Financial Arrangements Between Older Adults and Family Members: Loans and Guarantees

A Report prepared for the
Canadian Centre for Elder Law Studies
by its Committee on Legal Issues
Affecting Older Adults

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The members of the Committee are:

Prof. Emeritus Donald MacDougall - Chair
Noreen Brox
Charmaine Spencer
Gregory Steele, Q.C.
Gordon Turriff, Q.C.
Carol Ward-Hall
Marlene Scott, Q.C.
Margaret Hall - Reporter

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Canadian Centre for Elder Law Studies

The Canadian Centre for Elder Law Studies (CCELS) was created by the British Columbia Law Institute as a vehicle to carry forward the Institute's work in relation to legal issues affecting older adults and to enrich and to inform the lives of older people in their relationship with the law. It is a response to the need in Canada for a body that has a dedicated focus on this area to facilitate the development of Elder Law as a coherent body of knowledge.

1822 East Mall, University of British Columbia, Vancouver, B.C., Canada V6T 1Z1

Voice: (604) 822-0142 Fax:(604) 822-0144 E-mail: ccels@bcli.org
WWW: http://www.ccels.ca

British Columbia Law Institute

The British Columbia Law Institute was created in 1997 by incorporation under the Provincial *Society Act*. Its mission is to:

(a) promote the clarification and simplification of the law and its adaptation to modern social needs,
(b) promote improvement of the administration of justice and respect for the rule of law, and
(c) promote and carry out scholarly legal research.

The Institute is the effective successor to the Law Reform Commission of British Columbia which ceased operations in 1997.

The British Columbia Law Institute and the Canadian Centre for Elder Law Studies gratefully acknowledges the sustaining financial support of the Law Foundation of British Columbia and the Ministry of Attorney General in carrying out its work .
Funding for this Project has also been provided by the Law Commission of Canada.

Introductory Note

The Canadian Centre for Elder Law Studies and the British Columbia Law Institute has the honour to present:

Report on Financial Arrangements Between Older Adults and Family Members: Loans and Guarantees

This Report is the first to be issued expressly as a publication of the Canadian Centre for Elder Law Studies, a division of the British Columbia Law Institute. It sets out the analysis and recommendations of the Project Committee on Legal Issues Affecting Older Adults, an advisory body to the Centre. The Committee includes seniors' advocates, legal practitioners, and academics specializing in law and gerontology.

The Report concerns arrangements that involve a financial benefit conferred by a person on that person's child or grandchild. These benefits most often take the form of loans or guarantees and reflect the wholly laudable desire of older adults to help their family members. They may, however, have a very negative impact on financial security and family relationships. This Report contains recommendations for reducing or mitigating the problems associated with these family loans and guarantees.

A key element is the dissemination of information among the general public, professionals who may encounter such arrangements and, especially, among older adults who may otherwise not consider legal advice to be a realistic alternative. A recurring problem is that family loans are frequently undocumented with the result that there will not necessarily be a common understanding concerning the terms of repayment and related matters. The Report's recommendations address this in two different ways. First, they set out a simple model Family Loan Agreement to assist family borrowers and lenders in turning their minds to, and recording, the most important elements of their arrangement. Second, the Report also recommends the enactment of a *Family Loans and Guarantees Act* that would create certain presumptions concerning the repayment of a family loan where direct evidence is lacking. As its title suggests, the proposed legislation would also extend to guarantees given by older adults for the benefit of children and grandchildren. Here the emphasis is on disclosure by commercial lenders to prospective guarantors so there is no misunderstanding about the nature or extent of the liability created by the guarantee. It would also provide a "cooling off period" in relation to guarantees given to benefit a family member.

The Report is also intended to serve as an information resource for lawyers and for other professionals working with older adults. The aim is to stimulate discussion and awareness about the pitfalls of family loans and guarantees among the public generally and those people who may be considering a loan or guarantee to benefit a family member.

The Centre would like to thank the members of the Project Committee on Legal Issues Affecting Older Adults for their work and dedication. Their recommendations as set out in this Report have the full support and endorsement of the British Columbia Law Institute and we commend them for implementation.

October 1, 2004

Ann McLean
Chair,
British Columbia Law Institute, and
Canadian Centre for Elder Law Studies

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Part I: Introduction

A. Canadian Centre for Elder Law Studies

The "Report on Financial Arrangements Between Older Adults and Family Members: Loans and Guarantees" is the first Report of the Canadian Centre for Elder Law Studies. The Canadian Centre for Elder Law Studies was created at the British Columbia Law Institute in July 2003 to continue and develop the Institute's program on legal issues older adults. Research and scholarship, law reform, and the development and delivery of information and educational materials are all within the mandate of the Centre.

The British Columbia Law Institute was created in 1997 as the successor organisation to the Law Reform Commission of British Columbia. The Institute is an independent, non-profit society working for the improvement and modernization of the law, and to facilitate legal access.

B. Reasons for the Project

> "So many people in the position of having people make decisions for them, and so personal no one talks about it."
>
> *Comment, older adult responding to the issue of loans and guarantees*

All of us are vulnerable to a certain degree when we loan money to another person, or when we agree to act as a guarantor. A certain element of risk is inherent in these financial arrangements, whoever makes them; a bank incurs the risk of default every time it makes a loan, for example.

Banks and other lending institutions decide to incur the risks associated with loans and guarantees where the likelihood of profit outweighs the potential for loss. Individuals acting outside of the commercial context will generally be motivated by less objectively rational financial economic concerns; the desire to help a family member in need, for example, or a desire to express confidence and support (as where a loan or guarantee is sought to expand the borrower's business).

Loans and guarantees on behalf of family members have been identified as an issue with particular application to older adults because older adults are especially likely to enter into

these arrangements,[1] and because the characteristics of inter-generational family relationships generally make it more likely that the transaction will create significant risk for the older lender or guarantor. Older parents, for example, may feel pressure to "go along" with a suggested loan or guarantee in order to "keep the peace" within the family, despite a real preference not to proceed with the transaction.[2] Older adults are generally less able than younger people to replace money or assets lost, which may represent a lifetime of work and saving.[3] Loss of the "family home," in particular, may be especially traumatic.[4] Older people are also less likely to pursue legal action,[5] especially where family members are involved.

Consider the story of Mrs. A and her adult children, Jane and Steve.[6] There is no exploitation or financial abuse in this story, but the misunderstandings arising from conflicting, un-stated assumptions have resulted in distress to Mrs. A., the possible loss of her home and life's savings, and strained family relationships that may never recover.

> Mrs. A, a widow in her 70s, has lived in the same house in Vancouver for 50 years. That house is now worth a considerable sum of money and Mrs. A has little income, but Mrs. A has no intention of selling her home; always careful with money, Mrs. A has put away savings of approximately $50,000 for a "rainy day."
>
> Mrs. A has two adult children - a daughter Jane, divorced with three children, and a son Steve, never married with no children. Jane and Jane's three children have been staying with Mrs. A since Jane's recent divorce. Space is tight but Mrs. A is anxious to help her daughter and grandchildren any way she can. Jane would like to buy a place of her own but can't afford the down payment. Jane asks Mrs. A to loan her the money "until she gets back on her feet."

1. C. Spencer, "Diminishing Returns: An Examination of Financial Abuse Among Seniors" (1996) Gerontology Research Centre, Simon Fraser University; N.S.W Law Reform Commission, "Darling, please sign this form: a report on the practice of third party guarantees in New South Wales" (N.S.W.L.R.C. Research Report 11) (Sydney: N.S.W. Law Reform Commission, 2003).

2. *See Stel-Van Homes* v. *Fortini* (2001), 16 B.L.R. (3d) 103.

3. Seymour Moskowitz, "Saving Granny from the Wolf: Elder Abuse and Neglect- the Legal Framework" (1998) 31 Conn. L. Rev. 77.

4. *Ibid*.

5. Rosslyn Munro, "Elder Abuse and Legal Remedies: Practical Realities" (2002) 81 Reform 42 at 44.

6. The story of Mrs. A is a hypothetical, a compilation drawn from the case law, consultation, reports and other published material.

Mrs. A wants to help and agrees to loan Jane all of her savings - $50,000. Three years later, Jane has made no repayments. The situation is a source of great anxiety for Mrs. A, who is afraid that bringing the matter up with Jane will cause problems in their relationship and perhaps in Mrs. A's relationship with her grandchildren. Mrs. A can simply not afford to treat the money as a gift, or as an "advance" on inheritance. She had been planning to put at least some of the money towards necessary repairs and renovations to her home. She would also like to assist her son Steve; Mrs. A. does not think it would be fair for Jane to simply keep the entire sum. Anxious to preserve good will within the family and worried about taking care of herself in her home, Mrs. A does not know what to do next.

Mrs. A assumed that Jane would begin making payments within the year, but Jane assumed that there was no hurry for repayment; Mrs. A owned her own home, and seemed to have few expenses (Jane's promise to repay the money once she "got back on her feet" giving no real guidance about a repayment schedule). The $50,000 was (Jane assumed) "extra" money, and if Jane did not get around to paying it back during the lifetime of Mrs. A the amount could simply be "taken off" Jane's inheritance. Perhaps Jane understood the loan as really more of a gift - as Steve had no children there was no reason (in Jane's opinion) for Mrs. A to be concerned about fairness.

Steve, meanwhile, is applying for a bank loan to finance the expansion of his business. The bank is reluctant to make the loan unless Steve can provide a suitable guarantor. Steve approaches his mother, explaining that the bank requires a guarantee as a "formality" and that there would be little risk to Mrs. A. Mrs. A. agrees to help. At the bank, the manager explains that the guarantee means that if Steve does not make the repayments on the loan, Mrs. A will be responsible. Mrs. A does not want to give the impression that she lacks confidence in Steve's promise to make the repayments, and agrees to act as guarantor. Mrs. A is also concerned to be fair to both of her children; she has, after all, helped Jane with the loan, and feels that it would be unfair not to help Steve now. Mrs. A's house is her only significant asset, and she agrees to use her property as security for the loan to Steve.

Steve's business does not in fact thrive as he expected and Mrs. A learns that she is responsible for repaying the loan. Her house is her only significant asset. Mrs. A is devastated; she is angry with Steve for putting her in this position, and ashamed of herself for being there. Having lost her home, and her savings, Mrs. A does not know where to turn - where will she live? There is little that she can afford, especially in the old neighbourhood.

Mrs. A's story illustrates how and why a parent's desire to use accumulated wealth for the benefit of adult children - itself a positive, and very common, motivation - can have terrible

consequences. Human nature inclines us to hope for the best, especially for our own families. Mrs. A hopes and expects that Jane will quickly get back on her feet with a well paying job and reasonable child care, and that Steve's business will grow as he confidently expects it will. Reality may unfold very differently, however, even where no one is to blame.

The current social and economic context makes it more likely that a parent's desire to help an adult child financially will coincide with the ability to provide that assistance. Today's older adults are more likely than previous generations to be relatively asset rich, especially in urban markets such as Vancouver where rising property prices have created a significant asset base among older home owners at a time when younger adults and families are struggling with high housing costs.[7] The classic paradigm whereby the younger generation "looked after" needier, more dependent, and less affluent older family members no longer describes the relative distribution of assets in many families.

Patterns in inter-generational asset distribution encourage the kind of financial arrangements within families that have been described as "inter-generational asset management;"[8] using the assets of older adults for the benefit of younger family members. These arrangements can work to the satisfaction of all parties. Under certain circumstances, however, outcomes can be very damaging, as in the story of Mrs. A. Property markets have created a context in which asset wealth is not associated with income, and the "house rich" senior may nevertheless be income poor. For this individual the loss of the family home is, literally, the loss of everything.

C. The Purpose and Scope of the Project

The purpose of the Project is to make it less likely that older adults will suffer unsustainable losses or other harms through participation in family loans and guarantees for younger family members where the risk of non-repayment has not been appreciated, or where the older lender/guarantor's decision is not freely chosen but made on the basis of family pressure. It is important to note that the desire to use personal assets for the benefit of children or other family members is in no way pathological; there is nothing inherently "abusive" about inter-generational financial arrangements.[9] The Project was not intended to dissuade older people from providing financial assistance to family members where the

7. *See* Juliet Lucy Cummins, "Relationship Debt and the Aged: Welfare and Commerce in the Law of Guarantees" (2002) 27 Alternative Law Journal 63.

8. C. Tilse et al, "Families, Asset Management and Caregiving: Developing Issues in Policy, Research and Practice" Symposium: Assets, Aging and Abuse - Emerging Issues for Families (2003), online: 8th Australian Institute of Family Studies Conference <http://afrc2003.websites.net.au/finalpapers/Tilse,%20Cheryl.pdf> (date accessed: 20 August 2004).

9. C. Spencer, *supra,* note 1.

decision to do so is informed and freely made. Older people, like other adults, have the right to make choices about how to use their assets. The purpose of the Project is to enable choices that are both informed, and considered.

Informed decisions depend on adequate and accessible information about the risks associated with loans and guarantees; family relationships as well as financial security may be severely harmed or even destroyed where a loan is not repaid. Increased awareness about the "pitfalls" associated with loans and guarantees may also encourage older adults to be more self-aware about their own motivations ("do I really want to do this, or am I saying yes because I don't want my daughter to be angry with me?" "am I really agreeing just because I don't want my son to think I lack confidence in him?" "what would happen to me if this loan isn't repaid?" "should I seek advice before I go further?") Understanding personal motivations is key; it has been suggested that family ties of love and loyalty, not lack of information or understanding, are the most significant source of vulnerability.[10]

The recommendations set out in this Report are intended to protect the interests of older adults who wish to use their assets for the benefit of younger family members. The Committee also hopes to raise general awareness about the pitfalls associated with loans and guarantees, and how those pitfalls can be avoided, through distribution of the Report and through ongoing community education.

D. Research and Consultation

The recommendations made in this Report draw from the consultation and research carried out in connection with the Project, together with the knowledge and experience of the Committee.

Research carried out in connection with the Project had three objectives:

- to identify the nature of the problem,
- to consider the existing law applicable to the problem, and
- to evaluate the usefulness of law reform in relation to the problem.

Research included a review of the relevant literature and case law, creating an information resource that is expected to be of interest to legal professionals and to others concerned about the interests of older adults. In addition to this Report, a more detailed discussion of the law is included in the "Background Paper" to the Report available on the Canadian Centre for Elder Law Studies website (http://www.ccels.ca).

10. *Watt* v. *State Bank of New South Wales*, [2003] ACTCA 7.

Additional information about the nature and circumstances of inter-generational loans and guarantees, together with examples of underlying family dynamics, was obtained through questionnaires circulated to lawyers, bodies representing lending institutions, and older adults attending focus group sessions. Responses contain a rich level of "real life" detail and have been collated and appended to this Report as Appendix B.[11]

Consultation was intended to raise awareness among professionals and the public about the nature and scope of the problems associated with loans and guarantees involving older adults and younger family members, and to obtain opinions and ideas about possible solutions to those problems.

