ARTICLE

Security of Tenure in Foreclosure Proceedings: The Judicial Role when Borrowers are Absent or Self-Represented

Anna J Lund

THE RIGHT TO adequate housing requires that individuals not be evicted from their homes without being provided appropriate legal or other protections. In Canada, the federal government has promoted housing through mortgage-financed homeownership. Individuals risk losing their homes if they default on their mortgage. When an individual can no longer afford their mortgage payments, the law must reconcile the individual's right not to be evicted without appropriate legal protections with a lender's right to be paid. In a mortgage law system that prioritizes the economic interests of a lender, this is no easy task. This balance becomes especially difficult in court-based foreclosure proceedings because lenders are typically present and represented, and borrowers are frequently absent or self-represented.

Through observing 105 residential foreclosure proceedings at the Edmonton Law Courts, this article explores the role of courts in preserving the integrity of the adversarial system and thereby promoting security of tenure. It examines how judges can adjust their role in the adversarial model to better protect self-represented and absent borrowers. It identifies nine strategies used by judges: scrutinizing the lender's evidence, seeking additional information from the parties, scrutinizing the relief sought, raising new legal issues, enforcing consistency across cases, providing advice to borrowers, offering referrals to borrowers, encouraging negotiations,

LE DROIT À un logement adéquat exige que les personnes ne soient pas expulsées de leur domicile sans bénéficier de protections juridiques ou autres appropriées. Au Canada, le gouvernement fédéral a favorisé le logement au moyen de l'accession à la propriété financée par prêt hypothécaire. Les particuliers risquent de perdre leur logement s'ils ne remboursent pas leur prêt. Lorsqu'une personne ne peut plus honorer ses paiements hypothécaires, le droit doit concilier le droit de la personne à ne pas être expulsée sans protection juridique appropriée et le droit du prêteur ou de la prêteuse [ci-après « prêteur »] à être payé. Dans un système de droit hypothécaire qui privilégie les intérêts économiques du prêteur, la tâche n'est pas aisée. Cet équilibre est particulièrement difficile à trouver dans les procédures de saisie judiciaire, car les prêteurs sont généralement présents et représentés, tandis que les emprunteurs et emprunteuses [ci-après « emprunteurs »] sont souvent absents ou se représentent eux-mêmes.

En observant 105 procédures de saisie résidentielle au tribunal d'Edmonton, cet article explore le rôle des tribunaux dans la préservation de l'intégrité du système contradictoire et, par conséquent, dans la promotion de la sécurité d'occupation. Il examine comment les juges peuvent adapter leur rôle dans le modèle contradictoire afin de mieux protéger les emprunteurs non représentés et absents. Il identifie neuf stratégies

and assuming a problem-solving role. This article reveals that judges often assume an active role in an attempt to rectify the power imbalance in foreclosure proceedings. Furthermore, the mere presence of the borrower improves the judge's ability to account for their interests in the proceedings and thereby safeguard their security of tenure.

utilisées par les juges : examiner les preuves fournies par le prêteur, demander des informations supplémentaires aux parties, examiner la réparation demandée, soulever de nouvelles questions juridiques, assurer la cohérence entre les affaires, fournir des conseils aux emprunteurs, offrir des références aux emprunteurs, encourager les négociations et assumer un rôle de résolution de problèmes. Cet article révèle que les juges jouent souvent un rôle actif pour tenter de rectifier le déséquilibre des pouvoirs dans les procédures de saisie immobilière. En outre, la simple présence de l'emprunteur améliore la capacité du ou de la juge à tenir compte de ses intérêts dans la procédure et donc à préserver sa sécurité d'emploi.

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Anna J Lund[*]

I. THE ADVERSARIAL SYSTEM AND ITS DISCONTENTS

Housing is a key determinant of health and access to housing is a fundamental human right.[1] The Canadian government has recognized "that housing is essential to the inherent dignity and well-being" of Canadians and has committed to the progressive realization of the right to adequate housing.[2] For decades predating this acknowledgment, a pillar of the Canadian government's housing policy has been to promote home ownership by incentivizing residential mortgage lending.[3] Canada has a high rate of home ownership; millions of Canadians have purchased their houses using

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1 *Universal Declaration of Human Rights*, UNGA, 3rd Sess, UN Doc A/810 (1948) GA Res 217A (III), art 25(1); *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 art 11(1) (entered into force 3 January 1976); The Right to Adequate Housing, UNHCHR, (2014) Fact Sheet 21, Rev 1; Carolyn B Swope & Diana Hernández, "Housing as a Determinant of Health Equity: A Conceptual Model" (2019) 243 Soc Science & Medicine 1.

2 *National Housing Strategy Act*, SC 2019, c 29, s 313, s 4.

3 See generally Jason Leslie, *The Financialization of Housing in Canada and Federally-Backed Mortgage Securitization: Public Risks, Private Benefits* (PhD Dissertation, University of British Columbia, 2022) [unpublished]; John Bélec, "Underwriting Suburbanization: The National Housing Act and the Canadian City" (2015) 59:3 Can Geographer 341; Canada, Central Mortgage and Housing Corporation, *CMHC and the National Housing Act*, (Departmental Catalogue) No NHA 5030 3/77 (Ottawa: CMHC, 1977).

a mortgage. In Canada, mortgage law is inextricably linked to the human right to housing.

If a borrower cannot make their mortgage payments, they risk losing their home. Involuntary home loss negatively impacts all the people living in the home.[4] Some borrowers will end up homeless after a foreclosure, living in emergency shelters, or couch surfing with friends and family members.[5] Others will relocate to different accommodations. Foreclosure negatively impacts a borrower's credit rating and this can make it difficult to purchase or rent a new home.[6] Residents experience stress as they look for a new place to live. Their work lives may be disrupted. Children living in the home may need to relocate to a different school, which disrupts their education.[7] People who undergo foreclosure experience stigma, shame, and ostracism.[8] The loss of a house has been associated with mental and physical health problems, including death by suicide.[9] Undergoing foreclosure is positively correlated with getting divorced.[10] Foreclosure is

4 The people who lose a home during the foreclosure may be the borrower, people living with the borrower, or people renting from the borrower.

5 Much of the research on the negative impacts of home loss is American, yet there is no reason to believe that home loss in Canada is any less harmful (see e.g. Bob Erlenbusch et al, *Foreclosure to Homelessness: The Forgotten Victims of the Subprime Crisis: A National Call to Action* (Washington, DC: National Coalition for the Homeless, 2008) at 5).

6 See e.g. G Thomas Kingsley, Robin E Smith & David Price, *The Impacts of Foreclosures on Families and Communities: A Primer* (Washington, DC: The Urban Institute, 2009) at 2.

7 *Ibid*; Kathryn LS Pettit & Jennifer Comey, *The Foreclosure Crisis and Children: A Three-City Study* (Washington, DC: The Urban Institute, 2012) at 8. In the eviction context, see Matthew Desmond, *Evicted: Poverty and Profit in the American City* (New York: Crown Publishers, 2016) at 296.

8 See e.g. Kathryn Marie Dudley, *Debt and Dispossession: Farm Loss in America's Heartland* (Chicago: University of Chicago Press, 2000) at 129–36.

9 In the context of foreclosures, see Jason N Houle & Danya E Keene, "Getting Sick and Falling Behind: Health and the Risk of Mortgage Default and Home Foreclosure" (2015) 69:4 J Epidemiology & Community Health 382; Jason N Houle, "Mental Health in the Foreclosure Crisis" (2014) 118 Soc Science & Medicine 1; Theresa L Osypuk et al, "The Consequences of Foreclosure for Depressive Symptomatology" (2012) 22:6 Annals Epidemiology 379. In the context of other unhousing processes, see Allison K Groves et al, "Housing Instability and HIV Risk: Expanding our Understanding of the Impact of Eviction and Other Landlord-Related Forced Moves" (2021) 25:6 AIDS & Behavior 1913 at 1919. See also Anna Jane Lund, "Tenant Protections in Mobile Home Park Closures" (2021) 53:3 UBC L Rev 759 at 771 [Lund, "Tenant Protections"]; Esther Sullivan, *Manufactured Insecurity: Mobile Home Parks and Americans' Tenuous Right to Place* (Oakland, Cal: University of California Press, 2018) at 8, 122–24, 147, 150.

10 Rebecca Diamond, Adam Guren & Rose Tan, "The Effect of Foreclosures on Homeowners, Tenants, and Landlords" (2020) National Bureau of Economic Research, Working Paper No 27358 at 2.

"psychologically and physically devastating" for the displaced residents.[11] It is also hard on communities. A forced relocation severs the relationships that a person has with their neighbours, depriving them of social supports and eroding the broader community's sense of cohesion and security.[12]

The right to adequate housing guards against the harms of home loss by requiring that individuals facing removal from their homes be provided with "appropriate forms of legal or other protection."[13] Such protection ensures that individuals experience meaningful security of tenure, which the United Nations has identified as a core component of the right to adequate housing.[14] Thus, foreclosure proceedings can only be carried out in compliance with the right to adequate housing if homeowners are provided with access to appropriate legal and other protections.

