



# LOSS PREVENTION BULLETIN

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## BULLETIN #71

### INDEPENDENT LEGAL ADVICE: A RESPONSE

To The Editor:

I am writing in response to your request for comments on the articles appearing in the Loss Prevention Bulletin #65, Issue No. 16, December 1996. My comments relate to the article by Jim B. Rooney, Q.C. entitled "Competent Independent Legal Advice".

There is no doubt that the standards required of providers of independent legal advice continue to rise as Mr. Rooney suggests. But I think Mr. Rooney's article may shift the standards higher than they actually are and higher than they can realistically be for practitioners giving independent legal advice. Does a lawyer have to go beyond the usual explanation of the nature and effect of documents when giving ILA? Is a lawyer required to go into the *wisdom* of the transaction by getting into the "background and legal merits of the agreement"?

In his seminal article *Independent Legal Advice - A Practical Guide*, (1995) 49 R.P.R. (2d) 49, Brian Bucknall indicates that a lawyer is required to explain the nature and effect of a mortgage, including any special obligations. The aim is to avoid or defeat future defences based on *non est factum*. However, Mr. Bucknall appears to recognize the practical restrictions on giving ILA for the modest fee it usually commands. A lawyer who explores the wisdom of the transaction or suggests improvements to the proposed transaction is exceeding the usual standards. In such cases Mr. Bucknall suggests that the lawyer should open a separate file and embark on a full explanation of the transaction and charge the client accordingly.

In *Fasciani v. Banca Commerciale Italiana of Canada et al.*, [1996] O.J. No. 2631 (Ont. Gen. Div.). Mr. Justice Pitt said:

"Lawyers giving independent legal advice simply explain to prospective mortgagors the legal responsibilities and liabilities arising from the execution of the mortgage. They do not give business advice."

Similarly, in *Banco Exterior v. Thomas*, [1997] All ER 46 (C.A.) the court said of a widow who agreed to mortgage her house in return for a promise of a monthly income from a used car salesman:

"It was the bank's business to make sure that she knew what she was doing. So the Bank required her to go to an independent solicitor to be advised about the 'nature and effect' of the transaction and in whose presence, if so advised, sign the documents. Mrs. Ramsey did so."

Based on these authorities it appears that the extent of a lawyer's obligation in giving ILA is not as stringent as Mr. Rooney suggest. The practicalities demand a more realistic standard. I am concerned that Mr. Rooney's well-intentioned article may be

misconstrued and will result in unwarranted claims against lawyers giving independent legal advice.

Yours very truly,

GARDINER, ROBERTS

William S. O'Hara

**Jim B. Rooney Q.C., will comment on the foregoing in the next issue.**

## BULLETIN #72

### ADVISING THE GUARANTOR

*The following summary is from The Lawyers Weekly, February 21, 1997.*

#### **NEGLIGENCE - Duty of care - Solicitor liable for failure to explain consequences of personal guarantee to client.**

Client sought damages against his lawyer for his failure to advise him of all legal issues surrounding the purchase and financing of a hotel. In 1984, client purchased hotel for \$730,000. Client put up five quarters of his farm to secure \$230,000 of a loan, and bank provided remainder of the financing. Client also signed a personal guarantee. He understood that if the hotel venture failed he would only lose the farm land. Lawyer did not properly explain the personal guarantee to client. Under guarantee, client was responsible for all debts of hotel. Accordingly, when the hotel failed the bank sued client for \$520,000. Lawyer had no notes or memos regarding his discussions with client.

**HELD:** action allowed. Lawyer had a duty to client to fully explain the personal guarantee in such a way that client understood the nature, effect and significance of the document. Lawyer failed to carry out his obligation. The evidence disclosed that client would never have proceeded with purchase of hotel if he had known that he could be personally liable for all the debts. He had no knowledge whatsoever that he could be personally responsible for more than just his land.

*Couture v. Lamontagne, Sask. Q.B., Blacklock Linn J., Dec. 9/96.*

There is nothing surprising in this finding if, indeed, the lawyer failed to give proper explanations. Regrettably, there is nothing surprising even if there was some doubt as to what the lawyer advised, in light of the lawyer's failure to make notes or memos.

On the reverse of this Bulletin is a **Checklist for Completing a Guaranty**. Had the lawyer in question followed such a checklist, the result may have been different. In addition to following the checklist, an even better practice would include copying it, making notes on it when advising the guarantor, and keeping the noted checklist in the file.

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## **CHECKLIST FOR COMPLETING A GUARANTEE**

### **1. IS THERE A CONFLICT?**

- Ask the guarantor who is acting for the lender. (If you are acting for the lender, you should not advise the guarantor. Some lenders insist on independent advice.) If a conflict send client to another lawyer.

### **2. DO YOU KNOW THE PROPOSED GUARANTOR?**

- Check I.D.
- Can he/she understand English
- Can he/she read
- Is he/she competent.

### **3. IS THE FORM COMPLETED IN ALL RESPECTS?**

- If not, get it completed before execution.

### **4. DOES THE GUARANTOR HAVE ANY MISUNDERSTANDING REGARDING THE EFFECT OF THE GUARANTEE?**

- Will he/she be called only after all other security held by the lender is realized?
- Where there is more than one guarantor, is each liable only for his/her share?
- Will lender go after the principal debtor first before pursuing the guarantor?
- Is it limited in amount even though it is not expressed to be so on the guarantee?

### **5. ENQUIRE WHETHER**

- Other persons are also guaranteeing the debt;
- There are previous guarantees to the same lender;
- There are any representations or conditions by the lender, and if so, are they evidenced in writing;
- The guarantor has any control over the amount advanced to the principal debtor.

### **6. EXPLANATION**

- Ask guarantor if he/she has read guarantee. If not ask him/her to;
- Does he/she understand that he/she is personally responsible for the debt he/she is guaranteeing?
- Is the guarantor clear as to the amount for which he/she is liable?
- Is the lender bound or not bound to resort to principal debtor before being entitled to payment from guarantor?
- Can the lender give time, alter security, take other guarantees?

### **7. EXECUTION**

- Have guarantor initial any additions or deletions such as interest rate or amount;
- Have guarantor sign, and have signature appropriately witnessed.

### **8. ADVISE GUARANTOR TO:**

- Keep a copy for his/her records;
- Not to deliver guarantee to lender unless other guarantors do likewise, and any representations or conditions by the lender are evidenced in writing;
- To get the guarantee back once the debt is paid.