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DEBT LITIGATION

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Debt Litigation is a comprehensive work dealing with default and summary judgments relating to debtor-creditor law and practice. It includes annotations and commentary on topics such as the fiduciary duties of solicitors, including negligence and conflict of interest, spoliation of evidence and e-discovery and conventional mortgages and guarantees.

What's New in This Update

The author has added new commentary and case law regarding Introduction, Mortgages, Guarantees, Procedure, Evidence, Defences, Lender Liability, Fraudulent conveyances, Confidentiality Policy, Confidentiality Agreement, Federal Rules of Civil Procedure (U.S.). Notable cases are summarized below.

Highlights

[Introduction 1:1]

A liquidated debt is a presently due, objectively determinable sum calculable from an agreement, statute, fixed scale or formula and requiring no proof of loss. Unliquidated damages require assessment of actual loss under ordinary principles and are not pre fixed by contract. Consequential losses (e.g., lost profits, business interruption, reputational harm) that arise from a breach but have no contractual calculation mechanism are unliquidated claims: *Rawcorp Pty Ltd v. MDP No. 15 Pty Ltd*, [2026] QSC 38.

[Mortgages 2:3]

Where a non-privy third party provides the mortgage funds, the named mortgagee can still be treated as the lender so long as the immediate parties intended a debtor–creditor relationship, which may be evidenced by execution of loan and mortgage documents. The mortgagees may merely act as the third party's wealth vehicle and the actual origin of funds does not prevent recognition or enforcement of a repayable debt owed to the named lender or invalidate the loan agreements: *Millgate Limited v. Plaza 500 Hotels Ltd*., 2026 BCSC 991.

[Mortgages 2:5]

Section 23 of Ontario's *Family Law Act* allows courts to authorize encumbrances on a matrimonial home when a spouse's consent cannot be obtained and that section's wording supports a discretionary, case-by-case approach. Courts may waive the consent requirement to preserve equity where an existing encumbrance remains enforceable, the principal has not

increased and any prejudice can be remedied. Any early-payment penalty on sale can be addressed by adjusting net proceeds so the respondent is held harmless (accounting for interest savings). Therefore s.23(b)(i) suffices to dispense with consent because renewal preserves the joint asset by maintaining a pre-existing obligation at a better rate: *Atif v. Munir,* 2026 ONSC 3240.

[Mortgages 2:9]

Section 23 of the *Mortgages Act*, R.S.O. 1990, c. M.40 allows relief by payment of arrears instead of full-balance, accelerated mortgage repayment but the defending mortgagor must bring a cross-motion and post $100 security for costs. A repayment plan which is contingent, speculative and fails to address realty tax arrears will not qualify, most especially after prior adjournments for proposed refinancing that never occurred. The mere possibility of s. 23 relief does not create a genuine issue requiring trial so that a stay under Rule 20.08 may be refused on those grounds: *Canadian Imperial Bank of Commerce v. Khan*, 2026 ONSC 3337.

[Mortgages 2:15]

Ontario Rule 60.10 requires notice to all persons actually in possession and challenges to a writ of possession cannot be grounded in s. 24(1) of the *Charter* on the basis of translation delay because the *Charter* governs state action, not private litigation. The right to a French translation arises solely under the *Courts of Justice Act*, with the remedy for delay being an adjournment to permit review. Any allegedly-intrusive surveillance or investigative conduct remains private activity to which the *Charter* does not apply: *Wadie Narouz v. Fisgard Capital Corporation Also Known As Fisgard Asset Management Corporation*, 2026 ONSC 3060.

[Mortgages 2:15]

Section 31 of the *Judicature Act*, RSNB 1973, c J-2 requires a written absolute assignment plus express written notice to the debtor; notice becomes effective only when received, which can be established by sending notice to the debtor's address even if the debtor later denies receipt. Where an equitable assignment exists and there is no realistic risk the original creditor could later sue, the assignee may commence suit without prior notice to avoid multiplicity of proceedings: *MAC Financial Recovery (Canada) Inc., a body corporate v. Jeannine Cyr also known as Marie Therese Jeannine Cyr, also known as Jennie Therese Cyr, also known as Marie Therese Cyr, also known as Jeannine Desjardins, also known as Jeannie T Martin, 2026 NBKB 70.*

[Mortgages 2:27]

A second mortgagee defeated a later-registered modification to a prior construction mortgage because the *Property Law Act,* RSBC 1996, c. 377, s.28(2) protects only further advances "contemplated by and in accordance with" the original mortgage. Once the first mortgagee increased the loan and interest by a registered modification, those advances were no longer covered by the original instrument, so *PLA* s.28(2) did not apply. The second mortgagee's *Land Title Act* s.28 registration priority prevailed and it was entitled to the sale proceeds: *First Accredit Mortgage Corp. v. Pitman-Jelley,* 2026 BCSC 1029.

