

Second Mortgages Are Quietly Driving Enforcement Risk

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22 September 2026

The enforcement risk profile today is not limited to borrower default. It increasingly turns on lender-versus-lender dynamics, with second mortgagees moving from passive stakeholders to active actors seeking to take out firsts and step into their position.

Higher rates and refinancing gaps have created negative leverage and maturity walls. Underperforming assets amplify stress. Seconds are no longer content to wait behind stalled workouts, they are protecting position by proposing to pay out and take an assignment of the first mortgage. In Ontario, the mechanics to transfer a registered charge are straightforward under the *Land Titles Act* (a charge may be transferred and, until re-transferred, the transferee is deemed the absolute owner of the charge), which lowers the transactional friction and invites this play.

An assignment is not a reset

When a second lender “takes out” the first by assignment, it steps into the existing mortgage “as is,” with the same loan history, default posture, and any live borrower grievances. There is no clean slate. Any delay or forbearance history, inconsistent enforcement, or aggressive fee practices will follow the paper.

Ontario’s power of sale regime under the *Mortgages Act* imposes notice and process disciplines that run with the security, not the identity of the holder, a transferee mortgagee inherits the obligation to comply with statutory notice periods and sale conduct standards already in train. This is particularly relevant where default has already been declared and notices issued under Part III of the Act (Power of Sale).

Borrower rights also persist across assignments. For example, federal Interest Act safeguards, including the section 8 prohibition on fines or penalties that increase the charge on real property upon non-payment, continue to constrain the mortgagee’s ability to escalate default economics post-assignment. If default interest or fee constructs offend section 8, changing the name on the charge will not cure the issue.

Bottom line: you inherit the problems, not just the priority.

Weak or absent intercreditors create friction

Many deals lack a robust intercreditor or standstill. Without it, every element is negotiated in real time. Whether the first must consent to an assignment, the conditions it can impose (including KYC/AML, cost indemnities, cure of document gaps, arrears reconciliation), and the timing, especially mid-enforcement. In practice, the first mortgagee’s leverage often concentrates at this single chokepoint: control over assignment mechanics, conditions precedent, and document delivery. Treat it as a structured exit, not an administrative step.

Enforcement strategy shifts (but defences don’t)

An assignment changes who is driving, not the road rules. A new lender may push a more aggressive timeline or try to reset the relationship, but existing proceedings, notices, and borrower defences constrain strategy. Where a matrimonial home is involved, *Family Law Act* protections, such as spousal consent requirements affecting validity and certain enforcement steps, continue to apply irrespective of who holds the charge. Missteps in the hand-off (for example, notice defects or inconsistent positions before and after the assignment) create litigation leverage for the borrower.

Net message: assignment can complicate, not simplify, enforcement.

Practical takeaways

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For first mortgagees, treat assignment requests as structured exits. Use your process control to set conditions, timing, documentation standards, arrears/fee reconciliation, and comprehensive releases where appropriate. The assignment gate may be your only real control point in a distressed file.

For second mortgagees, do not assume an assignment gives you a fresh start. Underwrite the file history, enforcement steps already taken, and exposure to statutory constraints such as Interest Act section 8 and the Mortgages Act notice regime. Validate whether any family-law overlays, environmental liens, or municipal charges alter your enforcement calculus post-assignment.

For everyone, paper the intercreditor expectations early, even if basic, so that consent, cure rights, standstills, and fee economics are not invented under fire. Think through your enforcement pathway before default, not during it.

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