



**ALBERTA ASSOCIATION OF THE
APPRAISAL INSTITUTE OF CANADA**

**SUITE 245, 495 – 36 ST NE, CALGARY, ALBERTA T2A 6K3
PHONE: 403 207-7892 FAX: 403 207-7857 E-MAIL: abaaic@cadvision.com**

MEMORANDUM

DATED: June 15, 2002
TO: Members of the Alberta Association of the Appraisal Institute of Canada
RE: Forced Sale Price
Motion 7 of AB Assoc AGM March 2002

At the AGM of the AB Assoc AIC held on March 2, 2002, members passed the following Motion:

MOTION 7

That the executive of the AB Association of the Appraisal Institute of Canada retain the services of council to research and advise our members as to our requirement to provide forced sale price (cash and terms) to the court process; and further:

That the membership be advised as to the legal requirements of the need for this service being requested; and further:

That the bar be notified by the executive that the practice of providing this service will be eliminated if not required by case law; and further:

That a budget of up to \$5000 be approved for this initiative.

Dexter Groves/Mike Neville

Carried as amended

The following amendment to Motion 7 was proposed, debated, and carried:

Amendment to Motion 7

That the Provincial Council research the matter with the Masters In Chambers prior to consulting with a lawyer

Cy Hayes/Rick Sliwkanich

Carried

Janet Aspinall AACI was asked to research the matter with the Masters In Chambers. Janet discussed the matter with Al Taylor of Warren Tettensor, who presented the Forced Sale issue to Master Laycock.. Master Laycock agreed that the Forced Sale for Terms is basically a meaningless number. He indicated that the Masters were in consensus on this issue, but indicated

that a clear and concise definition of “Forced Sale Value” should be included with each foreclosure report.

In addition, Francis Price QC was asked to research the question of forced sale price, and provided the following recommendation:

“Appraisers in foreclosure actions should state (i) a market value and (ii) only a “forced sale” value (i.e., what we previously knew as “forced sale for cash value”). Both these values are required by the Court. Appraisers should not provide opinions on “forced sale on terms” unless they are given specific instructions and details as to the proposed “terms”.

(Janet Aspinall noted that the person who inspects swears that the contents of Exhibit A - the appraisal) are true.)

Emanuel Cohen AACI kindly informed council of a report prepared by the AB Association AIC for its members in January of 1985, presenting Proposed Guidelines for Mortgage Foreclosure Appraisals. A complete copy of this report was provided by Roger Beaupre AACI.

Both Francis Price’s report (2002) and the Proposed Guidelines for Mortgage Foreclosure Appraisals (1985) are copied in full below:

FRANCIS PRICE, Q.C. (MARCH 14, 2002)

MOTION: That the Executive of the Alberta Association of the Appraisal Institute of Canada retain the services of counsel to research and advise our members as to our requirement to provide forced sale price (cash and terms) to the court process;
and further: That the membership be advised as to the legal requirements of the need for this service being requested;
and further: That the bar be notified by the executive that the practice of providing this service will be eliminated if not required by case law;

RECOMMENDATION: Appraisers in foreclosure actions should state (i) a market value and (ii) only a "forced sale" value (*i.e.* what we previously knew as "forced sale for cash value"). Both these values are required by the Court. Appraisers should not provide opinions on "forced sale on terms", unless they are given specific instructions and details as to the proposed "terms".

Appraisals in Foreclosure Actions - Market and Forced Sale Values

Kerans J.A. stated in *Nova v. Will Farms Ltd.*:¹

"Value is always a question of fact. Valuation, therefore, is always a matter of evidence."

Requirement for an Affidavit of Value

1 (1981), 31 A.R. 378 at 383 (C.A.).

In foreclosure actions, the burden of proving the value of the land as at the date of the Court application is on the mortgagee.² Rule 687 of the Alberta Rules of Court requires that an affidavit of value must be filed in Court before the application for an order nisi, an order for sale, foreclosure or possession. The affidavit of value must be sworn by an independent appraiser,³ setting out the appraiser's qualifications. The affidavit of value consists of a standard form affidavit, with an appraisal report attached as an exhibit.

