SUPREME COURT OF NOVA SCOTIA

Citation: Big X Holdings Inc. v. Royal Bank of Canada, 2015 NSSC 184

Date: 20150630
Docket: Hfx. No. 406111
Registry: Halifax

Between:

Big X Holdings Inc., Robert Leonard McNeil and Margaret Anne McNeil

Plaintiffs

v.

Royal Bank of Canada

Defendant

Decision

Judge:	The Honourable Justice Jamie Campbell
Heard:	May 26, 27 and June 1,2,3,8,9,10,11,17,18 2015 in Halifax, Nova Scotia
Written Decision:	June 30, 2015
Counsel:	Michael F. Donovan, Q.C., for the Plaintiffs D. Geoffrey Machum, Q.C., Colin Piercey and Ian Breneman for the Defendant

Campbell, J.

[1] Len McNeil borrowed and lost a lot of money when he invested in The Advance Commission Company of Canada, ("ACC"). He was caught up in a fraud perpetrated by his business associate. And now he says that his bankers, The Royal Bank of Canada, ("RBC") who were also the bankers for ACC should be responsible for that loss. He argues that RBC shouldn't have continued to advance money to the company and should have caught the fraud.

[2] Mr. McNeil also says that a personal guarantee for $400,000, supposed to have been signed by him, is a fraud and a forgery.

Summary

[3] Len McNeil decided to borrow money from RBC to make an investment of over $1 million in ACC. RBC then also loaned money to his company ACC. Both Mr. McNeil and RBC were defrauded. RBC lost about $ 9 million. Mr. McNeil's initial $ 1 million investment is now worthless. A demand was made on the $400,000 guarantee that he had signed for ACC.

[4] Mr. McNeil has argued that RBC is responsible for his losses. It amounts to a claim of negligent lending. The bank should not have been so trusting of its client, his company, ACC. It should have had stricter controls in place to monitor the borrowing of the company. If it had, it would have caught the fraud by the principal shareholder much earlier. Mr. McNeil didn't ask for audited financial statements, or review the company's monthly bank statements because he just assumed that RBC was doing that.

[5] In order to be successful in a claim of negligence Mr. McNeil would have to show that RBC owed him a duty of care. Before any discussion can take place about the standard to which a bank can be held, there has to be a finding that RBC owed him a duty of care, either as a shareholder of its customer ACC or as a customer of RBC, or both. The duty of care that was proposed here would be a duty owed by a bank to a person who is both a bank customer and a company shareholder, to exercise reasonable care in lending to that company.

[6] That is not a duty of care that has been recognized as already existing in law.

[7] It isn't analogous to the duty owed by a bank to its customers in providing banking services and administering their own accounts. There was no loss claimed to be related to the operation of Mr. McNeil's own accounts with RBC. A bank doesn't owe a duty to its customers to advise against borrowing money or to assess the prudence of any investment they may decide to make with the borrowed money.

[8] It isn't analogous to the duty owned to third parties to act upon suspicion that the facilities of the bank are being used to perpetrate a fraud on the third party. RBC wasn't being used by a customer to engage in a fraud of a third party. It was itself being defrauded. In any event there was certainly no evidence to suggest that RBC or its employees either knew of the fraud or were suspicious about a fraud and just allowed RBC to be defrauded of $ 9 million.

[9] It would be neither fair nor reasonable to impose a duty of the kind proposed in these circumstances. That conclusion is based on the consideration of a number of factors.

[10] RBC's actions were not the direct cause of the loss. The fraud by the principal shareholder, Paul Burden, was.

[11] The relationship between Mr. McNeil and RBC was not one in which Mr. McNeil could reasonably have expected that RBC would monitor the borrowing of ACC for his benefit. He signed a guarantee that made it clear that RBC could deal with ACC as it chose fit without affecting the security of the guarantee. ACC had a number of borrowing covenants with RBC. Those were for the benefit of RBC and not for the benefit of Len McNeil. RBC at no time represented to Mr. McNeil that those covenants were for his benefit as a shareholder.

[12] RBC made no representation that it was undertaking to maintain surveillance of the accounts of ACC to insure that a fraud was not being perpetrated.

[13] The information that Mr. McNeil asserts should have been reviewed by RBC was not in its sole possession. Mr. McNeil had the same ability and opportunity to check the company's operating accounts, calculate accounts receivable and question the principal shareholder. RBC was far from being uniquely positioned or even better positioned to fulfill the duty.

