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## **The Liabilities of Sureties**

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Daniel P. Cipollone

### **Abstract:**

This paper provides an overview of when a surety may be released from his or her obligations under a guarantee following a material variation to the principal lending contract. Part I frames the overall discussion by reviewing the role and importance of guarantees in contemporary commerce, outlining the central tenets of guarantee obligations, and distinguishing them as a subset of indemnities. Part II reviews how sureties have traditionally enjoyed a favoured status at law as well as what, in law, is considered to constitute a material variation. Part III introduces and sets out a longstanding rule governing the liability of sureties following a material variation to the principal contract. Part III examines the decisions of the Supreme Court of Canada in *Manulife Bank of Canada v Conlin* and the Ontario Court of Appeal in *Bank of Montreal v Negin* and illustrates how the courts, under similar factual circumstances, arrived at conflicting outcomes. Part III summarizes the jurisprudence in Ontario following these decisions to show that most decisions have distinguished the Supreme Court of Canada's judgment in *Conlin* on the grounds that later guarantees have not been prone to the same inconsistencies. This argument is bolstered by an in-depth review of the Ontario Court of Appeal's recent decision in *Royal Bank of Canada v Samson Management & Solutions*, wherein the Court distinguished that case from *Conlin* and held the surety liable under her guarantee.

### **Keywords:**

Guarantees, sureties, suretyship, secured transactions, indemnities, creditor, debtor, lending, financing, liability, liabilities

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## THE LIABILITIES OF SURETIES

DANIEL CIPOLLONE\*

### INTRODUCTION

Guarantees are among the earliest forms of contractual obligations to be recognized under English law.<sup>1</sup> Briefly stated, a guarantee is a promise made by one party (known as the surety or guarantor) to be answerable for the due performance of some legal obligation of another party (known as the principal debtor).<sup>2</sup> A guarantee may relate to the performance of an obligation, the discharge of a legal liability, or the payment of an outstanding debt.<sup>3</sup> The Ontario *Statute of Frauds* states that a guarantee may involve “any special promise to answer for the debt, default, or miscarriage of any other person.”<sup>4</sup> In most cases, however, the guaranteed obligation will be in respect of an outstanding debt. More specifically, the guarantee is an undertaking designed to enhance the protections of a creditor in the event that a debtor fails to satisfy the payment obligations contained within the original lending agreement. Put another way, if a debtor defaults, a guarantee functions to provide the creditor with an alternate source of performance or payment. As a result, guarantees are among the most common types of security used in contemporary commercial transactions, and significant sums of money are lent daily in reliance on the strength of guarantees.<sup>5</sup>

The purpose of this paper is to provide an overview of when sureties may be released from their obligations under a guarantee following a material variation to the principal lending contract. Part I frames the overall discussion by reviewing the role and importance of guarantees in contemporary commerce, outlining the central tenets of guarantee obligations, and distinguishing them as a subset of indemnities. Part II reviews how sureties have traditionally enjoyed a favoured status at law as well as what, in law, is considered to constitute a material variation. Part III introduces and sets out a longstanding rule governing the liability of sureties following a material variation to the principal contract. Part III examines the decisions of the Supreme Court of Canada in *Manulife Bank of Canada v Conlin* and the Ontario Court of Appeal in *Bank of Montreal v Negin* and

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<sup>1</sup> Sir William Searle Holdsworth, *A History of English Law*, 2d ed (London, UK: Methuen, 1914) at 185.

<sup>2</sup> Kevin McGuinness, *The Law of Guarantee*, 3d ed (Markham: LexisNexis Canada Inc, 2013) at 1 [McGuinness].

<sup>3</sup> *Ibid* at 7.

<sup>4</sup> *Statute of Frauds*, RSO 1990, c S 19, s 4.

<sup>5</sup> McGuinness, *supra* note 2 at 1.

illustrates how the courts, under similar factual circumstances, arrived at conflicting outcomes. Part IV goes on to summarize the jurisprudence in Ontario following these decisions to show that most decisions have distinguished the Supreme Court of Canada's judgment in *Conlin* on the grounds that later guarantees have not been prone to the same inconsistencies. This argument is bolstered by an in-depth review of the Ontario Court of Appeal's recent decision in *Royal Bank of Canada v Samson Management & Solutions*, wherein the Court distinguished that case from *Conlin* and held the surety liable under her guarantee.

## PART I - GUARANTEES: A BACKGROUND

### I.I The Role of Guarantees in Contemporary Commerce

The importance of guarantees has not waned despite their longstanding role in contract law. Historically, banks and creditors would lend not based on collateral but based on guarantees or endorsements of bills of exchange, typically from the commercial entity or person that operated the business to which a loan was made.<sup>6</sup> By contrast, in instances where banks and creditors lent on a secured basis, they would only do so in exchange for hard collateral, often in the form of government bonds or real estate mortgages.<sup>7</sup>

Today, it is commonly understood that much of the global economy, particularly the western world, relies on the ready availability of credit. As Walter William Fell described in 1811,

The universal adoption of a system of credit in all mercantile transactions, and the prodigious extent to which that system is at present carried, has introduced, or at least very much increased, the practice of requiring counter securities against such credit or some other species of guarantee, for the performance of engagements entered into. The subject of mercantile guarantees may, therefore, be considered of first consequence both to the commercial world and the profession of law.<sup>8</sup>

Given the important role that credit serves in an economy, the laws and regulations that affect the relationships between creditors, debtors, and other interested parties exert an important influence on the economic growth and development of a nation or region. Generally speaking, laws that facilitate the extension of credit will fuel economic expansion, while those that restrict it will undermine and constrict economic growth. Noted legal scholar Kevin McGuinness writes that "the law relating to guarantees and other engagements of a similar nature is one branch of the law which clearly has a significant

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<sup>6</sup> McGuinness, *supra* note 2 at 18.

<sup>7</sup> *Ibid.*

<sup>8</sup> Walter William Fell, *A Treatise on the Law of Mercantile Guarantees and of Principal and Surety in General* (London: J Butterworth, 1811).

impact upon the rights of creditors and thus the flow of credit.”<sup>9</sup> Thus, an analysis of the law relating to guarantee transactions is relevant from both a legal and economic perspective. In order to conduct such an analysis, however, it is important to have an adequate understanding of guarantees and the obligations they engender.

