

TAB 3

The Six-Minute Debtor-Creditor and Insolvency Lawyer 2020

The New Reality: Mortgage Enforcement and Debt
Recovery During the 2020 COVID-19 Pandemic

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The New Reality: Mortgage Enforcement and Debt Recovery during the 2020 Covid-19 Pandemic

by

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Overview

I think it safe to say that virtually all of us were taken by surprise when Ontario was suddenly locked-down last March to stem the rising rate of hospitalization of extremely ill Ontarians who had contracted Covid-19; to ‘flatten the curve’ as we now understand it.

The lockdown affected everyone and everything. There really was no way for any of us to have been prepared for the declaration of a pandemic caused by the SARS-CoV-2 virus and all that that entails. Sudden and unexpected passing of loved ones. Separation from friends and family. Business closures, layoffs and rampant unemployment – all at once. And grocery store shortages. Remember those empty rows of shelving where toilet paper was once displayed?

In my recent [blog post](#) I recalled that in my practice, before the lock down, two of the more common causes of mortgage default were mortgagors’ deaths and marital breakdown. Few families can financially survive either of these calamities. Although merely anecdotal, it is safe to say that most Canadians were paying their mortgage debts in full and on time, until the pandemic arrived in March of 2020. But that was then.

This is now. The new reality. Covid-19 has changed everything – literally turning each of our world’s upside-down, virtually overnight. By the end of March, 2020, more than one million Canadians had applied for EI. To date, more than three and one-half million Ontarians have applied for CERB - Canadian Emergency Response Benefits.

Fortunately, shortly after the lock-down, our federal government, working closely with OSFI – the Office of the Superintendent of Financial Institutions, Canada’s bank regulators, and with CMHC and other mortgage insurers, permitted financial institutions to grant to its homeowner/mortgagor customers (without financial penalty) a moratorium, for up to 6 months,

on the payment of principal and interest owing under insured and uninsured mortgages not already in default. This was a welcome respite for the hundreds of thousands of Canadian households whose income or salary had suddenly stopped. By the 2nd week of July, payments under almost 750,000 mortgages had been deferred. In all, more than \$170,000,000,000 (that's *one hundred and seventy billion* dollars) in outstanding mortgage debt was deferred across the country.

Mortgagors that started their mortgage payment deferral in April will have to start making regular monthly payments again this month, in October. Similarly, May deferrals will have to restart payments next month, in November. Only time will tell how devastating the pandemic will be on Canada's mortgage industry. Many insiders are predicting an avalanche of new defaults over the next few months, as a direct result of the pandemic payment deferrals now coming to an end.

Today, I've decided to speak about enforcing mortgages during a pandemic. Something new to all of us. And there is no question, it certainly will be more challenging than it was pre-pandemic, for a variety of reasons.

Institutional Insured Mortgages

Initially, during March and through to June, financial institutions took a very passive, consumer friendly approach to mortgage enforcement and debt collection, by imposing a self-declared moratorium on mortgage remedies. This was not only good public relations, but good common sense as well. With OFSI's revision of the rules dealing with mortgage defaults, non-performing deferred mortgage loans no longer had a negative impact on a financial institution's capitalization. CMHC, Canada's largest mortgage insurer, also had instructed financial institutions to stop all mortgage enforcement on insured loans, without exception. Bottom line was that no institutional mortgage lender wanted to be seen to be taking any mortgage remedy steps at all with their insured or their non-insured, conventional mortgage loans.

In my institutional practice, I was instructed to institute a complete moratorium on all mortgage remedy proceedings immediately after the lock down was announced. And if any mortgagor/customer contacted me, I was to send a pre-scripted email offering a sympathetic ear for their financial woes and a payment deferral if requested. The order of the day was to speak softly and not carry any stick at all.

By the end of June and early July, as lock-down restrictions were easing across the province, so, too, was the complete mortgage enforcement hiatus easing. While some institutions permitted notices of sale to be issued, and statements of claim to be served, CMHC maintained a strict hands-off approach on insured mortgages. But one also has to remember that the Courts were virtually shut down during the first few pandemic months, except for urgent matters. And for the most part, mortgage remedies were just not considered to be urgent – and rightfully so.

