Minden Gross LLP

Mortgage Enforcement:
Powers of Sale

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Topics:

Mortgage Enforcement:
Powers of Sale
front page

Arbitrating Business Disputes:
Facts and Myths
page 3

The Limitations Act, 2002 - Review and Update
page 6

Professional Notes and Firm News
page 7

With the economy in the midst of a downturn, we can expect to see a rise in mortgage loan defaults and, therefore, an increase in lenders seeking to exercise their power of sale remedy.

A lender needs to ensure that its Notice of Sale is valid in order for it to be able to successfully take advantage of this enforcement remedy.

The power of sale is a self-help remedy that is recognized under the *Mortgages Act* (Ontario). Under Part III of the Act, after the mortgage is in default for at least 15 days, the lender (i.e., the "mortgagee") can issue a Notice of Sale providing the borrower (i.e., the "mortgagor") and other required parties with 35 clear days' notice of the lender's intention to sell the property.

Once the notice period expires under the Notice of Sale, the lender is generally free to market and sell the property. The borrower, however, may wish to delay or prevent the lender from selling the property in the hope of preserving its investment in the property. For example, a borrower may wish to buy time in order to come up with needed financing to redeem the mortgage.

The most common approach taken by borrowers in this regard is to attack the validity of the Notice of Sale. Procedurally, the borrower would need to seek an injunction from a judge restraining the lender from selling the property on the basis of some fatal defect in the Notice of Sale. The borrower would need to persuade a judge (among other things) that the Notice of Sale is defective and that the borrower would suffer "irreparable harm" if the injunction is not granted. Examples of cases in which irreparable harm might be found to exist include cases where the property is the borrower's home which is unique and has sentimental value to him or her, or where the property in question is an income-producing property and constitutes the sole asset and business of the borrower.

The Notice of Sale will need to contain a sufficient description of the mortgage and set out the amounts that are owing

under the mortgage and indicate that, unless those amounts are paid within the 35-day notice period, the lender will sell the property. Not every error in a Notice of Sale would result in the lender not being able to act upon it. An error in a Notice of Sale would have to be of such significance so as to likely mislead the person receiving it to his detriment. For instance, minor errors in the amounts shown to be owing in the Notice of Sale that do not affect the substance of the Notice of Sale or lead to confusion would not invalidate the Notice of Sale. These errors could be resolved as part of a subsequent accounting between the parties.

Although there is no rule of thumb that would indicate whether an arithmetic error is minor or not, it appears that the courts tend to compare the amount of the error in question with the amount of the overall mortgage debt. For example, a court would more readily declare a Notice of Sale to be invalid where the error in question amounted to 10% of the overall mortgage debt, as compared to an error of less than 1% of the balance owing.

Since the main purpose for the Notice of Sale is to give the required 35 days' notice of the lender's intention to sell the property if the mortgage debt is not satisfied, a Notice of Sale that provides that the property would be sold on a date that is less than the required 35 days would be deemed invalid.

A Notice of Sale does not need to include the method by which the various amounts were calculated. All that is required in this regard is that the Notice of Sale set forth the "bottom line" amounts that are owing. However, the Notice of Sale must specify individually the amounts due for principal, interest, legal costs and so forth. For instance, if the balances for principal and accrued interest are lumped together as one amount in the Notice of Sale, the Notice may be invalidated.

If there is a dispute as to whether an amount shown in the Notice of Sale is payable, such as whether or not a property manager's fees are excessive, or whether the interest rate is correct, so long as the lender has a reasonable basis upon which to claim the amount, the Notice of Sale would be upheld. Again, this could be the subject of a subsequent accounting.

A Notice of Sale must be signed before it is sent out; otherwise, it will be deemed defective. Further, where a lawyer signs a Notice of Sale on behalf of his or her lender client, but does not indicate in the Notice the capacity on which he or she is signing (i.e., as lawyer for the mortgagee), the Notice would be set aside.

Generally speaking, the Notice of Sale is to be served on the borrower, his or her spouse, and all subsequent mortgagees and other encumbrancers whose interests were registered or arose after the registration of the subject mortgage. Borrowers sometimes argue that they never received the Notice of Sale. In those instances, the focus is obviously on where the Notices were sent. If a lender knew or ought to have known that the address to which it mailed the Notice of Sale to the borrower was not the borrower's last known address, then the manner of service may be deemed improper and the lender may be barred from continuing with its power of sale proceedings.

