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GUARANTEES:

The Dangers of Giving a Continuing/All Accounts Guarantee

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In *Royal Bank of Canada v. Zuk*, 2017 BCSC 2069, the Royal Bank of Canada ("RBC") sought to enforce Carolyn Zuk's personal guarantee by which she guaranteed payment to RBC the indebtedness of the company Silverado. To recap, a guarantee is an agreement in which the guarantor promises another person ("the creditor") satisfaction of the debt of another (the debtor), only if and when the debtor fails to repay.

Ms. Zuk had guaranteed payment to RBC of the indebtedness of Silverado to RBC under various written agreements for loan financing. Two years later, Silverado and RBC entered into further written agreements continuing and amending the financing originally established for Silverado. Silverado stopped making its payments and RBC issued a demand to Ms. Zuk pursuant to the Guarantee for payment of Silverado's indebtedness.

Ms. Zuk did not make any of these payments, arguing that she didn't have to make them because RBC did not notify her that the original loan agreements had been amended. Specifically, she argued that there were material variations in the debt obligations of Silverado subsequent to the Guarantee for which RBC provided her with no notice and for which she provided no consent.

Thus at issue in this case is the question whether the Guarantee can still be enforced when there have been material variations to the original financing agreement without the guarantor's consent. The Court took a two-step process in deciding this question.

First, the Court looked at whether the variation was material, and a variation is material if the change "cannot plainly be seen to be unsubstantial". Secondly, the Court looked at whether the guarantor had contracted out of the common law rule stipulating that the guarantor is released from liability on a guarantee where there has been a material variation of the terms of the contract without the guarantor's consent. The guarantor would have contracted out of this rule if the guarantor had signed a continuing/all accounts guarantee under which the guarantor is liable for all of the debts accumulated by the debtor and the creditor is relieved from obtaining the consent of the guarantor before extending further debt to the debtor.



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The Judge found that the loan financing agreements and amendments that followed Silverado's loan arrangements were material alterations but concluded Ms. Zuk had contracted out of the common law rule requiring her consent to the amendments since she had signed a continuing/all accounts guarantee. As a result, RBC was under no obligation to disclose those variations to Ms. Zuk and her consent to the amendments was not required since she had guaranteed all of Silverado's current and future debts and all its liabilities.

For a closer examination of what a continuing/all accounts guarantee looks like, the guarantee contained the following language:

FOR VALUABLE CONSIDERATION, receipt whereof is hereby acknowledged, the undersigned and each of them (if more than one) hereby jointly and severally guarantee(s) payment on demand to Royal Bank of Canada ... of **all debts and liabilities, present or future**, direct or indirect, absolute or contingent, matured or not, at any time owing by Silverado Consulting Ltd. to the Bank...

AND THE UNDERSIGNED AND EACH OF THEM (IF MORE THAN ONE) HERBY JOINTLY AND SEVERALLY AGREE(S) WITH THE BANK AS FOLLOWS:

(1) The Bank may grant time, renewals, extensions, indulgences, releases and discharges to...**or change any term or condition applicable to the liabilities**, including without limitation, the rate of interest or maturity date, if any, or introduce new terms and conditions with regard to the liabilities...

(2) 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.

In light of this decision, any time you are required to sign a bank guarantee, please carefully consider the nature and extent of the guarantee before execution.