[14] The duty that Mr. McNeil expects of the bank was one that he was not willing to fulfill himself. He did not insist on receiving income tax assessments or audited financial statements. Furthermore, Mr. McNeil himself was fully aware that his company, ACC was threatening to change banks to avoid the requirement for an audit.

[15] Mr. McNeil urged the bank to consider his investment in ACC as having more value than they were prepared to assign to it. He wanted to leverage those

shares for other investments. That does not suggest a relationship in which Len McNeil was in any way relying on RBC to assess the value or the potential of ACC.

[16] More generally there are policy reasons why the duty should not be imposed in this relationship.

[17] It would place what amounts to an auditing duty on banks with respect to corporate customers which also happen to have shareholders who are personal clients of the bank. It would permit investors to avoid their personal responsibility of reasonable diligence with respect to monitoring their investments and permit them instead to rely on the lending requirements of the bank. Those lending requirements are designed to address the bank's risk, not the risks of others.

[18] It would insert banks into the internal workings of their corporate clients. They would have to respond to the competitive pressures of a company's demand for less strict reporting requirements while having in mind the concern not only for their own risk, but for the risk to the many investors who may also be clients of the bank.

[19] It would make personal guarantees a different form of security. The bank can make changes to the lending arrangement without voiding the guarantee. Imposing liability in negligence with respect to the administration of a loan would allow a guarantor to avoid liability where negligence was found on the part of the bank. A guarantee would hardly be a guarantee at all.

[20] RBC did not owe a duty of care to Len McNeil in the administration of the loan to ACC. It is not responsible for his losses.

[21] There is also no evidence to support Mr. McNeil's contention that the guarantee that he signed is a forgery. On the contrary there is evidence that it is not.

Background

[22] Len McNeil described himself as sophisticated investor. Anne McNeil is his wife. She relied entirely on his management of the couple's money. He is after all a retired chartered accountant with a master's degree in finance and significant career experience in dealing with complex commercial loans. He retired from his accounting practise as a partner with Grant Thornton in 2002.

[23] Mr. McNeil then got involved in a number of investments in an effort to provide more financial security in his retirement. He worked with Premier Mortgage and then invested in a self-storage business. One of his former clients spoke with him about his involvement in a recreational vehicle sales company. Mr. McNeil became the president of the operation. It continued to grow and became even more successful.

[24] Mr. McNeil was still on the lookout for good investment opportunities. In 2006 he was approached by Tim Moore whom he had known from other business dealings. Mr. Moore is an accomplished entrepreneur, with considerable and practical investment experience. Tim Moore told him about ACC.

[25] ACC was a real state commission factoring company that operated out of a head office in Kentville. Mr. McNeil described it as a pay day loan provider for real estate agents. It would lend money to a realtor or mortgage broker when a real estate deal was executed. The loan would be repaid with interest at the time of

closing. ACC would use its own capital and also maintained a line of credit. It was seen as an attractive business model. The loans made to agents were relatively small and low risk. The interest rate was substantially greater than the interest that the lender, ACC, paid on its line of credit.

[26] After conducting his own "due diligence", Len McNeil decided to invest in ACC. He didn't know the company's principal shareholder, Paul Burden. There was nothing then to suggest that Mr. Burden was a shady character. He had a number of business interests and was known to Mr. McNeil's associate Tim Moore. Len McNeil reviewed the unaudited financial statements and spent a day at the company's head office. He used what he referred to as the Grant Thornton standard "look see" package. He looked at a random sampling of 30 files and saw that everything was in order. He inquired of a friend as to why the existing investors wanted out and was satisfied that there were, as he was told, health related issues. ACC looked like a promising investment.

[27] Mr. McNeil didn't insist on seeing audited financial statements. He didn't review the company's bank accounts to confirm whether the amounts going through those accounts were consistent with the amounts claimed. He didn't request tax assessments to confirm that the corporate taxes paid to Canada Revenue Agency were the same as the amounts claimed on the company's financial statements. It would appear as though Mr. McNeil assumed that the principal shareholder, Paul Burden, as an established businessman, was not engaging in a fraud.

[28] Len McNeil incorporated a holding company, Big X Holdings Inc. to act as the vehicle for investing. [1]Through Big X he bought a 20% interest in ACC. The shares were valued at $114,000. He made a $950,000 shareholder loan to the company. His total investment was then $1,064,000. RBC advanced loans to both Big X and Mr. McNeil. Those loans were secured. Almost all of the personal assets of Len and Anne McNeil were tied up in the security. There were mortgages on their home and cottage, a pledge of their nonregistered investments and personal guarantees. The McNeils both personally guaranteed the loan to Big X in the amount of $850,000. They were in very deep.

