Publisher's Note

An Update has Arrived in Your Library for:

Please circulate this notice to anyone in your office who may be interested in this publication. *Distribution List*
☐
☐
☐
☐

CANADIAN COMMERCIAL REAL ESTATE MANUAL

McDermott

Release No. 1, March 2026

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), 4 (Mortgage Remedies in Ontario), 10(The Purchase of New Condominium Units in Ontario), 22(Site Plan Control Agreements), 25(Subdivision Agreements), 31 (Acquisitions and Dispositions), and 47 (An Analysis of Ground Lease Provisions).

Thomson Reuters®

Customer Support
1-416-609-3800 (Toronto & International)
1-800-387-5164 (Toll Free Canada & U.S.)
E-mail CustomerSupport.LegalTaxCanada@TR.com

Highlights

Law of Mortgages—Interest—Federal *Interest Act*—Interest Rate Increasing Upon Default—Increase Unenforceable as Penalty Contrary to Section 8 of *Interest Act*—Where the mortgage had a specified interest rate for the duration of the term of the mortgage, but increased the interest rate following default upon the maturity of the mortgage, the increase was unenforceable as being a penalty contrary to s. 8 of the *Interest Act*, R.S.C. 1985, c. I-15. In this case, on title, the mortgagor was described as a businessman, and the property was a two-acre rural property. There was a second mortgage that matured on April 29, 2024, and had not been paid. It appeared that the mortgage was intended to be a short-term loan of $1,850,000 for a period of 60 days. Under the heading "Payment provisions", the interest rate was stated as follows:

> (b) Interest Rate:
>
> (i) 14% per annum for the first twelve months following the Interest Adjustment Date; and (ii) thereafter, 20% per annum.

The lender commenced foreclosure proceedings, and the mortgagor did not oppose the order *nisi* being sought, except for the interest rate, as he submitted it contravened s. 8 of the Canada *Interest Act*, R.S.C. 1985, c. I-15, as the default was the failure to pay the principal and interest when the term expired, in which case a higher interest rate was charged on the arrears than was charged on the principal not in arrears. The mortgagor sought a declaration that the interest clause in the mortgage was enforceable. The mortgagor's application was granted.

Neither of the parties argued that there was a triable issue. From that, the court assumed the parties agreed that these issues could be resolved on a summary basis. There was no issue taken with respect to the length of the redemption period, so it ordered that the six-month redemption period commenced in July 2025, which was the date of the hearing. It also determined the issue in dispute. In this case, the court came to the same conclusion. The increase in interest created a penalty in the form of an increased rate for the non-performance. This was in violation of s. 8. The facts in *Reliant Capital Ltd. v. Silverdale Development Corp.*, 42 R.P.R. (4th) 39, 2006 BCCA 226, 2006 CarswellBC 1090, 52 B.C.L.R. (4th) 13, 270 D.L.R. (4th) 717, [2006] 7 W.W.R. 199, 226 B.C.A.C. 161, 373 W.A.C. 161 (B.C. C.A.), leave to appeal refused 2006 CarswellBC 2864, 2006 CarswellBC 2865, 242 B.C.A.C. 320 (note), 362 N.R. 396 (note), 400 W.A.C. 320 (note), [2006] S.C.C.A. No. 265 (S.C.C.) [Reliant] were distinguishable, as the increased interest rate had gone into effect prior to the expiration of the mortgage and due date. In *Reliant*, the mortgage holders were ultimately successful as the increase in the

interest rate took effect one month before the mortgage term expired, although the mortgagors did argue that this was a clever device to avoid contravention of s. 8. However, the effect of the penalty in the *Vant Geloof* case was obvious. The per diem interest rate during the term was $304.11, then upon failure to pay the amount owing, it increased to a per diem of $962.51. The increased interest rate was unenforceable pursuant to s. 8. The increase in interest created a penalty in the form of an increased rate for the non-performance. The prohibition against extra charges on arrears remained in place for loans secured by a mortgage. Moreover, the additional charge on arrears was prohibited in mortgage loans whether that charge was expressed as such, or whether the interest provision simply had the effect of increasing the charge in respect of the arrears: *Vant Geloof v. Grewal*, 2025 CarswellBC 2416, 2025 BCSC 1576, [2025] B.C.J. No. 1544 (B.C. S.C.).

