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DEBT LITIGATION

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2026-1 March

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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

[Mortgages 2:3]

There is an important distinction between an acceleration provision and a prepayment clause in a loan agreement. Acceleration allows the lender to demand early repayment after a default and entitles it to claim future interest as part of the accelerated debt. On the other hand, a prepayment clause is a voluntary early payment made before the due date, not triggered by enforcement actions; prepayment enables both parties to end the contract on mutually agreed terms. A borrower may not rely on section 17 of the *Mortgages Act* where the agreement is a commercial loan, not a mortgage. Section 8 of the *Interest Act* may apply to limit the interest rate on arrears to the contractual rate: *Redback Tours v. CEFL,* 2025 ONSC 5321 (Ont. S.C.J.).

[Mortgages 2:4]

The argument that the mortgage commitment document was invalid due to the respondent's missing signature was not found to be a viable defence where the mortgage itself was executed through payment and registration. The mortgage was valid despite the respondent's lack of signature on the commitment letter: *Patel v. 2811230 Ontario Ltd.* 2025 ONCA 679 (Ont. C.A.).

[Mortgages 2:14]

A mortgagee seeking possession as against tenants may fail to meet the legal test section 52 of the *Mortgages Act* to set aside a tenancy agreement due to lack of evidence, as a result of the mortgagor's and the tenants' (the respondents) failure to

deliver relevant documentation. Despite this, tenants who reside in the basement of the property must have some form of tenancy agreement, which is protected under the *Residential Tenancies Act.* In such circumstances, the court may order the respondents to produce any written tenancy agreement and furnish full details of start date, rent amount and payment history and, if the respondents fail to comply, enforcement mechanisms are available, and the applicant may renew its request to set aside the agreement: *First National Financial GP Corporation v. Wallace et al.,* 2025 ONSC 5397 (Ont. S.C.J.).

[Mortgages 2:15]

Where a mortgage is assigned to a new mortgagee but the mortgagor receives no written notice of the assignment and continues to make payments to the original lender, and thereafter to pay out the mortgage entirely, they are entitled to a discharge of the mortgage even where the assignee/new mortgagee refuses on the ground of non-payment. The original mortgagee/assignor is deemed to have received all post-assignment monies as agent for the assignee/new mortgagee where both and apparent actual authority is granted in the mortgage documentation: *Financial Services Regulatory Authority of Ontario v. First Swiss Mortgage Corp*., 2025 ONCA 731 (Ont. C.A.).

[Mortgages 2:23]

It is reversible error in interpreting ss. 10-11 of *The King's Bench Act* SS 2023, c 28 to determine that they preclude the inclusion of fire insurance expenses in a mortgage claim. These sections address acceleration clauses by affording the mortgagor an opportunity to remedy default (such as missed payments or breached covenants) before the lender proceeds with foreclosure or sale and they do not limit the types of expenses recoverable under a mortgage. Where the mortgagor breaches the obligation to insure the mortgaged property, the mortgagee can remedy this default by purchasing substitute insurance and adding the cost to the mortgage balance: *Innovation Federal Credit Union v. MacVicar,* 2025 SKCA 96 (Sask. C.A.).

[Mortgages 2:30]

The parties must have shared a continuing intention regarding a specific matter in the document which is to be rectified. The court must find that both parties had the same actual subjective intention (not merely what an objective observer might infer). An "outward expression of accord" is essential: some form of communication between the parties indicating mutual understanding of that intention, which must have persisted up to the time the document was executed.

There must be a mistake by which the document fails to reflect the common intention. Proof is on the balance of probabilities, but convincing evidence is needed to overcome the presumption that the written document reflects the parties' true intention. The precise wording of the common intention is not essential; what matters is that the substance and detail of the intention can be clearly identified. A party's unilateral and mistaken belief that certain wording achieves their intention does not prevent rectification if the true shared intention can be shown. For corporations the relevant intention is that of the person with authority to bind the company (not just the negotiators). Identifying the decision-maker and their state of mind is critical to the rectification exercise: *JAK Property Jersey Ltd. v. Together Commercial Finance Ltd.* [2025] EWHC 2442 (Ch).

[Mortgages 2:33]

Liens from improvements generally take priority over other interests. The definition of "Owner" under s.1 of the *Construction Act,* R.S.O. 1990, c. C.30 is any person (including the Crown) with an interest in the premises and liability requires that the owner must have requested the improvement, or the improvement must be:

- On their credit,
- On their behalf's
- With their consent,
- For their direct benefit.

The interest must be in the land and ownership is assessed at the time the work was requested, Consent or benefit alone is insufficient to meet the statutory definition without a request. It is crucial to note that this excludes home buyers. "At the request" may inferred from the parties' dealings and there is no requirement for a formal contract. Note that while a mortgagee has an interest in mortgaged property, if it requests nothing, it is not liable under a lien because awareness or approval of the work does not equate to a request. Exceptions apply for prior mortgages and those intended to secure improvements (construction mortgages, s. 78(1)). Even where a mortgagee qualifies as an "owner," its liability would be limited to the statutory holdback under section 23(1): *Demasi Contracting Inc. v. Farahmand*, 2025 ONSC 5445 (Ont. S.C.J.).

[Guarantees 3:3]

Where an oral release is alleged by the guarantor, the court may base its decision to reject that defence based on the primary loan's non-reliance and non-waiver clauses, which barred

the guarantor from relying on alleged external representations or activities by a purported agent of the lender: *HSBC Bank Canada v. Guido*, 2025 ONCA 684 (Ont. C.A.). There was no resort to s. 4 of the Statute of Frauds RSO 1990, c S.19, which might have prevented any oral modification to the guarantee or the main debt obligation.

[Guarantees 3:18]

At common law, a debtor has the right to direct how their payments are applied across multiple debts, and creditors must honor this direction. Where a credit agreement lacks terms on payment allocation, it does not override the debtor's common law rights. There must be clear intent for the allocation to be valid; the debtor must express their intention clearly and irrevocably, based on the specific facts of the case. The *Clayton's Case* exception, a presumption that payments apply to the oldest debts, does not apply to trust funds under section 8 of the *Construction Act*. Contractors must allocate trust monies to the correct project based on their source, regardless of whether the funds come from developers or are passed to suppliers. Should the debtor not specify a particular allocation, creditors must investigate the origin of trust funds before applying them: *Morin Bros. Building Supplies Inc. v. Bond Group Ottawa* 2018 Inc. et al, 2025 ONSC 5561 (Ont. S.C.J.).