Part II: Summary of the Current Law

A. General Principles

1. Loans

If A provides money to B on B's promise to pay that money back (with or without interest) A has loaned the money to B and B has an obligation to repay that money according to the terms of the loan. There is no requirement that loans be written down; a transfer of money that was intended to be a loan is not transformed into a gift because of a failure to document the true nature of the transaction.[12] Non-documentation can be a source of significant problems, however; where the transaction has not been documented it will always be more difficult to prove the true intentions of the parties where there is subsequent disagreement about what those intentions were, or where one party becomes incapable or dies. Where money has been transferred from parent to child, the presumption of advancement may also come into play, raising the presumption that the money was intended as a gift.[13]

Some older adults may carefully document all personal loans, including loans made to younger family members, but inter-generational family loans are often informal or un-documented. Parents and other older relatives such as grandparents, aunts or uncles may feel uncomfortable asking for documentation, finding it unnatural and unnecessary between

11. Many responses were received from lawyers, few from lending institutions, and very few from older adults attending focus group session; *see* discussion, below, "Responses to Consultation."

12. *Kooner* v. *Kooner* (1979), 100 D.L.R. (3d) 76 (B.C.S.C.); *Wispianska* v. *Kuzniar* (*Jopowicz*) (1978), 3 R.F.L. (2d) 6 (B.C.S.C.); *Campbell* v. *McLelland*, [1995] B.C.J. No. 1893 (S.C.).

13. The presumption has traditionally applied to fathers only and not mothers; this special treatment of fathers has been criticised as out of date, but has not been modified at the Supreme Court of Canada level. *See Dagle* v. *Dagle Estate* (1990), 70 D.L.R. (4th) 201 (P.E.I.C.A.), leave to appeal to the S.C.C. refused, 74 D.L.R. (4th) viii; *Re Wilson (Attorney of)* (1999), 27 E.T.R. (2d) 97 (Ont. Gen. Div.); *Edwards Estate* v. *Bradley*, [1957] S.C.R. 599.

family members and indicating mistrust ("nice" families don't need to write things down). Indeed, intentions and details about repayment may not be discussed, with each party assuming that the other understands the "true" nature of the exchange (as in the story of Mrs. A). The adult child may understand the money to form an advance on an anticipated inheritance; if the money is not paid back during the lifetime of the parent it can simply be subtracted from that inheritance after the parent's death. The parent's expectation might be very different, and such an advance might not be affordable.

Inter-generational family loans may be made more complicated by specific circumstances and expectations beyond the question of simple repayment. Family arrangements do not always fit neatly into discrete legal categories, and family members do not always describe their actions to each other in legally accurate terms. *Campbell* v. *McLelland*,[14] for example, involved a hybrid loan/care agreement[15] that, due to the unforeseen breakdown of the borrower's marriage, did not proceed as expected. In that case the lender was a grandmother who advanced money to her granddaughter and the granddaughter's husband on the understanding that the money was to be used to pay off their mortgage and undertake renovations on their house. Following completion of these renovations the grandmother would live with the couple for the rest of her life (her "repayment" for what the grandmother understood to be a "loan" - it is significant that these terms were not used by the parties at the time to describe what they were doing). The grandmother's understanding was that, if the grandmother did not remain living with the younger couple, the money advanced would be repaid. The granddaughter alleged that the money was a gift. The court found that the younger couple had been "unjustly enriched" by the grandmother, and that the grandmother should be repaid (the grandmother was entitled to an interest in the house but preferred to have the advance treated as loan).[16]

14. [1995] B.C.J. No. 1893 (S.C.).

15. British Columbia Law Institute, "Private Care Agreements Between Older Adults and Friends or Family Members" (B.C.L.I. Report 18) (Vancouver: British Columbia Law Institute, 2002).

16. *See* also *Hussey* v. *Palmer*, [1972] 3 All E.R. 744 (C.A.).

2. Guarantees

Legal presumptions and family dynamics may also be a source of vulnerability for the older family guarantor.

A person agreeing to act as a "guarantor" undertakes to be responsible for a loan made to a third person (the borrower) in the event that the borrower does not repay the loan. In this way, the guarantor provides security for the loan to the lender.

A guarantor is presumed to understand the nature and purpose of a guarantee; lenders are therefore obliged to disclose only "unnatural" circumstances applying to the guarantee unless asked directly by the guarantor to provide particular information or explanations.[17] The unsatisfactory credit rating of the borrower (which will bear on the borrower's ability to repay) does not normally comprise an unnatural circumstance for this purpose. The borrower's unsatisfactory credit rating will generally be a primary reason for the guarantee, a fact the guarantor is presumed to know.[18]

These presumptions may not realistically describe the knowledge and understanding of unsophisticated family guarantors, who often do not appreciate the risks involved in the absence of explicit and directed information. Older family members, like other vulnerable "relationship" guarantors such as wives,[19] may understand the request for a guarantee as a "formality" rather than an indication of underlying un-creditworthiness. An older parent or other family member may feel uncomfortable asking direct questions about the loan and the circumstances of the borrower, especially where the borrower is present during the transaction.

B. *Non est factum*

If a document is fundamentally different, in content, character, or otherwise, from the document the signer intended to execute, the signer can say that the act of signing was not his own and that the document was therefore not executed (*non est factum*).

Non est factum succeeds only where there is a complete misunderstanding of the nature of the document to the extent that the element of consent is totally lacking. It does not apply

17. *T.D. Bank* v. *Rooke and Rodenbush* (1983), 49 B.C.L.R. 168 (C.A.); *Canadian Western Bank* v. *Hanson* (1995), 10 B.C.L.R. (3d) 259 (C.A.).

18. *T.D. Bank*, *ibid*.

19. *See* B. Fehlberg, *Sexually Transmitted Debt: Surety Experience and English Law* (Oxford: Clarendon Press, 1997).

where a document has been signed carelessly.[20] *Non est factum* is usually associated with questions of mental capability; courts have been very reluctant to find *non est factum* where a person has full capacity and will do so only under compelling circumstances.[21]

C. Applicable Principles of Equity

Where *non est factum* does not apply, a transaction may be set aside as inequitable under the following circumstances:

- where the transaction is unconscionable,
- where the circumstances give rise to a fiduciary relationship that would make it inequitable to enforce the transaction, or
- where the lender/guarantor entered into the transaction by reason of undue influence.

1. Unconscionability

A transaction is unconscionable where a stronger party has exploited the weakness of another in order to obtain a benefit at the weaker party's expense; the "combination of inequality and improvidence alone may invoke this jurisdiction."[22] Under these circumstances, it would be inequitable to enforce the transaction.

A presumption of unconscionability is created where the plaintiff can establish two elements:

1. that the transaction was substantially unfair, and
2. that an inequality existed between the parties arising out of the ignorance, distress or incapacity of the weaker party such that he or she is "in the power" of the stronger.[23]

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20. *Marvco Color Research Ltd.* v. *Harris et al.* (1982), 141 D.L.R. (3d) 577 (S.C.C.).

21. *Adera Finanacial Corp. Ltd.* v. *Pan Asia Investments Inc.* (1984), 57 B.C.L.R. 50 (C.A.); *Shoppers Trust Co.* v. *Dynamic Homes Ltd.* (1992), 96 D.L.R. (4th) 267 (Ont. Gen. Div.); *See Bank of Montreal* v. *Sidhu*, [1997] B.C.J. No. 1664 (S.C.). *See* also *Beaulieu* v. *National Bank of Canada* (1984), 55 N.B.R. (2d) 154 (C.A.). In that case the New Brunswick Court of Appeal overturned the lower court's finding of *non est factum* where a wife had guaranteed a loan to her husband's business.

22. B. Crawford, "Comments" (1966) 44 Can. Bar Review 142 at 143.

23. *Morrison* v. *Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710 (B.C.C.A.); *Harry* v. *Kreutziger* (1978), 95 D.L.R. (3d) 231 (B.C.C.A.).

The stronger party can displace this presumption by showing that the bargain was in fact fair, just and reasonable - often, but not always, by showing that the other party received independent legal advice.[24]

Age is not in and of itself a condition of weakness giving rise to inequality for the purposes of the doctrine. Older adults are, in general, more likely to have characteristics or attitudes that will place them "in the power" of others, however, especially with regards to financial decision making. Older family members may be unfamiliar with modern business and financial practices, for example, or dependent on younger family members to provide assistance with the "outside world." There are many situations in which unconscionability has been found to apply to transactions involving older adults and family members.[25]

The "improvidence" or substantial unfairness of the transaction will generally be established by showing that the consideration received by the weaker party was inadequate given the kind and extent of benefit conferred. Factors other than money may comprise consideration for this purpose, including the "genuine desire to assist a relative, without personal monetary gain."[26]

A loan, like any other contract, may be set aside as unconscionable where the elements of inequality and substantial unfairness are shown and where the presumption they raise is not displaced. "Substantial unfairness" will generally be shown where the true nature of an advance as a loan that has not been repaid (and not a gift) has been established. Relationships of power and dependency between older adults and younger family members, together with relative strength and sophistication, make it more likely that unconscionability will be a factor in this context.

Family guarantees will almost always involve elements of inequality and improvidence. The guarantor will generally be weaker than the lender in terms of knowledge and information, and is unlikely to derive any benefit (aside from a desire to assist the borrower) from a transaction which (potentially) confers a substantial benefit on the lender. Where these two elements - inequality and substantial unfairness - are exaggerated by factual circumstances, as where a guarantor is especially weak and the transaction particularly disadvantageous

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24. *Morrison, ibid.*

25. M. Hall, "Equity and the Older Adult: Undue Influence and Unconscionability" in *Advising the Older Client*, A. Soden, ed. (Toronto: Lexis/Nexis Butterworths, 2004).

26. *CIBC* v. *Ohlson*, [1996] A.J. No. 185 (Q.B.); *Toronto Dominion Bank* v. *Wong* (1985), 65 B.C.L.R. 243 (C.A.).

(where the guarantee is used to secure an existing debt, for example), a presumption of unconscionability will be raised. The lender will be able to displace that presumption by showing that the guarantor received adequate independent legal advice explaining the scope and nature of the transaction and the risks involved.[27] Inter-generational family dynamics have been explicitly recognised as a source of "weakness" in this context:

> Parents are particularly susceptible to influence in their desire to help their children. Thus, it is important that a parent be frankly told the ramifications of what he or she is doing by someone - if not the banker then the lawyer. [28]

In the case of *Bertolo* v. *Bank of Montreal*,[29] for example, an unsophisticated 71 year old widow, with little education or knowledge of English and no business experience, agreed to provide security for a business loan to her son. The business was 100% debt financed on the basis of the security provided by Mrs. Bertolo, whose personal assets consisted of her modest home, savings of $22,000, and a very modest pension income. It was established that Mrs. Bertolo did not understand the nature of the risk involved (including the fact that she was the only person whose capital was at risk); "All she knew" the trial judge found "was that her son Eric was buying a restaurant and she was willing to help him."

Under the circumstances the lender appreciated that Mrs. Bertolo required independent legal advice. The advice obtained was not adequate under the circumstances, however. Mrs. Bertolo was initially referred to the lender's own solicitor, who was also acting for the borrower. The bank's solicitor referred Mrs. Bertolo, in turn, to his own partner, who advised Mrs. Bertolo about the transaction, but did not tell her that her house (security for the loan) was at risk.

The son's business was a failure, and the bank sought to enforce the guarantee. The Ontario Court of Appeal found that, although no fiduciary relationship existed between the lender and Mrs. Bertolo, it would nevertheless be unconscionable under the circumstances to enforce the guarantee.[30]

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27. *Smyth* v. *Szep*, [1992] 2 W.W.R. 673 (B.C.C.A.); *Doan* v. *I.C.B.C.* (1987), 18 B.C.L.R. (2d) 286 (S.C.); *Gladu* v. *Edmonton Land Co.* (1914), 19 D.L.R. 688 (Alta. S.C.); *De Wolfe* v. *Mansour* (1986), 73 N.S.R. (2d) 110 (S.C.); *Bank of Montreal* v. *Sidhu*, [1997] B.C.J. No. 1664 (S.C.).

28. *MacKay* v. *Bank of Nova Scotia et al.* (1994), 20 O.R. (3d) 698 (Gen. Div.). *See* also *Royal Bank of Canada* v. *Ironmonger*, [1999] B.C.J. No. 2568.

29. (1986), 57 O.R. (2d) 577 (C.A.).

30. *See* also *E. & R. Distributors* v. *Atlas Drywall Ltd. et. al.* (1980), 118 D.L.R. (3d) 339 (B.C.C.A.); *Avon Finance Co. Ltd.* v. *Bridger and Another*, [1985] 2 All E.R. 281 (C.A.).

> This bank was aware, or ought to have been aware, that this woman had not had the benefit of independent legal advice with respect to a transaction which, from a business point of view, was manifestly disadvantageous to her... In my opinion, the factors present in this case are such that it would be unconscionable to permit the bank to take advantage of the security it obtained from Mrs. Bertolo in the absence of proper independent legal advice.

Equity will also refuse to enforce a guarantee where the lender has notice of an underlying unconscionable transaction between the guarantor and the borrower. In the case of *May* v. *Dunster*,[31] for example, the court found that the lender-bank should have been "warned" of an underlying unconscionable transaction on the basis of the following factors:

- any reasonable loans officer, engaging her in conversation, would have realised that Mrs. Dunster was confused by and did not understand the nature of the transaction, and that she was in need of independent legal advice,
- Mrs. Dunster was in the position of a "fond mother to a much younger and more vigorous son,"
- the foster son arranged the loan, which was for his benefit,
- the transaction was clearly foolhardy for Mrs. Dunster, without significant benefit and full of terrible risk (the only benefit to Mrs. Dunster was to get her son "off her back"), and
- the relationship of Mrs. Dunster's income to the loan payments and the "clear unworthiness" of the son as a borrower.

The Court concluded that the lender should not have proceeded with the loan without advising Mrs. Dunster to obtain independent legal advice, and that it would be unconscionable to enforce the guarantee.

2. Fiduciary relationship

Relationships are described as "fiduciary" where one party (the beneficiary) can reasonably rely on the other (the fiduciary) to act in the beneficiary's best interests. Some relationships are always fiduciary in nature, such as the relationship between a beneficiary and trustee.

31. [1996] B.C.J. No. 3120 (S.C.), involving an older woman's mortgage of her home as security for a loan to her foster son.

