

Foreclosure

in Alberta



Property foreclosure can be a complicated and confusing experience for a homeowner. Many people are not familiar with what legal options they may have and what court processes they must follow.

This booklet gives a general overview of what foreclosure is, what can happen during a foreclosure, and how foreclosure may affect both property owners and renters living in a property.

You should **not** rely on this booklet for legal advice. It provides general information on **Alberta law only.**



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What is foreclosure?

Foreclosure is a legal process for a mortgagee (a lender, usually a bank) to sell, or take ownership of, a property when the mortgagor (the property owner) defaults on the mortgage.

In other words, the owner got a mortgage in order to buy the property and the owner has not been able to meet the promises made under the mortgage. The bank is worried about losing money, so the bank wants to either become the owner of the property or sell the property to collect the money that is owed under the mortgage.

In Alberta, if a bank wants to sell a property, the bank must follow the legal process for foreclosure, or get the owner's consent to the sale.

What are acts of default under a mortgage?

A mortgage agreement contains all of the promises that the property owner makes to the bank. If the owner does not fulfill these promises, then the owner has committed an "act of default."

Each mortgage is different, but common acts of default may include:

- failing to pay mortgage payments;
- allowing significant damage to occur to the property;
- failing to insure the property; and
- failing to pay taxes or condominium fees on the property.

Can a bank foreclose as soon as even one payment is missed?

Yes, in almost all mortgages the lender can seek foreclosure after even just one payment is missed.

Usually banks will not foreclose right away, because foreclosure is an expensive process: it is often in everyone's best interests if a compromise can be reached between the owner and the bank. For example, the property owner may be able to work out a temporary alternate pay schedule with the bank. At what point the bank will start to consider foreclosure depends on how many payments are missed, the value of the property, and various other factors that affect the risk that the bank will not get paid what it is owed. Remember, the point of the process is for the bank to stop losing money (as they lose money every time a mortgage payment is not made). To do this, they may ultimately need to sell or take ownership from the owner who is not making the mortgage payments.

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What are the possible outcomes for property owners?

Property owners basically have three choices.

- They can try to solve the problem with the lender on their own (usually after the reminder or demand letter);
- They can do nothing, at which point they will lose the property; or
- They can go to court to either:
 - co-operate with lender in some fashion in order to keep the property;
 - try get more time before the final foreclosure order; or
 - fight the foreclosure.

The processes resulting from each of these choices are described in more detail in the following questions.

How long can foreclosure take?

The time a foreclosure takes depends on the situation. The entire foreclosure process can take from three months to a year or more. Even though there are specific steps that must be taken in every foreclosure, each situation is different.



There is a tenant in the property. Will the tenant have to move out?

It depends on what step within the foreclosure process the property is in, and what the landlord and bank decide to do. Sometimes, a landlord is able to work something out with the bank, or is able to bring the mortgage current, and then the landlord remains the owner of the property and the tenancy agreement can stay in place. Sometimes if the property is sold through the foreclosure, the new owner will become the landlord.

More commonly, however, a tenant is required to vacate the property. Whether it is the bank who becomes the legal owner of the property, or the property is sold to another person during the foreclosure process, the bank or new owner will usually be entitled to possession of the property within 30 days from the date the tenant is served with the Court Order. If a tenant is served with a Court Order requiring them to move, then the tenant should contact the lawyer whose name and contact information is on the front of the Order and clarify when they have to move. The tenant can also ask the lawyer for more time, but the lawyer may not agree to that request.

It is important to understand that the notice periods under the *Residential Tenancies Act* do **not** apply if a Justice or a Master of the Court of Queen's Bench issues an Order requiring that the property be vacant.

Can a property owner appeal an Order for Foreclosure?

An order can only be appealed for limited reasons. Sometimes a property owner will not agree with a Court Order, but not liking or agreeing with it are not legitimate grounds for appeal. A property owner who wants to appeal an Order may want to contact a lawyer to receive legal advice before proceeding. There will usually be a term included in the mortgage contract that states that a property owner must pay the bank's legal costs. By consulting with a lawyer, the property owner may end up saving money because the time and expense of an unwarranted appeal may be avoided.



Is foreclosure the same as bankruptcy?