Following a mortgage default, the legal process by which Canadians lose their homes depends on the province or territory in which they reside. In some provinces, such as Alberta and Saskatchewan, the lender must apply to court for permission to sell or take title to the borrower's homes.[15] In other provinces, such as Ontario and New Brunswick, the lender has a contractual right to sell the home without going to court.[16] A borrower who wishes to stop the sale—or raise an issue afterwards about how it was conducted—can apply to court for relief.[17] The adequacy of the protections for borrowers can only be evaluated by understanding the challenges borrowers face in court.

Pity the borrower who ends up in court, fighting to save their home. They face significant barriers. Canada's common law courts are premised on an idealized adversarial model, where both sides are represented by

11 Cyleste C Collins et al, "Broken Homes, Broken Dreams: Families' Experiences with Foreclosure" (October 2013) at 2, online (pdf): <case.edu/socialwork/povertycenter/sites/default/files/2018-10/Briefly_Stated_No_13-03_Broken_Homes_Broken_Dreams.pdf>.

12 David H Kaplan & Gail G Sommers, "An Analysis of the Relationship Between Housing Foreclosures, Lending Practices, and Neighborhood Ecology: Evidence from a Distressed County" (2009) 61:1 Professional Geographer 101; Houle, *supra* note 9. Considering other home loss processes, see Lund, "Tenant Protections", *supra* note 9 at 780–82; Sullivan, *supra* note 9 at 117–18, 145; Desmond, *supra* note 7 at 70.

13 *General Comment 7: The Right to Adequate Housing (Art 11.1 of the Covenant): Forced Evictions*, UNCESCR, UN Doc E/1998/22 (1997) at para 3 [UNCESCR, *General Comment 7*].

14 *Ibid* at para 1.

15 Joseph E Roach, *The Canadian Law of Mortgages*, 2nd ed (Markham: LexisNexis, 2010) at 135–41, 161–62.

16 *Ibid* at 188–89.

17 *Ibid* at 187–88.

lawyers who elicit evidence and argue the law.[18] Judges, in this idealized model, play the role of passive arbiter—listening to counsel's submissions and granting the requested relief if the litigants have established their legal entitlement to it.[19] The adversarial model is an archetype, which Canadian courts depart from in a myriad of different ways, including judges donning the role of case managers and mediators.[20] The adversarial model is particularly challenged when one party cannot afford to hire a lawyer to skillfully produce evidence and argue law.[21] As David Luban surmises, "an adversary system with only one adversary is an adversary system in name alone".[22] Borrowers facing foreclosure rarely have the means to pay for legal assistance and thus face an unenviable choice: to represent themselves and try their best to navigate unfamiliar questions of process and doctrine, or to let their house go without a fight. In Alberta, most opt for the latter.

Pity the judge tasked with deciding these cases. They are being asked to take away people's homes, a judicial act that is bound to cause significant suffering. The mortgage law principles prioritize the economic interests of the lender, ensuring that the lender's property rights in the collateral-home

18 Marc Galanter, "Dining at the Ritz: Visions of Justice for the Individual in the Changing Adversarial System" in Helen Stacy & Michael Lavarch, eds, *Beyond the Adversarial System* (Leichhardt, New South Wales: Federation Press, 1999) 118 at 126; Janet Walker & Lorne Sossin, *Civil Litigation* (Toronto: Irwin Law, 2010) at 17–19; Anna E Carpenter et al, "Studying the 'New' Civil Judges" [2018] Wis L Rev 249 at 274–75 [Carpenter et al, "Civil Judges"]. See also *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 ("[c]ourts function as impartial arbiters within an adversary system. They depend on the parties to present the evidence and relevant arguments fully and skillfully" at para 29).

19 See generally Neil Brooks, "The Judge and the Adversary System" in Allen M Linden, ed, *The Canadian Judiciary* (Toronto: Osgoode Hall Law School, York University, 1976) 89.

20 Judith Resnik, "Managerial Judges" (1982) 96:2 Harv L Rev 374 at 378–79. Noting that judges have taken on roles beyond the passive arbiter see Carrie Menkel-Meadow, "The Limits of Adversarial Ethics" in Deborah L Rhode, ed, *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation* (New York: Oxford University Press, 2000) 123 at 126. On discussing ethical implications of judges involved new roles see also Canadian Judicial Council, *Ethical Principles for Judges* (2021) ch 5, commentary 5.A.8, 5.A.9, online (pdf): <cjc-ccm.ca/sites/default/files/documents/2021/CJC_20-301_Ethical-Principles_Bilingual_Final.pdf> [CJC, *Ethical Principles*]; Richard Devlin et al, "A Mixed Bag: Critical Reflections on the Revised Ethical Principles for Judges" (2022) 100:3 Can Bar Rev 325 at 335–36; *Alberta Rules of Court*, Alta Reg 124/2010, vol 1, r 4.11–4.15, 4.17–4.18 [*Alberta Rules of Court*] (rules 4.11–4.15 deal with case management, and rules 4.17–4.18 deal with judicial dispute resolution).

21 Menkel-Meadow, *supra* note 20 at 131; Jennifer A Leitch, "Lawyers and Self-Represented Litigants: An Ethical Change of Role" (2017) 95:3 Can Bar Rev 669 at 678 [Leitch, "An Ethical Change of Role"].

22 David Luban, "Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers" (2003) 91 Cal L Rev 209 at 219.

are protected.[23] Borrowers do have some protections in the foreclosure law process, however, they rarely know of or understand them. In a purely adversarial model, if a borrower did not claim applicable protections, they would not be afforded them. The adversarial model is informed by the idea of party autonomy, meaning that each litigant is "free to make a claim or forgo making a claim…to defend against a claim or to accede to it."[24] But borrowers are not, *en masse*, making a strategic decision not to claim protections. When they do get involved, it becomes evident that many lack the knowledge and resources to effectively claim their protections. They are at a disadvantage as compared to lenders, who invariably have legal counsel at their disposal.

Foreclosure law is marked by a structural power imbalance. The person with the most at stake, who is at risk of losing their home, has the least power. The adversarial process can exacerbate this power imbalance unless judges and lawyers take account of who has privilege and why that matters.

In practice, judges depart from the model of the passive arbiter to moderate the power imbalance between lenders and borrowers in residential foreclosure proceedings and thus reinforce the borrower's security of tenure. [25] This article draws on courthouse observations of 105 residential foreclosure proceedings to identify how judges adjust their role in the adversarial model to better protect self-represented and absent borrowers. Courts make a difference. They help ensure borrowers receive the protections to which they are entitled and, when home loss is legally unavoidable, they fashion less traumatic eviction processes. These findings have implications for whether borrowers should incur the—often significant—personal costs of attending foreclosure proceedings, whether the resource demands associated with judicial sales are justified, and for the ethical principles that should guide judges and lender's counsel.

This article proceeds as follows. Part II provides some background on mortgage lending and foreclosure proceedings. Part III describes the court observation methodology. Part IV reports the findings from the court observations, detailing nine different strategies that judges in foreclosure

23 Identifying a similar theme in residential tenancy processes, see Sarah Buhler & Catriona Kaiser-Derrick, "Home, Precarious Home: A Year of Housing Law Advocacy at a Saskatoon Legal Clinic" (2020) 32 J L & Soc Pol'y 45 at 66.

24 Walker & Sossin, *supra* note 18 at 17.

25 Recognizing that a shift towards more active judging may help address power inequities between the parties, see Marc Galanter, "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change" (1974) 9:1 Law & Soc'y Rev 95 at 140 [Galanter, "Why the Haves"]; Jennifer Leitch, "Coming off the Bench: Self-Represented Litigants, Judges and the Adversarial Process" (2017) 47:3 Adv Q 309 at 318, 329 [Leitch, "Coming off the Bench"].

proceedings used to ensure that absent and self-represented borrowers received the protections to which they were entitled. Part V considers the implications of this research for borrowers facing foreclosure proceedings, judicial sales, and judicial ethics. Part VI concludes by suggesting that a fundamental inconsistency might exist between presuming equality is baked into the adversarial system and achieving meaningful security of tenure.

II. BACKGROUND: MORTGAGE ENFORCEMENT PROCEEDINGS

Mortgage lending is a form of secured credit, meaning the lender provides a loan and takes property rights in the borrower's collateral—in this case, their house. The borrower is legally obligated to repay the principal of the loan, along with interest that accrues on it.[26] Most residential mortgages in Canada are structured to provide for periodic (bi-weekly or monthly) payments with the balance due at the end of the mortgage's term.[27] For example, a mortgage with a five-year term may require the borrower to make monthly payments over the course of the five years, and then at the end of the five years, to either renew the mortgage for a new term or pay off the balance of the loan. If a borrower misses a periodic payment, fails to repay the balance owing at the end of the term, or otherwise defaults on their obligations under the mortgage agreement, the lender can recover the amounts owing to them from the home.[28] They might do this by selling the home and paying themselves out of the sale proceeds or by taking title to the home in satisfaction of the debt.[29] These mortgage enforcement proceedings are colloquially called "foreclosures".

