”<sup>27</sup> Dollar dealers, a type of scam artist, buy properties from financially struggling homeowners for a nominal sum. The dollar dealer might allow the homeowner to remain in the property and pay rent to the dollar dealer or they may re-let the property to a tenant. The dollar dealer collects the rent, does not pay the mortgage, and disappears with their ill-gotten gains once enforcement proceedings commence.<sup>28</sup> By speeding up enforcement in these situations, the legislature reduced the potential profits available to a dollar dealer.

Some borrowers do not benefit from a *default statutory* redemption period: including corporate borrowers, individuals holding mortgages granted under the *National Housing Act*, and high-ratio, insured mortgages.<sup>29</sup> In these cases, it is still in the court’s discretion to grant a redemption period.<sup>30</sup> Thus, the real question for the court when dealing with a mortgage that is not covered by the default redemption periods is how long a redemption period it should set: a nominal one of a day, or something more substantial?

When a court is deciding whether to grant a more substantial redemption period on an excluded mortgage, a key consideration is whether the homeowner has any equity in the property, or in other words, whether the value of the property exceeds the encumbrances on it.<sup>31</sup> Where a borrower has equity in the property, courts are inclined to give them time to protect it. During the redemption period, the total amount outstanding on the mortgage will continue to grow with interest and costs, but the lender can ultimately recover these amounts from the value of the property. Conversely, courts are disinclined to give a borrower more time when the property is already over-encumbered, because the total amount outstanding on the mortgage will continue to grow, but the lender cannot recover these additional amounts from the value of the property.

Once a statutory redemption period is set, the court has the power to further extend it by postponing the end date of the period.<sup>32</sup> Courts will normally exercise this power when there is “ample security” to ensure the secured creditor will be paid, the homeowner is likely to be able to pay off the entire mortgage within a “short time,” and there are equitable reasons for granting an extension.<sup>33</sup>

After a redemption period has expired, a homeowner can still redeem their property. In fact, courts have the discretion to allow a homeowner to redeem even after the court has granted a final order of foreclosure (which transfers the property to the lender in full satisfaction of the borrower’s debt). The homeowner’s right to redeem is extinguished once

<sup>27</sup> *Law of Property Amendment Act*, SA 1984, c 24, s 2; Alberta Law Reform Institute, *ibid* at 35.

<sup>28</sup> Alberta Law Reform Institute, *ibid* at 35; Kyle Kawanami, “A Delicate Balance: Strategies for Dealing with Self Represented Litigants” in Hendrix, *Foreclosure Fundamentals*, *supra* note 19 at 8 describing *Scotia Mortgage Corporation v Gutierrez*, 2012 ABQB 683.

<sup>29</sup> *Law of Property Act*, *supra* note 1, s 43.

<sup>30</sup> Alberta Law Reform Institute, *supra* note 14 at 92.

<sup>31</sup> Francis Price, *Conducting a Foreclosure Action* (Calgary: Carswell, 1996) at 48.

<sup>32</sup> *Law of Property Act*, *supra* note 1, s 48(2).

<sup>33</sup> *In Bank of Montreal v Shepansky*, 2005 ABQB 249 at paras 18–19, the Court reviewed an excerpt from *Webmor Financial Services Ltd v James M Drummond Holdings Ltd*, (1981) 33 AR 493, and suggested that there may be other circumstances in which a court could grant an extension. See also Price & Trussler, *supra* note 13 at 192.

the court confirms a sale of the property, or if a lender who foreclosed on the property sells it to a third party.<sup>34</sup>

## B. NON-RECOURSE MORTGAGES AND PROTECTION FROM DEFAULT JUDGMENTS

A court may grant a deficiency judgment when a lender sells a secured property and the value of the property is insufficient to satisfy the full amount of debt owing on the mortgage. In Alberta, some homeowners will be held personally liable for the deficiency, whereas others are protected against personal liability. Mortgages that protect a homeowner from personal liability are called “non-recourse mortgages.” Statutory non-recourse mortgages only exist in two Canadian provinces: Alberta and Saskatchewan.<sup>35</sup>

Non-recourse mortgages have been justified with respect to at least two goals: protecting unlucky borrowers and limiting economic downturns. Alberta and Saskatchewan have experienced significant fluctuations in real estate prices, tied to the commodity-driven nature of their economies.<sup>36</sup> For example, between 1981 and 1985, housing prices in Calgary, Alberta dropped nearly 40 percent.<sup>37</sup> Non-recourse mortgages protect borrowers who buy properties that are subsequently devalued significantly during an economic downturn. Non-recourse mortgages also relieve borrowers from lingering debt obligations, which “make it more difficult for borrowers to re-establish themselves” following mortgage enforcement proceedings.<sup>38</sup> During economic downturns, these lingering debts constrain spending and worsen the downturn.<sup>39</sup> Protecting borrowers from personal liability interrupts the negative macroeconomic impact of lingering household debt.

Over the past century, Alberta legislators have developed different tools for protecting homeowners from personal liability. Legislation passed in 1919 restricted lenders to two options: they could either sell the property to a third party and collect any deficiency from the homeowner, or they could take title to the property themselves, in which case they were limited to the value of the property and could not collect the deficiency.<sup>40</sup> Lenders quickly

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<sup>34</sup> *Morguard Mortgage Investments Ltd v Faro Development Corp Ltd* (1974), 50 DLR (3d) 426 at 434–35; *Royal Bank v Laughlin*, 1998 ABQB 849; *Dickey v Pep Homes Ltd*, 2006 ABCA 402 at paras 14–15; Roach, *supra* note 12 at 87.

<sup>35</sup> Non-recourse mortgages were introduced in Saskatchewan with *An Act to amend the Limitation of Civil Rights Act, 1933*, SS 1934–35, c 89, s 4, now found in *The Limitation of Civil Rights Act*, RSS 1978, c L-16, s 2. See also the discussion in Cuming, *Overview*, *supra* note 11 at 2–4, Part 10. In other provinces, parties could make a mortgage into a non-recourse mortgage by including such a term in the loan agreement.

<sup>36</sup> Alberta Law Reform Institute, *supra* note 14 at 146–47, 164. In most of the American states with deficiency judgment protection, it is only available when a lender sells property outside of the judicial sale process and the deficiency judgment protection helps safeguard the borrower from misfeasance by the lender, such as selling the property for an inadequate price: Ronald CC Cuming, “Mortgage Obligation Deficiency Recovery” (2018) 81:2 Sask L Rev 113 at 117 [Cuming, “Mortgage Obligation”]. Extrajudicial sales of residential properties are not allowed in Alberta or Saskatchewan.

<sup>37</sup> Joseph T Robertson, “The Problem of Price Adequacy in Foreclosure Sales” (1987) 66:4 Can Bar Rev 671 at 675.

<sup>38</sup> Alberta Law Reform Institute, *supra* note 14 at 154; Ronald CC Cuming “The Case for Modernization of Saskatchewan Real Property Security Law” (2017) 80:1 Sask L Rev 189 at 205 [Cuming “The Case for Modernization”].

<sup>39</sup> Atif Mian & Amir Sufi, *House of Debt: How They (and You) Caused the Great Recession, and How We Can Prevent it From Happening Again* (Chicago: University of Chicago Press, 2014).

<sup>40</sup> *An Act to amend The Land Titles Act*, SA 1919, c 37, s 4, discussed in Alberta Law Reform Institute, *supra* note 14 at 24. This provision is now contained in *Law of Property Act*, *supra* note 1, s 48(1).

developed a workaround. They would ‘sell’ a property to themselves and seek to collect the deficiency: Alberta courts eventually affirmed the validity of this practice.<sup>41</sup> These sales are now called “Rice Orders” or an order for sale to plaintiff.<sup>42</sup> To get a Rice Order, the lender provides an appraisal to the court evidencing the value of the property. They can then recover any shortfall between the amount outstanding on the mortgage and the appraised value of the property.

As the Great Depression drew to a close, the Alberta legislature passed a new restriction on deficiency judgments. *The Judicature Act Amendment Act, 1939* prevented lenders from enforcing deficiency judgments against borrowers.<sup>43</sup> Over time, this broad protection has been made subject to a number of exceptions. The legislature carved out mortgages granted by *corporate* borrowers from the protection.<sup>44</sup> It therefore became the practice of lenders in Alberta to require borrowers to incorporate before they would be granted mortgage funding for commercial ventures.<sup>45</sup> In 1983, the Alberta government added a provision to ensure that deficiencies can be enforced against a corporate borrower, but not against an individual to whom the mortgage is assigned by a corporate borrower if the individual is using the property as a residence or farmland.<sup>46</sup> Certain types of mortgages granted to *individual* borrowers have been excluded from the non-recourse provision. These excluded categories of individual borrowers also do not have the benefit of statutory redemption periods. These excluded categories are discussed in the following section.