The common law rule on debt repayment holds that when a debtor makes a payment, it is first used to cover any interest that has accrued. Only after the interest is fully paid does any remaining amount go toward reducing the principal. The rationale behind the rule is fairness to creditors, who are entitled to interest as part of the contract: skipping interest payments undermines this entitlement. Applying payments to principal before interest would unfairly deprive the creditor of their contractual entitlement to interest, which is considered "common justice". The rule ensures that the terms of the debt agreement are respected, maintaining the balance of obligations: *Morin Bros. Building Supplies Inc. v. Bond Group Ottawa* 2018 Inc. et al, 2025 ONSC 5561 (Ont. S.C.J.).

[Procedure 4:33]

It is a core principle of civil justice, in the adversarial system, that parties must clearly define the issues in their pleadings, which ensures that evidence and arguments which are focused, and the judge rules only on those identified issues. There are judicial boundaries, in that cases must not be decided on grounds not pleaded or explored during the trial. Even if a different theory might better fit the facts, it cannot be adopted unless parties are given a fair chance to respond and judges

must respect the issues as framed by the parties, even if it leads to rejecting a claim that might have succeeded on another basis; introducing a new theory in judgment that hadn't been discussed during the hearing is it unfair: *Advanced Multi-Technology for Medical Industry (t/a Hitex) & Ors v. Uniserve Ltd.*, [2025] EWCA Civ 1212.

[Evidence 5:18]

When a contract is fully written, extrinsic evidence is generally not admissible to change its terms but contextual evidence may be used to help interpret the contract's language. This rule does not prohibit amendments made through subsequent agreements; parties cannot restrict their ability to modify their legal relationship later by mutual consent: *Howland v. Foster,* 2025 ABKB 586 (Alta. K.B.).

AT 5-43 [Evidence 5:10]

As a general rule, courts may consider prior documents to understand the surrounding circumstances and the commercial purpose of a contract. But evidence from pre-contractual negotiations cannot be used to infer the meaning of specific contractual terms or to show consensus on particular points because such negotiations are often fluid and divergent until a final agreement on exact terms; negotiations do not reliably reflect a shared understanding, which may misguide or misinform interpretation. The scope of enquiry is restricted to the factual matrix known to both parties at the time of contracting and this includes the "genesis" and "aim" of the transaction; may be considered. However, there may arise an ambiguity in distinguishing between (a) using background to understand context and (b) improperly using it to interpret specific terms. Recitals in the agreement may assist in interpreting a contract only where they which cannot contradict or diminish them. Today, courts increasingly consider background context and this softens older rules that required ambiguity before recitals could be used: *RMK Maritime (Europe) Ltd. & Anor v. CMB.Tech NV*, [2025] EWHC 2739 (Comm).

[Defences 6:7]

Allegations that the defendants' negligence prolonged a plaintiff's operations, worsening its insolvency, is an idea known as "deepening insolvency." Canadian negligence law demands both factual and legal causation and the latter hinges on reasonable foreseeability: that damages must be a foreseeable result of the defendant's conduct. Auditors and lawyers are not liable for business failures they couldn't control: causation in such instances is speculative, especially given the

multitude of contributing factors like market conditions and regulatory pressures. External factors such as loan portfolio valuation and regulatory hostility were found to be significant contributors to the company's collapse, absolving the defendants: the theory assumes that injecting funds worsens insolvency, but management decisions and external factors often intervene, breaking the causal link. The Ontario Court of Appeal expressed skepticism about adopting "deepening insolvency" as a standalone cause of action or damages theory, viewing it more as a descriptive label than a legal principle. The theory risks bypassing causation analysis, which has led to its rejection in U.S. courts: *1511419 Ontario Inc. (formerly known as The Cash Store v. KPMG LLP, and Canaccord Genuity Corp., and Cassells Brock & Blackwell LLP*, 2025 ONSC 5796 (Ont. S.C.J. [Commercial List]).

[Defences 6:7]

It is important to balance the lender's right to recover its contractual losses with the need to protect vulnerable mortgagors from potential exploitation. The lender must provide notice to the borrowers, market the property for sale and account for the proceeds in a manner consistent with the principles of fairness and transparency. Relying on appraised values for deficiency calculations, particularly in a rapidly appreciating real estate market, furnishes potential for abuse by aggressive lenders, described as follows:

> a) there is a disconnect between the value lenders contract to receive under mortgage loans and the value they can recover by enforcing their mortgage security and thereafter pursuing a deficiency judgment under New Brunswick law;
> b) some mortgagees are exercising a form of "frontier justice" (back-office accounting) in an effort to recover what they believe should be properly recoverable under the contractual terms of their mortgage contracts; and
> c) more problematic, particularly given the rapid acceleration in property values in New Brunswick in recent years, it is very possible (probable) that unscrupulous (aggressive) mortgage lenders (more likely those buying up non-performing mortgagee debts) are reaping wind fall profits at the expense of vulnerable residents of our province.

Royal Bank of Canada v. Cosgrove, 2025 NBKB 195 (N.B. C.K.B.).

[Defences 6:15]

The corporate veil will be disregarded if the company is merely a façade used to shield fraudulent or improper conduct, such as a Ponzi scheme. Courts apply a two-part test: (1) the

individuals must exercise total control over the corporation and (2) there must be fraudulent or improper misconduct which gives rise to the liability in question. Courts may pierce the corporate veil when a company is used for illegal or improper purposes or when its controllers direct wrongful acts and where the company is merely a façade used to shield fraudulent or improper conduct. Further, a Ponzi entails fraudulent misrepresentation, meeting the criteria under s. 178(1)(e) of the *Bankruptcy and Insolvency Act*, thereby ensuring that the debt survives bankruptcy: *Kahil v. Youvic Investments Group Inc., et al.*, 2025 ONSC 4999 (Ont. S.C.J.).