## I.II The Nature of Guarantee Obligations

A guarantee is a promise by one person (known as the guarantor or surety) to be answerable for the due performance of the obligation(s) of another person (known as the principal or debtor) should the principal fail to perform the obligation as required.<sup>10</sup> The *Civil Code of Quebec* defines a contract of guarantee, also referred to as a suretyship, as “a contract by which a person, the surety, binds himself towards the creditor, gratuitously or for remuneration, to perform the obligation of the debtor if he fails to fulfill it.”<sup>11</sup> In a similar way, the common law defines a contract of guarantee as “a contract whereby one person (‘the surety’) promises another person (‘the creditor’) to be answerable in the event of a third person (‘the principal debtor’) making default in respect of a liability incurred or to be incurred by such third person to the promise.”<sup>12</sup> This is distinct from other common forms of security such as mortgages or pledges because it only provides creditors with a promise of performance, rather than property, to which a creditor may seek recourse in the event of a default.

Given that a guarantee is essentially an undertaking to answer for a debt, default, or miscarriage of another person, it is argued that guarantees possess the quality of an indemnity. In its most basic sense, an indemnity is a contract by which one party agrees to indemnify another against loss or damage.<sup>13</sup> Despite this similarity, guarantees possess a defining characteristic that distinguishes them from indemnities, namely their contingent nature. More specifically, the difference between the two contracts is that in a contract of guarantee, the surety undertakes a secondary liability to answer for the debtor, who remains primarily liable. By contrast, in a contract of indemnity, the surety undertakes a primary liability, either on its own or jointly with the principal debtor.<sup>14</sup> In other words, if a person guarantees the obligations or debt of another person, the creditor will typically look first to the principal debtor for performance. It is only when the principal debtor has defaulted in its obligations that the creditor will turn to the surety for performance.<sup>15</sup> This difference is

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<sup>9</sup> *McGuinness*, *supra* note 2 at 18.

<sup>10</sup> *Ibid* at 1.

<sup>11</sup> SQ 1991, c 64, s 2333.

<sup>12</sup> E Jenks, *Jenks' Digest of English Civil Law*, 2d ed (London: Butterworths, 1921) at para 652.

<sup>13</sup> *McGuinness*, *supra* note 2 at 38-39.

<sup>14</sup> *Ibid* at 3.

<sup>15</sup> *Ibid*.

aptly described by the following extract quoted by Justice Stratton of the New Brunswick Court of Appeal in *Canadian General Insurance Co v Dubé Ready-Mix Ltd.*<sup>16</sup>

The essential differences are, therefore, that a guarantee gives rise to a secondary, whereas an indemnity gives rise to a primary obligation and that there are, therefore, three parties to a guarantee, the creditor, the debtor, and the guarantor, who promises to answer for the debt, default, or miscarriage of another, whereas there are only two parties to an indemnity and if it is a promise to indemnify a debtor it is owed to the debtor only, and not because he has failed to perform his obligation, but because he has performed it.

The role of guarantees as a contractual security mechanism and their secondary or contingent nature in turn give rise to a number of issues. As McGuinness notes, such questions include:

to what extent must the creditor look primarily to the principal for performance; must the surety be notified of a default by the principal before an action may be brought against him; in what way is the liability of the surety affected by payments made by the principal; must the creditor look to the proprietary securities provided by the principal before calling upon the surety as a secondary obligor to perform the guaranteed obligation; what are the rights of the surety in such proprietary security; and how is the liability of the surety affected by dealings between the creditor and the principal.<sup>17</sup>

While each of these issues present unique and challenging questions, this paper focuses on the last example question, namely how the liability of the surety may be affected by dealings between the creditor and the principal. To answer this question, it is important to have an understanding of the legal status of sureties.

## PART II - SURETYSHIP AND MATERIAL VARIATIONS

### II.I Sureties in the Eyes of the Law

In contrast to the position of a principal debtor, sureties are generally considered favoured parties in the eyes of the law.<sup>18</sup> As McGuinness notes, “courts have from time to time made reference to this supposed [favoured] status where they wished to prevent creditors from taking a perceived undue advantage – the liability of the surety thereby being

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<sup>16</sup> *Canadian General Insurance Co v Dube Ready-Mix Ltd*, 52 NBR (2d) 66 at 70, [1984] NBJ No 50 (NBCA).

<sup>17</sup> *McGuinness*, *supra* note 2 at 3.

<sup>18</sup> *Ibid* at 922.

trimmed to the level which the court perceived to be acceptable.”<sup>19</sup> This approach and treatment of sureties is undeniably rooted in long-standing policy concerns designed to ensure that sureties are afforded appropriate protections when facilitating lending transactions.<sup>20</sup> For example, most institutional lenders, franchisors, and other creditors with significant market power tend to use standard form contracts when accepting guarantees. These contracts, sometimes referred to as “contracts of adhesion,” limit the ability of prospective sureties to meaningfully negotiate and underscore the power imbalance that often exists in the creditor-surety relationship.<sup>21</sup> Enhancing this, sureties may be persons of limited sophistication and commercial expertise. However, the degree to which sureties may be perceived as favoured in law may also depend on a distinction that exists between accommodation sureties and compensated sureties.

As Justice McIntyre for the Supreme Court of Canada described in *Citadel General Assurance Company v Johns-Manville Canada*, accommodation sureties are those sureties “who have entered into their contract of surety in the expectation of little or no remuneration and for the purpose of accommodating others or of assisting others in the accomplishment of their plans.”<sup>22</sup> For instance, credit arrangements among family members may fall within this category. In respect of such arrangements, the law has taken a more vigilant approach to protecting accommodation sureties “by strictly construing their obligations and limiting them to the precise terms of the contract of surety.”<sup>23</sup> The practical implication of this approach is that any doubt or ambiguity in the guarantee is interpreted against the author of the document, in accordance with the *contra proferentem* rule.<sup>24</sup> Compensated sureties, on the other hand, are often highly sophisticated professional surety companies, which also tend to have significant experience and interests in the insurance industry.<sup>25</sup> In exchange for guaranteeing performance and payment, these sureties are compensated through a financial premium.<sup>26</sup> On these grounds, compensated sureties are generally not afforded the same beneficial treatment that accommodation sureties are said to enjoy. As Justice McIntyre went on to note, “The compensated surety cannot escape the liability found in the bond merely because of a minor variation in the guaranteed contract or because of a trivial failure to meet the bond’s conditions.”<sup>27</sup>

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<sup>19</sup> *Ibid* at 376.

<sup>20</sup> Paul M. Perell, “Discharging a Guarantee” (1994) 73 Can Bar Rev 125 [Perell].

<sup>21</sup> *McGuinness*, *supra* note 2 at 291.

<sup>22</sup> *Citadel General Assurance Company v Johns-Manville Canada Inc*, [1983] 1 SCR 513 at 521 [*Johns-Manville*].

