

# Court reaffirms lenders can only compel sale of borrower's property through sheriff's sale

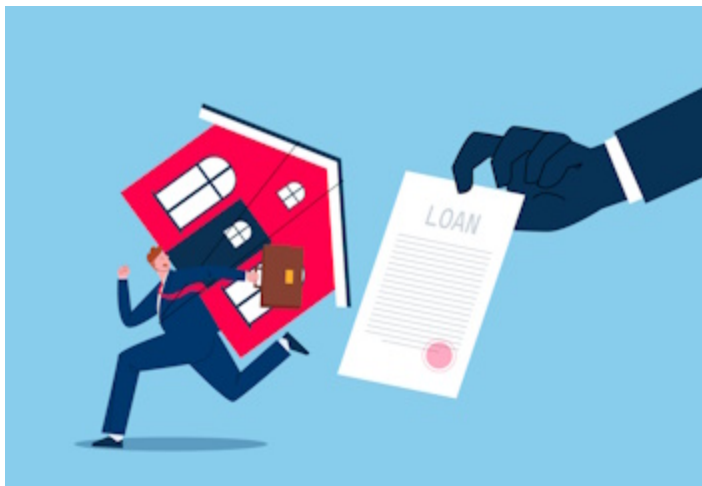
By **Scott Lemke and Alexa Cheung**

Law360 Canada (August 9, 2024, 1:44 PM EDT) -- Civil litigators would be wise to take note that in *Royal Bank of Canada v. Silvaggio (c.o.b. Tony's Mobile Repairs)*, 2024 ONSC 2749, the court reiterated that in most circumstances, a lender can only compel the sale of a borrower's property through a sheriff's sale, unless the lender can meet the high threshold to convince the court otherwise.

The defendant in this case owed Royal Bank of Canada (RBC) money for unpaid credit card bills. RBC obtained a default judgment for \$18,378 plus costs of \$351, but the judgment remained unpaid. To obtain payment, RBC filed a writ of seizure and sale for the defendant's property, which was jointly owned. In addition, RBC sought an order severing the joint tenancy and a declaration that the property was owned in common.

## Legal remedies

RBC had two avenues for compelling the sale of the defendant's property:



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1. RBC could compel a sale of the property under s. 9 of the *Execution Act*, RSO 1990, Ch. E-24, and collect the amount of the default judgment from the proceeds of the sale. This is commonly referred to as a sheriff's sale.
2. The court could appoint a referee under Rule 54.02 of the *Rules of Civil Procedure* and then obtain an Order for sale of the land under Rule 55.06. A court has inherent jurisdiction to order a reference and judicial sale.

In its materials, RBC stated its preference for the judicial sale process and argued that it would generate a better price for the property than a sheriff's sale and that it would be an efficient process.

## Legal precedents



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Justice Jocelyn Speyer canvassed recent decisions and noted that there are two diverging lines of case law.

The Justice ultimately agreed with and upheld the reasons in *RBC v. Hammond*, 2022 ONSC 4579; *Royal Bank of Canada v. Wong*, 2022 ONSC 54; *The Bank of Nova Scotia v. Robson*, 2023 ONSC 3116; and *Luu v. Abuomar*, 2016 ONSC 4299.

At paragraph 10, Justice Speyer summarized why an execution sale is preferred to a judicial sale, absent special circumstances:

(1) Broad J.'s decision in *Canaccede* was made in the context of then prevailing jurisprudence holding that the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("PIPEDA") prevented a mortgagee from providing a mortgage statement to a third-party judgment creditor of the mortgagor/debtor. Because the mortgagee was prevented by PIPEDA from providing such mortgage discharge statements as were required by the sheriff as a pre-condition to conducting a sheriff's sale, there existed significant and costly impediments to the third-party judgment creditor initiating a sheriff's sale. Broad J. concluded that those special circumstances allowed the court to exercise its inherent jurisdiction to order a reference and judicial sale. Broad J.'s decision in *Canaccede* stands for the proposition that for the court to exercise its inherent jurisdiction to order a reference and judicial sale, there must be:

- i. an impediment to the employment of a sheriff's sale, which Broad J. referred to as "special circumstances"; and,
- ii. a benefit to the employment of an equitable receiver that would make their use just and equitable.

(2) The legislature, through statute, the *Execution Act*, chose a sheriff's sale as the vehicle for the enforcement of a writ of seizure and sale against real property, and absent special circumstances or some other injustice, the process of the *Execution Act* should prevail over a common law process.

### **The decision of the court**

In applying the test from *Canaccede International Acquisitions Ltd. v. Abdullah*, 2015 ONSC 5553, Justice Speyer concluded that a reference and judicial sale is a cumbersome, inefficient and expensive process that would be a poor use of scarce court resources, something that all civil litigators should keep in mind.

She noted that in *Royal Bank v. Alburn Smith*, 2023 ONSC 2665, the reference process alone involved four court appearances over the period of a year.

The Justice also noted the current significant backlog in the Ontario Superior Court as another factor when considering what process was just. RBC's motion for a judicial sale of the defendant's property was, therefore, dismissed.

Lastly, Justice Speyer dismissed RBC's request for an order severing the joint tenancy. Since the defendant's property was jointly owned, the joint tenancy would have to be severed before the property could be sold. In *Ferrier v. Civiero*, [2001] O.J. No. 1883, the Ontario Court of Appeal held that an execution creditor does not have the statutory right to apply for a sale of land under the *Partition Act* if the land is jointly owned by the execution debtor and another person.

Following *Luu*, Justice Speyer noted that the Ontario Court of Appeal had clearly outlined the limitations of an execution creditor under the *Partition Act*. It would be inequitable to bypass the Court of Appeal's ruling by using the court's inherent jurisdiction to grant RBC its requested relief.

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