**Summary Judgments, Personal Guarantees and the Court’s Attitude**

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In *Hryniak v Mauldin,[[1]](#footnote-1)* the Supreme Court of Canada creates an avenue for timely and affordable justice through summary judgments. However, what happens when the stakes of a summary judgment may cost a party millions of dollars? Many would argue a decision of this magnitude is not appropriate for summary judgment, however, in the case of personal guarantees, courts across Canada have repeatedly ruled otherwise.

At its most rudimentary level, a personal guarantee is simply a promise made by a person (the guarantor) to accept responsibility for some other party’s debt (the debtor) if the debtor fails to repay outstanding debt owed to a lendor (most commonly a bank). The relationship between the availability of summary judgments and personal guarantees, at least following *Hryniak*, appears to be surprisingly straightforward in the eyes of the judiciary. An in-depth note up of *Hryniak* illustrates a court will generally uphold personal guarantees, whether the guarantees are for $50,000 or $5,000,000, on a summary basis. In considering such applications, the Court will look to three main factors: if the language of the guarantee is clear and unambiguous, if the guarantors fail to put their best evidentiary foot forward and if the education and commercial sophistication of the guarantor is established, the Court will uphold the personal guarantee with little to no leniency.

The first and arguably most straightforward factor the Court will look to is the language of the guarantee. Rooted in the practice of contractual interpretation, a court will review the actual wording of the guarantee when determining its validity. Courts will find a guarantee to be valid if it is “clear and concise”,[[2]](#footnote-2) if the “language of the guarantee was clear”[[3]](#footnote-3) or if the language of the guarantee was “clear and unambiguous”.[[4]](#footnote-4) In *ATB Financial v. Coredent Partnership*,[[5]](#footnote-5) the Alberta Court of Queen’s Bench considered the validity of a personal guarantee of $5,400,000. The Court ultimately found that the language of the guarantee was not only clear and unambiguous, but the terms of the guarantee were a complete answer to any defences raised by the guarantor. The language of the guarantee was so concise and so powerful, the defences raised were dismissed, not by the Court, but by the guarantee itself. The Courts will also determine what *isn’t* in the guarantees and strictly interpret that exclusion. This was done in *Toronto-Dominion Bank v. Konga*.[[6]](#footnote-6) Here, the lendor-bank provided a business loan secured by a personal guarantee of $1,100,000. After the debtor defaulted on the loan, the guarantor argued that the lendor-bank had a duty to provide notice to the guarantor of the debtor’s default. However, after the Court reviewed the strict wording of the guarantee, it concluded that there was no such clause, nor was there any duty or contractual obligation requiring the lendor-bank to provide notice under the guarantee.

The overall intention of the guarantee is also relevant to this first factor of analysis. In *Bank of Nova Scotia v. 22 King St. Inc. et al*,[[7]](#footnote-7) a lendor-bank brought a summary judgment application to enforce a guarantee of $2,000,000. Counsel for the guarantors encouraged the Court to be cautious in adopting an approach that focused on the strict wording of the guarantees. The Court, though, paying heed to this warning, instead relied on the principles from the Supreme Court of Canada decision in *Creston Moly Corp. v Sattva Capital Corp.*,[[8]](#footnote-8) which found that interpreting contracts required a full analysis of the factual matrix (facts relevant to that task), the intent of the parties and the scope of their understanding. Even when the Court followed this principle, it still found clear wording and the intent of the guarantee was enough to find the guarantee valid.

The second factor the Court looks to when assessing the validity of a personal guarantee during a summary judgment motion is the evidence put before the Court. While all parties have an obligation to put their best evidentiary foot forward,[[9]](#footnote-9) it is especially true for the guarantors, who often make bald assertions as to why they should not honour the agreement they have signed.[[10]](#footnote-10) This is why evidence is so essential – evidence is needed so the Court is able to discount a plethora of meritless defences used by the guarantors. This technique is a guarantor’s attempt to show the Court a full trial and/or *viva voce* evidence is needed before a determination can be made regarding the guarantee and the ultimate liability of the guarantor. To put it in colloquial terms, imagine the legal equivalent of the saying, “throw everything at the wall and see what sticks”.

Defences such as non est factum, negligent misrepresentation and fraud are commonly put before the Court to suggest the guarantee is not valid and should not be upheld.[[11]](#footnote-11) Guarantors are sometimes even more creative with their defences, as in *Business Development Bank of Canada v. Paloheimo*.[[12]](#footnote-12) Here, the guarantors put forward *inter alia* a defense that the summary judgment was premature as the lendor-bank refused to provide an Affidavit of Documents and the outstanding documents may support the defences raised.[[13]](#footnote-13) Not surprisingly, the Court did not accept this defence and highlighted that “[b]ald assertions as to what might be are not proper responses” to a motion for summary judgment. The overall attitude Courts have towards meritless defences was articulated well by Justice B.A. Allen of the Ontario Superior Court of Justice in *Bank of Nova Scotia v. 8405751 Canada Corp.*, which echoes similar statements made by courts across the country:

