Banque Nationale du Canada v. *Soucisse*: Liability of Heirs for Future Debts under Continuing Guarantee — Recent Developments in Contractual Obligations of Good Faith

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After nearly fifteen years before the courts, the case of *Banque Nationale du Canada* v. *Dame Florence Soucisse*[1] finally came to an end with the pronouncement of the judgment by the Supreme Court of Canada on 28 September 1981. The significance of this decision lies not only in the principal questions of law giving rise to the action, but also in the apparent development in the civil law of Québec of the theory of a general contractual duty to deal in good faith.[2]

The facts and the judgment of the Superior Court[3] can be briefly summarized. Several years before his death, Dr J.R. Groulx signed two continuing letters of guarantee which contained the right to revoke with respect to any future indebtedness, for the benefit of a certain corporation and one of its directors. The guarantees in favour of the Banque Canadienne Nationale (as it then was) covered all sums then due or to become due in the future up to the limits indicated.

The proof at trial revealed that at the time of the late Doctor's death, there was nothing owing by the company or its director to the bank. The evidence further indicated that the heirs of the late Doctor were unaware of the existence of the guarantee. More importantly, as we shall see, the bank had written to the heirs on two occasions after the death of the guarantor, listing all the debts and obligations of the deceased *without* any mention of the letters of guarantee.

The heirs, sued by the bank for advances made after the death following the bankruptcy of the company and its director, pleaded that they had no knowledge of the existence of the guarantee at the time of their acceptance of the estate, and that had they known of them, they

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[1] *Banque Nationale du Canada* v. *Soucisse* (unreported) 28 September 1981 (S.C.C.) *rev'g* [1975] C.A. 137, *rev'g* [1976] C.S. 116.

[2] See, generally, Rosenberg, *The Notion of Good Faith in the Civil Law of Quebec* (1960) 7 McGill L.J. 2, and Angus, *Abuse of Rights in Contractual Matters in the Province of Quebec* (1961) 8 McGill L.J. 150.

[3] *Banque Canadienne Nationale* v. *Soucisse* [1970] C.S. 116.

would have revoked them. It should be noted that the letters of guarantee were held by a different branch of the bank than that which had written to the heirs. There was no proof to the effect that the branch holding the guarantees was aware of its guarantor's death at the time it made its advances to the company.

Archambault J., after exploring the Québec and French civil law authorities,[4] and after analyzing analogous common law authorities,[5] held that such a guarantee could bind the heirs of the guarantor. This conclusion is strengthened in this case by the words of the document so that the Court could not intervene to rewrite the terms of the contract. The learned trial judge held:

> Que les héritières, comme elles l'affirment, n'aient pas eu connaissance personnelle de la signature des lettres de cautionnement, qu'elles ne se soient pas informées ou n'aient point été informées ou n'aient point su que les lettres, toujours en la possession de la banque et non revoquées, pouvaient un jour être utilisées et invoquées contre elles; que les employés, mandataires ou gérants de la demanderesse aux bureaux où les débiteurs garantis faisaient affaires aient eu personnellement ou non connaissance du décès, aient eu ou non connaissance de l'existence dans leurs dossiers de lettres de cautionnement obtenues par leurs soins ou par les soins d'autres personnes à l'emploi de la même banque, ne nous paraissent pas être des considérations juridiques pour maintenir ou rejeter l'action. On peut tout aussi bien, comme on l'a fait d'ailleurs, faire reproche au docteur Groulx de ne pas avoir attiré l'attention de ses héritiers naturels ou éventuels sur des engagements aussi sérieux qu'il avait pris pour d'autres personnes, pour des motifs, dans un but ou dans un intérêt qui ne sont pas révélés par la preuve et qui n'ont aucun poids sur la décision.
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> Même si l'on pouvait considérer que la banque, par ses représentants ou employés, avait pu, par courtoisie ou, selon un certain usage, qui n'est d'ailleurs pas prouvé, avertir formellement les héritières des obligations qui allaient demeurer les leurs par le fait de la non révocation des lettres de cautionnement, avant que de nouvelles charges ne viennent s'ajouter à celles qui existaient au moment du décès apparemment subit du docteur Groulx, il n'est pas possible au tribunal, avec la preuve devant lui, de retenir cette circonstance comme constituant une cause d'irrecevabilité de la demande ou une remise de la dette en faveur de la caution. Ce plaidoyer d'équité ne peut réussir en face des dispositions de la loi.[6]

The Québec Court of Appeal unanimously reversed the trial judge.[7] Owen J.A. held the obligation to guarantee future debts to be purely personal to the late Doctor, and notwithstanding the terms of the agreement,

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[4] See, *e.g.*, in Québec, *La Banque Provinciale du Canada* v. *Murray* [1957] R.L. 7 (C.S.); *Boucher* v. *Renaud* (1933) 55 B.R. 72; *Banque Canadienne Nationale* v. *Brousseau* (1932) 70 C.S. 167; P. Mignault, *Le droit civil canadien* (1909), t. 8, 342; L. Faribault, *Traité de droit civil du Québec* (1959), t. 8, 310-1; in France, R. Troplong, *Le droit civil expliqué (1846)*, t. 17, 58-9, 152-5, 171; H., L & J. Mazeaud, *Leçons de droit civil (1960)*, t. 3, 25-6.