[Defences 6:24]

The legal doctrine of *non est factum* is a rare and strict defence meant to protect individuals who, due to circumstances such as illiteracy or language barriers, sign documents fundamentally different from what they believed. he claimant must prove three things: lack of consent to the document's nature, a fundamental difference in the document's character, and that the mistake wasn't due to negligence. Courts consistently require strong evidence and diligence from the party asserting this defence and are generally reluctant to uphold *n est factum* if the signer failed to take reasonable steps to understand the document: *Balwant Singh Birk v. Rahul Chopra,* 2025 NBKB 152 (N.B. C.K.B.).

[Defences 6:40]

Section 4 of the *Interest Act* is consumer protection legislation mandating clear disclosure of annual interest rates to borrowers, preventing misleading practices, such as monthly compounding, which obscure true effective annual rates. There is some flexibility, however, as a mathematical formula or clear calculation method suffices under s. 4, even if the annual rate isn't explicitly stated. If interest on arrears after default increases to monthly *compounded interest,* but failed to state the annual rate, there is a violation of s. 4. Alberta courts may exempt sophisticated borrowers from s. 4, especially if they knowingly entered into the agreement and had independent legal advice, such that non-compliance will not reduce interest to 5% annually. Such judicial discretion is not available in Ontario: *Egger v. 1994426 Alberta Ltd.*, 2025 ABKB 533 (Alta. K.B.).

[Defences 6:41]

Any interest rate increase after the first day after term maturity violates section 8 of the *Interest Act* because the increase penalizes the borrower for default if the mortgage was not fully repaid on maturity, applying to arrears indefinitely. The court

emphasized that substance, not form, determines whether a rate increase constitutes a penalty. However, an interest rate increase due to passage of time (but not default) does not offend s. 8. Further, special servicing and default administration fees will be disallowed where they are not supported by evidence of being genuine pre-estimates of damages or actual costs incurred. The court held that such fees constituted penalties at common law and these, too, violated section 8: *Westjax Realty Inc. v. Khan,* 2025 ONSC 5146 (Ont. S.C.J.), additional reasons 2025 ONSC 5573 (Ont. S.C.J.), additional reasons 2025 ONSC 5726 (Ont. S.C.J.).

[Defences 6:41]

A clause in the bond instrument, secured by a mortgage and assignment of rents, imposed a 22% interest rate on overdue payments, compared to 12% on regular payments and therefore violated s. 8 of the Act. While it was held that the mortgagee could not enforce quantum stated in its demand, that did not make demand invalid even though the 22% default interest rate was deemed unenforceable: *Gemstone Advantage Limited v. Zhang*, 2025 BCSC 1012 (B.C. S.C.).

Where the plaintiff meets the threshold, the defendant may argue that enforcement would be inequitable. Accordingly, alias orders may be issued without prejudice to the defendant's right to challenge them later. The writ and garnishment orders will include all known aliases of the debtor: *Robert R. Ng v. Hao Ji Tang, formerly known as Joseph Hokai Tang*, 2025 ONSC 4740 (Ont. S.C.J.).

[Defences 6:41]

Section 8 of the *Interest Act*, R.S.C.1985, c. I-15 protects mortgagors from excessive charges on arrears that exceed the interest rate on non-arrears principal, as is illustrated in the following decisions; statutory protection is mandatory and parties cannot contract out. Section 8(1): prohibits fines, penalties, or interest rates on arrears that increase the financial burden beyond the agreed rate on principal not in arrears, in order to prevent charges that make it impossible for owners to redeem their property or protect equity (applies to fines, penalties, or interest rates that increase charges on arrears) and section 8(2) allows interest on arrears as long as it does not exceed the rate on non-arrears principal s. 8(1) limits freedom of contract where four conditions apply:

1. The charge must be a fine, penalty, or interest rate.
2. It must relate to arrears of principal or interest secured by mortgage.
3. It must increase the charge beyond the rate on non-arrears principal.

4. The arrears must be secured by mortgage on real property.

Mortgagees must prove charges reflect actual recovery costs; otherwise, they are deemed penalties and disallowed. Disguised penalties are differentiated legitimate pre-estimates of enforcement costs: *TMSSD Inc. v. Ojeikere*, 2025 ONSC 5245 (Ont. S.C.J.).

[Defences 6:52]

Equitable set-off is a valid defence that can raise a genuine issue for trial, thereby barring summary judgment. The requirements are as follows:

1. There must be an equitable reason to resist the plaintiff's claim.
2. The reason must strike at the core of the plaintiff's demand.
3. The cross-claim must be closely connected to the plaintiff's claim.
4. Claims need not arise from the same contract.
5. Both liquidated and unliquidated claims qualify.

Equitable set-off applies broadly and is a substantive defence when claims are tightly interwoven. Alberta courts have consistently treated equitable set-off as a substantive defence that can block summary judgment when genuine trial issues exist. The clean hands doctrine is applied contextually, not by rigid categories. Equitable set-off can be denied if the claimant's misconduct has an "immediate and necessary relation" to the transaction at issue, making it unjust to grant relief; however, misconduct must directly relate to the transaction or the equitable relief sought. Misconduct occurring after the transaction or loss (such as litigation tactics) generally does not qualify as unclean hands. ". . . Canadian courts have recognized two relevant categories of conduct that result in "unclean hands": (a) where a party misleads the court or abuses its process, and (b) where the court is being asked to assist in unconscionable conduct (e.g. by enforcing a right improperly obtained).": *Tempo Alberta Electrical Contractors Co Ltd. v. Man-Shield (Alta) Construction Inc*, 2025 ABCA 310 (Alta. C.A.).

Equitable set-off is a defence allowing a debtor to counter a claim when their own related claim goes to the root of the plaintiff's demand; it is available when both claims arise from or are part of a single transaction and it would be unjust to resolve one without the other. It is "equitable" because the counterclaim is unliquidated or not yet confirmed. Courts may

determine equitable set-offs during the course of summary trials to decide if both claims should be resolved together where, even if the counterclaim is not yet proven, it presents an arguable case: *Panopus PLC v. A.I.S. Resources Limited,* 2025 BCSC 1850 (B.C. S.C.).