Even though the affidavit of value may be dispensed with at the order nisi/order for sale stage, it is necessary to obtain and file an affidavit of value before any order finally disposing of the property.⁴ It is also useful to have an appraisal before advertising the property for sale, in order to obtain an adequate physical description of the property for the sale notice.

Market Value

In preparing an appraisal for a foreclosure action, an appraiser must indicate the "market value" of the property. In *Can. Permanent Trust v. King Art Dev.*

2 *Tucson Properties Ltd. v. Sentry Resources Ltd.* (1982), 22 Alta. L.R. (2d) 44 (M.C.).

3 *Bank of B.C. v. Willowbrook Homes (1964) Ltd.*, unreported, 16 June 1980, Alta. Q.B. No. 8003-05160, *per* Funduk M.C.; *Commerce Capital Trust Co. v. Unican Dev. Corp. Ltd.*, unreported, 7 July 1980, Alta. Q.B. No. 8003-09543, *per* Funduk M.C.

4 *Heritage Savings & Trust Co. v. Market Dev. Ltd.*, unreported, 17 August 1981, Alta. Q.B. No. 8003-26325, *per* Funduk, M.C., *Credit Foncier v. Smilar*, unreported, 7 October 1982, Alta. Q.B. No. 8103-25948, *per* Quinn M.C.

(No. 2),⁵ Laycraft J.A. cited definitions of “market value”, including one then used by the Appraisal Institute. Today, the Appraisal Institute has an even more comprehensive definition of “Market Value”:

“The most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress.

The following conditions are assumed:

No undue pressure on either party
An informed buyer and seller
A reasonable turnover period
Payment consistent with the standards of behaviour of the market.”

5 [1984] 4 W.W.R. 587.

In *Can. Permanent Trust v. King Art Dev*, the Court continued that the appraiser should give an opinion as to the length of time anticipated for the property to sell at that price. What is considered the normal time to achieve market value will vary depending on the type of real estate, the market and the economy in which it is to be offered for sale. In a buoyant economy, the normal sale time will be considerably shorter than in a depressed economy.

On application by the plaintiff for a *Rice* Order (an order selling the mortgaged land to the plaintiff), the Court requires that the plaintiff purchase the property at market value, unless there are special considerations.⁶ In *Manufacturers Life Ins. Co. v. Daon Dev. Corp.*,⁷ the Alberta Court of Appeal gave appraisers some guidelines. The “fair value” for the land should be based on “market value”, taking into account factors such as the anticipated length of time to sell and the available market:

In *King Art*, this court recognized that in considering an application for a Rice order, the court must establish a fair value for the lands.

Various methodologies may be employed to establish the fair value. The appraiser has various techniques available to assist him, such as establishing market value by replacement cost approach, or by income analysis, or by a comparison of sales of similar properties. Variations include the concept of a forced sale, either for cash or terms, which were discussed in *King Art*.

If the methodology employed by the appraiser is to establish "market value" by comparison to other sales, then the appraiser must also consider whether there is in reality any available market, and if so, what time period may

6 *Yorkshire Trust Co. v. Armwest Dev. Ltd.* (1985), 41 Alta. L. R. (2d) 1 (C.A.). In *Fidelity Trust Co. v. Philion*, [1986] 2 W.W.R. 443 (Alta. Q.B.), MacCallum J. held that the inability to obtain tenants for rental property amounted to “special considerations”, although the same difficulties had in fact existed in *Yorkshire Trust*.

7 (1989), 65 Alta. L.R. (2d) 40, 46 (C.A.).

be needed to sell. If the appraiser concludes that such market value is notional in the sense that there is very little if any available market within a reasonable period of time, then the market value would reflect the time-worth of money, and abnormal costs incurred because the sale may not be accomplished reasonably promptly.

With such assistance, the court must then establish the fair value for the lands, and in doing so, must establish a value which will reflect the different circumstances which may present themselves in any given case. Market value, however it is established, is clearly the major element to be considered to enable the court to establish the proper valuation to justify a *Rice* order; a broad discretion must be given to the Court to establish that value to reflect all relevant factors.

and further:

“Similarly, if the appraiser expects that market conditions would not facilitate sale within a reasonable period, then no doubt the appraiser would discount market value to reflect the abnormal fixed and operating costs and taxes beyond those which would normally be incurred if sale resulted within a reasonable period.”