[5] See *The Union Bank of Canada* v. *Clark* (1910) 43 S.C.R. 299; *Starrs* v. *The Cosgrave Brewing and Malting Co. of Toronto* (1886) 12 S.C.R. 571; H. De Colyar, *Treatise on the Law of Guarantees*, 3d ed. (1897), 392 *et seq.*

[6] *Supra*, note 3, 130.

[7] *Soucisse* v. *Banque Canadienne Nationale* [1976] C.A. 137.

it terminated on his death. Bélanger J.A. agreed but added that an implied continuing consent was necessary for the guarantee to remain valid in view of the continuing right to revoke. Without knowledge of the right to revoke by the heirs, no implied continuing consent could exist. Lajoie J.A. concurred with both.

Leave to appeal was granted to the bank by the Supreme Court of Canada based on the bank's argument that the termination of the guarantee upon the death of the guarantor was a question of public importance affecting the business of banking throughout Canada. The case was argued before a bench composed of Justices Dickson, Beetz, Estey, Chouinard and Lamer.

A new argument was suggested by the respondents, based on a recent French decision of the Première chambre civile of the Cour de cassation, in the case of *B.R.E.D.* v. *Jeannin.*[8] In this case, which arose in similar circumstances, the guarantee was held valid and binding on the heirs; but the failure of the bank to bring the letter of guarantee to the attention of the heirs was held to be a serious fault rendering it equally liable in damages, so that compensation was awarded to the heirs.

The Supreme Court held unanimously, for the reasons set forth by Beetz J., that in the present case the bank was clearly attempting to profit from its failure to bring the existence of the guarantees to the attention of the heirs. The Court held that since the bank had a duty to give complete information to the heirs — a duty based upon the implied contractual obligations of the parties to deal with one another in good faith — the bank's misconduct, or bad faith, now raised a *fin de non-recevoir* precluding it from exercising what would otherwise have been a valid claim. The reasoning of the Court of Appeal was entirely rejected by the Supreme Court.

Beetz J. held:

> S'il était nécessaire de le faire, je n'hésiterais pas à décider que, dans la mesure ou elle désirait consentir de nouvelles avances après le décès de la caution sur la foi des lettres de cautionnement, la *Banque* devenait obligée, dès qu'elle a elle-même appris le décès, de révéler aux héritiers de la caution l'existence de ces cautionnements et leur caractère révocable. Comme la Cour d'appel de Paris dans l'arrêt *Ervault*, je tiendrais que cette obligation découle du principe qui veut que les conventions doivent être exécutées de bonne foi. Il est vrai que l'on ne trouve pas dans notre Code civil une disposition qui le prescrit expressément comme l'art. 1134 du Code Napoléon mais *Mignault* remarque avec justesse que c'est "une vérité de La Palice" [P. Mignault, *Droit Civil Canadien* (1901), t. 5, 261] et que les conventions doivent être exécutées de bonne foi car "nous n'avons plus, comme en droit romain, des contrats de *bonne foi* et des contrats de *droit strict*" [*Ibid.*, 264]. *Trudel*, pour sa part, dans son étude de l'art. 1022 du Code civil, est d'avis que nos législateurs ont jugé cette disposition superflue "dans une institution

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[8] 17 October 1979, D. 1980. I.R. 198, *aff'g* Paris, 3e ch., A. 23 June 1977, D. 1980. I.R. 11. See also *Ernault* v. *Banque Populaire de la région Ouest de Paris*, Paris, 5e ch. A., 20 December 1978, D. 1981. I.R. 15.

juridique dont les assises sont la confiance et la bonne foi donnée" [G. Trudel, *Traité de droit civil du Québec* (1946), t. 7, 328-9]. Et il cite *Domat*: "Il n'y a aucune espèce de convention où il ne soit sous-entendu que l'on doit à l'autre la bonne foi, avec tous les effets que l'équité peut y demander tant dans la manière de s'exprimer dans la convention que pour l'exécution de ce qui est convenu et de toutes les suites" [*Ibid.*].
L'on rejoint ici l'art. 1024 du Code civil:

> Les obligations d'un contrat s'étendent non seulement à ce qui y est exprimé, mais encore à toutes les conséquences qui en découlent, d'après sa nature et suivant l'équité l'usage ou la loi.