[Defences 6:66]

The OPCA phenomenon is explored by Donald J. Netolitzky in "The Dead Sleep Quiet: History of the Organized Pseudolegal Commercial Argument Phenomenon in Canada - Part II" (2023) 60:3 Alta L Rev 795 – 832 who explains how pseudolaw, false legal concepts originating in the United States, spread to Canada around 2000 and was embraced by two distinct groups: Detaxers and Freemen-on-the-Land. Despite conditions that typically fuel pseudolaw movements, these early Canadian variants and their successors have largely faded and now remain inactive. Alberta courts, for instance, may issue an Apparent Vexatious Application or Proceeding (AVAP) Notice in respect of a pseudolaw claim, directing the Plaintiff to respond within 14 days or risk having the Statement of Claim struck out in whole or in part: *Sorensen v. The Toronto Dominion Bank*, 2025 ABKB 567 (Alta. K.B.) and *Marzib v. The Toronto Dominion Bank,* 2025 ABKB 566 (Alta. K.B.).

[Solicitors 7:2]

The disqualification of counsel is based on the court's inherent jurisdiction and further relies on the Law Society's Code of Professional Conduct, particularly rules concerning confidentiality and disqualification. The analysis resolves three competing values:

1. Upholding legal profession standards and justice system integrity.
2. Preserving a litigant's right to choose counsel.
3. Supporting reasonable lawyer mobility.

The principal question is whether the lawyer received confidential information relevant to the current proceedings and is there a risk that this information will be used to the client's prejudice. Prejudice may take two forms (1) the misuse of confidential information and (2) compromised representation due to conflicting interests. Courts are reluctant to remove counsel unless there is a real and demonstrable risk of prejudice: *Ladhar Estate v. Ladhar,* 2025 BCSC 1782 (B.C. S.C.), additional reasons 2025 BCSC 2000 (B.C. S.C.).

[Lender Liability 8:4]

The second stage for establishing vicarious liability, the "connection test", examines the link between that relationship

and the wrongful act or omission, synthesizing both stages: *Catholic Child Welfare Society v. Institute of the Brothers of the Christian Schools*, [2012] UKSC 56 (U.K. S.C.). "[T]here must ultimately be a synthesis of the two stages of the test. . .": *MXX v. A Secondary School,* [2022] EWHC 2207 (QB).

[Lender Liability 8:32]

The defendant's conduct must have actually assisted the breach of trust or fiduciary duty. The assistance must be more than minimal or must have made the breach easier than it would have been. As to causation, the loss must have directly resulted from the breach of trust but not necessarily from the assistance itself. There is no need to demonstrate direct causation between assistance and loss—it is sufficient that the assistance enabled the breach and it presents no defence to argue that the fiduciary would have committed the breach anyway, without any assistance. Common law causation concepts should not be imported into trust law: the focus remains on whether the breach caused the loss, not whether the assistance did. The assistance must be more than minimal and need not be the sole cause of loss: *Transworld Payment Solutions UK Ltd. & Anor v. First Curacao International Bank NV & Anor*, [2025] EWHC 2480 (Ch).

[Lender Liability 8:32]

Blind-eye knowledge ("wilful blindness") arises where a person may be deemed to have actual knowledge if they deliberately avoid confirming facts they suspect to be true. This is treated as actual knowledge in dishonest assistance claims;

1. The person must subjectively suspect wrongdoing.
2. They must make a deliberate decision not to investigate further.

The accessory doesn't need to understand the legal implications or know the specific breach of trust; it is sufficient that they suspected general wrongdoing. Deliberate ignorance in the face of suspicion can equate to complicity in civil cases: *Transworld Payment Solutions UK Ltd. & Anor v. First Curacao International Bank NV & Anor*, [2025] EWHC 2480 (Ch).

[Settlement 9:7]

In Ontario, recent amendments to Rule 49.14 allow for alternative remedies for any partial settlement agreement but where such agreements alter the adversarial landscape, the rule change does not override the binding precedents respecting immediate disclosure . Even where nondisclosure stems

from ignorance or negligence, "the result is the same as missing a statutory limitation period as it bars the action from proceeding" and the action must be barred and the court is compelled to stay the proceedings: *Smialek et al. v. Status Construction Ltd. et al.*, 2025 ONSC 5229 (Ont. S.C.J.).

[Settlement 9:12]

While settlement privilege is presumed, there are exceptions "when the justice of the case requires it" to prove the existence or terms of a settlement. Exceptions are justified only when the evidence is not used to show a party's weakness. If the purpose is unrelated to proving concessions, disclosure may be allowed, without undermining settlement policy, in cases involving fraud, misrepresentation, undue influence or to prevent overcompensation. Exceptions to settlement privilege are justified only when the evidence is not used to show a party's weakness. If the purpose is unrelated to proving concessions, disclosure may be allowed without undermining settlement policy: *Leeder v. Spence*, 2025 ONSC 5819 (Ont. S.C.J.).

Settlement privilege is a class or blanket privilege, covering all communications and documents created for settlement purposes. To qualify, three conditions must be met:

1. A litigious dispute must either exist or be reasonably contemplated (more than a mere possibility).
2. The communication must be intended to remain confidential should negotiations fail.
3. The purpose must be to effect a settlement.

This privilege does not apply to typical commercial or contract negotiations that are not aimed at resolving a legal dispute. Exceptions exist for public policy reasons, where competing interests outweigh the need for confidentiality. Communications may be admissible to prove the existence or scope of a settlement: *Acciona Wastewater Solutions LP v. Greater Vancouver Sewerage and Drainage District*, 2025 BCSC 2040 (B.C. S.C.).

[Settlement 9:21]

Standstill agreements must clearly state their intent to suspend time to avoid dismissal for delay. Although insurance coverage and trades actions are formally independent, they may be factually related and involve overlapping parties, such that advances in a coverage action, which are potentially dispositive of a trades action, moved the latter closer to resolution. The parties' agreement to proceed sequentially and the procedural steps taken in the coverage action supported this conclusion. The Court highlighted the parties' expectations and

the foundational rules of court, emphasizing that resolving the coverage action first was consistent with judicial economy and fairness: *Center Street Limited Partnership v. Nuera Platinum Construction Ltd.* 2025 ABCA 290 (Alta. C.A.).