### III. THE SCOPE OF PROTECTIONS FOR INDIVIDUAL HOMEOWNERS

Individual homeowners who are subject to mortgage enforcement proceedings may be uncertain about the scope of protections to which they are entitled. Some individual homeowners are excluded from the statutory redemption periods and non-recourse protection. Others may be holding non-recourse loans without realizing it, because the scope of the non-recourse provision in the *Law of Property Act* can apply to a range of loans secured against one’s property. In the past, governmental lenders have argued that they are not subject to the borrower protections in the *Law of Property Act* because of the doctrine of Crown immunity. Each of these legal principles raises problems for individual homeowners because they may be unaware of them, and they may be unaware of how the principles apply to their specific situation. This section describes the statutory exclusions, the unexpectedly wide scope of the non-recourse provision, and the relevance of Crown immunity to the scope of borrower protections.

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<sup>41</sup> Alberta Law Reform Institute, *supra* note 14 at 24–25; for a critical history of this practice: see Leslie R Meiklejohn, “The Rice Order: Is Sixty Years of Practice Wrong?” (1984) 22:2 Alta L Rev 273.

<sup>42</sup> The orders take their name from the case of *Trusts and Guarantee Company Limited v Rice*, [1924] 2 WWR 691 (Alta SC AD); the Alberta Courts have developed a template “Order: Sale to Plaintiff” (1 September 2022), online: <albertacourts.ca/docs/default-source/qb/template---order-sale-to-plaintiff.doc?sfvrsn=6fb0ad80\_6>.

<sup>43</sup> *The Judicature Act Amendment Act, 1939*, SA 1939 c 85, s 2; a version of this provision is now contained in *Law of Property Act*, *supra* note 1, s 40(1).

<sup>44</sup> *An Act to amend The Judicature Act*, SA 1946 c 38, s 1; *An Act to amend The Judicature Act*, SA 1964, c 40, s 4.

<sup>45</sup> Alberta Law Reform Institute, *supra* note 14 at 124.

<sup>46</sup> *Law of Property Act*, *supra* note 1, ss 43(2), 47.



## A. STATUTORY EXCLUSIONS

The *Law of Property Act* provides for the two protections discussed in section II and then excludes corporate borrowers and some categories of mortgages held by individual borrowers from these protections. Thus, for an individual to understand what protections they are entitled to during a mortgage enforcement process, they must understand whether they hold a mortgage that falls into one of the carved out categories: (1) *National Housing Act* mortgages; and (2) high-ratio, insured mortgages.<sup>47</sup>

### I. MORTGAGES GRANTED UNDER THE *NATIONAL HOUSING ACT*

The exclusion of mortgages granted under the *National Housing Act* from the statutory protections dates back to the first half of the twentieth century and the federal government's efforts to actively promote home ownership. During the Great Depression, the federal government passed the 1935 *Dominion Housing Act*, later replaced by the *National Housing Act* in 1938.<sup>48</sup> These statutes sought to enable individuals to become homeowners by promoting mortgages with long amortization periods and by enticing more institutional lenders into residential mortgage markets.<sup>49</sup> The federal government used different tools to entice institutional lenders, but they were all premised on the government sharing the financial risk of lending to homeowners.<sup>50</sup> In the 1938 *National Housing Act*, the government partnered with lenders to offer mortgages, while in 1954, the legislation was amended to introduce mortgage insurance.<sup>51</sup>

Mortgage insurance protects the lender in a mortgage transaction. If there is a deficiency when the lender enforces against the property, the mortgage insurance company will provide compensation to the lender to cover the deficiency. If the lender has a deficiency judgment against the homeowner, the lender will assign it to the insurer and the insurer can decide whether to enforce it.<sup>52</sup>

In 1945, the Alberta government amended the statutory redemption periods and non-recourse provision in the *Judicature Act* to specify that they did not apply to mortgages made under the *National Housing Act*.<sup>53</sup> In 1994, the Alberta Law Reform Institute speculated as to possible motivations for this amendment: (1) the mortgages may have been viewed as higher risk; (2) it may have been desirable to protect the public funds being loaned as part

<sup>47</sup> *Law of Property Act*, *supra* note 1, ss 43(4), 43(4.1).

<sup>48</sup> Canada, Central Mortgage and Housing Corporation, *CMHC and The National Housing Act*, Departmental Catalogue No NHA 5030 3/77 (Ottawa: CMHC, 1977) at 1 [CMHC].

<sup>49</sup> John Bélec, "Underwriting Suburbanization: The National Housing Act and the Canadian City" (2015) 59:3 *Can Geographer* 341 at 343; the federal government also used guarantees to encourage lenders to advance loans for the purposes of improving existing housing: see *The Home Improvement Loans Guarantee Act, 1937*, 1 George VI, c 11, Part 1-3 as discussed in CMHC, *ibid* at 1.

<sup>50</sup> Bélec, *ibid* at 343; CMHC, *ibid*.

<sup>51</sup> Bélec, *ibid*.

<sup>52</sup> Helen AC Rees, "Foreclosures from the Defendant's Position" in William C Ranson, Chair, *Update 2011* (Edmonton: Legal Education Society of Alberta, 2011) at 9.

<sup>53</sup> *The National Housing Loans Act (Alberta)*, SA 1945, c 6, s 2. A similar amendment was adopted in Saskatchewan in 1945 in *An Act to amend the Housing Act*, SS 1945, c 57. However the exception was subsequently restricted so that the only federally insured loans excepted from the non-recourse provision are those granted to rental housing, cooperative housing, dormitory housing, or a hostel: see *The Saskatchewan Housing Corporation Act*, RSS 1978, c S-24, s 46; Cuming, *Overview*, *supra* note 11 at 2-5.

of these mortgages; or (3) legislators may have felt that national uniformity was desirable and other provinces did not have non-recourse mortgages.<sup>54</sup> Although the 1945 amendment was ambiguous as to its reach, courts held that it allowed lenders to enforce personal judgments in two situations: when the mortgage had been granted to the federal crown corporation — the Canadian Mortgage and Housing Corporation (CMHC), or where the mortgage had been granted to a private lender but was insured by CMHC.<sup>55</sup>

## 2. HIGH-RATIO, INSURED LOANS

The second category of mortgages to individuals that are excluded from the statutory protections are high-ratio, insured mortgages. To understand the concept of a high-ratio, insured mortgage, it will help to have some background on mortgage insurance and why it is mandatory for some mortgages. As discussed above, governments have offered mortgage insurance as a way of encouraging lenders to lend money to people buying houses and to people building them. Mortgage insurance makes it less risky for lenders to loan money through mortgages, because the insurance company compensates lenders when there is a deficiency.<sup>56</sup> Mortgage insurance also protects against the systemic risk that mortgage lending can pose for the financial system. The risk, which manifested itself in the 1930s, is that lenders suffer significant losses because of unrecoverable deficiencies and subsequently experience liquidity issues.

The federal government mandates mortgage insurance for some loans as a way of protecting against the systemic risk created by widespread mortgage defaults. The details of this requirement have evolved over time. Currently, federally regulated lenders cannot advance a mortgage to a borrower for more than 80 percent of the value of the borrower's property unless the mortgage is insured by CMHC or a private insurer.<sup>57</sup> Prior to 2007, the federal legislation required insurance where more than 75 percent of the value of the property was encumbered,<sup>58</sup> and prior to 1965 the threshold was even lower: 66.7 percent.<sup>59</sup> A lower threshold means that a borrower must have a bigger down payment to avoid the mortgage insurance requirement.

The federal government relaxed the threshold for insurance to 80 percent in 2007 to make it more affordable for Canadians to purchase homes. Even though the insurance protects the

<sup>54</sup> Alberta Law Reform Institute, *supra* note 14 at 30.

<sup>55</sup> *Thijssen v Galusha and 308557 Alberta Ltd.*, [1985] 59 AR 138, discussed in Alberta Law Reform Institute, *supra* note 14 at 30, n 67. Note that initially CMHC stood for Central Housing and Mortgage Corporation, see *The Central Mortgage and Housing Corporation Act*, 9-10 George VI, 1945, c 15.

<sup>56</sup> CMHC, *supra* note 48 at 6-7.

<sup>57</sup> *Bank Act*, SC 1991, c 46, s 418 (domestic banks), s 551 (foreign banks). See also *Cooperative Credit Associations Act*, SC 1991, c 48, s 382.1; *Insurance Companies Act*, SC 1991, c 47, ss 469, 542.06. On the divided regulation of mortgage providers between federal and provincial governments, see Stephanie Ben-Ishai, "Home Capital and Cross-Border Lessons in Mortgage Regulation" in Stephanie Ben-Ishai, ed, *Dangerous Opportunities: The Future of Financial Institutions, Housing Policy and Governance* (Toronto: University of Toronto Press, 2021) 83 at 88-89 [Ben-Ishai, *Dangerous Opportunities*].

<sup>58</sup> *An Act to amend the law governing financial institutions and to provide for related and consequential matters*, SC 2007, c 6, s 452; *Bill C-37, An Act to amend the law governing financial institution and to provide for related and consequential matters*, 1st Sess, 39th Parl, 2007 (as passed by the House of Commons 27 February 2007).