Pursuant to section 42(1) of the *Mortgages Act* (Ontario), a mortgagee may not take any further action or proceeding during the notice period under the Notice of Sale. The intention being that the person with a right to redeem the mortgage should not be hindered from doing so due to any fresh steps taken during the notice period or due to any increase in costs incurred as a result. For example, a lender is prohibited, during the notice period, from taking possession of the mortgaged property; serving a notice of attornment of rents on a tenant; issuing or serving a Statement of Claim; or entering into an agreement of purchase and sale to sell the mortgaged property. Generally, where a mortgagee breaches this section, the specific step taken would be invalidated or set aside, but not the Notice of Sale itself.

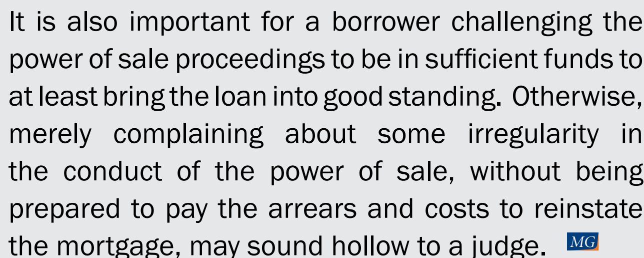
However, a lender is entitled, during a notice period, to take steps to prevent waste or injury to the mortgaged property. For example, although a lender would not be permitted to make cosmetic repairs during the notice period, it would be entitled to make repairs that are necessary to address health and safety concerns at the property.

Borrowers occasionally argue that the lender is no longer entitled to rely on a Notice of Sale where,

after issuing the Notice of Sale, the lender accepts payments and grants the borrower more time to redeem the mortgage. However, that in and of itself would not impair the validity of the Notice of Sale. It is only where the parties negotiate different terms of the mortgage (such as, for example, a new interest rate) would the lender not be able to act upon its original Notice of Sale.

Once a sale agreement is entered into, and except in the most extreme and exceptional cases, a lender acting in good faith and without fraud will not be restrained from exercising its power of sale. Although it still might be possible for a borrower to challenge the validity of a Notice of Sale after a sale agreement is entered into, presumably the defect relied upon in the Notice would have to be of real significance to warrant the court's intervention at that late stage in the process.

Absent fraud or collusion, it would likely not be possible to reverse a sale transaction after it has closed for reason of some irregularity in the exercise of the power of sale. The borrower would then be left with its remedy in damages against the lender.



It is also important for a borrower challenging the power of sale proceedings to be in sufficient funds to at least bring the loan into good standing. Otherwise, merely complaining about some irregularity in the conduct of the power of sale, without being prepared to pay the arrears and costs to reinstate the mortgage, may sound hollow to a judge.

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ARBITRATING BUSINESS DISPUTES: FACTS AND MYTHS

Arbitration is becoming an increasingly popular way of resolving disputes. This trend is probably due, in large measure, to the increasingly common practice of including arbitration clauses in contracts. Nevertheless, misunderstandings about arbitration continue to be prevalent, even among the most sophisticated business people. This article will attempt to identify and explain a number of common myths about arbitration.

Myth #1: Arbitration is not available in commercial disputes in the absence of an arbitration clause

Where a contract provides that disputes under the contract are to be resolved by arbitration, the parties have no choice but to arbitrate such disputes unless they agree to amend the contract, in effect, by deleting that clause.

However, even in the absence of an arbitration clause, or a written contract, for that matter, it is always open to parties to agree to arbitrate their dispute. All that is required is for both parties to agree on the scope of the arbitration and the identity of an arbitrator. Most of the other procedural details, even if not determined at the outset, can be worked out during the course of the matter, with or without the participation of the arbitrator.

Myth #2: Arbitration clauses do not foreclose litigation

As indicated above, subject to agreement to the contrary, parties who enter into a contract containing a mandatory arbitration clause have no choice but to resolve disputes contemplated by the clause (generally, disputes arising out of the agreement) by arbitration. In the event that a complaining party ignores the clause and commences a lawsuit, the responding party should be entitled to a Court Order halting the litigation and forcing the complaining party to proceed by way of arbitration.