[Mortgages 2:36]

An equitable chargee keeps a proprietary interest in proceeds from an unauthorised sale of charged property: equity treats the mortgagor as a fiduciary so a substituted-property equitable charge automatically attaches to traceable proceeds, or alternatively the chargee can adopt the sale and treat the mortgagors as its agents, making the proceeds held on trust (subject to prior charges) to satisfy the secured debt: *Gordian Holdings Ltd v. Sofroniou,* [2026] EWHC 1602 (KB).

[Mortgages 2:37]

Documentation and payment history may show an objective intention to secure the debt by mortgage. Either a legal mortgage exists or, alternatively, an equitable mortgage arises from the parties' common intention and conduct. Failure to register a mortgage affects only priority and public notice, not the validity of the mortgage and there is no evidence of unconscionability or prejudice from delay: *Royal Bank of Canada v. Day*, 2026 NSSC 189.

[Procedure 4:1]

The spouse of the judgment debtor enjoys no standing to bring a motion to set the judgment aside; if the judgment were to be set aside, it would need to be on motion by the party against whom it was made. Another consideration is that such a motion would need to be made in the action in which judgment was granted not by way of collateral attack in a separate and distinct proceeding: *Fogler Rubinoff LLP v. Eslami-Manouchehri*, 2026 ONSC 3325.

[Procedure 4:1]

If no independent attempt at personal service was made before implementing alternative service and, further, there was premature noting in default, the resulting default judgment is irregular and should be set aside, particularly where the *Mountain View* criteria are met and the balance of prejudice and the interests of justice favor allowing a merits hearing:

Vault Capital v. Sarwar, 2026 ONSC 2987.

[Evidence 5:9]

The principle of *contra proferentem* construction, that any ambiguity should be resolved against the drafters of the agreements, may be disallowed by express wording in the contract which prevents construction against the drafters: *IntraWorks Strategic Fund I, LP & Ors v. Prisma AI Corporation Pte Ltd & Ors,* [2026] SGHC(I) 8.

[Evidence 5:9]

Subsequent conduct may assist contractual interpretation only where an ambiguity remains and it cannot be used without that prerequisite finding: *0998823 B.C. Ltd. v. Chitchot*, 2026 BCCA 242.

[Defences 6:24]

In a commercial lender-borrower-guarantor context where the borrower/guarantor accepted new funding after optimistic projections were provided, a negligence defence against the lender must fail absent any pleaded or proven special or fiduciary relationship: *Business Development Bank of Canada v. MacIntyre,*2026 BCSC 1128.

[Defences 6:24]

Non est factum applies where a signer is misled about a document's nature; it requires a mistake caused by a misrepresentation and there must be a lack of carelessness. A realtor and its agent owe fiduciary duties; where a Buyer Representation Agreement (BRA) creates a conflict by potentially exposing the buyer to commission if a sale fails, the agent must prove they fully and promptly disclosed material BRA terms before execution. A non–English-speaking buyer who could not read the BRA and was not told commission might be payable was misled by omission; that fiduciary breach (not mere carelessness) caused the buyer's mistake. Consequently the BRA was void *ab initio* and the commission claim failed: *Royal Family Realty Inc. v. Juanli Liu,* 2026 ONSC 3172.

[Defences 6:35]

A resulting trust (which is equitable relief) is denied when the plaintiff's claim depends on their own illegal conduct. The clean hands doctrine bars applicants who must rely on fraudulent schemes; even where illegality is not relied on, a resulting trust cannot be granted where the claim hinges on concealing assets from creditors, nondisclosure in bankruptcy or secret side arrangements. If the plaintiff's case necessarily rests on such misconduct, equitable relief is to be refused: *Barry MacLeod v. B&R Farms et al*., 2026 PESC 17.