<sup>59</sup> Canada, Department of Finance, *2006 Financial Institutions Legislation Review: Proposals for an Effective and Efficient Financial Services Framework* (Ottawa: Department of Finance, 2006) at 13 [Department of Finance].

lender, the borrower usually pays the cost of the policy.<sup>60</sup> After the 2007 change, borrowers could avoid paying for mortgage insurance as long as they had a down payment in excess of 20 percent, instead of the 25 percent previously required. The Federal Minister of Finance explained that this change could be made without creating systemic risks because lenders' risk management practices had improved in the 30 years since mortgage insurance was first mandated and the framework for regulating lenders had been strengthened.<sup>61</sup>

Providing mortgage insurance to lenders can be profitable and, over time, private insurers have entered the field. In 1994, the Alberta Law Reform Institute noted that the Mortgage Insurance Corporation of Canada had been offering mortgage insurance in the province, but had temporarily suspended this offering.<sup>62</sup> In 2003, one private company — GE Capital Mortgage Insurance Canada — was offering mortgage insurance in Alberta. As of 2020, two private insurers were active in the province: Canada Guaranty and Genworth (which rebranded in October 2020 as "Sagen").<sup>63</sup>

In 2003, the Alberta government amended the *Law of Property Act* to carve out high-ratio mortgages from borrower protections, if those mortgages were insured either privately or by a Crown corporation.<sup>64</sup> Previously, only borrowers with mortgages insured under the *National Housing Act* were excluded from the protective provisions. The member of the legislative assembly, who sponsored the 2003 amendment, expressed concern that failing to treat insurance companies equally would give CMHC, a federal Crown corporation, an unfair competitive advantage over private market insurers.<sup>65</sup> An opposition party MLA questioned if the amendments really did level the playing field, given that CMHC was required by its mandate to insure riskier mortgages than its private market competitors.<sup>66</sup> Despite this critique, the amendment passed.

To be excluded, a mortgage must be both insured *and* a high-ratio mortgage, and it bears noting that mortgages may be insured without being high-ratio.<sup>67</sup> The concept of a high-ratio mortgage was borrowed from federal statutes, which require lenders to insure mortgages where the ratio of the amount borrowed to the value of the property exceeds a specified threshold. However, the *Law of Property Act* contains its own definition of high-ratio mortgage, and it adopts a different ratio than the federal legislation. Recall that the federal legislation was amended in 2007 to relax the insurance requirement, so that a mortgage only requires insurance if the amount advanced exceeds 80 percent of the property's value. In

<sup>60</sup> This payment arrangement leads some homeowners to the mistaken belief that they are protected against deficiencies: see Rees, *supra* note 52 at 6.

<sup>61</sup> "Bill C-37, An Act to amend the law governing financial institutions and to provide for related and consequential matters," 2nd reading, *House of Commons Debates*, 39-1, vol 141, No 93 (7 December 2006) at 5780 (Hon Jim Flaherty). See also Department of Finance, *supra* note 59 at 13.

<sup>62</sup> Alberta Law Reform Institute, *supra* note 14 at 126. Writing in 1985, Price and Trussler noted that there was one only private insurer operating in Alberta: The Mortgage Insurance Company of Canada, Price & Trussler, *supra* note 13 at 484; "Lender Update: Genworth Canada is Now Sagen" (23 October 2020), online: <[www.sagen.ca/wp-content/uploads/2021/01/SAGEN-Lender-Update-Genworth-Canada-is-now-Sagen.pdf](http://www.sagen.ca/wp-content/uploads/2021/01/SAGEN-Lender-Update-Genworth-Canada-is-now-Sagen.pdf)>.

<sup>63</sup> Judith Hanebury, "Foreclosures in Alberta: The Return of the '80s?" *LawNow* 45:1 (September/October 2020) 21 at 21.

<sup>64</sup> *Law of Property Amendment Act, 2003*, SA 2003, c 24, s 2.

<sup>65</sup> "Bill 29, Law of Property Amendment Act, 2003," 2nd reading, *Alberta Hansard*, 25-3 (27 March 2003) at 802–803 (Hon Marlene Graham).

<sup>66</sup> *Ibid* at 803–804 (Hon Hugh MacDonald).

<sup>67</sup> Rees, *supra* note 52 at 4.

Alberta, a regulation passed in 2004 pursuant to the *Law of Property Act* defines a high-ratio mortgage as a mortgage given where the value advanced by the lender exceeds 75 percent of the value of the property.<sup>68</sup> The provincial regulation has not been updated to reflect the change in the federal statute. The provincial definition applies when determining if a mortgage is a *high-ratio*, insured mortgage, and thus excluded from the statutory borrower protections in the *Law of Property Act*.

## B. THE UNEXPECTEDLY WIDE SCOPE OF THE NON-RECOURSE PROVISION

Residential homeowners may be entitled to protection under the *Law of Property Act* when defaulting on a range of credit products secured against their home. The non-recourse provision protects individuals from personal liability on any secured loan that can be characterized as “a covenant for payment contained in the mortgage.”<sup>69</sup> This formulation is broader than Saskatchewan’s non-recourse provision, which only applies to mortgages given to secure the purchase price of the property.<sup>70</sup> The difference between Alberta and Saskatchewan’s non-recourse provisions is illustrated in the following example.

Imagine that a homeowner purchases their residence with funds from Scotiabank, secured by a mortgage (the first mortgage). Later, they return to Scotiabank and apply for a home equity line of credit, which by its terms is also secured against their land (the second mortgage). They default on their line of credit; Scotiabank enforces against their property. There is sufficient collateral to pay out the first mortgage, but not the second mortgage. Can Scotiabank collect the deficiency on the line of credit from the homeowners? In Saskatchewan, the answer is yes because the second mortgage was not used to purchase the home. In Alberta, the answer is more complicated. It depends on whether a court holds that the debtor’s obligation to repay the home equity line of credit is a covenant for payment contained in a mortgage. If it is, then the lender cannot get a deficiency judgment.<sup>71</sup>

The Alberta cases on how to characterize a non-purchase money mortgage are fact-specific and the outcomes are not easily predicted, but the key issue that courts seem to be grappling with is whether the borrower and the lender intended for an obligation to be secured solely against the property, or if they intended it to have a “wider reach.”<sup>72</sup> For example, in the leading case of *Clayborn Investments Ltd*, the borrower had granted a mortgage to a lender for \$5,500 and signed a promissory note for the same amount.<sup>73</sup> The Court of Appeal held that the obligation covered by the promissory note did not have a wider

<sup>68</sup> When calculating how much of the property is encumbered, the definition takes account of pre-existing encumbrances. A second mortgage on a property for 50 percent of its value, where 40 percent was already encumbered by a first mortgage, would constitute a high-ratio mortgage: see *Law of Property Regulation*, Alta Reg 89/2004, s 1(2).

<sup>69</sup> *Law of Property Act*, supra note 1, s 40.

<sup>70</sup> *The Limitation of Civil Rights Act*, supra note 35, s 2.

<sup>71</sup> *Bank of Nova Scotia v Mawer*, 2013 ABQB 587 [*Mawer I*] (non-recourse provision applies to subsequent secured credit card debt); *Bank of Nova Scotia v Mawer*, 2013 ABQB 633 (same analysis as *Mawer I*); *Bank of Montreal v Fu*, 2019 ABQB 753 (non-recourse provision applies to a subsequent secured line of credit).

<sup>72</sup> *Clayborn Investments Ltd v Wiegert* (1977), DLR (3d) 170 at 176 [*Clayborn Investments Ltd*]. For a good survey of case law in this area that illustrates the fact specific nature of the cases, see *Royal Bank of Canada v Stallman*, 2009 ABQB 766 [*Stallman*].

<sup>73</sup> *Clayborn Investments Ltd*, *ibid* at 171.

reach than the mortgage and, thus, after foreclosing on the property, the lender could not recover a deficiency. The Court contrasted the facts before it with a hypothetical where a lender advances \$100,000 to a borrower and, as security, takes mortgages against a cabin worth \$15,000 and an empty lot worth \$10,000. Enforcing either of the mortgages should not preclude the lender from recovering the deficiency because it is evident from the terms of the initial transaction that the borrower's obligation to repay had a wider reach than the lands granted as security; the lender was also relying on the borrower's income earning potential.<sup>74</sup>

If a borrower knows to raise this argument, it could provide them with protection against personal liability on a range of secured lending products, including reverse mortgages and home equity lines of credit. However, it is difficult to imagine that many laypeople can discern the availability of this argument from the language of the statute. Reported decisions in this area note that *the court, and not the borrower*, raised the question of whether or not the non-recourse provision precluded the lender from getting a deficiency judgment.<sup>75</sup>

### C. THE DOCTRINE OF CROWN IMMUNITY

The doctrine of Crown immunity adds another confusing aspect for residential homeowners, though one that has laid dormant for over two decades. Crown immunity refers to the concept that legislation does not bind the government unless it contains explicit language to that effect. This concept has been codified in some, but not all, *Interpretation Act* statutes.<sup>76</sup> In the 1980's, some provincial Crown agents took the position that they were able to enforce deficiency judgments against otherwise-protected borrowers because the Alberta *Law of Property Act* did not specifically bind the provincial Crown and thus they were exempted from the non-recourse provision by the doctrine of Crown immunity.<sup>77</sup> Other provincial Crown agents declined to rely on the doctrine and observed the same restriction on collecting deficiency judgments as private lenders.<sup>78</sup> Federal Crown agencies cannot ordinarily be bound by provincial legislation and, in the 1980s, a common view was that they were not bound by the statutory protections in the *Law of Property Act*.<sup>79</sup>

The question of Crown immunity was temporarily resolved in a pair of decisions in 1987 and 1988: *Alberta Mortgage & Housing Corporation v. Ciereszko* and *Farm Credit Corp. v. Dunwoody Limited*.<sup>80</sup> The Alberta Court of Appeal held that both provincial and federal

<sup>74</sup> *Ibid* at 173, 176.

