

TAKING POSSESSION OF MORTGAGED PROPERTY:
IS ONTARIO STILL A SELF-HELP JURISDICTION?

by

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A mortgagee is entitled to take possession of a mortgaged property following default. And a mortgagee may do so without a court order and without a writ of possession. This is, and always has been, the law in Ontario.

The right of the mortgagee to take possession using self-help (without resorting to the courts) was unpacked and explained in a companion article that I have written for the Law Society's 2022 Six Minute Debtor-Creditor and Insolvency Seminar entitled "A Mortgagee's Right to Possession of Real Property in Ontario"¹.

While my companion paper focuses on the genesis of a mortgagee's *right* to possession, this paper will look at how a mortgagee can take possession without resorting to the courts. This analysis starts with a review of relevant statute law (in particular, the Mortgages Act² and the Land Registration Reform Act³) followed by a review of the common law dealing with the manner in which a mortgagee may take possession of a mortgaged property.

Many paralegals and lawyers have practiced under the misapprehension that a mortgagee is always required to obtain a writ of possession from the courts before being entitled to take possession of mortgaged property following default. Fortunately, this misapprehension was dispelled unequivocally in the very recent Ontario Court of Appeal decision of *Hume v. 11534599 Canada Corp.*⁴, which confirms that Ontario is still a self-help jurisdiction. And that a writ of possession is not a prerequisite for a mortgagee to take possession. The *Hume* decision also gives us the first

¹ To be published by Law Society of Ontario in its Six Minute Debtor-Creditor and Insolvency Lawyer 2022 Seminar

² R.S.O. 1990, c. M.40

³ R.S.O. 1990, c. L.4

⁴ 2022 ONCA 575 <https://canlii.ca/t/jr8xn>

clear picture of what taking possession peaceably means. This decision is a must-read for all mortgagees who intend on taking possession of a mortgaged property.

The relevant facts of the *Hume* decision are simple and undisputed. The mortgaged property was a residential home that had been ‘significantly’ damaged by fire. The mortgagors were forced to move out of the property, but left personal possessions behind. They had also locked the doors. The mortgage went into default. The mortgagee did an inspection of the property, saw the fire damage and concluded that the property appeared to be uninhabitable. And as a consequence, the mortgagee immediately changed the locks and took possession of the fire-damaged property. Obviously, one of the significant issues before the court was whether the mortgagee had taken possession of the mortgaged property peaceably.

Before turning to the common law, anyone analyzing a mortgagee’s right to possession under a mortgage has to be familiar with the 1985 Land Registration Reform Act⁵ (the “**LRRA**”) which provides that every mortgage in Ontario is deemed to include a provision allowing the chargee to enter on and take possession of the mortgaged land on default of payment:

- for the number of days specified in the charge or in the Mortgages Act (whichever is longer)
- on giving the notice specified in the charge or required by the Mortgages Act (whichever has the longer notice provision).⁶

The Mortgages Act is silent in this regard. It does not contain any provision requiring a mortgagee to wait any specific number of days after default, before the mortgagee is entitled to take possession of the mortgaged property. And similarly, it does not contain any provision requiring the mortgagee to give any notice to the mortgagor or to others, before the mortgagee may take possession of mortgaged property after default.

⁵ Supra, footnote 3, subsection 7(1)1.(v)

⁶ Section 7(1) 1. (v) provides: “That the chargee on default of payment for the number of days specified in the charge or in the Mortgages Act, whichever is longer, may on giving the notice specified in the charge or required by that Act, whichever is longer, enter on and take possession of, receive the rents and profits of, lease or sell the land.”

But, the LRRA does include a provision⁷ allowing a mortgagor and mortgagee to exclude the deemed covenant referred to in the previous paragraph; see subsection 7(3) quoted in the footnote below⁸.

The mortgage before the Court of Appeal in the *Hume* matter included the Dye & Durham standard charge terms 200033. This set of standard charge terms is perhaps the most commonly used standard charge terms in private mortgage transactions in Ontario. And please take note that Dye & Durham's standard charge terms 200033 excludes, as permitted by subsection 7(3) of the LRRA, the above-referenced implied covenants set out in subsection 7(1) of the LRRA.

