CITATION: Royal Bank of Canada v. Regis Ainbinder, 2025 ONSC 4681
COURT FILE NO.: CV-24-00094492-0000
DATE: 20250813

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Royal Bank of Canada, Plaintiff

AND:

Regis Ainbinder, Defendant

BEFORE: Associate Justice Perron

COUNSEL: Leigh Ann Sheather and Amanda Jackson, Gowling WLG (Canada) LLP, for the Plaintiff

READ: August 13th, 2025

SUPPLEMENTARY ENDORSEMENT

1. This supplementary endorsement is further to my endorsement on November 28, 2024.

2. On November 28th, I read the Plaintiff's motion seeking leave to issue a Writ of possession. I granted the motion but raised concerns about the Notice Demanding Possession (the "NDP") that was sent by the Plaintiff and found as follows:

> *As indicated on several previous endorsements to this firm on motions seeking similar relief, the Notice Demanding Possession does not comply with the requirements of the caselaw. The caselaw provides that the Notice should clearly indicate that judgment granting possession HAS been obtained and attach a copy of the said Judgment. The Notice is to be sent to all occupants. By necessity to comply with the caselaw, the Notice should only be sent after the judgment is obtained. The occupancy check should be done in close proximity to the Notice being sent.*
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> *That said, there is evidence in the record that the only occupant of the premises is the Defendant and that he was served with a copy of the Judgment and the Notice, albeit separately. A follow up occupancy check was also conducted recently. I am therefore satisfied that the relief sought is appropriate in this specific case. But please note that if the Notice is not compliant, future motions may be denied.*

3. Because of similar concerns being raised on a number of other motions in writing by the law firm representing the Plaintiff, an off the record virtual zoom meeting was held with

Amanda Jackson, a partner at Gowling WLG, on December 13, 2024. Counsel offered to send me written submissions in support of their position that the NDP was appropriate for my consideration on future motions.

4. The written submissions were delivered to my attention on March 14, 2025. The written submissions did not alleviate my concerns regarding the form of NDP sent to occupants in possession of the land/property who were not parties to the action. I did not issue a supplementary endorsement at that time but have decided to do so now in order to provide more fulsome reasons that will capture the issues I have been raising in my endorsements on subsequent motions.

5. For the reasons set out below, I remain of the view that the template NDP used by this firm does not comply with the requirements set out in the Rules and the applicable caselaw, particularly when the NDP is sent to occupants who are non-parties to the proceedings.

The Rules of Civil Procedure

6. The relevant provisions governing the issuance of writs of possession are found in Rule 60.10.

7. I agree with the Plaintiff's submissions that Rule 60.10 of the *Rules of Civil Procedure* (and the former Rule 567) permit a moving party to apply for a writ of possession at the same time that an order granting possession is made. This route is set out in subrule 60.10(1) which provides that a writ may be issued with leave of the court "without notice or at the time an order entitling a party to possession is made" [emphasis added].

8. However, prior to granting leave to issue a writ, subrule 60.10(2) requires the following: "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" [emphasis added].

9. Breaking this down, subrule 60.10(1) states that a writ of possession may be issued only with leave of the court and that, a) leave of the court may be obtained on a motion

without notice; or, b) leave may be obtained at the same time an order entitling a party to possession is made. By using the conjunction “or”, in my view subrule (1) means that if a party seeks leave to issue a writ at the same time as an order for possession is made, the moving party must “serve” its motion materials and such a motion cannot be brought without notice.

10. Subrule 60.10(2) appears to qualify the test for granting leave broadly speaking and requires that leave may only be granted if all persons in actual possession of any part of the land have received sufficient “notice of the proceeding in which the order was obtained”.

11. While use of the past tense in subrule (2) to qualify the timing of the order being obtained may appear to contradict a party’s right under subrule (1) to move for the issuance of the writ and judgment at the same time, in my view, subrule (1) and (2) appear to target two different procedural scenarios, while emphasizing the overarching importance of ensuring that all parties in possession of the property have “sufficient notice” that the moving party is applying for the writ. Generally, what is “sufficient notice” will depend on the procedural route chosen by the moving party and the facts of each case.

12. For example, if a party moves on notice for an order granting possession and the issuance of the writ simultaneously, the moving party would be required to put the adverse party on notice that it is seeking the order, and the Court will need to be satisfied that all persons in actual possession have also received sufficient notice that a writ is being sought. On the other hand, if a party moves without notice – which is by far the most common route – this usually means that the plaintiff previously received a judgment/order granting possession (typically by default judgment) such that use of the past tense in subrule 60.10(2) does not create any confusion.