[Enforcement 10:17]

The *Civil Code of Québec* (C.C.Q.) and the *Code of Civil Procedure* (C.C.P.) must be interpreted together, as complementary codes within the civil law tradition. A unified legal framework is necessary, especially regarding rules for executing judgments and interrupting limitations prescription. A notice of execution under the C.C.P. is not a separate procedural act but part of a judicial application that interrupts prescription under article 2892 C.C.Q. The 2014 reform replaced the formalistic "writ of execution" with a streamlined "notice of execution" to promote efficiency and reduce costs. The respondents filed and served the notice of execution before the prescription period expired, demonstrating diligence, which action interrupted prescription under article 2892 C.C.Q.; although the seizure was later suspended, it was not dismissed by a court, so the interruption remained valid under article 2894 C.C.Q. The Court declined to address section 89 of the *Indian Act* regarding whether the property was "situated on a reserve": *Mohawk Council of Kanesatake v. Sylvestre*, 2025 SCC 30 (S.C.C.).

[Fraudulent Conveyances 11:9]

Generally, the transfer of the family home to the debtor's wife is a potential "badge of fraud," but "A familial relationship alone does not support a finding of fraudulent intent." Where the consideration for the transfer included forgiveness of a $50,000 debt and assumption of half the mortgage, this may be deemed adequate. Even where some badges of fraud exist, these don't automatically prove fraudulent intent to defraud creditors where the transferor owned part of a successful business and there was no indication of insolvency or risky financial behavior at the time of the transfer. The business had secured substantial loans without repayment issues, indicating financial stability. There was no evidence of intent to defeat creditors. The court found no basis for a *prima facie* case of fraud or improper asset transfer and held that it was lawful for the transferor to restructure his assets in anticipation of future (but not present) liabilities: *Chuhan v. Soundrarajan,* 2025 ONSC 3288 (Ont. S.C.J.).

[Fraudulent Conveyances 11:19]

An analysis of transactions under the framework of ss. 95 and 96 of the *BIA* may establish transfers at undervalue where

the debtor companies received no or insufficient consideration, which diminished the debtors' estate and were made to non-arm's length parties. Preferences under s. 95(1)(b) of the *BIA* will be found where payments favored one particular creditor who was not dealing at arm's length with the debtors during their insolvency. Persons privy to the transfers at undervalue had knowledge or involvement in the impeached transactions and declarations of these findings may be made: *Ernst & Young Inc. v. Anwar,* 2025 SKKB 62 (Sask. K.B.).

[Bankruptcy 12:15]

The trustee's mischaracterization of a plaintiff's debt as secured was solely the trustee's error, not the defendant's, and where both parties and the trustee treated the debt as secured during the proposal process, and excluded from the proposal, and the plaintiff creditor reasonably relied on this shared assumption, it would be inequitable to now classify the debt as unsecured and thereby extinguished. Although neither party is at fault, the defendant's estate is estopped from resiling from the prior shared position that the debt was secured. The judgment was renewed to reflect accrued interest: *Tri-Star Redi-Mix Concrete Ltd. v. Gotch*, 2025 SKKB 155 (Sask. K.B.).

[Mortgages 2:5]

The *Family Law Act*, R.S.O 1990, c. F.3, s. 21 prohibits the sale of a matrimonial home without the consent of a non-titled spouse and the absence of communicated spousal consent invalidates an agreement for the purchase and sale of a matrimonial home. and the deposit must be returned": *Caradonna et al. v. Covach et al.,* 2025 ONSC 5873 (Ont. S.C.J.).

[Mortgages 2:8]

Where a mortgagor acknowledges breaching their covenant, the contractual consequences of doing so do not constitute irreparable harm for the purposes of injunctive relief, since the loss of the property is a foreseeable consequence of the moving party's default under the mortgage. No irreparable harm arises from enforcing the writ of possession in such circumstances, as the mortgagor agreed to such terms when entering into the mortgage contracts and the mortgagee is simply exercising rights already agreed to: *Starkman v. Home Trust Co.*, 2015 ONCA 436 (Ont. C.A.).

[Mortgages 2:8]

Losing one's home causes hardship, but mortgage default and loss of possession do not automatically amount to irreparable harm as the mortgage explicitly provides that default would allow the mortgagee to take possession of the property: "the loss of one's home for failure to pay the mortgage does not

always constitute irreparable harm." A stay motion requires proof of irreparable harm with a high probability of permanent, non-compensable injury: *MCC Mortgage Holdings Inc. v. Rutaihwa,* 2025 ONCA 778 (Ont. C.A.).

[Mortgages 2:8]

A discretionary stay under Ontario Rule 63.02(1)(b), follows the three-factor test for an interlocutory injunction: (1) whether there is a serious issue to be tried, (2) whether the moving party would suffer irreparable harm if the stay were refused, and (3) the balance of convenience: *Park v. Manulife Bank of Canada*, 2025 ONCA 815 (Ont. C.A.). A stay pending appeal on the balance of convenience may be granted where this would not prejudice the respondents, on the basis that irreparable harm could result from selling the property before the appeal was resolved, given the family's emotional attachment to the premises. In this case, serious issues existed regarding the trial judge's findings and their application of the limitation period, and the interests of justice favoured granting it.

[Mortgages 2:8]

Under s. 22(2) of Ontario's *Mortgages Act*, it is the substance of the information that matters, not its form. No specific form of statement is mandated under s. 22(2) and a heading that it was "for information purposes only" is immaterial. It is irrelevant that the mortgagee's law firm furnished the discharge statement, where it properly details the default, principal balance, interest and expenses. *Equitable Bank v. Cartel,* 2025 ONCA 799 (Ont. C.A.).

[Mortgages 2:14]

A mortgagee does not automatically terminate a lease upon taking possession of a property and if the mortgagee serves a Notice of Attornment of Rents and engages with the tenant regarding the lease, a year-to-year tenancy is created. Termination of such a tenancy requires six months' notice and if the mortgagee fails to provide this, any unilateral lockout of the tenant becomes unlawful and an injunction to safeguard the tent's rights will issue: *1000979674 Ontario Inc. v. 13276139 Canada Inc*., 2025 ONSC 6606 (Ont. S.C.J.) at paras.

