

# LAW REFORM COMMISSION OF BRITISH COLUMBIA

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## Backgrounder

### LRC 118—Report on Mortgages: Judicial Sales and Deficiency Claims

Date: March 1991

A lender who makes a substantial loan usually wants some form of security for repayment of that loan. A mortgage against the borrower's land is a familiar type of security. If the borrower defaults on the loan, the lender who holds a mortgage has a number of remedies. One remedy allows the lender to take the mortgaged property in satisfaction of the debt. This remedy is called foreclosure. The lender begins the foreclosure process by making a petition to the court. If the lender makes out the case in the petition, the court issues an interim order (called an "order nisi"). The borrower then has a period of time to make good the debt (called a "redemption period"). If the borrower is unable to do this, then the lender may take the property in satisfaction of the debt (this is called an "order absolute"). When a lender obtains an order absolute of foreclosure, it loses the right to pursue its other remedies (such as suing the borrower personally to recover the debt). This holds true even if the value of the mortgaged property is less than the amount that the borrower owed to the lender. Alternatively, instead of obtaining an order absolute at the end of the redemption period, the lender may seek to have the mortgaged property sold under the supervision of the court (this is called a "judicial sale"). When the property is sold on a judicial sale the lender retains its right to pursue other remedies, such as suing the borrower for any amount still outstanding on the debt after the property is sold.

In the years just before this report was published, lenders began to explore a new way to realize upon a mortgage. They would purchase the property themselves on a judicial sale and then sue the borrower for any amount that the borrower still owed. In other words, even though the result is the same in each case (the lender ends up with title to the mortgaged property), the route used to reach this result appears to allow for different answers to the question of whether the lender is able to sue the borrower for any deficiency in repayment of the debt. This report examines if this practice should be allowed, and if so in what circumstances.

The report begins by canvassing a lender's potential remedies when a borrower is delinquent in their payments. It then discusses the options for reform of the law. The Commission considered two routes of reform. The first would be to have a general rule preventing lenders from buying mortgaged property, and then provide a list of exceptions. The other

would be to allow a lender to purchase the mortgage property in any situation but end the borrower's liability after such a sale. Both options are discussed in detail.

The report concludes by recommending that the *Property Law Act* be revised so that no matter how a lender acquires a residential property after a default on a mortgage, the liability of the borrower is brought to an end. Draft revisions to the *Property Law Act* are included.

### **Further Developments**

The report's recommendations have not been implemented.