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**SECURED AND UNSECURED TRANSACTIONS**

# Standard form agreement but not so standard result

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**A recent decision of the Ontario Court of Appeal serves as a reminder to financial institutions that standard form banking documents should be used with caution.**

In *Royal Bank of Canada v. El-Bris Limited* ("El-Bris Limited*")*, James Ellis, the president and sole shareholder of El-Bris, provided a collateral mortgage against his personal property in the amount of $700,000.

Mr. Ellis also provided a personal guarantee in exchange for an increase in El-Bris' existing line of credit with Royal Bank of Canada (the "Bank") from $200,000 to $700,000. Both the guarantee and the collateral mortgage were in the Bank's standard form and purported to create separate and independent obligations of Ellis.

Over time, El-Bris' line of credit increased to $3.5 million and ultimately fell into arrears. Upon the subsequent insolvency of El-Bris, the Bank attempted to claim under both the collateral mortgage and the personal guarantee.

***. . . the Court of Appeal ultimately determined that the parties had only intended the collateral mortgage to act as a security for the guarantee.***

In response, Ellis paid the Bank $700,000 and requested a discharge of the collateral mortgage and a release of his guarantee. Taking the position that Ellis' obligation under the collateral mortgage was separate and apart from his obligation under the guarantee, the Bank refused to release Ellis from his guarantee until he provided the Bank with an additional payment of $700,000.

In response, Ellis argued that the collateral mortgage was given as support, or security, for the guarantee, and that the discharge of his collateral mortgage discharged his obligations under the guarantee.

## Trial Court

At the court of first instance, Ducharme, J. ruled in favour of Ellis and found that the collateral mortgage was given as security for the personal guarantee. The Bank subsequently appealed the lower court's decision to the Ontario Court of Appeal (the "Court of Appeal").

## Court of Appeal

On their faces, the terms of the collateral mortgage and the guarantee created separate and independent obligations. However, notwithstanding the seemingly independent nature of the documents, the Court of Appeal ultimately determined that the parties had only intended the collateral mortgage to act as security for the guarantee.

In the Court of Appeal's opinion, the standard form documents used by the Bank did not accurately reflect

*See Secured and Unsecured, page 86*

# Secured and Unsecured *continued from page 85*

the agreement reached by Ellis and the Bank. In reaching this conclusion, the Court of Appeal relied on the fact that the collateral mortgage and the guarantee were signed at the same time, bore the same interest rate and secured an identical payment obligation ($700,000), among others.

The Court of Appeal concluded that to permit the Bank to collect $1.4 million on its security for a $700,000 loan would amount to an unjust enrichment of the Bank and unfair dealing.

## Parties' intentions

Furthermore, the oral evidence and later conduct of the parties supported a finding that the true intention of the parties was to execute a collateral mortgage as security for the guarantee and *not* to create separate and independent obligations on behalf of Ellis.

In particular, the Court of Appeal relied heavily on the Bank's delay in responding to a letter from Ellis' counsel, which described the collateral mortgage as a mortgage in support of the guarantee.

After receiving the letter and a subsequent $700,000 cheque from Ellis, the Bank failed to inform Ellis of its intention not to release Ellis from the guarantee until six months after depositing Ellis' cheque.

The Court of Appeal relied heavily on the Bank's conduct in this regard and the corroborating oral evidence provided by Ellis in deciding that the intention of the parties was to execute the collateral mortgage in support of Ellis' personal guarantee.

The Court of Appeal found that Ellis' obligations pursuant to the guarantee were discharged along with the collateral mortgage upon Ellis' payment to the Bank.

## Significance

In light of the Court of Appeal's decision in *El-Bris Limited*, lenders should take steps to ensure that the content of standard form agreements correctly reflects the true intentions of the contracting parties. Although the decision in *El-Bris Limited* turned narrowly on its facts and is unlikely to open the floodgates for similar claims by borrowers, it nonetheless heeds a warning to lenders who use the same standard form agreements for varied and differing purposes.

REFERENCE: *Royal Bank of Canada v. El-Bris Limited* (2007) CanLII 12717 (ON S.C.), [2008] ONCA 601 (CanLII).

**LIBEL**

# Supreme Court introduces defence of responsible journalism

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**The Supreme Court's responsible journalism defence provides for the reasonable protection of reputation while encouraging the public exchange of information.**

The Supreme Court of Canada recently announced two decisions that changed the law for magazines, newspapers, television, radio and bloggers. Before these cases, prior to publishing a critical piece, the issue was whether the piece could be proven in Court given the strict rules of evidence.

Now, the Court has shifted its emphasis to how vital the public exchange of information is to modern Canadian society. If a story is in the public interest and the press has every reason to believe it is true, then media publishers, editors and reporters are entitled to a defence.

***This case represents an essential shift in the law away from the protection of individual reputation to supporting the concept of the ventilation of discussion over matters of public interest.***

One of the two recent cases, *Grant v. Torstar Corporation,* concerned a local political dispute. The *Toronto Star* wrote an article about a proposed golf course up in New Liskeard, Ontario that was owned by Peter Grant, a wealthy businessman who was also a friend and financial supporter of Mike Harris.

The article was carefully written and obviously vetted for libel. Mr. Grant refused to be interviewed about the dispute with various landowners around the golf course who objected to its expansion to a full nine holes from its existing three holes.

## New defence to libel

From this relatively careful article, together with a companion case, a new defence has been developed in Canada. That defence is called "responsible communication on matters of public interest." The defence is so named because it does not just apply to journalists — it also applies to bloggers and anybody communicating to the public.

This case represents an essential shift in the law away from the

***See Libel, page 87***