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FALCONBRIDGE ON MORTGAGES, FIFTH EDITION

by Walter M. Traub
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This work, initially formed from Dean Falconbridge's lectures at Osgoode Hall, quickly became the authoritative text on mortgages in Canada. Now in its fifth edition, under the editorial leadership of distinguished practitioner Walter M. Traub, *Falconbridge on Mortgages* is the standard reference source for those who teach and those who practise in the field, and has often been cited by the judiciary.

What's New in this Update:

This release features updates to the case law and commentary in Chapter 20 (Assignment of Mortgage Instead of Discharge), Chapter 22 (Action for Possession), Chapter 26 (Judgment for Foreclosure), Chapter 27 (Action or Judgment for Sale), Chapter 29 (Action for Redemption), Chapter 31 (Accounting in a Mortgage Action), Chapter 32 (Mortgagee in Possession), Chapter 33 (Regulation of Mortgage Interest), Chapter 34 (Costs) and Chapter 35 (Sale under Power of Sale).

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Highlights:

- **EXTINGUISHMENT OF MORTGAGE—ASSIGNMENT OF MORTGAGE INSTEAD OF DISCHARGE—COMMON LAW: RECONVEYANCE TO A PERSON BEST ENTITLED**—The Ontario Court of Appeal confirmed in *Rout v. Firm Capital Mortgage Fund Inc.*, 2025 CarswellOnt 5537 (Ont. C.A.) that a second mortgagee has standing—despite having discharged their second mortgage—to challenge the three-month interest amount charged to the mortgagor by the first mortgagee under s. 17 of the *Mortgages Act*: “Bringing an application before mortgage discharge may well be advisable, but it was not required. The respondents did not lose their right to pursue the matter on this account.”
- **MORTGAGE ACTIONS—ACTION FOR POSSESSION—ACTION DURING PROHIBITED PERIOD IN SECTION 42**—In some circumstances a court may give its sanction to the mortgagee taking a step that would otherwise be in contravention of s. 42 as premature. In *Flexpark Inc. v. Ercolani*, 2025 CarswellOnt 2732 (Ont. S.C.J.), the mortgagee’s statement of claim was admittedly issued, without leave, prior to the expiry of the 35-day redemption period in the notice of sale, in breach of s. 42 of the *Mortgages Act*. The mortgagor claimed that the mortgagee’s entire enforcement action was void as a result. The court ruled it could grant an order *nunc pro tunc* (i.e. with retroactive effect) which operated to validate the premature filing of the claim. While the action was indeed commenced early, no other steps were taken during that time. Further, the mortgagor would experience no prejudice if the retroactive order was granted, because she still had still been given the opportunity within the 35 days to cure the default but did not do so.
- **MORTGAGE ACCOUNTS—ACCOUNTING IN A MORTGAGE ACTION—REQUIREMENT FOR AN ACCOUNTING**—The nature and scope of a mortgagee’s accounting obligations were recently considered in , 2024 CarswellOnt 13998 (Ont. S.C.J.), a case involving a mortgagee in possession who collected rents until the properties were sold. The application judge described the duty to account in the following terms: “[T]he mortgagee in possession has a duty to account. This is not a foreclosure proceeding. The mortgagor remained on title until the properties were sold. The mortgagee in possession is required to reasonably maintain the property, but does not become an owner. It is required to account fully to the mortgagor. A mortgagee in possession assumes the obligation to keep accounts and ‘have his accounts always ready’. The mortgagee in possession’s affidavit should verify all monies received or disbursed, with particulars [citations omitted].”
As a result of the defendants’ failure to produce documentation, the plaintiff retained a forensic and investigative accounting expert to prepare an accounting with the best available evidence. The court rejected the defendants’ challenges to the report on the following terms: “The responsibility for the 2020 Lynch report being constructed the way it was lies solely with the mortgagee in possession, who both failed and refused to provide information to the mortgagor regarding rents collected, expenses paid, property taxes paid, and HST remitted. It does not lie in the mortgagee in possession’s mouth to criticise the 2020 Lynch report for failing to be based on documents that it alone had the ability to provide, was required to provide, and failed to provide.”

On the other hand, the court rejected the same report's claims for certain amounts for lack of substantiation: "Similarly, the KPMG report includes deductions for management fees without any explanation of what they are, to whom they were paid, and for what services. It includes expenses for professional services but provides no explanation of how those sums were derived. Utility charges are calculated with no evidence of utility bills provided. Indeed, there is evidence that some tenants paid the utility bills themselves. Claims are made for maintenance and repairs without any discernible substantiating evidence. There is simply no proper basis in the evidence before me for these deductions." (The application judge's decision in *Dalpa* was confirmed by the Court of Appeal at 2025 CarswellOnt 3984.)