<sup>23</sup> *Ibid*.

<sup>24</sup> *McGuinness*, *supra* note 2 at 290-291. As *McGuinness* notes, “The *contra proferentem* rule is a principle of construction which holds that the construction that should be placed upon an ambiguous document is the one which is least favourable to the person who put forward the document. It is one of the most frequently invoked defences where a claim is made under a guarantee.”

<sup>25</sup> *Ibid*.

<sup>26</sup> *Ibid* at 522.

<sup>27</sup> *Johns-Manville*, *supra* note 22 at 514.

With an understanding of the traditional treatment and status of sureties at law and the distinction that is sometimes drawn between accommodation and compensated sureties, attention can now turn to instances where a surety may be discharged from his or her obligations under a guarantee. Though there are a number of instances where this may occur, this paper is primarily concerned with the extent to which a surety may be discharged from his or her obligations following a material variation to the principal contract between the creditor and principal debtor.<sup>28</sup> For this purpose, it is necessary to look at what courts have generally considered to constitute a material variation.

## II.II Material Variations Defined

In lending arrangements between creditors and debtors, it is not uncommon for the creditor to agree to amend the original contract. Such variations may be in respect of the number of payments, the amount of each payment, the interest rate charged under the agreement, or the date for repayment of the loan.<sup>29</sup> These types of amendments are typically made once it is apparent to the creditor that the debtor may default or has defaulted under the agreement. Often, creditors agree to such compromises in an effort to facilitate repayment of the outstanding debt and to avoid commencing legal proceedings to recover the debt.<sup>30</sup> However, such variations may be considered material and, in some instances, may relieve a surety from his or her obligations under a guarantee.

In its most fundamental sense, a material variation is said to be “one that alters the business effect of the relationship, so as to vary the risk.”<sup>31</sup> Such variations may be effected by an express agreement between the creditor and principal debtor or, in the absence of such an agreement, by a failure to act in accordance with the terms set out in the principal contract.<sup>32</sup> According to McGuinness, a variation is material if it is one that a prudent and sensible person would take into consideration when entering into an agreement or transaction.<sup>33</sup> In the case of guarantees, variations to the principal contract are often presumed to be material unless they are clearly unsubstantial or beneficial to the position of the surety.<sup>34</sup> In cases where the effect of the variation is unclear, no inquiry is made into

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<sup>28</sup> Such instances may include: where a creditor delays in taking action to recover the debt; where there is an improper or inappropriate dealing with the security; where there is illegality surrounding the contract of guarantee; where a power of sale is carried out with notice to the surety; or the operation of statutory provisions. See Joseph E Roach, *The Canadian Law of Mortgages*, 2d ed (Markham: LexisNexis Canada Inc, 2010) at 499-500 [Roach].

<sup>29</sup> Roach, *supra* note 28 at 502.

<sup>30</sup> *Ibid.*

<sup>31</sup> *McGuinness*, *supra* note 2 at 924. As Lord Campbell CJ claimed in *Pybus v Gibb* (1856), 6 El & Bl 902 at 911, “Where there is a bond of suretyship for an office, and by an act of the parties or by an Act of Parliament, the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond is avoided.”

<sup>32</sup> *Ibid* at 925.

<sup>33</sup> *Ibid* at 924.

<sup>34</sup> *Ibid.*



whether the variation is material on the facts of the case.<sup>35</sup> Rather, if a lack of prejudice is not self-evident, the surety is relieved of liability.<sup>36</sup> While there is an infinite range of possible variations that may be considered material, a number of contract modifications have been recognized as material variations. Some examples include repeated renewal of a loan, an increase in the rate of interest, conversion of a loan into a revolving credit facility, exceeding a stipulated credit limit under an agreement, and altering the terms of a guaranteed lease in order to prevent the principal from carrying on the type of business initially contemplated by the parties.<sup>37</sup> With an understanding of what may constitute a material variation, we can now turn to an analysis of instances when a surety may be discharged from his or her obligations following a material variation to the principal contract. A review of jurisprudence in this area is required.

### PART III - THE LIABILITY OF SURETIES

#### **III.I The Liability of Sureties Following a Material Variation – The Rule in *Holme v Brunskill***

Courts throughout the common law world have questioned the surety's right to be discharged from his or her obligations where there has been a material variation to the principal contract. Generally speaking, the courts have held that any material variation to the terms of the principal contract made subsequent to the giving of the guarantee without the consent or approval of the surety will discharge the liability of the surety.<sup>38</sup> As Lord Loughborough stated in *Rees v Berrington*, "It is clearest and most evident equity not to carry on a transaction without the knowledge of the surety, who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him."<sup>39</sup> The terms of this rule were perhaps most notably set out in the case of *Holme v Brunskill*.<sup>40</sup> According to Lord Justice Cotton,

The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or

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<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid* at 929.

<sup>38</sup> *McGuinness*, *supra* note 2 at 922.

<sup>39</sup> *Rees v Berrington* (1795), 30 ER 765 (Ch).

<sup>40</sup> *Holme v Brunskill* (1878), 3 QBD 495 CA.

one which cannot be prejudicial to the surety, the Court... will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not consented he will be discharged.<sup>41</sup>

The rule in *Holme v Brunskill* has since been adopted and applied by Canadian courts. In *Rose v Aftenberger*,<sup>42</sup> Justice Laskin, then with the Ontario Court of Appeal, reiterated the rule as follows: “In my view, the encompassing principle to be applied is that a surety is discharged if either the principal contract to which he gave his guarantee is varied without his consent in a matter . . . not plainly unsubstantial or necessarily beneficial to the guarantor; or, if the terms of the contract of guarantee between the creditor and the surety are breached by the creditor.”<sup>43</sup>

In other words, the relationship of the surety to the creditor and principal debtor is such that it safeguards the surety’s position from being altered by an agreement between the creditor and principal debtor from that in which the surety stood at the time of the giving of the guarantee. However, in the event that a proposed variation may prejudice the position of the surety, the creditor must seek the consent of the surety in order to preserve the possibility of recourse to the surety.<sup>44</sup> For McGuinness, the consistent judicial interpretation of this rule has allowed for the scope of such a defence to be defined comprehensively.<sup>45</sup> As he notes, “[I]t has been held . . . that a surety is entitled to a discharge even where the variation in the contract has not been acted upon.”<sup>46</sup> Further, he claims that proof of actual or certain prejudice to the surety is not required and that a surety may be discharged of his or her obligations so long as there is a potential for prejudice.<sup>47</sup> As one may glean from the rule in *Holme v Brunskill* and its subsequent adoption in Canada, the Canadian judicial system has, consistent with the policy concerns discussed above, taken a vigilant approach to safeguarding the position of sureties. As a result, sureties have been discharged from their obligations in a number of instances. Some examples include where a creditor has allowed the debtor to make payments via installment rather than upon maturity, where a creditor has agreed to renew the principal contract, where a creditor has stayed the execution of a judgment without the consent of a surety, and where a creditor has increased the interest rate in exchange for extending the term of a loan.<sup>48</sup> In this way, a surety may be absolutely discharged if the contract between the creditor and the principal debtor is varied

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<sup>41</sup> *Ibid* at 505-506.