[Defences 6:47]

Economic duress occurs when a party is coerced into a contract by improper threats or pressure and has no practical alternative; absent credible evidence of such pressure, available alternatives (e.g., refusing to sign or seeking other financing) or failure to promptly protest, courts will not find duress: *Bennington Financial Corp. v. Wade's Off-Road Vac Services Ltd.*, 2026 NLSC 80.

[Defences 6:47]

Duress requires coercion by threats (physical or economic) which displaces free will and economic pressure must be illegitimate. There is nothing illicit where the pressure arises from court orders and the prospect of another order, as well as personal stress. Such pressure is lawful, not illegitimate and duress is not thereby established: *Irps-bleeker v. Groenberg Farms Inc.*, 2026 ONSC 3425.

[Defences 6:49]

Tender in mortgage law stops interest accrual only when the borrower makes a strict tender: the full balance must be actually available (set aside, produced or paid into court) so the lender could demand and take it. Money held in a solicitor's client account counts as sufficient. A mere offer to pay is not a tender, if funds are not presently available. Contractual interest continues, even where new financing is approved but not drawn down because the lender refuses the tender. A mortgagor can redeem by paying the correct amount, but interest will continue unless the mortgagor was truly ready and willing to part with the money; strict and immediate availability is the core requirement: *Houssein & Ors v. London Credit Ltd & Anor,* [2026] EWCA Civ 830.

[Solicitors 7:2]

Courts have inherent supervisory powers to remove counsel, an exceptional, restrained remedy which can override a party's choice of lawyer, to protect the justice system's integrity. Decisions balance professional standards and public confidence against the individual's right to chosen counsel. On disqualification motions, a prior related retainer creates a presumption that confidential information was imparted, such that the "target" lawyer must objectively rebut this, otherwise disqualification follows. The controlling test is whether a reasonably informed public observer would be satisfied that no misuse of confidential information will occur; this safeguards client confidentiality and confidence in the administration of justice: *Caretek Integrated Business Solutions Inc v. Bajwa*, 2026 ONSC 3822.

[Solicitors 7:2]

Alberta's *Code of Professional Conduct* recognizes solicitor-like duties can arise even without a formal retainer and courts may disqualify lawyers at the request of non-clients when a "near client" relationship exists. That is, a person related to an actual client who reasonably expected confidentiality or loyalty; "near client" disputes often turn on the risk of misuse of confidential or privileged information. Alberta courts apply a broad "composite rule," permitting disqualification not only to protect confidences but also to prevent substantial injustice or harm to public reputation and future lawyer–client relations. However, a corporate officer who merely instructs external counsel on the corporation's behalf is not, by that fact alone, a client, near client or former client. The lawyer's loyalty in that context is owed to the corporation, not the officer, unless confidential information was at risk: *Piikani Nation v. McMullen*, 2026 ABCA 189.

[Solicitors 7:2]

The *Rules of Professional Conduct*, while not binding on courts, are persuasive public policy. Law Society of Ontario Rule 5.2-1 prohibits an advocate from giving their own evidence except where permitted or purely formal; commentary advises handing the case to another lawyer if testimony is needed. Courts disqualify lawyer-witnesses because their dual role creates an unwaivable conflict between duties to the client and duties of objectivity to the court, and courts may remove counsel under their inherent jurisdiction. Ontario courts routinely remove successor lawyers who took over, completed underlying litigation and thereafter sue the former lawyer for negligence—such close involvement creates a conflict under the Essa factors: *Bahrami v. Jagtoo,* 2026 ONSC 3110.

[Lender Liability 8:1]

Banks do not owe a *prima facie* duty of care to a client's children or beneficiaries; negligence and negligent misrepresentation require a special relationship, which is absent between a bank and the client's family. The relationship is purely creditor debtor. Moreover a fiduciary duty requires some sort of undertaking to act in the claimant's best interests and this is normally lacking between financial institutions and a client's family, so such claims cannot be cured by amendment without first establishing a special relationship on the evidence: *Hall v. The Bank of Nova Scotia*, 2026 NSSC 200.

