

**CANADIAN
CENTRE
FOR
ELDER LAW
STUDIES**



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**Consultation Paper
on
Reverse Mortgages**

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Canadian Centre for Elder Law Studies

The Canadian Centre for Elder Law Studies (CCELS) was created by the British Columbia Law Institute as a vehicle to carry forward the Institute's work in relation to legal issues affecting seniors and to enrich and to inform the lives of older people in their relationship with the law. It is a response to the need in Canada for a body that has a dedicated focus on this area to facilitate the development of Elder Law as a coherent body of knowledge.

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British Columbia Law Institute

The British Columbia Law Institute was created in 1997 by incorporation under the Provincial *Society Act*. Its mission is to:

- (a) promote the clarification and simplification of the law and its adaptation to modern social needs,
- (b) promote improvement of the administration of justice and respect for the rule of law, and
- (c) promote and carry out scholarly legal research.

The Institute is the effective successor to the Law Reform Commission of British Columbia, which ceased operations in 1997.

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I. INTRODUCTION

More and more, Canadians are relying on borrowing to meet their financial needs. A recent study conducted by Statistics Canada noticed a pronounced trend in favour of increased borrowing:¹

Over the past 14 years, there has been a significant run-up in household debt, corresponding with a decline in the saving rate. This is a continuation of a long-term trend in demand for housing and goods and corresponding increased household indebtedness that has reflected demographic demand as well as more relaxed attitudes towards debt on the part of both lenders and borrowers.

The phrase “demographic demand” refers to the idea that a person’s goals in obtaining credit may be driven by age. The borrowing patterns of young people provide the most familiar example of this phenomenon. In general, young people have not had the opportunity to accumulate savings; but they have a high potential to earn income on an increasing scale. They most often seek out credit to enable them to purchase major items of property, such as cars, furniture, appliances, and houses. Lenders extend them credit on the strength of their ability to earn income.

It is widely known that the fastest growing demographic group is not young people—it is senior citizens. When senior citizens apply for loans their goals are often the mirror image of those of younger people. Many senior citizens own major assets. They often own real estate outright—unencumbered by a mortgage; and they have often seen the value of their real estate rise considerably since it was purchased. Due to retirement, though, senior citizens’ incomes are diminished.

Lenders have noticed these differing needs of borrowers based on age. They have begun to develop loan products to cater to the needs of older as well as younger people. This Consultation Paper will examine one product that is aimed at senior citizens—the reverse mortgage.

The aim of this Consultation Paper is to garner readers’ opinions on whether the law requires reform to regulate reverse mortgages adequately. In the chapters that follow, this Consultation Paper will discuss what reverse mortgages are, what common complaints about them exist, how British Columbia regulates them, and what options for reform of the law are most promising. As a means of approaching the topic, this Consultation Paper will begin by considering the example of a hypothetical older couple.

1. *Recent Trends in Household Net Worth*, online: Statistics Canada <<http://www.statcan.ca/english/freepub/13-605-XIE/2003001/chronology/2004networth/index.htm>> at 3.

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Mr. A and Mrs. A are a married couple. Both of them are 68 years old; both retired at age 65. Mr. A worked from a young age until retirement as a labourer. Mrs. A's employment history was interrupted for a long period as she cared for the couple's children. She worked part-time in various clerical positions from her late 40s until retirement. Mr. A's and Mrs. A's pensions provide them with a modest income. Their savings are minimal.

Mr. A and Mrs. A own a house that was built in the 1920s and is located in a working-class neighbourhood in east Vancouver. They purchased the house in the late 1960s for \$20 000. The loan that they took out to buy the house has been paid off. They have clear title to the house. Apart from the house and a 10 year old car, Mr. A and Mrs. A own no major assets.

The house has risen considerably in value since Mr. A and Mrs. A purchased it. It is currently valued at \$300 000. The house's increase in value is entirely due to the general appreciation in real estate prices across the lower mainland since the late 1960s. In fact, the house is in need of repair. Its condition is becoming a source of anxiety for Mr. A and Mrs. A.

Mr. A and Mrs. A have always dreamed about travelling across North America in a recreational vehicle. They hoped to spend their early retirement fulfilling this dream. However, their current income will not permit them to do it. They decide to borrow the money they need to fulfil their goals.

Mr. A and Mrs. A discover that there is a large number of ways to borrow the funds they need. They find the choices to be baffling, as neither has much experience in evaluating financial products. They become attracted to a product called a "reverse mortgage" because it appears to be a way to free up the equity in their house and because it does not require them to make periodic payments. They complete the application procedure for the reverse mortgage, which includes an appraisal of their house. Mr. A and Mrs. A are told that they are eligible to borrow \$80 000, with interest at an annual rate of 7.25 percent, compounded semi-annually. They agree to borrow that amount.

Mr. A and Mrs. A use \$25 000 from the proceeds of the reverse mortgage to purchase a used recreational vehicle. They also use \$5000 to begin making repairs to their house. They invest the remaining \$50 000 in an annuity, which gives them approximately \$325 per month in income. The payments from this annuity supplement their pension income and enable them to travel.

Ten years after they enter into the reverse mortgage, Mr. A and Mrs. A, now 78, decide that they wish to move. They have found it difficult to keep their home in proper repair and wish to move to a smaller, more manageable property. They are informed that the reverse mortgage will come due when they complete the sale of their house. They are also informed that they owe slightly more than \$160 000, or double the amount that they borrowed. This surprises Mr. A and Mrs. A. Their

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home has not appreciated greatly in value. Mr. A and Mrs. A are not sure that the amount they will receive from its sale will enable them to purchase the property they want, after the reverse mortgage has been paid off.²

There are many ways for the law to regulate transactions such as the one involving Mr. A and Mrs. A.³ This Consultation Paper will primarily focus on one method of regulation: enacting legislation to provide enhanced disclosure rights to borrowers in reverse mortgage transactions. It is the tentative position of this Consultation Paper that increased disclosure is needed as a response to the special qualities of reverse mortgages.

II. WHAT IS A REVERSE MORTGAGE?

A. Introduction

Fundamentally, a reverse mortgage is a type of loan secured by a mortgage of real estate. The main differences between a reverse mortgage and a conventional mortgage involve eligibility for the loan and repayment terms. Reverse mortgage lenders only offer their product to senior citizens. Reverse mortgages do not require the borrower to make any payment on account of the principal or interest accruing on the loan until the entire balance is due. These qualities provide the “reversal” implied in the name “reverse mortgage.” Under a conventional mortgage, a lender advances funds to a borrower. Typically, these funds are applied to the purchase of real estate (although they may be used for other purposes). The borrower is obliged to make periodic payments on account of the principal and interest owing. For the lender, the borrower’s ability to make these periodic payments is of prime importance; for the borrower, the loan is necessary to buy the real estate. Under a reverse mortgage, the real estate to be mortgaged has already been purchased and any financial charges on title to it have been discharged. The borrower is not expected to make periodic payments, or any payments, until the loan comes due. For the lender, the value of the mortgaged property is paramount; for the borrower, the loan is obtained to supplement income or to enable purchases of assets other than the mortgaged property.

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2. This example was inspired in part by Jennifer Aitkens, “A Sobering Look at Home Equity Conversion” *Canadian MoneySaver* 21:2 (February 2002) 8, online: Canadian MoneySaver <http://www.canadianmoneysaver.ca/article_retrieve.aspx?article_id=203>. The calculation of the amount Mr. A and Mrs. A owe after ten years relies on “the rule of 72,” which Ms. Aitken describes at 8 as “. . . an arithmetic shortcut that tells you how many years it will take for an amount of money to double at a given rate of growth” ($72/7.25 = 9.93$). The precise amount Mr. A and Mrs. A will owe is \$163 072.55. In order to retain the simplicity of the example, no attempt has been made to account for non-interest charges or for changes in the house’s value or in the interest rate during the 10 year period.
 3. For example, there is existing legislation restricting unconscionable practices in consumer transactions and limiting the rate of interest that a lender can charge. See *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, sections 7–10; *Criminal Code*, R.S.C. 1985, c. C-46, section 347. As there is no evidence of such abusive practices being used in reverse mortgage transactions in British Columbia, this Consultation Paper will not concern itself with unconscionability or criminal rates of interest.
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British Columbia does not have legislation establishing a legal definition of reverse mortgage. As can readily be appreciated, although the basic structure of a reverse mortgage is well established, there can be some differences in detail. Our discussion, therefore, is not focussed on a single model of the reverse mortgage, but will also examine some familiar variations.⁴

B. Eligibility

In order to grant a mortgage a borrower must own real estate. This limit to eligibility is common to all mortgages. A further restriction on eligibility applies only to reverse mortgages. Reverse mortgages tend to be limited to people who are 62 years old or older. Where this age limit is not established by law,⁵ the dynamics of the transaction appear to dictate it. Since reverse mortgages are repaid when the loan comes due, reverse mortgage lenders do not require a borrower to have the income level necessary to support monthly payments. Further, under most reverse mortgages the loan may not come due until the borrower dies. Lending to younger borrowers could result in reverse mortgages of such a long duration that the effect of compounding interest would invariably cause the amount outstanding under the loan to eclipse the value of its security. The value of the mortgaged property is of the utmost importance for reverse mortgage lenders. The ideal candidate for a reverse mortgage is a person who owns a principal residence unencumbered by a mortgage and who is seeking an income supplement. People who fit this profile tend to be senior citizens. As a result, reverse mortgage lenders restrict eligibility for reverse mortgages to senior citizens.