Mortgage Remedies—Special Problems—Guarantee—Guarantor Being Sophisticated Businessman—Guarantor Signing Documentation Without Legal Advice—Guarantor Personally Liable Upon Mortgage Default—Guarantor Liable for Bonus of Three Months' Interest—Where the principal of the corporate mortgagors signed the mortgage documentation, as both an officer of the mortgagors and in his personal capacity, without legal advice, he was personally liable when the mortgagors defaulted on the mortgage as he was a sophisticated businessman, and he was liable for a bonus of three months; interest as that was what the parties agreed to. In this case, the mortgagors granted a mortgage in the amount of $2,650,000 in favour of the mortgagee, which was ostensibly personally guaranteed by the individual, TB. The mortgagors were companies that owned two separate pieces of property, and the guarantor, TB, was the principal of both companies. The mortgage was for a one year term ending in July 2019. The parties subsequently agreed to an extension of the mortgage so that it would mature on January 25, 2020. The mortgagors defaulted on the loan. The mortgagee sent demand letter to the mortgagors and the guarantor setting out a statement of the amounts necessary to bring the mortgage into good standing. A notice of intention to enforce security, and a notice of sale were also delivered to them. The mortgagee's motion seeking summary judgment was granted. The trial judge found the defendants did not raise any of traditional defences that might relieve a party from adhering to a contract, such as *non est factum*, unconscionability, unequal bargaining power or misrepresentation.

The trial judge found the guarantor was a sophisticated businessman, and while the guarantor did not have lawyer, there was no evidence suggesting any duress. The trial judge found the guarantor could have obtained legal advice if he had chosen to, and nowhere did he indicate that he did not understand what the guarantee meant. The trial judge further found the documentary evidence was clear

that the guarantor was executing the documentation as an officer of the companies as well as guarantor. The trial judge found the guarantor's assertion that when he signed as "guarantor" he was not doing so in his personal capacity but as agent for the companies was nonsensical. In addition, the trial judge found the mortgagee did not fail to provide adequate notice. A bonus of three months' interest in the amount of $93,619 was properly included in the amount owing to the mortgagee as that was what the parties agreed to, and the administration fee was also properly recoverable. The guarantor appealed, and his appeal was dismissed.

This was a matter of straightforward contract interpretation between sophisticated and represented parties. The documentation was clear that the guarantor signed as personal guarantor, and no ambiguity existed. The motion judge's conclusion that TB was liable as a personal guarantor was driven by the law on contract interpretation, and not by any credibility finding with respect to TB. There was no ambiguity in the documentation that could give rise to the admissibility and relevance of TB's personal understanding. The motion judge did not err in finding that the bonus was triggered when the current extension ended, and the mortgage was neither discharged upon its maturity nor extended to a new maturity date. The motion judge made no error in his interpretation of the standard clause regarding the required notice, and that the mortgagee complied with it. The interest on the amount at issue was properly calculated. Adequate notice of the outstanding amount was given: *Devi Financial Inc. v. Everwood Place Ltd*., 2022 CarswellOnt 1196, 2022 ONCA 104, [2022] O.J. No. 569 (Ont. C.A.), affirming *Devi v. Everwood et al.*, (2021), 2021 ONSC 1968, 2021 CarswellOnt 3559 (Ont. S.C.J.).

Acquisitions and Dispositions—Zoning—Building Scheme—Prior Corporate Owner Controlling Initial Character and Design of Developments—Corporate Owner No Longer in Existence—Scheme Now Obsolete and to be Cancelled—Where the building scheme was intended to allow the prior owner to control the initial character and design of all development on the subject lands, for some unstated period of time, but not longer than the prior owner's willingness and ability to administer the building scheme in accordance with its terms, that ended with the end of the prior owner's existence as a corporation, and on that basis, the scheme was now obsolete and should be cancelled. In this case, the owner obtained a development permit to construct a townhouse project on a property adjacent to the petitioners' property. The petitioners asserted that construction of the project was prohibited by terms of a "common law" building scheme (scheme) dated 1959, and registered against the title to 200 properties in the area. It was described as a "common law" building scheme, as it was created prior to the provisions of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*] permitting creation of statutory building schemes, under s. 220. The petitioners claimed the

building scheme prohibited construction of anything other than a single family residence. The scheme provided for not more than one dwelling for one family without the approval from the approving officer of the previous owner of the lands, which was a corporation that ceased to exist in 1983. The scheme contained no sunset provisions or provisions addressing what was to happen when the previous owner ceased to exist, and there was no time limitation on the restrictions. The petitioners brought a petition for a permanent injunction to prohibit construction of the townhouse project (injunction petition). The owner brought a petition for an order modifying or cancelling the scheme to allow the townhouse project to proceed (cancellation petition). The injunction petition was dismissed; the cancellation petition was granted.