[Lender Liability 8:32]

The *Quincecare* duty is narrow: when acting as agent on payment instructions, a bank must refrain and make reasonable enquiries if "put on inquiry" that the instruction may be

suspicious. It protects the customer (but not third-party fraud victims) and applies only where authority/validity is unclear or suspect, typically where an agent lacks actual authority due to dishonesty. Making payment while on inquiry breaches the *Quincecare* duty, potentially invalidating the debit - but recoverable damages also require showing enquiries would likely have prevented the loss. Attribution of dishonest agents' acts follows purpose-specific rules; companies can sue dishonest controllers and remain victims. Allocation of APP (authorised push payment) fraud losses is now driven largely by regulation and legislation, with reimbursement schemes shaping practical recovery: *Moorwand Ltd v. Hamblin & Ors*, [2026] EWCA Civ 942.

[Lender Liability 8:32]

In *1442422 Ontario Ltd. et al v. The Toronto Dominion Bank*, 2026 ONSC 3856, the Ontario Superior Court held that a bank faced constructive knowledge of a breach of trust after multiple red flags and its failure to obtain or verify satisfactory answers about the source of funds used to pay down an overdraft. Because the bank did not make reasonable inquiries, the elements of knowing receipt were met and the bank was held liable. The decision also imposed liability on grounds of conversion and unjust enrichment.

[Settlement 9:1]

The buyer representation agreement's use of "TBD" (no amount nor any method to set it) prevents it from proving the purchaser agreed to pay a commission if the sale didn't close. A later revised co-operation agreement specified the seller, not the purchaser, would pay the commission. The court found the parties never agreed that the purchaser would owe the commission if he failed to complete the purchase and the appellants cannot seek to have the court to imply such a term into the agreements: *Qureshi v. Zeema Investments Incorporated*, 2026 ONCA 413 at paras. 13-19.

[Settlement 9:19]

Settlement discussion privilege protects confidential communications made during genuine settlement negotiations (civil and criminal) to promote candid, compromise-oriented dialogue by making them inadmissible. It bars disclosure to parties and third parties, but can be displaced when the settlement's existence or terms are at issue, the nature of the negotiations give rise to an independent cause of action or a compelling public interest requires disclosure, reflecting a presumption of privilege limited by fairness. Sharing an opponent's mediation brief with a private investigator is not a

compelling-public-interest exception: surveillance can proceed without confidential materials and admitting such evidence would undermine settlement negotiations: *Taylor v. Brar,* 2026 BCSC 960.

[Settlement 9:19]

Admissible background (factual-matrix) evidence includes facts known at contract formation and prior documents that illuminate the contract's origin and commercial purpose, but not negotiation statements used to prove agreed meanings: *Briety Shipping Inc v. Trafigura Maritime Logistics PTE Ltd,* [2026] EWHC 1714 (Comm).

Canadian law is unsettled post-*Sattva* on admitting pre-contract negotiations; broadening "surrounding circumstances" risks erasing the line between interpretation and bargaining history, undermining contractual certainty and inviting unreliable reliance on negotiation or post-contract conduct: *Tricor Automotive Group, Inc. v. Premier Dealer Services, Inc.*, 2026 ONSC 3326.

[Enforcement 10:32]

Where an adult child is added to real property title and bank accounts but the transferor parent did not intend a gift, a presumption of resulting trust arises. This presumption is reinforced if the parent's wills name the child as sole beneficiary (indicating survivorship/probate-avoidance, not an *inter vivos* gift). A declaration of trust can confirm the child holds the assets in resulting trust for the parent and has no beneficial interest in the bank accounts. Consequently, the child's creditor cannot reach those assets *Brunton v. Lanzarotta et al*, 2026 ONSC 4080.

[Fraudulent Conveyances 11:19]

Section 96 of the BIA targets transfers for no, or conspicuously less than fair market value. Insolvency must be shown on clear and convincing evidence such as unmet loan demands, ongoing defaults, breach of a preservation order and diversion of a tax refund, all of which support insolvency and intent to defeat creditors. However, s. 96 is discretionary and where the recipients acted in good faith on existing debts, lacked notice at the material time and exceptional hardship concerns exist, the court can decline a repayment order despite reduced recoveries for secured creditors: *7032749 Canada Inc. v. 1998514 Ontario Inc.*, 2026 ONSC 3067.