No. Foreclosure occurs because of a breach of contract. For example, the bank gave money to the property owner to buy a property, and in return, the property owner promised to pay that money, plus interest, back to the bank. If the property owner does not pay the bank, then the owner has breached the contract made with the bank and the bank can then start foreclosure proceedings. Usually, only one asset will be involved, such as a house.

Bankruptcy occurs when someone cannot meet any of their financial obligations. A person in bankruptcy does not control any assets; instead, a trustee controls the assets and decides what happens to those assets. Bankruptcy is also a court process, but it is very different from foreclosures. Sometimes both foreclosures and bankruptcy can occur at the same time.

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Does the property owner still have to leave if it's winter and cold outside?

Yes, the property owner must leave if they have been ordered to do so by the Court. The weather or temperature outside does not matter. If the property owner does not move, then the new owner can get a Civil Enforcement Agency to force anyone living in the property to leave.

What is the Court process for foreclosure?

A foreclosure action starts in the same way that other lawsuits do: the Plaintiff (the bank) files and serves a Statement of Claim (which starts the lawsuit and sets out the facts on which the claim is based) against the Defendant (the property owner).

The owner then has 20 days in which to file and serve a Statement of Defence or Demand for Notice. If the owner does not do either of these things within 20 days, then the Plaintiff can note the Defendant in default. This basically means that the bank is telling the Court that the property owner is not fighting or defending the claim.

Once these steps are over, the bank must file an Affidavit of Value (which includes an appraisal that sets out the current fair market value of the property) and an Affidavit of Default (which includes the amount owing on the mortgage, the amount in default, and other specific information). The bank can now apply to the Court for various remedies (for example, sale of the property). The Court will decide what to order based on the circumstances.

Rarely, the Court will decide not to issue an order. This would occur, for example, when the Court finds that the property owner did not commit an act of default under the mortgage. This means that the bank had no grounds to sue the owner.

Usually, the Court will grant a Redemption Order. A Redemption Order will order that:

- the owner has a specified time to bring the mortgage current (in other words, the owner has a specified amount of time to make all of the payments that the Court orders must be made);
- if the owner does not pay all of the money within the time period, then the property will be offered for sale; and
- the sale be done by a specified method. There are three usual methods:
 1. listing the property with a real estate agent;
 2. advertising the property for sale in a newspaper or other publication; or
 3. a posting at the courthouse.

Sometime after the property has been listed, there will be another court application(s). If there are no valid offers from a third party on the property, then the bank will apply to become the legal owner. If there is a valid offer on the property, then the Court must approve and accept the offer and order that the property can be sold to the purchaser. If the Court does not accept an offer for whatever reason, then the property remains listed for sale. Basically, for the property to be sold, the Court must first approve the offer.