Alberta is a judicial sales district, meaning that any lender who wishes to sell or assume title to the borrower's home must start a court proceeding and apply for a series of orders: to set a redemption period, to specify the sale process, to conclude the sale—either to a third party or the lender, and, where allowed, to grant a deficiency judgment against the borrower.[30]

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26 Roach, *supra* note 15 at 4–17; Walter M Traub, *Falconbridge on Mortgages*, 5th ed (Aurora: Canada Law Book, 2003) at §1:4.

27 CMHC, "Homebuying Step by Step: Your Guide to Buying a Home in Canada" (27 October 2020) at 10, online: <cmhc-schl.gc.ca/consumers/home-buying/buying-guides/home-buying/homebuying-step-by-step-workbook-and-checklists>.

28 Traub, *supra* note 26 at § 22:12.

29 Roach, *supra* note 15 at 135–41, 161–62. Foreclosures are technically just one type of remedy that can be granted during mortgage enforcement proceedings (*ibid* at 129–30).

30 *Law of Property Act*, RSA 2000, c L-7, ss 39–40 [*Property Act*].

A deficiency judgment is granted against a borrower when a house is worth less than the amount outstanding on the mortgage.[31]

An oft-repeated phrase about judicial foreclosure proceedings is that borrowers rarely have any defences.[32] This prioritization of the lender's interest is justified with respect to the macro-economic need of the consumer credit market: without easy, inexpensive access to creditor's remedies, lenders will be reluctant to advance credit.[33] In a market like Canada, which emphasizes home ownership over other forms of tenure, a restriction in residential mortgage lending could have devastating impacts on people's access to housing.

Borrowers may not have many defences to foreclosure, but they do have some protections in the process. In Alberta, two key borrower protections are redemption periods and limits on deficiency judgments.[34] Redemption periods give the borrower some time to cure the default on their mortgage or sell their house themselves.[35] A deficiency judgment is awarded against a borrower when a house sells in a foreclosure process for less than the amount of the mortgage loan: the borrower is held responsible for the shortfall.[36] Some, but not all, borrowers in Alberta are protected from deficiency judgments, meaning that the bank bears the loss if the amount of the mortgage exceeds the value of the house.[37]

III. METHODS: COURT OBSERVATION

To understand how judges oversee foreclosure proceedings, I went to court. The study method used in this article was derived from the method used by Anna Carpenter *et al* in their study of how judges manage self-represented

31 Alberta is one of two Canadian provinces that protects borrowers from deficiency judgments, but these protections do not apply to all types of mortgages (see Anna Lund, "Uncertainty Over the Scope of Borrower Protections in Mortgage Enforcement Proceedings in Alberta: The Problems and Potential Solutions" (2023) 60:4 Alta L Rev 905 at 911–16 [Lund, "Uncertainty"]).

32 For a discussion of what constitutes a defence to a mortgage action in Alberta, and what does not, see Denise Hendrix, "Unusual Defences in Foreclosure Actions" (Paper delivered at LESA's Foreclosures – Beyond the Basics webinar series, November 2021) [unpublished].

33 Alberta Law Reform Institute, *Mortgage Remedies in Alberta*, Report No 70 (Edmonton: Alberta Law Reform Institute, 1994) at 11–12 [*Mortgage Remedies*].

34 Lund, "Uncertainty", *supra* note 31.

35 *Ibid* at 907–08.

36 *Ibid* at 911.

37 *Ibid*.

litigants in America's state courts.[38] They observed in-court proceedings. They explained this methodological choice with reference to certain features of litigation in courts where self-represented litigants predominate: "appeals are rare, and court records are sparse and difficult to access. Party engagement with judges and procedures happens in real-time, in the courtroom, with little to no discovery or exchange of pleadings."[39] The situation in foreclosure applications bears important similarities, including that parties engage with judges in real time, and thus court observations allowed me to see how judges were exerting oversight over foreclosure proceedings.

For seven months, I observed foreclosure proceedings at the Law Courts in Edmonton, Alberta. These applications are heard by Applications Judges. Applications Judges (who were called Masters until September 1, 2022) sit in the provincial superior court and hear a mix of civil law matters: interlocutory applications, applications for summary disposition, and foreclosure proceedings.[40] A party can appeal an Applications Judge's decision to a single Justice of the same provincial superior court.[41]

Applications Judges have morning chambers in Edmonton, where they hear foreclosure matters alongside other applications. On most days during the observation period, there were two Applications Judges sitting in the mornings. They started their morning with unscheduled matters including consent orders and applications brought without notice to the other side. They then heard scheduled matters, where at least one party has filed materials ahead of time and each matter was assigned a number on the list. Applications Judges regularly had 20 or more matters scheduled on any given morning and had limited time beforehand to review the materials submitted by the parties. Applications Judges worked through the scheduled matters in the order they appeared on the list, sometimes moving matters to the end if they expected them to take a long time (more than ten minutes per side) or if one of the parties was not yet present.[42]

Between December 2022 and June 2023, I attended morning chambers on 22 separate occasions and observed 105 residential foreclosure procedures. I varied which day of the week I attended because some foreclosure

38 Anna E Carpenter et al, "Judges in Lawyerless Courts" (2022) 110:3 Geo LJ 509.

39 *Ibid* at 514.

40 As of September 1, 2022, Masters of the Court of Queen's Bench of Alberta (as it then was) were renamed Applications Judges (see Alta Reg 137/2022, s 3(6)). This was passed pursuant to the *Court of King's Bench Act*, RSA 2000, c C-31, s 27(1) [*King's Bench Act*].

41 *Alberta Rules of Court*, *supra* note 20, r 6.14(1).

42 Jean E Côté, *Alberta Civil Procedure: Introduction and Glossary* (Edmonton: Juriliber, 2019) at 101.

lawyers regularly schedule their court matters for a specified weekday (*e.g.*, Wednesday each week) and I wanted to observe the Court interacting with a variety of lawyers.

I also wanted to ensure that I was observing different Applications Judges. At the time this observation was carried out, there were four Applications Judges in Edmonton. Early in my observations, I would decide which courtroom to observe based on which Applications Judges were sitting, always opting for the Applications Judge that I had not had as much opportunity to observe. As time went on, I had seen each of the four Applications Judges multiple times, and I began selecting the chambers that had more foreclosure matters scheduled on a given day. I did this by reviewing the list of matters scheduled to be heard in each room. The list provides basic information including the names of the parties and the type of order being sought.

I have used "they/them/their" pronouns throughout when referencing the Applications Judges as there was only one woman sitting as an Applications Judge during the time I carried out my observations and I do not want to single them out for identification. Likewise, I have opted to anonymize my observations from court, to protect the identity of the borrowers, lenders, and counsel observed. I did not require research ethics approval to carry out these court observations as all the matters I heard were held in open court—thus open to the public—and I have presented my research in a way that prevents specific individuals from being identified.[43]

I took notes on every matter I heard. I developed a standard list of information that I collected including the nature of the order sought, the type of mortgage, whether the borrower appeared, whether the borrower was represented by a lawyer, the estimated value of the property, the amount outstanding on the mortgage, and the relief granted. My collection efforts were limited to information offered by the litigants or elicited by the

43 This study is governed by Article 2.3 of the Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans - TCPS 2 (2022) which provides that research ethics board approval is not required for "research involving the observation of people in public places where: (a) it does not involve any intervention staged by the researcher, or direct interaction with the individuals or groups; (b) individuals or groups targeted for observation have no reasonable expectation of privacy; and (c) any dissemination of research results does not allow identification of specific individuals" (see Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of Canada & Social Sciences and Humanities Research Council of Canada, *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans*, Catalogue No: RR4-2/2023E-PDF (Ottawa: Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of Canada & Social Sciences and Humanities Research Council of Canada, 2022) art 2(3) online: <ethics.gc.ca/eng/documents/tcps2-2022-en.pdf>).

Applications Judge. I did not have a straightforward means to request additional details or double-check the accuracy of the information provided.

After each observation session, I entered the standard information into a spreadsheet. I also wrote up narrative accounts of the residential foreclosure applications, based on my notes. As I attended more hearings, I began to organize these narrative accounts around themes that were emerging. This analysis was an iterative process and I refined the themes as I spent more time observing court and reflecting on my observations.

IV. FINDINGS: NINE STRATEGIES OF ACTIVE JUDGING

At its outset, I expected this project to be about how Applications Judges interact with self-represented borrowers during foreclosure proceedings. My perception of what was happening in foreclosure proceedings had been shaped by my *pro bono* work with the Alberta Court of King's Bench Assistance Program. As a volunteer lawyer with that program, I would assist borrowers who were appearing as self-represented litigants in morning chambers. This work included explaining the foreclosure process to them, helping them to negotiate with the lender's lawyer, and assisting them with presenting their side of the case to the Applications Judge. My sense of foreclosure proceedings was that borrowers were regularly self-representing. As it turns out, this was an incomplete picture.

