

Do You Know How to Advise Your Client When:  
Your Client Has Judgment for Possession and Needs You to Obtain a Writ of Possession

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**Overview**

A mortgagee must look beyond the *Rules of Civil Procedure*<sup>1</sup> in order to successfully obtain a writ of possession against a mortgaged property. The mortgagee must, of course, satisfy the Court that all persons in actual possession of the mortgaged property have received notice of the mortgagee's action for possession. But it is the statutory right given to a mortgagor under the *Mortgages Act*<sup>2</sup> to redeem a mortgage in default that is the underlying reason why the Court will not grant leave for a writ of possession to be issued to a mortgagee until all mortgagors have been sued and until judgment for possession has been issued against all of them.

**Leave To Issue A Writ of Possession**

A mortgagee who has a judgment for possession of a mortgaged property cannot (at least from a practical point of view) just list and sell the mortgaged property. The mortgagee must first obtain possession of the mortgaged property in order to allow potential buyers to access the mortgaged property. The statutory requirement for a writ of possession is set out in Rule 60.10:

- (1) A writ of possession (Form 60C) may be issued only with leave of the court, obtained on motion without notice or at the time an order entitling a party to possession is made.
- (2) The court may grant leave to issue a writ of possession only where it is satisfied that all persons in actual possession of any part of the land have received sufficient notice of the proceeding in which the order was obtained to have enabled them to apply to the court for relief.

For success before the Courts, however, a mortgagee needs to be aware of key *Mortgages Act* provisions and relevant case law.

### **Mortgagors' Rights to Remedy Default**

Sections 22 and 23 of the *Mortgages Act* (see Appendix I) give a mortgagor the right to reinstate and redeem a mortgage that has gone into default by paying arrears and costs. These two provisions allow a mortgagor to bring a mortgage that has gone into default back into good standing even if the mortgagee has accelerated payment of the amounts owing under the mortgage.

Section 22 applies when the mortgagee has not commenced an action to enforce its rights under the mortgage in default. This provision gives the mortgagor the right to be relieved from the consequences of default if the mortgagor pays both the amount in arrears and the mortgagee's enforcement costs.

Section 23 applies when the mortgagee has commenced an action to enforce its rights under the mortgage in default. Where judgment has not yet been obtained, the Court *must* dismiss the action if the mortgagor pays the amount in arrears, the mortgagee's enforcement costs and \$100 to the credit of the action as security for costs. If judgment has been obtained but the mortgagee has not yet taken possession of the property, Section 23 provides that the Court *may* dismiss the action.

The effect of this Section 23 right is that when a mortgagee takes possession of a mortgaged property pursuant to a mortgagee's judgment for possession, the mortgagor loses his or her *Mortgages Act* rights to redeem a mortgage that has gone into default. The mortgagor cannot put the mortgage back into good standing under either section 22 or 23 of the *Mortgages Act*.

### **Sue And Obtain Judgment Against All Mortgagors**

The Courts have actively protected mortgagors' Sections 22 and 23 rights. The issue in *Kinross Mortgage Corp. v. Balfour*<sup>3</sup> was whether leave to issue a writ of possession should be granted when only one of two mortgagors had been served with the statement of claim and judgment for possession had been obtained against only one of them. Krever J. held that leave to issue a writ of possession can be granted only if all mortgagors have been sued and judgment obtained against all of them. At paragraph 6, he explained that:

The main issue in this appeal... is whether the Court should grant leave to issue a writ of possession in a case in which one of the mortgagors has not been sued to judgment for possession and the disposition of that issue turns on the answer to the question whether, by the issue of a writ of possession, Mr. Balfour [the mortgagor who had not been sued for judgment] would lose any right which he otherwise would have had. If the answer is in the affirmative leave to issue a writ should not be granted.

And more broadly, at paragraph 5:

When a plaintiff comes to Court seeking Court-sanctioned possession he must comply with the fundamental requirement of our procedure that service be effected on all parties of proper notice of proceedings which potentially cause them to lose rights which they would otherwise have. Mr. Balfour appears to be such a person.

Without suing and obtaining judgment against all mortgagors, Krever J. reasoned, a non-possessory mortgagor might lose his or her *Mortgages Act* rights to redeem a mortgage without having been sued and without having had a judgment filed against him or her. In other words, a mortgagor's right to redeem obligates a mortgagee to be mindful to sue and obtain judgment against all mortgagors.

### **Give Notice To All Persons In Actual Possession**

The case law decided under Rule 60.10 shows a similar judicial concern to give notice to all those whose rights may be affected by the granting of a writ of possession. First, consider the

statutory language. Subrule 60.10(2) provides that leave to issue a writ of possession may be granted only where the Court is satisfied that “all persons in actual possession of any part of the land have received sufficient notice of the proceeding in which the order was obtained to have enabled them to apply to the court for relief.”