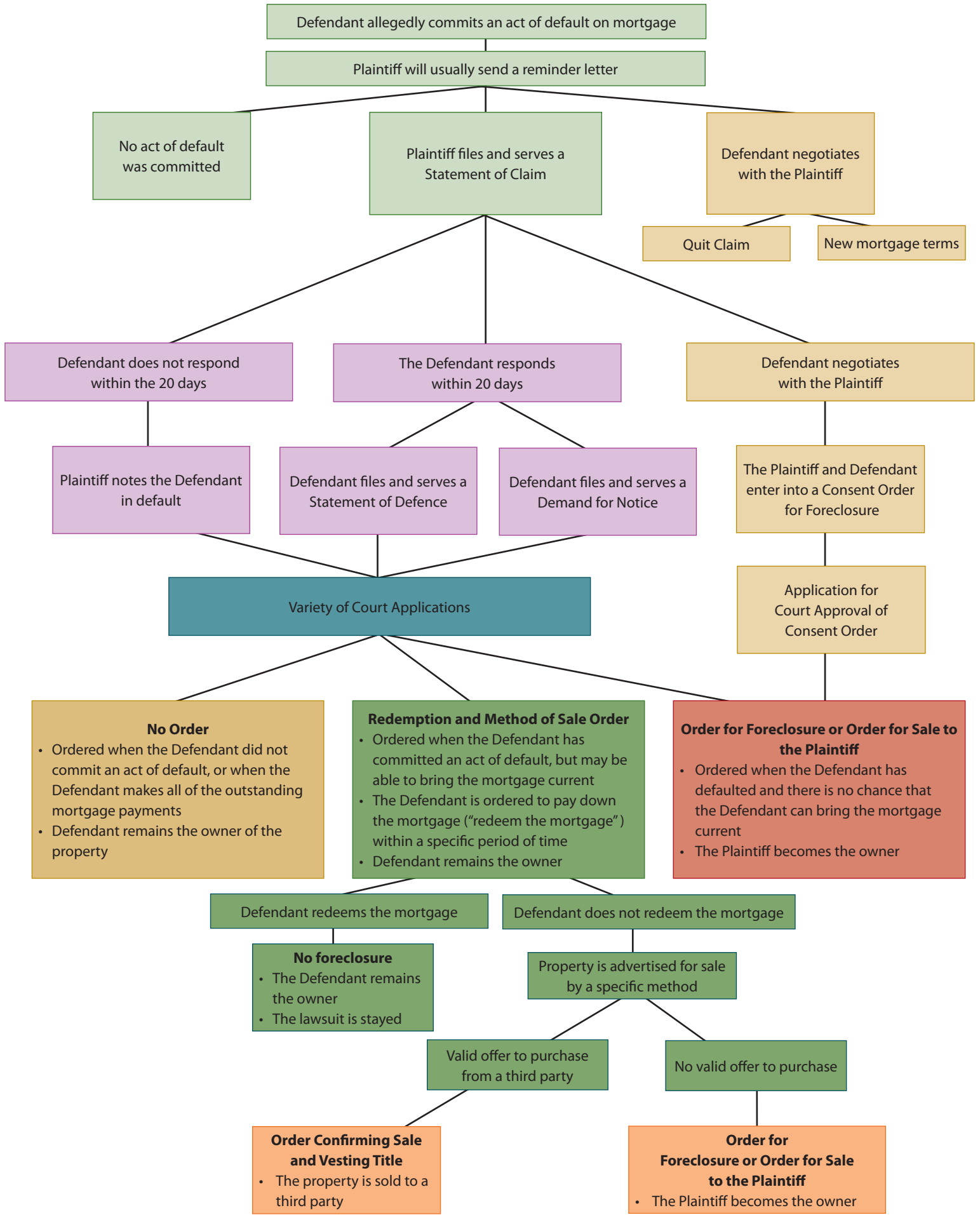
Sometimes the Court will make an Order for Foreclosure or an Order for Sale to the Plaintiff. This will occur, for example, when the owner has committed an act of default under the mortgage, and the Court does not believe that there is any way that the owner can rectify (or fix) the default. For example, if the owner has absolutely no money or other assets, is unemployed, and owes the bank over a year's worth of mortgage payments, the Court might decide that there is no chance the owner will be able to redeem the mortgage. If the court makes an Order for Foreclosure, then the bank will become the owner of the property.

Whether it is the bank or a third party that becomes the owner of the property, they will usually be entitled to possession of the property within 30 days. This means that if the property owner or a tenant lives in the property, the tenant will be served with a Court Order requiring them to move within 30 days. If the tenant does not move, then a Civil Enforcement Agency can be hired to force the tenant to leave the property.

Does a foreclosure always go through the Courts?

Not necessarily. Usually, if the property owner commits a default under the mortgage, the bank will attempt to contact the owner to remind the owner of their obligation under the mortgage. Sometimes the owner and the bank will be able to work something out between themselves (for example, an alternative pay schedule), and then the owner will remain the owner of the property.

Sometimes the bank and the owner will not be able to work out a way for the owner to remain the owner of the property. In this case, the owner and the bank may decide to proceed with a Quit Claim, or a Consent Order.