Quoi qu'il en soit, dès que la *Banque* a pris l'initiative de renseigner la succession sur les obligations de la caution vis-à-vis d'elle, elle s'est obligée à le faire complètement car des renseignements partiels sont des renseignements trompeurs. La *Banque* ne pouvait surtout pas se permettre de révéler ce qu'il était à son avantage de révéler et de taire ce qu'il était dans son intérêt de cacher.[9]

This conclusion is particularly remarkable since the guarantees were held by one branch of the bank, and the knowledge of the death of the guarantor was gained by two other branches which had sent the letters concerning the other debts to the heirs. It may be mere speculation to suggest that this judgment will significantly alter the manner in which lending institutions will be required to deal with their customers in the future. Nonetheless, a similar conclusion is reached by Professor Yves Chartier in a note responding to the *B.R.E.D.* decision.[10] While Professor Chartier points out that the Court in the *B.R.E.D.* case chose to adopt a strict and binding interpretation of the continuing letter of guarantee, the Court also imposed an obligation on the bank to inform its customers of the information known to it which, if not given to the customer, could subsequently cause the customer to suffer prejudice. Chartier adds that this new obligation imposed on the bank by the Court constitutes "une dimension nouvelle qui mérite de retenir l'attention".[11] He clarifies the extent of the obligation established by the *B.R.E.D.* decision when he states:

> Tout en admettant que la banque n'était tenue à aucune obligation de conseil, l'arrêt retient en revanche qu'elle devait, pour satisfaire à la demande qui lui avait été adressée, fournir au notaire chargé de la succession "tous renseignements qui pouvaient permettre aux ayants-droits de son ancien client d'être très exactement informés de leur situation à l'égard de leur client"... . Ainsi, en ne révélant pas l'existenee du cautionnement souscrit par leur auteur, la banque avait-elle, d'après la cour [d'appel de Paris], commis une faute.
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> L'arrêt semble en effet porter la marque d'une sévérité toujours accrue tant à l'égard des banques que, plus généralement, à l'encontre de tous les créanciers bénéficiaires de l'engagement d'une caution.
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> C'est donc une obligation originale que la cour impose ici à la banque.[12]

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[9] *Soucisse, supra*, note 1, 20-2.
[10] (1979) Rev. jur. com. 175, 178 *et seq.*
[11] *Ibid.*, 178.
[12] *Ibid.*, 181-2.

It should be pointed out that the French courts may have chosen this solution to the problem in the *B.R.E.D.* case because of earlier decisions[13] which had held that the obligation of the guarantor arising from a continuing letter of guarantee passed to the heirs even where the obligation arose after the death without the knowledge of the heirs. The creation of a new obligation imposed on the beneficiary of the contract of suretyship becomes quite complex when one considers the various possible fact patterns which may arise. For example, if the creditor is not aware of the death, should it then be permitted to collect from the heirs who, being ignorant of the existence of the guarantee, have not revoked it? Or, should the creditor, which has branches throughout the country, be deemed to know of a letter of guarantee signed by the deccased in Vancouver when the succession opens in Montréal, and the Montréal branch replies to a request for information without indicating the existence of the guarantee?

Another interesting situation could arise where the bank has two customers whose lines of credit are secured in a manner which as a result of the special knowledge of the bank, could be seen as putting the bank in a position of conflicting interests. Suppose customer A were to have given a registered general assignment of book debts in favour of the bank to secure its line of credit, the conditions of which require that the customer provide the bank with a weekly statement of its receivables. Contained in this list is a very large shipment to another of the bank's customers, customer B, who has given its inventory as security in virtue of s. 178 of the *Bank Act*.[14] If the bank were to exercise its security with respect to customer B before the expiry of the delays for customer A to revendicate as the unpaid vendor,[15] does this violate the bank's obligation to deal in good faith so as to give rise to a *fin de non recevoir* to preclude the bank from the enforcement of its claim against customer A to the extent of what customer A could have realized had it revendicated the goods?

The Supreme Court expressly held that knowledge of the right to revoke by the heirs is not an essential element of the continuing guarantee and accordingly, the knowledge of this right by the deceased is sufficient to render the contract binding on the heirs.[16] While it lessened the obvious possibilities of inequitable results by softening the harshness of such a rule, it remains to be seen how far the obligation of good faith will extend beyond the *Soucisse* case.

[13] See *Soucisse, supra*, note 1, 13-9.
[14] S.C. 1980, c. C-40.
[15] Arts 1543, 1998, 2009 C.C.
[16] *Supra*, note 9, 9 *et seq.*

It should be pointed out that the Civil Code Revision Office has included in its final draft a clear disposition[17] which would as a matter of public order require the termination of all continuing suretyships upon the death of the surety so that there could be no transmission of any obligations to the heirs with respect to advances made by the creditor after the death.

[17] Civil Code Revision Office, *Report on the Québec Civil Code* (1977), vol. 1, bk 5, art. 861.