Forced Sale Value

The appraiser should also provide an estimate of the value of the property sold on a "forced sale" basis.

"Forced sale" implies that (i) there is available less than the normal time within which to find a purchaser (*King Art* case), and (ii) the vendor is under pressure to sell. The term reflects the reality of foreclosure sale process. Sale in a Court action may be by ways other than by listing with a realtor.⁸ There may be advertisement in newspapers or posting on the notice board at the Clerk's office at the Law Courts. The appraiser should identify these pressures on the vendor in describing the term "forced sale value".

Not only is there potential undue pressure on the mortgagor, there is also a negative aspect for buyers of foreclosure property, who must bid on and take the property "as is", without the typical warranties associated with a

8 The Court of Appeal in *Can. Permanent Trust Co. v. King Art Dev. Ltd. (No. 2)*, *supra*, note 5, encouraged the Courts to remain as flexible as possible in selling property in foreclosure cases.

normal conveyance. The Court, in approving a sale, will not grant any warranties, and the prospective buyers will have to be made aware of that problem.

Forced Sale for Cash or Terms ?

In the 1980s and until recently, "forced sale" value was further broken down into "forced sale for cash" and "forced sale for terms". There was considerable judicial discussion about the circumstances in which either of these values should be used. Unfortunately, there was little direction from the Courts as to the meaning of these terms, and appraisers had to arrive at their own conclusions, with widely divergent results. The concept is probably historically based, predating the 1970s when mortgage rates started to become greatly varied in practice.

If the appraiser is able to define "forced sale" satisfactorily, then "forced sale for cash" is obvious. The prospective purchaser will have to arrange their own financing on the property in question, so that they pay "cash" for the property. Where there is the possibility of assuming prior encumbrances as part of the purchase, the purchaser may be credited with the balance being assumed, as with any normal conveyancing file.

The forced sale for cash value is the value figure most pertinent to the question of the appropriate redemption period.⁹ The Court is presented

⁹ *F.C.C. v. Lacombe Nurseries Ltd.* (1989), 102 A.R. 53, 59 (M.C.), affirmed in the Court of Appeal, without mention of this point: 2 Alta.L.R. (3d) 20.

with a “range” of values, from market to forced sale, on which to base its decision.

However, the concept of "forced sale for terms" practically defies definition. The concept is meaningless unless the appraiser specifies the "terms" being offered, or assumed. It will only be in the rare case, where particularly favourable (or unfavourable) terms are available from the plaintiff, that they will have an effect on the sale price in a foreclosure action. Usually the plaintiff will have no interest in offering terms. It just wants to be paid.

To put it another way, “forced sale for terms” is a meaningless and therefore inappropriate statement of opinion in the absence of stated terms. So the appraiser’s professional opinion ought not to state such a value in the absence of specific terms.

In some cases, the mortgaged property may be sold in a mortgage action conducted by a second or subsequent mortgagee. The interest rate on the prior mortgage may be low compared to current rates. Such a favourable first or prior mortgage may indeed have a beneficial effect on the market value. The second or subsequent mortgagee may wish to sell the property subject to the (favourable) prior mortgage. Lawyers will need to give specific instructions to the appraiser, including a detailed description of the terms of the first or prior mortgage. A meaningful statement of forced sale value “on terms” may then be possible.

Recommendation

Appraisers in foreclosure actions should provide (i) a market value and (ii) only a "forced sale" value (*i.e.* what we previously knew as “forced sale for cash value”). Both these values may be required by the Court in a foreclosure action. Appraisers should not provide opinions on “forced sale on terms”, unless they are given specific instructions and details as to the proposed “terms”.

Submitted with respect

REYNOLDS, MIRTH, RICHARDS & FARMER

Per: *Francis Price*

Francis Price, Q.C., C.Arb.

14 March 2002

PROPOSED GUIDELINES FOR MORTGAGE FORECLOSURE APPRAISALS (1985)

Prepared by:

Committee for Foreclosure Valuation Guidelines, AB Assoc AIC

Bruce Anderson AACI

Andy Chopko AACI

BR Jensen AACI

Jim Wall AACI

January 23, 1985

Memorandum to Members, Jan. 23, 1985:

The Directors of the Alberta Association of the Appraisal Institute of Canada have reviewed mortgage foreclosure procedures and valuator's reports in order to improve the standard of report writing and provide a higher degree of consistency and a common approved reference source within our profession.