[29] As of the time of the investment in February 2007 ACC wasn't an RBC client. The borrowing from the bank to invest in ACC didn't involve any investigation by the bank into ACC. It had security for its loans to Mr. McNeil and Big X. The bank was not particularly concerned about how solid a company ACC was because if things went sour they had the security of Mr. McNeil's personal assets.

[30] Soon after Mr. McNeil and Mr. Moore invested in ACC that company also started doing business with RBC. Mr. McNeil was a strong advocate for moving ACC's business to RBC. By mid-May 2007 a deal was in place and Mr. McNeil was anxious to get it done.

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[1] Throughout this decision Len McNeil, Anne McNeil and Big X will be referred to interchangeably. Ms. McNeil's interest in the matter is certainly no less than that of Mr. McNeil but because investment decisions were largely made by him and actions were undertaken by him, his name will be used.

[31] On 22 May 2007 RBC sent a letter offering credit facilities to ACC. The terms involved a revolving demand loan, of up to75% of ACC's accounts receivable to a maximum of $ 8 million. There were two "financial covenants." The company had to maintain a ratio of total liabilities to tangible net worth of no greater that 2:1. It also had to keep a ratio of income to interest expense of 2.5:1.

[32] ACC would be required to provide RBC with a borrowing limit certificate each month. That's a document that sets out the calculation of the current accounts receivable and establishes what the borrowing limit at 75% of that would be. ACC would have to provide monthly in-house company prepared financial statements, an annual audited statement, an updated statement of affairs for each of the guarantors and others reports as requested by RBC. The monthly borrowing limit certificates and the financial statements would not be confirmed by any independent party. The verification would come only at year end with the annual audit.

[33] Each shareholder would be required to provide a personal guarantee in proportion to the shares they held. The total amount would be $2 million. Tim Moore and Len McNeil would provide personal guarantees of $400,000 each and Paul Burden as the 60% shareholder would sign a personal guarantee of $1.2 million. The guarantees contained a standard provision that permitted the bank to deal with its customer and change or waive reporting requirements without affecting the enforceability of the guarantee. By signing that a guarantor is taken to understand that the bank will make decisions having regard to its risk tolerance and its relationship with its customer. Those decisions will not affect the guarantee.

The Evolving Reporting Requirements

[34] The Business Banking Transaction Record (BBTR) dated 3 May 2007 and approved on 16 May 2007 provides some insight into the considerations that were involved in lending money to ACC. RBC's larger loans of then over $7.5 million and later over $10 million, were assessed by a central risk management group in Toronto. The BBTR was the manner in which the local account manager, among other things, would record the request for approval. Having Len McNeil and Tim Moore as investors in a company with Paul Burden lent credibility to the proposal. ACC was a good risk because the three shareholders were well known men of some means. Mr. Moore was described as a "highly regarded member of the Halifax Business Community". He had been a long time highly valued RBC client. Paul Burden was a well-known and successful businessman. Len McNeil was a respected chartered accountant. ACC already had a $6 million line of credit with the Bank of Montreal and the company was continuing to grow. Len McNeil was noted at that time as becoming more involved with the company. The Account Manager strongly recommended the deal "based on the owner (sic) involved and their past involvement in successful operations and the history of success from ACC." The clients had invested capital in the business and were willing to sign guarantees. The nature of the security taken and the reporting requirements imposed were based on a risk assessment that included the consideration who just who the investors were.

[35] An exception was made to the reporting requirement so that audited statements not would be required for that first year. Review engagement statements for 2006 would be acceptable. The rationale for that was the modest use of the line of credit. There was a substantial buffer between the amount used and the amount

of credit available. ACC was conservative. It was not running up its line of credit or depending on it for its day to day operations.

[36] In an audit, the accountants verify that the numbers presented on the firm's financial statements are accurate. In a review engagement there is no such verification. The accountants use the numbers provided by the company and determine only whether proper accounting practices have been applied. Relying on a review engagement means relying on the integrity of the management of the business. In this case that integrity was not suspect.