Other relationships which are not always or "essentially" fiduciary[32] may *become* fiduciary under circumstances in which the following three characteristics can be shown:[33]

1. the fiduciary has scope for the exercise of some discretion or power,
2. the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests, and
3. the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

Relationships between older parents and adult children (for example) are not always and immutably fiduciary in nature but will become fiduciary where the child has the ability to exercise power over the parent in a way that can affect the parent's interests and where the parent is "peculiarly vulnerable" to that power. The parent who depends on an adult child for advice and guidance about financial matters, for example, and who has reason to believe that the child will continue to act as adviser in the parent's best interests, is vulnerable to the possibility that the child will abuse that trust for personal gain (by advising the parent to take a course of action that will benefit the child at the expense of the parent). The parent's relative vulnerability in this kind of relationship will also depend on personal circumstances - what is the parent's own level of knowledge about the matter in question? Is the parent dependent on the child in other ways (to act as translator, for example)? The child/fiduciary who abuses the trust of the parent/beneficiary for personal gain will have breached the duty of loyalty owed by all fiduciaries to beneficiaries, the duty to act in the beneficiary's best interests.

In the case of *Janz* v. *McIntosh (Trustee of)*,[34] for example, an elderly woman who had never worked outside the home and had a grade eight education had come to rely on a family friend after the death of her husband to act as a link to the "outside world," managing finances, arranging and taking her to appointments, and helping with general care needs. Under these circumstances the woman's relationship with her friend had become a relationship of dependence in which the woman could reasonably look to the friend as an advisor and protector, a fiduciary role meeting the three indicia outlined above. A loan suggested to the woman by the friend in this context, at terms clearly disadvantageous to the woman for the benefit of the friend, involved a breach of fiduciary duty.

32. *See* M. Hall, "Intuitive Fiduciaries: The Equitable Structure of Family Life" (2002) 19 C.J.F.L. 345.

33. *Frame* v. *Smith*, [1987] 2 S.C.R. 99; *Lac Minerals Ltd* v. *International Corona Resources Ltd.*, [1989] 2 S.C.R. 574.

34. [1999] S.J. No. 431 (Q.B.).

The relationship between banker and customer, like the relationship between older adults and younger family members, is not in itself essentially fiduciary. That relationship may become fiduciary in nature under certain "special" circumstances,[35] however, in which the banker has assumed an advisory role. Where the fiduciary relationship is established, the banker/fiduciary owes a duty to advise the customer/beneficiary in the customer's best interests. That duty will be breached where the banker/fiduciary provides advice that works to benefit the bank at the expense of the customer; equity presumes that, where the fiduciary relationship exists, the benefit will have been obtained through abuse of the influence inherent in that relationship.

In the case of *Hayward* v. *Bank of Nova Scotia*,[36] for example, the plaintiff had been a customer at the defendant bank for over forty years when she was approached by P, also a customer at the bank, with a business proposition. P suggested that the plaintiff invest in P's exotic cattle business. The plaintiff, knowing nothing about the exotic cattle business, approached her bank manager to discuss the proposed investment. The bank manager knew a great deal about the exotic cattle business; he also knew the investment was a risky one and was aware that P had fallen behind in his financial obligations to the bank. Nevertheless, the bank manager recommended the investment to the plaintiff. The plaintiff was granted a loan for the purposes of investing in the cattle; further loans were subsequently approved, also with no discussion of the of the particular risks involved. P's exotic cattle business subsequently failed, and P became bankrupt.

The plaintiff claimed that the bank manager had breached the fiduciary relationship existing between them by recommending the investment; the capital infusion into P's business was to the obvious advantage of the defendant (as it allowed P to meet his financial obligations to the bank) at the expense of the plaintiff, who relied on the defendant to advise her on how to proceed. The court agreed that a fiduciary relationship had come into being, citing the following relevant factors:

- the plaintiff was a widow in her 60s and concerned about her future financial security,
- the plaintiff was jeopardising her only asset (her home) by making the investment,
- the plaintiff had not made up her mind about the investment prior to meeting with the bank manager (her decision was influenced by his advice),

35. *Standard Investments* v. *CIBC* (1985), 52 O.R. (2d) 473 (C.A.); *Konefal* v. *CIBC*, [1985] B.C.J. No. 2360 (C.A.).

36. (1985), 51 O.R. (2d) 193 (C.A.). *See* also *Smith* v. *Continental Bank of Canada*, [1985] A.J. No. 375 (Q.B.).

- the bank manager was a respected member of the community,
- the plaintiff asked the bank manager to give her advice, and the bank manager did so, with enthusiasm, encouraging the plaintiff to make the investment,
- the plaintiff knew nothing about the exotic cattle business while the defendant knew a great deal, creating an inequality in bargaining power, and
- the plaintiff in fact listened to, accepted and relied on the bank manager's advice.

The English case of *Lloyds Bank* v. *Bundy*[37] also involved a situation in which a fiduciary relationship had come into being between a bank manager and the defendant, who guaranteed a loan to his son's business using his home (the family farm) as security. Unknown to the defendant, but well known to the bank manager, the son's business was in serious trouble. The bank manager did not disclose this information to the defendant.

The defendant, a longtime customer of the bank, was described as naive and tractable in financial matters, completely reliant on the advice and guidance of his bank manager, and anxious to stand behind his son. The farm had been in the defendant's family for generations and was his only significant asset. It was also a place of tremendous emotional significance for the defendant who, after the failure of his son's business, faced eviction by the bank. Under the circumstances, the court concluded that the relationship between the defendant and the bank had crossed the line to become fiduciary in nature.

It must be noted that a guarantee may be inequitable (and unenforceable) where no fiduciary relationship exists if the circumstances should indicate to the lender that full and meaningful independent legal advice is required due to the vulnerable circumstances of the guarantor (see discussion, above, under "Unconscionability") or the undue influence of the borrower (see discussion, below, "Undue Influence"), and where the lender has not taken steps to ensure that adequate advice has been taken.

37. [1974] 3 All E.R. 757 (C.A.).

3. Undue influence

Equity will intervene to set aside a transaction where undue influence has played a role on the basis of insufficient consent; it would be unfair to enforce a transaction which has not been freely consented to. Consent is not freely given where the person apparently consenting does so by reason of another person's undue influence.

Undue influence may be "actual," or intentional, where one person intentionally manipulates or pressures another person for the purpose of obtaining that person's agreement. Undue influence may also be exercised unintentionally, where influence arises by nature of the relationship itself. A relationship of dependence may develop between an older parent and adult child for example, in which the parent relies on the child for emotional support and practical assistance. In this context, the parent may agree to transactions because of a fear that doing otherwise might jeoparadise this crucial relationship. The adult child may be completely blameless, with no intention of withdrawing support or otherwise punishing the parent who does not go along; the parent's experience of influence, and not the intentions of the child, establish undue influence for the purposes of the doctrine.[38]

Close relationships of this kind - in which the potential for domination is inherent in the nature of the relationship between the parties[39]-give rise to a presumption of undue influence. The presumption may be rebutted where the evidence establishes that the particular transaction in question was in fact the result of the plaintiff's free and informed consent.[40] Independent legal advice will be an important factor in this determination.

Certain kinds of relationships will always give rise to a presumption of undue influence: lawyer/client and doctor/patient, for example. Outside of this limited class, a relationship giving rise to the presumption must be established through a "meticulous" examination of the facts.[41] An intermediate category of relationships has been suggested that would justify an approach of "special tenderness" on the part of the courts.[42] The risk of undue influence

38. "Equity and the Older Adult: Undue Influence and Unconscionability," *supra,* note 25.

39. *Geffen* v. *Goodman Estate*, [1991] 2 S.C.R. 353 at 377.

40. *See Coish* v. *Walsh* (2001), 40 E.T.R. (2d) 204 (Newf. C.A.) for a full discussion of relevant factors.

41. *Allcard* v. *Skinner* (1887), 36 Ch. D. 145.

42. *Barclay's Bank plc* v. *O'Brien*, [1994] 1 A.C. 180. *See* also *Bank of Montreal* v. *Duguid* (2000), 47 O.R. (3d) 737 (C.A.), Application for leave to appeal to the Supreme Court of Canada was granted with costs December 7, 2000, S.C.C. Bulletin 2000, 2238; *Gold* v. *Rosenberg*, [1997] 3 S.C.R. 767 (referring with approval to the *Barclay's Bank* decision); *CIBC Mortgage Corp.* v. *Rowatt et al.* (2002), 61 O.R. (3d) 737 (Ont. C.A.).

affecting a voluntary disposition by a wife in favour of a husband, for example, is greater than in the "ordinary run of cases" where no underlying sexual or emotional ties exist; "[a] wife's true wishes can easily be overborne because of her fear of destroying or damaging the wider relationship between her and her husband if she opposes his wishes."[43] Similar considerations may apply to the relationship between older parent and adult child; "[W]hile the relationship between husband and wife may be one in which it is more obvious that the husband will have influence over the wife, the relationship between a son in the prime of his life and parents in the evening of life is equally a relationship in which it should be appreciated that the possibility of influence exists."[44] It is also more likely that transactions between family members will be informal, and that the full scope of the risks entailed will therefore not be fully explained, intentionally or not.

A loan contract, like any other transaction, may be set aside on the basis of undue influence;[45] in practical terms, however, this remedy will be of little use where the problem is the borrower's inability to repay. The doctrine of undue influence is more likely to assist the family guarantor. Although it is possible that the bank itself may be the exerciser of undue influence over the guarantor, undue influence is more likely to occur within or arise out of the relationship between borrower and guarantor. The question then becomes whether the lending institution had notice of that undue influence, but decided to proceed regardless.

Where the alleged undue influence is unintentional, arising through the nature of the relationship itself, actual notice will almost always be impracticable. A bank manager will normally not be in the position to judge the inter-personal quality of relationships between borrowers and guarantors. The doctrine of "special tenderness," however, would work to put lenders on notice that certain kinds of relationships may give rise to a presumption of undue influence; before proceeding with the transaction involving members of this special class, lenders must therefore take steps to assure themselves that undue influence is not a factor.[46]

These principles were recently clarified by the English House of Lords in *Royal Bank of Scotland* v. *Etridge*.[47] That case held that in all cases where the relationship between the

43. *Barclay's Bank, ibid.* at 190. *See*, for example, *Stel-Van Homes Ltd.* v. *Fortini*, *supra*, note 2 (a case involving an older adult's transfer of shares in the "family business" to his sons-in-law).

44. *Avon Finance Co.* v. *Bridger*, [1985] 2 All E.R. 281 at 288.

45. *See Janz*, *supra,* note 34.

46. *Barclay's Bank* , *supra,* note 42.

47. [2001] 4 All E.R. 449 (H.L.)

borrower and the guarantor was non-commercial the bank would be put on notice that the relationship between them may be one giving rise to a presumption of undue influence. The bank would then be required to take reasonable steps to assure itself that undue influence was not a factor. Note that where no undue influence between borrower and guarantor is established (as where the presumption is successfully displaced by the whole of the evidence) the failure to carry out these "reasonable steps" will not in themselves make the guarantee unenforceable. The effect of *Etridge* is to set out the process that will subsequently protect the lender from a claim that it had notice of (subsequently established) undue influence between borrower and guarantor. Both elements must be shown: undue influence between borrower and guarantor and the lender's notice of that undue influence.

Recognising that "independent legal advice" in these circumstances is often a "fiction," "a charade," and "woefully inadequate," *Etridge* sets out the steps to be taken in addition to recommending that the guarantor receive independent legal advice.

1. The lender should check directly with the guarantor the name of the solicitor acting for him or her. The lender should communicate directly with the guarantor, and require written confirmation from the solicitor that he or she has explained the nature of the documents and their practical implications to the guarantor. The guarantor should be told by the lender that the purpose of confirmation is that the guarantor not be able to dispute the transaction. The solicitor may also act for the debtor, but must advise the guarantor separately. The lender should not proceed without an appropriate response from the guarantor.

2. If the lender is not willing to explain the transaction itself, it must provide the guarantor's solicitor with the necessary financial information regarding the debtor and the transaction to the solicitor (information that the solicitor needs to fully explain the risks and practical implications of the transaction to the guarantor).

3. In certain situations, where the lender believes or suspects that the guarantor has been misled by the debtor, or is not going forward of his or her own free will (through undue influence or otherwise), the lender must advise the guarantor's solicitor of the situation.

4. The lender should not proceed without written confirmation from the guarantor's solicitor.

Solicitors providing independent advice to guarantors would be required to take the following steps:

1. The solicitor will need to explain his or her role in the transaction (why independent legal advice is necessary).

2. The solicitor will need to explain the nature of the documents and their practical consequences ("She could lose her home if [the debtor's] business does not prosper. Her home may be her only substantial asset, as well as the family's home. She could be made bankrupt.")

3. The solicitor will need to explain the seriousness of the risks involved, and the extent of the guarantor's liability.

4. The solicitor should discuss the guarantor's financial means, and whether other assets are available to repay the debt.

5. The solicitor should explain to the guarantor that he or she has a choice about whether to proceed.

6. The meeting between solicitor and guarantor should take place face to face, without the lender, and in non-technical language.

The courts in this country have tended to define notice more narrowly in this context, and many decisions seem to require actual knowledge of undue influence to give rise to an obligation on the part of the lender to explain or advise the guarantor with respect to the transaction.[48] *Etridge* was discussed with approval in a 2002 decision of the Ontario Court of Appeal, *CIBC Mortgage Corp.* v. *Rowatt*, however.[49] In that case the court confirmed that the presumption of undue influence in the case has been rebutted; there would be no appeal from the "clear and unequivocal finding" of the trial judge that the appellant in this case (a wife) had not been subjected to undue influence by her husband (the borrower).[50]

4. Consumer Protection Legislation

Several provinces have incorporated principles relating to unconscionability in legislation. Where "unconscionable transactions" legislation applies, the equitable and statutory

48. "In the absence of any evidence of undue influence, fraud or misrepresentation or any evidence supporting a defence of *non est factum*, the failure of the bank to ensure that the spouse obtained independent legal advice before signing the guarantee may not be fatal to the claim of the bank." *Bank of Montreal* v. *Featherstone* (1989), 68 O.R. (2d) 541 (C.A.). *See* also *Bank of Nova Scotia* v. *MacLellan* (1980), 30 N.B.R. (2d) 596 (C.A.) and (1980), 31 N.B.R. (2d) 141 (C.A.); *Trans Canada Credit Corp.* v. *Hawkes*, [1992] N.B.J. No. 510 (Q.B.).

49. *Supra*, note 42. Application for leave to appeal to the Supreme Court of Canada was dismissed with costs, May 15, 2003; S.C.C. File No. 29524.

50. *Ibid.* at para. 20.

jurisdictions appear to co-exist side by side.[51] Most legislation applying to unconscionable transactions is limited to certain kinds of transactions.