The discussion of absent litigants in this article brings something new to the discussion of the adversarial system and its shortcomings. Scholars have thought deeply about the problems that the adversarial model creates for individuals who self-represent in court.[44] This attention is warranted. But this article is not just about self-represented litigants; it considers absent ones too and the—sometimes novel, sometimes familiar—ways in which they challenge the adversarial model.

In most foreclosure applications, the borrower was absent. Of the 105 residential foreclosures hearings I observed, the borrower was absent in 76 matters (72 percent). The borrower was present or represented in only 28 matters (27 percent), or less than a third of the time.[45] When

44 Leitch, "An Ethical Change of Role", *supra* note 21; Leitch, "Coming off the Bench", *supra* note 25; Galanter, "Why the Haves", *supra* note 25.

45 In one of the hearings, the borrower was not present for the hearing but appeared after the hearing had concluded. This makes up for the discrepancy in the total number of hearings (76 borrower absent matters + 28 borrower present/represented matters + one case where borrower appeared post-hearing).

borrowers did appear, they frequently self-represented. In 18 of 28 borrower appearances (64 percent), the borrower self-represented. In ten of 28 cases (36 percent), the borrower was represented by a lawyer. In one case, the borrower was assisted by a lawyer volunteering with the Court of King's Bench Assistance Program.[46]

Borrowers rarely applied to court for relief. Borrowers were the applicants in only three of the matters observed. One involved a borrower seeking to have money paid to them from the court's accounting department. The funds in question represented the sales proceeds remaining after the applicant's house had been sold in mortgage enforcement proceedings. The bank had been paid in full and a surplus remained. In another, a borrower was seeking the return of belongings that he had left behind in a foreclosed property. Both these borrowers were granted the orders they sought. In a third, a borrower unsuccessfully applied for relief against their co-borrower. The applicant was not present in court and the articling student (a trainee lawyer) representing them was unclear on what relief they were seeking on behalf of their client. The Court denied this application.

Mortgage lenders were the applicants in an overwhelming portion (101 of 105, or 96 percent) of the observed matters.[47] They had a remarkably high success rate: in all but six of the 101 cases, lenders received some version of the order they were asking for. In other words, they succeeded 94 percent of the time (95 of 101 matters).

Yet, the Applications Judges regularly modified the terms of the orders sought by lenders and these modifications could be meaningful for the borrowers. The most common modification was to give the borrower more time. Such modifications were made in at least ten percent of the matters observed.[48] The extra time might be a longer redemption period—a stay period during which borrowers can bring their mortgage back into good standing, refinance with a different lender, or sell their property them-

46 The total here (18 self-represented + ten represented + one assisted by a volunteer lawyer) adds up to 29, because on one matter, two different litigants were claiming to be the owner of the property subject to foreclosure. One was self-represented and one was represented by a lawyer.

47 In addition to the three applications brought by borrowers, a fourth was brought by a non-mortgage creditor seeking to be paid from surplus sales proceeds held by the Court.

48 It is difficult to be precise about how often courts modified the terms sought by the lender, because lenders were not always prescriptive about what they were seeking. For example, they might provide a range of suggested time periods and their evidence about why that range was appropriate. However, in ten out of 103 (ten percent) matters, the Court specifically granted the borrower a longer redemption period or a later closing date than the lender had requested.

selves. The extra time might be a later closing date. This extra time gave the borrower more runway to prepare for their move and helped mitigate the disruptions caused by the home loss, *e.g.*, by delaying the homeowner's moving date until after a significant life event such as a scheduled medical proceeding or the end of a child's school year.

Applications Judges also assigned higher values to homes than the lenders were asking for—this modification could affect the price at which the home was listed or the size of the deficiency judgment granted against the borrower. Applications Judges sometimes made modifications in response to submissions by the borrower, or—in rare instances—their counsel. Other times, the borrower was absent, and the Applications Judge made the modification because they did not believe that the evidence presented by the lender entitled the lender to the relief on the terms sought.

Applications Judges used a range of strategies to ensure that homeowners were receiving the protections to which they were entitled, and sometimes, to mitigate the negative impacts of involuntary home loss. These strategies overlapped with those identified by Carpenter *et al* in their study of active judging of self-represented litigants. Carpenter *et al* identified six active judging strategies: adjusting procedures, explaining law and process, eliciting information, raising new legal issues not previously raised by parties, referring parties to court-based and non-profit service providers, and facilitating negotiation between parties.[49] In foreclosure proceedings in Edmonton, Applications Judges used five comparable strategies: providing advice, soliciting information, raising new issues, providing referrals, and facilitating negotiations. However, they employed four additional strategies: scrutinizing evidence, scrutinizing legal entitlements, enforcing consistency, and solving problems.

Applications Judges used five of these strategies even when a borrower did not appear. Four were only available to the Judges when the borrower was present. With all the strategies, Applications Judges had more scope to deploy them when the borrower showed up. A borrower's presence changed the dynamic of an application because they often had information to provide the Court that might have a bearing on the relief sought by the lender. The Applications Judge could also provide the borrower with guidance about further steps they could take to protect themselves. Despite

49 Carpenter et al, "Civil Judges", *supra* note 18 at 279–80. See also Anna E Carpenter, "Active Judging and Access to Justice" (2017) 93:2 Notre Dame L Rev 647 at 686–703 [Carpenter, "Active Judging"].

the overwhelming success rate of lenders on their applications, borrowers made a difference when they appeared.

The following section describes the nine different judicial strategies observed in foreclosure proceedings, starting with the five strategies that judges could use even when a borrower was not present, and ending with the four strategies that could be used in the 27 percent of matters where the borrower or their representative appeared.

A. Scrutinizing Evidence

Applications Judges scrutinized evidence provided by the lender. The evidence in foreclosure proceedings commonly revolves around how to value the property. The value of the property impacts how much time a borrower is given to resolve their financial difficulties. If the borrower has equity in the property (*i.e.*, it is worth more than the amount owing on the mortgage), the courts will give the borrower more time to develop a financial solution. The amount of equity in a home also impacts the method by which a property is sold. When there is little or no equity left, houses are sold using more expeditious methods.[50] If the house is listed with a realtor, the value of the property dictates the price at which it is listed. The value of the property can also impact the size of a deficiency judgment for which the borrower might be liable.

Two types of documentary evidence are commonly used in foreclosure proceedings in Alberta to establish the value of a property. The first is an Affidavit of Value of Land, which attaches a report prepared by a qualified real estate appraiser. The report estimates the value of the home based on its location, size, condition, age, and the sales prices of recently purchased properties that the appraiser considers to be comparable. The second is a comparative market analysis prepared by the listing realtor. The market analysis provides a value based on the prices at which properties, which the realtor believes to be comparable, have recently sold.

Applications Judges scrutinized these documents to confirm that the evidence provided supported the estimated value. For example, on one application, a lender asked for an order for sale to the lender at an appraised market value of $380,000 based on an exterior appraisal of the property. The absent borrower owed significantly more on their mortgage and was

50 See Part IV.E: Enforcing Consistency, below, for a discussion of listing property via online classified advertisements.

facing a sizable deficiency judgment. The Applications Judge asked to see the Affidavit of Value of Land. They noted that the comparable properties were all located in the same residential complex and that there had been an adjustment of $10,000 to $20,000 to account for the relative condition of the property being sold. Satisfied by the evidence, the Applications Judge granted the order.

It is easier for Applications Judges to scrutinize evidence when two or more estimates of the home's value are provided. They can then compare the processes used to value the property. The borrower provided a competing appraisal in only three of the 105 observed matters (three percent). The Applications Judge either compared the appraisals to consider any differences, or lender's counsel conceded that the borrower's value should be used. Where a borrower questioned the value in the lender's appraisal but had not sought a competing appraisal, Applications Judges were willing to adjourn the matter to give the borrower time to have their home appraised.

It was uncommon for borrowers to provide their own appraisals, and more often lenders provided competing appraisals at different points in the foreclosure process. For example, when a property had been listed with a realtor for several months without any substantial interest from purchasers, the lender's counsel could return to court and ask to have the listing price lowered. They could support their application with new evidence of value.[51] In cases where there has been a big drop in the appraised value of a home, the lender's counsel could explain why the value had decreased. Some lenders reported that the initial appraisal had been based on an exterior examination of the property and the appraiser assumed the interior to be of average condition. When an appraiser subsequently discovered that the interior was of a substandard condition, they would reduce their valuation of the property. Lenders' counsel pointed to smoke damage, excessive clutter, and cat urine and feces as reasons for the price reduction.

Consider how an Applications Judge scrutinized the evidence to determine a new, reduced listing price for property in the face of competing valuations from the lender. In one case, the borrower had been slowly deconstructing the interior of the home during the foreclosure proceedings. The health authority had condemned the property as uninhabitable and steps had

51 Lenders also presented the level of interest in the property as some evidence of its value. If the property had been on the market for an extended period of time with few or no showings, or many showings but no offers, that suggested the listing price was too high. For example, in one application, the lender's counsel supported their application for a lower listing price by noting that the property had been listed for eight months without any activity.

been taken to bar the borrower from accessing the property. An appraisal done prior to the deconstruction work valued the property at $250,000, whereas one done later set the value at half that amount ($125,000). The Applications Judge hearing the matter reviewed the two appraisals and noted that the difference between the two values was only partially explained by the damage to the interior: the first had made a minimum (four percent) adjustment to the value to reflect the condition of the unit's interior, whereas the second had made a significant (46 percent) adjustment. But the two appraisers had also used what the Applications Judge described as "very different" comparable properties. The lender's counsel made additional submissions about a previous offer received (the Court rejected a $130,000 offer as too low) and one that was expected at $140,000. The Applications Judge took account of all this information and set the value at $165,000, partway between the two appraised values, but closer to the newer, lower one.