[37] Those reporting requirements changed over time. Rather than becoming stricter, or perhaps what the three shareholders of the company might have perceived of as being more difficult to deal with, RBC relaxed its requirements. It didn't do that on its own initiative as a way to simplify the process. Reporting requirements were an ongoing issue with ACC. The company, through Paul Burden, chafed at providing audited statements. It used the interest of competitor banks in ACC's business, along with its own growth, to keep pressure on RBC to relax those requirements. In retrospect it's easy to understand why Paul Burden was so adamant. At no point did the other shareholders intervene to urge the bank to maintain strict reporting requirements. Paul Burden dealt with RBC and the message from him, as ACC, was that the reporting requirements were unrealistic. Len McNeil knew about that.

[38] In August 2008 the BBTR completed by the Account Manager Mike Bishop, noted the concerns that ACC had with respect to service at the local branch. ACC had been with RBC for just over a year at that point and issues were already being raised about the potential of moving the business to a competitor. Todd Strickland,

who had been the account manager had gone to another bank, TD. There was a concern that the business could be lost to TD. Mike Bishop noted that the business was growing. An exception was requested and granted to once again permit the use of year-end review engagement financial statements. At that time, there were concerns from ACC about incurring the cost of an audit. The exception was granted but was noted as being only for a year.

[39] The same thing happened the next year. In 2009 ACC requested a renewal of the exception for audited statements. Review engagement statements were provided for the year ending 30 September 2008 but ACC indicated that a new accountant was going to be retained. It argued that the requirement for an audit was not realistic given the nature of the business. A tolerance letter was issued to indicate that RBC was willing to waive that requirement but only for that year.

[40] In 2010 once again, the requirement was discussed. RBC at that time agreed to accept a review engagement statement but only up to the current borrowing limit of $ 8 million. That was based on the strength of the company, its conservative use of the line of credit and "our knowledge and relationship with the three principals." The bank was willing to accept unaudited year end statements in part because of its confidence in the shareholders, including Len McNeil.

[41] In January 2011 the concern about losing the ACC account to another bank was at the forefront. The BBTR for that date makes reference to the waiver once again of audited statements and makes specific reference to the loss of the account. RBC was concerned that if that reporting requirement were not relaxed ACC could go elsewhere. And by that time ACC appeared to be an expanding, profitable and very low risk company.

[42] In early 2011 ACC had reached an agreement to buy its second largest competitor Real Estate Financial (REF). That acquisition was seen as a major step forward for ACC. It had bought out some competition, and opened up large new markets. The new business would require more lending capacity and an increase in the line of credit. The line of credit was increased to $10 million and the BBTR for the period notes that despite the high profitability of the company it remained conservative in terms of use of the line of credit and payment of dividends to the shareholders. The lending value of the company's accounts receivable remained constant. With regard to obtaining audited statements, once again RBC was prepared to agree to review engagement statements given their "comfort and knowledge of the three principals." The credit line was increased to $10 million.

[43] Paul Burden, as the principal shareholder remained very "sensitive" to the issue of audited year end statements. Mike Bishop's telephone call with him in April 2011 confirmed that. Mr. Burden was speaking for ACC and was concerned about what level of sample size would be required for an audit. All of this discussion was going on under the cloud of concern that ACC might just take its business elsewhere. Len McNeil was at that stage indicating to RBC that the company was close to reaching a deal with either CIBC or TD.

[44] By June 2011 the bank's regional vice president Kim Mason went to meet with Paul Burden in Kentville to work on the relationship. RBC didn't want to lose the client over something like reporting requirements. In that meeting Ms. Mason agreed to review RBC's requirement for a year end audit. There was a serious concern that the other banks were indeed prepared to offer more money relying only on a review engagement without an audit. The interim audit of accounts

receivable was considered to be a deal breaker. RBC was concerned that the message being received by the Paul Burden was that the bank didn't trust him.

[45] The risk was further mitigated by having the corporate security department review ACC's account activities. That review confirmed that there were no unusual activities and the use of the line of credit was consistent with what was shown in those statements. In other words, the amounts going in and out of the operating accounts matched up with the reported use of the line of credit. RBC assumed that ACC was using the shareholders' loans and retained earnings along with the line of credit to fund the loans to clients. With the increase of the line of credit to $15 million ACC agree to provide audited statements for the year ending September 30, 2011.