Defendant allegedly commits an act of default on mortgage

Plaintiff will usually send a reminder letter

No act of default was committed

Plaintiff files and serves a Statement of Claim

Defendant negotiates with the Plaintiff

Quit Claim

New mortgage terms

Defendant does not respond within the 20 days

The Defendant responds within 20 days

Defendant negotiates with the Plaintiff

Plaintiff notes the Defendant in default

Defendant files and serves a Statement of Defence

Defendant files and serves a Demand for Notice

The Plaintiff and Defendant enter into a Consent Order for Foreclosure

Variety of Court Applications

Application for Court Approval of Consent Order

No Order

- Ordered when the Defendant did not commit an act of default, or when the Defendant makes all of the outstanding mortgage payments
- Defendant remains the owner of the property

Redemption and Method of Sale Order

- Ordered when the Defendant has committed an act of default, but may be able to bring the mortgage current
- The Defendant is ordered to pay down the mortgage ("redeem the mortgage") within a specific period of time
- Defendant remains the owner

Order for Foreclosure or Order for Sale to the Plaintiff

- Ordered when the Defendant has defaulted and there is no chance that the Defendant can bring the mortgage current
- The Plaintiff becomes the owner

Defendant redeems the mortgage

Defendant does not redeem the mortgage

No foreclosure

- The Defendant remains the owner
- The lawsuit is stayed

Property is advertised for sale by a specific method

Valid offer to purchase from a third party

No valid offer to purchase

Order Confirming Sale and Vesting Title

- The property is sold to a third party

Order for Foreclosure or Order for Sale to the Plaintiff

- The Plaintiff becomes the owner

What law in Alberta deals with foreclosure?

There are several laws in Alberta that apply to foreclosures:

- *Law of Property Act*;
- *Land Titles Act*;
- *Alberta Rules of Court*; and
- contract law (the mortgage between the property owner and the bank is a contract so the terms of the mortgage will govern parts of the foreclosure process).

What is a Quit Claim?

A Quit Claim is an agreement where the property owner transfers the ownership of the property to the bank. It is negotiated by the bank and the owner, and does not involve the courts at all. The bank then becomes the owner of the property. Quit Claims are rare in Alberta.

What is a Consent Order?

A Consent Order for Foreclosure means that the landlord and the bank negotiate a Consent Order, and then apply to the Court for approval of the Order. There is some court involvement, in that the Court must approve the Consent Order, but the rest of the foreclosure process is eliminated. This method of proceeding is common in Alberta. Usually this type of Order will allow the tenant 30 days to vacate the property. The bank will become the legal owner of the property.

What are solicitor client costs and why does the property owner have to pay them for the bank?

“Solicitor client costs” means the full amount of a lawyer’s fees. Usually there is a term in the mortgage that states that if the property owner defaults under the mortgage and the bank has to hire a lawyer to collect the amount owing under the mortgage, then the property owner is responsible to pay the solicitor client costs of the bank.

In other words, the property owner agreed when he or she entered into the mortgage to pay the full cost of the bank’s lawyer. The end result is that the property owner will have to pay the fees of two lawyers: his/her own lawyer’s fees, plus the bank’s lawyer’s fees.

Is there anything a property owner can do if he or she thinks that the lawyer’s fees are too high?

If a property owner doesn’t think that the lawyer’s fees are reasonable, then the bill can be assessed. This means that the owner would ask an assessment officer at the courthouse to review the bill to make sure that the fees are reasonable. The assessment officer can lower the fees if they are not reasonable.

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Once a property has been foreclosed on and sold, can the bank try to get more money from the property owner?

Sometimes. In Alberta, there are different kinds of mortgages and different rules apply to each mortgage. Usually, a bank is limited to collecting the money that is owed to them through forcing the sale of the property. But there are some mortgages that allow a bank to force the sale of the property and also sue the property owner for any other money that is owed to the bank. The money that is still owed to the bank after the sale is referred to as a “deficiency judgment.”

For example, if a property is sold through foreclosure, but the money that is made from the sale is not enough to cover the money that is owed under the mortgage, the bank may be able to sue the property owner for the rest of the money that is owed under the mortgage. Again, whether this can happen or not depends on the type of mortgage that the property owner has.

A lawyer would be able to help a property owner through the process and explain all of the consequences of the foreclosure.

What do the words mean?

