

KEEPING CURRENT

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Steps in a Power of Sale

By Zev Zlotnick

As a commercial mortgage lender you generally prefer the avoidance of enforcement. However, one must hope for the best and plan for the worst.

The following are the basic steps in the most common form of mortgage loan enforcement – power of sale. The steps below are meant as a brief outline of the power of sale process, however, bear in mind that there are various nuances and options at each stage of the process and proper legal counsel should be retained to guide you through and advise on the various matters involved.

Step 1: Initial Demand for Payment

The power of sale process starts when the borrower breaches the mortgage terms. The lender issues a Notice of Default or Demand Letter, giving them a chance to remedy the default. Section 42 of the [Mortgages Act](#) precludes the lender from commencing further enforcement proceedings during the demand period specified for payment.

Step 2: Exercising the Power of Sale

In each case, the power of sale provisions contained in the mortgage should be studied. Section 32 of the [Mortgages Act](#) provides that notice of the exercise of the power of sale shall not be given until the default has continued for at least 15 days and the sale shall not be made for at least 35 days after the notice has been given.

In a proceeding under the [Bankruptcy and Insolvency Act](#) (“BIA”), the lender must issue a notice of its intention to enforce security under section 244 of the [BIA](#) and then subject to certain exceptions set out therein, enforcement of the lender’s security may not proceed until 10 days after delivering the notice.

With the exception of a charge or mortgage contained in a debenture exempted from Part II of the [Mortgages Act](#), a power of sale cannot be exercised without a notice of that intention first being delivered in accordance with Parts II or III of the [Mortgages Act](#).

Step 3: Issuing the Notice of Sale

A subsearch of title to the mortgaged premises should be conducted prior to issuing a Notice of Sale to determine the names of all persons having an interest in the mortgaged property subsequent in priority to the mortgagee. Part III of the [Mortgages Act](#) requires that a statutory form of notice be given in accordance with the [Mortgages Act](#) and stipulates

the persons upon whom the notice must be served.

Step 4: Redemption Period

After the Notice of Sale is sent out, the lender must wait 35 days (typically, two additional days are provided for service), which is referred to as the “redemption period,” requiring the borrower to rectify the mortgage or pay off the debt.

Step 5: Closing of Power of Sale

Once the Notice of Sale period expires without borrower redemption, the property may be sold. At least two independent appraisals should be conducted and a real estate broker should be retained to properly list the property for sale. The closing of a power of sale is very similar to any other closing for the purchase and sale of a commercial real property once the agreement of purchase and sale is entered into; however, the major differences found in the agreement of purchase and sale and the closing documents include, among others, real property is being sold as “as is/where is” and in Ontario, statutory implied covenants are to be deleted.

Step 6: Sale Proceeds

Sale proceeds do not affect prior encumbrancers. The parties must deal with prior mortgages as part of the sale process, with the lender acting as a trustee for any surplus.

Step 7: Results of a Power of Sale

After the mortgagee has completed the exercise of a power of sale, the lender no longer has any further interest in the mortgaged property. The new owner of the purchased property who bought the property under the power of sale acquires good title to the property subject only to prior encumbrances so long as the mortgage sale was completed “in professed compliance” with the [Mortgages Act](#) and all proper parties were served with the notice of sale.

For any related questions, please contact the writer. To see my previous 1-Minute Reads for Commercial Mortgage Lenders, please visit the Blog portion of my profile at <https://www.grllp.com/profile/zevzlotnick>

Contact Us

If you are in need of legal advice, please do not hesitate to contact [Zev Zlotnick](#), at 416.865.6601 or zzlotnick@grllp.com.

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