

Legal and Equitable Mortgages



By Brian Madigan LL.B.

At common law, a mortgage was actually a transfer of the legal title to the property. Upon payment in full of the mortgage principal and interest, the former “property owner” was entitled to a reconveyance of the title to his property. Then, once again he would have legal title.

But, the interesting question was: “how would you describe his interest before he paid off the mortgage”?

He was not the **legal owner**, that description now befell the mortgagee. What he did have was a certain common law right which was the **right to redeem** the property upon payment.

Just to complicate things a little more, there were two separate Court systems in England up until the late 19th century: Common Law Courts and Courts of Equity. The claim for the return of the legal title fell under the jurisdiction of the Courts of Equity. Hence, this right to redeem property came to be referred to as the “**equitable right of redemption**”.

So, in a technical sense, the owner of real property that was mortgaged was only the beneficial owner, or was the owner of the equity of redemption.

Now, there’s one more step. This involves a second mortgage. The beneficial owner who places a second mortgage on title can only transfer the equitable right of redemption (because that is all he has left). But, he still retains a further equitable right of redemption in respect to the second mortgage. This could go on and on. Consequently, second and subsequent mortgages came to be referred to as “equitable mortgages”

But, that’s not all there is. The **Land Titles** system does not register a transfer of the legal title. The owner retains title and the mortgagee obtains a **Charge** against the title (like a lien). That has been the case since its inception in the latter part of the 19th century.

The Land Titles system is commonplace in the western Provinces and in about one half of Ontario. As the subdivisions are registered in Ontario, they all will fall under the Land Titles system. In the interim period, there is a program to convert all Registry lands to the Land Titles system.

The Land Registration Reform Act changed the system of registration in 1984 when it came into force. The Land Titles system remained intact, but the

common law rules in the Registry system changed. No longer was a first mortgage a conveyance of the legal title. It was only a Charge upon the lands or somewhat like a lien, just like the Land Titles system. The new document in use was now referred to as a MORTGAGE/CHARGE.

So, what's left over in terms of the conveyance of the legal title:

- 1) old mortgages in the Registry system, registered prior to 1984,
- 2) old mortgages in Land Titles where the original mortgage was registered when the property was recorded in the Registry system, and then transferred to the Land titles system.

In Ontario, a true "legal mortgage" is rare. Legal as used here refers to a conveyance of the legal title. Having said that, it is still the case in some other Provinces as well as a substantial number of States in the United States.

As time goes by, the term "legal mortgage" will lose its meaning and only have a footnote in real property law history. It will evolve into a rather new and unrelated meaning. A legal mortgage will simply mean any mortgage which is valid and enforceable at law.

Similarly, the term "equitable mortgage" will also change in meaning. Historically, it only makes sense if you understand the term legal mortgage. So too, it will have to evolve. In all likelihood it will take on the meaning of an intention to offer a pledge. It will be synonymous with a beneficial mortgage. In other words, some initial steps were taken provide security but no actual registration took place. For example, a developer has two properties. He secures a mortgage on the first in favour of his bank, and pledges (offers his assurance) that he will at some time in the future grant a mortgage on the second property if the bank so demands. Before the demand for the mortgage, the bank has an unregistered, unsecured beneficial interest or "equitable mortgage" upon the second property.

Let me put it this way, 1984 was 23 years ago. These two terms have to change their meaning (at least in Ontario). Even George Orwell would be impressed!

Brian Madigan LL.B., Realtor is an author and commentator on real estate matters, Coldwell Banker Innovators Realty
www.OntarioRealEstateSource.com