B. Soliciting Information

Applications Judges did not just scrutinize the evidence the parties produced, they also solicited additional relevant details from the lender and—when they were present—the borrower too. Applications Judges used this information to determine what protections applied to the borrower and how to mitigate the disruptions of home loss.

In cases where the borrower was absent, the Applications Judge regularly asked lender's counsel if they had heard anything from the borrower. Sometimes the answer was a short no: the borrower had been completely unresponsive to the lender's communications. In other cases, lender's counsel was able to advise the court that the borrower had been in touch and either did not object to the relief sought or even supported it. For example, in one case, the homeowner had died and their personal representative wanted the bank to sell the home. In another, the lawyer advised the Court that the owner had vacated the house and communicated to the bank that he was unable to make any further mortgage payments. Although the borrower would have been entitled to a redemption period had they still been in the home, their decision to leave early allowed the bank to proceed with an expedited sale.[52]

In some cases, lender's counsel provided an elaborate response to the Applications Judge's inquiries, which painted a sympathetic picture of the

52 *Property Act*, *supra* note 30, ss 41(2)(b)(iii), 42(c).

borrowers, and resulted in the borrowers being granted additional allowances. In one case, lender's counsel advised the Court that a heterosexual couple owned the house and the man had hidden the foreclosure proceedings from his spouse. When she discovered the true state of their financial affairs, the husband attempted to die by suicide. After hearing this summary of the borrowers' affairs, the Applications Judge asked if the homeowners would require extra time to move out and lender's counsel answered affirmatively. The Applications Judge gave the couple almost two extra weeks to move out.

In other cases, lender's counsel painted an unsympathetic picture of the borrower. On an application to shorten the redemption period, an Applications Judge asked lender's counsel whether they had any information about the borrower. Lender's counsel indicated that the borrower was uncooperative and had threatened anyone who entered her property with legal proceedings. The Applications Judge inferred that there was no indication that the borrower planned to redeem the property, and thus it was in her best interest to have the property on the market soon. The Applications Judge agreed to shorten the redemption period but stipulated that the order include a clause allowing the borrower to bring the matter back before the Court to ask for more time.

When borrowers were present, the ways that Applications Judges elicited information shifted. They wanted to hear from the borrower whether they had a plan to address their financial defaults; the Applications Judges were willing to give a borrower time to implement a plan, if it appeared feasible. The Applications Judges even solicited information from the lender to assist the borrower in coming up with a plan to address their defaults. In one case, the Applications Judge provided a borrower with guidance on how long they had to bring their mortgage back into good standing by paying the missed periodic payments. The Applications Judge then asked lender's counsel to confirm whether the mortgage had matured—or had reached the end of its term. Lender's counsel indicated that there was less than five months left on the term of the mortgage. The Applications Judge then advised the borrower that at the end of the term, they would need to either renew the mortgage, or refinance with a new lender.

C. Scrutinizing Legal Entitlements

Applications Judges scrutinized the relief sought by the lenders to determine whether they were legally entitled to it. Applications Judges modified the orders sought if they found the applicants' legal entitlement was lacking.

The lender might lack legal entitlement if the evidence—even when the Court accepts it—does not support the requested relief. In one case, the lender asked to expedite the sale process and the Applications Judge expedited the process, but not as much as the lender wanted. Under the applicable legislation, the borrower was entitled to a default redemption period of six months.[53] Courts can shorten this period for a variety of reasons, including if there is no equity in the home. The lender was asking to abbreviate the period because the borrower's home insurance had been cancelled and the lender wanted to sell the house quickly, in case it burnt down. The borrower had significant equity in the property—over $100,000. The Applications Judge reviewed the lender's materials and noted that the home was old and most of the property's value was the value of land: thus, even if the home burnt down, the lender could still pay itself by selling the bare land. The Applications Judge granted an order with a redemption period of three months, which gave the borrower more time than the lender had requested.[54]

Applications Judges also tested the grounding—in law—upon which the lender was seeking relief. Applications Judges are familiar with the statutes and case law governing foreclosure procedures, and thus they never asked lender's counsel *on what basis* they could grant an order to sell the property or to transfer title to the lender. But costs are different. The lender's entitlement to full costs, rather than just a partial indemnity, depends on the wording of the contract between the lender and the borrower. Standard language in residential mortgages makes borrowers liable for *all* costs that a lender incurs in foreclosure proceedings. In foreclosure actions brought by institutional lenders, the Court did not ask for evidence of the lender's contractual entitlement to full costs. However, in foreclosure actions brought by other parties, Applications Judges might ask for lender's counsel to confirm that their client was contractually entitled to its full costs. In one case, a lawyer was bringing foreclosure proceedings on behalf of three separate condominium corporations to collect unpaid fees. The lawyer was claiming full costs for each corporation, and the Applications Judge asked the lawyer to confirm that the condominium

53 *Ibid*, s 41(1)(b). The default redemption period does not apply to borrowers with some types of mortgages (see Lund, "Uncertainty", *supra* note 31 at 912–16). However, there was no evidence that any of those exceptions applied in this case.

54 Neither lender's counsel nor the Applications Judge specified what period of time lender's counsel requested, but it was clear from the Applications Judge's ruling that it was less than three months.

corporations were authorized—by their incorporating bylaws—to recover full costs. The lawyer had copies of the bylaws with him and read through one set until they found the provision that entitled their client to costs. The Applications Judge then asked them to confirm that the other two corporations had similar language in their bylaws, before granting full costs to all three corporations.

D. Raising New Legal Issues

Applications Judges have significant expertise in foreclosures, as well as other areas of law, and they see issues beyond what the parties to the proceeding have identified. They raised these issues in hearings when the borrower was not present, to help protect the borrower. For example, in one case the borrower had died and no one was representing the deceased homeowner's estate in the foreclosure proceedings. The lender applied for an order to transfer the home to itself. The Court had previously allowed the lender to proceed without notice to the deceased's estate. The Applications Judge asked lender's counsel whether any belongings remained in the property. The lawyer was unsure. The Applications Judge directed that any remaining belongings would not be treated as abandoned goods because the deceased's estate had not been notified of the application. The Applications Judge protected the deceased borrower by identifying title to personal property in the foreclosed home as a relevant legal issue.

Applications Judges also found themselves in the position of raising new legal issues when borrowers were present. The borrower's understanding of the law might be such that they were contemplating a step that would prejudice their interests, and the presiding Applications Judge felt compelled to alert them to their legal peril. For example, in one case the self-represented litigants indicated that they had commenced insolvency proceedings but wished to continue making payments on the property. They were facing a sizeable deficiency judgment ($75,000) in the foreclosure proceedings. The Applications Judge advised them that they should not make any further payments on the mortgage because the insolvency proceedings would discharge their liability for the deficiency judgment, and they risked reaffirming the debt and becoming liable for the deficiency judgment again if they made additional payments.[55] The Applications Judge

55 See e.g. Stephanie Ben-Ishai, "Reaffirmation of Debt in Consumer Bankruptcy in Canada" (2015) 56:2 Can Bus LJ 238.

was able to guide the borrower away from prejudicing themselves by identifying reaffirmation as a legal issue and explaining why it was relevant to the borrower's situation.

E. Enforcing Consistency

Even when no borrowers were present, Applications Judges ensured consistency when granting similar orders. For example, on one application, a lender was asking to list the house for sale on Kijiji, a website that contains classified advertisements. If no offers were received during the listing period, the lender would be entitled to purchase the property in exchange for cancelling a portion of the mortgage debt equivalent to the value of the home.[56] The Applications Judge asked the lawyer what period of time houses were commonly listed on Kijiji. The lawyer was unsure. The Applications Judge granted the requested order, using the same timelines included in a similar order they had granted earlier that day. The Applications Judge was ensuring a measure of fairness in how different borrowers were being treated by adopting consistent timelines across similar cases.[57]

Applications Judges have developed many oversight tools that they can use even if the borrower is absent. Applications Judges faced a shifting quandary in cases where the homeowner participated in the foreclosure proceedings. Although the Applications Judge now had two parties before it, the proceedings still departed from the adversarial ideal. Borrowers were largely self-represented and always appearing against a lender who was represented by counsel. There was a significant power imbalance between the two sides. The self-represented litigants lacked substantive legal knowledge about the foreclosure process. They also lacked knowledge about basic court processes, like how to put evidence before the court.[58]

There was also a power imbalance between the lenders and the borrowers emanating from the stakes they had in the proceedings. Borrowers were facing the loss of their home, and for some, homelessness. The evidence that they were putting before the court was often emotionally charged and involved explaining the personal hardships that had led them to default

56 This expedited sale process is used when a property has no equity in it and any further delays will result in the mortgage debt growing further beyond the value of the home.