In *Canada Trustco Mortgage Co. v. McLean* (“*Trustco*”),<sup>4</sup> the Court was asked to refuse to issue a writ of possession because of, among other things, the “inequitable hardship” that losing possession would cause the judgment debtors. Potts J. held that the Court’s only discretion under Subrule 567(2), the precursor to Subrule 60.10(2), is limited to the question of whether, in the circumstances, the mortgagee has taken such steps as may be adequate to ensure that all persons in actual possession have received the requisite notice. He wrote that:

As sub-rule 567(2) limits the plaintiff’s right only by the requirement that he give notice as aforesaid, in my view he is entitled to obtain leave once he satisfies the court that such notice has been given. The discretion of the Court under sub-rule 567(2), in my opinion, is limited to the question of whether, in the circumstances of each particular case, the plaintiff has taken such steps as may be adequate to ensure that all persons in actual possession of the lands have received the requisite notice.<sup>5</sup>

Put another way, the *Trustco* decision stands for the proposition that the Court has no discretion to refuse to issue a writ of possession once the Court is satisfied that all persons in actual possession have been given notice. Potts J. also made a point of confirming that notice need not be given to any defendant in the action on whom the claim has been served nor to any mortgagor against whom judgment for possession has been awarded, as these parties have already been given an opportunity to have their rights determined. Citing the lower Court’s reasons, he explained that:

...the wording of [what is now Subrule 60.10(2)] makes it clear that further notice need not be given any defendant to the action who had been served with the writ or otherwise had been made aware of the claim for possession made against him in the action.<sup>6</sup>

### **Residential Tenancies**

A writ of possession is not effective against a tenant of residential property. By virtue of Section 47 of the *Mortgages Act*, a mortgagee in possession of a mortgaged residential property is deemed to be the landlord under the tenancy agreement. As landlord, the mortgagees only access to possession of a residential property which is subject to a tenancy agreement is via the *Residential Tenancies Act, 2006*<sup>7</sup> and the provisions of Part V of the *Mortgages Act* relating thereto.

### **Successful Ex Parte Applications: Affidavit Requirements**

To summarize, in order to obtain a writ of possession, a mortgagee must: (1) issue and serve a statement of claim against all mortgagors; (2) obtain judgment for possession against all mortgagors; (3) ascertain that there are no tenants in possession; and 4) give notice to everyone in actual possession of the mortgaged property that the mortgagee is seeking a leave to issue a writ of possession.

Under Rule 60.10, leave to issue a writ of possession is available by means of an *ex parte* application. As noted in *Trustco*, the Courts have little discretion not to issue a writ under Rule 60.10. However, the affidavit supporting the application must satisfy the mortgagee's Subrule 60.10(2) burden of establishing that all persons in actual possession have received sufficient notice.

In *National Bank of Canada v. Ehtisham*,<sup>8</sup> MacLeod M. dismissed an *ex parte* motion to grant leave to issue a writ of possession on the grounds that the supporting affidavit did not meet the plaintiff's burden. MacLeod M. took issue with an all too common oversight: the failure to comply with Subrule 30.01(4). This Rule allows affidavit evidence based on information and belief *only where the source of the information and the fact of the belief are specified in the affidavit*. The mortgagee's affidavit failed to specify the source of an unfounded assertion that the defendants and the defendants' immediate family were the only persons in possession of the mortgaged property.<sup>9</sup> In MacLeod M.'s words, at paragraph 5:

The affidavit...contains the bald assertion that the defendants are the registered owners of the mortgaged property which is a residential home and states that the defendants and the defendants' immediate family are the only persons in possession of the mortgaged property. The source of this information and belief is not disclosed and in particular there are no details of property inspection or of any attempt to put anyone other than the two named defendants on notice of the proceeding. The affidavit goes on to recite that there has been no application requesting relief from the judgment of possession.

And further at paragraph 6:

The affidavit material put before the court on this motion falls short. I am simply not satisfied that this meets the test of demonstrating that all persons in possession of the premises were on notice or that there were no such persons to be put on notice. The motion for a writ of possession is understandably a motion without notice to the named defendants because of course the named defendants have been noted in default and a default judgment has been obtained. It is a motion however that might severely impact on parties who were not on notice of the claim. As an *ex parte* motion, it imposes on the moving party an obligation of full, complete and frank disclosure.

In dismissing the plaintiff's application, MacLeod M. set out what he considered to be the minimum requirements for an affidavit in support of a successful *ex parte* application of this nature. These requirements flow from Subrule 39.01(6), which imposes upon all *ex parte* motion applicants an obligation to make "full and fair disclosure of all material facts." His judgment sets

out what constitutes full and fair disclosure in the writ of possession context; however, it is an excellent primer for all *ex parte* motion applications.