The *Business Practices and Consumer Protection Act*[52] is new legislation designed to replace the *Consumer Protection Act*, the *Trade Practice Act*, and a number of other enactments concerned with consumer protection.

The *Consumer Protection Act*[53] included a presumption of unconscionability where a mortgage was provided as security for credit (a guarantee), but only where the loan is used for non-commercial purposes,[54] excluding the common situation where an older adult provides a guarantee for a loan to the business of the younger family member (as in the hypothetical story of Mrs. A).

In the case of *Columbia Trust Co.* v. *Carter*,[55] however, the court found that the question of whether the provision applied to a business loan was a triable issue. The guarantor in that case was a 68 year old widow who, wishing to "do her duty" to her daughter and son-in-law, agreed to mortgage her home as security for a loan to expand her son-in-law's sportswear business. The guarantor's very low monthly income would have been insufficient to repay the loan, but she fully expected, and was led to believe, that her son-in-law would be making all repayments. In fact the sportswear business was struggling financially (contrary to the belief of the guarantor, who had been assured that the business was doing well), and payments fell into arrears.

Division 2 ("Unconscionable Acts or Practices") of the *Business Practices and Consumer Protection Act*, including sections seven through ten, deals with unconscionable acts and practices generally and does not make explicit provision for mortgages provided as security (the division applies to "suppliers" "consumers" and "guarantors"). Mortgages are not excluded from the application of Part 2, however, as provided for in section 2(2)(a) of Part 1 ("Definitions and Application"). Division 2 is appended to this Report as Appendix C.

51. *Lloyds Bank* v. *Bundy*, *supra,* note 37; *Bertolo* v. *Bank of Montreal*, *supra,* note 29; *Bomek* v. *Bomek* (1983), 146 D.L.R. (3d) 139 (Man. C.A.).

52. S.B.C. 2004 c.2. Most sections of the Act were brought into force effective July 4, 2004 by B.C. Reg. 274/2004.

53. R.S.B.C. 1996, c. 69.

54. R.S.B.C. 1996, c. 69, s. 59. "Mortgage transactions" were defined under that heading as meaning "the extension of credit on the security of a mortgage," but did not include a transaction involving the extension of credit on the security of a mortgage for investment, business, or commercial purposes (s. 57).

55. [1987] B.C.J. No. 134 (S.C.).

Section 9(2) provides that, if it is alleged that a supplier committed or engaged in an unconscionable act or practice, the burden of proof that the unconscionable act or practice was not committed or engaged in is on the supplier.

The circumstances to be considered by a court in determining whether an act or practice is unconscionable include:[56]

- whether the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction,

- whether the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the consumer transaction,

- whether, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of consumer transactions were/are readily obtainable by similar consumers,

- whether, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the total price by the consumer,

- whether, at the prevailing rate of interest at the time the mortgage transaction was entered into, there was no reasonable probability of refinancing any unpaid balance of principal at the end of the term, and

- whether the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were/are so harsh or adverse to the debtor as to be inequitable.

No explicit distinction is made in the new legislation between "investment, business and commercial" purpose credit and other kinds of credit (note, however, that "consumer transactions" are defined in Part 1, section 1 as "a supply of goods and services or real property by a supplier to a consumer for purposes that are primarily personal, family or household"). The objective of the Committee's Recommendation No. 2 (see below, Part IV)

56. S.B.C. 2004, c. 2, s. 8.

is to ensure that the sections contained in Division 2 would apply in all situations where an older family member agreed to provide a guarantee.

5. Conclusion

The law currently protects the interests of borrowers and guarantors where it can be shown that the transaction was unfair because of lack of understanding or consent, pressure, exploitation of ignorance or other weakness, or the breach of a fiduciary duty. The equitable doctrines of undue influence and unconscionability, in particular, are especially likely to apply to older family members. The older adult who loans money to a younger family member may, like any other lender, ask to have the loan enforced (repaid, according to its terms) although this recourse may be complicated by the uncertainty that can result from lack of documentation.

Older adults as a group may be less likely than others to pursue legal action, however, especially where family members are involved.[57] The failure of expectations - that loans were not repaid, that a daughter's business failure resulted in significant personal loss - may be a source of potent shame feelings for parents and other older family members (this kind of thing shouldn't happen to "nice" families). Demoralised older adults facing significant financial loss, potentially including homelessness, may not have the resources to seek out and obtain legal assistance. Prevention is crucial: enabling and encouraging older adults to make careful and prudent decisions about the best way to help family members without jeopardising relationships and personal financial security. The Recommendations set out below in Part IV are focussed on prevention, and are intended to make it less likely that older lenders and guarantors will need to rely on a subsequent ability to access legal remedies.

It must also be noted that the common law in this area is still developing. The Canadian courts have yet to deal conclusively with developments in the English case law regarding undue influence,[58] despite approving references to the "special tenderness" class described in the *Barclay's Bank* case and to the guidelines set out in *Etridge.* Adoption of the *Etridge* guidelines, in particular, would clarify this area of the law significantly.

The current case law provides ambiguous guidance for lenders with regard to unconscionability; a presumption of unconscionability is raised in some, but not all, cases, and where the presumption does come into play it can be rebutted only with receipt of

57. *Supra*, note 5.

58. *National Westminster Bank plc* v. *Morgan*, [1985] H.L.J. No. 13; *Bank of Credit & Commerce International S.A.* v. *Aboody and Another,* [1989] 2 W.L.R. 759 (C.A.); *C.I.B.C. Mortgages Plc* v. *Pitt* [1994] 1 A.C. 200 (H.L.); *Barclay's Bank Plc* v. *O' Brien*, *supra,* note 42; *Royal Bank of Scotland* v. *Etridge*, *supra*, note 47.

adequate independent legal advice (the suggestion that the guarantor receive independent legal advice is not enough). Determination of when the circumstances give rise to a presumption of unconscionability is highly dependent on the perceptions and discretion of the individual "front line" bank manager. Clearer and more definite guidelines may work to benefit lenders as well as guarantors.

Part III: Responses to Consultation

Consultation for this project was carried out in two stages. The objective of the first stage was to collect factual information about inter-generational loans and guarantees and the problems associated with them. The objective of the second stage was to obtain feedback from the community regarding the "Possible Solutions/Proposals" to those problems as set out in a "Consultation Paper on Financial Arrangements Between Older Adults and Younger Family Members: Loans and Guarantees."

A. Stage 1: Questionnaires

The response from lawyers to the questionnaire was high, with 123 responses received. A compilation of those responses is included in an appendix to this Report (Appendix B).

Ninety five respondents indicated that, within the last ten years, they had been approached by an older adult for advice regarding a loans made to a younger family member. Amounts involved varied significantly; the amount most frequently mentioned was $100,000, with $10,000 the second most frequent number.

Respondents indicated that, in most cases where the advice was not to proceed with the loan, the older client chose to proceed regardless. Those giving an opinion most frequently indicated that the decision to provide the loan under these circumstances arose from love, trust, and concern for the borrower. The responses contained in the appendix contain a level of detail and nuance that provides a realistic and multi-dimensional picture of the circumstances in which inter-generational loans take place. Bear in mind that most inter-generational family loans will not involve legal input, although there is no obvious reason why the factors cited by the responding lawyers would not apply where the loan was informal and no legal advice was ever sought regarding its creation of subsequent enforcement.

Seventy-one respondents indicated that they had been approached to give advice to an older client regarding a guarantee made on behalf of a younger family member. The amount most commonly involved, by a large margin, was $100,000.

Forty-one respondents indicated that, where they had advised the older client not to go ahead with the guarantee, the client chose to do so regardless. Eight respondents answered this

question "no" (the client had not gone ahead), and the remainder did not answer the question. Love, trust, family obligation were again cited as reasons for why older clients in this situation chose to proceed with the guarantee. Respondents indicated a high level of concern for older family members approached to act as guarantors under these circumstances; again, the compiled responses give a rich and nuanced level of detail about the dynamics involved.

Responses received from the questionnaire distributed to lenders have also been compiled and are included as an appendix to this Report (Appendix B). Four responses were received. One lender indicated that formal guidelines would apply (requiring independent legal advice) where an older family member was involved as a potential guarantor. Other respondents indicated that, while no formal guidelines were in place regarding this particular situation, policies of general application would require independent legal advice. One respondent indicated that independent legal advice would be recommended where "common sense" alerted the bank officer to the possibility of pressure or impropriety. Respondents also indicated an inability to fully inform a guarantor about the borrower's financial situation for reasons of privacy.

The attempt to get information from older adults about their personal experiences with loans and guarantees was not successful. There was a low take-up by seniors' centres and other organisations approached to host focus groups on this issue. Seniors who did attend, and who responded to the questionnaire, provided little information on the issue. Two explanations are possible. First, only seniors who had experience as guarantors or family creditors would be in a position to answer the questionnaires (as opposed to more general issues such as housing, about which all seniors are likely to have an opinion). The focus group methodology did not target seniors who had experienced these transactions, and results were correspondingly low. Second, inter-generational loans and guarantees tend to be, for older adults, an intensely personal and private issue, especially where the arrangement does not work out. Seniors who (apparently) had not had personal negative experiences expressed the opinion that problems of this kind would never be relevant to them as their families were "nice" and they were not poor.

B. Stage 2: Consultation Paper

A Consultation Paper on "Financial Arrangements Between Older Adults and Family Members: Loans and Guarantees"was circulated to legal professionals, seniors organisations and other professionals working with seniors, organisations representing lending institutions, and individuals requesting copies in response to media coverage of the Project. The Paper provided a succinct overview of the issues, set out possible solutions to the problems associated with loans and guarantees, and included a form that may be used for documenting family loan agreements. Information presentations were also held at seniors centres and other locations in the lower mainland.

There was strong support for the importance of education in this area, as a means of informing older adults about the nature of the risks involved and as a tool for empowering individuals by legitimising the importance of cautious and reasoned decision making (not a lack of confidence, but a prudent course of action advised by the education provider). Many older family members will need to feel supported in the decision to say no, and the right educational material can provide that support in addition to information about risks. Lending institutions consulted indicated that raising public awareness about risks through education was key to ensuring that older adults did not take on unsustainable risks, without unduly restricting credit.

Older adults attending information sessions were generally enthusiastic about the form for documenting family loan agreements described in Recommendation No. 3, below, and appended to the Final Report as Appendix A. Those commenting indicated that such a form would be useful, and would be used.

Part IV: Recommendations

A. Information and Education

Recommendation No. 1

Older adults need objective information about the possible consequences of family loans and guarantees. Not all older family members approached to provide a loan or guarantee will obtain legal advice, especially where the loan involves a relatively small amount of money. Educational material does not replace legal advice, but can provide important support in situations where the older adult does not perceive legal advice to be a realistic alternative. Educational material, providing information from a neutral source (as opposed to information and advice from another family member, for example), can "support" or justify the decision of the individual who decides not to proceed with a proposed loan or guarantee.

Education through community outreach (public presentations and lectures) is a permanent feature of the Canadian Centre for Elder Law Studies program, and information related to loans and guarantees will continue to be included in that process. The Committee also hopes to produce educational material in the form of a brochure setting out the potential pitfalls of family loans and guarantees, using the drama of Mrs. A and her children[59] to illustrate the motivations and risks commonly involved.

B. Family Loans and Guarantees Act

59. *Supra*, Part I.

Education and information is important but not, in itself, sufficient. The Committee has concluded that changes in the law are also needed to provide adequate protection for the interests of the older family member who loans money or agrees to act as a guarantor. Recommendation No. 2 sets out the form of legislation that the Committee believes will achieve this goal.[60]

The legislation recommended below has been drafted in the form of a stand-alone Act. The Committee has no firm views on the question of where the legislation should be placed. Any of the following possibilities would, in the opinion of the Committee, be suitable.

- Inclusion as a new part or division of the *Business Practices and Consumer Protection Act*.[61] The protection of vulnerable persons is a common goal of the new Act and the recommended legislation set out below. Moreover, a number of specific provisions in the *Business Practices and Consumer Protection Act* can be usefully linked or incorporated by reference in the recommended legislation.

- Inclusion as a new part of the *Family Relations Act*,[62] given the focus on transactions between family members.

- Inclusion as a provision of the *Law and Equity Act*.[63] This Act is currently used to regulate some aspects of contractual relationships.

- Implementation as a stand-alone Act.

Recommendation No. 2

The Committee recommends the adoption of an enactment with the following provisions:

FAMILY LOANS AND GUARANTEES ACT

Interpretation

60. One member of the Committee, Gordon Turriff Q.C., was not persuaded that the existing law is inadequate, even if it may need some rationalisation. He does not think that this recommendation can be justified on the basis that the proposed law is expected to operate preventatively. In his view, the existing law is preventative and it is not desirable to make new law to address particular circumstances where necessary remedies can be supplied by the appropriate application of established principles.

61. S.B.C. 2004, c. 2. *See* the discussion in Part II C(4) of this Report.

62. R.S.B.C. 1996, c.128.

63. R.S.B.C. 1996, c. 253.

1 In this Act:

"commercial lender" means a person, including a seller and a lessor, who in the course of business extends credit;

"family guarantee" means a guarantee given to a commercial lender in relation to credit extended to:

(a) to a child or grandchild of the guarantor,
(b) a spouse or domestic partner of a person mentioned in paragraph (a),
(c) a corporation that is controlled by one or more persons mentioned in paragraph (a) or (b);

"family transfer" means a transfer of money or extension of credit made by a person to

(a) a child or grandchild of that person,
(b) a spouse or domestic partner of a person mentioned in paragraph (a),
(c) a corporation that is controlled by one or more persons mentioned in paragraph (a) or (b);

Comment: The main significance of the definitions is to identify the kinds of inter-generational transactions to which the Act should apply. The two key types of transactions are the "family transfer" and "family guarantee." They contemplate either a direct transfer of wealth or a contingent transfer for the benefit of a child or grandchild of the person conferring the benefit, a spouse of a child or grandchild, or a corporation controlled by a child or grandchild or the spouse of a child or grandchild. The inclusion of corporations is prompted by the reality that often older adults are asked to loan money to or guarantee the obligations of a business owned by a younger family member but which is carried on in the form of a limited company. The older family member involved in this kind of transaction is no less vulnerable than if the benefit were conferred directly.

It should also be noted that these definitions only apply to a benefit that is conferred on descendants. Thus a transfer by a child to a parent would not fall within the definition of "family transfer."

Family transfer presumed to be a loan

2 (1) Subject to subsection (2) a family transfer is presumed not to be a gift but instead to be a loan made by the transferor to the transferee upon the following terms:

(a) the loan is repayable on demand
(b) the loan carries no interest, and
(c) if, on the death of the transferor the loan is unpaid, the loan is payable to the transferor's estate and may be deducted from any entitlement of the transferee to share in or benefit from the estate.