By September, however, mortgage remedies were opening up just enough to allow recovery work to continue so long as no one interfered with the owner/mortgagors possession of the mortgaged property. Even CMHC has started to allow insured lenders to restart mortgage remedies gently, with permission to become a mortgagee-in-possession of residential rental property, and to sell that property, so long as the tenant's rights are respected.

Conventional Loans

It goes without saying that on a go forward basis, each institution will formulate its own policies and procedures to deal with its non-insured mortgages in default. And just as the second wave of the pandemic seems to be taking a foothold across most of the country, so, too, should lenders' mortgage enforcement policies ebb and flow with the times. It is trite to say, "we shall see what we shall see".

Private Mortgages

Private mortgage lenders are not subject to OSFI regulations and requirements, and do not have to account for mortgage defaults in their financial statements as strictly as do OSFI regulated institutions. Nonetheless, many took a back seat last Spring and either formally or informally, allowed their mortgagors the same deferral options that were offered to insured mortgagors. Some private mortgagees made forbearance arrangements with owner/mortgagors and others just relaxed their mortgage enforcement for a few months. But by September, I was seeing an influx of new mortgage enforcement files in my office from private mortgagees. It was, for the most part, a return to business as usual.

At this stage of the pandemic, one must remember that the province's Emergency Order on March 16, 2020, that suspended all time periods in the Rules of Civil Procedure (including the twenty days for the delivery of a statement of defense by a defaulting mortgagor) has come to an end effective September 14, 2020. So it is now possible, in mortgage recovery actions, to note defendants in default, if they do not file and serve a statement of defense within the twenty day time period set out in the Rules of Civil Procedure.

But, of course, no one yet knows what the current wait time will be between the filing of a requisition for default judgement and obtaining default judgment signed by the Registrar of the Court. Nor is it clear whether the Courts will entertain electronic motions for summary judgment where a defendant has not filed a defense. Again, only time will tell. And no doubt different Courts around the province will have different wait times and very different attitudes about helping mortgage lenders enforce their security during the pandemic.

And this is where the story takes an unexpected twist. When their mortgages go into default, private mortgage lenders want their counsel to push ahead, take possession of the mortgaged property and then sell the mortgaged property. The law allows private mortgage lenders to take possession. Either by enforcing a writ of possession obtained from the Courts, or by using the self-help remedy of taking possession peacefully. However, with the Courts not yet being a reliable source for default judgments for possession or for motions asking for judgment for possession, the self-help remedy is even more appealing than it was previously.

Of course, no mortgagee can forcefully take possession without a court order if the mortgagee were to be required to breach the peace. This is a reasonable and fair limitation on the self-help remedy of taking possession without a Court order. Owner/mortgagors can therefore refuse to give up possession to her or his private mortgage lender by simply refusing to leave the mortgaged property. But what about tenants?

Tenants in Possession of Residential Rental Property

The law dealing with possession of mortgaged property, especially when the property is rented to a tenant, takes us back to our first year real property course from law school. Real Property Law 101 if you will.

You will recall that in Ontario, when we talk about an owners' *fee simple interest* in real property, what we are really saying is that at common law, an owner has a bundle of rights relating to her or his ownership of the land in question, and all of these rights taken together result in her or his absolute ownership of the real property in fee simple. Included in this bundle of rights is the right:

- to occupy and live in the property – or put more formally, to be in possession of the property
- to allow others to use the property either by giving a license (temporary permission) to use the property or by granting a lease of the property
- to develop and build upon the property
- to farm the land or cut down timber
- to sell the property
- to bequeath the property upon death

In order to grant a lease of real property, the owner must give the tenant exclusive possession of the property for a clearly spelled out term. These 2 factors, exclusive possession and a 'term certain' are necessary preconditions to any lease of land at common law.

