

# KEEPING CURRENT

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## Enforcement Against Guarantors – But the Loan Terms Have Changed!

By Zev Zlotnick

A guarantor takes on liability for the obligations of the borrower or debtor under a commercial loan. A lender can require a secured guarantee or an unsecured guarantee. If the guarantee is secured, which means as collateral security for the guarantee the guarantor has also provided a general security agreement in favour of the lender, on enforcement the lender can seize the property used as collateral for the guarantee. An unsecured guarantee means that the lender did not require the guarantor to use its assets as secured collateral. If a borrower has defaulted on its loan obligations and the lender, having made demand under the guarantee, finds that the guarantor also failed to fulfill the outstanding loan obligations, the general lender options are to commence legal proceedings or serve a statutory demand against the guarantor as a pre-cursor to winding up or bankruptcy proceeding.

But what if the material terms of the loan have changed, such as the loan amount, interest rate or term of the loan? If the guarantor has not been advised of these changes is the guarantee enforceable?

The case of *Royal Bank of Canada v Samson Management & Solutions Ltd* 2013 ONCA 313 changed the common law whereby a guarantor would be released from liability on their guarantee in the circumstances where the creditor and the debtor agree to a material alteration of the terms of the loan without the consent of the guarantor. The Ontario Court of Appeal in *Samson*, in overturning the trial decision, provides

lenders with additional measures to ensure a guarantee is enforceable regardless of a material change in the loan terms by stating that a guarantee will be enforced against a guarantor where the guarantor explicitly consented to future changes to the underlying loan terms, where the guarantee is a “continuing guarantee” or where the guarantor contracts out of the protection provided by common law or equity.

The case sets out explicit language that should be included in all forms of commercial loan guarantees in order to ensure lenders can rely on the terms of the guarantee in circumstances where the loan terms change after the initial loan has been advanced. Best practices, of course, is to ensure all parties involved in a commercial loan have notice of and have agreed in writing to any changes to the loan terms.

Feel free to contact the writer with any questions regarding your form of guarantee or any other commercial loan matters.

### Contact Us

If you are in need of legal advice, please do not hesitate to contact [Zev Zlotnick](mailto:Zev.Zlotnick@grllp.com), at 416.865.6601 or [zzlotnick@grllp.com](mailto:zzlotnick@grllp.com).

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