(2) The presumption created by subsection (1) may be rebutted if:

(a) the transfer or any aspect of it is the subject matter of a writing, including a will, evidencing an intent by the parties to the transfer that is inconsistent with the presumption, or

(b) all of the circumstances surrounding the transfer, including the amount of the transfer, suggest an intent by the parties that is inconsistent with the presumption.

Comment: In large numbers of cases transfers of money between family members are not documented and it later becomes necessary to characterise the legal nature of the transfer. This might happen, for example, on the death of either a parent or the child or if a dispute should arise. Is it a gift? Is it a loan? If it is a loan, what are the terms?

The purpose of section 2 is to provide presumptions that will assist in characterising the transfer where there is no other information available. Subsection (1) characterises the family transfer as a loan rather than a gift and sets out some basic terms of the loan that will be compatible with the intentions of very many parents and grandparents who loan money to their children or grandchildren (either directly or by loaning money to a spouse).

Section 2 is expressly intended to displace and reverse the common law "presumption of advancement" discussed on page 6 and in footnote 13.

Subsection (2) makes it clear that the presumption is easily rebutted, either by a writing that expresses a contrary intent,[64] or through an examination of the circumstances surrounding the transfer. The circumstances may include the amount of the transfer itself (the transfer of a small amount is more likely to comprise a gift than the transfer of a large amount).

Application of *Business Practices and Consumer Protection Act* to family guarantees

3 For the purposes of Part 2, Division 2 of the *Business Practices and Consumer Protection Act*

(a) a family guarantee is deemed to be a consumer transaction,

(b) a commercial lender who takes a family guarantee is deemed to be a supplier, and

(c) a person who gives a family guarantee is deemed to be a consumer except in those provisions that refer expressly to guarantors

whether or not the credit that is the subject matter of the guarantee is extended for investment, business or commercial purposes.

Comment: Part II, Division 2 of the *Business Practices and Consumer Protection Act* provides relief from the consequences of unconscionable transactions. That Part is reproduced as an Appendix to this Report (Appendix C). The effect of section 3 is to bring the taking of a family guarantee within the protection of that Part.

64. The *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 29 gives the word "writing" a wide meaning.

The finding that an unconscionable act or practice has occurred invokes section 10 of the *Business Practices and Consumer Protection Act* which may result in the guarantee being held to be not binding on the guarantor or the application of a number of other remedies available to the court under section 10(2). Section 10(2)(d) allows the court to set aside any security given in respect to the transaction (where the older adult gives a mortgage of his or her home to secure a guarantee for a business loan made to a son-in-law, for example,[65] the mortgage can be set aside).

Family guarantees: disclosure by commercial lender

4 (1) A commercial lender must deliver to the guarantor, before completing a family guarantee, a statement, disclosing the following:

(a) whether the guarantee includes any prior loans to the borrower and, if so, the amount owing under the prior loans,

(b) whether the guarantee covers any future extensions of credit and, if so, whether they are limited in time or amount,

(c) the maximum amount for which the guarantor may become liable under the guarantee or, if the guarantor's liability is unlimited, a statement to that effect,

(d) the right of the guarantor to cancel the guarantee under section 5 and the way in which that right may be exercised, and

(e) a statement in the form set out in the Schedule to this Act.

(2) If the extension of credit for which a family guarantee is to be taken is a credit agreement within the meaning of Part 5, Division 3 of the *Business Practices and Consumer Protection Act* the commercial lender must also furnish the guarantor with a copy of the disclosure statement to which the borrower is entitled under that Division.

(3) If a commercial lender fails to comply with subsection (1) or (2) then, for the purposes of Part 2, Division 2 of the *Business Practices and Consumer Protection Act* an unconscionable act or practice is deemed to have occurred.

(4) The obligations imposed on a commercial lender by subsections (1) and (2) are in addition to, and do not diminish, any duty of disclosure arising out of particular facts or circumstances that may be imposed on the lender otherwise by law.

Comment: The older adult who gives a family guarantee is in an extremely vulnerable position. Guarantees are often complex arrangements and there is a very real chance that the guarantor may not appreciate the nature of the risks being assumed or the extent of his or her obligations under the guarantee. Section 4 ensures that the guarantor receives the information necessary to make an

65. The situation in *Columbia Trust Co.* v. *Carter*, *supra,* note 55; *See* Part II C(4).

informed choice. This objective is achieved by placing specified disclosure requirements on the lender taking the guarantee.

If the lender fails to make the required disclosure an unconscionable act or practice is deemed to have occurred and the remedies set out in section 10 of the *Business Practices and Consumer Protection Act* apply.

The disclosure requirements set out a minimum standard and do not displace the existing law under which the facts and circumstances of a particular transaction may call for a higher standard.

Family guarantees: cooling off period

5 (1) A guarantor may cancel a family guarantee by giving a notice of cancellation to the commercial lender not later than 10 days after the date that the guarantor would, but for this section, have become bound by the family guarantee.

(2) The right to cancel under subsection (1) may be waived by a guarantor who has received independent legal advice.

(3) A waiver under subsection (2) is effective only if it is in writing and signed by the guarantor and the person who provided the independent legal advice.

Comment: Section 5 gives the family guarantor a "cooling off" period of 10 days in which the guarantee can be cancelled.

Where it is urgent that the credit transaction proceed immediately, the guarantor can waive the benefit of the cooling off period but only after receiving independent legal advice.

Regulations

6 (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.

(2) The authority to make regulations under subsection (3) does not limit subsection (1).

(3) The Lieutenant Governor in Council may make regulations as follows:
(a) defining a word or expression used but not defined in this Act;
(b) respecting:
(i) the form of the statement referred to in section 4(1) and the manner in which it is to be delivered,

(ii) the form of the notice referred to in section 5(1) and the manner in which it is to be delivered, and
(iii) the form of the writing referred to in section 5(3), and

(c) exempting a person from the application of all or part of this Act or the regulations or establishing circumstances when all or part of this Act or the regulations do not apply.

Comment: Self explanatory.

Commencement

7 This Act comes into force by regulation of the Lieutenant Governor in Council.

Comment: Self explanatory.

Schedule

Important Information about Guarantees

A guarantee is a binding legal document. It imposes a serious liability. It is not a mere formality. Sign it only if you wish to be bound.

If the borrower fails to repay what is owed, you, as the guarantor of the debt, become responsible to pay. If you fail to pay, your assets and income may become liable to seizure to satisfy the debt.

Make sure you understand the terms of the guarantee. It may cover more than the amount of the loan made or credit extended at the time the guarantee is given.

Depending on how the guarantee is worded it may make you legally responsible to pay:

- **old debts of the borrower owing to the same lender, or**
- **future loans made or credit extended by the lender to the borrower**

If you are in any doubt, ask the lender to explain carefully the nature and extent of your legal responsibilities under the guarantee.

The law gives you a "cooling off" period of 10 days in which you may cancel the guarantee by giving a notice to the lender. Make sure you understand your right to cancel and how notice must be given to the lender.

C. Getting it in Writing

Recommendation No.3

Family members may not document loans for a number of reasons. Parents and other older family members may fear that asking for documentation suggests mistrust or a lack of confidence in the borrower, or feel that "nice" families don't need to document their financial arrangements. Older family lenders may also be reluctant to involve a lawyer in the transaction, for the reasons noted above or because of a desire to avoid expense, maintain privacy, and "keep it simple."

Lack of documentation is often the source of subsequent problems, however. The parties may be unclear about each other's expectations regarding the terms of repayment (the lender may expect prompt and regular repayments, for example, where the borrower understands that repayment may be deferrable until the lender's death, at which point any outstanding balance will be subtracted from the lender's estate).

In Appendix A we provide a form to assist family members to document their loan transactions. It is not a "model agreement" in the sense that it is intended to create or constitute a formal contract between the parties. It is not, and is no substitute for, legal advice which people contemplating making loans are strongly encouraged to obtain in all cases.

Rather, the form is intended to serve as a checklist to ensure that the parties have turned their minds to the most fundamental terms of their agreement and as a template that will make it easy to record what those terms are (in particular encouraging the parties to make clear statements about the terms of repayment).

A written record of this kind will assist the parties if, at some later date there are disagreements over what the terms are. It will also provide evidence of the arrangement to other persons who may have reason to question the nature or terms of the loan. In extreme cases, it can also provide some legal evidence of its terms if the loan should become the subject of court proceedings.

Appendix A

Getting it in Writing: A Form for Documenting Your Family Loan

Introduction

As stated earlier, this form is intended to assist family members in documenting their loan transactions by providing a checklist and a template. Its function is to help them to focus their attention on the most important features of their loan and to make sure there is a common understanding of the rights and obligations it creates.

This form must be used only for the purposes that it was intended to serve and care must be taken in completing it. Even in what may seem to be a simple case it is no substitute for a formal contract prepared with the assistance of a lawyer. When a loan transaction may be regarded as "simple" will not necessarily be obvious and legal advice will assist in identifying and avoiding legal pitfalls.[66]

Our Family Loan

Our purpose in completing this form is to set out our intentions in relation to a proposed family loan and to ensure that we have thought about its important elements and that no uncertainty or confusion can arise later.

An original signed copy of this form should be retained by the lender.

Who We Are

The Lender is _____
Print Name

The first Borrower is _____
Print Name

The relationship of the first Borrower to the Lender is *(check one)*

[ ] child of the Lender or [ ] spouse of a child of the lender

or [ ] other

If "other," explain

66. An example of such a pitfall concerns limitations of actions. The Limitation Act requires that a debt be repaid within 6 years of the time it becomes due or it will be extinguished. Where a loan is payable on demand, that 6 year period starts to run from the time the loan is made rather than when the demand is made. So if a demand loan is made and nothing is done for 6 years the right to repayment is lost. There are ways of avoiding this result but they require legal advice.

Only complete this section if there is a second Borrower

The second Borrower is _____

_____
Print Name

The relationship of the second Borrower to the Lender is (check one)

[ ] child of the Lender or [ ] spouse of a child of the lender
or
[ ] other

If "other," explain

_____

Where there is a second borrower is it understood that the lender is entitled to look to either borrower for repayment of the full amount of the loan.

About The Loan

The amount of the loan is $_____

The loan must be repaid to the lender (check one)

[ ] with no interest or [ ] with simple interest at _____% per year
or
[ ] other

If "other," explain

_____

The loan must be repaid to the lender in the following way(choose one)

[ ] In full whenever the lender demands that it be repaid*
[ ] In full on this date _____
[ ] In instalments as follows

	Date	Amount
Instalment No. 1	_____	$ _____
Instalment No. 2	_____	$ _____
Instalment No. 3	_____	$ _____

If it is to be repaid in more than 3 instalments use an additional sheet of paper

[ ] In continuing monthly installments of $ _____ payable on the first day of each succeeding month until such time as the full outstanding balance of principal and interest owing is reduced to zero.

Where there is only one borrower, if the lender should die before the loan is repaid in full *(check one)*

[ ] the amount then owing is forgiven and need not be repaid to the lender's estate,

or

[ ] the amount then owing may be deducted from any money to which the borrower is entitled from the lender's estate but the estate shall have no further claim for repayment,

or

[ ] the amount then owing must be repaid in full in accordance with the terms of the loan agreement to the lender's estate.

Where there are two or more borrowers, the issue of who is responsible for repayment should be addressed.

* *See* note 66.

Our Intentions

We have considered the options and issues identified in this document carefully and have signed it to indicate that our choices represent out true intentions in relation to the loan.

Date _____

_____
Lender's Signature

_____
Signature of Borrower Number One

_____
Signature of Borrower Number Two (if any)

Appendix B
Financial Arrangements in Families: Loans and Guarantees By Older Family Members
(Lawyers Questionnaire)
RESPONSES

About you

1. Where do you currently work?

Private firm:	101	Other:	2	No response:	10

2. Number of partners in firm (if applicable)

1:	29	6:	2	23:	1	58:	2	In house counsel:	1
2:	14	7:	3	30:	2	60:	2	Wills and estates planner:	1
3:	14	9:	2	45:	1	200+:	1	No response:	17
4:	5	15:	4	50:	2	350:	2		
5:	4	16:	1	50+:	2	600:	1		

3. In what municipality is your practice located?

Burnaby:	2	New Westminster:	3	Sidney:	1	White Rock:	3	Chemainus:	2
Squamish:	1	No response:	11	Courtenay:	1	Okanagan:	1	Summerland:	1
Duncan:	2	Port Coquitlam:	1	Kamloops:	3	Sunshine Coast:	1	Prince George:	1
Surrey:	4	Kelowna:	3	Prince Rupert:	1	Terrace:	1	Langley:	6
Richmond:	3	Vancouver:	37	Nanaimo:	5	Saanich:	2	Victoria:	12
National:	2	Salmon Arm:	1	West Vancouver:	1			North Vancouver:	1

Loans

4. Have you been asked within the last ten years to give advice to an older person regarding a loan made to a younger friend or family member (before a loan has been made, or where a loan has not been paid back?)

Yes: 95 No: 18

If your answer to question 3 was yes, please answer the following questions 4- 12; if no, please proceed to question 13.

5. Approximately how many times have you been asked to give such advice?

Once:	3	2-10 times:	53	More than 10 times:	30	No response:	27

6. The last time you gave such advice, was your client:

Male:	37	Female:	58	No response:	23

7. The last time you gave such advice, was your client from a non-English speaking background?

Yes:	9	No:	77	No response:	27

8. The last time you gave such advice, what was the relationship between your client and the borrower?

Some respondents identified more than one kind of transaction

Parent/son:	48	Grandparent/grandchild:	1	Parent/daughter-in-law or son's partner:	1
Parent/daughter:	35	Aunt or uncle/niece or nephew:	1	Another relative (please describe):	0
A friend:	4	No response:	21	Parent/son-in-law or daughter's partner:	4

9. The last time you gave such advice, what was the approximate amount of the loan?

74 responses were received

The amounts indicated range between $8,000-$600,000

$8,000:	1	$24,000:	1	$50,000:	6	$75,000:	2	$200,000:	4
$10,000:	8	$25,000:	1	$52,000:	1	$80,000:	3	$250,000:	2
$11,000:	1	$30,000:	4	$60,000:	3	$100,000:	11	$300,000:	2
$15,000:	1	$35,000:	3	$62,000:	1	$100,000+:	2	$350,000:	1
$20,000:	4	$40,000:	2	$65,000:	1	$130,000+:	1	$450,000:	1
				$70,000:	1	$150,000:	4	$600,000:	1

10. The last time you gave such advice, were you consulted regarding:

Documentation of the loan (before money was transferred):	54
Documentation of the loan (after money was transferred):	2
Non-repayment of a loan:	28
No response:	29

11. Where you were consulted prior to the loan (before money was transferred), have you recommended that the client not proceed with the loan?