[Mortgages 2:15]

The legal character of the assignment may be crucial: where the assignment is equitable (not an absolute nor irrevocable) the original assignor is a necessary party to the proceedings. The legal character of the assignment may be arguable if the documents show features of both an absolute assignment and a floating security interest. Joining the assignor in lawsuits where an assignment is equitable is a procedural rule, not a

substantive right; the equitable assignee holds the substantive right to sue, while joinder of the assignor is a procedural safeguard to protect the debtor from multiple or conflicting actions. Failure to join the assignor therefore does not create a substantive defence; at most it raises a procedural objection that the court can dispense with when joinder is unnecessary to prevent successive suits or inconsistent judgments: *MSN 1364 Leasing Ltd. & Anor v. Big Charter PVT Ltd.*, [2025] EWHC 3154 (Comm).

[Mortgages 2:16]

Novation must be properly pleaded: pleadings are foundational: they define the issues of fact and law, guide discovery, and ensure fairness in litigation. As a contractual claim, novation requires pleading of material facts: each term and the substitution of parties must be explicitly set out and all parties to the substituted contract to be before the court. Courts require novation to be expressly pleaded at the outset, as late introduction is procedurally unfair, prejudicial and contrary to justice; entertaining novation at closing would unfairly shift the case theory as the defendants would face a fundamentally different case than pleaded: *Kushty Consulting Ltd. v. Wissman,* 2025 BCSC 2344 (B.C. S.C.).

[Mortgages 2:16]

The existence of a novation is assessed objectively and does not depend on the parties' awareness. Although all parties must consent, such consent may be inferred from conduct: *Dekel v. RE Capital Administrators Ltd. & Anor*, [2025] EWHC 2976 (Ch).

[Mortgages 2:16]

In a three-party novation, party B assumes the rights and obligations of party A under a contract with party C; consideration is provided by the discharge of the original contract. Whether a novation has occurred is judged objectively and for this reason the parties need not be aware that a novation has taken place for it to be valid – but all parties must consent to the transaction which effects the novation. This consent can be express or inferred from conduct which objectively shows agreement. Post-novation conduct is admissible to determine whether a novation has occurred and the test is whether inferring a novation is necessary to give business efficacy to the parties' actions and furnishes a lawful basis for their conduct: *Lee & Anor v. BDB Pitmans LLP & Anor,* [2025] EWHC 2881 (Ch).

[Mortgages 2:28]

Where the mortgagee sends a mistaken discharge statement to the conveyancing lawyer, who then reasonably relies

on its pay-out figure when undertaking to discharge a mortgage, the mortgagee will be estopped from claiming that more funds are needed. The pay-out statement was erroneous but there could be no fault in the lawyer's reliance on it. Even should that conclusion be incorrect, the mortgagee may still have breached explicit trust conditions by failing to discharge all three mortgages after receiving funds under specific escrow terms. As a remedy, the court may order the Registrar of Land Titles to discharge the mortgage held by mortgagee from the property title: *Pakravan v. Equitable Bank,* 2025 BCSC 2159 (B.C. S.C.).

[Mortgages 2:30]

Rectification cannot be invoked to escape unintended tax liabilities resulting from the normal application of tax statutes. Reliance on an accountant's mistaken advice was insufficient to justify rectification, as taxpayers are expected to exercise due diligence. The court stressed that taxation is based on the legal agreements made, not on the parties' underlying intentions: "a taxpayer is barred from resorting to equity in order to undo, alter or modify a concluded transaction or its documentation to avoid a tax liability arising from the ordinary operation of a tax statute.": *Keystone Enterprises Real Estate Ltd. v. Canada (Attorney General),* 2025 SKKB 183 (Sask. K.B.).

[Mortgages 2:30]

The land titles system is built on certainty and reliance: purchasers must be able to trust the register and legal advice without fear of hidden defects or post-purchase rectification. Indefeasibility of title protects not only ownership but also the integrity and usability of title. A *bona fide* purchaser for value without notice is entitled to rely on the registered title without further investigation. Under the *Act*, purchasers need not investigate past dealings or look behind the register (the "curtain principle") and the register itself is sufficient to establish title (the "mirror principle"). Rectification will be denied where it would unjustly interfere with their rights, and errors in registration do not fall on *bona fide* purchasers without notice, such that rectification of a restrictive covenant interferes with the rights of a *bona fide* purchaser for value without notice: *Wonderland Power Centre Inc. v. Post and Beam on Wonderland Inc.*, 2022 ONSC 2237 (Ont. Div. Ct.).

[Mortgages 2:30]

A common intention to secure the debt by a certain property may be found in a written repayment agreement agreeing to a "voluntary caveat" in respect of the loan and an equitable mortgage may be the true character of this transaction: *Dubois*

v. Dubois et al., 2025 MBKB 135 (Man. K.B.).

[Guarantees 3:1]

The simple fact that a guarantee is tied to a mortgage but was given to support an unsecured loan does not automatically mean that the limitation period is the ten-year limitation period in the *Real Property Limitations Act*, since the connection to real property was merely incidental to a claim for breach of contract: *6971971 Canada Inc. v. Messica,* 2025 ONCA 514 (Ont. C.A.); application for leave to appeal dismissed with costs: 2025 CanLII 116173 (S.C.C.) sub nom. *Eli Messica v. 6971971 Canada Inc*., et al.

[Procedure 4:1]

While a party in default isn't technically entitled to notice of a motion for default judgment, it's considered best practice to serve the motion materials on the defendant. This ensures that any questions about the adequacy of the service of the Statement of Claim are addressed. Even if the Registrar has noted the defendant in default, a judge will want to confirm that the defendant was properly notified of the claim. Serving the default judgment motion record and filing proof of service helps the court verify that the defendant was aware of the claim and the motion for default judgment but chose not to respond: *Konstantonis v. Topping,* 2025 ONSC 4645 (Ont. S.C.J.) at para. 16, *Babinets v. Babinets,* 2025 ONSC 4934 (Ont. S.C.J.) and *Carboline Canada Division of RPM Canada v. 11331841 Canada Corp*., 2024 ONSC 4943 (Ont. S.C.J.). The law is collected by *Fragomeni J. in Dhillon v. Punia et. al.,* 2024 ONSC 6259 (Ont. S.C.J.).