Therefore, with no statutory restrictions on the right of a mortgagee to take possession of mortgaged property, the Court of Appeal in *Hume* confirmed that the mortgagee was required to take possession of the mortgaged property in accordance with the terms of the mortgage. And that the Dye & Durham standard charge terms 200033, which formed a part of the mortgage:

- allows a mortgagee to take possession of the mortgaged property after default
- does not require that the mortgagee give any notice to the mortgagor or to any other person of its intention to take possession⁹.

The only limitation that the common law then places on a mortgagee taking possession of a mortgaged property following default is that the mortgagee has to take possession peaceably.¹⁰

⁷ R.S.O. 1990, c. L.4 section 7(3)

⁸ Section 7(3) provides that: "A covenant deemed to be included in a charge by subsection (1) may, in a schedule to the charge, or in a set of standard charge terms filed under subsection 8 (1) and referred to in the charge by its filing number, be expressly excluded or be varied by setting out the covenant, appropriately amended."

⁹ 2022 ONCA 575 at para 40, stating: "Where a mortgagor has defaulted on a mortgage, absent a provision in the mortgage agreement requiring notice, a mortgagee is not required to give notice to the mortgagor before taking possession of the property." And: "The terms of the mortgage agreement, specifically paragraph 10, did not require the appellant [mortgagee] to give the respondents [mortgagor] notice that it intended to take possession of the property."

¹⁰ Supra footnote 4, para 41

The *Hume* Court continued with a discussion of the meaning of the phrase “peaceable possession”, by stating¹¹ that:

“A review of the limited authorities on the issue suggests that what “peaceable” means depends on the circumstances of the case. At a minimum, taking peaceable possession means taking possession of a property without violence or the threat of violence; in other words, without engaging in behaviour that is contrary to the Criminal Code. Such conduct is self-evidently not peaceable.”

And that is the *ratio decidendi* of the *Hume* case. That taking peaceable possession means that a mortgagee must do so without violence and without the threat of violence; that is, without engaging in behaviour that is contrary to the Criminal Code. And that the mortgagee in this case took possession of this uninhabitable, fire damaged property peaceably, when it changed the locks and excluded the owner/mortgagor from the property.

Clearly, taking possession peaceably is easily accomplished in the case of vacant land. And also in the case of an industrial building or a commercial building, where the mortgagee can attend when no one is present at the mortgaged property in order to change the locks and take possession using self-help. And in that simple manner a mortgagee can take possession of vacant land or an industrial building or a commercial building “without violence or the threat of violence”.

But what about residential property? Again, if the home constructed on the property is unoccupied (and by ‘unoccupied’, I mean no one appears to be living at the mortgaged property), the *Hume* decision stands for the proposition that the mortgagee should likewise be able to take possession of the unoccupied residential property by just changing the locks – so long as there is no violence or threat of violence when doing so. This was, after all, the *ratio decidendi* in the *Hume* decision.

¹¹ Ibid, para 59

But this leaves occupied residential property and partially occupied residential property in a grey area. The Court of Appeal did *comment* (in *obiter*) on the ability of a mortgagee to take possession of occupied residential property (without a writ of possession) by using the self-help remedy of changing the locks in order to take possession, as follows¹²:

“The meaning of peaceable possession may also depend on whether the property is occupied for residential purposes. In the case of residential properties that are occupied, the requirement that possession be taken peaceably may require something more than possession being taken without violence or the threat of violence. Otherwise, mortgagees could change the locks on a residence while the occupants are temporarily away which, while not involving the actual use or threat of violence, dispossesses the owners or occupants of their habitation and personal possessions without giving them an opportunity to make arrangements to move to another location. While such actions may not be violent, they are likely not peaceable.”

In the *Hume* case, the Court of Appeal accepted the lower court’s finding of fact that the mortgaged property was left uninhabitable by fire, and therefore, even though the mortgagors had not abandoned the property per se, it was perfectly acceptable for the mortgagee to have taken possession without notice. And that taking possession of this fire damaged (temporarily) unoccupied property by changing the locks and excluding the owners was done peaceably and in accordance with law.