<sup>42</sup> *Rose v Aftenberger*, [1969] OJ No 1496, [1970] 1 OR 547, 9 DLR (3d) 42 (Ont CA).

<sup>43</sup> *Ibid* at para 19. See also *Holland-Canada Mortgage Co v Hutchings*, [1936] SCR 165 at 172.

<sup>44</sup> *McGuinness*, *supra* note 2 at 923.

<sup>45</sup> *Ibid*.

<sup>46</sup> *Ibid*.

<sup>47</sup> *Ibid*. See also *Pioneer Trust v 220263 Alberta Ltd*, [1989] AJ No 56, 42 BLR 266 at 277 (Alta QB).

<sup>48</sup> E Jane Murray, “Protecting the Guarantee after it is Signed” (Paper delivered at the 4h Annual Solicitor’s Conference, County of Carleton Law Association, 1996 [unpublished]).

or amended unless “without inquiry it is self-evident that the change is unsubstantial or not harmful to the surety,” or “the surety has consented to the change.”<sup>49</sup> Additionally, given that the obligations created under a guarantee are of a contractual nature, it is possible for sureties to contract out of the protections provided by the common law or equity.<sup>50</sup> Despite this, Canadian jurisprudence has inconsistently interpreted such agreements, particularly on the issue of whether a surety ought to be discharged of his or her obligations. This discrepancy is particularly evident when one examines the Supreme Court of Canada’s decision in *Manulife Bank of Canada v Conlin* and the subsequent decision of the Ontario Court of Appeal in *Bank of Montreal v Negin*.

### III.II *Manulife Bank of Canada v Conlin* – The Pinnacle for Sureties

The decision in *Conlin* marked an important point in the law of guarantee and, more specifically, the treatment of sureties following a material variation in a principal contract. As Jeffrey Lem noted in the last sentence of his annotation of *Montreal Trust Co of Canada v Birmingham Lodge Ltd*, “*Conlin* is on its way to the Supreme Court of Canada. The lending bar waits with bated breath.”<sup>51</sup> Although a complete review of the case is set out in the dissenting opinion of Justice Iacobucci, a brief review of the facts in *Conlin* is helpful in this analysis.

The case arose out of a mortgage loan made by Manulife Bank of Canada (the creditor) to Dina Conlin (the principal debtor) in the amount of \$275,000.<sup>52</sup> Initially, the loan was made for a three-year term and bore an annual interest rate of 11.5 per cent.<sup>53</sup> Dina Conlin provided security for the loan in the form of a first mortgage against lands located in Welland, Ontario.<sup>54</sup> In addition, in order to obtain the loan, two guarantees were required as additional security, one from Dina Conlin’s husband and the other from a limited company.<sup>55</sup> According to the guarantee’s terms, the guarantee was to remain binding “notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon.”<sup>56</sup> Furthermore, the liability of the sureties was to be continuous, subsisting “until payment in full of the principal sum and all other moneys hereby secured.”<sup>57</sup>

In 1990, prior to the maturity of the mortgage, Dina Conlin and the creditor renewed the mortgage for an additional three-year term at an increased interest rate of 13

<sup>49</sup> *Perell*, *supra* note 20 at 132.

<sup>50</sup> *Bauer v Bank of Montreal*, [1980] 2 SCR 102 at 107.

<sup>51</sup> Jeffrey Lem, annotation of *Montreal Trust Co of Canada v Birmingham Lodge Ltd* (1995), 46 RPR (2d) 153.

<sup>52</sup> *Manulife Bank of Canada v Conlin*, [1996] 3 SCR 415 at para 49 [*Conlin*].

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid* at para 51. For complete excerpts from the guarantee, see paragraph 56 of the decision.

<sup>57</sup> *Ibid.*

per cent per annum.<sup>58</sup> Although the renewal form provided spaces for the signatures of both the registered owner and the sureties, only Dina Conlin signed the agreement.<sup>59</sup> Her husband, from whom she had separated in 1989, was not provided any notice, nor did he have any knowledge of the mortgage renewal.<sup>60</sup> In 1992, Dina Conlin defaulted on the mortgage, and the creditor sought to recover.<sup>61</sup>

At trial, the judge found that according to the “clear and unequivocal language” of clauses 7 and 34 (respecting Renewals or Extensions of Time and Guarantee and Indemnity, respectively), Conlin’s husband was liable under his guarantee despite the renewal of the mortgage and the increase in the interest rate.<sup>62</sup> However, in a two-to-one majority ruling, the Ontario Court of Appeal overturned the decision of the trial judge and released the husband from his obligations under the guarantee.<sup>63</sup> Both majority opinions found that the renewal of the mortgage constituted a material variation of the original contract, which had the effect of extinguishing the sureties’ liability and could not be saved by the guarantee and indemnity clauses in the agreements.<sup>64</sup> In accordance with the *contra proferentem* rule, the court held that the clause was to be construed narrowly against the creditor.<sup>65</sup> Under this approach, the court found that the language in the guarantee clause did not clearly contemplate the renewal agreement. As a result, the material variation to the loan, effected through the renewal agreement, released the sureties from their respective obligations.<sup>66</sup> While both majority opinions stressed the notion that the guarantee ought to be strictly interpreted against the creditor, they also placed particular emphasis on the favoured treatment traditionally afforded to sureties at law.<sup>67</sup> The decision was subsequently appealed to the Supreme Court of Canada.

In a four-to-three split decision, the Supreme Court of Canada found that the sureties were released from their obligations upon the renewal of the mortgage loan and affirmed the notion that a material variation to a principal contract alters the surety’s risk and extinguishes liability in the absence of consent.<sup>68</sup> Writing for the majority, Justice Cory agreed with McGuinness and held that to allow unilateral variations by “the principal and creditor would amount to a radical departure from the principles of consensus and voluntary assumption of duty that form the basis of the law of contract.”<sup>69</sup> However, as some have

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<sup>58</sup> *Ibid* at para 50.

<sup>59</sup> *Ibid* at para 53.