57 As Jessica Csandl adroitly pointed out, consistency is only one possible measure of fairness, because if the timelines used are unfair, they are being consistently applied (in their unfairness) to all similarly situated borrowers.

58 See generally Leitch, "Coming off the Bench", *supra* note 25 at 338 (observing that evidentiary rules create significant hurdles for self-represented litigants).

on their mortgage obligations: accidents or illnesses, relationship breakdowns, reduction in income, or the expenses associated with caring for ill children. Sharing such stories with a figure of authority in a room full of strangers can be deeply intimidating.[59] These were high stakes for the borrowers. Conversely, the institutional lenders' interest was merely a matter of money: they wished to maximize their recovery. When the borrower was present, Applications Judges adopted additional strategies to mitigate the power imbalance between the parties. The strategies included the five discussed above, as well as providing advice, providing referrals, facilitating negotiations, and problem solving.

F. Providing Advice

Applications Judges frequently explained aspects of procedural and substantive law to the borrowers.[60] In terms of procedure, at the start of an application, they might ask if the borrower was present. They would then explain to the borrower where to sit and when they would have an opportunity to speak (after the lender's counsel had made their submissions). They cued the borrower as to when they should be standing and when they could be sitting.

The borrowers' lack of procedural knowledge required creativity on the part of Applications Judges. Applications Judges are not entitled to receive oral testimony.[61] Evidence is to be submitted by way of a written, sworn affidavit. Yet, borrowers frequently wanted to tell their story in court. The Applications Judge allowed borrowers to explain their situation and, in some instances, adjourned the matter so that a borrower could put their evidence into an affidavit. When the borrower's submissions went to the estimated value of the house, the Applications Judges would urge the

59 Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants: Final Report* (National Self-represented Litigants Project, 2013) at 95, online (pdf): <representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf> (describing court appearances by self-represented litigants as "the most intensely anticipated and intimidating aspect" of their legal experience, and one which "terrified" them).

60 Noting this trend amongst administrative decision makers, see Michelle Flaherty, "Self Represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law" (2015) 38:1 Dal LJ 119 at 130.

61 *King's Bench Act*, *supra* note 40, ss 9(3)(a)–(b).

self-represented litigants to get an appraisal and were willing to adjourn applications to allow borrowers to do so. Applications Judges even suggested that an adjournment was in order despite the borrower not having requested one. For example, one borrower indicated that he needed more time to figure out a solution to his default. His family had welcomed a new baby which had placed financial strain on the household and he was hoping to settle his debts by selling some business assets or getting money from his family. He also noted that the value in the lender's appraisal seemed low. The Applications Judge interjected and said that it sounded like the borrower wanted to adjourn the application so he could get his own appraisal done. The borrower indicated he "would take what your honour will allow". Thus, the matter was adjourned.

Borrowers were mystified by substantive foreclosure law, and Applications Judges frequently had to explain it to them. The most common topic explained was how a redemption period operates. A redemption period pauses the foreclosure proceedings so that the borrower can come up with a financial solution of their own. Some borrowers came to court expecting to lose their house immediately only to discover that they had been granted a six-month reprieve.

Applications Judges frequently advised borrowers of their options during the redemption period: reinstate the mortgage by paying any outstanding arrears and costs of enforcement, redeem the mortgage by paying the full balance, refinance with a different lender, or sell the house themselves, hopefully for a higher price than can be achieved in a distressed sale. Judges tailored the advice to the borrower's circumstances. For example, in one case where there was a substantial judgment from an unsecured creditor registered against the house, the Applications Judge indicated to the borrower that it was unlikely he would be able to refinance with a new lender. In another, the Applications Judge noted that the mortgage was matured and thus the borrower would need to pay off the entire balance of the mortgage if they wished to stop the foreclosure proceedings.

Applications Judges provided substantive and procedural legal direction in response to the specific issues or questions raised by self-represented borrowers. In one case, the lender was applying for a deficiency judgment against the borrowers. The borrowers brought a print-out, which they indicated had been provided to them by an employee at their bank. The print-out said that deficiency judgments were not granted against borrowers in Alberta. The Applications Judge then advised them that the protection from deficiency judgments only applied to some types of mortgages,

and the type of mortgage they had was not subject to the protection.[62] In another case, the borrower wanted to know what would happen after the possession date, when title to the property transferred to the bank. The Applications Judge explained that if she had not moved out by the possession date, the lender could have a bailiff remove her.

G. Providing Referrals

Applications Judges referred parties to court-based and non-profit service providers if they appeared to require additional assistance. Sometimes these referrals were to programs that could help borrowers with the legal aspects of their foreclosure matter. There are a handful of no-cost legal assistance programs available to borrowers navigating foreclosure proceedings. The Alberta Debtor Support Program matches borrowers with volunteer lawyers, who provide summary legal advice and may help them negotiate with their lenders.[63] Additionally, volunteer lawyers with the Court of King's Bench Assistance Program attend court on Wednesdays in Edmonton to assist people who are appearing in Morning Chambers without a lawyer. Applications Judges made referrals to these programs, and they adjourned matters with self-represented borrowers to Wednesdays when volunteer lawyers would be available to assist. In one case the lender was seeking an order for sale and a deficiency judgment, but the borrower contested the amount owing on the mortgage. The Court granted the order for sale but adjourned the application for a deficiency judgment for six weeks so that the borrower could get assistance from duty counsel.

A second common referral was for Applications Judges to suggest that borrowers consult an insolvency trustee. Insolvency trustees are private market professionals who assist borrowers in accessing debt relief through bankruptcy or a proposal process.[64] In Canada, borrowers cannot use insolvency proceedings to forestall a foreclosure.[65] However, they can use it to reduce or write off other debts, which might give them the financial

62 See Lund, "Uncertainty", *supra* note 31 at 911–17.

63 Judith Hanebury, "Foreclosures in Alberta: The return of the '80s" (15 September 2020), online (blog): <lawnow.org/foreclosures-in-alberta-the-return-of-the-80s>; Alberta Debtor Support, "Helping Albertans Toward Recovery" (last visited 15 April 2025), online: <www.albertadebtorsupport.ca/>.

64 Anna Jane Samis Lund, *Trustees at Work: Financial Pressures, Emotional Labour, and Canadian Bankruptcy Law* (Vancouver: UBC Press, 2019) at 39–69.

65 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, ss 69.2–69.3 [*Bankruptcy Act*]; Traub, *supra* note 26 at § 28:1.

capacity to reinstate or redeem their mortgage.[66] In 12 percent of the applications brought by lenders (12 of 101), the lender or borrower indicated that the borrower had started insolvency proceedings. Borrowers can also use insolvency proceedings after a foreclosure to discharge any resulting deficiency judgment. When granting or renewing deficiency judgments, Applications Judges often suggested to the borrower that they speak to an insolvency trustee about possible debt relief options.

H. Facilitating Negotiations

A negotiated settlement may be the best resolution to a foreclosure action, for both the borrower and the lender.[67] A borrower and lender might agree to a payment plan whereby the borrower brings the mortgage back into good standing. Alternatively, the borrower and the lender might agree on how and when a house will be sold. In the observed proceedings, the lender and the borrower sometimes negotiated a resolution prior to the court date. Lender's counsel would then appear in court to have a consent order approved by an Applications Judge. In other cases, the court application was the first time the borrower and lender discussed settlement.

Applications Judges facilitated negotiations between the parties. If it was evident that the parties had not discussed a potential resolution, an Applications Judge would stand the matter down to allow the lender and borrower to talk. On days when volunteer lawyers were present, they sometimes assisted in these negotiations. These talks did not always result in a negotiated solution, but sometimes they did. Applications Judges oversaw any resulting settlement to ensure it benefitted both parties. For example, in one case the parties agreed that the Court should grant an order for sale to the lender but stay it as long as the borrower made payments of $4,000 per month to the lender. A volunteer lawyer had assisted in negotiating this settlement. Even so, the Applications Judge asked the borrower to confirm that the payment plan was feasible. The borrower indicated he could make the payments and the Applications Judge granted the order.

66 *Bankruptcy Act*, *supra* note 65, s 178(2).

67 Self-represented litigants valued judges who assisted in moving the parties towards settlement (see Macfarlane, *supra* note 59 at 105).

I. Solving Problems

Applications Judges became active problem solvers for the parties. Sometimes, the problem was a practical one. In one application, the lender was asking for an order to sell a home located two hours outside of Edmonton. The borrowers had belongings remaining in the home, which they wished to recover, but did not have access to a truck big enough to move the belongings. The Applications Judge brainstormed ways for the borrowers to get their stuff back (*e.g.*, could the property manager drop it off with a friend in town?) and then encouraged the borrowers to contact the property manager to make arrangements. In other cases, the problem was a legal one. In one application a dispute had arisen between two owners of a mortgaged property. The Applications Judge noted that their dispute likely engaged the *Family Property Act*[68] because the two owners had been in a romantic relationship. It was unclear what relief the applicant-owner was seeking, but the Applications Judge indicated that if they merely wanted to get one of the owners off the title, they could do so by signing a transfer of land. The Applications Judge indicated that such a transfer would *technically* be a breach of their mortgage, but the lender was unlikely to take any enforcement steps as long as the remaining owner stayed current with their mortgage payments.