Myth #3: Arbitrators try to get parties to settle

This is a fundamental misunderstanding which appears to be prevalent. It arises from a common confusion about arbitration as opposed to mediation. Mediators try to help parties resolve disputes through settlement. Arbitrators are like judges: they conduct some form of hearing and then render decisions, in the same way as judges do.

Myth #4: Arbitration is always cheaper than ltigation

Arbitration can indeed offer a more streamlined process than litigation. Most of the time, this will depend on the parties' willingness to move matters along expeditiously by limiting or eliminating procedural steps such as discoveries. In addition, arbitrators can sometimes be persuaded to reduce the number of days spent in a hearing by streamlining the hearing process itself. For example, the parties and the arbitrator can agree that certain evidence in chief can be entered by affidavits rather than oral testimony. Even an agreement on expanding the number of hours spent in a day receiving evidence and hearing argument can reduce the length of the hearing. All of these steps may serve to reduce costs.

However, the bottom line is that the court system is publicly financed. Arbitrators can be extremely expensive, particularly where the dispute is to be resolved before a tribunal of three arbitrators. I recently concluded a two-week arbitration where the arbitrator's fees alone approached six figures. There are numerous advantages to arbitrating commercial disputes, but reduced expense is not necessarily one of them.

Myth #5: Arbitration is always faster than litigation

It is true that arbitration is often faster than litigation. However, the fact is that complex commercial disputes take a long time to resolve regardless of the process utilized by the parties. The review of productions and conduct of examinations for discovery will occupy a significant amount of time in either context, unless the parties voluntarily agree to limit themselves (and each other).

Another important factor in determining how quickly an arbitration proceeding will move ahead involves that willingness of the parties to co-operate with each other. A party that is not willing to proceed in a good faith, co-operative and expeditious fashion may find it easier to drag matters out in an arbitration proceeding than in litigation, where parties have the benefit of binding and easily enforceable rules designed to move matters forward.

Additionally, disputes which can be resolved by way of an Application as opposed to an action, or through the use of the procedure available from the Commercial List in Toronto, will almost always reach a conclusion more expeditiously than would an arbitration.

Myth #6: At the end of the day, arbitration offers no advantages over litigation

Even though arbitration can be costlier than litigation, and may not offer any advantage in terms of speed, it does offer important advantages.

Chief among these is the ability of the parties to choose their arbitrator. This is particularly important where the dispute involves matters of a technical or industry-specific nature, since it is generally open to parties to select an arbitrator with specific expertise in the relevant area.

Another important advantage of arbitration is confidentiality. Matters that are litigated become part of the public record. This sometimes attracts the attention of the media, which may not be desirable for at least one of the parties to the dispute. Arbitration proceedings are not automatically exposed to the public eye in the same way.

A third important advantage, at least where the parties are prepared to deal with the dispute in good faith, is that of efficiency. As a general rule, parties involved in an arbitration are free to negotiate the procedural aspects of the dispute to increase efficiency and cost effectiveness. Some of the possible steps that might be available in this connection are mentioned above. As experienced lawyers know, if at all possible, attention should be paid to the opportunity to agree on a streamlined process at the time that the contract is being entered into so that the arbitration clause might cover as many procedural points as possible.

Myth #7: Arbitration awards can be appealed just like a judgment

The *Rules of Civil Procedure*, coupled with the jurisprudence, clearly define appeal routes and the scope and standard of review available to litigants. In an arbitration process, it is open to parties to confine or even eliminate appeal rights when the arbitration clause in the contract is drafted. If the arbitration clause does not deal with appeals, the *Arbitration Act* provides that a party may appeal an award to the Court on a question of law with the Court's permission which will only be granted under certain circumstances. It therefore follows that as a general rule, arbitration awards are much more difficult to challenge by way of appeal than judgments.

Myth #8: Unlike a Court judgment, an arbitration award cannot be enforced easily

The *Arbitration Act* specifically provides that arbitration awards can be enforced by the Court. The Court is required to grant judgment enforcing an arbitration award made in Ontario unless one of several conditions apply, such as the existence of a pending appeal. In fact, if the arbitration award was made elsewhere in Canada, with a few additional exceptions, an Ontario Court will grant judgment enforcing that award as well.