Obviously, we will have to wait for future decisions to see how this *Hume obiter* quoted above is to be applied to other fact scenarios. But for now, mortgagees and lawyers alike can rest assured that taking possession without a writ of possession appears to be lawful with respect to:

- vacant property
- property improved with a commercial building
- property improved with an industrial building
- unoccupied residential property

¹² Ibid, para 59

And it is also clear (and certainly not new law) that a writ of possession is needed in order for a mortgagee to take possession of occupied residential property *unless the person in occupation of the property consents and moves out or vacates voluntarily.*

Just one post-script that requires mention. The Court of Appeal quite correctly commented that there is very little case law dealing with the meaning of ‘peaceable possession’. But the Court went on to speculate that the reason for this dearth in judicial interpretation of the phrase “peaceable possession’ is because “*prudent mortgagees generally apply to the court for a writ of possession before taking possession of a property after an event of default*”¹³.

It is with the greatest respect that I have to disagree with this sentiment. While no one involved in the enforcement of mortgages of *occupied residential property* can seriously disagree that without the co-operation of the mortgagor, a writ of possession is needed for the mortgagee to take possession of an owner occupied residence. However, I do not believe it to be prudent at all for a mortgagee of:

- vacant property
- or property improved with a commercial building
- or property improved with an industrial building
- and especially, of unoccupied residential property

to apply to a court for a writ of possession before taking possession. I believe that the Court of Appeal is assuming that applying for and obtaining a writ of possession is generally a rather quick and efficient process. In reality, it is usually just the opposite.

In many, many mortgage enforcement matters, the mortgagor will avoid service of the statement of claim, making the mortgagee spend the time and money to obtain an order for substituted service

¹³ Ibid, para 45

(or validating service). It is also common for a mortgagor served with a statement of claim for possession of the mortgaged property to file a Notice of Intent to Defend. And then (on the 30th day after being served with the claim) file a defense. And more often than not, the defense filed is quite devoid of an actual defense on the merits. Whether the filed defense is frivolous (of no serious value) or vexatious (intended to delay or annoy) or an abuse of the Court's process, a motion for summary judgment will be the mortgagee's next step.

And motions for summary judgment are almost always heard no earlier than 4 to 6 months after the motion is filed. And that assumes that the mortgagor co-operates and does not ask for one or more adjournments (which, if self-represented, are often granted, at least the first request for an adjournment is often granted).

And so, this process, which the Court of Appeal must assume to be a rather 'quick and efficient' process, often delays a mortgagee from taking possession (to which it is entitled at law and under the mortgage contract) for 6 to 9 months on average. And sometimes longer.

Of course, one has to remember that the mortgage was likely in default for a number of months before being sent to the lawyer's office for enforcement. And all the while, the mortgagor is living in the mortgaged property or renting out the mortgaged property and

- not paying any interest instalments owing
- not paying realty taxes falling due
- often not paying for insurance for the improvements at the mortgaged property
- not maintaining nor repairing the improvements at the property
- keeping for the mortgagor's own benefit income emanating from its use of the property (when rent cannot be attained or when tenants ignore attornment notices).

Without trying to sound too righteously indignant, this is just unfair. Unfair to the mortgagee and unfair to the subordinate mortgagees. And often, as today, with interest rates rising and with property values decreasing, extremely costly to the mortgagees as well, with absolutely no downside or harm to the mortgagor. In fact, the mortgagor gets the benefit of living in or using the property at no cost during the entire ordeal (of the mortgagee trying to obtain a writ of possession from the courts).

And so, despite of the Court of Appeal's comments about 'prudent' behaviour requiring writs of possession, my experience leaves me with no option but to remind all that we, as counsel for enforcing mortgagees, receive clear instruction from our clients to take possession of mortgaged property (following default) just as soon as the law allows. And while a writ of possession will be a necessity in order for the mortgagee to take possession of occupied residential property (in circumstances in which the mortgagor will not voluntarily vacate), prudent mortgagees - who are trying to protect their investment and avoid having the mortgagor benefit unjustly from months of delay – will instruct counsel to avoid turning to the courts and bringing an action for possession. And instead, mortgagees will require that the self-help remedy of taking possession peaceably be utilized every time that it is available. And, in my humble opinion, that is the prudent steps to take!

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