<sup>75</sup> *Stallman*, *supra* note 72 at para 1; *Magnum Mortgage & Realty Corp v Cruickshank*, 2011 ABQB 744 at para 5.

<sup>76</sup> See e.g. *Interpretation Act*, RSA 2000, c I-8; *Interpretation Act*, RSC 1985, c I-21, s 17; British Columbia and Prince Edward Island's statutes contain the opposite presumption: *Interpretation Act*, RSBC 1996, c 238, s 14; *Interpretation Act*, RSPEI 2021, c I-8.1, s 20. The relevant provision from Ontario's *Interpretation Act* has been incorporated into its *Legislation Act*, SO 2006, c 21, Schedule F, s 71.

<sup>77</sup> Alberta Law Reform Institute, *supra* note 14 at 31. For example the Alberta Mortgage and Housing Corporation took this position in *Alberta Mortgage & Housing Corporation v Ciereszko*, (1987) 77 AR 81 [*Ciereszko*].

<sup>78</sup> Alberta Law Reform Institute, *ibid* at 217 (reporting that, in 1994, the Alberta Treasury Branch did not rely on the doctrine).

<sup>79</sup> Writing in 1984, Price & Trussler, *supra* note 13 at 482–83, wrote: “the Law of Property Act cannot bind C.M.H.C. as it is an agent of the Crown.” The analysis on this point has changed due to the subsequent Court of Appeal decisions outlined in this section.

<sup>80</sup> *Ciereszko*, *supra* note 77; *Farm Credit Corporation v Dunwoody Limited*, 1988 ABCA 216 [*Dunwoody*].

Crown agents were subject to the non-recourse provision in the *Law of Property Act*. The resolution was only temporary because subsequent Supreme Court of Canada decisions revised the legal principles governing Crown immunity. In its 1994 report, the Alberta Law Reform Institute questioned if *Ciereszko* and *Holowach* remained good law.<sup>81</sup> The Alberta Court of Appeal eventually affirmed that they were. In the 1999 case of *Agriculture Financial Services Corp v. Redmond*, the Alberta Court of Appeal held that Crown agents were still subject to the non-recourse provision.<sup>82</sup>

The question of Crown immunity has been resolved for the moment: Crown agents are bound by the non-recourse provision in the *Law of Property Act*, and by implication, the statutory redemption periods, too. However, as happened in the 1990s, there is a possibility that changes elsewhere in the legal principles governing Crown immunity might open the door for Crown agents to argue that they are not bound by *Law of Property Act*. Were such an argument to succeed, a homeowner who thought they had a non-recourse mortgage would risk being held liable for a deficiency judgment on the basis of a legal doctrine of which they are, almost assuredly, completely unaware.

This summary of the scope of statutory protections for borrowers in the *Law of Property Act* highlights an important aspect of the law governing mortgage enforcement proceedings in Alberta: it is complex. There are two key protections: default redemption periods and non-recourse loans. These protections usually apply to any loan granted to an individual borrower that is secured against real property, regardless of whether the mortgage funds were used to purchase the property. Individuals who assumed mortgages from corporate borrowers are protected if they are using the property as a residence or farmland. However, individuals are not protected if they granted a lender a mortgage under the *National Housing Act* or a high-ratio, insured mortgage, or if they assumed such a mortgage from someone else. The next section considers why this complexity is problematic and canvasses potential solutions.

#### IV. POSSIBLE SOLUTIONS

The complexity of mortgage enforcement law in Alberta hampers homeowners from meaningfully participating in a legal process that can have significant, negative impacts on them. Homeowners often cannot afford a lawyer to assist them during the proceedings.<sup>83</sup> Thus, they may be unaware of the governing legal principles or unsure of how those principles apply to their case. This is a problem. Homeowners may lose a house or be subject to a large deficiency judgment when they had a viable claim to a longer redemption period or protection from personal liability. What is the solution? In Alberta, at least three different interventions could be used to empower homeowners to exert the legal protections available

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<sup>81</sup> Alberta Law Reform Institute, *supra* note 14 at 48–54; the report’s authors noted that the reasoning in *Ciereszko*, *ibid* and *Dunwoody*, *ibid* seemed to be undermined by the Supreme Court of Canada’s decision in *Alberta Government Telephones v Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 2 SCR 225 [*Alberta Government Telephones*].

<sup>82</sup> *Agriculture Financial Services Corporation v Redmond*, 1999 ABCA 175 at para 5 [*Redmond*]. In *Redmond*, *ibid* at para 80, the Alberta Court of Appeal applied the benefit-burden test articulated in *Alberta Government Telephones*, *ibid*, and determined that there was sufficient nexus between the benefit “offered by the utilization of the land titles system and the burden imposed by [the non-recourse provision]” that the Crown agent had waived its immunity by taking advantage of registration under the Torrens system.

<sup>83</sup> Alberta Law Reform Institute, *supra* note 14 at 144; Kawanami, *supra* note 28 at 1.

to them: education initiatives aimed at the borrower; disclosure requirements aimed at the lender; and revising the scope of borrowers subject to protection. This section considers each of these options.

## A. EDUCATION INITIATIVES FOR BORROWERS

Initiatives that aim to empower borrowers through education are informed by two separate, but related, movements: public legal education and financial literacy. Public legal education gained traction in Canada starting in the 1960s, and aims to provide people with legal education so that they can “engage with the law as a source of real help in managing their affairs and in pursuing justice for themselves and others.”<sup>84</sup> Financial literacy initiatives gained popularity in Canada in the years following the global financial crisis of 2008, which was attributed, at least partly to “individuals not understanding the terms of the subprime mortgages to which they had agreed, leading to an unexpectedly high number of defaults.”<sup>85</sup> The federal government appointed a Financial Literacy Task Force in 2009, which made 30 recommendations about how the federal government could implement a national strategy “to strengthen the knowledge, skills and confidence of Canadians to make responsible financial decisions.”<sup>86</sup>

Albertan homeowners facing mortgage enforcement proceedings can access a number of different sources of information about their rights and obligations. In the months following the start of the COVID-19 pandemic, Judith Hanebury led a series of initiatives to address the expected increase in mortgage enforcement proceedings. She had recently retired from a position as a Master of the Alberta Court of Queen’s (now King’s) Bench (a position since re-named to Applications Judge). One of these new initiatives was a guided website, hosted by the Centre of Public Legal Education Alberta (CPLA).<sup>87</sup> Debtors who use the guided website are given the option of indicating that they are behind on their “mortgage and other bills” or just “behind on [their] bills.”<sup>88</sup> Those who indicate the former will be provided with a referral to a *pro bono* program and a list of 11 resources, one of which deals with foreclosures.

<sup>84</sup> Public Legal Education Association of Canada, *The Impacts of Public Legal Education in Canada: Research Report* (Ottawa: Department of Justice Canada, 2014) at 10.

<sup>85</sup> Gail E Henderson, “Securities Regulators and Investor Education” in Ben-Ishai, *Dangerous Opportunities*, *supra* note 57, 65 at 66. See also Toni Williams, “Empowerment of Whom and for What? Financial Literacy Education and the New Regulation of Consumer Financial Services” (2007) 29:2 *Law & Pol’y* 226 at 238–42, describing pre-2007 development in financial literacy in Canada.

<sup>86</sup> Canada, *Report of the Recommendations on Financial Literacy: Canadians and Their Money: Building a Brighter Financial Future*, Catalogue No F2-198/2011E-PDF (Ottawa: Task Force on Financial Literacy, 2010) at 4, online: <publications.gc.ca/collections/collection\_2011/fin/F2-198-2011-eng.pdf>.