Continued email correspondence between the lender and borrower may create a false impression that no defence is required. Rule 19.02 leaves the notice issue to the court's discretion. Technically, a defendant noted in default is generally not entitled to notice of further steps unless the court orders otherwise. Nevertheless, courts emphasise that serving the default judgment motion record is best practice and often exercise discretion requiring such formal notice in the interest of justice, especially in the instance of a self-represented defendant. Where there are ongoing settlement discussions by email and the defendant is actively engaged in resolving the claim, the defendant should be served with default judgment materials, which step is easy, costless and ensures that the defendant is informed. Where settlement discussions persist even after default judgment was obtained but the plaintiff withholds disclosure of the judgment, it should be set aside. Serving the judgment only by regular mail, while negotiating by email, constitutes a lack of transparency: *Royal Bank of*

Canada v. Skelly et al., 2025 ONSC 6622 (Ont. S.C.J.).

[Procedure 4:1]

Defendants whose behaviour demonstrates a disregard for court orders and processes, including delays, threats and failure to present a substantive defence are not likely to have a default judgment set aside, especially where there is obvious prejudice to the plaintiffs, including health impacts and litigation delays which outweigh any prejudice to such defendants. "[T]he desire to determine matters on their merits may not carry the day where the prejudice is of the defendants' own making": *Papanicolaou v. Privitera*, 2025 ONSC 6033 (Ont. S.C.J.).

[Evidence 5:2]

There is a core principle that an onerous clause in standard terms will not be binding unless it was fairly and reasonably brought to the other party's attention; that is, incorporation is denied. The "red hand doctrine" (aka the "onerous clause doctrine") demands that particularly harsh or unusual contract terms, purportedly incorporated by reference, are only enforceable if the other party's attention was specifically drawn to them. There is a sliding scale: the more onerous or unreasonable a clause is, the greater the level of notice required for it to be validly incorporated into a contract. However, the clause's nature and the adequacy of notice are determined by the specific facts of each case. The doctrine may apply to commercial contracts, but its relevance diminishes when parties are professionally advised, as in insurance markets, where agents are expected to explain contract terms to their principals and commercial applications are rare. Courts impose a high threshold to deem a clause "onerous" or "unusual," especially in commercial contracts where parties have equal bargaining power and standard terms are common. Judicial discretion eschews strict rules, as flexibility is needed to accommodate varying circumstances: *MS Amlin Marine NV v. King Trader Ltd. & Ors*, [2025] EWCA Civ 1387.

[Evidence 5:9]

Determining spoliation, including whether the file was intentionally destroyed to affect the litigation, is a matter for trial; pre-trial remedies are not appropriate in this context: *Ayangma v. FLSB and ELSB*, 2025 PECA 7 (P.E.I. C.A.).

[Evidence 5:9]

Canadian courts applying the modern principle of statutory interpretation analyze legislative language by considering its grammatical and ordinary meaning within the full context of the statute. This includes the act's overall structure, purpose,

and Parliament's intent. The approach integrates textual, contextual, and purposive elements to ensure the interpretation aligns with the statute as a whole, as affirmed in *Piekut v. Canada (National Revenue)*, 2025 SCC 13 (S.C.C.): *Qualico Developments West Inc v. Edmonton (City)*, 2025 ABKB 624 (Alta. K.B.).

The UK Supreme Court in *Uber BV v. Aslam*, [2021] UKSC 5 affirmed a purposive approach to statutory interpretation: courts should interpret legal provisions in a way that best fulfills their intended purpose. This approach involves assessing facts in light of the statute's purpose and the key question is whether the statute, interpreted with its purpose in mind, was meant to apply to the transaction as it realistically occurred: *IDDQD Ltd. v. Codeberry Ltd.* [2025] EWHC 2561 (Ch).

[Defences 6:43]

Compound interest is normally awarded to compensate for the loss of the commercial value of money. Key principles from the Privy Council in *Sagicor Bank Jamaica Ltd. v. Seaton* [2022] UKPC 48 are as follows:

- Detailed financial disclosure by the claimant is generally unnecessary and disproportionate.
- Losses from higher borrowing or missed investment opportunities can be inferred from general business context.
- Approximate losses may be assessed using commercial return rates, even without specific project or borrowing details.

Courts will generally avoid complex counterfactual analysis when awarding compound interest for equitable compensation, simple interest would be a genuine anomaly in commercial cases: *JSC Commercial Bank PrivatBank v. Kolomoisky* [2025] EWHC 2909 (Ch).

[Defences 6:47]

Equitable set-off can apply even without mutuality, unlike legal set-off: *O'Brien-Moran v. O'Brien-Moran,* 2025 ABKB 616 (Alta. K.B.).

[Defences 6:47]

There exists a general presumption that a party receiving legal advice is properly informed of its rights but a defendant may waive privilege over its legal advice and the plaintiff may thereby successfully rebutted that presumption: *URE Energy Ltd. v. Notting Hill Genesis,* [2025] EWCA Civ 1407. That presumption can only be rebutted by waiving privilege and proving otherwise. Even where there is a presumption of undue influence, it is rebutted by the Certificate of Independent Legal

Advice, where no evidence is led to challenge the Certificate; the same is true of a claim of non est factum: *The Toronto-Dominion Bank v. 953322 Ontario Inc. et al,* 2025 ONSC 5918 (Ont. S.C.J.).

[Defences 6:47]

In English law, there is no general principle (such as that in *Mackay v. Dick*) that a condition in a contract, which would give rise to a debt owed by a party if fulfilled, should be treated as fulfilled (or dispensed with or waived) where that party wrongfully prevents the condition from being satisfied. A buyer's breach does not entitle the seller to ignore contractual conditions. While a party cannot benefit from its own wrongdoing, this is a principle of interpretation—not a stand-alone rule of law—and must be applied within the framework of standard contract interpretation. A party cannot benefit from a contractual provision if they caused a breach through their own fault. This aligns with the broader legal maxim: "A man cannot be permitted to take advantage of his own wrong" (i.e., willful default). If a condition precedent fails due to the plaintiff's actions which prevented satisfaction of the condition precedent, the appropriate remedy is damages—not automatic entitlement to a debt. English contract law prioritizes the actual terms of the agreement, emphasizing freedom of contract and legal certainty. Remedies for breach are governed by doctrines like mitigation and remoteness, and under the efficient breach doctrine, a party may lawfully breach a contract if doing so is economically rational, even if it results in profit: *King Crude Carriers SA v. Ridgebury November LLC,* [2025] UKSC 39.