Foreclosures have gained prominence in the news since early 1982 and the rate of foreclosures has had and will continue to have for some time to come a great impact on the real estate market in Alberta. The sudden increase in foreclosures was preceded by a buoyant economy, rapidly increasing housing prices, high migration to Alberta, low unemployment, and rising incomes. As a result of the general economic recession, the initial wave of foreclosures was undoubtedly caused by the inability of homeowners to make mortgage payments due to loss of employment, increasing interest rates, etc.

Statistical data available indicates a second wave of foreclosures starting in 1983 added a new dimension to foreclosures and were perceived to be caused by declining property values. Property values continued to decline throughout 1982 and 1983 to a point where many property values were actually lower than the outstanding mortgages. Under such circumstances owners were simply walking away from properties as there was no equity and in some cases the loan exceeded the market value.

With the increasing number of foreclosures and related appraisals, wide variations in property values are reported and no consistency in report writing is evident. Many of the problems arise when appraisal reports are completed for foreclosure proceedings where property values are estimated on the basis of exterior inspections and/or lack of income and expense information etc. If owners are not co-operative or

if the property is vacant and access if not provided, certain assumptions may be considered necessary in order to estimate market value. These assumptions are not often stated and/or special terms of reference relating to financing, leasing, etc., are not included in the valuator's report. Without prior knowledge of a property it is difficult if not impossible to analyze differing estimates of value if the conclusions are not based on stated assumptions or if a full inspection of the property has not been carried out.

Therefore it is being recommended to our membership that the attached guidelines and certain definitions form part of the overall consideration in reporting property values for foreclosure purposes. As stated these are recommendations only and they are provided in order to improve our standards and to incorporate an officially approved reference source which other organizations can recognize. The committee is fully aware that further study into our role in foreclosure procedures may be required in the future and further that there are undoubtedly other definitions available, however the one stated are considered by the committee to be acceptable.

In closing I would urge you to incorporate these guidelines and definitions into your mortgage foreclosure appraisals and I would welcome any constructive criticism or comments you might have on the appraisers role in foreclosure proceedings.

UPDATE JANUARY 23, 1985
ALBERTA ASSOCIATION OF THE APPRAISAL INSTITUTE OF CANADA

Guidelines for preparation of valuator's reports in conjunction with foreclosure proceedings:

BACKGROUND

Current economic circumstances prevalent throughout the Province of Alberta have resulted in an increasing number of appraisal requests from financial institutions, solicitors, etc., for use in foreclosure proceedings.

Research conducted on appraisal reports filed with the courts in documented foreclosure actions revealed that many valuator's reports are of questionable quality relative to the care and attention given to the amount of research and content to support a reasonable estimate

of value. Based on this research, it is evident that the preparation of some appraisal reports have been in direct contravention of the CODE OF ETHICS.

Further, instructions received from lending institutions, legal firms, etc., have included a request to provide the following:

- A. Forced Sale Value on a Cash Basis.
- B. Forced Sale Value with Terms

and, more recently, requests have been made to include a MARKET VALUE estimate as well. The perceived difference between MARKET VALUE and FORCED SALE VALUE is viewed by many, as a reduction in time during which the property in question would be exposed on the open market. There is some uncertainty as to which time period this should relate to, example "the period of redemption, the period over which the property will be exposed for sale through the tendering process, or some other method."

The dilemma appears to be, in the court's impression, that by virtue of previous experience and long standing practice, appraisers have a clear understanding of the concepts, definitions and appraisal techniques involved in arriving at these three separate value conclusions. Appraisers on the other hand, have been asked to provide value conclusions for two of the three items "forced sale value on and cash basis and with terms" where no uniform (clear) definition has been established.