<sup>87</sup> Hanebury, *supra* note 63 at 23; Zena Olijnyk, “University of Calgary Law School Launches Program to Aid Albertans Facing Serious Debt or Bankruptcy” (8 October 2020), online: <canadianlawyer mag.com/resources/legal-education/university-of-calgary-law-school-launches-program-to-aid-albertans-facing-serious-debt-or-bankruptcy/334035>; “Alberta Debtor Support Project Launched” (26 October 2020), online: <law society.ab.ca/alberta-debtor-support-project-launched/>; a second prong of the program was a project to provide debtors with free legal assistance, initially housed at the University of Calgary’s Public Interest Law Clinic and moved, in the summer of 2022, to the Edmonton Community Legal Centre: “News” (28 June 2022) online: *Law Society of Alberta* <myemail.constant contact.com/Practice-Advisors--Summer-Months--New-Mentor-Moment-Available--Court-Announcements--Consumer-Debt-Negotiation-Project-Made-Perma.html?soid=1127621477491&aid=xh8lyY059\_E>.

<sup>88</sup> “Help with Debt Alberta,” online: <cplea.ca/help-with-debt-alberta/?ans=courtno>.

The foreclosure resource, to which homeowners are directed by the guided website, is an 8-page brochure, prepared by CPLEA, that provides an overview of the mortgage enforcement process. The brochure does not explicitly set out the statutory redemption periods, but it indicates that a borrower may be given time to redeem the mortgage if they have an ability to pay it. It also indicates that borrowers can ask the court for more time. On the second-to-last page, the brochure addresses the question: “Once the property has been foreclosed, do I owe the lender money?” The brochure responds that the borrower’s liability will depend on whether or not the mortgage was insured.<sup>89</sup> The brochure does not indicate that the non-recourse provision might apply to other secured loans.

If a borrower facing financial difficulty turns to the internet for advice, they may find it difficult to determine the scope of protections to which they are entitled. The results a person will find when using an internet search engine will vary according to a myriad of factors including what search terms they use, their past search history, their location, and their browser settings.<sup>90</sup> By way of an example, consider the resources a borrower might discover if they use the popular search engine “Google,” with search terms “mortgage Alberta default.” When such a search was conducted in September 2022, CPLEA’s brochure was the fourth result. Other results included three blogs by mortgage brokers, four by lawyers, a data set on mortgage delinquency rates by the CMHC and a 2020 article in CPLEA’s magazine *Law Now* by Judith Hanebury detailing the then-new debtor support initiatives. With respect to redemption periods, half of the results mentioned them explicitly, two referred to them obliquely and none of them mentioned the default redemption periods.<sup>91</sup> Only half of the ten results raised the issue of deficiency judgments. Four of the ten (including the CPLEA brochure) explained that borrowers with insured mortgages are liable for a deficiency. None of the resources indicated that the non-recourse provision might apply to other secured loans.

All of these sources provide some useful legal information on mortgage enforcement proceedings, but many do not fully detail the scope of protections available to homeowners. It should be acknowledged that providing information on the scope of the protections in a method that is accessible to laypeople is difficult because the governing law is complex. Additionally, these sources cannot answer the question of whether a specific homeowner is entitled to statutory protections because that depends on whether the homeowner’s mortgage falls into one of the excluded categories.

## B. DISCLOSURE REQUIREMENTS ON LENDERS

To assess what protections they are entitled to, homeowners need to know what type of mortgage they hold. Statutory disclosure requirements ensure that homeowners are provided with this information. There are at least three times at which a homeowner can be provided this information: at the time they grant the mortgage; during the course of the lending

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<sup>89</sup> “Foreclosures” (2020), online: <[cplea.ca/wp-content/uploads/ForeclosureGeneral.pdf](http://cplea.ca/wp-content/uploads/ForeclosureGeneral.pdf)>.

<sup>90</sup> “How Results are Automatically Generated,” online: <[google.com/search/howsearchworks/how-search-works/ranking-results/](https://google.com/search/howsearchworks/how-search-works/ranking-results/)>.

<sup>91</sup> The closest mention of the statutory redemption period was one article by an Alberta lawyer which indicated that “any decent amount of equity in the property will get an owner-occupier six more months to bring the property into good standing”: “Mortgage Default and Foreclosure in Alberta” (25 May 2015), online: *Investor Lawyer: Barry C McGuire* <[barrymcguire.ca/2015/05/25/mortgage-default-foreclosure-alberta/](http://barrymcguire.ca/2015/05/25/mortgage-default-foreclosure-alberta/)>.



relationship; and at the time that the lender begins mortgage enforcement proceedings. Disclosure at each of these stages serves slightly different purposes. A disclosure requirement at the time of lending helps the homeowner to understand the nature of the financial obligations they are undertaking. A disclosure requirement that allows a homeowner to ascertain their legal protections during the course of the lending relationship empowers an individual to make informed financial decisions, especially in situations of financial distress. A disclosure requirement when the lender starts enforcement proceedings ensures that the homeowner understands the full scope of the jeopardy they face as a result of the court action.

## 1. DISCLOSURE AT TIME OF LENDING

Disclosure at the time of lending ensures that an individual is making an informed decision about their mortgage obligations before they commit to them. Alberta implemented a disclosure requirement at the time of lending; however, the requirement is no longer in force. After changing the *Law of Property Act* in 2003 to allow for deficiency judgments on high-ratio, insured mortgages, the provincial government took steps to ensure that homeowners with these mortgages were notified of their potential personal liability. Starting on 1 August 2006, a regulation passed pursuant to the *Law of Property Act* required all high-ratio mortgages granted in Alberta to include the following statement, published prominently on the mortgage documents:

This mortgage is a high ratio mortgage to which sections 43(4.1) and (4.2) and 44(4.1) and (4.2) of the *Law of Property Act* apply. You and anyone who, expressly or impliedly, assumes this mortgage from you, could be sued for any obligations under this mortgage if there is a default by you or by a person who assumes this mortgage.<sup>92</sup>

Within four years of coming into force, a consortium of lenders successfully challenged this regulation in *Bank of Montreal v. Hoehn*.<sup>93</sup> The Court held that the regulation was ultra vires and thus inoperative. The *Law of Property Act* empowered the Lieutenant Governor in Council (that is, the provincial cabinet) to pass regulations defining what constituted a high-ratio mortgage.<sup>94</sup> The Court held that the legislation did not delegate power to the provincial cabinet to implement a notice requirement.<sup>95</sup> In the 12 years since *Hoehn* was decided, the provincial government has taken no steps to either re-enact the notice requirement nor to remove it from the regulation, and thus this inoperative provision remains on the books.

Despite striking down the notice requirement, the case of *Bank of Montreal v. Hoehn* also illustrates why such a notice requirement is valuable. The case involved a number of

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<sup>92</sup> *Law of Property Regulation*, *supra* note 68, s 2.

<sup>93</sup> 2010 ABQB 405 at para 128 [*Hoehn*]. In the alternative, the Court would have held that failure to comply with the notice requirement did not absolutely preclude a lender from enforcing a deficiency judgment, but rather a court would determine whether or not the borrower had received sufficient notice of the deficiency in some other way or had suffered some other prejudice as a result of the non-compliance, *ibid* at para 129. See a discussion of the case in Jonnette Watson Hamilton, "A Trap for the Unwary: Assuming High Ratio Mortgages" (16 June 2015), online (blog): *ABlawg* <[ablawg.ca/2015/06/16/a-trap-for-the-unwary-assuming-high-ratio-mortgages/](http://ablawg.ca/2015/06/16/a-trap-for-the-unwary-assuming-high-ratio-mortgages/)>; Taman & Court, *supra* note 19 at 13.

<sup>94</sup> *Law of Property Act*, *supra* note 1, s 50.1.

<sup>95</sup> *Hoehn*, *supra* note 93 at para 61.

borrowers who had received inadequate notice that they were entering into high-ratio, insured mortgages and, after default, took the position that they should be protected from deficiency judgments. For example, two of the borrowers were given commitment letters which referenced an insurance premium, but made no mention of the borrower's liability for a deficiency judgment. A third was presented with a mortgage that had the required statutory language but the language was not prominently displayed. Had the regulation been *intra vires*, the Court held that none of these three borrowers would be liable for the deficiency judgment.<sup>96</sup>

Borrowers are not completely without protection. When a lawyer represents a borrower in a high-ratio mortgage transaction, they are required to advise the borrower about the borrower's potential liability for a deficiency judgment and failure to do so can constitute professional negligence or conduct deserving sanction by the Law Society of Alberta.<sup>97</sup> The best practice is for a lawyer to advise the client of their personal liability flowing from the high-ratio, insured nature of mortgage and to confirm the same in writing.<sup>98</sup> A borrower who is not advised of their liability could sue the lawyer or make a complaint to the Law Society. In some cases, a borrower may be able to escape liability for a deficiency on the basis that they lacked sufficient understanding of the mortgage.<sup>99</sup> However, for many residential borrowers, these legal remedies are only available in theory because of the practical obstacles — time and cost — to pursuing them.