C. Conditions of Closing

Given the importance of the value of the reverse mortgage borrower's property, reverse mortgage lenders require that potential borrowers obtain an appraisal of their property. The potential borrower must pay for this appraisal. The cost of the appraisal should be borne in mind by borrowers; it will form a non-interest charge that should be factored into determining the overall cost of borrowing under a reverse mortgage.

Some reverse mortgage lenders require borrowers to retain independent legal representation for the reverse mortgage transaction. Others require borrowers to provide a certificate of independent legal advice as one of the closing documents for the loan.

4. Currently, there is one reverse mortgage lender in British Columbia, down from the three that were active in the early 1990s. Even one lender cannot be expected to maintain the details of its reverse mortgages constant over time. This Consultation Paper draws on a variety of sources, including reverse mortgages offered in the United States, to canvas the customary features of a typical reverse mortgage.

5. See e.g. *National Housing Act*, *infra* note 53, § 1715z-20 (b) (1); Mass. Gen. Laws ch. 167E, § 14A (2003), online: The General Laws of Massachusetts <<http://www.mass.gov/legis/laws/mgl/167E-2.HTM>>.

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Reverse mortgage lenders insist on having the first mortgage on title to the borrower's property. If the borrower's title is encumbered by other financial charges, then the borrower will be obliged to use part of the reverse mortgage proceeds, or other funds, to pay out and discharge these other charges.

D. Amount of the Loan

Lenders determine the principal amount of the loan by reference to the value of the house and the age of the borrower or borrowers. Older borrowers are usually entitled to a larger loan. Reverse mortgages have a lower initial loan-to-value ratio than conventional mortgages. The principal advanced tends to fall in a range between 10 percent to 40 percent of the value of the mortgaged property. Of course, as interest accrues over time, this ratio will become higher.

Borrowers may choose to have the principal advanced in a lump sum or periodically over the term of the loan. A popular choice effectively combines these two options: borrowers receive a lump sum and invest all or part of it in an annuity, which pays borrowers income periodically. Reverse mortgage lenders that do not offer annuities themselves will often facilitate their purchase for borrowers.

E. Interest

The interest component of reverse mortgages is usually pegged to an external rate. For example, one lender charges interest at a rate of 4.75 percent above the one-year Government of Canada Treasury Bill rate, as it is set by the government from time to time. The lender "resets" its interest rate each year to account for variations in the underlying Government of Canada Treasury Bill rate. This method of charging interest is not unique to reverse mortgages.

A key feature of reverse mortgages that may escape some borrowers is that reverse mortgages are rising debt loans. Since borrowers are not making periodic payments they are not reducing the amount of interest accruing on the loan. As that interest is regularly compounded (usually semi-annually), the amount outstanding under the loan can grow to be quite large, as the borrower ends up paying interest on the accumulating interest.

F. Taxes

The money that senior citizens receive from a reverse mortgage is characterized as proceeds from a loan. As is the case for all loans, this money is not taxable under the *Canadian Income Tax Act*.⁶

6. R.S.C. (5th Supp.), c. 1.

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Reverse mortgage borrowers continue to be the registered owner of the mortgaged property. This means that they are fully liable for property taxes.

G. Term of the Loan and Repayment

Most reverse mortgage loans are not made for a set term of years. Instead, the reverse mortgage becomes fully due and payable on the occurrence of a specified event. That event is typically the earliest to occur of:

- (1) A certain amount of days (for example, 120 days) after the date of the borrower's death. (If there is more than one borrower, then this period begins to run after the date the last borrower dies.)
- (2) The date on which ownership of the mortgaged property is transferred to another person. (A transfer can be a sale of the property, or another transaction, such as a gift, that vests ownership in someone other than the borrower.)
- (3) The date on which the mortgaged property ceases to be the borrower's principal residence. (Since it is often not a simple task to determine when a person's principal residence changes, the reverse mortgage usually sets out a formula—such as three months continuous absence from the property—in order to determine when this event has occurred.)

Borrowers who wish to prepay the reverse mortgage will usually find their rights to do so restricted. Prepayment of part of the principal borrowed is not permitted. Borrowers prepaying the full amount of principal and accrued interest will have to pay a penalty. The amount of this penalty varies with the date of prepayment. Prepayment five years or later after the date on which the loan is fully advanced is subject to a penalty of three months' interest charges, in accordance with section 10 of the *Interest Act*.⁷ Prepayment on an earlier date is subject to a harsher penalty. Some reverse mortgages grant the right to pay accrued interest at any time without incurring a penalty.

Reverse mortgage lenders tend to look only to the mortgaged property for repayment. Many reverse mortgages limit the recourse that lenders have against borrowers personally. If the agreement provides for this, even if the amount of principal and interest outstanding at the time the reverse mortgage comes due exceeds the value of the mortgaged property, the reverse mortgage lender is not permitted to sue the borrowers personally for the balance. This nonrecourse feature of reverse mortgages effectively caps the amount that borrowers will be required to repay at the value of the mortgaged property.

7. R.S.C. 1985, c. I-15.

H. Default

Reverse mortgages, like mortgages generally, operate to secure repayment of a loan and performance of obligations⁸ by giving the lender enhanced rights if the borrower defaults. As is the case under a conventional mortgage, a default under a reverse mortgage leaves a borrower open to having his or her interest in the mortgaged property foreclosed. Reverse mortgages differ from conventional mortgages with respect to defaults in two main ways.

First, the most common mortgage default is failure to make a periodic payment. Since reverse mortgage borrowers are not required to make periodic payments, as a practical matter they are less likely to default. This does not mean that defaults under a reverse mortgage are impossible. A borrower could fail to repay the loan when it comes due. In addition, a borrower who fails to make a property tax payment or a payment under a subordinate financial charge will, in all likelihood, find that such a failure constitutes a default under the reverse mortgage.

Second, as noted above, reverse mortgages tend to be nonrecourse loans. In a true nonrecourse loan, the borrower has no personal liability to repay the loan or interest on it, and the lender's remedies are confined to foreclosure or sale of the mortgaged property. Some reverse mortgage lenders operate on a true nonrecourse basis, and the mortgage limits their remedies for default to foreclosure. Other lenders provide that, while the original loan and interest on it are nonrecourse, the borrower will be personally liable for other types of charges.⁹ In addition, some reverse mortgages attempt to allow for changes in the value of real estate over time within a cap on the personal liability of a borrower. These lenders limit the borrower's personal liability to the value of the mortgaged property at the time the reverse mortgage comes due, at the time it is sold, or at the time the reverse mortgage is actually paid, whichever is greatest. Since this conception of "value" could exceed the amount received from a sale of the mortgaged property, there is a possibility that a defaulting borrower could have to make up the difference personally.

III. CONCERNS ABOUT REVERSE MORTGAGES

A. Introduction

Few critics of reverse mortgages would go so far as to advocate banning the loan. Reverse mortgages can have a legitimate place among loan products tailored to senior citizens'

8. The obligations that reverse mortgage borrowers are required to perform include payment of property taxes and (where applicable) strata maintenance fees and keeping the mortgaged property insured and in an acceptable state of repair.

9. For example, a reverse mortgage borrower could be personally liable for any amounts that the lender spends to repair damage to the mortgaged property. In addition, borrowers may be personally liable for interest accruing after a default.

needs.¹⁰ Reverse mortgages even have enthusiastic defenders, such as the reverse mortgage borrower who declared “[i]t’s the closest thing I’ve found to getting something for nothing. I don’t know why anyone would question the plan.”¹¹ The impression that one can get something for nothing raises consumer protection concerns for critics of reverse mortgages. These concerns focus on the need for plain and accurate disclosure of the risks of and other information regarding reverse mortgages and for enhanced rights to protect an often-vulnerable class of borrowers.

