

CLARIFYING CANADIAN LANDLORDS' RIGHTS

Good news arrived for Canadian landlords earlier this year when the Supreme Court of Canada (SCC) clarified a murky issue regarding tenants' bankruptcy. In 1965, the Ontario Court of Appeal (Ont. C.A.) considered the liability of a tenant's guarantor in *Cummer-Yonge Investments Ltd. v. Fagot*. In that case, the tenant made a voluntary assignment in bankruptcy and the bankruptcy trustee disclaimed the lease. In turn, the landlord sued the guarantor for the unpaid rent. The *Cummer-Yonge* court held that the guarantor was not liable. Since then, landlords seeking recourse have relied on creative drafting and courts have engaged in "tortuous distinctions" to impose liability on guarantors.

Earlier this year, the SCC addressed this issue in *Crystalline Investments Ltd. v. Domgroup Ltd.*, in which a grocery store tenant assigned its lease and the assignee became insolvent. The Ont. C.A. held that contractual privity, and, therefore, the liability of the original tenant, was not affected by the repudiation of the lease by the bankruptcy trustee, but distinguished the case from *Cummer-Yonge* because the liability at issue was that of an assignor, not a guarantor.

The SCC concurred on the privity issue but, in *obiter*, focused on *Cummer-Yonge*. Quoting from a 1996 English decision, the court stated that continuing to distinguish between guarantors as having secondary obligations and assignors as having primary obligations "would make no sort of legal or commercial sense." Rather, neither should be relieved of their contractual obligations.

As a result, while a well-drafted guarantee remains important, after 39 years, the need to draft around *Cummer-Yonge* has been eliminated.

David N. Ross

Partner, Commercial Real Estate

McMillan Binch LLP

david.ross@mcmillanbinch.com