The lack of mandatory disclosure in the mortgage documents also creates a risk for purchasers who assume an existing mortgage: they will be held liable for any deficiency *even if* they do not realize the mortgage is a high-ratio, insured mortgage.<sup>100</sup> This risk is likely to be realized more often as rising interest rates make it attractive for purchasers to assume existing mortgages rather than applying for a new one.<sup>101</sup>

Implementing a disclosure requirement at the time of lending would be straightforward: the legislature could amend the *Law of Property Act* to include a notice provision or to empower the lieutenant governor in council to adopt one through regulations. Students and a staff lawyer from the Public Interest Law Clinic in Calgary prepared a brief on the topic of disclosure at time of lending, and went so far as to draft suggested statutory language for

<sup>96</sup> *Ibid* at paras 113–17.

<sup>97</sup> Holding a lawyer 60 percent liable for a deficiency judgment as a result of his misconduct, including failing to advise the straw buyer in a fraudulent mortgage scheme of her personal liability under a high-ratio mortgage: *Tran v Kerr*, 2014 ABCA 350. For examples of lawyers being subject to discipline as a result of failing to advise clients about their liability under a high-ratio mortgages: see *Law Society of Alberta v Hanson*, 2014 ABL 28; *Law Society of Alberta v Nelson*, 2014 ABL 27 at para 7 (Citation 4).

<sup>98</sup> *Law Society of Alberta v Bondar*, 2014 ABL 56 involved a lawyer who applied to retire after being subject to a number of disciplinary complaints relating to his involvement in fraudulent mortgage transactions. In six separate citations, he was accused by clients of failing to advise them of their liability under a high-ratio, insured mortgage. He noted that it was his practice to provide such advice, but he had no written evidence of the same for any of the citations, *ibid* at Appendix, paras 30–31, 47–48, 60, 73, 86. In *Law Society of Alberta v Fletcher*, 2017 ABL 12 at Appendix 1, para 19, the lawyer admitted that he had his clients sign acknowledgements of their liability under the high-ratio mortgage, but did not always discuss this matter with them and his failure to do so “call[s] into question the service I provided to my purchaser clients.”

<sup>99</sup> Denise Hendrix, “Unusual Defences in Foreclosure Actions” in Hendrix, *Beyond the Basics*, *supra* note 15 at 11–12; Rees, *supra* note 52 at 5–6.

<sup>100</sup> *CIBC Mortgages Inc v Abdallah*, 2016 ABCA 281; *Land Titles Act*, *supra* note 16, s 58; Taman & Court, *supra* note 19 at 9.

<sup>101</sup> Hanebury, *supra* note 63 at 22.

inclusion in the *Law of Property Act* or a revised regulation.<sup>102</sup> As of the writing of this article, no steps have been taken to implement these changes.

## 2. DISCLOSURE DURING THE LENDING RELATIONSHIP

A disclosure requirement during the course of the lending relationship empowers an individual to make informed financial decisions. If they have insufficient funds to pay all their bills, they may choose to prioritize paying a mortgage if there is a risk of a deficiency judgment. That prioritization may not make economic sense for an individual if the mortgage is a non-recourse loan and there is no financial solution that will allow them to keep their home. The possibility of a deficiency judgment might also impact their decision about if and when to commence insolvency proceedings because proceedings commenced too early will not protect them from the deficiency judgment.

Alberta places a periodic disclosure requirement on lenders that a homeowner can take advantage of in advance of a default; however, the information the homeowner is entitled to does not include whether their mortgage is subject to the statutory protections. A borrower can ask for a statement of all amounts outstanding on their mortgage. They are entitled to receive this information, without paying a fee for it, twice a year.<sup>103</sup> Additionally, where the lender alleges they have breached a covenant in their mortgage, the homeowner is entitled to receive a written notice detailing the nature of the breach and the amount outstanding on their mortgage.<sup>104</sup> In either situation, the lender must respond within 30 days of receiving the borrower's request and the lender's enforcement powers are stayed until they respond.<sup>105</sup>

The *Law of Property Act* could be amended to give a homeowner, in either of these circumstances (that is, twice per year and upon default), the right to ask for and receive a written statement from the lender detailing whether or not their mortgage or other secured loan is subject to the statutory protections. The lender would then need to specify its position as to whether the loan is a "personal covenant on a mortgage," a *National Housing Act* mortgage, or a high-ratio, insured mortgage. This would allow homeowners, who are facing financial difficulties, to confirm what protections are available to them. Where they disagree with the lender's characterization of the loan, it would also provide the parties an opportunity to resolve such a disagreement before the lender commences enforcement proceedings, potentially saving costs for both the lender and the borrower.

## 3. DISCLOSURE DURING ENFORCEMENT PROCEEDINGS

A disclosure requirement when the lender starts enforcement proceedings ensures that the homeowner understand the full scope of the jeopardy they face as a result of the court action. Borrowers should be able to ascertain what remedies the lender is seeking by reading the lender's initial pleadings.

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<sup>102</sup> Public Interest Law Clinic, "High Ratio Mortgages: A Trap for the Unwary" [copy on file with author].

<sup>103</sup> *Law of Property Act*, *supra* note 1, s 38(3).

<sup>104</sup> *Ibid*, s 38(2).

<sup>105</sup> *Ibid*, s 38(4). Non-responsive lenders may also be charged with an offence under the *Law of Property Act* and face a fine of up to \$500, *ibid*, s 38(6).

There are two ways that disclosure goes awry in mortgage enforcement pleadings. The lender might under-claim by failing to include a claim for a deficiency judgment in its initial pleadings and only adding it later on. A borrower who misunderstands the magnitude of their personal risk may not take all the steps to protect themselves that they otherwise would have. And the borrower may find it difficult to unwind some of what has occurred later in the enforcement proceedings when the deficiency judgment claim is added. On the other hand, a lender might over-claim, indicating they are seeking a deficiency judgment or an abbreviated redemption period when they are not entitled to either. This over-claiming may occur because a lender provides erroneous instructions to their counsel, or because counsel for a lender uses the same template Statement of Claim for all their mortgage enforcement proceedings. Over-claiming causes borrowers needless angst as they worry about how a deficiency judgment or abbreviated redemption period will impact them. They may expend time and incur costs exploring possible defences that they would not have expended and explored if they were properly apprised of their jeopardy.<sup>106</sup>

Once enforcement proceedings start, the relevant disclosure requirements are contained in the general pleading rules in the *Alberta Rules of Court*. Lenders start mortgage enforcement proceedings by filing a Statement of Claim and personally serving it on the homeowner. Their Statement of Claim must include any relevant facts and specify the remedies, which the lender is seeking.<sup>107</sup> A lender who failed to include a claim for a deficiency judgment could amend their Statement of Claim later, and if the borrower has not defended the action, this amendment can be done without a court order.<sup>108</sup> Lender's counsel is required to serve the amended claim on the borrower and the borrower could respond to defend at that point.<sup>109</sup> Additionally, anytime a lender applies to court for a deficiency judgment, they must provide notice of that application to the borrower.<sup>110</sup> There is no penalty for a lender who overclaims.

New legislation proposed by the Law Reform Commission of Saskatchewan would require the lender to alert a homeowner to the fact that they are seeking a deficiency judgment at two points: in their initial notice of enforcement which is provided to the homeowner 30 days after the default and again, after receiving permission from the court to enforce against the land.<sup>111</sup> While this legislation ensures that homeowners are put on notice at the outset of the proceedings, it does not guard against a situation where a lender includes a claim for a deficiency judgment in their pleadings without any entitlement to actually seek one.

Alberta could implement disclosure requirements specific to mortgage enforcement proceedings by adding to the foreclosure specific provisions of the *Alberta Rules of Court*.<sup>112</sup>

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<sup>106</sup> Kawanami, *supra* note 28 at 3.

<sup>107</sup> *Alberta Rules of Court*, Alta Reg 124/2010, r 13.6(2) [*Rules*].

<sup>108</sup> If the defendant homeowner files a Statement of Defence, the pleadings will close and the lender must apply to court to amend their Statement of Claim: *ibid*, r 3.62. However, if a defendant homeowner does not file a defence to the pleadings, then the pleadings will not close and the lender can continue to amend its Statement of Claim without needing to seek the court's permission, *ibid*, r 3.67.

<sup>109</sup> *Ibid*, r 3.62(2).

<sup>110</sup> *Ibid*, r 6.5(3).

<sup>111</sup> Law Reform Commission of Saskatchewan, *Proposals for a Land Charges Act: Final Report* (Saskatoon: Law Reform Commission of Saskatchewan, 2020) at 81, 85.

<sup>112</sup> See e.g. *Rules*, *supra* note 107, rr 3.4, 3.41, 3.77, 6.5, 9.30–36, 11.23–24.