13. What is clear from reading Rule 60.10 in its entirety as well as the principles arising from the caselaw is that prior to issuing a writ, the Court must be satisfied that all persons in possession of the property have received sufficient notice of the moving party’s intention to seek the issuance of the writ.

14. In any event, I do not need to decide how to reconcile any ambiguity arising between

subrule 60.10 (1) and (2) on this motion. The within motion, and all subsequent motions in which I have raised concerns about the NDP used by this firm are motions brought in writing, on an ex parte basis, after the order granting possession was made. My decision should be read accordingly.

15. But what does it mean for all persons in actual possession to "have received sufficient notice of the proceeding"? Therein lies the crux of the issue on this motion.

Interpretation of "Sufficient Notice of the Proceeding" in the Caselaw

16. A review of the applicable caselaw is helpful to clarify the notice requirement. I have considered the caselaw referenced in the Plaintiff's submissions and have not conducted independent research except to consult an annotated version of Rule 60.10 which appeared to identify the same key cases referenced by the Plaintiff herein.

17. Although decided under the former rules, the Court in *Jamort Investments Ltd. et al.* v. *FitzGerald* ([1968] 1 O.R. 541-546, (1968 CarswellONt 703 at para 10) found that " 'sufficient notice of the proceedings in which such judgment was obtained' do[es] not limit the time for giving notice to that time before judgment." [emphasis added].

18. However, in discussing the timing of the notice, Master Dunn in *Jamort* offered additional insight as to what he considered to be "sufficient notice" and stated as follows:

> [9] Once having determined the identity of all the persons in actual possession, the Master must be satisfied from the affidavit material that they "have received sufficient notice of the proceedings in which such judgment was obtained to have enabled them to apply to the court for relief or otherwise". When and in what form should notice be given? The rule is not clear as to the length of the notice, and prescribes no form.
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> [10] I am of the opinion that the words "sufficient notice of the proceedings in which such judgment was obtained" do not limit the time for giving notice to that time *before* judgment. If these words were so construed, a writ of possession could not be obtained in the action should any person go into possession after judgment has been entered, however slender the right of such person to possession might be. It is my view that the words "in which such judgment was obtained" used in Rule 567, should not be strained to read "prior to judgment", or "leading to judgment", thereby limiting the proceedings of which notice must be given to those taken before judgment. These words are not

> contained in the English rule encompassing a similar application (Supreme Court Practice, 1967, Order 45, Rule 3), which in other respects is similar to the wording of Rule 567 in so far as it relates to the evidence to be given on the application for leave and under which notice is given *after* judgment to all persons in possession. The additional wording in Rule 567 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 personally made aware of the claim for possession made against him in the action, whereas the English practice requires that such a defendant in possession be served with notice of the judgment and that he be called upon to give up possession under it. [emphasis added]

19. Master Dunn went on to explain the importance of the notice and what should be contained in the notice:

> [11] It is my view that no order for a writ of possession should go in a mortgage action, even upon notice, when it is apparent that the lands are in the actual possession of a person prior in interest to the plaintiff, or of a person who should have been a party to the plaintiff's action for foreclosure and possession and was not made a party (*e.g.*, a lessee under a lease from the mortgagor made subsequent to the plaintiff's mortgage without his consent before the action was commenced), or of a tenant who pays rent to the mortgage pursuant to a notice from him, or otherwise becomes the tenant of the mortgagee (Falcombridge, *Law of Mortgages*, 3rd ed., p. 295). Thus the affidavit in support of the application should negate any relationship that would cast doubt on the applicant's superior claim to possession, provided the applicant knows of the true relationship. If he does not know, and cannot reasonably obtain the information, he should say so, and the person in possession would in such circumstances be left to "apply to the court for relief or otherwise".
>
> [12] The nature or content of the notice required to be given to persons in possession is not stipulated in the Rule. However, the English practice in this regard seems suitable, in that notice is given by prepaid post setting out the particulars of the judgment and asking the occupant to vacate the premises forthwith and stating that in default of vacating the premises or of any application by him to the Court for relief or otherwise, the plaintiff would proceed to recover possession upon the judgment without further notice. (Supreme Court Practice 1967, vol. II, Form No. PF 94, p. 230.) It is of course important that the occupant be given particulars of the judgment in order that he may be made aware of the nature of the plaintiff's claim and apply for relief in the action if entitled. [emphasis added]

20. Regarding the timing of the notice, *Jamort* confirms that: a) notice of the proceedings is

not limited to providing notice only to those in possession prior to the judgment being obtained; and, b) the rules do not require that notice only be given prior to the judgment being issued or leading to the obtention of the judgment.