[46] Len McNeil, as a shareholder, never asked for much less insisted on receiving audited financial statements from his own company. He never insisted that they be provided to RBC and in no way communicated to RBC any concern that he might have had about their willingness to accept review engagement statements. RBC at no point indicated to Mr. McNeil that the bank was monitoring the business to detect potential fraud. RBC did or said nothing to suggest that the bank was reviewing the monthly operating accounts to determine whether the activity in the account would support the amount of the accounts receivable that were being claimed in the borrowing limit certificates. It's worth considering here what the reaction might have been had RBC insisted on audits to protect Len McNeil and Tim Moore from a potential fraud by their associate Paul Burden or had insisted on receiving and reviewing all operating accounts from all institutions in which ACC maintained accounts to insure that Mr. Burden wasn't making up the numbers. Mr. McNeil and Mr. Moore could protect their own interests by

insisting on audits, reviewing financial statements, looking at the actual accounts receivable files in the Kentville office or performing calculations to determine the actual accounts receivable. RBC was satisfied that its interests were protected. The bank's intervention into the shareholders' relationship could reasonably be expected to have destroyed the business relationship with ACC as an ostensibly valuable client.

[47] For the first few years things seemed to be going along very well. Actually, right until the very end in April 2012, things seemed to be going remarkably well. That might just have been part of the problem. Nobody it seems wants to check for a potential fraud when money is rolling in. There hardly seems to be a reason to insist on reports and audited statements when the company is growing and making money, or at least seems to be. And ACC certainly seemed to be making money.

[48] The investors received loan interest and dividends. The interest payments to Mr. McNeil amounted to $114,000 annually based on 12% of the principal loan amount of $950,000. Those payments were made from 2008 to 2012. Dividends were declared and paid to Mr. McNeil in 2010, 2011 and 2012 in the total amount of $212,000. From 2008 through 2012 Mr. McNeil, through his holding company Big X, received a total of $778,931 in interest and dividend payments. That was a substantial proportion of the initial investment returned in the first few years of operation. Why would anyone check anything?

[49] Each year, when he received statements from ACC Mr. McNeil commented on just how well the company was doing. He was satisfied and made no inquiries at all into whether the profits generated were real or not.

[50] In October 2011 for example, upon receiving the preliminary unaudited financial statements for the year ending 30 September 2011, Mr. McNeil wrote to Paul Burden, "If you keep producing financial results like these –I will wax your car and boat –if you have one (just kidding)." He commented at one stage that ACC was the best investment he had ever made.

[51] From RBC's perspective ACC was doing remarkably well. The bank performed its monthly calculations based on the financial statements provided by ACC. On paper, ACC remained within the ratios of its borrowing covenants. They were not running up the line of credit and there was never even the slightest suggestion of a problem with payment. There were some discrepancies. During some months the amounts set out as accounts receivable in the financial statements and the borrowing certificates didn't match. That raised no suspicions and a call to Paul Burden would likely have resulted in a simple correction. The use of the line of credit was so conservative there seemed to be no cause for concern. The purpose was to make sure that the borrowing was within the ratios and it was so clearly within those ratios that the discrepancies didn't change that.

[52] RBC didn't review ACC's monthly banking statements to see if they matched the claimed amounts for accounts receivables. ACC had accounts at a number of other banks that it used to provide same day service to customers. At no point did RBC feel the need to bring all of that information together to confirm that what appeared to be a successful business actually was. The bank didn't ask for copies of all of ACC's bank statements and tally them up. It didn't ask for tax assessments to determine whether the amounts being reported were indeed not just fabricated.

[53] Mr. McNeil was frustrated at times with his own inability to get his statements from ACC in a timely way. He wanted to do his income tax returns and those for Big X. He needed statements from ACC to do that and he would frequently have to make a number of inquiries to find out the amount of the dividend. Like RBC he didn't insist on getting audited statements. He didn't even ask for them. He didn't return to the head office to check on the files to see whether this whole thing was a sham. He didn't ask to see income tax assessments to make sure that the money he was getting was reflected in the actual profit of ACC. Once again, why would he do that when the money was rolling in?

[54] The money it seems, was all the proof anyone needed of the company's success.

The Fraud

[55] Then the bubble burst.

[56] Paul Burden was the face of the company. He ran the day to day operations. He provided what were supposed to be ACC's 2011 year-end statements on 4 April 2012. They were supposed to have been audited by Grant Thornton. That was the requirement of RBC for the increased $15 million line of credit. ACC had pushed back about the expense but finally agreed that RBC would get audited statements. The statements provided showed a significant profit, significant retained income and an accounts receivable balance of more than $18,000,000. It was a rosy picture.

[57] There was an "error" in the statement. The statements should have covered the year ending September 30, 2011 but purported to cover the period ending

September 30, 2012, which at that time was a future date. When Mr. McNeil saw that he knew there was a problem of some kind. He first made inquiries of Gordon Caldwell CA, a partner at Grant Thornton who was responsible for the purported audit. Mr. Caldwell sent what he had prepared to Mr. McNeil.