The owner had received approval from the District for its proposed project, and was entitled to know whether the scheme and associated restrictive covenant on its title was a barrier before it invested further time and money on the project. The building scheme did not set out its purpose or objects, other than to establish the restrictions set out in it. The building scheme was obsolete. Compliance with the building scheme became impossible once the previous owner ceased to exist in 1983. The scheme did not prohibit construction of anything other than single family residences since Clause 3 specifically allowed the former owner to authorize the construction of "duplex, semi-detached and/or multiple dwelling" units. The prohibition against multi-family housing was very limited. The portions of the scheme restricting construction to single-family residences were secondary to the primary object of the scheme in providing for control of development as whole by the previous owner. Given the central role of the previous owner under the scheme, it was inferred that it was not intended to remain in effect in perpetuity. Cancellation of the building scheme would not be unjust or inequitable: *Smith v. Clearwater Park GP Inc*., 69 R.P.R. (6th) 210, 2025 CarswellBC 1967, 2025 BCSC 1239, (B.C. S.C.).

Special Agreements—Ground Lease Provisions—Option to Extend Lease—Tenant Failing to Fully Pay Rent Due to Pandemic—Tenant Filing Proposal Under *Bankruptcy and Insolvency Act*—Proposal Approved by Creditors and Landlord—Tenant Entitled to Exercise Option to Extend Lease—Preconditions Met as Prior Non-payment of Rent Protected by Section 65.1 of BIA—Where the COVID-19 pandemic had a severe negative impact on the tenant's business, and it filed a Notice of Intention to Make a Proposal to its creditors, which was approved by its creditors, including the landlord, the tenant was entitled to exercise its option to extend the lease as it met the preconditions as any prior non-payment of rent was protected by s. 65.1 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. In this case, the tenant was in the business of producing baked goods for resale to food

retailers. In 2020, the tenant leased premises from the landlord for use as a warehouse and production facility. The tenant took possession of the premises on March 1, 2020, days before the COVID-19 pandemic was declared. The pandemic had a severe impact on the tenant's business. The tenant failed to pay rent or made incomplete payments of rents for several months in 2021. On June 9, 2022, the tenant filed a Notice of Intention to Make a Proposal to creditors (NOI) eight days after last incomplete payment of rent. The majority of the tenant's creditors, including the landlord, voted in favour of the proposal. Prior to the NOI, the landlord took no steps to act on the tenant's defaults under the lease. The lease agreement provided three preconditions for exercising an option to extend the lease, including that the rent was paid when due, the tenant was not otherwise in default of the lease terms, and the tenant's financial strength was not diminished from that existing as at the date of the signing of the lease.

The tenant gave the landlord notice of its intention to exercise the first of the three options to extend the lease for an additional five years. The landlord claimed that the tenant was in default of the lease, and as such, it was not entitled to exercise the option to extend. The lease also provided that the tenant had the first opportunity to negotiate the purchase of the property if the preconditions were met, including the tenant was the original tenant, and tenant was never in default under the lease. The landlord and the tenant brought applications to determine the validity of the exercise of the option to extend the lease. The court determined that the tenant's exercise of its option to extend the lease was valid as all three preconditions were met, and the lease was extended by five years. The last non-payment of rent was on June 1, 2022, and with the NOI being filed on June 9, 2022, any non-payment of rent was protected by s. 65.1 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. It was agreed that the rents since June 9, 2022 had been paid in full and when due.

The term of the lease included any extension that was properly exercised, and the entire term was entitled to protective cover of s. 65.1 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. In any event, relief from forfeiture would have been granted if the tenant was in default of any preconditions. In considering relief from forfeiture under a commercial lease, the court should consider the conduct of the tenant asking for relief, and the conduct of the landlord. In this instance, the tenant made diligent efforts to comply with the terms of the lease, which were unavailing through no default on its own. However, the protection of s. 65.1 of the Act did not provide protective cover in relation to the opportunity to purchase the property. Section 65.1 of the Act did not protect against the loss of all rights and options. The tenant lost its opportunity to negotiate the purchase as it was in default for the non-payment of rent, and that default was not entitled to the protection of s. 65.1 of Act or to relief

from forfeiture: *Baketree Inc. v. Nico Properties Inc.*, 69 R.P.R. (6th) 331,2025 CarswellOnt 1794, 2025 ONSC 1047, [2025] O.J. No. 665 (Ont. S.C.J.).