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Practice in Mortgage Remedies in Ontario (Fifth Edition) Marriott and Dunn Release No. 2, May 2022

Publisher's Special Release Note 2021

The pages in this work were reissued in March 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the March 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references.

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Marriott and Dunn: Practice in Mortgage Remedies in Ontario, 5th Edition, provides the most comprehensive step-by-step review of the procedures governing foreclosure, judicial sale, and power of sale in Ontario. Fifteen chapters provide the busy practitioner with a ready reference to every aspect of the power of sale remedy with the most comprehensive case law review of the process in Ontario. The notice of sale itself, including parties to be served and the service requirements, sale without notice, the right to redeem, injunctive relief, the marketing process, the mortgagee's duties in conducting the sale, the registration process, accounting for the sale proceedings and costs receive chapter-by-chapter coverage.

This release updates case law and commentary in the following chapters: 2 (Available Remedies), 4 (Defendants: Persons Interested in the Ultimate Equity of Redemption), 6 (Originating Process, Pleadings and Defences), 7 (Judgments, Taking Accounts and References), 24 (Abortive Sale, Reopening a Sale and Recovering the Deficiency), 26 (Notice of Sale), 31 (Restrictions on the Mortgagee's Proceedings), 32 (Injunctive and Other Relief), 42 (Priorities—Generally), 43 (Statutory Priorities & Liens), and 44 (Interest).

- **Foreclosure: Originating Process, Pleadings and Defences —Defences** — The mortgagor sought to respond to a motion for summary judgment brought by the mortgagee on the basis that there were accounting defects in the notice of sale. The court granted summary judgment finding that to deny a summary judgment motion for an accounting defect would achieve a commercially unreasonable result, the mortgagor had other remedies (an accounting) to pursue the issue of the miscalculations and, since the issuance of the notice of sale, the mortgagee had sought an amount less than the amount reflected in the notice of sale by removing many of the charges that the mortgagor found to be objectionable: *We Care Funding Limited Partnership v. LDI Lakeside Developments Inc. et al*, 2021 CarswellOnt 16429, 2021 ONSC 7466.
- **Power of Sale: Injunctive and Other Relief —Tests; Foreclosure: Judgments, Taking Accounts and References — Appeals** — The mortgagor sought a stay of a writ of possession pending his appeal of an Order granting summary judgment in favour of his mortgagee. Applying the test in *RJR Macdonald Inc. v. Canada (Attorney-General)*, the court concluded that the mortgagor had failed on all three parts of the test and dismissed the motion. First, while the mortgagor had raised important issues relating to land claims of Indigenous peoples, the court found that those issues did not relate to issues raised by the motion for summary judgment and the “straightforward commercial arrangement between the parties”. Second, any losses that the mortgagor might suffer as a consequence of the mortgagee's enforcement were losses compensable by damages. The fact that the property might be worth in excess of what was owed to the mortgagee begged the question of why the mortgagor did not refinance the property. Finally, the court concluded that “[t]he enforcement of security validly given by a party, who is in default, should not be interfered with absent compelling reasons. Otherwise, the essential functioning of these type of commercial arrangements would be undermined.” *National Bank of Canada v. Guibord*, 2021 CarswellOnt 18070, 2021 ONCA 864.
- **General Matters: Priorities — Generally — Mortgagees and Debenture Holders — Between Mortgages; Charges in Registered**

Agreements — The court refused to confirm the priority of a mortgagee over a subsequently registered mortgage. In this case, the mortgagee had changed the terms of its mortgage in several ways, increased the interest rate nearly threefold, capitalized various amounts owing, and increased the principal amount owing by approximately \$1.1 million. The court noted how undisclosed amendments to a mortgage can “irreparably disadvantage subsequent encumbrancers and ‘make a sham out of notice’, causing ‘knowledge, reasonable due diligence and the importance of notice in our Land Registry and Land Titles systems’ to become ‘irrelevant’ ”. Notwithstanding the language of the mortgagee’s standard charge terms, the court concluded, as a matter of policy, that the registration of standard charge terms cannot give a mortgagee “carte blanche” to remake the terms of a mortgage to its unilateral benefit: *CVC Ardellini Investments v. Diversified Capital*, 2021 CarswellOnt 17502, 2021 ONSC 7634.

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