Yes: 40 No: 36 No response: 37

Where the answer is yes, did the client proceed with the loan regardless?

Yes: 30 No: 8 No response: 75

12. If the answer to 11 was yes, do you have any opinion as to why the client chose this course of action?

33 responses were received.

- I believe because client took steps, following my recommendation to document the loan.
- His daughter needed a place to live - love and affection for his daughter.
- Trusted son; mind made up before they saw me (I reviewed referral to give I.L.A to parent)
- Usually client either wanted to help out child while alive; or considered it pre-advance on inheritance.
- Pressure from son to proceed with the loan, parent trusted son.
- Fear of alienating son/daughter.
- Family pressure - being dependent on child not wanting to be separated from child.
- Regardless of the financial risk to the parent, the parent wanted to help the child (even with lots of bad financial history for child).
- After a review of the facts the parents' assets were insufficient to absorb a loss, if one occurred. The loan was for the purchase of a first home. There was some equity in the home - although the risk of loss remained if there was a matrimonial split or falling property values. The parent declined to take security on the house being purchased.
- Client aware of risks and chose to take the risk.
- She felt morally compelled to help her son, partly out of love for him and partly in hope that it would help him get back on his feet again. He'd had a string of bad luck and wanted the money to start a new business venture.
- Felt obligated to give financial support to their son - confident son would cover payments.
- Love.
- Absolutely. We discussed it at great length alone and it made perfect sense.
- The client had felt an obligation to her daughter, pressured by her daughter and was not thinking clearly about her own situation and liability. In obtaining legal advice she was able to more clearly sort through the issues and make a more reasonable and informed decision.
- Pressure from family relation.
- They understood the risk of what they were doing and wanted to help their child regardless.
- She advised me that the borrower exerted tremendous pressure on her. Additionally, my client was generous by

nature and was very wealthy.
- Guilt - they were a rotten parent who raised a pathetic needy child. The fact that the child was needy gave the parent ongoing power.
- Sense of family obligation.
- Because the client could afford to do so and wished the younger generation to have the use of the money now when they needed it rather than waiting to inherit it. If money was lost, then nothing later to inherit.
- After a thorough discussion: a) client concluded there was adequate security for the loan b) client had the resources to make the loan and wouldn't suffer if a loss c) client was (appropriately) wanting to help family member (daughter).
- Family harmony; gave advice as to how to structure if going to proceed; security etc; done in conjunction with estate planning - get share early etc. sometimes advance not loan.
- They explained they would gift the money if necessary and trust their child.
- Family ties. Paternal obligation. Wanted to help. Know the risks.
- Kindness.
- Desire to assist son's business venture.
- I know this does not strictly follow your guidelines but I see a lot of this type of transaction or the fall out from it. Usually client proceeds no matter what you tell them, although if I really feel strongly that they are being taken advantage of, I try to convince them that although there is no doubt about the credit worthiness of their son/daughter/relative, they might be sued, or some non-existent spouse might take advantage of them, etc. Even then…
- This is a dumb question.
- Family reasons- this was something the parent really wanted to do for her child. I sensed no threats or fear was involved.
- Overwhelming desire to help son, in the belief that this would finally given him the start he needed.
- The last time I was asked for advice, the loan had already gone into default and the co-signing had been done.
- They feel they can trust their family not want to complicate matters.

13. Do you have any other comments about this issue?
39 responses were received.

- It's a private matter between parents and children, rarely documented.
- Haven't seen any abuse in this area. Times I advised not to go ahead was because of risk of loan being not repaid.
- Arises often, but very few problems.
- Difficult issue. Seldom does the client follow the lawyer's advice. Emotion typically overrides reason, and typically the parent is unsophisticated.
- The relationship between parents and the favoured child are difficult to deal with because the favoured child is often at times the primary caregiver for the parent who feels some obligation to favour the child.
- Out of love, some people set aside their wisdom.
- I have on many occasions advised my clients not to lend money. In the case of large amounts the loans are generally secured by a mortgage on property.
- Try to get more public awareness of parent's position *vis a vis* a child in a marriage breakup of the child.
- Loans vs. gifts are always discussed particularly if parent-child relationship.
- People maintain a huge amount of trust in their children.
- Over last 10 years I have given ILA to many. Some I have advised not to sign.
- Rarely do clients take that advice. They want to help their children.
- This is such a common issue. I have had long standing clients go elsewhere (for the documentation) when I have strongly advised them against making the loan. Only very occasionally have they accepted the advice and not made the loan.
- Usually it is a parent wanting to advance a child's (children's) interest who as lender is not concerned that a child may not repay.
- Granted son initial (?) mortgage to help him purchase condo. She wanted to sell home and son refused to refinance.
- Parents help children all the time . . . usually with a down payment on a house. We try to document it by a P.N. and mortgage so it is clear that it is not a gift. This is especially important when the loan is to a child and his or her

spouse.

- I have tried to get lending institution to modify its mortgage security from the guarantor and tried to limit the guarantee - not much success.
- I have been involved in this type of situation many times and you always have to meet with the person alone and make sure it makes good sense and they know what they are doing.
- Advice needs to be given earlier on in the loan application process - not once all security drawn and parties ready for funds.
- Clients are not well-informed on this issue and often get ripped off.
- It's very common. I try to ensure that no undue influence is being exerted and that the client will not be facing financial hardship as a result of providing financial assistance.
- There are 2 major problems. First, the loan becoming statute barred because of no payments or acknowledgement within 6 years of a demand loan. Second, risk of loan not being recognized by the court in dividing assets on marriage breakup of borrower.
- Most loans happen without consultation with a lawyer.
- Situations I have been in have always been close family members. I would have greater concerns if non-family and extended concerns if the overall assets could leave the elders in financial jeopardy.
- Assistance to the younger generation is very frequent; and problems or unfairness not frequent, in my experience. Usually problems related to testementary fairness.
- Most inter-family loans. I have been involved with a high net worth individuals who are experienced business people.
- I suspect (sometimes) that even when there is a full discussion with the client i.e. pros and cons that the desire to help overcomes common sense.
- It is also a frequent source of conflict for siblings after parent's death.
- I will not become involved in this type of transaction unless the loan is secured.
- There is a great deal of pressure, to the point of abuse, exerted on the elderly of both sexes by predatory children and predatory acquaintances to lend money. The pressure is exerted until the elderly person caves in; and they cave in only to relieve the pressure, which they do not know how to avoid in any other way. Elderly people cannot withstand demands, subtle threats and repetitive pressures the way younger, more vigorous people can. And these pressures have an important emotional content; the elderly person knows that if s/he does not comply with the demands, emotional support may be withdrawn and emotional abuse or starvation may follow. The saddest aspect of this problem is that the elderly person often has no one else other than the abuser to turn to… or at least I believe that is the case.
- That, notwithstanding the relationship between the parties, the lawyer should always explain fully to the lending client about the advantages and disadvantages, real and "political," of making loans, and particularly unsecured or non-documented loans, to relatives. The financial effect on the client should also be considered.
- This is real tangle. Parents expect their children to be fair after they die but do not always give credit for services rendered. They may loan money and expect it back and when it is not paid back, they don't always have any issues except that they would like their estate to be reallocated to take into account the loans; there are many problems, documentation of moneys loaned and what has been paid back; documentation of what was a loan and what was or becomes a gift. Services rendered to the senior which the senior considers part payment of the loan OR doesn't and should, etc.
- Most of my experience is with parents loaning their child and child's partner money to buy their first home. I strongly advise them to document the loan by way of mortgage and to register in the LTO. Often they will allow the documentation but choose not to register at this time.
- Question 10 is somewhat awkward, perhaps inappropriate. Generally, it seems to me, a lawyer should neither recommend nor not recommend such a loan. Legal advice, the province of the lawyer, deals with such issues as the security to be provided, the prospect of non-payment and the remedies available, and so on.
- It was an extraordinarily risky venture and, unfortunately, did not succeed and now the parent has lost everything.
- The rules of Undue Influence are too narrow for many seniors. Notaries should be absolutely BANNED from handling such transactions.
- I simply think that we need to better educate the public of the need to use lawyers prior to doing anything of this nature. While it is difficult to do given the nature of what lawyers must do on behalf of their clients it is imperative that an effective advertising campaign be instituted to promote the use of lawyers as a preventative measure and not as the ruthless, moneygrubbing pythons that we seem to be depicted as too often.

- It is an incredibly common scenario. Typically the parties only arrive in the lawyer's office "to draw up the papers." They don't come seeking advice, but are usually grateful to receive it.
- The loan was from father to daughter, and the father was of the view that the loan was simply an advance of the daughter's likely inheritance. The purpose of the documentation was to ensure that the other children would be treated fairly.

Legal Advice to Guarantors

14. Have you given legal advice within the last 10 years to an older person in relation to a guarantee to secure a loan for a younger friend or family member?

Yes: 71 No: 32 No response: 10

If your answer to question 14 was yes, please answer the following questions.

15. Approximately how many times have you been asked to give legal advice to an older person in relation to a guarantee to secure a loan for a younger friend or family member?

Once: 1 2-10 times: 38 More than 10 times: 24 No response: 50

16. The last time you gave such advice, was your client:

Male: 29 Female: 39 No response: 45

17. The last time you gave such advice, was your client from a non-English speaking background?

Yes: 8 No: 53 No response: 52

18. The last time you gave such advice, what was the relationship between your client and the borrower?
Some respondents identified more than one kind of transaction

Parent/son:	38	Grandparent/grandchild:	3
Parent/daughter:	14	Aunt or uncle/niece or nephew:	1
Parent/daughter-in-law or son's partner:	4	Another relative (please describe):	2
Parent/son-in-law or daughter's partner:	2	*Parent/daughter and son-in-law*	
Can't recall usually it for a son or daughter		A friend:	2
No response:	49		

19. The last time you gave such advice, was the guarantee provided for a business or consumer/personal purpose?

Business: 24 Personal/consumer: 38 No response: 51

20. The last time you gave such advice, what was the approximate amount of the loan?
51 responses were received
The amounts indicated range between $10,000-$800,000

$10,000:	2	$30,000:	2	$70,000:	1	$135,000:	1	$200,000:	5
$16,000:	1	$40,000:	3	$80,000:	2	$150,000:	3	$250,000:	1
$20,000:	2	$50,000:	3	$85,000:	1	$160,000:	1	$300,000:	1
$25,000:	5	$60,000:	1	$100,000:	13	$180,000:	2	$800,000:	1

21. The last time you gave such advice, where did the meeting with your client take place?

Your office:	58	Client's home:	2	No response:	52
Office of lending body:	0	Other (please describe):	1		

22. The last time you gave such advice, who else was present (other than yourself and the client)?
23 responses were received.

- No one else present and certainly not the borrower!!!
- Interpreter and husband of the client.
- No one, the parents only (i.e. my clients)
- Client only.
- Sometimes a staff member for witness and documentation purposes when client wants to lend on guarantee contrary to my advice.
- They wanted the child present.
- Can't recall. Usually it is with both parties. i.e. The son or daughter who is borrowing the money and the parent who is guaranteeing the loan.
- Both parents / clients.
- Client's spouse.
- No one else. I won't tolerate anyone else's being present.
- No one; Nobody (8 responses)
- I usually try to isolate the client from the recipient.
- Both father and son.
- Client's spouse.
- Their (approximately 4 year old) granddaughter.

23. The last time you gave such advice what information, if any, did you have about the reasons why the lender had requested the guarantee?
56 responses were received.

- Borrower not having sufficient income or assets to borrow without a guarantee.
- One security for the business loan was insufficient for the amount of the loan and the guarantors were providing additional security.
- Not much.
- Son did not have sufficient income to qualify for loan.
- Enable child to purchase a home.
- Borrowers otherwise ineligible for mortgage financing
- Lender wanted line of credit secured against duplex co-owned by parties. No other financing on unit.
- The loan to daughter would not have been made without parent□s guarantee.
- More security including more solid security.
- The child's income was not high enough to meet the debt ratio required by lenders.
- Lender wants security - independent advice is required by all commercial leaders.
- Precarious personal financial situation of borrower.
- Child borrower had limited assets.
- The principal borrower did not have sufficient resources to be approved for the loan alone.
- Limited. The only information was that provided by the client.
- Child needed a guarantor for house mortgage.
- Primary borrower's income not sufficient for size of mortgage.
- Covenant not strong enough.
- Additional security for loan.
- They needed the additional security
- Indebtedness, lack of assets and youthfulness of borrower.
- None.
- Borrower didn't qualify.
- I understood the entire transaction.
- Poor credit rating of daughter and lack of assets to secure loan.
- Assist with home purchase.
- Security from borrower was not sufficient. Lender required additional security in order to provide loan.

- Borrower had insufficient income and assets to justify loan.
- To cover their ass.
- Parental love.
- Inability of child to qualify.
- Lots of history - on going clients of mine.
- Limited Information.
- Borrower starting new business. Father experienced and high net worth.
- Some but likely not all.
- Borrower not have proper credit rating.
- Wanted better covenant, wouldn't lend without it.
- Lender needed additional security.
- Borrower too weak financially to finance alone.
- The borrower had inadequate security.
- To help purchase a first home.
- Just the lender's version of the facts.
- No reasons given by lender. Guarantor assumed it was because the borrower had no assets to attach other than a car.
- Desire to assist son's business.
- I believe that I was given all the reasons.
- Whatever I needed.
- It was to enable the son (and his wife) to purchase a home. The son and daughter in law did not qualify for a mortgage from a conventional lender.
- Son did not qualify without guarantor due to bad credit rating and lack of assets.
- To secure child's financial obligations under a mortgage where concern about ability to pay.
- Guarantee purchase of home.
- Simply because the client was a guarantor with different rights than the borrower.
- They wanted access to the guarantor's equity.
- I knew that the lender would not make the loan without a guarantee. The lender in the past had received a guarantee from other family members, who were no longer able to give the guarantee.
- Just that the loan could not be made without a guarantee.
- Inability to obtain own financing because of age/inexperience.
- No information directly from the lender but obviously the daughter did not qualify without the guarantee.

24. The last time you gave such advice, did you feel that you had access to sufficient information (e.g. regarding the financial position of the borrower) to give useful advice to the guarantor? Please explain.
57 responses were received.

- In the last instance, I had sufficient information, however, in these situations it is frequently very difficult to obtain all the information and to assure yourself that it is sufficient.
- No, and no further comment (2 responses).
- Yes, the guarantor of mortgage on house parent was transferring to son - adequate security in real estate to induce risk of guarantee.
- Parent knew child well enough.
- Yes. Advised not to be guarantor; kids couldn't afford the home.
- Client felt there was very little risk to transaction. Son had worked in same business for 10 years.
- No, I was only consulted after the guarantee was in place.
- No, my duty was to make my client aware of the worst-case scenario if the lender does not pay back the debt.
- Yes, and no further comment (8 responses).
- If you don't have the information, you get it.
- The advice is more often based on the financial position of the guarantor. The only information is that received from the parent which is *usually* fairly good.
- Not particularly although I pointed out the risks of not knowing the information.
- Yes, child's income did not meet bank requirement for loan. Parent had substantial assets.
- Not initially but we called the bank and got the additional info.