So an owner who has rented out the mortgaged property has, by definition, given exclusive possession of the property to the tenant as a necessary precondition to the creation of a residential lease. It is therefore the tenant, and not the owner, who is in possession of the mortgaged property.

Taking Possession of Rented Residential Property

A mortgagee's ability to take possession of mortgaged property without a court order stems back to the centuries old origins of mortgage law, when the granting of a mortgage was accomplished by the mortgagor actually handing over to the mortgagee the deed to the mortgaged property. Historically, the delivery of the deed to the mortgaged property was accompanied by the delivery of possession of the mortgaged property. At law, the mortgagee became the owner of the mortgaged property and was entitled to possess the mortgaged property. Somewhere in the annals of time, likely shortly after the English Courts of Equity created the concept of 'equity of redemption' (which permitted an owner/mortgagor to redeem the mortgage following default), the mortgage contracts themselves started containing clauses allowing the mortgagor to keep possession of the mortgaged property until default. And only after default, was the mortgagee entitled to possession of the mortgaged property under the mortgage contract. This practice of contractually reversing the common law rules of possession exists in virtually all mortgages.

And so, when the mortgage goes into default, the mortgagee is entitled by the mortgage contract to take possession of the mortgaged property. But if the property has been leased, possession has already passed from the owner/mortgage to the tenant.

When a mortgagee changes the locks on rented property and gives the tenant the new key, that rather symbolic action indicates the mortgagee's clear intention to prevent the owner/mortgagor from taking back possession of the property from the tenant at the expiry of the term of the lease. And upon doing so (as I mentioned in [Blog XXI](#)) the mortgagee becomes the mortgagee-in-possession of the mortgaged property.

Dye & Durham's Standard Charge Terms 200033, which is used in many many private mortgages these days, sets out 3 separate clauses allowing the mortgagee to take possession of the mortgaged property following default. The first is a clause which says that *"The Chargee - on default of payment for at least 15 days may, on at least 35 days' notice in writing given to the Charge, enter on and lease the land or sell the land."*

These standard charge terms go on to state that *"Provided further, that in the case default be made in the payment of the principal amount or interest or any part thereof and such default continues for two monthsthen the Chargee may exercise the foregoing powers of entering, leasing or selling or any of the them without any notice..... "*. And lastly, these standard charge terms then clarify that *"Upon default in payment of principal and interest under the Charge.the Chargee may enter into and take possession of the land hereby charged[whereupon] the Chargee shall enter into, have, hold, use, occupy, possess and enjoy the land without the let, suit, hindrance, interruption or denial of the Chargor or any other person or persons whomsoever....."*.

And so, with the mortgage contract clearly giving the mortgagee the right and full power to take and keep possession of the mortgaged property upon the mortgagor's default, without the suit or hindrance of the mortgagor, no court proceeding and no writ of possession is needed in order for the mortgagee to do so.

All that the mortgagee need do is become the mortgagee-in-possession of the mortgaged property. Which can occur by the mortgagee attorning rent or changing the locks. But what if the tenant refuses to allow the mortgagee to change the locks?

The answer is fairly straightforward. Once a mortgagee attorns the rents, the mortgagee becomes the landlord of the residential property by virtue of section 47 of the [Mortgages Act](#), R.S.O. 1990, c. M.40 . And section 24 of the [Residential Tenancies Act](#), 2006, S.O. 2006, c.17 gives the landlord permission to change the locks on residential premises so long as the tenant is given a copy of the new key. So, it should be fairly simple for the mortgagee to change the locks on rental properties. 'Should be simple' - being the operative words. Sometimes, the tenant just says "no".

This month alone I've brought two separate motions seeking an urgent hearing allowing a mortgagee to change the locks and take possession of residential property when the tenant has refused to co-operate. The Brampton Court refused our request for an urgent motion date but gave us a regular motion date just 2 weeks after the motion was filed. We will see what the Oshawa Court will do.....

Time will tell. This is now.....our new reality.

Stay healthy everyone.

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