Myth #9: Arbitrators call them the way they see them

There is a commonly held view that arbitrators make decisions in the same way as do judges. Certainly, that should be the case. Unfortunately, experience teaches us that there is one glaring difference between arbitrators and judges that may be relevant to this issue.

The simple fact is that arbitrators are engaged and paid by parties and their lawyers. As a result, regrettably, there are arbitrators who feel that if they are too aggressive with a decision, they will not get selected again by the unsuccessful lawyer. As a result, they choose to play King Solomon to some extent and it is difficult to get what litigators refer to as a "clean win". This has at least the following consequences. Firstly, counsel sometimes try to load up on frivolous claims essentially because they are playing for the middle ground between zero and the maximum number they can imagine. Secondly, a truly meritorious claim, which would be honoured in full by a judge, might get watered down by an arbitrator. Looked at in isolation, this might suggest that a party with a meritorious claim ought to consider avoiding arbitration if possible.

There is every reason to believe that the popularity of arbitration as a mechanism for the resolution of commercial disputes will continue to increase. Certainly, it is becoming an increasingly significant part of the practice of our firm's Litigation Group. Its increasing popularity is likely a reflection of the fact that on balance, and in most cases, it does offer advantages compared to litigation. Hopefully, this article has provided some context within which our readers can make their own assessment. MG

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THE LIMITATIONS ACT, 2002 – REVIEW AND UPDATE

On January 1, 2004, the Ontario Limitations Act, 2002 was proclaimed in force, superseding the previous Limitations Act and other related statutory provisions for all claims other than real property claims. The principal feature of the new legislation is the implementation of a two year limitation or prescription period for the commencement of most legal actions, including claims in contract and tort which were previously subject to a six-year limitation period, and other claims that were not previously subject to any restrictions, such as claims for breach of fiduciary duty. In all cases, the limitation period is qualified by the doctrine of "discoverability", meaning that the time for bringing the claim does not start to run until the person with the claim discovers it or reasonably ought to have discovered it, subject to an "ultimate limitation period" of 15 years.

The purpose of the Act, as explained in a recent decision of the Ontario Court of Appeal, is "to balance the right to access to justice by bringing a lawsuit with the right to certainty and finality in the organization of one's affairs." The purpose of the ultimate limitation period is to balance the concern over undiscovered causes of actions with the need to prevent indefinite postponement of a limitation period, and the associated costs of keeping records forever.

The Act contains complex transition rules which apply to claims that arose before January 1, 2004. Many of the cases which have been decided since the Act came into force have required the courts to interpret the transition rules. In the Court of Appeal case referenced above, for example, the court decided that the ultimate 15-year limitation period did not start to run until January 2004. As a result, the plaintiff in that case was allowed to go forward with an action that was started in 2005, but that related to alleged negligence occurring in 1978. What this means is that, despite the new, shortened period for bringing known claims, it may still be necessary to retain records until at least the year 2019, in order to deal with potentially undiscovered claims.

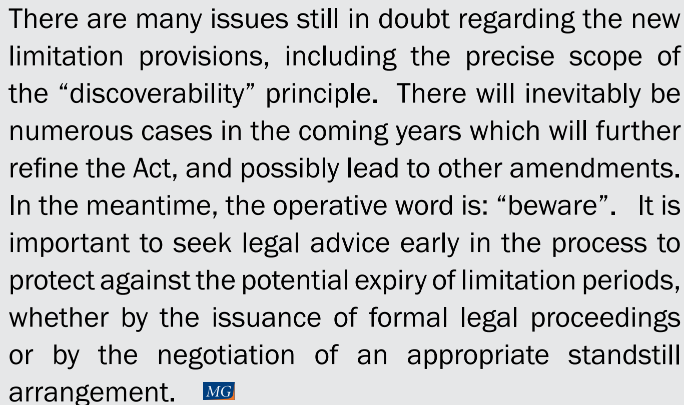
Although the new Act was many years in the making, a number of problems have surfaced which have been sufficiently serious to justify legislative amendments. For example, the Act, when it initially came into force, contained a prohibition against agreements which vary or waive the limitation periods. After widespread complaints, this prohibition was legislatively removed, subject to more modest consumer protection provisions.