Glossary

Act of Default	Occurs when an owner does not fulfill specific promises made under the mortgage. For example, not paying the mortgage payments is considered an act, or acts, of default.
Alberta Court of Queen's Bench	The Superior Court in the province of Alberta. All matters dealing with foreclosure will be dealt with in the Court of Queen's Bench.
Foreclosure	A court process started by a mortgagee (in this booklet, the bank) to either gain ownership of a property, or to force a sale of a property, in order to satisfy the unpaid debt secured by the property.
Mortgagee	A mortgagee is a person or business that is owed a debt under a mortgage. For example, when a bank gives a mortgage to a property owner, then the bank is considered a mortgagee, and the property owner is a mortgagor. In this booklet, the mortgagee is referred to as a "bank" but can, in reality, be a variety of different lending institutions, or anyone who has loaned money under a mortgage.
Mortgagor	A mortgagor is a person who owes a debt to another person or business. For example, when a bank gives a mortgage to a property owner, then the property owner is considered a mortgagor.

Where can I get more help?

Community Resources

Law Society of Alberta Lawyer Referral Service

The Lawyer Referral Service can help people who need legal services with finding a lawyer. The Service operates out of the Calgary and Edmonton offices, but can provide contact information for lawyers from across Alberta.

Toll Free: 1-800-661-1095

In Calgary: 403-228-1722

Website: www.lawsocietyalberta.com/public/lawyerreferral.aspx

Legal Service Centres (LSC)

Legal Aid Alberta operates 11 LSCs around the province and offers representation services to those who meet financial guidelines across Alberta.

Phone: 1-866-845-3425

Law Information Centres

LInC coordinators can assist people in understanding Alberta's court processes. They can assist with court forms, inform of the steps involved in legal proceedings, and refer to other resources that may be able to help. They cannot provide legal advice or representation.

Calgary Courts Centre

Main Floor, 601-5 Street SW

Phone: 403-476-4744

Edmonton Law Courts Building

Second Floor

South Law Society Library

1A Sir Winston Churchill Square

Phone: 780-644-8217

Red Deer Courthouse

Main Floor, 4909-48 Avenue

Phone: 403-755-1469

Grande Prairie Courthouse

10260-99 Street

Phone: 780-833-4234

Legal Clinics

Clinics can provide you with legal information. Some clinics offer representation services. Financial restrictions may apply.

Calgary Legal Guidance

100, 840 – 7th Avenue SW, Calgary, AB T2P 3G2

www.clg.ab.ca; Phone: 403-234-9266

Central Alberta Community Legal Clinic

301, 5008 Ross Street, Red Deer, AB T4N 1Y3

www.communitylegalclinic.net; Phone: 403-314-9129

Edmonton Community Legal Centre

10056 – 101A Avenue, Edmonton, AB T5J 0C8

www.eclc.ca; Email: intake@eclc.ca

Phone: 780-702-1725

Grande Prairie Legal Guidance

10113 103 Avenue, Grande Prairie, AB T8V 1C2

www.gplg.ca; Email: gplg@thecommunityvillage.ca

Phone: 780-882-0036

Lethbridge Legal Guidance

423 – 5 Street South, Lethbridge, AB T1J 2B6

www.lethbridgelegalguidance.ca; Phone: 403-380-6338

Student Legal Services of Edmonton

Emily Murphy House

11011 – 88 Avenue, Edmonton, AB T6G 0Z3

www.slsedmonton.com

Email: info@slsedmonton.com

Phone: 780-492-8244

Student Legal Assistance (Calgary)

Volunteer law students from the University of Calgary offer their services to the Calgary and area public. Representation is available based on income.

University of Calgary Campus, Room 3390,

Murray Fraser Hall, Calgary AB, T2N 1N4

www.ucalgary.ca/sla; Phone: 403-220-6637

The Legal Resource Centre

The Legal Resource Centre is a non-profit organization whose purpose is to provide Albertans with reliable information about their rights and responsibilities under the law.



Legal Resource Centre of Alberta

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**Paul Messner
Witten LLP, Edmonton**

This booklet is one of a number produced by the Legal Resource Centre of Alberta that may interest you. Other booklets related to this topic include:

- Renting 101: A Guide to Renting in Alberta for Students and First-time Renters
- Foreclosures for Landlords and Tenants
- Reverse Mortgages
- Sample Roommate Agreement
- Life Leases
- Renting a Condominium
- Renting Out a Room in Your Home

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