B. Disclosure of Information

Much of the criticism of reverse mortgages targets financial, rather than legal, issues. Critics point out that, in various ways, the cost of borrowing for a reverse mortgage is greater than for other loan products.¹² Further, the special features of reverse mortgages can obscure this fact, and make it difficult for potential borrowers to compare reverse mortgages to other types of loans.¹³

Commentators frequently point out that reverse mortgages are structured as rising debt loans: since there is no requirement to repay interest periodically, it is added to the principal loan balance and compounded over the term of the loan.¹⁴ As a result the amount owing under the reverse mortgage increases dramatically over time. If borrowers do not repay any of the interest that accrues over the term of the loan (and this would appear to be the case in the vast majority of reverse mortgages), then a reverse mortgage can become a very expensive means of borrowing. The concern is that, at the time they enter into the reverse mortgage, borrowers do not appreciate the effect of compounding interest coupled with no repayment of interest until the loan comes due.

Reverse mortgage loans are repaid in one large payment. This payment may represent a substantial amount of their equity in the mortgaged property. Again, some critics have argued that borrowers fail to appreciate how substantial this payment will be. There is a

10. See *Bain v. Empire Life Insurance Co.*, 2004 BCSC 1577 at para. 80, Tysoe J. (remarking that, while a reverse mortgage transaction allowing for independent legal advice and a cooling off period is not “inherently unconscionable,” it is “an appropriate transaction for a relatively narrow group of people”).

11. This remark is quoted in Mary Beggan, “Reverse Mortgages—Ahead of Our Time” *Canadian Banker* 98:5 (September–October 1991) 44 at 46.

12. See e.g. Nancy Carr, “Reverse Mortgages: Let the Seniors Beware,” online: Wednesday-Night <<http://www.wednesday-night.com/reverse-mortgages.asp>> (21 July 2003); Aitkens, *supra* note 2.

13. See e.g. Manitoba, Legislative Assembly, *Debates* (28 May 2001) (Scott Smith), online: The Legislative Assembly of Manitoba <http://www.gov.mb.ca/legislature/hansard/2nd-37th/vol_036/h036.html>.

14. See e.g. Beggan, *supra* note 11 at 46; United States, Federal Trade Commission, *Reverse Mortgages: Proceed with Care* (2002).

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concern that the size of the payment could effectively lock borrowers into their current residences.¹⁵ This result would occur if the proceeds of a sale of the property, after discharge of the reverse mortgage, would be too low to enable the borrowers to purchase new housing at an acceptable standard. If payment is put off until after death, then the borrower's estate will suffer a corresponding reduction in value.

Borrowers will often use the proceeds of a reverse mortgage loan to purchase an annuity. In these cases, the borrower will almost always end up receiving less in income from the annuity than the borrower (or the borrower's estate) will have to pay out in interest. This result may not trouble borrowers who are interested in receiving income now, rather than preserving assets for the future. However, making a comparison between the present value of an income stream from an annuity and the loss of equity in real estate can be difficult for borrowers without experience in examining financial products.

Some financial planners argue that relying on reverse mortgages is an inferior strategy, when compared to other options and different types of loans.¹⁶ For example, property tax deferral programs can be used to free up funds for day-to-day expenses. Such programs do not involve borrowing.¹⁷ If borrowing is required, then other types of loans should be considered. Secured lines of credit, for instance, can often be obtained at a lower rate of interest. Further, lines of credit tend to encourage borrowing only what is necessary under the circumstances. Reverse mortgages would appear to encourage borrowing the full amount that a borrower is eligible to receive.

Finally, it is unlikely that a borrower who relies simply on promotional material will be able to make meaningful comparisons between reverse mortgages and other types of loans. Promotional material can be informative, up to a point. As with all types of advertising, though, it shows the product in its most favourable light and ignores its shortcomings.

C. Vulnerabilities of Typical Consumers

Reverse mortgages are currently only available to senior citizens. While this is a diverse class of people, it is also a class of consumers that has often been singled out for special consideration in consumer protection law. The most common reasons cited for senior citizens' vulnerability as consumers are age, infirmity, and social isolation. For reverse mort-

15. See Carr, *supra* note 12.

16. One financial analyst has bluntly described the result of many reverse mortgage transactions as follows: "[i]t costs you 2.5 times the value of your home to buy it from the bank when you use a mortgage, and in a reverse mortgage the bank buys it back from you for 10 to 40 per cent. . . ." See Carr, *ibid.* See also Aitkens, *supra* note 2 at 9.

17. Interest will be payable on the taxes deferred: see *Land Tax Deferral Act*, R.S.B.C. 1996, c. 249, section 8.

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gage consumers the declining potential to earn income also contributes to this sense of vulnerability.¹⁸

Financial vulnerability can lead a consumer to believe that a course of action is the only option. Enhanced disclosure can remedy this perception. However, disclosure rights alone cannot make up for the vulnerabilities of certain consumers. These rights require ancillary rights to make them effective.

IV. HOW DOES BRITISH COLUMBIA REGULATE REVERSE MORTGAGES?

A. Introduction

Unlike some other North American jurisdictions, British Columbia does not have a statute that specifically addresses reverse mortgages. Currently, there are a number of provincial or federal enactments that impose disclosure obligations on lenders. Reverse mortgages tend to fall into gaps in coverage of these enactments. This situation will change when part 5 of the *Business Practices and Consumer Protection Act*¹⁹ comes into force. In order to take an accurate picture of how British Columbia regulates reverse mortgages, it is necessary to examine both the law as it currently exists and as it will exist in the near future.

B. The Current Law

A number of existing federal or provincial laws require lenders to disclose information to borrowers before a loan transaction closes. For a variety of reasons, these laws do not regulate most reverse mortgages. The current law is best described as a series of near-misses.

The legislative provisions that come closest to placing a general obligation placed on lenders to disclose information to consumers about a loan transaction appear in part 3 of the *Consumer Protection Act*.²⁰ Part 3 contains British Columbia's current rules governing the disclosure of the cost of consumer credit. These rules require a lender in a consumer credit transaction to provide a borrower with a written statement disclosing, at a minimum, the principal sum, the charges, the cost of borrowing, and the calculation.²¹ The statement must also contain the annual percentage rate of interest applicable to the loan, presented in a

18. See Iain Ramsay, "The Alternative Consumer Credit Market and Financial Sector: Regulatory Issues and Approaches" (2001) 35 Can. Bus. L.J. 325 at 328 (arguing that vulnerable consumers are those who are subject to low income and financial distress and that senior citizens, along with a number of other groups, are more likely than the general population to fall into one of these two categories).

19. *Supra* note 3.

20. R.S.B.C. 1996, c. 69.

21. *Consumer Protection Act, ibid.*, section 41.

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manner that corresponds to the nature of the credit advanced.²² Part 3 of the *Consumer Protection Act* does not apply to mortgages of land, though, and thus does not apply to reverse mortgages.²³

As one commentator has pointed out, “[t]he law of cost of consumer credit disclosure in Canada does not only vary from province to province. It also varies within one province depending on who provides the credit.”²⁴ Banks, credit unions, and other financial institutions must provide borrowers with extensive disclosure of the cost of borrowing.²⁵ Reverse mortgage lenders in British Columbia, though, have typically not been banks, credit unions, or other financial institutions. Therefore, rules aimed at specific credit providers tend not to affect reverse mortgage transactions.

It has been observed that the title of the *Mortgage Brokers Act*²⁶ does not capture the true scope of the legislation.²⁷ The definition of “mortgage broker” in the *Mortgage Brokers Act* is very broad. It includes persons who may not immediately come to mind as mortgage brokers. For instance, a person who “carries on a business of lending money secured in whole or in part by mortgages, whether the money is the mortgage broker’s own or that of another person” is considered a mortgage broker.²⁸ A person who “during any one year, lends money on the security of 10 or more mortgages” is also considered a mortgage broker.²⁹ A reverse mortgage lender could easily fall within one of these categories. However, the disclosure provisions of the *Mortgage Brokers Act* are qualified by the requirement that a mortgage broker receive an “additional amount.” Since this “additional amount” appears to be a neutral characterization of a brokerage commission, this requirement limits the application of the disclosure provisions of the *Mortgage Brokers Act* to classic brokerage arrangements. Since reverse mortgages do not typically require a borrower to pay an “addi-

22. *Consumer Protection Regulation*, B.C. Reg. 62/87, section 4.

23. *Consumer Protection Act*, *supra* note 20, section 6.

24. Jean Bédard, “Cost of Credit Disclosure in Consumer Credit” (1997) 16 Nat’l Banking L. Rev. 9 at 9.

25. See e.g. *Bank Act*, S.C. 1991, c. 46, section 450; *Cost of Borrowing (Banks) Regulations*, SOR/2001-101.

26. R.S.B.C. 1996, c. 313.

27. See Bédard, *supra* note 24 at 16, n. 12.

28. *Ibid.*, section 1 “mortgage broker” (a).

