

A MORTGAGEE'S RIGHT TO POSSESSION OF REAL PROPERTY IN ONTARIO

by

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In Ontario, a mortgagee is entitled to take possession of mortgaged property following default. It may do so with or without a court order and with or without a writ of possession. The only limitation imposed by the common law is that the mortgagee must take possession peaceably. That is (and has been for centuries) the law in Ontario.

For a thorough review of the meaning of 'taking possession peaceably', I refer you to a companion paper that I have written for the Law Society's 2022 Six Minute Debtor-Creditor and Insolvency Seminar which is entitled, *Taking Possession of Mortgaged Property: Is Ontario Still a Self-Help Jurisdiction*¹. This companion paper deals with the manner in which a mortgagee can take possession of mortgaged property and in doing so, unpacks the meaning of taking possession 'peaceably'.

This paper explains the genesis of the right of a mortgagee to possession of mortgaged property, without the need of the mortgagee to resort to the courts. This right to use self-help when taking

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possession was confirmed in August of 2022 by the Ontario Court of Appeal in its *Hume v. 11534599 Canada Corp.*² decision, where the court held at paragraph 55:

“the [lower] court’s [conclusion] that the Mortgages Act precludes a mortgagee from taking possession of a single-family unit without a writ of possession in all cases is misplaced.” (BOLD words in parenthesis were added for context).

Note the use of the phrase “*in all cases*”. This was included by the Court of Appeal, as it did caution that that general rule (a writ of possession is not a prerequisite to take possession) likely does not apply when a mortgagee is taking possession of residential premises that are actually occupied by the owner. However, the Court of Appeal did not specifically make that finding a part of its *ratio decidendi* in this Hume decision. And so, it is not (yet) part of the common law. Undoubtedly, future cases will come along in which the court will be asked to decide whether a mortgagee needs a writ of possession in order to take possession of *occupied* residential property. And only then will we see what additional limits (if any) are placed on a mortgagee in that particular fact situation.

The balance of this paper will explain the rationale for this general rule; that a writ of possession is not a prerequisite for a mortgagee who intends to take possession of a mortgaged property.

To understand the genesis of this rule, one must look back some 500 years (or more), to the development of mortgage law, when mortgages were first recognized and enforced by the English

² 2022 ONCA 575 <https://canlii.ca/t/jr8xn>

Courts of Law. Back then, there was no form of mortgage contract in use like there is today. In the 1400s and 1500s, a mortgage was created by the land owner signing over the deed to his property to the lender. But with the proviso that the deed be returned to the owner when the debt was paid.

The English Courts of Law found that the granting of a mortgage in this manner was not just a contract affecting land, in which the mortgagee received contractual rights in and to the mortgaged property. Rather, the Law Courts concluded that a mortgage created by the delivery of the deed to the lender included the transfer, by the owner/mortgagor to the lender/mortgagee, of a legal interest (or estate) in land (much like a lease transfers a legal interest in the landlord's land to the tenant). And that coupled with the transfer of legal title to the mortgagee, was the absolute right of the mortgagee to possession of the mortgaged property.³

According to Megarry and Wade's seminal text, *The Law of Real Property*⁴, this fundamental right of the mortgagee to possession of the mortgaged property appears to have been a part of the law of England at least as early as the 15th century. The authors explained the right of the mortgagee to possession of the mortgaged property in the 15th century, this way:

*"The mortgagor conveyed the land to the mortgagee in fee simple, subject to a condition that the mortgagor might re-enter and determine the mortgagee's estate if the money lent was repaid on the named date. The mortgagee still took possession forthwith."*⁵

³ *McCarthy v Municipal Savings & Loan Corp.*, 1996 CarswellOnt 3538 (Gen, Div,)

⁴ Megarry & Wade, *The Law of Real Property* (4th)

⁵ *Ibid*, Chapter 14 Part 2.2 at page 887-888

And

“Since a legal mortgage⁶ gives the mortgagee a legal estate in possession, he is entitled to take possession of the mortgaged property as soon as the mortgage is made, even if the mortgagor is guilty of no default.”⁷

This continued to be the law in Ontario through to the early 1900s. In fact, the 1919 edition of Falconbridge on Mortgages summarizes the right of the mortgagee to possession of mortgaged property as follows:

“In the absence of any provision in the mortgage reserving the right of possession to the mortgagor, or of any agreement express or implied to the same effect, a legal mortgagee is entitled, after the making of the mortgage and by virtue of the conveyance to him of the legal estate, to take possession of the mortgaged lands at any time.”⁸(emphasis added).