21. As discussed above, I agree with the Plaintiff that the rules – as interpreted by the caselaw such as *Jamort* – provide options, and depending on the procedural route chosen by the moving party, that route will guide the timing of the notice. My endorsement of November 28, 2024 should therefore not be read to require that in *all cases* the NDP must be sent only after judgment is issued.

22. However, in my view, another important principle arising from *Jamort*, in particular Master Dunn's findings in paragraph 12, is that when seeking leave to issue a writ of possession, it is essential that all those who are in actual possession of the land be made fully aware of the proceedings which includes, when applicable, providing occupants with full particulars of the judgment so that they may apply for relief.

23. A finding that "sufficient notice" includes notice of the particulars of the judgment can also be gleaned from the Court's decision in *National Bank of Canada* v *Ali Ehtisham* (2010 ONSC 1528).

24. In *Ehtisham*, Master MacLeod (as he was then) considered the notice requirement set out in the new/existing rule, subrule 60.10(2). After considering applicable caselaw such as *Jamort*, and cautioning that the court was not bound by a rigid formula, Master MacLeod set out a list of what evidence *might* be appropriately set out in the affidavit supporting the motion which included: "That a notice demanding possession together with particulars of the judgment has been served on persons in possession and when and how that occurred." (see para 9 of *Ehtisham*). Master MacLeod went on to say, at paragraph 10, that "Besides a copy of the judgment for possession, it may be necessary to attach proof of service, an affidavit of a process server or investigator who has visited the lands and ascertained who is in possession…".

25. The Plaintiff relies on the absence of rigidity in *Ehtisham* to submit that it is not necessary to provide particulars of the judgment or to attach a copy of the judgment to the NDP. The Plaintiff also submits that such a requirement would contradict subrule 60.10(1) which permits a moving party to seek a writ at the time it moves for an order/judgment.

26. Requiring that particulars of the judgment be set out in the NDP when a party is moving for a writ on an ex parte basis would not be inconsistent with subrule 60.10(1). As discussed above, there are two different procedural routes available to moving parties: before/at the same time that an order for possession is sought pursuant to subrule 60.10(1); or on an ex parte basis after the order/judgment for possession is issued which triggers 60.10(2).

27. I do not disagree that there are circumstances when it may be appropriate to move for an order and a writ on the same motion, if a moving party has evidence of occupancy at the time the order is sought and evidence that all occupants have been put on notice of the relief sought. See for example *Starkman* v *Home Trust Company*, (2015 ONCA 436) where the Court of Appeal dismissed the defendant's appeal and found that she was the only occupant and that the defendant's two adult children, who might be impacted by the issuance of the writ, had knowledge of the plaintiff's efforts to gain possession (see *Starkman* at paras 13 to 15)[1].

28. Where the defendant(s) is the only occupant, the Court has also held that further notice is not required if the defendant was previously served, or was otherwise made aware of the claim for possession in the action, because in those cases, the defendant has already been given a chance to seek relief (*Canada Trustco Mortgage Co.* v *McLean* [1983] O.J. No. 269 at paras 10 and 11).

29. That said, and while it is true that the Court in *Jamort* and *Ehtisham* did not impose rigid requirements on what the NDP must include, in my view those decisions provide that when a moving party seeks leave to issue a writ of possession on an ex parte basis after the order/judgment granting possession has been issued, "sufficient notice of the proceeding" requires that all occupants have full particulars of the judgment. When the notice is delivered, there should be no doubt in the occupant's mind that the moving party is entitled to possession based on the order/judgment and that they need to vacate the property unless they successfully apply for relief.

30. Although *Ehtisham* does not provide that the list of evidence set out at paragraphs 9

[1] I disagree with the Plaintif's submission that the Court of appeal in *Starkman* implicitly found that it was not necessary to serve a copy of the judgment as a prerequisite to obtaining leave to issue a writ. *Starkman* was determined on its facts which included a finding that the defendant was the only occupant.

and 10 is mandatory, I note that if such evidence was included as standard practice on ex parte motions seeking leave to issue writs of possession, there would be far fewer adjournments and/or dismissals of these types of motions. In my view, although not an exhaustive list, it would certainly be best practice for the moving party to include evidence for each of the enumerated factors listed at paragraphs 9 and 10 of *Ehtisham*.