[58] As it turned out, there wasn't really an audit at all. Grant Thornton had been retained to do a review engagement only. They had prepared statements based only on information provided to them by Paul Burden. They had not done an audit that would involve verifying what was in the company's books. There were two sets of financial statements and there were large discrepancies between them. Paul Burden's fraud began to unravel.

[59] He had altered the ACC financial statements to make it appear as though Grant Thornton had done an audit and to increase ACC's revenues, accounts receivables balance, profitability and retained earnings balance. Mr. McNeil reported what he found to RBC.

[60] Paul Burden quickly admitted his fraud. (In April 2015 he formally pled guilty to three counts of fraud and is awaiting sentencing on those criminal charges in October.) He insisted for a short while that there were $15 million in accounts receivable which might allow for ACC to keep going. It became clear fairly quickly that there was nothing that could be done to save it.

[61] In the aftermath, RBC froze ACC's bank accounts and hired Ernst and Young to do an investigation. RBC obtained a court order to appoint a Receiver and Manager on 12 April 2012. ACC had been operating at a net loss since 2007. Its revenues and retained earnings were very substantially lower than had been reported both to RBC and to the minority shareholders, including Mr. McNeil.

When the fraud was discovered the line of credit balance to RBC was $12,098,304.99. When the Receiver assembled the accounts receivable it was able to identify only $3,449,175 and eventually collected $3,092,175.

[62] When a person who commits a massive long term fraud admits to it, it's a risky proposition to rely on the details of his admission. How much of it is true could be anyone's guess. Some of it is probably accurate because it comports with what was eventually found.

[63] As it turns out when Tim Marriot and Len McNeil initially invested in the company they were shown fraudulent statements. The thing was a sham from the outset. Paul Burden had had two business partners before Mr. Marriot and Mr. McNeil. He used their shareholders loans in the company to pay off those partners. The money that was apparently to be used to provide capital for ACC was never there in the first place. RBC's assumption that the company was well capitalized was wildly wrong.

[64] Each month, Paul Burden had provided RBC with a borrowing limit certificate containing numbers that he had just made up. The company's financial statements were a fiction, to support what was claimed in the borrowing certificate. He either provided false information to the accountants who did review engagement reports or altered reports that had been done. The company was not doing anywhere close to the volumes of business that were being claimed.

[65] Paul Burden's deception was caught by Len McNeil in April 2012, because he made the mistake of putting in the wrong year. When asked at trial about how that mistake happened, Paul Burden simply said, "Not too bright I guess."

[66] On one level it's fraud at a sophomoric level. Any unsophisticated person with basic computer skills could alter documents and make up amounts. It took more than that to keep this fraud afloat for so many years. Paul Burden was able to use the reputations and financial wherewithal of well-respected people to leverage his fraud. He was able to keep them satisfied with a stream of not only good reported financial results but of actual money in their hands. It had to come from somewhere. It came from RBC. He was able to create the appearance of growth in terms of acquiring new contracts and taking over competitors. That took more than merely cutting and pasting financial statements. He was then able to use the growth of the company and the interest of other lending institutions to stave off RBC's requests for more reporting. Yet, back at that basic level it relies on the same part of human nature that everyone from penny ante carnival hucksters to Ponzi scheming corporate charlatans have used for generations. People are most likely to believe things that they most desperately want to be true. And everyone involved wanted Paul Burden's story to be true.

The Claims

[67] Out of that shambolic mess come the competing claims in this matter.

[68] Mr. McNeil's investment in ACC is gone. He was an unsecured creditor and got nothing as part of the receivership. His shares in ACC are worthless. It's not clear what they would have been worth in the beginning anyway given the extent of the fraud.

[69] His family's net worth has been decimated. The money loaned to his holding company Big X was secured against his personal investments and a personal guarantee of $850,000.

[70] Len and Anne McNeil say that that RBC continued to make negligent misrepresentations about the value of ACC and that that they relied on those in making their retirement decisions. The negligent misrepresentation claim is very closely connected to the general negligence claim. Mr. McNeil says that RBC continued to give him positive reports about ACC. Those reports were based on RBC's failure to properly monitor the loan.

