

Undue Influence

Judge made 'several errors' in finding undue influence in loan transaction, rules Appeal Court

By **John Schofield**

(July 27, 2020, 12:40 PM EDT) -- A Delaware lender took all reasonable steps necessary to avoid the presumption of undue influence when it loaned \$5 million to a now bankrupt Florida-based e-commerce company and accepted as collateral a historic family homestead in eastern Ontario belonging to the CEO's wife, the Ontario Court of Appeal has found.

In its July 17 unanimous decision in *JGB Collateral v. Rochon* 2020 ONCA 464, the Court of Appeal concluded that Ontario Superior Court Justice Graeme Mew was wrong last August when he ruled in a summary judgment that the appellant, JGB Collateral LLC of Delaware, could not collect the mortgage on the Lanark County property after the bankruptcy of the Rochons' company, JRjr33 Inc., and their loan default. The mortgage was not enforceable, Justice Mews found, because Donna Rochon was unduly influenced by her husband, John Rochon, when she co-signed the loan documents and agreed to put up the Ontario property as collateral.

The Rochons, who live in Texas, also put their Dallas property up as collateral, but challenged the enforceability of the mortgage on the Lanark property on the grounds of undue influence. The farm had been in Donna Rochon's family since 1852.

"Applying the correct legal test, Ms. Rochon's allegation of undue influence fails," Appeal Court supernumerary Justice Paul Rouleau wrote for the three-judge panel. "Respectfully, the motion judge's analysis is tainted by several errors."

Drawing on decisions such as *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 and *CIBC Mortgage Corp. v. Rowatt* [2002] O.J. No. 4109, the Appeal Court underlined that the presumption of undue influence is a rebuttable evidential presumption — and the motion judge overlooked the evidence by considering only the nature of the Rochons' 46-year marriage and not their business relationship or the transaction itself.

In his summary judgment, Justice Mews characterized the situation as "a classic case of a spouse who unquestioningly complied with any and all requests by her husband to sign documents related to his business." Given the indications of possible undue influence, he ruled, JGB Collateral should have obtained a certificate of independent legal advice to prove Donna Rochon understood what she was signing.

In their affidavits before the motion judge, the Rochons swore that Donna Rochon had no financial interest in the company, but then acknowledged in their appeal factums that she did — although it was too small to be of any consequence, they argued.

The Court of Appeal determined, however, that Donna Rochon had a significant interest in the company and the loan.

Based on U.S. Securities and Exchange Commission filings that were submitted to the motion judge, the Appeal Court concluded that Donna Rochon was a limited partner and 20-per-cent owner in Rochon Capital Partners Ltd., which in turn held about 35 per cent of the common shares in JRjr33 Inc. In addition, the company was essentially a family business, employing both the Rochons' son and daughter.

"Separate and apart from her significant financial interest in the Corporation, Ms. Rochon had an

interest in doing what she could to support it," the Court of Appeal observed. The loan "was not a transaction which, from a business point of view, was of no benefit to Ms. Rochon."

In addition, the Appeal Court noted, even though the Lanark property had been in Donna Rochon's family for generations, John Rochon had actually purchased it from his wife's family and gifted it to her.

The motion judge also erred by misinterpreting *Rowatt* and elevating a lender's protection against the presumption of undue influence to a written certificate of independent legal advice, said the Appeal Court. As per *Rowatt*, it advised, a lender need only "take reasonable steps to try to ensure that the proposed guarantor understands the transaction and is entering into it freely by suggesting that the guarantor seek and obtain independent legal advice and a full explanation of the transaction"

Based on evidence presented during the summary judgment proceedings, the Appeal Court said, JGB Collateral took reasonable steps when one of its employees asked two lawyers representing the Rochons — and the lawyers confirmed — that everything in the loan had been explained to the Rochons, including a statement in the guarantee that it had been explained to them by an independent solicitor.

But pointing to *Bank of Montreal v. Duguid* [2000] O.J. No. 1356, the Appeal Court noted that, even in the absence of independent legal advice, the presumption of undue influence can still be rebutted on the totality of the evidence, and the motion judge failed to consider all the evidence.

Most notably, the Appeal Court observed, Donna Rochon admitted in her cross-examination that she signed the documents of her own free will and her husband did not threaten her or force her to sign them. "Ms. Rochon's own evidence," it said, "rebutts the presumption on which she seeks to rely."



Melanie Ouanounou, Goodmans LLP

While the doctrine of undue influence comes up more commonly in wills and estates matters, there have been numerous undue influence cases involving loans, said Melanie Ouanounou, a Toronto-based partner in the litigation and class actions groups with Goodmans LLP, who represented JGB Collateral along with Goodmans litigation associate Kirby Cohen.

"There have been cases where courts have set aside transactions against third-party lenders because a loan was manifestly disadvantageous to the wife, there was no lawyer involved and no one took any reasonable steps, so all the three elements were never met," Ouanounou told *The Lawyer's Daily*.

"But there have been many where they have been upheld because of examples like this, where the wife did benefit from the loan so the lender would not have been put on notice.

"It's just important for lenders to understand," she added, "that there may be a prospect of undue influence if the person guaranteeing a loan has a close relationship with the other person, the person benefiting from the loan. They just have to be aware that if there is a prospect of undue influence, then they need to take those reasonable steps to ensure that the person is entering into the transaction freely."

In wills and estates matters, some indicators of possible testamentary undue influence can include the testator being socially isolated or a recent family conflict or bereavement, according to a checklist prepared by Toronto-based Whaley Estate Litigation Partners and drawn, in part, from a 2013 Ontario Superior Court decision, *Gironda v. Gironda* [2013] O.J. No. 2949. Other indicators could include a new will that is inconsistent with prior wills or a testator who is dependent on a beneficiary for fulfilling his or her emotional or physical needs.

Lawyer Jonathan P.M. Collings of Brockville, Ont., firm HET Law, representing Donna Rochon, and lawyer Taayo Simmonds of Ottawa-based Simmonds Law, who represented John Rochon, did not respond to a request for comment.

If you have any information, story ideas or news tips for The Lawyer's Daily please contact John Schofield at john.schofield@lexisnexis.ca or call (905) 415-5891.

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