<sup>60</sup> *Ibid*.

<sup>61</sup> *Ibid* at para 55.

<sup>62</sup> *Ibid* at para 57.

<sup>63</sup> *Ibid* at para 59.

<sup>64</sup> *Ibid*.

<sup>65</sup> *Ibid* at para 60. It should be noted that the *contra proferentem* rule was not invoked by Finlayson JA, but was referred to by Carthy JA in the majority opinions.

<sup>66</sup> *Ibid*.

<sup>67</sup> *Ibid* at paras 58-61.

<sup>68</sup> *Ibid* at para 32.

<sup>69</sup> *Ibid* at para 3.

argued, “the Supreme Court of Canada’s judgment in [*Conlin*] may represent the high water mark of judicial indulgence for [sureties] in mortgage proceedings.”<sup>70</sup>

In rendering the judgment, Justice Cory reiterated the rule in *Holme v Brunskill* as follows: “It has long been clear that a [surety] will be released from liability on the guarantee in circumstances where the creditor and the principal debtor agree to a material alteration of the terms of the contract of debt without the consent of the [surety].”<sup>71</sup> In addition, Justice Cory affirmed the principle in *Bauer v Bank of Montreal* that parties may contract out of the protections traditionally afforded to sureties.<sup>72</sup> However, the majority also drew upon the principle that sureties are “favoured creditors in the eyes of the law whose obligation should be strictly examined and strictly enforced.”<sup>73</sup> While the majority did not invoke the *contra proferentem* rule, it agreed with the Ontario Court of Appeal’s position in *Conlin* that the language of contracting out provisions must be clear and construed narrowly.<sup>74</sup> On these grounds, the majority held that the language in the documents did not contain the necessary clarity.

In particular, the majority found a distinction between renewals and extensions of contract. In reviewing the documents and arrangements at bar, the majority found that the agreement varying the principal contract was a renewal and not an extension.<sup>75</sup> Applying this to the facts of the case, the majority found that since the guarantee provision failed to provide for the continuing liability of the surety in the event of a renewal, the surety could not have contracted out his rights and was thus relieved of his obligations.<sup>76</sup> Although the majority espoused the importance of the *contra proferentem* rule, it did not resort to it as Justice Cory held that the clauses in the guarantee “unambiguously [indicated] that the [surety] was not bound by the renewal.”<sup>77</sup>

In addition to the strict interpretation of the guarantee provisions, the majority made two other observations that it considered significant. First, the majority recognized the distinction between accommodation and compensated sureties, and noted that the sureties “in this case [came] within the class of accommodation sureties.”<sup>78</sup> As the majority went on to note, “[I]t follows that if there is a doubt or ambiguity as to the construction or meaning of the clauses binding the [surety] in this case, they must be strictly interpreted and resolved in favour of the surety.”<sup>79</sup> Second, in *obiter*, the majority commented on the fact that the renewal agreement contained a signature line for the surety, but that no signature had been

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<sup>70</sup> Peter Devonshire, “The Liability of Original Mortgagors and Sureties Upon Default by a Mortgagor by Assumption” (2006) 39 UBCL Rev 195 [*Devonshire*].

<sup>71</sup> *Supra* note 52 at para 2.

<sup>72</sup> *Ibid* at para 4.

<sup>73</sup> *Ibid* at para 10.

<sup>74</sup> *Ibid* at para 5.

<sup>75</sup> *Ibid* at para 26.

<sup>76</sup> *Ibid*.

<sup>77</sup> *Ibid* at para 18.

<sup>78</sup> *Ibid* at para 14.

<sup>79</sup> *Ibid* at para 15.

obtained.<sup>80</sup> This, as Justice Cory theorized, was a clear indication that the surety was expected to sign and consent to the renewal.<sup>81</sup> Justice Cory went on to note that had a signature been obtained, this would have been an indication of both notice and consent to the renewal.

Interestingly, Justice Iacobucci, writing for the dissent, agreed with a number of the principles outlined by the majority. Most notably, he agreed with the principle set out in *Holme v Brunskill* that “any material variation of the terms of a contract between debtor and creditor, which is prejudicial to the [surety] and which is made without the [surety’s] consent, will discharge the [surety].”<sup>82</sup> As he noted, “[A]n increase in the rate of interest and an extension of the time for payment are both material changes to the loan agreement sufficient to discharge a surety.”<sup>83</sup> Additionally, Justice Iacobucci recognized that the surety may waive his or her right to be discharged as a result of a material variation to a principal contract.<sup>84</sup> However, the dissent disagreed with the majority on the interpretation of the guarantee.

According to Justice Iacobucci, “there is no special rule of construction for guarantees. Guarantee contracts are basically contracts, like any others, and should be construed according to the ordinary rules of contractual interpretation.”<sup>85</sup> Instead, the primary rule, as he noted, was that the court should give effect to the intentions of parties as expressed in their written document.<sup>86</sup> While he held that the *contra preferentem* rule may be applied where there is ambiguity within a guarantee, he claimed that it is an interpretive rule of last resort, only to be used when all other means of ascertaining the intentions of parties have failed.<sup>87</sup> Applying this approach to the interpretation of the guarantee, he was not persuaded by the surety’s argument that a renewal is not the same thing as giving time for payment.<sup>88</sup> Instead, he found that “the plain ordinary meaning of the words, the giving of time for payment . . . or the varying of the terms of payment [encompassed] the renewal agreement and, on these grounds, would have held the surety liable under his guarantee.”<sup>89</sup>

Following the decision in *Conlin*, there was much controversy and concern in the lending bar.<sup>90</sup> Specifically, lenders, commentators, and lending practitioners worried that courts would subsequently be less willing to uphold standard form guarantees and material variations to principal contracts. As Professor Reuben Rosenblatt wrote in response to the decision:

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<sup>80</sup> *Ibid* at para 17.

<sup>81</sup> *Ibid* at para 23.

<sup>82</sup> *Ibid* at para 76.

<sup>83</sup> *Ibid*.

<sup>84</sup> *Ibid* at para 77.

<sup>85</sup> *Ibid* at para 78.

<sup>86</sup> *Ibid* at para 79.

<sup>87</sup> *Ibid* at para 80.

<sup>88</sup> *Ibid* at paras 89-90.

<sup>89</sup> *Ibid* at para 90.

<sup>90</sup> Reuben M Rosenblatt, “Manulife Bank of Canada v Conlin” (1997) 6 RPR (3d) 65 at 66 [Rosenblatt].