To address underclaiming, the *Rules* could require a lender to include a claim for a deficiency judgment in their Statement of Claim. They could add one later if they apply to court and establish that the amended claim will cause no prejudice to the borrower. To address overclaiming, the rules could penalize this behaviour. For example, lenders who improperly include a claim for a default judgment could be subject to a costs penalty of a specified amount, similar to the penalty imposed on litigants who file a late Affidavit of Records.<sup>113</sup>

### C. CHANGES TO THE SCOPE OF BORROWERS COVERED BY THE PROTECTIONS UNDER THE *LAW OF PROPERTY ACT*

A third option for addressing the potential for confusion around the scope of protections for individual homeowners in mortgage enforcement proceedings is to revise the scope of the protections. Law reform institutes in both Alberta and Saskatchewan — the only two jurisdictions in Canada with statutory non-recourse mortgages — have considered possible revisions to the laws governing mortgage enforcement proceedings in their provinces: the Alberta Law Reform Institute (ALRI) published a report in 1994<sup>114</sup> and the Law Reform Commission of Saskatchewan (LRC-SK) published one in 2020.<sup>115</sup>

Both institutes suggested that the scope of the borrower protections be revised so that individuals using mortgaged properties as residences would be entitled to enhanced protections, while individuals owning other properties, including commercial and investment properties, would not. In Alberta, such an amendment would build on the provision added to the *Law of Property Act* in 1983, which protected individuals who assumed mortgages from corporate borrowers (often developers) for land that they planned to use as a residence or a farm.<sup>116</sup> This approach also resonates with the reality, set out in the introduction to this article, that losing a *home* has a particularly negative impact on a borrower. The LRC-SK identified other rationales for distinguishing between residential and commercial borrowers when crafting the scope of protections in mortgage enforcement proceedings: commercial actors are more likely to be in a position to hire legal counsel to respond to enforcement proceedings; and commercial actors have greater recourse to insolvency proceedings to stay enforcement proceedings against their real property.<sup>117</sup>

The Alberta and Saskatchewan institutes' specific recommendations with respect to redemption periods and non-recourse mortgages are set out below.

#### 1. REDEMPTION PERIODS

The Alberta proposal recommended retaining the existing redemption period regime, with a few changes. The legislation would provide statutory redemption periods of 12 months for

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<sup>113</sup> Litigants who file a late Affidavit of Records are subject to a costs penalty of two times the amount set out in the costs tariff for filing an Affidavit of Records, *ibid*, r 5.12. The amount set out in the costs tariff varies according to the amounts at issue in the lawsuit. The litigant can avoid the penalty if they show "sufficient cause" for their lateness, a similar exception could be incorporated into a provision penalizing over-claiming.

<sup>114</sup> Alberta Law Reform Institute, *supra* note 14.

<sup>115</sup> Law Reform Commission of Saskatchewan, *supra* note 111.

<sup>116</sup> *Real Property Statutes Amendment Act*, SA 1983 No 2, c 97, ss 2(4)–(5), now contained in *Law of Property Act*, *supra* note 1, ss 43(2), 47.

<sup>117</sup> Law Reform Commission of Saskatchewan, *supra* note 111 at 15, 24.

farmland and six months for residential land. The proposed six-month statutory redemption period for residential land would apply to fewer properties than the existing provision which covers “land other than farm land” and thus includes commercial and investment properties owned by individuals.<sup>118</sup> Under the proposal, courts would continue to have the ability to extend or shorten the periods and no redemption period would be required where the land was abandoned or had been sold while in default or shortly before default occurred. Additionally, no redemption period would be required where the value of the land was significantly less than the amount owing.<sup>119</sup> The proposal did not specify whether the statutory redemption periods would apply to mortgages given under the *National Housing Act* because, as discussed below, ALRI’s board members disagreed more generally on how those mortgages should be treated.<sup>120</sup> The proposal pre-dates the addition of high-ratio, insured mortgages to the *Law of Property Act* and thus does not contemplate what redemption periods would apply to them.

The Saskatchewan proposal does not set out a redemption period, as such, but incorporates fixed and discretionary stays into the enforcement process against residential properties. As a result, every residential borrower would get at minimum 110 days from the time of default to the time of sale, with the court having discretion to add up to eight months and thereby extend the enforcement timeline to approximately a year. These minimum and maximum timelines do not account for delays in the process that are external to the statute, such as a delay in waiting for a court date or a delay in serving a document.

## 2. NON RECOURSE LOANS

Under the Alberta proposal, lenders would not be able to seek deficiency judgments against individuals where the mortgage was secured against property that the individual or one of their family members was using, in good faith, as a residence or a farm.<sup>121</sup> ALRI incorporated a good faith requirement into the provision to prevent someone from moving into a property on the eve of a default to avoid a deficiency judgment.<sup>122</sup> The ALRI Board could not agree on whether deficiency judgments should continue to be allowed against *National Housing Act* mortgages and, again, there was no discussion of high-ratio, insured mortgages, because this category had not yet been incorporated into Alberta mortgage law.<sup>123</sup> Under the proposed reforms, the non-recourse protection would continue to apply to non-purchase money secured loans.<sup>124</sup> Recall at the time of the report the law on the question of Crown immunity was unsettled and ALRI recommended that the Crown should be bound by all mortgage regulations unless specifically excluded from them (for example, the exclusion for mortgages granted under the *National Housing Act*), though it also acknowledged that

<sup>118</sup> *Law of Property Act*, *supra* note 1, s 41.

<sup>119</sup> Alberta Law Reform Institute, *supra* note 14 at 267–71.

<sup>120</sup> *Ibid* at 227.

<sup>121</sup> *Ibid* at 180.

<sup>122</sup> *Ibid* at 176.

<sup>123</sup> *Ibid* at 227. The disagreement between the board members revolved, in large part, around the identity of people borrowing under the *National Housing Act*. Some board members accepted that these borrowers were low income and felt it was unfair to allow judgments against them, while protecting wealthier borrowers. Others were “uncomfortable with the assumption” that people borrowing under the *National Housing Act* were “low and modest-income borrowers” and felt that without the possibility of personal liability, borrowers might too easily walk away from their mortgage obligations (*ibid*).

<sup>124</sup> Alberta Law Reform Institute, *supra* note 14 at 180.

the provincial government may not be able to bind the federal government through legislation.<sup>125</sup>

In Saskatchewan, the proposed protection from deficiency judgments would continue to be restricted to purchase money loans: a lender would be precluded from enforcing a deficiency judgment against a homeowner of residential land *only if* the mortgage secures the purchase price of the land. Two further exceptions would apply to residential homeowners with purchase money mortgages. The lender could still enforce a deficiency judgment if: (1) the homeowner did not negotiate with the lender in good faith or a commercially reasonable manner prior to the mortgage being granted to them; or (2) the homeowner neglected or intentionally damaged the land.<sup>126</sup>

Under the Saskatchewan proposal, a lender who is granted a *non-purchase money* mortgage could enforce a deficiency judgment but would be subject to a truncated limitation period: they would have two years from the date the residential property is sold to collect the judgment. After the two years has expired the deficiency judgment would become unenforceable.<sup>127</sup> This abbreviated limitation period of two years is shorter than the normal limitation period for orders which, in Saskatchewan, is ten years.<sup>128</sup> The court could shorten or extend the period for enforcing a deficiency judgment having regard to considerations including any party's misconduct, whether the mortgage includes harsh or unconscionable terms, and the impact of enforcement on the homeowner and their dependents.<sup>129</sup>

## V. EVALUATION AND RECOMMENDATIONS

All of these proposed solutions need to be considered in the context of how mortgage enforcement law is practised. Homeowners are poorly situated to enforce their rights. They rarely have the funds to hire a lawyer.<sup>130</sup> The complexity of the law makes it difficult for a self-represented individual to navigate it. And there are other barriers preventing homeowners from participating in the legal process. The ALRI observed:

One would expect borrowers to come to court to present their side of the case. Unfortunately, human nature works against logic in this situation. We received strong indication, although anecdotal, that many borrowers fail to come to court because they are embarrassed, intimidated or naive, not because they would not benefit from presenting their case before the court.<sup>131</sup>

Application Judges have an important role to play in safeguarding the rights of borrowers. They oversee the vast majority of mortgage enforcement proceedings. They may “criticize the pleadings from the point of view of intelligibility and compliance with the rules.”<sup>132</sup> They may test the lender's valuation of the property to ensure that the borrower is receiving

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<sup>125</sup> *Ibid* at 216–22.

<sup>126</sup> Law Reform Commission of Saskatchewan, *supra* note 111 at 8, 45.

<sup>127</sup> *Ibid* at 49.

<sup>128</sup> *The Limitations Act*, SS 2004, c L-16.1, s 7(1).

<sup>129</sup> Law Reform Commission of Saskatchewan, *supra* note 111 at 50.

<sup>130</sup> See generally *supra* note 83 and accompanying text.

<sup>131</sup> Alberta Law Reform Institute, *supra* note 14 at 178.

