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CANADIAN COMMERCIAL REAL ESTATE MANUAL McDermott Release No. 2, July 2025
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Publisher's Special Release Note 2024

The pages in this work were reissued in February 2024 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the February 2024 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

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The *Canadian Commercial Real Estate Manual* addresses the unique requirements of the commercial real estate industry. It covers the critical stages of development from acquisition through property management. The primary tabs are: Remedies (Mortgage), Financing, Taxation and Investment Analysis, Development and Conveyancing, Agreements, Precedents and Checklists.

This release features updates to the case law and commentary in Chapter 1 (The Law of Mortgages), 2 (Close Connectedness), 4 (Mortgage Remedies in Ontario), 11 (Purchase of New Condominium Units in Ontario), 25 (Subdivision Agreements), 31 (Acquisitions and Dispositions), and 47 (An Analysis of Ground Lease Provisions).

Highlights

Law of Mortgages — Extinguishment of Mortgage — VTB Mortgage — Refusal to Discharge Mortgage — Positive Obligation to Deliver Discharge — Set-off Settlement Between Parties — Mortgagee Refusing to Accept Set-off — Mortgagee Liable for Owner's Damages — Where the mortgage created a positive obligation on the mortgagee to deliver a discharge of the mortgage, upon full payment, in a timely manner, and the mortgagee refused to do so, resulting in the owner's inability to use the equity in his property to purchase an investment property, the mortgagee was liable for damages for the owner's loss of opportunity to invest in the real estate market. In this case, the vendor-take-back mortgage on the subject property provided that the "Chargee shall have a reasonable time after payment in full of the amounts secured by the Charge to deliver for registration a discharge". The mortgagee refused to deliver the discharge, disputing the owner's entitlement to a set-off of \$20,000 based on an earlier court settlement between the parties. The owner entered into an agreement of purchase and sale to acquire an investment property, and planned to use the equity in the subject property to finance the purchase. The owner provided written notice to the mortgage that the charge constituted a cloud on title, and threatened his pending transaction. The mortgagee still did not deliver the discharge, and the deal did not close. The owner brought an application for damages for the mortgagee's refusal to discharge the mortgage. The owner's application was granted; damages were assessed at \$150,375 for the loss of opportunity to invest in the real estate market: *De Rita v. 1266078 Ontario Inc.*, 2023 CarswellOnt 21441 (Ont. S.C.J.), affirmed 2024 CarswellOnt 8673 (Ont. C.A.).

Mortgages — Priorities — Fraudulent Mortgage — Mortgage Broker Taking Advantage of Friendship With Client — Broker Encouraging Client to Renovate Inherited Property — Broker Not Having Alleged Construction Company — Construction Costs Added to Client's Existing Mortgage — Client Awarded Damages — Mortgage Debt Reduced by Advances Tainted by

Broker's Unconscionable Conduct — Where the director of a private mortgage lender exploited his friendship with the plaintiff and her lack of sophistication in financial matters, and fraudulently induced her to enter a construction contract for his own benefit, and add the costs of construction to her existing mortgage debt, the plaintiff was awarded damages in relation to the construction contract, while the mortgage debt was reduced by the mortgage advances that were tainted by the director's unconscionable conduct. In this case, the plaintiff had a long-standing friendship with the defendant, the director of a private mortgage lender, X Inc. The plaintiff relied on him for financial advice. The defendant, through X Inc. issued a series of mortgages to the plaintiff, which were ultimately consolidated into one mortgage. He also recommended that she enter into contract for the renovation of a property inherited from her parents, with what the defendant represented to be his company R Inc. X Inc. was to manage the construction, and its costs were to be added to the mortgage debt in respect of her own property and the inherited property. R Inc. did not actually exist, and the construction work was poorly done and left incomplete. The plaintiff brought an action alleging fraud, and seeking to set aside the mortgage and the construction contract. The trial judge's found that the defendant's fraudulent misrepresentation induced the plaintiff to enter into unconscionable contracts. The plaintiff's action to set aside the mortgage, and the construction contract was allowed, with an award of damages for negligence and breach of contract; the defendants' action to enforce the terms of the mortgages was dismissed. The defendant and his company appealed, submitting that the judge erred in finding unconscionability and fraudulent misrepresentation and in setting aside the entire mortgage and awarding damages for negligence and breach of contract. The plaintiff, by way of cross-appeal, submitted that she should be granted relief based on the Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A, undue influence, conversion, or set-off. The defendant's appeal was allowed in part: *McKenzie-Barnswell v. Xpert Credit Control Solutions Inc.*, 2025 CarswellOnt 4780 (Ont. C.A.), reversing in part *McKenzie-Barnswell v. Xpert Credit*, 2021 CarswellOnt 11205 (Ont. S.C.J.).