Lenders will amend their standard form of guarantee to ensure that the words “vary, increase or decrease” are used in addition to the words “alter the terms.” Lenders will make sure that whenever they use the word “successor” they will also add the word “assigns.” Lenders will amend the standard forms to ensure that whenever they use the word “extension,” they will add the term “renewal.”<sup>91</sup>

While many lenders modified their agreements to reflect such changes in the wake of *Conlin*, the effect of the decision has not been as problematic as initially anticipated. As noted by Gerald Ranking, former chair of Fasken Martineau DuMoulin’s litigation department in Ontario, “[R]ather than relieving [sureties] of their obligations, *Conlin* has become a legal impediment which courts have consistently, if not gracefully, avoided in order to find in favour of lenders.”<sup>92</sup> In fact, “[M]ost decisions since [*Conlin*] have distinguished the Supreme Court of Canada’s judgment on the ground that later agreements have not been prone to the same inconsistencies.”<sup>93</sup> A key example of this is the Ontario Court of Appeal’s decision in *Bank of Montreal v Negin*.

### III.III *Bank of Montreal v Negin* – A Retreat from *Conlin*

The *Negin* decision was delivered less than two months after *Conlin*. In fact, the Court reserved its judgment and waited for the reasons of the Supreme Court of Canada before delivering its final decision.<sup>94</sup> The appeal in *Negin* concerned summary judgments obtained against both mortgagors and sureties. In particular, the case concerned two brothers who “each signed a mortgage with the plaintiff bank, and each brother signed the other’s mortgage as a [surety].”<sup>95</sup> On appeal, one of the brothers argued that he was discharged as surety because the plaintiff bank renewed the mortgage without his consent.<sup>96</sup> The mortgage was renewed for a period of six months beyond its original maturity date, while the rate of interest was reduced from 13.5 per cent to 5.75 per cent.<sup>97</sup>

In dismissing the appeal, Justice McKinlay held that distinct from *Conlin*, the terms of the guarantee were unambiguous and that the provisions concerning amendments and extensions were contained within the guarantee clause.<sup>98</sup> Similar to *Conlin*, the guarantee

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<sup>91</sup> *Ibid* at 68.

<sup>92</sup> Gerald LR Ranking, “Recent Developments in the Law of Guarantees” in Guarantees and (Near-Guarantees) quoted in Kelley M McKinnon and Melissa MacKewn, “Drafting and Enforcement of Guarantees: A Practical Guide” (2001) KERN RP 007.

<sup>93</sup> *Devonshire*, *supra* note 70 at 196.

<sup>94</sup> *Bank of Montreal v Negin* (1996), 31 OR (3d) 321, [Negin].

<sup>95</sup> *Ibid*.

<sup>96</sup> *Ibid*.

<sup>97</sup> *Ibid*.

<sup>98</sup> *Ibid*.

provision contemplated an extension of time, but not a renewal.<sup>99</sup> However, Justice McKinlay did not distinguish between renewals and extensions and instead noted, “[T]he most compelling words, in my view, are those which state that the liability of the [surety] ‘shall continue and be binding on the [surety], and as well after as before default and after as before maturity of this mortgage, until the said mortgage moneys are fully paid and satisfied.’”<sup>100</sup> Interestingly, this language bears close resemblance to the guarantee in *Conlin*, which included a “continuous liability [that] shall subsist until payment in full of the principal sum and all other moneys hereby secured.”<sup>101</sup> Despite this, Justice McKinlay went on to summarize, the surety “has covenanted to pay the full amount owing on the mortgage after as well as before default, and those moneys have not been paid.”<sup>102</sup> Additionally, it should be noted that Justice McKinlay claimed that the surety in *Negin* could not be classified as an accommodation surety. Rather, as he remarked, “[E]ach brother guaranteed a mortgage of the other. Each did so knowing that he would be liable on the mortgage of the other until all amounts owing were paid.”<sup>103</sup> Presumably, the fact that each brother stood as surety for the other in furtherance of the loans represented some material benefit sufficient to bring them beyond the scope of an accommodation surety.

The reasoning employed by Justice McKinlay appears to resemble that of the dissent in *Conlin*, but it is difficult to reconcile the Ontario Court of Appeal’s decision with that of the Supreme Court of Canada. While Peter Devonshire, Professor of Law at the University of Auckland, notes that “the guarantee clause in *Negin* strengthened the creditor’s position to the extent that liability was deemed to continue after maturity,” he questions “whether in the overall scheme this is a truly substantive difference warranting a departure from [*Conlin*].”<sup>104</sup> Instead, Devonshire submits that the result in *Negin* may have been driven by broader policy concerns, particularly the court’s reluctance to bring into question the strength of guarantees in commercial arrangements.<sup>105</sup> Similarly, Professor Rosenblatt questions the extent to which these decisions can be reconciled.<sup>106</sup> For him, the main distinguishing factors are that the renewal term was considerably shorter in *Negin* (six months instead of three years), and the interest rate was reduced not increased.<sup>107</sup> As such, it could be argued that the material variation of the principal contract in *Negin* did not produce a sufficiently adverse impact on the surety’s risk to warrant a complete discharge of the obligations under the guarantee.

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<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> *Conlin*, *supra* note 52 at para 17.

<sup>102</sup> *Negin*, *supra* note 94.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Devonshire*, *supra* note 70 at 196.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Rosenblatt*, *supra* note 90 at 69.

<sup>107</sup> *Ibid.*



Despite the undeniable difficulties in trying to reconcile the decisions in *Conlin* and *Negin*, it appears that the reasoning of the majority in *Conlin* has not persuaded subsequent decisions of the Ontario Court of Appeal nor those of the lower courts. Many courts have agreed with *Conlin*'s statement of the law, namely that: (i) a surety will be released from his or her obligations under a guarantee where the creditor and principal debtor have agreed to a material variation of the principal contract without the consent of the surety, and (ii) that a surety can contract out of the protections afforded by the common law or equity provided that such language is clear and unambiguous. As in *Negin*, however, most courts have distinguished *Conlin* on the grounds that subsequent guarantees have not been prone to the same inconsistencies.<sup>108</sup> This is particularly evident in the recent judgment of the Ontario Court of Appeal in *Royal Bank of Canada v Samson Management & Solutions*.<sup>109</sup>

### **III.IV *Royal Bank of Canada v Samson Management & Solutions* – Continued Retreat from *Conlin***

The Ontario Court of Appeal's decision in *Samson* was released on May 13, 2013. The appeal concerned the enforceability of a standard form bank guarantee.<sup>110</sup> The facts of the case are as follows.