<sup>132</sup> Price & Trussler, *supra* note 13 at 67 [footnotes omitted].

sufficient credit during the enforcement proceedings.<sup>133</sup> Yet their power to ensure fairness in the proceedings is limited by the volume of work they carry out and the absence of homeowners from the proceedings. With the exception of matters set down for special chambers, Application Judges usually do not have time to carefully read the written materials submitted by counsel prior to the hearing and have mere minutes to review it during the hearings. And they rely on homeowners to provide evidence that challenges the lender's narrative of events, for example, if the homeowner believes the lender's appraised value is too low. But homeowners are commonly absent from the proceedings or do not provide evidence in a form that the court can readily accept.<sup>134</sup>

Given the context in which mortgage enforcement law is being practised, how should one evaluate the three possible solutions outlined in the previous section? This contextual background suggests two criteria against which these solutions can be evaluated.

First, the law should be as straightforward as possible, so that laypeople can navigate it. Part of being straightforward means using concepts, like residential use, that align with common understandings, as opposed to technical concepts like high-ratio, insured mortgages. Part of being straightforward means having the applicable legal principles set out in legislation and regulations, so that laypeople can find it and are not caught by surprise by additional complexities, such as the doctrine of Crown immunity. Legislation and regulations also need to be updated so that unenforceable provisions are removed.

Second, the law should be designed to make protections for homeowners the default, because they face significant obstacles to participating in the legal process. Exceptions to the default protections should be limited, because they invite court applications by the lenders. Borrowers are unlikely to respond to such applications, putting the Applications Judge in the uncomfortable position of testing the evidence and legal arguments of lenders during hurried chambers applications.

With these two criteria in mind, what systemic changes could be made to reduce the uncertainty of homeowners navigating the legal complexity of mortgage enforcement proceedings?

Non-profits and mortgage industry professionals have undertaken to make information about the mortgage enforcement process accessible to individual borrowers. There is room to improve the existing offerings. For example, it would be helpful to highlight for borrowers they may be protected against deficiency judgments with respect to loans secured against their property, other than purchase money mortgages. However, education initiatives are, at best, a measure of limited utility, because they download responsibility for navigating an impenetrable area of law on laypeople, rather than addressing the issues that make mortgage enforcement law impenetrable.<sup>135</sup> Educating laypeople about their protections in mortgage

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<sup>133</sup> Alberta Law Reform Institute, *supra* note 14 at 254.

<sup>134</sup> Kawanami, *supra* note 28 at 1 (Court processes “which lawyers take for granted, such as the necessity of having evidence in affidavit form ... a self-represented litigant may not be aware of”).

<sup>135</sup> Scholars have been critical of how financial literacy initiatives download responsibility for consumer protection to individual consumers: see Lauren E Willis, “Against Financial Literacy Education” (2008) 94:1 Iowa L Rev 197 at 200; Williams, *supra* note 85 at 227; Henderson, *supra* note 85 at 75.



enforcement proceedings is complicated because the underlying legal principles are complex. Educating borrowers would be easier if the underlying legal principles were simplified.

Disclosure of key information by the lender should be required at the time of the initial transaction, upon request during the term of the mortgage, and during the enforcement process. The information disclosed should include whether the loan is subject to statutory protections. Without this information, homeowners cannot apply the governing legal principles to their own cases. In Alberta, these initiatives could be implemented by amending the *Law of Property Act* and the *Alberta Rules of Court*.

Both Alberta and Saskatchewan have made a number of suggestions about how the law governing mortgage enforcement proceedings could be reformed. It has been nearly thirty years since the ALRI published its report and much has changed in the mortgage industry in the time since. Alberta needs to systematically re-examine its mortgage law, but in the meantime, the existing statutory protections could be improved.

The Alberta legislature could make the scope of mortgage protections more comprehensible to laypeople by making the statutory borrower protections applicable to all individual homeowners who are using their property as a residence. As outlined above, there are also compelling policy reasons to protect people when they risk losing their home, but these reasons do not apply with the same force when a person risks losing a commercial, investment, or vacation property.

A straightforward mortgage enforcement law would have set, default redemption periods, as opposed to completely discretionary ones. Thus, the approach in Alberta, of a default minimum redemption period, is preferable to the proposed approach in Saskatchewan, which combines some short, mandatory waiting periods with the possibility of a stay of up to eight months. Setting a ceiling as opposed to a floor is likely to benefit the parties that appear in court and argue for a shorter time period, that is, the lenders. Further empirical research on how well redemption periods work could assist policy makers in determining the ideal length of a period: too short will result in needless unhousing of borrowers; too long risks increasing lender's costs with little resulting benefit for the homeowner.

The idea of giving lenders an abbreviated period of time for enforcing deficiency judgments is appealing. It allows those creditors who are able to get judgments — or their insurers — to collect from borrowers who could pay, but strategically default on their mortgage. Debtors without an ability to pay would, in theory, be protected from enforcement by safeguards built into judgment enforcement law including the exemptions for property and income.<sup>136</sup> Unfortunately, these safeguards for debtors will only work in practice if Alberta's judgment enforcement law is updated to ensure safeguards are adequate. Currently, they are not. The exemption values have not been updated since 1995. At that time, the minimum value of monthly employment earnings that a debtor was entitled to retain before their wages would be subject to garnishment was \$800 (\$9,600 per year), and the maximum they could

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<sup>136</sup> Cumming, "Mortgage Obligation," *supra* note 36 at 124.

keep before any further surplus was garnished was \$2,400 (\$28,000 per year).<sup>137</sup> Twenty-seven years later, these amounts remain unchanged and thus their real value has been significantly eroded by inflation.

Whether non-recourse protection should continue to apply to non-purchase money loans raises difficult questions. Ronald CC Cuming criticizes Alberta's approach, observing that it has "resulted in a large amount of litigation in Alberta Courts that has provided little certainty, except in the most obvious cases."<sup>138</sup> He argues in favour of continuing to restrict non-recourse protection to purchase money mortgages in Saskatchewan to avoid some of the complexity that has arisen in Alberta law. At the same time, he also observes that complexity has arisen in Saskatchewan about what constitutes a purchase money mortgage.<sup>139</sup> There are good policy reasons to continue Alberta's practice of making some non-purchase money mortgages into non-recourse loans. It encourages lenders to be judicious in their credit offerings. It also protects borrowers from lingering debts following the loss of a home. As discussed above, the lingering debts can delay an individual's financial recovery and, during a widespread downturn, worsen the overall economic picture.

Saskatchewan has suggested creating an exception to non-recourse protection for borrowers who are dishonest in their mortgage applications. Mortgage fraud is a real concern; however, a fraud-like exception could have some undesirable results. Borrowers may have difficulty responding to allegations of dishonesty in court, even when they have legitimate grounds for doing so. When ALRI listed the different reasons that borrowers do not appear in court, they identified that some borrowers might feel embarrassed or intimidated. One can imagine that an honest borrower who is accused of dishonesty or fraud might feel too overwhelmed with the stigma of the accusations to enter a defence. The borrowers might also not be the only person, or even the primary person, involved in any misconduct. Mortgage brokers or bank employees might have encouraged the borrower to stretch the information they provide on their application form. Or there may be a more organized fraudulent scheme including brokers, bank employees, lawyers, and others.<sup>140</sup> An unrepresented borrower caught up in this complicated web will have a difficult time eliciting the evidence and legal arguments necessary to vindicate their position. To put it succinctly, a fraud-like exception might give sophisticated lenders another avenue for curtailing a borrower's legitimate claim to protection.

## VI. CONCLUSION

In arguing for the modernization of Saskatchewan's mortgage enforcement laws, Cuming noted wryly: "Maybe it is acceptable to retain a system [of law] that is so complex that a full understanding of it is reposed in a few legal 'high priests' who know the secrets on which

<sup>137</sup> *Civil Enforcement Regulation*, Alta Reg 276/1995, s 39. Compare the situation in Alberta to Saskatchewan's income exemptions, which for a single person is the greater of \$1,500 per month (\$18,000 per year) and 70 percent of their net income: see *The Enforcement of Money Judgments Regulations*, RRS c E-9.22 Reg 1, ss 23(7)-(8).

<sup>138</sup> Cuming, "Mortgage Obligation," *supra* note 36 at 128.

<sup>139</sup> *Ibid* at 127-29 (discussing Alberta's legislation), 114-15 (discussing what constitutes a purchase money mortgage).

<sup>140</sup> See e.g. Stephanie Ben-Ishai, "The Shaky Foundations of the Home Capital Crisis" in Ben-Ishai, *Dangerous Opportunities*, *supra* note 57, 1-7, describing a lender who fired 45 of its mortgage brokers after internal investigations indicated they had been involved in falsifying mortgage applications.

important aspects of society are based.”<sup>141</sup> His point was, of course, that this state of affairs is not acceptable. This article has outlined how the situation in Alberta is comparable. Reform is needed. This article has offered some preliminary recommendations for reforms that might be valuable. Yet, even in the absence of reform, this article will provide lawyers and legal intermediaries assisting borrowers with some of the knowledge usually retained by “high priests” of mortgage enforcement law with the result, hopefully, that more homeowners are able to lay claim to the protections to which they are legally entitled.

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<sup>141</sup> Cuming, “The Case for Modernization,” *supra* note 38 at 191.

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