29. *Ibid.*, section 1 “mortgage broker” (e).

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tional amount,” most reverse mortgages will escape the disclosure provisions of the *Mortgage Brokers Act*.³⁰

The oldest truth-in-lending measure in Canadian law is contained in section 6 of the federal *Interest Act*.³¹ It requires lenders who secure their loans by taking a mortgage of land to provide borrowers with “a statement showing the amount of the principal money and the rate of interest chargeable on that money, calculated yearly or half-yearly, not in advance.”³² Failure to provide this statement results in no interest being chargeable on the loan. Section 6 does not apply to all mortgages, though. It only applies to mortgages that are repayable by blended payments of principal and interest, on a sinking fund plan, or by an allowance of interest on stipulated repayments.³³ Since reverse mortgages typically do not contain any of these three types of repayment terms, they are not caught by section 6.

C. The *Business Practices and Consumer Protection Act*

Part 5 of the *Business Practices and Consumer Protection Act*³⁴ incorporates the *Cost of Consumer Credit Disclosure Act*³⁵ and represents a new departure in the regulation of consumer credit in British Columbia. Unlike part 3 of the *Consumer Protection Act*, part 5 of the *Business Practices and Consumer Protection Act* expressly applies to mortgages of land.³⁶ Once part 5 comes into force³⁷ it will give reverse mortgage borrowers added protection by allowing them to have access to organized and systematized information about the mortgage they are going to sign.

30. *Ibid.*, section 15 (2).

31. *Supra* note 7.

32. *Interest Act*, *ibid.*, section 6.

33. *Ibid.*

34. *Supra* note 3.

35. S.B.C. 2000, c. 13, which was enacted in spring 2000 but was never brought into force. The *Cost of Consumer Credit Disclosure Act* was inspired by the Uniform Law Conference of Canada’s *Uniform Cost of Credit Disclosure Act* and by the Alberta Law Reform Institute’s *Report on Cost of Credit Disclosure* (ALRI Rep. No. 82) (Edmonton: The Institute, 2000). For a helpful review of the new British Columbia provisions, see Bruce I. Macallum, “British Columbia’s *Cost of Consumer Credit Disclosure Act*” (2002) 60 *Advocate* 519.

36. *Supra* note 3, section 2 (2).

37. Under B.C. Reg. 274/2004, part 5 was scheduled to come into force on 1 January 2005. In December 2004, though, the date of coming into force was changed. Part 5 is now scheduled to come into force on 1 January 2006: see O.I.C. 1194/2004, B.C. Gaz. 2004.II.1248.

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Under part 5, an individual borrower who enters into a credit agreement for primarily personal, family, or household purposes³⁸ will be entitled to receive an “initial disclosure statement” from the lender.³⁹ The information to be provided in the initial disclosure statement varies with the type of credit granted. In most cases, a reverse mortgage would be classified as “fixed credit.”⁴⁰ A reverse mortgage lender will therefore be required to give a borrower a written statement disclosing, at least, the following information:⁴¹

- the effective date of the initial disclosure statement;
- the date on which interest begins to accrue;
- the initial annual interest rate and the compounding period;
- the method of determining the annual interest rate at any time;
- the nature and amount of any charges, other than interest, that are payable or will become payable by the borrower in connection with the reverse mortgage;
- the total of all advances to be made under the reverse mortgage;
- the annual percentage rate;⁴²
- a statement of the conditions under which the borrower may make prepayments, and any charge for prepayment; and
- the circumstances under which the outstanding balance of the loan, or a portion of it, must be paid.

38. *Supra* note 3, section 58 (2).

39. *Ibid.*, section 66.

40. *Ibid.*, section 57 (1) “fixed credit.”

41. *Ibid.*, section 84. This list is an abbreviation of section 84, which has to cover more types of loans than reverse mortgages and therefore contains information that is not relevant in this context.

42. The “annual percentage rate” is calculated by reference to a formula that is prescribed by regulation: *see Disclosure of Cost of Consumer Credit Regulation*, B.C. Reg. 273/2004 (in force 1 January 2006). It is intended to express the total cost of credit as an annual rate of interest. The “total cost of credit” is defined in section 57 (1) to mean “the difference between (a) the payments made or to be made by the borrower in connection with a credit agreement, and (b) the advance received or to be received by the borrower in connection with the credit agreement, disregarding the possibility of prepayment or default.”

The lender will be required to give the initial disclosure statement to the borrower at least two business days before the date on which the borrower incurs any obligations to the lender, unless the borrower agrees to waive this requirement.⁴³ In addition to the initial disclosure statement, the lender must also give the borrower, once every 12 months, a disclosure statement that describes: (1) the period covered by the statement; (2) the annual interest rate at the beginning and the end of this period; and (3) the outstanding balance at the beginning and the end of this period.⁴⁴ If the reverse mortgage is amended, then the lender will be required to give the borrower a further disclosure statement, containing details of the amendment.⁴⁵ The legislation will only establish minimal requirements for the form of these disclosure statements: they must be in writing, contain the information required by the statute, and prominently display that information in a clear and comprehensible manner.⁴⁶ Subject to these requirements, the lender will be able to determine the form of the disclosure statement, and to combine it with other documents such as the loan agreement.⁴⁷

A lender who fails to give an initial disclosure statement or who misrepresents any information in the initial disclosure statement will commit an offence under the legislation.⁴⁸ Further, if the disclosure statement is inconsistent with any information or provision set out in the loan agreement between the borrower and the lender, then the loan agreement is presumed to incorporate the information or provision that is more favourable to the borrower.⁴⁹

V. OPTIONS FOR REFORM

A. Introduction

The Centre's tentative position is that the general cost of consumer credit provisions contained in part 5 of the *Business Practices and Consumer Protection Act* will not adequately respond to the special qualities of reverse mortgages. Specific legislation tailored to these qualities is necessary. A number of other North American jurisdictions have also come to

43. *Supra* note 3, section 66 (3) and (4). A waiver of the notification period will be subject to the conditions set out in section 15 of the *Disclosure of Cost of Consumer Credit Regulation*, *ibid.*

44. *Business Practices and Consumer Protection Act*, *ibid.*, section 85 (1).

45. *Ibid.*, section 87.

46. *Ibid.*, section 67 (1).

47. *Ibid.*, section 67 (2).

48. *Ibid.*, section 189 (3) (a), (b), and (k).

49. *Ibid.*, section 70.

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this conclusion. In Canada, Manitoba recently amended⁵⁰ its legislation governing mortgages in general⁵¹ by adding a new part dealing specifically with reverse mortgages.⁵² In the United States, two federal omnibus statutes contain provisions that regulate reverse mortgages. The *National Housing Act*⁵³ requires reverse mortgage lenders who wish to qualify for mortgage insurance to provide enhanced disclosure and to grant certain ancillary rights to borrowers.⁵⁴ The *Truth in Lending Act*⁵⁵ contains a provision setting out a special regime for disclosing the cost of borrowing under a reverse mortgage.⁵⁶ In addition, a number of American states have enacted legislation that extends obligations similar to those found in the *National Housing Act* to uninsured reverse mortgages and that builds on the disclosure provisions in the *Truth in Lending Act*. All these statutes share several common features. These features provide a starting point for designing British Columbia legislation to address these issues.

B. Enhanced Disclosure

Each North American statute that specifically regulates reverse mortgages contains provisions requiring reverse mortgage lenders to disclose information to reverse mortgage borrowers that is in excess of what typical consumer borrowers receive. Manitoba's statute illustrates how this enhanced disclosure requirement operates. Disclosure is tied into a form that is set out as a schedule to the *Reverse Mortgage Regulation*.⁵⁷ The lender must use a form obtained from or approved by the Manitoba Consumers' Bureau.⁵⁸ If the lender alters any part of the disclosure form, then the altered form is rendered invalid for the purposes of the statute.⁵⁹

50. See *The Mortgage Amendment Act*, S.M. 2001, c. 11.

51. *The Mortgage Act*, R.S.M. 1987, c. M200, C.C.S.M. c. M200.

52. *The Mortgage Act*, *ibid.*, part III. Part III is reproduced in Appendix A, *infra* at 23ff.

53. 12 U.S.C.S. §§ 1701 *et seq.* (Law. Co-op. 1993).

54. See 12 U.S.C.S. § 1715z-20 (Law. Co-op. 2003 Supp.).

55. 15 U.S.C.S. §§ 1601 *et seq.* (Law. Co-op. 1993).