In 2005, Ms. Cusack and her husband, Mr. Brasseur, provided continuing guarantees for the indebtedness of Mr. Brasseur's business, Samson, to the Royal Bank of Canada ("RBC") for \$150,000.<sup>111</sup> In 2006, RBC agreed to increase the limit on Samson's line of credit to a maximum of \$250,000.<sup>112</sup> In furtherance of the limit increase, Ms. Cusack and Mr. Brasseur each provided fresh personal guarantees for \$250,000 to RBC.<sup>113</sup> Subsequently, the amount covered by the loan agreement was increased on two occasions—to \$500,000 in 2008 and to \$750,000 in 2009.<sup>114</sup> Although RBC received new personal guarantees from Mr. Brasseur in respect of each increase, it did not request new guarantees from Ms. Cusack.<sup>115</sup> In 2011, Samson failed, and RBC made demands on Mr. Brasseur and Ms. Cusack under their personal guarantees, namely his 2009 guarantee and her 2006 guarantee.<sup>116</sup> While the motion judge granted summary judgment to RBC against Samson and Mr. Brasseur on his personal guarantee, he refused to grant RBC summary judgment against Ms. Cusack and, instead, granted her summary judgment on her cross-

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<sup>108</sup> See for example: *AGF Trust Co v Muhammad* (2005), 73 OR (3d), 95 OAC 230; *Riley v Investors Group Trust Co* [1999] OJ No 314 (Ont Ct Gen Div); *Royal Trust Corp of Canada v 502759 Ontario Ltd* [1998] OJ No 1897, 17 RPR (3d) 260 (Ont Ct Gen Div); *Laurentian Bank of Canada v 755253 Ontario Ltd* [1997] OJ No 3926, 13 RPR (3d) 23 (Ont Ct Gen Div).

<sup>109</sup> *Royal Bank of Canada v Samson Management & Solutions Ltd*, 2013 ONCA 313 [Samson].

<sup>110</sup> *Ibid* at para 1.

<sup>111</sup> *Ibid* at para 3.

<sup>112</sup> *Ibid* at para 4.

<sup>113</sup> *Ibid*.

<sup>114</sup> *Ibid* at paras 7-8.

<sup>115</sup> *Ibid*.

<sup>116</sup> *Ibid* at para 10.

motion to dismiss RBC's action against her.<sup>117</sup> Following this, RBC appealed to the Ontario Court of Appeal and, as Justice Lauwers noted, "[T]here is a single issue in this case . . . Did Ms. Cusack contract out of the protection provided to a [surety] by the common law or equity?"<sup>118</sup>

Like in other decisions since *Negin*, the Court of Appeal recognized that the basic governing law was set out in *Conlin*.<sup>119</sup> In a parallel fashion, the Court of Appeal laid out the long-standing legal principle in *Holme v Brunskill*, but also noted that under *Conlin* a surety can contract out of the protection provided by the common law or equity.<sup>120</sup> In the end, however, *Conlin* was distinguished from the facts at bar "as a case not involving a continuing guarantee, where the wording of the guarantee did not create a prior consent for subsequent prejudicial actions."<sup>121</sup>

In conducting its analysis, the Court of Appeal agreed with the motion judge that there had been material variations in the loan arrangements made between RBC and Samson about which Ms. Cusack had not been consulted and that increased her risk, even though her financial exposure was capped at \$250,000.<sup>122</sup> The court noted that these variations would have discharged Ms. Cusack from liability under the guarantee in the absence of either her consent or clear language. The court also claimed that the motion judge erred by failing to interpret the language of the guarantee in order to determine whether Ms. Cusack had contracted out of her right to be notified of such variations.<sup>123</sup>

Looking at the guarantee in the context of the transaction as a whole, the court found that the language of the guarantee was broad and plainly designed to ensure that the surety contracted out of the ordinary protections afforded under the common law and equity.<sup>124</sup> More specifically, the Court found that certain excerpts from provisions in the guarantee indicated that Ms. Cusack had contracted out of her right to be notified of any variations. The excerpts that the Court placed particular emphasis on are as follows.

The first paragraph of the guarantee provided that Ms. Cusack would pay on demand to RBC "all debts and liabilities, present or future, direct or indirect, absolute or contingent, mature or not, at any time owing by . . ." Samson to RBC "or remaining unpaid by the customer to the Bank, heretofore or hereafter incurred or arising and . . . incurred by or arising from agreement or dealings between the Bank and the customer . . ."<sup>125</sup> This

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<sup>117</sup> *Ibid* at para 1.

<sup>118</sup> *Ibid* at para 15.

<sup>119</sup> *Ibid* at para 16.

<sup>120</sup> *Ibid* at paras 16-17.

<sup>121</sup> *Ibid* at para 39. See also Jim Shanks, "Appeal Court Favours Certainty, Efficiency in Guarantee Case", *Canadian Lawyer* (16 September 2013) online: *Canadian Lawyer* <<http://www.canadianlawyermag.com/4812/Appeal-court-favours-certainty-efficiency-in-guarantee-case.html>>.

<sup>122</sup> *Ibid* at para 19.

<sup>123</sup> *Ibid* at paras 20-21.

<sup>124</sup> *Ibid* at para 23.

<sup>125</sup> *Ibid* at para 24.

provision, as the Court noted, “[made] it clear that RBC could increase the amount of its loan to Samson and Ms. Cusack would remain liable under the guarantee.”<sup>126</sup> According to the Court, this was reinforced by the fact that a letter of independent legal advice, acknowledged by Ms. Cusack, stated that the guarantee was “for the purpose of securing the liabilities, whether past, present or future, of Samson.”<sup>127</sup> In addition, the Court noted that the continuing obligation of Ms. Cusack was clearly expressed in clause two, which provided: “This guarantee shall be a continuing guarantee and shall cover all the liabilities, and it shall apply to and secure any ultimate balance due or remaining unpaid to the Bank.”<sup>128</sup>

Lastly, the Court found that various clauses throughout the guarantee expressly permitted RBC to take actions that might or would otherwise be material variations affecting the enforceability of the guarantee at common law or equity, such as extending time for payment, renewing the loan arrangements, increasing the interest rate, changing the maturity date of any loan, and introducing new terms and conditions to the borrowing.<sup>129</sup>

On the basis of the language included in the guarantee, the Court went on to find that Ms. Cusack had contracted out of the protection provided by the common law and equity and was therefore liable under the guarantee. According to the Court, “[Ms. Cusack] knew and accepted that Samson’s indebtedness to RBC could increase in the future even though her guarantee was limited.”<sup>130</sup> While the Court acknowledged that the subsequent increases in the credit facility were material variations to the principal loan contract, it held that these variations were contemplated by the parties and permitted under the guarantee.<sup>131</sup> Consequently, despite the material variations in the underlying loan arrangements, Ms. Cusack’s personal guarantee remained enforceable given the clear and unambiguous language of the guarantee and the factual context.<sup>132</sup>

The Court of Appeal’s decision in *Samson* reflects the emphasis courts have placed on the notion that transacting parties “are entitled to make their own arrangements and [that] a [surety’s] decision to contract out of the protection provided by the common law or equity will usually be respected by the courts[.]”<sup>133</sup> Furthermore, the decision stands as a key example of the continuing preference of lower courts to distinguish cases from the Supreme Court of Canada’s ruling in *Conlin*. As some lending practitioners have argued, the decision in *Samson* is a clear indication that the long-established case law upholding the

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<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid* at para 25.