V. IMPLICATIONS: FORECLOSURE PRACTICE AND JUDICIAL ETHICS

The descriptions in Part IV of what Applications Judges are already doing in foreclosure proceedings have implications for foreclosure practice and judicial ethics. This section examines what these courthouse observations indicate about whether borrowers benefit from attending court, the benefits of having court-based (versus out-of-court) foreclosure proceedings, and the need to provide judges with additional ethical guidance when they work in practice areas where one party is commonly absent.

A. Showing up Matters

Homeowners facing foreclosure may look at the high success rate of lenders in foreclosure applications and determine that it is not worth the time,

68 RSA 2000, c F-4.7.

stress, and discomfort to appear in court.[69] Writing about the high rate of non-appearance by tenants in residential tenancy hearings in Saskatchewan, Sarah Buhler and Rachel Tang observed that tenants may be choosing not to appear because they have little trust in the tribunal.[70] This skepticism may be well-founded. Buhler and Kaiser-Derrick's review of decisions from Saskatchewan's residential tenancy tribunal indicates that if a tenant is not able to pay rent, there is little they can do to avoid eviction.[71] Not showing up to a hearing may be a strategic choice for a tenant if their appearance will have little to no impact on the outcome.

And yet, the situation may be different in foreclosures. The Alberta Law Reform Institute suggested that borrowers may benefit from showing up:

> One would expect borrowers to come to court to present their side of the case. Unfortunately, human nature works against logic in this situation. We received strong indication, although anecdotal, that many borrowers fail to come to court because they are embarrassed, intimidated or naive, *not because they would not benefit from presenting their case before the court* [emphasis added].[72]

The observations reported in this article support the Alberta Law Reform Institute's position: borrowers benefitted from appearing and presenting their case before the court. The most obvious benefits accrued to self-represented litigants when they showed up with a financial solution to their default. If they had a credible explanation for how they planned to reinstate or redeem the mortgage, the court would give them a chance to implement their plan. For example, in one case a borrower was facing foreclosure against his family's residence. He owned a second property and indicated that he planned to sell it and use the proceeds to retire the mortgage indebtedness. The lender was asking for a short redemption period of two months, but the court gave the borrower six months to attempt his plan.

When a borrower lacked the financial wherewithal to avoid foreclosure, courts were willing to provide the borrower with more time to reduce the disruptions caused by the home loss. Courts gave borrowers extra time to move out if they faced barriers to undertaking the move. Courts also

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69 Detailing the monetary, temporal, and psychological costs of attending court, see Noel Semple, "The Cost of Seeking Civil Justice in Canada" (2016) 93:3 Can Bar Rev 639.

70 Sarah Buhler & Rachel Tang, "Navigating Power and Claiming Justice: Tenant Experiences at Saskatchewan's Housing Law Tribunal" (2019) 36 Windsor YB Access Just 210 at 215–16.

71 Buhler & Kaiser-Derrick, *supra* note 23 at 62.

72 *Mortgage Remedies*, *supra* note 33 at 178.

delayed moving dates until after significant events in the lives of borrowers, such as scheduled medical procedures.

Self-represented litigants also improved the outcome when they brought evidence of the value of the property in the form of an appraisal. What the court did when faced with competing appraisals varied. In one case, lender's counsel conceded that the court should adopt the borrowers' appraisal for the purposes of calculating the deficiency judgment, resulting in a decrease in the amount the borrower owed. In another, the court simply averaged the two appraisals to arrive at a value for the home. In a third case, there was a substantial ($43,000) difference between the two appraisals. The court adopted the higher (borrower's) amount for the purposes of setting a redemption period of six months and indicated that if the house was to be sold afterward, it should be listed at either the lower (lender's) amount or such higher price as a realtor might recommend. Although the specific judicial response differed, in each of these cases the borrower's appraisal impacted the relief the Applications Judge granted, sometimes significantly.

Borrowers may also incur benefits from showing up despite not impacting the outcome of the court proceeding in a concrete way. Previous research on self-represented litigants indicates that they perceive proceedings as being more fair when they have a voice in the process, even if sharing their story does not ultimately change the outcome.[73] They may experience some relief after explaining the personal circumstances that led them into foreclosure to a person in a position of authority, especially when that person responds sympathetically and takes their submissions seriously. Applications Judges did not always respond sympathetically to the personal stories of borrowers, but on balance were commendably patient and kind when these stories were shared. Borrowers may incur other benefits. The judicial explanations of the law and referrals to legal advice might help them better understand the options available to them. The referrals to insolvency trustees may give them tools for addressing their indebtedness about which they were previously unaware or not willing to contemplate.

B. Judicial Oversight

Alberta is a judicial sales district, but other Canadian provinces allow foreclosure proceedings to take place outside of the court. One might wonder

73 Nourit Zimerman & Tom R Tyler, "Between Access to Counsel and Access to Justice: A Psychological Perspective" (2010) 37 Fordham Urb LJ 473 at 487, 490.

which approach is preferable. The Alberta Law Reform Institute posed this question in a 1994 report. It noted a prevalent perception that judicial sales are slower and more costly than extrajudicial sales, however, the actual evidence it collected on their comparative cost was inconclusive.[74] Judicial sale proceedings do take up limited judicial resources. And yet, given the high stakes facing borrowers when they lose a home, this use of judicial resources may be well justified. Recall that ensuring security of tenure, as part of the broader right to housing, requires that residents be provided access to adequate legal and other protections.[75] Judicial oversight is one mechanism for providing these protections.

The Institute detailed how judicial oversight can act as a check to safeguard the borrower. It protects "against sales at inadequate prices" as "the court will not knowingly approve sales at grossly inadequate prices".[76] The court can ensure that the borrower is able to take advantage of the protections available to them under law, including redemption periods and protection from deficiency judgments.[77] Judicial oversight also insulates the lender against allegations of wrongdoing.[78]

The observations reported on in this article elaborate how Applications Judges are exercising this oversight function. They scrutinized and solicited evidence. They scrutinized legal entitlements. They raised new legal issues. They ensured consistency between applications. They coached borrowers on procedural and substantive law. They provided referrals and solved problems. They overwhelmingly granted the applications asked for, but not always, and sometimes only with modifications.

The small number of cases in which orders were denied or modified does not capture the full impact of judicial oversight. Lender's lawyers know they must present their matters before a court, and they may be denied the relief if the evidence or law does not support it. Consequently, judicial oversight encourages lawyers to police themselves and preemptively avoid asking for relief to which their clients are not entitled.

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74 *Mortgage Remedies*, *supra* note 33 at 140–41. In the same Report, the authors note that "the difference in costs [between the two procedures] is not very great" (*ibid* at 147).

75 UNCESCR, *General Comment 7*, *supra* note 13 at para 3.

76 *Mortgage Remedies*, *supra* note 33 at 145.

77 *Ibid*.

78 *Ibid*.

C. Judicial Ethics Applicable to Self-Represented and Absent Borrowers

Decision-makers may find that the ethics designed for a passive judge in an idealized, adversarial system fit uncomfortably when they take on an active role. A foundational principle of the Canadian legal system is that judges must be impartial.[79] Parties represented by lawyers may perceive that judges behave with an impermissible level of partiality if they take steps to assist a self-represented litigant or protect an absent one.[80] But this concern overlooks how judicial intervention may be necessary to ensure that "all parties…have a fair opportunity to present their case."[81] Providing self-represented litigants "with information about what to do, where to go, and when to appear, all demonstrate respect both for those people and for their right to have their problems handled fairly by the courts."[82] This feeling of being respected impacts a litigant's sense of whether they have been dealt with fairly.[83] For absent litigants, active judges safeguard against unfair treatment in inaccessible legal proceedings.

The Canadian Judicial Council provides Canadian judges with direction about their ethical responsibilities when dealing with self-represented litigants in its *Statement of Principles on Self-represented Litigants and Accused Persons*. The Supreme Court of Canada has endorsed these principles.[84] The *Statement of Principles* recognizes that judicial neutrality and impartiality are consistent with taking a more active role in adjudication and suggests that such an active role may be necessary to ensure a fair court process for self-represented litigants.[85] It contemplates that such steps might include explaining the process, inquiring whether parties understand it, making referrals, providing information about law and evidentiary requirements, modifying the traditional order of taking evidence,

79 CJC, *Ethical Principles*, *supra* note 20, ch 5, commentary 5.A.1–5.A.4.

80 Flaherty, *supra* note 60 at 124; Leitch, "Coming off the Bench", *supra* note 25 at 312.

81 Flaherty, *supra* note 60 at 128. On judicial impartiality and self-represented litigants, see e.g. Micah Rankin, "Access to Justice and the Institutional Limits of Independent Courts" (2012) 30 Windsor YB Access Just 101 at 122–28.