56. See 15 U.S.C.S. § 1648 (Law. Co-op. 2003 Supp.).

57. Man. Reg. 65/2002. The disclosure form is reproduced in Appendix B, *infra* at 29ff.

58. *Ibid.*, section 4.

59. *Ibid.*, section 5.

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The form is made up of twelve parts. All of these parts are descriptive, but the details provided in each part are aimed at different goals. Some of the parts are clearly meant to educate borrowers on how reverse mortgages differ from standard mortgages and on the special rights and remedies that reverse mortgage borrowers have under Manitoba legislation. Other parts identify the lender and the property to be mortgaged. There is also a part recommending that borrowers consider getting legal and financial advice before they sign the reverse mortgage.

Elsewhere, the form requires the lender to describe the mechanics of the loan. The formula used to arrive at the date on which the loan is to be repaid is clearly set out. In addition, prepayment rights and entitlement to statements of account are set out.

The heart of the form consists of disclosure of financial information about the reverse mortgage loan. There is a particular focus on interest costs. Information about the initial interest rate, compounding of interest, revisions of the interest rate, and the amount of interest that accumulates during the first twelve months of the loan is set out in one part. Another part attempts to illustrate the effect that compounding interest over the term of the loan will have on the borrower's equity in the home.

The lender must give a copy of the disclosure form to each borrower under the reverse mortgage loan.⁶⁰ All borrowers must each acknowledge receipt of the disclosure form by signing it before a Manitoba lawyer or a notary public. Signing the acknowledgement does not obligate the borrower to go through with the reverse mortgage loan.

Disclosure requirements under the American *Truth in Lending Act* are similar to those in the Manitoba statute. One small difference is that lenders are required to provide borrowers with a "good faith estimate of the projected total cost of the mortgage . . . expressed as a table of annual interest rates."⁶¹ Financial disclosure under this provision must also include "statements of annual interest rates for not less than 3 projected appreciation rates and not less than 3 credit transaction periods" and a projection of the total cost of the reverse mortgage, including all associated costs and charges.⁶² The information must be provided in a

60. *The Mortgage Act*, *supra* note 51, section 33 (2).

61. *Supra* note 56, § 1648 (a).

62. *Ibid.*, § 1648 (a) (1) and (b).

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prescribed form.⁶³ Disclosure must be provided at least three days before the borrower signs the reverse mortgage.⁶⁴

These enhanced disclosure provisions have many advantages over the general provisions that will come into force under part 5 of the *Business Practices and Consumer Protection Act*. The information lenders are required to disclose specifically addresses the special features of reverse mortgages. The additional information set out in the disclosure form gives potential reverse mortgage borrowers a clearer picture of the transaction that they are about to enter into. Enhanced disclosure of information will lead to informed consumers, which is a desirable result.

C. Cooling-Off Period

Reverse mortgage legislation tends to contain a number of rights for borrowers that are ancillary to and that support the enhanced disclosure provisions. One of these rights is a cooling-off period. The usefulness of enhanced disclosure of information is curtailed if that disclosure is made at the time the borrower becomes obligated to go through with the loan. A cooling-off period gives borrowers time to consider the disclosed information.

Manitoba's statute sets out a seven-day cooling-off period.⁶⁵ The cooling-off period actually embraces seven clear days: it begins to run on the day after the day on which the last borrower signs an acknowledgement of receipt of the prescribed disclosure form and remains in effect for seven days. The earliest day on which a borrower may sign the reverse mortgage, or any other document assuming obligations under the reverse mortgage, is the day after this seventh day.⁶⁶ If a borrower signs a reverse mortgage before the end of this cooling-off period, then the borrower is under no obligation to accept an advance of funds or to sign a new reverse mortgage and the lender is obliged to return the reverse mortgage document or, if it has been registered in the land title office, to take all steps necessary to effect a discharge at its own expense.⁶⁷ If the lender advances funds in these circumstances, then the borrower's liability under the reverse mortgage is limited to return of the principal

63. 12 C.F.R. § 226.33 (b) (Law. Co-op. 2003 Supp.). The form must be "substantially similar" to the model form set out at 12 C.F.R. Part 226, Appx. K (Law. Co-op. 2003 Supp.).

64. *Supra* note 56, § 1648 (a). The borrower may only waive this notice period in very limited circumstances: *see* 12 C.F.R. § 226.31 (c) (iii).

65. *The Mortgage Act*, *supra* note 51, section 33.

66. *Ibid.*, section 33 (2).

67. *Ibid.*, section 33 (3).

amount of the loan less any fees, penalties, or costs imposed by the lender but not authorized by the statute.⁶⁸

The disadvantage of a mandatory cooling-off period is that it adds time to every reverse mortgage transaction. Increasing the length of the transaction may frustrate some borrowers. For this reason, some jurisdictions allow borrowers to waive the cooling-off period.⁶⁹ An open-ended waiver provision, though, could be abused by including a waiver of the cooling-off period in standard-form reverse mortgage documents. As well, reverse mortgage loans are not home purchase loans. Timing is therefore less of a concern in a reverse mortgage, which undercuts the argument in favour of allowing a borrower to waive the cooling-off period. The Manitoba provision encourages borrowers to consult fully with advisers and family before entering into a reverse mortgage. This result is desirable.

D. Counselling

Disclosure of information is of little assistance to consumers who lack the expertise to evaluate that information. For this reason, many reverse mortgage statutes encourage or require borrowers to receive counselling from an independent source.

Manitoba encourages borrowers to obtain independent legal and financial advice on the reverse mortgage. This encouragement is provided in a warning printed on the disclosure form and in a requirement that the borrower acknowledge receipt of the disclosure form by signing it before a lawyer or notary public. The hope is that borrowers will take the opportunity to obtain legal advice on the substance of the reverse mortgage, rather than simply having their signature notarized. Nothing in the legislation requires borrowers to obtain legal advice on the reverse mortgage, though.

American legislation tends to take a different approach to counselling. Rather than recommending legal advice, American statutes focus on providing financial counselling. The *National Housing Act* makes independent third party financial counselling a condition of being eligible for mortgage insurance.⁷⁰ The legislation also sets out a list of topics that must be discussed at a counselling session, and obliges the American federal government to ensure that a network of trained counsellors exists.⁷¹ Some states have adopted mandatory financial counselling for all reverse mortgages.⁷²

68. *Ibid.*, section 33 (4) (a)–(d).

69. *See e.g. supra* note 63.

70. *Supra* note 54, § 1715z-20 (d) (2) (B).

71. *Ibid.*, § 1715z-20 (f).

72. *See e.g.* Mass. Gen. Laws ch. 167E, *supra* note 5, § 14A; N.C. Gen. Stat. § 53-270 (6) (2003), online:

The American approach gets to the heart of many of the concerns about reverse mortgages, which relate to financial, rather than legal, issues. However, in order to make this approach work, a network of financial counsellors must be in place. The American legislation provides for the creation of such a network. The costs of creating such a network in British Columbia may rule out this option. In addition, some borrowers could view mandatory counselling as paternalistic. The Manitoba legislation strikes a better balance between promoting counselling and retaining decision-making authority in the borrower's hands.

E. Penalties and Administrative Offences

All reverse mortgage legislation establishes penalties for breach of the lender's disclosure and ancillary obligations. Under the Manitoba statute, for example, if a lender advances funds before the end of the cooling-off period, without first providing the borrower a disclosure form, or after providing the borrower with a disclosure form containing a material error or omission, then the terms of the loan are amended in a manner that deprives the lender of the right to charge interest on the loan.⁷³ Such a lender also commits a quasi-criminal offence under the legislation and is subject to an administrative penalty.⁷⁴ The legislation also gives borrowers the right to apply to court for a determination if the lender complied with its disclosure obligations. If the court determines that the lender did not, then it may make an order varying the terms of the reverse mortgage in any manner that would be just and reasonable.⁷⁵

F. Regulation and Enforcement

Expanded consumer rights are meaningless in the absence of enforcement. However, consumers often are not able to enforce their rights effectively through the courts. For this reason, government agencies sometimes take the lead in the enforcement of consumers' rights.

Manitoba gives its Consumers' Bureau the authority to investigate complaints involving reverse mortgages and to prosecute offences committed under the statute. The Consumers' Bureau is also authorized to mediate disputes involving reverse mortgage loans. Some American states place even more emphasis on government regulation of reverse mortgages. For example, several jurisdictions require reverse mortgage lenders to submit details of

North Carolina General Assembly <http://www.ncleg.net/Statutes/GeneralStatutes/HTML/ByArticle/Chapter_53/Article_21.html>.

73. *The Mortgage Act*, *supra* note 51, section 33 (4).