- Yes, went into it in detail.
- Yes, copies of all principle loan documents.
- Usually not. The parent has usually made up their mind already.
- Yes, parents had info.
- No. Info not provided.
- Yes. I understood the borrower's _____(?) the business being purchased.
- Yes, guarantor / parent was well aware if daughter's position and provided information requested.
- Yes, familiar with client's background.
- Financial position of borrower less relevant that the Guarantor understanding the risk if the guarantee was called upon and the financial consequences if it was called.
- Yes (to financial position of the borrower) from client.
- No.
- Yes - it was money to put horseshoes on a dead horse in my view.
- Yes, income lower than required.
- Yes, see above.
- Yes, I was given detailed information on borrower's financial circumstances and business plan.
- No, requested but not forthcoming
- Guarantor is experienced businessman and knows the risks better than anyone.
- Yes. Was able to say to guarantor - Can you afford to pay that without hardship? Answer - Yes - so not much detail required.
- Guarantee had already been made issue was non-repayment.
- Yes, I asked.
- Yes. The guarantor worked in the borrower's business and knew what she was getting into.
- Yes, client of long standing.
- Yes. My knowledge of the financial position of the guarantor was extensive. Any potential loss would not create a financial burden for the guarantor.
- Yes. Guarantor explained borrower's financial position.
- No. His records were not well kept. Usually in such situations the elderly person does not set out to keep accurate records., preferring to assume that the child was doing the right thing.
- The guarantor himself was of the opinion that the borrower had sound business prospects based on existing contracts that the guarantor knew of and based on the talent and accomplishments that the guarantor believed the borrower had.
- Yes. Long time clients. Family well known to me.
- Generally, yes. I was advised of, it seemed to me candidly, the borrower's income and the financial circumstances of the parents.
- Yes. I had all details regarding interest rate, other securities taken, etc.
- Yes, guarantor seemed knowledgeable about son's family income sources.
- Yes. Guarantor appeared aware of son's family income resources.
- Not readily but after a bit of questioning of the client I was able to reasonably understand the arrangement. I find however the general case is that the background material is often deficient and that I am having to dig info out of the client or contacting the lawyer acting for the borrower for more info.
- No. I didn't meet the borrower and had no direct access to that information.
- My client was better able than me to understand the financial situation of the borrower, and in any event, reviewing and commenting on financial statement is likely not legal advice.
- No, not really.
- Yes. The parents knew enough about their daughter's financial situation.

25. In the last 10 years, have you ever advised an older client not to guarantee a loan for a younger family member?

Yes: 52 No: 15 No response: 46
If yes, what were your reasons for doing so, as you recall them?
43 responses were received.

- I always advise people in these situations not to guarantee the loan because they usually trust the younger family member and believe they will succeed. The guarantor is rarely considering the negative consequences to themselves if the loan is not repaid.
- Risk of loan.
- No security available, depletion of limited assets.
- Poor credit history of the child or poor risk - i.e. lack of assets, weak employment history, marital problems.
- No benefit to older client and potential for later dispute with family member.
- Probability was very low that borrower could ever repay.
- The child did not appear capable of repaying the debt.
- Inability of borrower to pay and of lender to suffer the loss.
- Risk.
- Personal financial risk.
- Unequal treatment of children.
- The proportion of the loan/risk to client's assets were too high. A default in the loan would have devastated the client financially.
- Client was not financially able to handle the risk of default.
- Several times. Several reasons from a child not.
- Capable of making payments to child's company not a viable business.
- High-risk loan. If called on the guarantee it would deplete too much of my client's finances.
- Soundness of the child's business transaction appeared to be questionable.
- Encumber their own home, Family maintenance/spousal claims.
- Borrower somewhat unreliable - client could not afford the risk.
- Too risky.
- I felt it was too risky and my client had a lot to lose if the business did not work out.
- Parents in retirement were putting up their assets which if taken by the bank due to a default by daughter/child would make a comfortable retirement not so comfortable.
- Lack of client's confidence regarding child's ability to pay and effect this would have on client.
- It is my practice to advise against providing the guarantee on the basis that if the security was insufficient for the lender there was an obvious risk to the guarantor.
- Risk to the guarantor.
- Too great a risk of default by borrower.
- Personal liability which could deplete their finances and ability to look after themselves.
- No information regarding credit of borrower.
- Client needed funds for own care.
- Risk, no benefit / consideration.
- High risk business loan.
- The younger family member had a habit of borrowing money and never repaying any previous loans advanced.
- I generally caution against it, particularly where the loan exceeds the collateral of the borrower which is usually the case.
- Venture was for a restaurant, which is very high risk for business failure.
- I always do, where have you guys been?
- The parent would have faced financial difficulties had she been called upon to honour the guarantee and there was a substantial prospect that the son would have defaulted and there would have been a shortfall.
- Due to the high risk nature of the transaction.
- No consideration given except for natural love and affection and liability if debt exceeds property value.
- No consideration for guarantee other than love and affection.
- I felt that the borrower did not have a good track record and there was not sufficient security to protect my client.
- Risk to essential assets.
- Possibility of bankruptcy of borrower and poor relationship between borrower and guarantor.
- No benefit to them uncertainty of repayment.

26. Where you have advised an older client not to act as guarantor for a younger family member, has the client ever gone ahead and signed anyway?

Yes: 45	*Almost always (1)*	*2-10 times(1)*	*A few times (1)*
No: 8	*Several times (1)*	*99% of the time (1)*	*Always (2)*
No response: 60	*Every time (2)*	*Approximately 80% (1)*	*Not very (1)*
95% of the time (1)	*Once (5)*	*I don't keep statistics (1)*	*Most often (1)*
Frequently (1)	*85% of the time (1)*	*Most (75%) of the time (1)*	*Twice (2)*
Usually (3)	*50% of the time (1)*	*Rarely (1)*	*Many times (1)*
		Can't remember (4)	25% of the time, estimate (1)

27. If yes, do you have any opinions about why this happened?
37 responses were received.

- The older client either has faith in the younger loved one or feels obligated to assist them, even if they do not believe they will succeed. Occasionally, the older client is merely gifting their assistance without regard to consequences to themselves.
- Minds are made up before they see me - referred to me for I.L.A.
- Support of the child without concern for consequences of non-repayment.
- Love and stupidity?
- Parent felt strongly they should help out.
- Family ties and influence too strong.
- Love.
- I believe parent felt a moral obligation. Later when child did not repay, parent amended Will to provide for repayment to estate or deduction from child's gift.
- See comments in question 12.
- Parents like to help their kids particularly if tax benefit of creating another principal residence in a family.
- The parent(s) feel an obligation to assist their children in being able (usually) to acquire a home. Sometimes to start or continue or expand a business.
- Belief my client that family member will succeed in their endeavour.
- Again, wants to help child.
- Decision driven by love and desire to be supportive often blinded to the inherent risk due to the blind faith or optimism they have regarding their child.
- They say they trust their children and want to help them out.
- Were determined to assist their son, anyway.
- They felt family pressure.
- They had faith in their children and wanted to help.
- Parents usually wanting to help their children and not having enough regard of their own financial situation should they be called on the guarantee. Also, parents not getting advice until the last minute when they see it as too late or back out.
- Same as before - a parent wanting to assist a child.
- Blood is thicker than water.
- Family pressure.
- They went and saw an incompetent notary. Also you have the rent-a-lawyers from title insurance who will do anything for $25.
- Blood is thicker than my advice.
- Softhearted parent.
- The parents' sense of duty.
- Because a verbal commitment has already been made by the guarantor so that he/she feels morally obliged to follow through and usually the guarantor wants to help out the younger person.
- Desire to assist family pressure to help out.
- This is annoying, obviously they wanted to.

- Sometimes a parent feels that the claims of the child trump their own claims. There may be events in the past which make the parent feel guilty or the parental instinct to protect one's own offspring may prove to be determinative. None of this is *prima facie* wrong, but it brings subjective factors into play in an area where lawyers would prefer to limit the range of matters to be considered in the strictly objective.
- Parents seem to feel a real need to help their children, regardless of the risk. It seems that particularly when the child is a bad risk, that they seem all the more determined to help, perhaps out of a sense of guilt that they raised such a child. Many have been extremely reluctant to do so, but all seem particularly resigned, as if it is inevitable.
- Natural love and affection between parent and child and parent's desire to care for the child.
- Natural love and affection between parent and child and desire of parent to provide for their children.
- The client was willing to accept the risks rather than create a possible rift in the family.
- Natural love and affection.
- For family support reasons.
- Trust in family.

28. Do you have any special concerns about giving legal advice to an older person in relation to a guarantee to secure a loan for a younger relative or friend?
50 responses were received.

- Have not done I.L.A. for many years and refuse because I'm not afforded time and information to determine the facts. Usually the parent (or sometimes wife) merely wants a rubber stamp and feels that there is a great pressure to comply with their children's (or their spouses) requests.
- The probability that the older relative is being taken advantage of is great, even when you bring this to their attention they assure you otherwise. They either don't believe they could lose everything or believe that their needs in a material sense are not important compared to the needs of the younger relative, particularly if that relative is the one that cares for their emotional needs.
- Yes, that they truly understand the legal consequences of the borrower's default.
- To what extent should I assure myself that client will be okay under worst-case scenario of no repayment. Full analysis would verge on making me a financial planner.
- No, happens quite often in purchases of real estate. Parents helping children buy first home, etc.
- Ensuring independence, absence of coercion.
- No. Not a big issue or problem. Suggest you pick another problem area to study?
- That they receive independent legal advice.
- Only to ensure older person understands the consequences of their actions.
- Their judgment is sometimes clouded by love.
- Some clients are very naive and unsophisticated and when the older person is like that, I generally advise them not to guarantee or lend if they cannot afford to lose the money.
- See comments in question 11 and 24.
- Yes - improper influence or preying upon sympathy.
- Yes, parent could be foreclosed out of their own home.
- Less so for a home than a business loan - more risk of loss with a business loan - more concern with grandchild or nieces and nephews than parent-child -more concern with retired than working guarantors. The size of the estate of the guarantor - their ability to absorb the loss of the amount risked. If they can afford it and are competent less concern than when the risk is a significant percentage of their estate. The perception of whether or not the guarantor is making a full choice influenced by love and affection or is being coerced into the guarantee. A loan or guarantee to a family member is never in the client's interest, but there are situations where the decision is reasonable; where it is unreasonable, I will refuse to sign or witness the documents if it is financially reckless or I perceive the decision is being coerced. They usually find someone to sign.
- Yes, concerns regarding the vulnerability of the older person not just financial risk, but personal risk..
- Yes, but if older person is fully informed of effect of guarantee and consequences of non-payment the older person can make their own decision.
- Yes. The client is often not exercising sound reasoning or judgement. Overly eager to be helpful and supportive. Can't say no.
- No. As long as the older person understands the possible pit falls, such older persons are entitled to make the same mistakes as someone younger.

- Always concerned about capacity and undue influence. Also impact on other siblings and estate.
- Just the usual concerns.
- Yes.
- No as long as I am the advisor only to the older person.
- Legal advice needs to be obtained earlier on in the process of loan application.
- Usually we see people when loan is advancing and parties are depending on funds to be advanced that day or shortly. The pressure to sign is therefore greater.
- I would be very concerned if I thought there was any issue as to competency or undue influence.
- Yes; negative advice is often not heeded; clients are dismissive of the risks and when something goes wrong it's often the lawyer's fault.
- Yes. 1. Risk to the person 2. Undue influence 3. Guilt on the part of the person 4. Lack of mental incompetence 5. Blind faith.
- None for me - I have a lot of concerns for the guarantor.
- Their mental capacity and reasons.
- I take care to ensure that the elder understands the possibility of loss of the funds and to question the elder of the potential impact of that on him or her in the future if they are required to pay instead of the borrower. I require the elder to see me alone and ask the same type of questions I would to establish capacity to execute a Will or Power of Attorney.
- Depends entirely on the knowledge and experience of the people involved. A one-size fits all solution will not work.
- Yes. I always advise clients to consider money to be a gift, if repaid or guarantee not called upon, they are lucky. If they can't afford to lose it, don't do it.
- Yes, to ensure there is no undue influence or duress, and the monies are properly used for the purpose given.
- No but watch for undue influence or pressure of guilt from the younger relative.
- This would depend on the nature and circumstances of the older person. Is the older person taking the initiative or is it the younger person? Who suggested the loan? What is the purpose of the loan?
- Yes. The financial position of the borrower.
- Mental competency.
- Yes. The commitment is given/extracted before the advice is sought/recommended.
- I don't like it and generally advise not to sign.
- To insure a complete understanding of the practical and "political" aspects, and the extent of the exposure of the guarantee to the client, and the financial effect upon the client in the event of a claim under the guarantee is made upon the client.
- Of course!!!!
- Certainly, but different in degree only from those I have in any relationship between guarantor and a principal debtor. Assume that the guarantee will be called upon and then examine the impact on the guarantor.
- Certainly, I take all steps to ensure capacity and try to deal with any issue of undue influence. However, as stated above, most parents seem to feel a moral compulsion to help their children fulfill their dreams.
- None- depends on each financial transaction, sophistication and knowledge of the guarantor.
- No, only that it should be given very early on in the process ie. At about the same time that the borrower is applying for the loan.
- Older people, even with full capacity, often lack the sophistication and general awareness necessary to properly evaluate the merits of proceeding, or not. People acting out of love or concern do so without regard to their own personal fortune- perhaps this is as it should be?
- In all the recent situations that I can recall, the older relative giving the guarantee was sufficiently sophisticated to understand the transaction and the consequences. Therefore, I have had no concerns in assisting with the transaction.
- Undue influence.
- There is not enough documentation generated to clarify terms of loans, and default the older person is normally at risk of being bullied by the borrower.

29. Are there any other comments you wish to make about this issue?
11 responses were received

- The level of sophistication of the older relative guarantor often concerns me. If the older relative is sophisticated

you can usually assure yourself they understand the risks and assume them voluntarily which they should be able to do. Age does not mean they are stupid. However, the unsophisticated guarantor with little financial affairs for them, believing in the ability and judgement of that relative.