According to MacLeod M., the mortgagee's affidavit in support of a motion for leave to issue a writ of possession should set out the following facts:

- (a) that a statement of claim was issued claiming possession of the property, the particulars of who was served, by whom, in what manner and on what dates
- (b) particulars of anyone other than the named parties who was served with notice of the claim and their interest in the land
- (c) that judgment of possession was signed and the particulars of the judgment
- (d) the manner of determining who is in possession of the property and proof that no one other than the parties who were served with the claim are in possession
- (e) alternatively specific evidence of who else is in possession and whether that person is a tenant or is in possession in some other capacity
- (f) whether the plaintiff has ever heard from any other person who claims an interest in the land or appears to be a person in possession and whether anyone in possession appears to be a person under a disability
- (g) that a notice demanding possession together with particulars of the judgment has been served on persons in possession and when and how that occurred
- (h) that the persons in actual possession remain in possession and have not vacated the premises or given up possession to the plaintiff or its agents
- (i) that there has been no action taken to appeal the judgment or to otherwise seek relief<sup>10</sup>

To satisfy (a)-(d), the relevant documents ought to be attached to the affidavit. That is, attach the statement of claim, the affidavit(s) of service, the judgment(s) for possession and the Parcel Page and deed.

## **Conclusion**

To obtain a writ of possession, a mortgagee must go beyond Rule 60.10 and consider a mortgagor's statutory right to redeem under the *Mortgages Act* and the obligation of full and fair disclosure imposed by Subrule 39.01(6). For success before the Courts, a mortgagee must: (1) issue and serve a statement of claim against all mortgagors; (2) obtain judgment for possession against all mortgagors; (3) determine who is in possession of the mortgaged property; (4) determine whether such occupants are tenants or (alternatively) are occupying the mortgaged property in some other capacity; (5) give notice to all non-tenant occupiers in actual possession of the mortgaged property; and, (6) fully and fairly disclose all of the material facts in an affidavit in support of an *ex parte* motion application for leave to obtain a writ of possession.



**Relief before action**

22.(1) Despite any agreement to the contrary, where default has occurred in making any payment of principal or interest due under a mortgage or in the observance of any covenant in a mortgage and under the terms of the mortgage, by reason of such default, the whole principal and interest secured thereby has become due and payable,

- (a) at any time before sale under the mortgage; or
- (b) before the commencement of an action for the enforcement of the rights of the mortgagee or of any person claiming through or under the mortgagee,

the mortgagor may perform such covenant or pay the amount due under the mortgage, exclusive of the money not payable by reason merely of lapse of time, and pay any expenses necessarily incurred by the mortgagee, and thereupon the mortgagor is relieved from the consequences of such default.

**Statement of arrears, expenses, etc.**

(2) The mortgagor may, by a notice in writing, require the mortgagee to furnish the mortgagor with a statement in writing,

- (a) of the amount of the principal or interest with respect to which the mortgagor is in default; or
- (b) of the nature of the default or the non-observance of the covenant,

and of the amount of any expenses necessarily incurred by the mortgagee.

**Idem**

(3) The mortgagee shall answer a notice given under subsection (2) within fifteen days after receiving it, and, if without reasonable excuse the mortgagee fails so to do or if the answer is incomplete or incorrect, any rights that the mortgagee may have to enforce the mortgage shall be suspended until the mortgagee has complied with subsection (2). R.S.O. 1990, c. M.40, s. 22.

**Relief after action commenced**

23.(1) Despite any agreement to the contrary, where default has occurred in making any payment of principal or interest due under a mortgage or in the observance of any covenant in a mortgage and under the terms of the mortgage, by reason of such default, the whole principal and interest secured thereby has become due and payable, in an action for enforcement of the rights of the mortgagee or of any person claiming through or under the mortgagee, the mortgagor, upon payment into court of the sum of \$100 to the credit of the action as security for costs, may apply to the court and, conditional upon performance of such covenant or upon payment of the money due under the mortgage, exclusive of the money not payable by reason merely of lapse of time, and upon payment of the costs of the action, the court,

- (a) shall dismiss the action if judgment has not been recovered; or

(b) may stay proceedings in the action, if judgment has been recovered and if no sale or recovery of possession of the land or final foreclosure of the equity of redemption has taken place.

**Idem**

(2) Despite clause (1) (b), where judgment has been recovered and recovery of possession of the land has taken place, the court may stay proceedings in the action upon the application of a person added as a party in the master's office, made under subsection (1) within ten days after service of notice of the judgment has been made upon the person.

**Subsequent default**

(3) Where proceedings have been stayed under clause (1) (b) or under subsection (2) and default again occurs under the mortgage, the court upon application may remove the stay. R.S.O. 1990, c. M.40, s. 23.

## Appendix II: Citations

<sup>1</sup> RRO 1990, Reg 194. All references in the text to “Rule” and “Subrule(s)” are to the *Rules of Civil Procedure*.

<sup>2</sup> RSO 1190, c. M. 40.

<sup>3</sup> [1981] O.J. No. 3028.

<sup>4</sup> [1983] O.J. No. 269.

<sup>5</sup> *Ibid.* at para. 11.

<sup>6</sup> *Ibid.* at para. 9.

<sup>7</sup> S.O. 2006, c. 17.

<sup>8</sup> [2010] O.J. No. 967.

<sup>9</sup> *Ibid.* at paras. 5-6.

<sup>10</sup> *Ibid.* at para. 9.