

Subject: **FORECLOSURE ORDERS AND ORDERS CONFIRMING  
SALE**

## BACKGROUND

When a mortgagor is in default under a mortgage (or an encumbrancer under an encumbrance or a purchaser under an agreement for sale), the mortgagee is entitled to commence proceedings whereby either the property will be sold to a third party (or the mortgagee in the case of a Rice order) and sale proceeds applied to the mortgage loan or title to the property will be issued to the mortgagee in satisfaction of the mortgage debt. When the property is sold during the course of foreclosure proceedings, the court gives an order confirming the sale and directing the Registrar to issue a new title in the name of the purchaser. Alternatively, the court may give a foreclosure order directing the Registrar to issue a new title in the name of the mortgagee. In both situations, the mortgagee's security for the loan is the mortgagor's interest in the property as it existed at the time of registration of the mortgage being foreclosed. Thus, as a general principle, orders resulting from foreclosure proceedings deal only with the extinguishment of interests in the property which are registered after, or have been postponed to, the mortgage being foreclosed. (1)

## REGISTRATION PROCEDURE

1. The copy of the order presented for registration must be certified or FAX FILED by the clerk of the court.
2. The requirements of section 191 of the Land Titles Act must be complied with. This usually takes the form of a consent to the order by the defendant or his solicitor or a certificate of no appeal (see procedure under [ORD-1](#)).
3. The address of the party to whom title is being issued must be provided.
4. For fee calculation purposes, the order must be accompanied by an affidavit of value. If the order deals with parcels in more than one title and the value is not allocated to the various parcels, the value field is left blank. The fees listed in [Tariff item 3](#) are charged.
5. Orders normally direct that a new title be issued to the purchaser or mortgagee free and clear of all encumbrances or all subsequent encumbrances. An order which does not contain any direction concerning the interests to be carried forward is dealt with in the same way. (2)

Even though the above wording may be used in an order, the following instruments or caveats are always carried forward. The only exception is when an order specifically identifies an instrument or caveat which is not to be carried forward. (2)

- a) all instruments and caveats which are registered prior to the mortgage being foreclosed or to which the mortgage has been postponed, except those which have been postponed to the mortgage
  - b) a transfer of or certificate of *lis pendens* in respect of any instrument or caveat specified in item a)
  - c) tax recovery notifications (3)
  - d) easements, conservation easements, environmental reserve easements, utility rights of way, party wall agreements, restrictive covenants, encroachment agreements and caveats concerning these interests, unless the owner(s) of the interest is named as a defendant in the foreclosure action in which case the instrument should not be carried forward
  - e) orders under the Surface Rights Act (4)
  - f) certificates under the Water Resources Act (4)
  - g) orders and notices under the Historical Resources Act (4)
  - h) notices of intention to expropriate, extension orders and certificates of approval (4)
  - i) notices of a transportation protection by-law under the City Transportation Act (4)
  - j) restricted development area memoranda under Schedule 5, Government Organization Act, R.S.A. 2000, c. G-10 (4)
  - k) memoranda under the Irrigation Act and the Drainage District Act (4)
  - l) caveats in respect of condominium fees (5)
  - m) Airport Vicinity Protection Area Regulations
  - n) notices of lien registered under the Rural Utilities Act, Rural Electrification Long Term Financing Act or the Rural Electrification Loan Act, unless the lien has been postponed to the mortgage or encumbrance (6)
  - o) any instruments or caveats registered after the date of the order other than writs against the mortgagor (The holders of these interests will not have been parties to the proceedings and may have rights that are enforceable against the purchaser or mortgagee.)
  - p) notices of security interest under the Personal Property Security Act which are registered before the date of the order (7)
  - q) notice of health hazard (8)
  - r) orders and caveats re orders under the Environmental Protection and Enhancement Act (9)
  - s) caveats re undermining and related conditions (10)
  - t) caveats by HMQA – Minister of Seniors and Housing
- Any other unusual instruments should be referred to a supervisor.

6. **Caveats** - If the endorsement for a caveat does not indicate what the claim is, the caveat should be checked before a determination is made as to whether or not it carries forward. If the caveat is carried forward, the particulars of the claim and the address for service should be endorsed on the title. When the caveat is in regard to restrictive covenant, easement or encroachment agreement, only the claim should be shown.

7. **Postponements** - When postponements are endorsed on a title, which is being foreclosed, care is to be exercised in determining which instruments are carried forward. Pursuant to section 107 of the Land Titles Act, a postponement only alters the priority with respect to the rights under the document specified in the postponement and not with respect to the rights under other documents registered against the title.

Therefore, if the following are endorsed against a title:

Mortgage 1

Mortgage 2

Caveat 1

Postponement of Mortgage 1 to Caveat 1

and Mortgage 2 forecloses, Mortgage 1 would carry forward to the new title unless the order specifically stated otherwise, because it is a prior interest and it has not agreed to postpone its rights to Mortgage 2. If Caveat 1 was the party foreclosing, Mortgage 1 would not carry forward as it is a subsequent interest by virtue of the postponement but Mortgage 2 would carry forward as it is a prior interest.

8. Orders confirming sale are often conditional upon payment of a sum of money into court in which case the court clerk's certificate of payment of the specified sum into court must accompany the order.

9. If an order confirming sale directs title to issue to a named person or his nominee and is submitted for registration with a nomination properly executed by the named person designating the nominee, title is issued in the name of the nominee. A letter from the named person designating the nominee is not acceptable for registration, as proper execution requirements must be complied with. See procedures under [AFF-1](#), [AFF-2](#) and [COR-1](#) with respect to attestation requirements.

10. Foreign Ownership requirements must be complied with for orders confirming sale (see procedure under [FOL-1](#)).

11. The consideration shown on a title issued upon the registration of an order for foreclosure is "FORECLOSURE" and the consideration stated in the order is shown for an order confirming sale.

## STATUTE AND CASE REFERENCES

1. s. 61(2), Land Titles Act, R.S.A. 2000, c. L-4; s. 48, Law of Property Act, R.S.A. 2000, c. L-7
2. *F.C. Richert Co. Ltd. v. Registrar for SALRD* [1937] 3 W.W.R. 632 at p. 636; *Wasył Holdings Ltd. v. Allarie* (1981) 31 A.R. 275
3. s. 413(4), Municipal Government Act, R.S.A. 2000, c. M-26
4. s. 48(1) of the Law of Property Act states that title vests "free from all right and equity of redemption on the part of the owner ... or any person claiming *through or under him* subsequently to the mortgage". These statutory interests are not

strictly speaking claimed through or under the owner but rather through the provisions of the applicable statute.

5. s. 39(12), Condominium Property Act, R.S.A 2000, c. C-22
6. s. 38(8) and (9), Rural Utilities Act, R.S.A. 2000, c. R-21; s. 21(2) and (3), Rural Electrification Loan Act, R.S.A. 2000, c. R-19; s. 22(2) and (3), Rural Electrification Long Term Financing Act, R.S.A. 2000, c. R-20
7. s. 36(2), Personal Property Security Act, R.S.A. 2000, c. P-7
8. s. 64(2), Public Health Act, R.S.A. 2000, c. P-37
9. s. 224(4), Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12
10. s. 694(5.3), Municipal Government Act