- The tendency to make loans and other agreements within families without appropriate written documentation is very common.
- It isn't a big issue.
- It's natural to want the best for your kids and the kids also expect the parents to think that way and that is the rub.
- I am a strong believer in talking people out of guarantees unless they are to receive some direct benefit from so doing and they are willing to pay for proper loan documentation and agreements to reflect the real transaction.
- It is a reality that is becoming all too common as parents help their adult children get into the housing market or start a business. Very difficult nowadays for young people to do it on their own.
- If I have a concern that if the loan or guarantee is made and there is a default my client will not have enough to live on and they are elderly I will not proceed.
- One of the worst groups are people who get seniors to do reverse mortgages when they do not understand the consequence. [A nationally televised reverse mortgage advertisement] has mislead many people.
- I am not thinking of any of the specific requests: whether for independent legal advice or for client instituted advice. Usually I see the client alone but they often are not clear on what they are lending their credit worthiness to, though several have applied for reverse mortgages to fund their children's needs or wants, all but one of which I have advised not to proceed with. It is very difficult to be business-like with people that may be vulnerable whether by age or disability or simply by a desire to help their (generally speaking) child.
- I don't see any practical way of legislating protection in this area. If lawyers act properly ie asking themselves who their client is, and if they avoid conflicts, and if they give good advice and document it- there is probably not much else that can be done. In my experience younger bright people will loan their life savings to a lover- it is not a rational decision.
- I don't advise my clients as to whether they should sign or not sign. I make sure they are competent to sign (I won't witness it if they aren't or sign the certificate of ILA) and I make sure they understand the consequences.

Enforcing Guarantees

30. In the last ten years, have you acted for parties to a guarantee involving the enforcement of a guarantee where the borrower was a younger friend or family member of the guarantor?

Yes: 25 No: 70 No response: 18

If your answer was yes, please answer the following questions.

31. The last time you acted in such a matter, which party did you act for?

The lender: 9 The guarantor: 13 The borrower: 0 No response: 91

32. The last time you acted in such a matter, was the guarantor

Male: 10 Female: 14 No response: 89

33. The last time you acted in such a matter, was the guarantor from a non-English speaking background?

Yes: 4 No: 16 No response: 93

34. The last time you acted in such a matter, what was the relationship between the guarantor and the borrower?

Parent/son:	10	Parent/daughter-in-law or son's partner:	3	A friend:	1
Parent/daughter:	2	Parent/son-in-law or daughter's partner:	2	No response:	91
		Grandparent/grandchild:	2		
		Aunt or uncle/niece or nephew:	1		
		Another relative (please describe):	1		

35. The last time you acted in such a matter, was the guarantee provided for a business or consumer/personal purpose?

Business:	11	Personal/consumer:	11	No response:	91

36. The last time you acted in such a matter, what was the approximate amount of the loan?
19 responses were received
The amounts indicated range between $30,000- $300,000

$30,000:	3	$60,000:	1	$90,000:	1	$200,000:	4
$40,000:	1	$68,000:	1	$100,000:	4	$250,000:	1
$50,000:	1	$75,000:	1	$150,000:	2	$300,000:	1

37. The last time you acted in such a matter, how did the guarantor find out that the guarantee was being enforced?

Communication from lender:	10	Legal proceedings commenced:	8
Communication from borrower:	5	Other (please describe):	0
		No response:	90

38. The last time you acted in such a matter, did the matter settle?

Yes: 12 No: 10 No response: 91
If yes, at what stage did the matter settle?

14 responses were received.

· The mother died.
· Lender agreed to discontinue its action on the basis that the borrowed had a valid estoppel argument.
· Unsettled.
· Upon commencement of legal proceedings, guarantors paid up.
· After examinations for discovery.
· Parent paid up but had to put mortgage on his house to settle up.
· After sale of the property.
· Negotiated a settlement at a meeting between the parties, a re-payment schedule was agreed to by the borrower.
· Prior to court.
· On-going
· Before suit.
· After judgment.
· Don't know. Matter was apparently abandoned after the death of the guarantor.
· After examinations for discovery.

39. If the matter settled at any stage, what was the outcome?

12 responses were received.

· Guarantors refinanced assets (paid up), still support son (his spouse!)
· Son obtained refinancing
· Parent paid up but had to put mortgage on his house to settle up.
· Child paid loan.
· The guarantor was paid in full by the sale of the guarantor's home.
· Finalisation.
· Lender was paid in full from funds of guarantor.
· Guarantor paid.

- Client paid about 25% only.
- Don't know.
- Foreclosure but with no claim against the guarantor for the shortfall.
- A few payments were made, then default occurred and the parent did not have the stomach to continue.

40. If the matter did not settle, what was the outcome?
8 responses were received.

- It ended by reason of the death of the II.

- Still pending.
- The guarantor had their house foreclosed and lost all of their equity to the guarantee secured by the mortgage.
- Stalemate.
- We obtained personal judgement against guarantors.
- Don't know.
- I was not involved at that time.
- Judgement at Order Nisi stage in a foreclosure.

41. What defences, if any, were raised on behalf of the guarantor in the matter?
19 responses were received.

- It was a gift.
- Evidence existed that the guarantor and borrower sought and was granted a release of the guarantee.
- None.
- *Non est factum*, material variation of principal contract, lack of independent legal advice.
- NIL, there were none.
- No defence on guarantee but sought claim over against borrower.
- None, as the guarantor had none.
- There were none. They appreciated the nature of the guarantee both at signing and subsequently. The business loan which was guaranteed was called when the business (which had formerly been the parents) fell on hard times.
- None.
- Non est factum.
- Inability to pay in a lump sum.
- None.
- None, there was no defence. Had sign guarantee contrary to legal advice - but was a sophisticated businessman (way more than his son).
- Unfair: Guaranteed what turned out to be a leaky condo.
- None.
- None.
- Collateral agreement.
- Bank misinformation.
- The loan was a gift or, if not a gift, then delayed remuneration for undercompensation for time spent in the family business. Unless I misreads it.

42. Do you have any other comments about this issue? (Use separate sheet if necessary.)
12 responses were received.

- No solution except education.
- It isn't a big issue. No more an issue or problem in my practice than the perceived (wrongly) issue of attorneys abusing their parent donors under an enduring Power of Attorney, i.e. it isn't a problem in my practice. Rare occurrence. Rarely results in spousal discord or parental/child discord.
- I believe the same concerns apply to reverse mortgage transactions.
- Lloyds Bank v. Bundy Old Herbert Bundy was a farmer, Denning, MR.

- See number 12 and number 28. It happens and is going to continue to happen.
- Parents are often suckers for their kids. It is love but maybe not enough tough love.
- Guarantor did not fully understand her obligation.
- Guarantors must be told the securities may be valueless. 1. Wasted. 2. Fire without insurance 3. Leaky condo (?) 4. Expropriated so they know their full possible exposure is unlimited. (?) This applies to all guarantors!!
- There are many permutations and combinations of the issues, most of which I have seen in 25+ years of practice. The older person, not fully aware of the costs and present value of money, although tight with themselves, is convinced by a younger relative that they need the money now and the older person doesn't… Trying to provide a worst case scenario for the older person is a bit depressing but can make them think how hard they worked for the money and do they really want to give it (realistically it is not a loan and unlikely to come back during their lifetime to come back during their lifetime) and if they do give it, what happens when the "bad thing" against which they are spending this money happens anyway, and now they don't have the money to assist the (usually child) borrower as the proverbial good money has gone after bad and there are no further options.
- I do a lot of work with representation agreements, which raise some of the same issues that you are addressing in your study, and suggest that you include consideration of those documents when you are addressing intergenerational financial arrangements.
- There is nothing in this issue which is particularly new. It seems that so called "elder law" makes a distinction without a difference. In any negotiation parties are unequal in any number of ways. This should always be a factor which a lawyer considers. The parent-child relationship is a particular example of this.
- Notaries should be BANNED from placing mortgages where seniors are co-signers or co-purchasers but are putting up more than their proportionate share of the cash down or assuming the de facto liability due to their more secure income, or…..

The Vulnerable Guarantor: Where an Older Family Member Agrees to Guarantee a Younger Person's Debts

RESPONSES

1. Your institutional affiliation

Bank: 4 Credit Union

2. Please describe your position within that institution

(Bank 1) - Branch Manager
(Bank 2) - Branch Manager
(Bank 3) - Branch Manager
(Bank 4) - Credit officers for British Columbia situated in Vancouver.

3. Does your institution currently have in place formal guidelines for dealing with older clients?

Yes

(Bank 2) - In situations where an older family member is involved in a credit deal an ILA is a condition of credit approval.
(Bank 3)- Not exactly "formal" but if it appears there is coercion, we'll ask for ILA.

No

(Bank 1)- In terms of day to day banking we don't have anything formal other than our Plan 60 accounts. In terms of lending pdt, please see question 5.
(Bank 4) - While there is no written policy dealing with the elderly specifically, there are policies and directives in place regarding the taking of guarantees and when independent legal advice should be obtained, such as unsophisticated individuals, which include the elderly, among others.

4. Does your institution currently have in place formal guidelines for dealing with older clients in family situations (where older family members attend with younger relatives to make banking or financial arrangements of any kind)?

Yes

(Bank 2) - Younger family members are excused from the interview when it comes to talking with the older client about their financial dealings and portfolios.
(Bank 3) - Not exactly formal, rather common sense - if staff sense duress or coercion, they would elevate to management.

No

(Bank 1)
(Bank 4) - While no formal policy is in place the current practise is one of common sense and prudence, with ILA obtained as noted above. Guarantees are obtained from older clients in some cases, however generally speaking transactions are not completed on the sole basis of providing the guarantee, particularly in those cases where the guarantor is unsophisticated, and/or recourse to the guarantor would create financial hardship.

5. Does your institution currently have in place formal guidelines requiring that independent advice be recommended for guarantors?

Yes

(Bank 1) - ILA is required where: 1. there is any doubt that a borrower or guarantor understand the obligation that they are entering into. 2. there is any doubt that a borrower or guarantor is getting the benefit of the credit. 3. there may be circumstances of undue influence or duress. We are required to make a conscientious effort to be satisfied the obligor fully understands the possible consequence of the commitment to the Bank.
(Bank 2) - see question 3.
(Bank 3) - see question 3.
(Bank 4) - ILA is recommended in all scenarios where the guarantor(s) do not have full knowledge of the transaction or where the decision could be influenced by language barriers, age, duress, and a number of other factors.

No

6. Does your institution currently have in place formal guidelines on how to proceed in the event that independent advice is recommended and refused?

Yes

(Bank 1) - ILA would be a condition of a credit deal, and if not obtained/waived by our adjudication centre, we would not be able to proceed with the funding of a credit deal.
(Bank 2) - Independent adjudication of all credit deals takes the "immotional" piece out and therefore easier to enforce to grant credit to the customer.
(Bank 3) - If required and refused we'd likely not proceed.

No

(Bank 4) - These situations are extremely rare, and should they transpire are normally resolved by common sense and good judgement.

7. Does your institution currently have in place formal guidelines requiring the provision of information regarding a borrower's financial status to a guarantor or the guarantor's advisor?

Yes

(Bank 1) - We would not release any information in regards to the borrower's financial status to anyone due to the privacy act. Up to the borrower to provide that information himself/herself to the guarantor.
(Bank 4) - Normally guarantors are provided with a letter, term sheet or some form of documentation, outlining the details of the transaction, which should be acknowledged by them. Furthermore, any material changes to the client's loans/borrowing arrangements require the acknowledgement(s) of the guarantor(s).

No

(Bank 3) - Not that I'm aware of but they often come in together and thus the guarantor usually knows the borrower's circumstances.

8. If the answer to question 7 is "no," how would your institution respond to a request for such information from a guarantor or the guarantor's advisor?

(Bank 3) - I would tell the guarantor that I need the applicants OK to release that information to the guarantor.

9. Are you personally aware of any situations in the past 10 years involving action taken by your institution to enforce a guarantee where the borrower is a younger family member or friend of the guarantor?

Yes (Banks 2, 3 and 4)

No (Bank 1)

10. If the answer to question 9 is "yes," on how many occasions (that you are aware of) has this occurred?

Once

2-10 times (Banks 3 and 4)

10-20 times (Bank 2)

More than 20 times

11. To your knowledge, is this a fairly common arrangement (older guarantor for younger family member or friend)?

Yes (Banks 1 to 4)

No

12. If the answer to 11 is "yes," to your knowledge is this arrangement generally successful (beneficial to all parties)?

Yes (Banks 1, 3, and 4)

No

13. To your knowledge, is this arrangement generally considered within your institution to be inherently risky, and treated with caution?

Yes (Bank 1) - See question 5, request ILA. (Banks 3 and 4)

No

14. Do you have any other comments about this issue?

(Bank 3) - I think , regarding question 13 that we do a good job of explaining the risks to people doing this kind of thing.
(Bank 4) - The Bank's underlying philosophy and principal is one of prudence and caution when dealing with this situation. Notably, loans are not granted solely on the strength of the elderly guarantor, and are avoided where the probability of default is high, and/or potential recourse to the guarantor may result in financial hardship.

Appendix C

Business Practices and Consumer Protection Act
S.B.C. 2004, c. 2
Division 2 – Unconscionable Acts or Practices
Part 2

Application of this Division

7 Nothing in this Division limits, restricts or derogates from a court's power or jurisdiction.

Unconscionable acts or practices

8 (1) An unconscionable act or practice by a supplier may occur before, during or after the consumer transaction.

(2) In determining whether an act or practice is unconscionable, a court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.

(3) Without limiting subsection (2), the circumstances that the court must consider include the following:

(a) that the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction;

(b) that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;

(c) that, at the time the consumer transaction was entered into, the total piece grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers;

(d) that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the total price by the consumer;

(e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;
(f) a prescribed circumstance.

Prohibition and burden of proof

9 (1) A supplier must not commit or engage in an unconscionable act or practice in respect of a consumer transaction.

(2) If it is alleged that a supplier committed or engaged in an unconscionable act or practice, the burden of proof that the unconscionable act or practice was not committed or engaged in is on the supplier.

Remedy for an Unconscionable act or practice

10 (1) Subject to subsection (2), if an unconscionable act or practice occurred in respect of a consumer transaction, that consumer transaction is not binding on the consumer or guarantor.

(2) If a court determines that an unconscionable act or practice occurred in respect of a consumer transaction that is a mortgage loan, as defined in section 57 [definitions], the court may do one or more of the following:
(a) reopen the transaction and take an account between the supplier and the consumer or guarantor;
(b) despite any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken and relieve the consumer from any obligation to pay the total cost of credit at a rate in excess of the prevailing prime rate;
(c) order the supplier to repay any excess that has been paid or allowed by the consumer or guarantor;
(d) set aside all or part of, or alter, any agreement made or security given in respect of the transaction and, if the supplier has parted with the security, order the supplier, to indemnify the consumer;
(e) suspend the rights and obligations of the parties to the transaction.

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