74. *Ibid.*, section 36.

75. *Ibid.*, section 34.

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their reverse mortgages to a state regulator for approval before they begin to carry on business in the state.⁷⁶

For British Columbia, the identity of the regulator would have to be considered. A logical choice would be the newly-formed Business Practices and Consumer Protection Authority, which has been incorporated as a non-profit corporation existing at arm's length from the provincial government. Other choices would include the designation of an agency within the government or the creation of new agency specifically to deal with reverse mortgages.

G. Other Enhanced Rights and Remedies

In addition to enhanced disclosure and ancillary rights, legislation governing reverse mortgages often grants borrowers a package of other rights. An example is a right of prepayment, in whole or in part, without penalty at any time during the term of the loan.⁷⁷ Another example is limitation of the lenders' remedies for default to foreclosure.⁷⁸ These provisions appear to have their source in terms that are frequently found in reverse mortgages themselves. The legislation expands a right existing in the marketplace, making it more favourable for borrowers.

VI. QUESTIONS

Readers are encouraged to send in their comments on the issues raised in this Consultation Paper. The Centre is especially interested in determining whether support exists for legislation that will govern reverse mortgages and in hearing opinions on the features of such legislation. To that end, we have posed a series of specific questions, which are set out below.

Question (1) Should British Columbia enact legislation that specifically regulates reverse mortgages?

Question (2) Does Manitoba's legislation provide an acceptable model for legislation in British Columbia?

Question (3) Manitoba's legislation contains the following major provisions:

76. See e.g. Iowa Code § 528.6 (2004), online: Iowa General Assembly <<http://www.legis.state.ia.us/cgi-bin/IACODE/Code2003SUPPLEMENT.pl>>; Tenn. Code § 47-30-103 (2003), online: LexisNexis <http://198.187.128.12/tennessee/lpext.dll/Infobase/2181a/24b25/24b3e?f=templates&fn=document-frame.htm&2.0#JD_47-30-102>.

77. See e.g. Cal. Civ. Code § 1932.2 (a)(2004), online: Official California Legislative Information <<http://www.leginfo.ca.gov/cgi-bin/waisgate?WAISdocID=6700362855+0+0+0&WAISaction=retrieve>>; Colo. Rev. Stat. § 11-38-103 (2003), online: LexisNexis <http://198.187.128.12/colorado/lpext.dll/Infobase/16774/16ad1/16dee/16e03?f=templates&fn=document-frame.htm&2.0#JD_11-38-102>

78. See *The Mortgage Act*, *supra* note 51, section 31 (1).

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- (a) *Enhanced disclosure of information to borrowers, provided by way of a standard form.*
- (b) *A seven-day cooling-off period between disclosure and completion of the reverse mortgage transaction.*
- (c) *Encouragement that borrowers seek independent legal or financial advice, but no mandatory requirement that borrowers act on this encouragement.*
- (d) *Quasi-criminal penalties for lenders who breach their disclosure obligations.*
- (e) *Regulation and enforcement by a government consumer affairs agency.*
- (f) *Express authority for the courts to make orders varying unfair terms in a reverse mortgage.*

Should British Columbia change any of these provisions, if it chooses to enact legislation regulating reverse mortgages? Should any other provisions be added to the legislation?

This consultation paper will form the basis of a presentation to the Centre's first Canadian Conference on Elder Law—"Law Community and Care." The Conference will take place in Vancouver on 29 and 30 October 2005. Details of the Conference may be found at the Centre's website at www.ccels.ca.

The Centre's final recommendations on this topic will take into account the discussion at the Conference. The Conference presentation will be greatly enhanced by thoughtful comments made on this paper. We would be grateful if they could be submitted no later than **31 August 2005**.

Comments may be made by ordinary mail, fax, or e-mail, using the contact information below.

Mail: Canadian Centre for Elder Law Studies
c/o British Columbia Law Institute
1822 East Mall, University of British Columbia
Vancouver, BC V6T 1Z1
Fax: (604) 822-0144
E-mail: ccels@bcli.org

Alternatively, comments may be submitted by completing the online questionnaire at:

<http://www.ccels.ca/revmort.html>

APPENDIX A

Manitoba's Reverse Mortgage Statute

PART III

REVERSE MORTGAGE LOANS

Definitions

29 In this Part,

“borrower” means an individual who borrows money under a reverse mortgage loan and signs a reverse mortgage as a mortgagor, and includes

- (a) an individual who applies for a reverse mortgage loan, and
- (b) after the reverse mortgage is signed, a person from time to time deriving title under the original borrower;

“Consumers’ Bureau” means the Consumers’ Bureau under *The Consumer Protection Act*;

“lender” means a lender under a reverse mortgage loan, and includes

- (a) a person from time to time deriving title under the original lender, and
- (b) a prospective lender;

“minister” means the minister appointed by the Lieutenant Governor in Council to administer this Part;

“person entitled to disclosure” means

- (a) a borrower, and
- (b) an individual whose consent is required under *The Homesteads Act*;

“prescribed” means prescribed by a regulation made under this Part;

“reverse mortgage” means a document under which an individual grants a mortgage, whether statutory or equitable, of real property as security for a reverse mortgage loan;

“reverse mortgage loan” means a loan that is secured by a charge on real property owned by an individual, and under which

- (a) no payment of principal or interest is due before the entire balance of principal and interest is due, or
- (b) the borrower is not required to make periodic payments designed to reduce, from one payment to the next, the balance owing under the loan,

but does not include

- (c) a loan under which no interest is payable,
- (d) a loan where the borrower is required to make periodic payments, at least once every two years, to repay all accrued interest on the loan;

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- (e) a loan that is repayable only on demand, if there is no restriction on when the lender may demand payment; or
- (f) a loan between persons who, in making the loan, are not dealing with each other at arm's length.

Application of this Part

30 This Part and the regulations under this Part apply to every reverse mortgage loan entered into after this Part comes into force, despite any agreement made or waiver given to the contrary before or after this Part comes into force.

Lender's limited recourse

31 (1) A lender may enforce payment of the debt due under a reverse mortgage loan only against the borrower and only through a foreclosure of the mortgaged property or under an order for sale of the mortgaged property made under *The Real Property Act* or by a court of competent jurisdiction.

Borrower's limited liability

31 (2) When a property encumbered by a reverse mortgage is sold or otherwise disposed of, the total liability of the borrower under the reverse mortgage loan at the time of the disposition is the lesser of the balance otherwise owing under the loan and

- (a) the sale proceeds, if the property is sold
 - (i) by the lender, or
 - (ii) by the borrower to a purchaser in good faith for value; or
- (b) the fair market value of the property at the time of the disposition, in any other case.

Application and other fees

32 (1) A borrower is not liable for any fee, cost or penalty charged in connection with a reverse mortgage loan, including an application or processing fee, cost or penalty unless

- (a) the lender has complied with subsection 33 (2); and
- (b) the borrower signs the reverse mortgage.

Refund to borrower

32 (2) If a borrower has paid an amount for which he or she is not liable because of subsection (1), the lender must refund it to the borrower on written demand.

Exception for independent legal and appraisal fees

32 (3) This section does not apply to a fee charged directly to a borrower

- (a) by a lawyer for independent legal advice; or
- (b) by an independent appraiser for an appraisal of the property to be mortgaged.

"Cooling-off period" defined

33 (1) In this section, "**cooling-off period**" means the seven-day period starting on the day after the day every person entitled to disclosure in relation to a reverse mortgage loan has signed, before a person authorized to take affidavits under *The Manitoba Evidence Act*, a statement in prescribed form acknowledging receipt of the prescribed form to be provided to him or her under subsection (2).

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Disclosure required

- 33 (2) A lender must provide, in the prescribed manner, to each person entitled to disclosure, a prescribed form that provides full and accurate disclosure of prescribed information regarding the loan. The prescribed form must be provided at least seven clear days before any borrower signs the reverse mortgage or any other document that obligates a borrower to sign the reverse mortgage.

Mortgage signed before end of cooling-off period

- 33 (3) If a reverse mortgage is signed by a borrower before the end of the cooling-off period,
- (a) the borrower is not obligated to accept an advance of funds under the reverse mortgage loan or to sign a new reverse mortgage after the end of the cooling-off period; and
 - (b) unless funds have been advanced under the reverse mortgage loan, the lender must
 - (i) return the signed mortgage to the borrower, and
 - (ii) if the mortgage or any other document has been registered in a land titles or registry office, take all steps necessary to have the registration discharged at the lender's own cost.