The Content of the Plaintiff's Notice Demanding Possession

31. I now turn to consider the wording of the applicable NDP. The template Notice used by the Plaintiff's lawyers states the following:

> TAKE NOTICE that [x], the above named Plaintiff, has commenced an action for possession in this Court against [the Defendant(s)] claiming immediate possession of the lands and premises municipally known as [the property address] (the "Property")).
>
> This action was commenced in Ottawa as Court file No [X].
>
> It appears that you may be in actual possession of all or part of the Property. You are therefore required to deliver possession of the Property to the Plaintiff.
>
> **If** you have not quit the Property by [X date] **and Judgment has been obtained** in this action, an application will be made to the Court without further notice to you for an Order permitting the issue of a Writ of Possession to the Sheriff's office to deliver possession of the Property to the Plaintiff.
>
> [emphasis added]

32. The firm's practice is to serve only the defendant(s) with a copy of the default judgment after the judgment has been issued. Based on the firm's practices, service upon the defendant(s) of the default judgment may occur before or after the occupancy check. Similarly, service of the NDP may occur before or after the occupancy check and, in some cases, the date by which the occupant is requested to vacate precedes the actual date of the notice.

33. Even if I am not correct in my interpretation of the caselaw requirements regarding the sufficiency of the notice, based on the wording of this law firm's template NDP, I find that the NDP would not be "sufficient" because it is ambiguous.

34. The NDP is conditional or contingent on two requirements. The NDP says that an application will only be made: a) if the occupant has not vacated/quit the property; and, b) if judgment has been obtained. Because the NDP does not attach a copy of the judgment and because it does not say that judgment has actually been obtained, how is an occupant supposed to know if they need to vacate or move for relief? What if the plaintiff is not successful, for whatever reason, in obtaining the judgment? In the absence of the judgment being granted, based on the wording of the NDP, there would not be a need to vacate the property and nothing to seek relief from. An occupant receiving such a notice is told that the requirement to quit is prefaced on judgment being obtained, so how are they to know if they are legally obliged to vacate without being made aware of the judgment having been obtained?

35. There is an important nuance between: i) being made aware that an action has been commenced and that a party will be required to vacate <u>if judgment has been obtained</u>; and, ii) being made aware that an action was commenced, that judgment granting possession <u>has been obtained</u> and that the requirement to vacate, or need to apply for relief, has been triggered.

36. To avoid ambiguity, at a minimum, the NDP should indicate that <u>judgment granting possession to the plaintiff was obtained on X date</u> and that unless the occupant vacates the property or applies for relief by a specified date, the plaintiff will move without further notice for leave to issue a writ of possession. Enclosing a copy of the issued judgment to the NDP -- a practice followed by most law firms -- is an easy, effective and practical way of confirming the plaintiff's entitlement to possession and to the issuance of the writ. The judgment is not confidential; once issued, it is a public document. Attaching the judgment would clearly signal to the occupant that the plaintiff is legally entitled to possession and that the occupant must either vacate or move for relief.

37. To ensure that all known occupants receive proper notice, it follows that the occupancy check should be conducted prior to the NDP being delivered, but after the judgment has been obtained.

38. The Plaintiff may submit that they should be entitled to deliver the NDP at whichever stage in the proceeding they choose – including prior to the order/judgment being

granted -- in reliance on *Jamort*. However, this would still make the NDP ambiguous as I explain above. Another option for the Plaintiff might be to subsequently send a copy of the judgment/order granting possession to all occupants thus confirming that judgment has been obtained. However, in my view, that approach would still be confusing for the occupants. It would also be duplicative of effort for the Plaintiff and be more costly. To avoid confusion and ambiguity, the approach set out at paragraphs 36 and 37 is more appropriate.

39. The bottom line is that the "sufficiency" of the notice may well be a specific finding that will turn on the facts of each case. Some cases may require particular notice requirements that are unique to the facts of that case.

40. However, in my view, requiring that the moving party provide particulars of the judgment to all occupants when they are moving for the issuance of a writ on an ex parte basis after judgment has been issued is not an onerous requirement and should be a requirement for the notice to be deemed "sufficient". In those situations, there should be no doubt in the occupant's mind that the plaintiff is entitled to possession and they should be told that an order/judgment granting possession has been issued such that the occupant needs to vacate or apply for relief.

41. Even if I am wrong in finding that "sufficient notice of the proceeding" pursuant to subrule 60.10(2) includes notice of the particulars of the judgment, I would still find that the NDP used by the Plaintiff's law firm is not sufficient because it is ambiguous. An occupant receiving this NDP is left confused, not knowing whether a judgment granting possession has in fact been granted and not knowing whether the need to vacate or seek relief has actually been triggered. That cannot be "sufficient notice".

Date: August 13, 2025

Associate Justice Perron