

Foreclosures from the Defendant's Position

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Prepared By:

Helen A. C. Rees

Masuch Albert LLP

Calgary, Alberta

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RESIDENTIAL FORECLOSURES FROM THE DEFENDANT'S POSITION

STATUTORY SOURCES:

SECTION 40 – 50.1 OF *THE LAW OF PROPERTY ACT*, RSA 2000 Ch.L-7 (“**LPA**”)

SECTION 1-2 OF *THE LAW OF PROPERTY ACT REGULATION 89/2004* (“**LPA Regulation**”)

Division 5, Rules 9.30 – 9.36. OF *THE ALBERTA RULES OF COURT 2010*. (“**ARC**”).

WE ARE NOT DISCUSSING:

Farm land.

Corporate mortgages.

TERMINOLOGY:

Mortgagor is the homeowner – she that grants the mortgage over her property to the lender.

Mortgagee is the lender – that which receives the security to secure the money advanced.

CONVENTIONAL AND INSURED MORTGAGES – REVIEW

Basic rule of thumb: If the mortgage is not an insured ‘high ratio’ mortgage then it is a conventional mortgage.

“insured” means insured by under the *National Housing Act (Canada)* or insured by an insurer licensed under the *Insurance Act* to undertake mortgage insurance in Alberta. – see Section 43 (4.1) LPA.

“High Ratio” is a statutorily **defined** term set out in section 1 (2) of the LPA Regulation. If your mortgage does not fall within this definition then it is not an ‘insured *High Ratio* mortgage’ for the purposes of LPA and for foreclosure.

Note: a mortgage issued for more than 75% of the market value of the property is not sufficient to render a mortgagee entitled to a deficiency judgment. It must also be a loan which is CMHC/Insurance Act insured.

Any mortgage not fitting the insured high ratio definition must follow the foreclosure process for conventional mortgages.

CONVENTIONAL MORTGAGES

- A. Fundamental **procedural** differences when compared to Insured High Ratio mortgages:

- a) Right to a Redemption Period – Section 41 (1) LPA – generally 6 months for residential property. Can be reduced down to 1 day or increased as the Court thinks fit. Criteria for this are set out in Section 41 (2) (b). LPA. . Most common example: No equity or property is abandoned. Equity is demonstrated by the Plaintiff’s appraisal. The Defendant may bring its own appraisal (cost circa \$400) or may present an affidavit from a Realtor giving Comparative Market Analysis (“CMA”) for the property and current value.

CMA can be more up to date where house prices are moving.

Some Masters will not give CMA as much weight as an appraisal; the latter being prepared by an expert.

- b) Court MUST attempt sale (judicial sale) – Section 40(2) LPA. This is generally done in one of 2 ways.
- i) Judicial Listing - realtor is appointed by Court to list in accordance with the terms of the listing attached to the Court Order.
 - ii) Judicial Tender process: Advertising either in the newspaper or on the notice board of the Court House.
 - iii) Note circumstances where an attempt at judicial sale may be avoided are set out in Sections (40(3) – where Order Nisi (*now called* Redemption Order) is granted by consent or Section 40(4) where mortgagor consents to a Final Order of Foreclosure.

B. Fundamental **Legal** difference when compared to Insured High Ratio mortgages:

- i) Lenders remedy is limited to sale of the land.

No deficiency judgment is available unless one of the exceptions to Section 40 (1) LPA apply. These exceptions are found in Sections (43-49) LPA which include mortgages granted/held by individuals in relation to non residential land or non farm land mortgages and mortgages given by a corporation where