[71] Len McNeil says that he was shocked to learn that RBC didn't have safeguards that he would have expected to have been in place with respect to ACC's borrowing. No one told him what safeguards there might be but he assumed that RBC would use the diligence that he would expect of a bank. The volume and dollar values of transactions going through ACC's bank accounts with RBC were not nearly enough to generate the volume of accounts receivable claimed on the financial statements that Burden had been providing to RBC. Mr. McNeil was able to perform some basic calculations to show that if RBC had taken ACC's monthly bank statements over a period of months and totalled them, they would have shown accounts receivable that were very much less than what Paul Burden was claiming. He argued that RBC should be deemed to have actual knowledge of every transaction that takes place within RBC accounts. The company had other accounts at other banks but those were simply for the convenience of clients. Money all made its way eventually into the account with RBC.

[72] Mr. McNeil said that RBC waived or just ignored its loan requirements for audits of interim statements and annual financial statements and performed no internal checks. Had it required the audited statements, absent Paul Burden fraudulently altering those documents as well, it would have been very clear that ACC was not profitable.

[73] RBC didn't require ACC to provide copies of its income tax notices of assessment and had it done so, RBC would have realized that the amounts claimed for income tax on the financial statements submitted to RBC were entirely fictitious. The amounts of revenue claimed would have generated significant income tax liabilities but ACC wasn't submitting the false high income to Canada Revenue Agency.

[74] In summary, Mr. McNeil's claim is framed as a negligence claim and includes a claim of negligent misrepresentation. He did not argue that RBC had breached an implied term of its contract with him, nor did he maintain that the bank owed him a duty as a fiduciary. He argued that RBC owed him a duty of care and was negligent in fulfilling that duty. Mr. McNeil asserts that RBC was, to use his words, "asleep at the switch". Had they performed like a reasonable banking institution, ACC would not have been advanced an amount of money that allowed it to become so deeply indebted. Essentially, RBC should have protected both itself and him against his fraudulent business associate by being more careful. Another way of putting it is that RBC negligently loaned money to his company, ACC.

[75] He claimed damages totalling $3,958,130.

[76] RBC for its part disputes that it is responsible for any damages. The bank said that Mr. McNeil wants to convert ACC's banker into an auditor for his benefit. The bank argued there was no duty of care owed to Mr. McNeil as a third party to those transactions.

[77] RBC has lost something in the range of $9,000,000 as a result of Burden's fraud. It argued that Mr. McNeil owed money under the guarantee that he signed for ACC. Mr. McNeil denied signing a $400,000 guarantee.

Legal Issue

[78] The issue is whether RBC owed a duty of care to Len McNeil in the administration of the line of credit extended to ACC.

[79] Without a duty of care there can be no successful negligence claim. Even if RBC were asleep at the switch, would the bank have been tending that switch for the benefit of Mr. McNeil? The duty of care proposed by Mr. McNeil has to be precisely described. It is a duty of care owned by the bank to a bank customer, who is also a shareholder in company, not to be defrauded by the company or its majority shareholders in the administration of a loan to that company. The claim of negligent misrepresentation arises from RBC itself being defrauded. Mr. McNeil's loss is claimed to arise both from his being exposed to liability through the extension of the line of credit and his being misled by implication that RBC was confident in the financial status of ACC.

The Anns /Cooper Test

[80] Whether a duty of care exists involves the application of the test set out in *Cooper v. Hobart* [2] which is a restatement of the two stage analysis used by Lord Wilberforce in *Anns v. Merton London Borough Council* [3]. It is still known as the *Anns* test.

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[2] 2001 SCC 79

[3] [1978] A.C. 7238 (H.L.)

[81] The first stage involves two questions. The first is whether the harm was foreseeable and the relationship sufficiently proximate. The second is, if foreseeability and proximity are established, whether there are reasons, having regard to the relationship, that tort liability should not be recognized. At the second stage the issue is whether there are policy reasons outside of the relationship why a duty of care should not be imposed.

Proximity

[82] On that first question, it would be foreseeable that if ACC were to be become overextended and borrowed based on fraudulent financial statements that the McNeils would suffer losses. It may be foreseeable that damages will be suffered by a class of persons but proximity also has to be found. To establish proximity the relationship itself must be one where it is just and fair to impose a duty of care. The nature of the relationship has to be evaluated. Sufficiently proximate relationships are identified using established categories. The starting point is whether the relationship is one where proximity has already been found or where there is a closely analogous category where proximity has been found to exist.

[83] Obviously, the decision to invest in ACC was, in retrospect, a bad one. As a client of RBC Mr. McNeil borrowed money from the bank and secured that borrowing against personal assets. The purpose was to invest in ACC. With regard to that borrowing itself the bank would owe him no duty to become involved in the decision regarding the quality of investment in another company. RBC offered no investment advice that involved a recommendation to become involved in ACC. In that regard Mr. McNeil was entirely on his own.

