

# KEEPING CURRENT

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## Power of sale restored by Court of Appeal under “safe harbour protections”

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In *2544176 Ontario Inc. v. 2394762 Ontario Inc.*, [2022 ONCA 529 \(CanLII\)](#), the Ontario Court of Appeal restored a power of sale transaction that had been invalidated by an application judge due to the mortgagees’ refusal to provide the mortgagor with a discharge statement.

The case involved a gas station which had been purchased by the owner/mortgagor for approximately \$5.4 million. The purchase was financed with a mortgage of approximately \$3.79 million that was assigned to several mortgagees.

In December 2020, the mortgagees delivered a notice of sale to commence private power of sale proceedings under the mortgage. Unbeknownst to them, the mortgagor had already entered into an agreement to sell the property.

The 35-day mandatory standstill required in power of sale proceedings expired January 13, 2021. The next day, on January 14, 2021, counsel for the

mortgagor told the mortgagees that the property had been sold with a February 15, 2021 closing date. Counsel for the mortgagor also requested a discharge statement for the amount required to discharge the mortgage. The mortgagees refused to do so and took the position that because the notice of sale period had expired, the mortgagor’s “equity of redemption” had expired.

The mortgagees then sold the property to another buyer for \$4.9 million.

In April 2021, the Ontario Superior Court of Justice heard an application regarding whether the mortgagees conveyed good title when they sold the property by private power of sale without providing the mortgagor with a discharge statement when requested under [section 22](#) of the [Mortgages Act](#).

Section [22\(3\)](#) of the [Mortgages Act](#) requires a mortgagee to provide a written statement to the mortgagor that sets out the amount of the principal or

interest with respect to which the mortgagor is in default, and, if the mortgagee fails so to do within 15 days without reasonable excuse then the mortgagee's rights to enforce the mortgage "shall be suspended".

The application judge found that the mortgagees had improperly refused to provide the mortgagor with the requested information statement and that the mortgagees' enforcement rights were consequently suspended at the time they sold the property: *2544176 Ontario Inc. v. 2394762 Ontario Inc.*, [2021 ONSC 3067 \(CanLII\)](#). As a result, the application judge determined that the mortgagees' sale was invalidated and set aside. On appeal, the buyer of the property from the mortgagees argued that because the transaction occurred under power of sale, without any notice of defects in the power of sale process, its rights took precedence over those of the mortgagor even if the mortgagor had a claim against the mortgagees for the improper exercise of the power of sale.

The buyer relied on the "Safe Harbour Protections" under sections [35](#) and [36](#) of the *Mortgages Act*, which specify the Compliance Declaration and Statements that must be provided by a mortgagee during a power of sale, and [section 99](#) of the *Land Titles Act*, which provides as follows:

99(1) Subject to the *Mortgages Act* the registered owner of a registered charge that contains a power of sale, upon registering the evidence specified by the Director of Titles, may sell and transfer the interest in the land or any part thereof that is the subject of the charge in accordance with the terms of the power in the same manner as if the

registered owner of the registered charge were the registered owner of the land to the extent of such interest therein.

99(1.1) The evidence specified by the Director of Titles under subsection (1) is conclusive evidence of compliance with Part III of the *Mortgages Act* and, where applicable, with Part II of that Act and, upon registration of a transfer under that subsection, is sufficient to give a good title to the purchaser. The buyer submitted that the "Safe Harbour Protections" on their face and as a matter of policy, must "trump" since otherwise, under a power of sale, no buyer for value and without notice could ever be assured of good title.

The Court of Appeal agreed with the buyer: *2544176 Ontario Inc. v. 2394762 Ontario Inc.*, [2022 ONCA 529 \(CanLII\)](#).

In the Court of Appeal's view, while the mortgagees' enforcement rights were suspended at the time of the transfer due to its failure to comply with [section 22\(3\)](#) of the *Mortgages Act*, the Safe Harbour Protections operated to protect the innocent buyer who registered title to the property under the *Land Titles Act* system after receiving both the Compliance Declaration and the Compliance Statements from the mortgagees.

In that regard, the Court of Appeal reviewed the three principles that underlie the *Land Titles Act*, namely (i) the mirror principle, where the register is a perfect mirror of the state of title; (ii) the curtain principle, which holds that a purchaser need not investigate the history of

past dealings with the land, or search behind the title as depicted on the register; and (iii) the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy: *Stanbarr Services Limited v. Metropolis Properties Inc.*, [2018 ONCA 244](#), 141 O.R. (3d) 102, at para. [13](#).

While fraud is an exception to the mirror principle, there were no such allegations in this case and the application judge had found that the buyer had no notice of any defects in the power of sale process.

Contrary to the application judge's determination, the Court of Appeal found that no other exception exists to the mirror principle when a mortgagee is subject to a suspension of its enforcement rights under [section 22\(3\)](#) of the *Mortgages Act*. In the Court of Appeal's view, that was an erroneous interpretation of the legislation.

[Section 22\(3\)](#) does not give a mortgagor substantive rights. Rather, [section 22\(3\)](#) provides that, absent reasonable excuse, a mortgagee's right to enforce the mortgage shall be "suspended" until the mortgagee complies and provides the mortgagor with a default statement. The mortgagee does not lose its substantive rights as a result of [section 22\(3\)](#); rather, it loses its right to enforce them.

Here, it was not the mortgagee who sought to enforce its rights but the innocent buyer. The mortgagor cannot rely on [section 22\(3\)](#) to invalidate the buyer's title: its recourse is against the mortgagees for the improper exercise of the power of sale.

As a result, the Court of Appeal set aside the application decision and ordered that the mortgagor's application be dismissed with costs. The mortgagor was left to pursue its remedies against the mortgagees.

This case balances the interests of a mortgagor against the interests of an innocent buyer who has received the requisite compliance statements from a mortgagee and has no notice of other issues regarding a mortgagor's complaints with a power of sale. As long as the statutory requirements are met, a buyer may generally rely on the safe harbour protections to obtain good title from a mortgagee.

## Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact [James Cook](#), at 416.865.6628 or [jcook@grllp.com](mailto:jcook@grllp.com).

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