And this right of possession of the mortgagee continues to be the law in Ontario. In the *Four-Maids Ltd. v. Dudley*⁹ decision, the Court held in 1957 that:

“[T]he right of the mortgagee to possession in the absence of some contract has nothing to do with default on the part of the mortgagor. The mortgagee may go into possession before the ink is dry on the mortgage unless by a term expressed or necessarily implied in the contract he has contracted himself out of that right.”

⁶ A ‘legal mortgage’ is the first registered mortgage of a property, being the only mortgage recognized by the English Courts of Law. Any second or subsequent mortgage was often referred to as an ‘equitable mortgage’, because it was, historically, the mortgage of the owner’s equity of redemption in and to the mortgaged property and thus only recognized by the English Court of Chancery (the Court of Equity)

⁷ Megarry & Wade, *The Law of Real Property* (4th) Chapter 14 Part 3.3 at page 914

⁸ Falconbridge, *Law of Mortgages of Real Estate* (1919) Chapter XXII Section 212 at page 346

⁹ [1957] Ch D 317 at pg 320

And in the 1997 *Royal Trust Corp. of Canada v. Gupta*¹⁰ decision and also in the 2005 *Royal Trust Corp. of Canada v. 880185 Ontario Ltd.*¹¹ decision (which decisions were cited with approval by the Court of Appeal in the 2022 *Hume* matter) the same conclusion was reached.

And that is why, at common law, a mortgagee always has had, and continues to have, the right to take possession of mortgaged property immediately upon the grant of the mortgage taking place.

Now, we are all aware of the fact that virtually every mortgage drafted over the last century – perhaps longer – contains a clause allowing the owner/mortgagor to remain in possession of the mortgaged property; but only for so long as the mortgage remains in good standing.

The English Courts of Law accepted and enforced this contractual clause. This is evidenced by the quote from the 1919 edition of Falconbridge on Mortgages, which starts with the qualification that:

*“In the absence of any provision in the mortgage reserving the right of possession to the mortgagor or of any agreement express or implied to the same effect.....”*¹²

And this continued to be true in Ontario through 1957, as noted in the quote from the *Four-Maids Ltd. v. Dudley* decision that starts with:

*“[T]he right of the mortgagee to possession in the absence of some contract.....”*¹³

And this contractual agreement between mortgagor and mortgagee giving the mortgagor the right to possession of the mortgaged property until default, and giving the mortgagee the right to

¹⁰ [1997] O.J. No. 347 (Gen. Div.), at para. 37

¹¹ 2005 CanLII 13910 (ONCA) <https://canlii.ca/t/1k8ck>

¹² Falconbridge, *Law of Mortgages of Real Estate* (1919) Chapter XXII Section 212 at page 350

¹³ [1957] Ch D 317 at pg 320

possession thereafter, is actually codified in the Land Registration Reform Act¹⁴. This statute sets out in subparagraph 7(1)1.(v) 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).

And so, in conclusion, a mortgagee in Ontario always has had the right to possession of the mortgaged property. This right to possession was intrinsic to the grant of the mortgage itself. Over time, mortgagors and mortgagees added clauses into the mortgage contract allowing the mortgagor to keep possession of the mortgaged property until a default occurred under the mortgage. But upon and after default, the mortgagee was entitled to possession. And there was never any requirement in any statute or under the common law that a writ of possession was a necessary precondition to the mortgagee taking possession after default.

However, the common law does impose two obligations on a mortgagee who intends to take possession of mortgaged property. The first is that the mortgagee must comply with any terms in the mortgage contract dealing with the taking of possession. And the second is that the mortgagee has to take possession peaceably.

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¹⁴ R.S.O. 1990, c. L.4 section 7(1) 1. (v)