In order to alleviate some of the problems related to appraisals being carried out for foreclosure purposes, the ALBERTA ASSOCIATION OF THE APPRAISAL INSTITUTE OF CANADA has prepared reference guidelines for members directly involved in the preparation of foreclosure appraisal reports (valuator's reports attached as Exhibit "A" to an Affidavit of Value). This information if considered by our members when undertaking foreclosure appraisal assignments should serve to provide a higher degree of consistency and a common, officially approved reference source within our own profession.

Before dealing with the reference guidelines and definitions, it may be useful to review the main steps of the foreclosure procedures, and in particular as these procedures impact on appraisers.

STATEMENT OF CLAIM

Attached to the Statement of Claim will be:

- A: Affidavit of Default
- B: Affidavit of Search
- C: Affidavit of Value and Valuator's Report

The purpose of the Statement of Claim is to fix the amount of the total claim and an attempt by the mortgagee to have the redemption period shortened. The appraiser is involved at this point and the appraisal will be entered as an Exhibit to the Statement of Claim. The appraisal may or may not include a Statement of a Forced Sale Value. Appraisals for the mortgagor seldom, if ever do. When the statement of claim is filed, it becomes a public document open for review as does the appraisal.

ORDER NISI

This order provides that the Defendant (Mortgagor) may pay to the Plaintiff (Mortgagee) or the court the stated amount at any time before the final order for foreclosure is granted. Upon payment of the total claim, the mortgagee shall discharge the mortgage, etc.

The Order Nisi further provides that on default of payment as stated, the property shall be offered for sale by tender.

ORDER FOR SALE

This order provides that as it was not redeemed in accordance with the Order Nisi, the property shall be offered for sale by tender and all tenders received be submitted to the court for approval. If no sale occurs, the mortgagee may apply for foreclosure. Tenders provide for payment of a 10% deposit with the balance to be paid within 30 days of acceptance of the tender.

DIRECTION FOR ADVERTISING

Copies of advertisements are sent to the real estate brokers, to all parties shown on titles having a registered interest in the property, as well as to newspapers for publication once a week for two consecutive weeks.

In Edmonton, direction for advertising is under review and in some cases has changed from publication in newspapers to a specified listing

period with local real estate brokers through the Multiple Listing Service. This method may provide superior market exposure as there is a lack of response to judicial sales advertised in local newspapers.

ORDER FOR FORECLOSURE

This order provides for the transfer of the property to the mortgagee and further orders the mortgagor to deliver possession of the property within a stated period of time.

PERSONAL COVENANT

When a personal covenant is involved, the mortgagor may be held liable to the mortgagee for the difference between the market value and the total claim.

Source: Rules of Court (Rule 695 Forms Q1-Q18)

CODE OF ETHICS

Dealing specifically with the members of the Alberta Association of the Appraisal Institute of Canada, particular attention should be drawn to the following section of the Institute's Code of Ethics.

PART C, ARTICLE 11:

"The following shall be considered mandatory practice in the preparation and presentation of the appraisal report resulting from the valuation process.

1. An adequate written appraisal containing a supported value estimate shall be prepared for each appraisal assignment accepted, and shall include the following as minimum requirements.
 - 1) An adequate description of the property being appraised.
 - 2) The purpose of the appraisal and a definition of the rights and value estimated
 - 3) The effective date of the appraisal
 - 4) Pertinent zoning as of the effective date of the appraisal
 - 5) A statement of the estimated highest and best use of the subject property
 - 6) A reasonably documented and factually supported value conclusion based on at least one approach to value considered most applicable to the type of property being appraised

- 7) Reasoning supporting the value conclusion
- 8) The final estimate of value
- 9) Special and limiting conditions, if any
- 10) The appraiser's certification and signature

This does not prohibit the use of form appraisals when specifically requested by the client. The appraiser must have the minimum data requirements outlined in a) above in his file to properly support the final estimate of value."

Source: Code of Ethics, Regulation No. 1, Appraisal Institute of Canada

In addition to the foregoing when completing a valuator's report for foreclosure purposes the following should be considered:

1. Date of Inspection
2. A comment on interior or exterior inspection stating assumptions considered
3. Where applicable, state lease data, rental income, etc., or statement of assumptions considered. Where applicable if specific terms of reference are supplied or specific financing will be provided, a statement in that regard should be included in the Letter of Transmittal and Limiting Conditions.
4. Definition of values stated, i.e. market value, forced sale value, etc.
5. Final conclusions stating market value, forced sale value on a cash basis and forced sale value with terms.