Statutory terms

- 33 (4) Unless a judge orders otherwise under section 34, when a lender advances funds under a reverse mortgage loan where
- (a) the reverse mortgage was signed before the end of the cooling-off period;
 - (b) no disclosure has been given by a lender as required under subsection (2); or
 - (c) there is a material error or omission in the information provided under subsection (2) by a lender;
- the terms of the loan are deemed to be amended as necessary from the time that the funds are advanced, so that
- (d) the total liability of all borrowers under the loan is limited to the unpaid balance of the funds advanced under the loan, less any portion of those funds that was used to pay a fee, penalty or cost for which no borrower is liable because of section 32;
 - (e) the amount calculated under clause (d) is due only
 - (i) when the term of the loan expires, if it is for a fixed term,
 - (ii) on the 120th day after the death of the borrower or, if there is more than one borrower, of the last of them to die, or
 - (iii) when any of the mortgaged property is sold or otherwise disposed of, whichever occurs first; and
 - (f) the borrower may at any time prepay all or any part of the amount calculated under clause (d) without notice, fee or penalty.

Set-off and refund

- 33 (5) A borrower who has paid an amount under a reverse mortgage loan for which he or she is not liable because of subsection (4), may set it off against the balance owing under the loan. If that amount exceeds the balance owing, the lender must refund the excess to the borrower or to his or her legal representative on written demand.

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Order for discharge and costs

- 33 (6) If a lender fails to have the registration of a reverse mortgage or any other document discharged as required by clause (3) (b) or, if subsection (4) applies, when the borrower's liability under the reverse mortgage loan has been fully discharged in accordance with that subsection, a judge of the Court of Queen's Bench may, on summary application by a registered owner of the land affected by the registration,
- (a) order the registration to be discharged; and
 - (b) award costs, on a solicitor and client basis, to the owner.

Application to court

- 34 (1) On summary application by a lender or a borrower under a reverse mortgage loan, or by a borrower's legal representative, to a judge of the Court of Queen's Bench,
- (a) the judge shall determine whether the lender provided disclosure as required under subsection 33 (2);
 - (b) if the judge determines that the lender did not provide disclosure as required under subsection 33 (2), the judge may make an order varying the application of subsection 33 (4) or substituting any other terms or conditions for the loan that in his or her opinion would be just and reasonable if he or she concludes that it would not be just and reasonable in the circumstances for subsection 33 (4) to apply;
 - (c) even if the judge determines that the lender did provide disclosure as required under subsection 33 (2), if the judge is satisfied, having regard to all the circumstances, including whether or not the borrower received independent legal advice, that the terms of the loan are not just and reasonable, he or she may make an order varying the terms of the loan in any manner that in his or her opinion would be just and reasonable in the circumstances;
 - (d) the judge may order the lender to set off against the balance owing under the loan, or to refund to the borrower, any amount paid by the borrower for which he or she was not liable because of section 32, subsection 33 (4) or the judge's order under clause (b) or (c); and
 - (e) the judge may make any order respecting costs or any other order he or she thinks fit.

Onus re disclosure

- 34 (2) In an application under subsection (1), the burden of proof to prove that the borrower was provided with disclosure as required under subsection 33 (2) is on the lender.

Limitation period

- 34 (3) An application under subsection (1) may be brought not later than six years after the registration of a reverse mortgage or other document has been discharged.

Consumers' Bureau

- 35 The director of the Consumers' Bureau or any person acting under the authority of the director is responsible for
- (a) receiving and investigating complaints involving reverse mortgage loans; and
 - (b) mediating disputes involving reverse mortgage loans;

and in performing these duties has the powers, duties and protection given under sections 73 and 92 of *The Consumer Protection Act*, with such changes as the circumstances require.

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Offence

- 36** (1) A person is guilty of an offence who
- (a) fails to provide a borrower with the form required by subsection 33 (2);
 - (b) provides a form required by subsection 33 (2) which contains material errors or fails to disclose information required under that subsection;
 - (c) advances funds under a reverse mortgage loan where the reverse mortgage was signed by a borrower before the end of the cooling-off period;
 - (d) fails to refund an amount to a borrower as required by subsection 32 (2) or 33 (5); or
 - (e) fails to comply with clause 33 (3) (b).

Liability of directors and officers

- 36** (2) If a corporation commits an offence, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in, participated in or permitted the commission of the offence is also guilty of an offence and is liable on summary conviction to the penalties set out in clause (3) (a), whether or not the corporation has been prosecuted or convicted.

Penalty

- 36** (3) A person who is guilty of an offence under subsection (1) is liable on summary conviction,
- (a) in the case of an individual, to a fine of not more than \$20,000. or imprisonment for a term of not more than three months, or both;
 - (b) in the case of a corporation, to a fine of not more than \$50,000.

Limitation period

- 37** A prosecution for an offence under this Part may be commenced not later than one year after the day on which evidence sufficient to justify a prosecution for an offence came to the knowledge of the director of the Consumers' Bureau.

Regulations

- 38** The minister may make regulations
- (a) enlarging or restricting the meaning of "reverse mortgage loan";
 - (b) prescribing for the purpose of subsection 33 (1) the form and content of a statement acknowledging receipt of the prescribed form required by subsection 33 (2);
 - (c) prescribing information to be provided under subsection 33 (2), and the form and manner in which it is to be provided;
 - (d) respecting any other matter the minister considers necessary or advisable to carry out the purposes of this Part.

APPENDIX B

Manitoba's Reverse Mortgage Disclosure Form

REVERSE MORTGAGE DISCLOSURE FORM

THIS DISCLOSURE FORM HAS IMPORTANT INFORMATION ABOUT THE REVERSE MORTGAGE YOU ARE CONSIDERING. THE FORM CONSISTS OF PARTS A TO M. BE SURE YOU READ ALL PARTS.

THE LENDER MUST GIVE A COPY OF THIS FORM TO EACH PERSON WHO SIGNS IT (*excluding witnesses*).

A. SIGN TO SHOW YOU RECEIVED THE FORM

Manitoba's *Mortgage Act* requires that the lender give you this form because you are considering a reverse mortgage. It also requires the lender to give the form to any person whose consent to the mortgage is required under the *Homesteads Act*. This will usually be a spouse or common-law partner who does not own the property that may be mortgaged.

The *Mortgage Act* also requires that the lender give this form to you, and anyone whose consent to the mortgage is required by the *Homesteads Act*, **before** the start of a **seven calendar-day period** (cooling-off period) that must have ended before you sign the mortgage or any other document that requires you to sign the mortgage.

The seven-day cooling-off period does not begin until the day after you and any person whose consent is required under the *Homesteads Act* have signed this form to show that it has been received. Signatures must be witnessed by a Commissioner for Oaths, Notary Public or other person who can take affidavits under the *Manitoba Evidence Act*.

THIS IS NOT A CONTRACT. YOUR SIGNING DOES NOT REQUIRE YOU TO TAKE THE LOAN. IT ONLY SHOWS THAT YOU RECEIVED THE DISCLOSURE FORM.

Borrower (please print name)

Date

Witness (Commissioner for Oaths for Manitoba,
Notary Public, etc.)

Signature of Borrower (y/m/d)

Date

Borrower (please print name)

Date

Witness (Commissioner for Oaths for Manitoba,
Notary Public, etc.)

Signature of Borrower (y/m/d)

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THIS IS NOT A CONTRACT. YOUR SIGNING DOES NOT REQUIRE YOU TO TAKE THE LOAN. IT ONLY SHOWS THAT YOU RECEIVED THE DISCLOSURE FORM.

Person Whose Consent is Required
(please print name)

Date

Witness (Commissioner for Oaths for Manitoba,
Notary Public, etc.)

Signature of Person Whose (y/m/d)
Consent is Required

Person Whose Consent is Required
(please print name)

Date

Witness (Commissioner for Oaths for Manitoba,
Notary Public, etc.)

Signature of Person Whose (y/m/d)
Consent is Required

B. WHAT IF I SIGNED THE MORTGAGE BEFORE RECEIVING THE DISCLOSURE FORM?

If you have already signed the mortgage or any other document that obligates you to sign the mortgage and you do not want to continue with the loan, the *Mortgage Act* might allow you to cancel. If you have already spent all or part of the loan funds, the Act might reduce your obligations under the loan. You should call the Consumers' Bureau at 945-3800 or 1-800-782-0067 (toll free in Manitoba) if you want more information.

C. REVERSE MORTGAGES ARE NOT LIKE ORDINARY MORTGAGES

1. A reverse mortgage is a loan based on the equity you have in the property being mortgaged. The loan amount may depend on such factors as the amount of equity you have in the property, your age, and the location and value of the property. As with other mortgages, you owe interest on the money borrowed through a reverse mortgage.
2. Reverse mortgages usually differ from ordinary mortgages in at least two important ways:
 - a) the interest rate is usually higher with reverse mortgages than with short term conventional mortgages; and
 - b) with reverse mortgages, the loan is usually not required to be repaid until the borrower dies or the property is sold.