[Solicitors 7:4]

The appearance of a conflict between a corporate client's interests and the conflicted individuals who are providing instructions on the corporation's behalf may be sufficient to disqualify a lawyer from acting for that corporation. Where there is no evidence of a valid board resolution or membership vote authorizing these conflicted individuals to instruct counsel and this created a substantial risk of impaired representation and compromised the integrity of the administration of justice and the corporation was ordered to appoint new counsel and ensure that instructions are provided by individuals without any conflicts of interest: *Fodjo v. NufiCanada*, 2025 ONSC 6330.

[Lender Liability 8:4]

A *Bazley v. Curry* analysis was implemented in *Athanasiou v. King,* 2025 ONSC 5689 (Ont. S.C.J.), holding that employers may be vicariously liable for authorized acts of their employee

and further unauthorized acts closely connected to authorized duties. Vicarious liability holds enterprises accountable for risks they introduce into society; a three-step test applies:

1. Is the issue settled by precedent?
2. If not, the court must assess:
   - The closeness of the relationship between tortfeasor and employer.
   - The connection between the wrongful act and authorized conduct.

There are established factors for assessing connection

- Opportunity for abuse.
- Alignment with employer's aims.
- Friction or intimacy in the enterprise.
- Power over victims.
- Victim vulnerability.

[Lender Liability 8:21]

A *Norwich* order is commonly used in fraud cases to trace misappropriated funds and identify account holders. A financial institution such as a federally-chartered bank must normally keep account-holder information confidential but this confidentiality is not absolute, as section 7(3)(c) of the *Personal Information Protection and Electronic Documents Act,* S.C. 2000, c. 5 permits disclosure when required by a court order, subpoena or warrant. Accordingly, personal financial disclosure under a *Norwich* order does not breach the bank's statutory obligations as *PIPEDA* does not limit the court's authority to order disclosure: *R.M. of Edenwold No. 158 v. John Doe*, 2025 SKKB 179 (Sask. K.B.) citing *Royal Bank of Canada v. Trang*, 2016 SCC 50 (S.C.C.) and *Google Inc. v. Equustek Solutions Inc*., 2017 SCC 34 (S.C.C.).

[Lender Liability 8:32]

The so-called *Quincecare* duty is not a novel or exceptional obligation; it is simply the bank's duty not to execute instructions that it knows (or should know) are unauthorised. The duty traditionally described under *Quincecare* is now better understood as part of the general law of agency and mandate rather than a distinct, standalone doctrine. The term persists in practice but risks obscuring the fact that these cases are simply applications of orthodox principles about a bank's obligations when faced with potentially unauthorised instructions, which requires the as application of orthodox contractual and agency rules. The Supreme Court's decision in *Philipp* highlights that banks have a fundamental duty under their

contract with customers to execute payment instructions promptly and without second-guessing the wisdom or risks involved once the customer has unequivocally authorized and instructed the bank. This duty is strict and balanced with limited exceptions, such as when there are reasonable grounds to believe the instruction is fraudulent or involves criminal activity: *Arena Television Ltd. v. Bank of Scotland PLC,* [2025] EWHC 3036 (Comm).

It is trite law that the core duty of a bank is to make payments only when instructed by an authorized agent, acting with reasonable skill and care. This duty, also pleaded as a tort, prevents unauthorized payments. The 'scope of duty principle,' assesses the purpose of the duty based on its objective and what losses fall within the purpose of the duty owed, judged objectively: in banking, this is to protect the customer from fraud. This duty requires verification of instructions when there are reasonable grounds to suspect fraud, and liability usually extends to unauthorized payments and related consequential losses (e.g., interest, overdraft fees, currency losses). It generally does not cover authorized payments, even if imprudent or losses from transactions the customer entered into, which would not have occurred had the bank frozen the account during inquiries *Arena Television Ltd. v. Bank of Scotland PLC* [2025] EWHC 3036 (Comm).

[Lender Liability 8:29]

There are two bases for accessory liability:

(1) Knowingly procuring a wrong: a person who intentionally causes another to commit an actionable wrong becomes jointly liable. If the primary wrong is a breach of contract, this results in a separate tort; if it's a tort, no separate tort is needed.

(2) Assisting under a common design: a person who provides more than trivial assistance in committing a tort, as part of a shared plan or purpose, is also jointly liable.

Mere assistance is not enough, unless it's part of a shared design. For joint liability, knowledge of the essential elements of the tort, even where the tort itself doesn't require such knowledge, is required: *Iddqd Ltd. v. Codeberry Ltd.* [2025] EWHC 2561 (Ch).

[Fraudulent Transactions 11:6]

A sham is any arrangement where the apparent relationship of contracting parties differs intentionally from their true relationship, thereby misleading third parties or the court. To qualify as a sham, parties must be doing one thing but pre-

senting another: there must be a (secret) shared intention that the arrangement does not create real legal rights or obligations. A party may be deemed to have this intention even if they are recklessly indifferent to the misrepresentation: *Scott v. Estate* [2025] EWHC 2796 (Ch).

[Fraudulent Transactions 11:6]

Legally, a sham mortgagor remains liable for mortgage debts regardless of how the funds were disbursed if there's no evidence supporting their claim of alleged non-responsibility for repayments. Where the evidence suggests that the mortgagor was complicit in a fraud, and knowingly executed misleading mortgage documents, they did not come to court with clean hands and was not entitled to equitable relief: *5716650 Manitoba Ltd. v. Caplan et al.,* 2025 MBKB 127 (Man. K.B.).

[Fraudulent Transactions 11:14]

There are general principles, but no universal test, for constructive trusts in cases of fraud and victims of theft can trace stolen assets in equity, even when mixed with other funds through a constructive trust, not a resulting trust. Equity will not necessarily impose a constructive trust in every case of personal fraud and there is no general rule that fraud automatically converts the wrongdoer into a trustee: constructive trusts arise only in specific circumstances. Beneficiaries retain an economic interest in traceable proceeds of trust property and this binds recipients unless they can prove themselves *bona fide* purchasers for value without notice. A *bona fide* purchaser status is a single, complete defence: *Barnett v. General Subsidiary 2 Ltd.* [2025] EWHC 2830 (Ch).