The foregoing information is provided as a guide and is not intended to limit the content of an appraisal report but rather to suggest that a valuator's report contain at least the minimum content of an appraisal report as required by the Appraisal Institute of Canada and specific items relating to foreclosure proceedings.

DEFINITION OF MARKET VALUE

The Appraisal Institute of Canada defines MARKET VALUE as "the highest price in terms of money which a property will bring in a competitive and open market under all conditions requisite to a fair sale, a buyer and seller, each acting prudently, knowledgeably, and assuming the price is not affected by undue stimulus."

Source: Introduction to Real Estate Appraising, Appraisal Institute of Canada
Glossary

Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

“buyer and seller are typically motivated – both parties are well informed or well advised, and each acting in what he considers his own best interest:

- a reasonable time is allowed for exposure in the market;
- payment is made in cash or its equivalent;
- financing, if any, is on terms generally available in the community at the specified date and typical for the property type in its locale;
- the price represents a normal consideration for the property sold unaffected by special financing amounts and/or terms, services, fees, costs or credits incurred in the transaction.

Source: Introduction to Real Estate Appraising, Appraisal Institute of Canada

DEFINITION – FORCED SALE

“A sale made without the consent or concurrence of the owner of the property but by virtue of a judicial process, such as writ of execution or an order under a decree of foreclosure.”

Source: Black’s Law Dictionary (p. 1504)

DEFINITION – FORCED SALE VALUE

The highest price which a property can reasonably be expected to bring, if offered for sale without the consent or concurrence of the owner by virtue of judicial process, in what may be a restricted market place, within a restricted time frame, to a prudent, willing and able purchaser who may have limited knowledge about the property, its uses and capability.

Source: Committee for foreclosure valuation guidelines

Note: It is important to state what may be a typical selling period under normal market conditions for a property, example: 90 days, with the understanding that reasonable market exposure for residential property may be somewhat different to commercial-

industrial properties or farm and acreages. It is also important to state in the definition of forced sale value, the restricted time period which is less than normal market exposure. (Example: 30 days or 60 days.) It is recommended that the client instruct the appraiser as to the time limit to be imposed on the appraisal. Consideration should be given for court processing time which should not include any lengthy delays from the effective date of appraisal to the stated date of completion.

It is possible that forced sale values – CASH AND TERMS – may at times be the same. It may also be appropriate to assume that a bonus is paid for terms, rather than a discount for cash.

The appraiser must clearly state in the Letter of Transmittal, Limiting Conditions and the report itself, whether or not the imposed time limit can be regarded as a reasonable period of time for the property and the effect on value.

In addition to the time limit, the imposition of terms will be meaningless unless the terms are stated as to interest, ratio of loan to value, amortization period and renewable terms. Terms can be either:

TYPICAL: Meaning that such terms as would likely be applied to the subject property as at the effective date of appraisal assuming the loan is made by a lender normally financing the type of property being appraised and that the borrower would be approved.

ATYPICAL: (Specified Terms) – terms specified by the client which are not typical for the subject property and/or the effective date of appraisal. The appraiser must clearly state in the Letter of Transmittal, Limiting Conditions and in the report itself, the terms considered in the appraisal and the effect typical or atypical terms have on the value conclusions.

SUMMARY

It is recommended that the foregoing definitions be accepted by the members of the Alberta Association of the Appraisal Institute of Canada to form a basis of consistent report writing. If terms of reference are provided by the client, this information will be clearly stated in the valuator's report and the conclusions will be based thereon. If the terms of reference are not provided, the assumption would be made that typical terms would be applicable and so stated in the valuator's report. With the time element and terms stated in each report, more consistency can be achieved and the variations in value

(if any) can be directly related to terms of reference. The foregoing should promote consistency in reporting thereby providing greater ease in reviewing valuator's reports and reconciling variations in values stated.

Submitted by:

Committee for Foreclosure Valuation Guidelines

Alberta Association of the Appraisal Institute of Canada, January 23, 1985:

Bruce Anderson AACI

Andy Chopko AACI

B R Jensen AACI

Jim Wall AACI