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FALCONBRIDGE ON MORTGAGES, FIFTH EDITION

by Walter M. Traub

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This work, initially formed from Dean Falconbridge's lectures at Osgoode Hall, quickly became the authoritative text on mortgages in Canada. Now in its fifth edition, under the editorial leadership of distinguished practitioner Walter M. Traub, *Falconbridge on Mortgages* is the standard reference source for those who teach and those who practise in the field, and has often been cited by the judiciary.

What's New in this Update:

This release features updates to the case law and commentary in Chapter 2 (Mortgage at Common Law), Chapter 3 (Mortgage in Equity), Chapter 8 (Priorities under the Registry Act and the Land Titles Act), Chapter 18 (Spousal Rights in Mortgaged Land), Chapter 22 (Action for Possession), Chapter 26 (Judgment for Foreclosure), Chapter 33 (Regulation of Mortgage Interest), Chapter 34 (Costs) and Chapter 35 (Sale under Power of Sale).

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Highlights:

- **PERSONS CLAIMING UNDER THE MORTGAGOR—SPOUSAL RIGHTS IN MORTGAGED LAND—REGISTRATION REQUIREMENTS FOR SPOUSAL MORTGAGES—**The repercussions of leaving unregistered interests off the registry were demonstrated in *Peedham v. 1000516033 Ontario Ltd.*, 176 O.R. (3d) 123, 67 R.P.R. (6th) 1, 2025 CarswellOnt 1666, 2025 A.C.W.S. 835, 2025 ONCA 109 (Ont. C.A.), which pertained to an option to purchase on the part of tenants. The option was embodied in their written lease agreement, but was never registered on title. A subsequent purchaser of property, who had acquired it through power of sale, resisted the tenant's attempts to give effect to it. Initially, a motion judge had ruled that the unregistered option was nonetheless enforceable, but this was reversed on appeal. First, the Court of Appeal confirmed that option to purchase is an interest in land that can indeed be registered under s. 71 of the *Land Titles Act*. When it remains unregistered, however, only the parties to the lease were deemed to have notice of it; absent fraud, any subsequent *bona fide* purchaser for value was presumptively protected by s. 78(4) of the Act. That latter provision states that, when registered, an instrument shall be deemed to be embodied in the register and effective according to its nature and intent. The effectiveness of registered instruments in the land titles system was accordingly guaranteed, and protected subsequent purchasers. In this case, and with the option being unregistered, it was unenforceable on that ground alone, unless it could be shown that the purchasers had actual notice of it. Since there was no evidence on this point, the matter was remitted back to trial.
- **MORTGAGE ACTIONS—ACTION FOR POSSESSION—ACTION DURING PROHIBITED PERIOD IN SECTION 42—**In *Kakoutis v. Bank of Nova Scotia,* 2025 ONSC 2966, 2025 CarswellOnt 7632 (Ont. S.C.J.), the court granted a writ of possession even though the underlying judgment for possession had been granted 10 years earlier, and even though there may be privacy concerns respecting the current occupants and their family members (who were not the registered owners/defaulting borrowers). The court found the occupants had been given sufficient notice and proper notice of enforcement, which in law was the only precondition to granting the writ under the governing rules.
- **MORTGAGE ACCOUNTS—COSTS—GENERAL PRINCIPLES—**A court retains jurisdiction in connection with determining costs awards, even where the mortgage document between the parties sets out a stipulated approach, or quantifies entitlement. In *2642948 OntarioInc. v. Jonny's Antiques Ltd.*, 2025 ONSC 3215, 2025 CarswellOnt 8291, 2025 A.C.W.S. 2654 (Ont. S.C.J.); related decision at 2025 ONCA 381, 2025 CarswellOnt 7481, 2025 A.C.W.S. 2419 (Ont.C.A.), where the court affirmed the general principle that a mortgagee can generally expect a full indemnity of enforcement costs under the *Rules of Civil Procedure*, which is tempered by numerous factors including the reasonable expectations of the unsuccessful party and the costs clauses in the mortgage itself, which are recognized by courts absent misconduct on the part of the party claiming costs. Nonetheless, costs remain discretionary and must be "fair and reasonable" pursuant to the principles established by statute and jurisprudence. On the facts of the case, the standard charge terms covered legal fees on a solicitor-and-

client basis, but the claim for nearly $99,000 was deemed excessive and reduced to approximately $25,000.

- **MORTGAGE ACCOUNTS—COSTS—COSTS OF MORTGAGE ACTION—**In *MCC Mortgage Holdings Inc. v. Fernandes*, 2025 ONSC 3178, 2025 CarswellOnt 8525 (Ont.S.C.J.), the lender purported to charge the defaulting mortgagors just under $30,000 as part of its mortgage enforcement. Among the disputed charges included a "renewal walk-through fee" ($500), certain renewal fees ($10,000) and NSF Fees ($4,000), as well as various administration fees. At issue was whether those charges contravened s. 8 of the *Interest Act*. The court found that certain fees were contractually-stipulated and had been agreed-to by the mortgagors in that they were tied to two signed renewal agreements. These additional charges merely reflected routine administration and discharge-related fees, and did not amount to penalties. On the other hand, other purported fees amounted to impermissible penalties. For example, a "pro-rated lender fee", which the mortgagee demanded post-maturity, was unenforceable, most notably because it was triggered by the mortgagors' default and was therefore contrary to s. 8 of the *Interest Act*. Similarly a fee of $650 for each NSF cheque was not a genuine per-estimate of administrative costs, but a penalty in disguise.