

## Publisher's Note

2017 — Release 4

Previous release was 2017-3

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McDermott

# Canadian Commercial Real Estate Manual

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

This release features updates to case law and commentary in Chapters 6 (The Law of Mortgages), 8 (Remedies), 14 (Condominium Mortgages), 36 (Construction and Development), 38 (Acquisitions and Dispositions), and 40 (Special Agreements).

## Highlights

**The Law of Mortgages — Priorities — Construction Liens, Builders' Liens or Mechanics' Liens** — Where plaintiff contractor failed to serve its statement of claim within one-month time limit under s. 34(7) of Nova Scotia *Builder's Lien Act*, R.S.N.S. 1989, c. 277, builder's lien was vacated for non-compliance with statutory timelines. Contractor contracted with owners to provide renovation services on their home. Contractor ceased

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working on plaintiffs' home in December 2015. Owners refused to pay contractor's outstanding invoices, claiming that work was incomplete and inadequate. Contractor registered builders' lien against property on February 5, 2016; statement of claim and certificate of *lis pendens* were not filed until March 21, 2016. Owners claimed that statement of claim had not been served as of hearing. Owners submitted that lien should be vacated due to contractor's non-compliance with one-month time limit to serve statement of claim, pursuant to s. 37(4) of *Builder's Lien Act*. Contractor argued that failure to comply with time limit in the Act should be treated as "irregularity". Contractor also relied on Rule 2.02 of *Civil Procedure Rules*, to excuse and correct its non-compliance and for extension of time to serve its statement of claim. Motion by owners to vacate builder's lien was granted. Lien was vacated where contractor failed to file and serve statement of claim within one month of filing lien, as required in s. 34(7). Failure to comply with time limit was not mere "irregularity". Act conferred rights on lien claimant in excess of rights of an ordinary plaintiff in civil action. Those rights came with corresponding obligations, including compliance with strict statutory timelines. Contractor had not offered any reason for its failure to file and serve statement of claim in time. To allow an extension of time would be to divest statutory time frame of any consequence or meaning. Decision to vacate lien did not leave contractor without a remedy: *Tam Hampson 20/20 Design Inc. v. Kreuger-Naug*, 2016 NSSC 217, 2016 CarswellNS 678, 376 N.S.R. (2d) 315, 62 C.L.R. (4th) 305, 100 C.P.C. (7th) 323, 1185 A.P.R. 315.

**Remedies — Foreclosure and Judicial Sale — Preliminary Considerations, Right to a Certificate of Pending Litigation** — In British Columbia, shareholders of a corporation have no proprietary interest in land owned by the corporation and, accordingly, although commencing action against corporation seeking relief for negligent and fraudulent misrepresentation and breaches of contract, trust, and fiduciary duty, shareholders could not register certificate of pending litigation against land of the corporation. Plaintiff shareholders commenced action against, *inter alia*, defendant corporation, M Ltd., and two individual defendants for relief for negligent and fraudulent misrepresentation and breaches of contract, trust, and fiduciary duty. Two individual defendants were controlling shareholders and officers of defendant M Ltd., which owned lands on which three seniors' complexes were located. M Ltd. was general partner of defendant limited partnership (LP), and was also partner of various other defendants in another partnership. The two plaintiffs bought shares in M Ltd., and one also became limited partner in LP. Plaintiffs alleged their investments were mismanaged, including through diversion of certain lands to other partnership, which lands were to be sold for benefit of other partnership. Plaintiffs registered certificate of pending litigation against lands that M Ltd. intended to sell. Plaintiffs also applied for appointment of

receiver and for interim injunction restraining defendants from dealing with lands without court approval or consent of parties. M Ltd. applied for order cancelling certificate of pending litigation. Appointment of receiver was denied, but interim injunction was granted. M Ltd.'s application cancelling the CPL was granted: *Schmidt v. Balcom* (2016), 79 R.P.R. (5th) 103, 2016 BCSC 2438, 2016 CarswellBC 3685, 64 B.L.R. (5th) 259.

**Condominium Mortgages — Purchase of New Condominium Units in Ontario — By-laws and Rules** — “Single family use” could not be interpreted to include one’s operation of hotel-like business, with units being offered to complete strangers on internet, on repeated basis, for durations as short as a single night. Declaration for residential condominium complex restricted use of units to “single-family dwellings”. Two unit owners leased their unit to their own company, and offered unit for rent on short-term basis. Condominium corporation adopted rule preventing leases shorter than four months. Owners’ company pursued legal proceedings against condominium corporation, but abandoned them. Corporation then brought an application against owners and their company for order enforcing corporation’s regulations against short-term tenancies. Corporation’s application was granted. Company was proper and necessary party since it was occupier of owners’ unit. Owners and their company had waived provisions of s. 134(2) of *Condominium Act, 1998*, S.O. 1998, c. 19, requiring parties to proceed to mediation and arbitration before an application could be brought. Owners had persisted with company’s application against corporation for seven months before suddenly arguing that Court lacked jurisdiction to hear corporation’s application. Further, s. 134(2) had no application where dispute was with tenant, and staying proceeding against owners but not against tenant would be contrary to s. 138 of *Courts of Justice Act*, R.S.O. 1990, c. C.43, which sought to avoid multiplicity of proceedings: *Ottawa-Carleton Standard Condominium Corp. No. 961 v. Menzies* (2016), 78 R.P.R. (5th) 318, 2016 ONSC 7699, 2016 CarswellOnt 19267 (S.C.J.).