Since you usually make no payments before the end of the loan, the amount of debt you owe under a reverse mortgage loan will accumulate. Depending on the interest rate and the amount of the loan, the amount of debt can accumulate quickly.

3. A risk with a reverse mortgage loan is that your debt can consume all of your equity in the property. As a result, you or your family may find that equity being counted on for other purposes no longer exists.

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Tables in Part M show how your equity in the property could be affected by the interest rate, the length of the loan you are considering and changes in the value of your property.

4. Unless a judge orders otherwise, you will not have to pay back more than the fair market value of your property as determined when the property is sold or otherwise transferred to a new owner.

D. LENDER

Lender (**prospective mortgagee**)

Address

Contact Person

Phone Number of Contact Person

E. PROPERTY TO BE MORTGAGED

Address

Legal Description

(attach schedule if necessary)

F. FEES AND OTHER COSTS OF THE LOAN

1. Fees and Other Costs the Lender Requires the Borrower to Pay to the Lender or Another Person as a Result of this Loan

(if estimated, place E in the brackets)

- | | | | | |
|-----------------------------|-------------|----------------|--------------------------|-------------|
| a) property appraisal | \$_____ () | paid from loan | paid from another source | \$_____ () |
| b) independent legal advice | \$_____ () | paid from loan | paid from another source | \$_____ () |
| c) application fee | \$_____ () | paid from loan | paid from another source | \$_____ () |
-

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d) Other fees and costs the lender requires the borrower to pay to the lender or another person as a result of this loan (identify each)

(i) _____
(state particulars)

\$ _____ () paid from loan paid from another source \$ _____ ()

(ii) _____
(state particulars)

\$ _____ () paid from loan paid from another source \$ _____ ()

(attach schedule if necessary)

- | | | |
|----|--------------------------------------------------------------------------------|--------------|
| 2. | Subtotal: Fees and Other Costs paid from loan | \$ _____ () |
| 3. | Subtotal: Fees and Other Costs paid from a source of funds other than the loan | \$ _____ () |
| 4. | Total Fees and Other Costs | \$ _____ () |

G. LOAN AMOUNT GOING TO BORROWER AND TOTAL AMOUNT BEING BORROWED

- | | | |
|----|----------------------------------------------------------------------------------------|----------|
| 1. | Actual loan funds you would receive | \$ _____ |
| 2. | Actual amount of funds you would have to repay, excluding interest
(F.2. plus G.1.) | \$ _____ |

H. INTEREST COSTS

1. Interest Rate Changes

a) the interest rate will be equal to **(describe method of determining the interest rate)**

b) the interest rate can change every _____ months

c) the first date when the interest rate will possibly change is

----- **(describe date)**

2. Initial interest rate _____%

3. Interest will be compounded _____ times per year

4. Due to the effect of compounding, the effective initial interest rate is _____% per year

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5. Based on the initial interest rate, the amount of interest that would accumulate during first 12 months of the loan is \$_____

Note: You are subject to interest rate risk. The higher the interest rate, the faster your equity in the property will decrease.

I. DATE LOAN TO BE REPAYED

If you do what you are required to do under the loan, it will not have to be repaid, unless a judge orders otherwise, until the earlier of

_____ days after the date the property is sold by you;

Or

_____ days after the date of your death or, if there is more than one borrower, the death of the last borrower to die.

It is important to note that the debt may have to be repaid before the death of the borrower(s) or the sale of the property by the borrower(s). This can happen if you fail to do what is required under the loan such as fail to pay property taxes or insurance or fail to maintain the property in good condition.

J. EARLY REPAYMENT

1. Partial prepayments of the loan are permitted _____ yes _____ no
(if partial prepayments of the loan are permitted, indicate any conditions)

2. If the loan is prepaid in full, there is a prepayment penalty _____ yes _____ no
(if there is a penalty, state how it is determined)

3. Prepayment of accumulated interest is permitted _____ yes _____ no
(state any conditions)

K. STATEMENTS OF ACCOUNT

1. The lender will give you statements of account at no charge every _____ months.

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2. The statements will include
- a) interest rate
 - i) current yes no
 - ii) all rates since last statement yes no
 - b) amount of loan yes no
 - c) total amount owed as of date of statement yes no
 - d) amount of any prepayments since last statement
 - i) interest yes no
 - ii) loan yes no
3. Borrower can request a statement of account at any time yes no

(state any conditions) _____

4. Section 25 of Manitoba's *Mortgage Act* gives you the right to request a statement of account once every 12 months or whenever you need one to pay off the loan or sell the property. The lender cannot charge you for the statement.

L. CONSIDER GETTING ADVICE

1. Review this disclosure document carefully.
2. This disclosure document is not a contract and does not contain all of the details of the mortgage you are considering.
3. It is strongly recommended that you talk to your lawyer about this reverse mortgage before you sign the mortgage or any other document that requires you to sign the mortgage.
4. It is also recommended that you talk to someone employed by a bank, credit union or other financial institution or an accredited financial advisor to make sure a reverse mortgage is the best option for you.
5. You might also want to talk to a family member or friend about this reverse mortgage.

M. EFFECT OF INTEREST RATE, LENGTH OF LOAN AND PROPERTY VALUE ON YOUR EQUITY IN THE PROPERTY

Tables I and II show how the interest rate, length of loan and changes in property value could affect the amount of equity you have in your property.

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TABLE I: INITIAL INTEREST RATE

Table I assumes that the interest rate does not change from the initial rate of _____% (from H.2.). Table I shows how the amount of equity you have in the property is affected by the length of the loan. It also shows what can happen if the value of your property did not increase or increased by 1.0% per year.

- (a) Property Value (land and buildings) as per
 i) most recent property tax bill \$ _____
 or
 ii) most recent appraisal by an accredited appraiser \$ _____
 (b) Amount of Loan _____
 (c) Estimated Equity [(a) minus (b)] _____
 Interest Rate (from H.2.) _____

End of Year	Amount Owed (A)	Assume Property Value Does Not Change		Assume Property Value Increases by 1.0% per year	
		Property Value (B)	Equity Remaining (B) minus (A)	Property Value (C)	Equity Remaining (C) minus (A)
1.2346e+16					

IT IS IMPORTANT THAT YOU UNDERSTAND THAT THE INFORMATION IN TABLE I IS BASED ON ASSUMPTIONS. BEFORE YOU HAVE REPAID THE LOAN, INTEREST RATES COULD HAVE INCREASED BY MORE THAN THE AMOUNT SHOWN IN THE TABLE OR THEY COULD HAVE DECREASED.

SIMILARLY, THE VALUE OF YOUR PROPERTY MAY HAVE INCREASED BY MORE THAN THE AMOUNTS SHOWN IN THE TABLE, OR IT MAY HAVE DECREASED. A DECREASE IN THE VALUE OF YOUR PROPERTY WOULD CAUSE YOUR EQUITY TO DECREASE TOO.

THE FIGURES ARE EXAMPLES TO SHOW YOU WHAT COULD HAPPEN AND TO HELP YOU UNDERSTAND HOW A REVERSE MORTGAGE WORKS.

TABLE II: INTEREST RATE THAT IS TWO PERCENTAGE POINTS HIGHER THAN INITIAL INTEREST RATE

Table II assumes that the interest rate is constant at _____% which is two percentage points higher than the initial rate (H.2. plus two percentage points). Like Table I, the information in Table II shows how the amount of equity you have in the property is affected by the length of the loan. As with Table I, the information also shows what can happen if the value of your property did not increase or increased by 1.0% per year.

- (a) Property Value (land and buildings) as per
 i) most recent property tax bill \$ _____
 or
 ii) most recent appraisal by an accredited appraiser \$ _____
 (b) Amount of Loan _____
 (c) Estimated Equity [(a) minus (b)] _____
 Interest Rate (from H.2. plus 2 percentage points) _____

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		Assume Property Value Does Not Change		Assume Property Value Increases by 1.0% per year	
		Property Value (B)	Equity Remaining (B) minus (A)	Property Value (C)	Equity Remaining (C) minus (A)
End of Year	Amount Owed (A)				
1.2346e+16					

IT IS IMPORTANT THAT YOU UNDERSTAND THAT THE INFORMATION IN TABLE I IS BASED ON ASSUMPTIONS. BEFORE YOU HAVE REPAYED THE LOAN, INTEREST RATES COULD HAVE INCREASED BY MORE THAN THE AMOUNT SHOWN IN THE TABLE OR THEY COULD HAVE DECREASED.

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