47      The Defendants did not put their best foot forward in defending this motion. Or perhaps that was their best foot but their best foot was not good enough. Their denials and allegations are devoid of support on the evidentiary record before the court. The legal arguments advanced by the Defendants are unsubstantiated by the evidence.[[14]](#footnote-14)

The third and final reoccurring factor the Courts often consider is the education and commercial sophistication of the guarantors.[[15]](#footnote-15) In a motion for summary judgment, this factor can give trial judges a greater sense of comfort when they attempt to simplify the personal guarantee proceedings. The education and commercial sophistication of a guarantor can help indicate to a Court that the guarantor was aware of what they were signing and understood the consequences. For example, in *Toronto-Dominion Bank v. Island Heat Tanning Centers Inc*, the Court found the guarantors “were not illiterate, inexperienced individuals with no knowledge of how loans operated… [r]ather, [the guarantors] were experienced businessmen who had an on-going relationship with the Plaintiff bank”.[[16]](#footnote-16) In *22 King St*., the Court was satisfied there was no genuine or triable issue because the guarantors undertook liability for the debtor freely and with an acknowledged level of sophistication.[[17]](#footnote-17) While this third factor plays a somewhat lesser role as compared to factors one and two, courts across Canada continuously point to it as an contributing factor to find a personal guarantee valid and enforceable.

One of the various underlying principles of *Hryniak* is that there will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment.[[18]](#footnote-18) With this principle in mind, it seems summary judgments are particularly well-suited for actions to enforce personal guarantees. When a personal guarantee is signed by sophisticated parties and has clear, unambiguous language and the guarantor has produced no evidence to the contrary, a Court is able to reach a fair and just determination on the merits of the guarantee. Anything in the alternative would defeat the fundamental purpose of a personal guarantee and compromise the process of fair and just adjudication offered by summary judgments.

1. 2017 SCC 77 [*Hryniak*]. [↑](#footnote-ref-1)
2. *BNS v Compas*, 2018 ONSC 3262. [↑](#footnote-ref-2)
3. *Bank of Nova Scotia v. 22 King St. Inc. et al*, 2017 NBQB 172 [*22 King St.*]; *Toronto-Dominion Bank v. Konga*, 2016 ONSC 1628 [*Konga*]. [↑](#footnote-ref-3)
4. *Konga, ibid.*; *Farm Credit Canada v Pratas*, 2014 ONSC 5592, where a personal guarantee for the value of approximately $2,100,000 was upheld; *Toronto-Dominion Bank v. Eddymask Ltd.,* 2015 ONSC 2429; *Royal Bank of Canada v. 3255177 Nova Scotia Limited*, 2018 NSSC 181. [↑](#footnote-ref-4)
5. *ATB Financial v. Coredent Partnership,* 2019 ABQB 680 [*ATB Financial*]. [↑](#footnote-ref-5)
6. *Konga*, *supra* note 3. [↑](#footnote-ref-6)
7. *22 King St., supra* note 3. [↑](#footnote-ref-7)
8. 2014 SCC 53 [*Sattva*]. [↑](#footnote-ref-8)
9. *Business Development Bank of Canada v. Paloheimo*, 2015 ONSC 7295 [*Paloheimo*]. [↑](#footnote-ref-9)
10. *ATB Financial v. Coredent Partnership,* 2019 ABQB 680 [*ATB Financial*]; *Bank of Nova Scotia v. 8405751 Canada Corp*., (2018) 295 A.C.W.S. (3d) 896 [*Canada Corp.*] at para 47; *Blue Hill Excavating Inc. v. Canadian Western Bank Leasing Inc*., 2019 SKCA 22; *Paloheimo*, *ibid* at para 12. [↑](#footnote-ref-10)
11. *RBC v 164939*, 2019 ONSC 5145; *Canada Corp*., *supra* note 8. [↑](#footnote-ref-11)
12. *Paloheima*, *supra* note 9 at paras. 11 and 12. [↑](#footnote-ref-12)
13. *Ibid*. [↑](#footnote-ref-13)
14. *Canada Corp*., *supra* note 8. [↑](#footnote-ref-14)
15. *22 King St*., *supra* note 3; *Toronto-Dominion Bank v. Island Heat Tanning Centers Inc.*, 2014 ONSC 4333 [*Island Heat Tanning*]; *Rescon Financial Corp. v. New Era Development (2011) Inc*, 2018 ONSC 259; and *BNS v. Compas*, 2018 ONSC 3262. [↑](#footnote-ref-15)
16. *Island Heat Tanning*, *ibid* at para 16. [↑](#footnote-ref-16)
17. *22 King St., supra* note 3 at para 36. [↑](#footnote-ref-17)
18. *Hryniak*, *supra* note 1 at para 49. [↑](#footnote-ref-18)