In another situation, a drafting glitch in the new Act led to an Ontario Court of Appeal decision deeming the limitation period for recovery of a demand loan to start running from the date of advance rather than the date of default. This decision has had widespread ramifications for the enforceability of loans made between related parties or in other informal situations. This situation is also in the process of being remedied by an amendment to the Act.

As time passes, more and more cases are starting to interpret the limitation provisions as they apply to claims that have arisen since January 1, 2004.

Until recently, there was a judicial line of authority holding that the court retained a discretion to permit cases which were *prima facie* barred by the limitation period to go forward, if the plaintiff could demonstrate "special circumstances". The Court of Appeal has now closed the door on such claims, confirming that the expiry of a limitation period is an absolute bar to a claim, including the addition of new parties and claims to an existing lawsuit. The only exception is the addition of new claims against the parties to an existing lawsuit where the new claims are closely connected with the original claim.

Accordingly, it is extremely important not only to start lawsuits within the limitation period, but also to ensure that all potential causes of action and defendants are included in the claim in the first instance.



There are many issues still in doubt regarding the new limitation provisions, including the precise scope of the "discoverability" principle. There will inevitably be numerous cases in the coming years which will further refine the Act, and possibly lead to other amendments. In the meantime, the operative word is: "beware". It is important to seek legal advice early in the process to protect against the potential expiry of limitation periods, whether by the issuance of formal legal proceedings or by the negotiation of an appropriate standstill arrangement. MG

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Professional Notes

Stephen Posen appeared on two panels at the Real Leasing Conference on September 18, 2008, entitled: *Leasing in a Slowing Economy: Anticipating Tenant Defaults, Bankruptcy and Insolvency*; and *Operating Cost Issues.*

David Louis conducted a CCH Webinar in October, alongside **Samantha Prasad** and **Michael Goldberg**, with Meritas affiliates in Winnipeg and Montreal and will be participating in the next CCH Webinar taking place in February. He published an article on valuation and family business shares structures in Tax Topics as well as monthly articles written in Tax Notes. David and Michael both submitted a number of editorial notes to the *Canadian Income Tax Act with Regulations, Annotated (CCH)*.

Samantha Prasad wrote the article, "'Till Taxes Do Us Part - Income Splitting with your Spouse", in the *TaxLetter* and the article, "The Art of Tax-Loss Selling", in the *MoneyLetter*. On October 20th, she was featured in the article, "Women in Law" in *Law Times*.

Joan Jung wrote quarterly columns for the STEP Canadian newsletter, *STEP Inside*.

Steven Pearlstein spoke at *The Six-Minute Real Estate Lawyer - 2008* on November 6 about "The Repeal of Section 46(3) of the *Personal Property Security Act* and it's Effect on Commercial Mortgage Financing." He was also elected to membership in the American College of Mortgage Attorneys in September.

Stephen Messinger was the Chairman of the ICSC New Urbanization Forum which took place in Toronto on September 16, 2008. Both he and **Stephen Posen** are listed in the 2009 Lexpert/ALM Directory of Leading 500 Lawyers in Canada in the area of Property Leasing.

After 45 years, **Hartley R. Nathan, Q.C.** has been awarded the gold medal for standing first in his graduating class of 1963 at Osgoode Hall Law School. There has been a change in marking criteria not in force at the time of his graduation. The medal will be presented at a ceremony to take place on May 20, 2009 at the Law School. On May 7, 2009 Hartley will be delivering a lecture on Calling and Conducting Meetings of Directors and Members of Non-Share Capital Corporations at the Annual Charitable and Not-For-Profit Association Symposium in Toronto.

Howard S. Black presented a paper on October 6 entitled, "Rectification of Wills: Can Mistakes Be Cured?" at The Law Society of Upper Canada program entitled *The Administration of Estates – Avoiding the Pitfalls*. On August 26, he made a fifth appearance as a guest on the Business News Network television show *MoneyTalk* with Patricia Lovett-Reid, speaking on the topic of "Estate Planning for High Net Worth Seniors."

A. Irvin Schein, chair of our Litigation Group, co-chaired the annual meeting of the Meritas Litigation Section in Seattle, Washington on October 20-21. The meeting featured a seminar on practice skills as well as presentations on topics that included arbitration agreements and the effective use of forensic accountants in commercial litigation.

Firm News

Minden Gross LLP is pleased to welcome **Matthew P. Maurer** to our Litigation Group.

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