82 Zimerman & Tyler, *supra* note 73 at 488.

83 *Ibid* at 489; Leitch, "Coming off the Bench", *supra* note 25 at 320, 326.

84 *Pintea v Johns*, 2017 SCC 23 at para 4.

85 Canadian Judicial Council, *Statement of Principles on Self-represented Litigants and Accused Persons* (CJC, 2006) ch B, commentary 1–2, online (pdf): <cjc-ccm.ca/sites/default/files/documents/2020/Final-Statement-of-Principles-SRL.pdf> [CJC, *Statement of Principles*]. See also CJC, *Ethical Principles*, *supra* note 20, chs 2, 5, commentary 2.D.1–2.D.2, 5.A.B; Devlin, *supra* note 20 at 336–37.

and questioning witnesses.[86] The strategies that Applications Judges are using to assist self-represented borrowers are consistent with these ethical responsibilities.

There is less direction for judges about the specific ethical responsibilities that arise when a party is not present, or how their responsibilities need to be adjusted in areas of practice where one side is regularly absent because of a significant power imbalance between the parties. The lack of ethical direction for judges can be contrasted with the ethical principles that apply to lawyers when the "opposing interests are not represented".[87] The Federation of Law Societies of Canada's *Model Code* requires lawyers to treat tribunals with "candour, fairness, courtesy and respect."[88] In the commentary to the rule, the Code provides that:

> When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations in which the full proof and argument inherent in the adversarial system cannot be achieved, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled.[89]

The Alberta version of the *Code of Professional Conduct* for lawyers imposes the same duty of candour, fairness, courtesy, and respect, and the commentary on this rule goes further. It indicates that a lawyer appearing against an absent litigant is obliged "to prevent a manifestly unjust result by disclosing all material facts known to the lawyer that the lawyer reasonably believes are necessary to an informed decision."[90]

Judges have ethical obligations to "foster access to justice for all" and to conduct "the proceeding before them to ensure equality according to law."[91] These general obligations support judges taking a more active role to protect the interests of an absent litigant, especially when their absence reflects a structural power imbalance. However, more guidance would be useful. One option to consider is whether judges have an ethical obligation in unopposed matters that corresponds with the lawyer's—to take a more active role to ensure that the lawyer is candid, and fairness is maintained.

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86 CJC, *Statement of Principles*, *supra* note 85, ch B.4.

87 See e.g. Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2024) ch 5.1-1 [FLSC, *Model Code*].

88 *Ibid*.

89 *Ibid*, ch 5.1-1, commentary 6.

90 Law Society of Alberta, *Code of Conduct* (LSA, 2024) ch 5.1-1, commentary 7 [LSA, *Code of Conduct*].

91 CJC, *Ethical Principles*, *supra* note 20 at chs 2.D, 4.

This topic warrants further research. Judicial education has a role to play here too. Applications Judges have much wisdom to impart on their judicial colleagues about how to promote fairness when a litigant is absent.

Before leaving this topic, it bears noting that the ethical principles in this section apply to federally appointed judges, whereas Applications Judges are provincially appointed. Alberta's Judicial Council is empowered to establish a Code of Ethics for Applications Judges and other provincially appointed judicial officers.[92] As of the writing of this article, they have not adopted such a Code of Ethics but are guided in their work by the principles applicable to federally appointed judges.[93]

VI. CONCLUSION

The presumptions underlying the adversarial system break down in foreclosure proceedings because of the prevalence of absent and self-represented borrowers. If judges conducted themselves as though the adversarial ideal still held, they could perpetuate the power imbalance between sophisticated lenders, who have access to legal counsel, and financially distressed homeowners, who generally do not. Borrowers would not receive protections to which they were entitled, and would consequently lose their homes. When foreclosures occur without due regard to the homeowner's legal entitlements, they undermine the security of tenure that is a central component of the right to housing. Such a breakdown of the adversarial system would have real world impacts: involuntary home loss negatively impacts all the people living in the home.

Fortunately, active judicial oversight of the foreclosure process helps ensure that homeowners get their legal due. By enhancing the fairness of the process, judicial oversight strengthens the borrower's security of tenure and promotes public confidence in the administration of justice. This article has detailed some of the methods that Applications Judges in Edmonton, Alberta have used to ensure that their oversight role is robust in the large number of cases where the homeowner is entirely absent and in the smaller number of cases where the homeowner is present, but self-represented.

Just because judicial oversight can provide meaningful protections to homeowners does not mean that it always will. Judges must take on the

92 *Judicature Act*, RSA 2000, c J-2, s 32(c).

93 Correspondence on file with author.

oversight role and resist the urge to rubber stamp applications. This temptation may be especially great when courtrooms are overburdened and the list of matters to be heard is long. Judges need time to perform their job well, which means that courts need to be sufficiently resourced so that judges can be afforded this time. Judges can also be supported in this work with ethical guidelines that specifically contemplate the challenges created by absent litigants. A judge's ability to exercise oversight might also be shaped by the culture of their workplace and the training they receive. Judges can read this article for strategies that enable them to breathe life into their oversight role.

Just because judicial oversight can provide meaningful protection to homeowners does not mean that better alternatives do not exist. Borrowers would likely benefit from enhanced access to paid duty counsel, who could spend time with them reviewing the evidentiary and legal aspects of their claims. An alternative dispute resolution process might be more accessible to borrowers and make it easier for them to participate in the foreclosure proceedings. At the same time, the low levels of tenant participation in specialized tribunals designed to hear residential tenancy proceedings might weigh against such a conclusion.[94] Moreover, the unequal power imbalance between borrowers and lenders may be further obscured by the lack of oversight in administrative tribunal processes.[95] Judges can play a role in correcting power imbalances that are difficult to "monitor and correct" when disputes are resolved in non-public settings.[96]

This article has offered a preliminary glimpse into foreclosure proceedings with its frequently absent borrowers, but questions remain. The observational method does not reveal how self-represented and absent litigants evaluate their experiences with the legal process. Other Canadian research suggests that many self-represented litigants have negative experiences in the courtroom that include feeling belittled, condescended to, as though their matter had been prejudged, and as though they were not being taken

94 About 37–38 percent of tenants attend their residential tenancy hearing (see Sarah Buhler, "Pandemic Evictions: An Analysis of the 2020 Eviction Decisions of Saskatchewan's Office of Residential Tenancies" (2021) 35 J L & Soc Pol'y 68 at 80).

95 Noting a lack of transparency in residential tenancy tribunals flowing from limited or no public access to written decisions, see e.g. Jonnette Watson Hamilton, "Reforming Residential Tenancy Law for Victims of Domestic Violence" (2019) 8 Annual Rev Interdisciplinary Justice Research 245 at 267.

96 Menkel-Meadow, *supra* note 20 at 131.

seriously by the judge.[97] It would be invaluable to know how those who show up for foreclosure matters experience them.[98] Amongst those who are absent, it would be invaluable to know why they did not appear. Lender's counsel are the drivers of the foreclosure process and warrant further study. One question that calls out for scholarly attention is the sufficiency of existing ethical guidance about a lawyer's obligations when proceeding *ex parte*.[99] The current rules fail to contemplate the situation of a lawyer who is almost always proceeding *ex parte* against a less powerful adversary, while seeking relief that threatens the fundamental human rights of said adversary.

Ultimately, there may be an unresolvable tension between the adversarial system's presumption of equally resourced litigants and the progressive realization of fundamental human rights, including the right to housing. The adversarial system prioritizes "individualistic, rights-based values…over broader communitarian values."[100] It is premised on a competitive theory where "competing individuals have no legal responsibility for the competence of their counterparts on the other side of the transaction and, consequently, have no obligation to share the benefits of their own competence with the other side."[101] Applications Judges have a role to play in mitigating the power imbalance, but they cannot eradicate it entirely. Where one side regularly comes to the adversarial system with less—less power, less knowledge, less money—they will consistently lose in court. And where a loss in court translates into the loss of a home, through foreclosure or otherwise, the adversarial process operates to undermine security of tenure, and thus the human right to housing.

97 Macfarlane, *supra* note 59 at 100–04. Reporting on negative experiences with opposing counsel, see Leitch, "An Ethical Change of Role", *supra* note 21 at 680–85. See also Leitch, "Coming off the Bench", *supra* note 25 at 322–35.

98 Calling for more research into how residents experience legal unhousing processes, see e.g. Sarah Buhler & Michelle C Korpan, "Measuring the Impacts of Representation in Legal Aid and Community Legal Services Settings: Considerations for Canadian Research" (2019) 56:4 Alta L Rev 1117 at 1119.

99 See e.g. FLSC, *Model Code*, *supra* note 87, ch 5.1-2B; LSA, *Code of Conduct*, *supra* note 90, ch 5.1-2A.

100 Menkel-Meadow, *supra* note 20 at 125.

101 Robert J Kutak, "The Adversary System and the Practice of Law" in David Luban, ed, *The Good Lawyer: Lawyer's Roles and Lawyers' Ethics* (Totowa: Rowman & Allanheld, 1984) 172 at 174.