<sup>130</sup> *Ibid* at para 60.

<sup>131</sup> *Ibid* at paras 63-64.

<sup>132</sup> *Ibid* at para 64.

<sup>133</sup> *Ibid* at para 61.

validity and enforceability of guarantees remains intact.<sup>134</sup> Though it may be argued that *Samson* involved a continuing guarantee that sufficiently distinguished it from *Conlin*, it is arguable that the guarantee in *Conlin* possessed similar continuing language as evidenced by the analysis above. Nonetheless, the decision represents the continued commitment of the courts to promote legal certainty and uphold the validity and enforceability of guarantees and their role in facilitating the extension of credit. In fact, it should be noted that the decision in *Samson* marks the second time in 2013 that the Ontario Court of Appeal “has enforced the provisions of a ‘plain-vanilla standard form bank guarantee’ in the context of a business loan.”<sup>135</sup> It is also important to note that the Supreme Court of Canada recently dismissed the leave to appeal application in *Samson* in November 2013.<sup>136</sup> Taken together, these decisions, combined with those following *Conlin* and *Negin*, suggest that in guarantee transactions courts are, for the most part, reluctant to intervene and afford sureties the traditionally favoured status that they have enjoyed at law.

Despite the legal certainty promoted by *Samson*, lenders and lending practitioners would be well advised to continue to consult and seek the consent of sureties when contemplating material variations to loan arrangements. As many of these cases, including *Samson*, emphasize the language used in the actual guarantee, it is also prudent for lenders to examine their lending documentation and make any necessary revisions so as to ensure that “the contracting-out language is clear and unambiguous.”<sup>137</sup> As lawyer Stephen Gillespie remarked in his paper for the Law Society of Upper Canada,

The only foolproof method of ensuring that a surety will be bound by a guarantee in the face of circumstances that would give rise to a defence is to obtain the consent of the surety. This should always be done when circumstances arise which may give rise to a defence, regardless of how comprehensive the language of the guarantee may be and even if it is not clear that a defence will be available to the surety.<sup>138</sup>

That being said, lenders may take some comfort in the fact that the risk of failing to do so may be somewhat lessened as courts show a clear preference for upholding and enforcing

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<sup>134</sup> Stephen J. Redican, Angela Vivolo & Jenna Grant, “Lenders can Breathe a Sigh of Relief as the Law of Guarantees Remains Unchanged” Borden Ladner Gervais Financial Services Client Update (May 2013), online: BLG <[http://www.blg.com/en/NewsAndPublications/Documents/Publication\\_3371.pdf](http://www.blg.com/en/NewsAndPublications/Documents/Publication_3371.pdf)>.

<sup>135</sup> *Ibid.* See *Fifth Third Bank v MPI Packaging Inc*, 2013 ONCA 5.

<sup>136</sup> Stephen J. Redican & Jenna Grant, “Supreme Court of Canada provides Comfort on the Law of Guarantees” Borden Ladner Gervais News & Publications (19 November 2013), online: BLG <[http://www.blg.com/en/newsandpublications/publication\\_3571](http://www.blg.com/en/newsandpublications/publication_3571)>.

<sup>137</sup> *Ibid.*

<sup>138</sup> Stephen Gillespie, “Avoiding Inadvertent Release of Guarantors”, *Guarantees (and Near-Guarantees): Materials for the program chaired by John Kelly*, The Law Society of Upper Canada, Department of Continuing Education, November 1999, at 2-37.

well-crafted guarantees. Ultimately, whether the legal certainty espoused by *Samson* and similar decisions will continue into the future remains to be seen.

#### PART IV: CONCLUSION

Guarantees play an important role in facilitating the extension and free flow of credit in contemporary commerce. In fact, guarantees are among the most common forms of security used in commercial lending arrangements. Historically, the law has recognized the unique contingent nature of the liability assumed by sureties and, as a result, has treated them as favoured parties in lending arrangements. This is particularly true in the event of a material variation to the principal contract between a creditor and principal debtor. In such instances, courts have traditionally held that any material variation of the terms of a contract between the creditor and debtor, which is prejudicial to the surety and is made without the surety's consent, will relieve the surety of his or her obligations under the guarantee.

The Supreme Court of Canada affirmed this long-standing principle in *Conlin*, where the Court discharged a surety following a material variation to the principal contract to which the surety had not consented. However, despite this ruling, the Ontario Court of Appeal in *Negin*, a case with very similar facts to those in *Conlin*, held that the guarantee clearly and unambiguously waived the surety's rights and protections under the common law and equity. On these grounds, the Court of Appeal upheld the guarantee and held the surety liable. Intriguingly, similar to *Negin*, most Ontario decisions since *Conlin* have distinguished the Supreme Court of Canada's judgment on the grounds that later guarantees have not been prone to the same inconsistencies. This is particularly true when one considers the Ontario Court of Appeal's recent decision in *Samson*, where the Court distinguished the case from that in *Conlin* and held the surety liable under her guarantee.

While it is undeniably difficult to reconcile these decisions, a few conclusions can be drawn. First, the course of jurisprudence in Ontario makes clear that courts have a preference for legal certainty in lending arrangements involving guarantees and are reluctant to intervene where transacting parties have agreed to contract out of the protections afforded by the common law or equity. Second, the decision in *Conlin* may represent the high point of judicial indulgence for sureties in lending arrangements as the subsequent case law questions the extent to which sureties may still enjoy favoured status at law. Third, and perhaps most notably, the decisions signal the importance of well-drafted guarantees. Ultimately, while lenders may take some comfort in the trajectory that jurisprudence in Ontario has taken since *Conlin*, it remains to be seen whether this commitment to legal certainty will be long lasting. As a result, despite the current preference for courts to respect and uphold guarantees, it remains highly advisable for lenders to seek out and obtain the consent of sureties when contemplating material variations to their loan arrangements.