[84] The relationship between the lender and the borrower is a commercial relationship unless there is a "special relationship" or exceptional circumstances that would give rise to a fiduciary duty. No fiduciary relationship was claimed here.

[85] A bank does owe a duty of care to its customer in dealing with the customer's accounts. For example, a bank owes a duty to its customer to verify the corporate existence and the signing authorities of the customer. It owes a duty of care to the customer to ensure that cheques drawn on the customer's account reflect the authorized signing authorities. A bank owes a duty to its customer beyond the contractual one, to exercise a reasonable standard of care.[4] The duty claimed here however, is not the duty to properly manage Mr. McNeil's own accounts. There is no suggestion that the manner in which the accounts of Len McNeil or Big X were administered resulted in any losses.

[86] That duty of care applies to the banking services offered by the bank to its customer. Here, RBC did not advise Mr. McNeil with regard to the ACC investment. It was never asked to do that and never represented that it would do that. RBC for example did not, as an advisor, recommend to Len McNeil that he should not ask for audited financial statements or income tax assessment from his own company. RBC did not advise him about the degree to which he should trust his business partners. Monitoring of the business activities of ACC was not one of the banking services offered by RBC to Len McNeil as a customer of RBC.

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[4] *Don Bodkin Leasing Ltd. v. Toronto-Dominion Bank* (1993),14 O.R. (3d) 571 (Gen. Div.), affirmed (1998), 40 O.R.(3d) 262, leave to appeal denied [1998] S.C.C.A. No. 381

[87] The duty of care claimed here is not analogous to the duty of a bank to exercise reasonable care in dealing with its customers' accounts.

[88] The duty is not analogous to the duty that a bank owes a third party when it is aware or has suspicions that its customer is perpetrating a fraud using its banking facilities. RBC was the banker for ACC. The relationship was between RBC and ACC. Mr. McNeil as a shareholder in ACC was a third party to that relationship. He was not personally bound by the terms of that contract or subject personally to the obligations of the relationship.

[89] Generally, a bank don't owe a duty of care to third parties in dealing with its client's accounts. That changes when the bank knows that its facilities are being used to defraud third parties. A bank cannot knowingly permit its banking facilities to be used for fraudulent purposes. Further, banks have a duty to take steps to prevent such a fraud when the bank has knowledge of facts that establish a "clear probability" of fraud. [5]That involves actual knowledge of facts, not constructive knowledge. The bank is not deemed to have knowledge of all banking transaction in all accounts that it maintains for its customers.[6] The bank doesn't have a duty of care to have knowledge about all banking activities of its customers or to be aware of all suspicious activities. Banks are not required to keep their clients' accounts under surveillance or to keep a watchful eye for potential fraud or for suspicious transactions. [7]

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[5] *Semac Industries Ltd. v. 1131426 Ontario Ltd.* [2001] O.J. No. 3443 (S.C.J.)

[6] *Dynasty v. Toronto Dominion Bank* 2010 ONSC 436 para. 51

[7] *Dynasty* para. 60

[90] There is no evidence in this case to suggest that RBC had knowledge of facts that that demonstrated fraudulent activity and no evidence that RBC was suspicious with respect to ACC or Paul Burden. An error in the date of what purported to be a review engagement financial statement in 2007 was not evidence of fraud. Errors in borrowing certificates are not evidence of fraud. Taken together the errors are not evidence of fraud or evidence that could be used to support a suspicion of fraud. It is only with hindsight that they might be considered significant at all.

[91] Mr. McNeil cannot rely on that case law to establish a duty of care. He has to take it at least a step further. What is proposed goes beyond knowledge of facts that raise a suspicion of fraud to a more positive obligation to detect fraud. It is an obligation on the bank to take positive steps, such as requiring audited financial statements and tax assessments and doing calculations based on information in all of the customer's bank accounts to prevent or uncover fraud when there is no present suspicion of it.

[92] This situation is a step removed from that line of case law for a number other of reasons as well. Len McNeil was an RBC customer. While he was a third party to the loan he was also an RBC customer. What if any duty does a bank owe to its on customer who also happens to be a shareholder of a company to which credit is being extended?

[93] Furthermore, this is not a case of the bank being used to perpetrate a fraud. Paul Burden did defraud Len McNeil and Tim Moore through his initial deception about the value of the company. That had nothing to do with RBC. He lured them into the deal using false financial statements, not RBC. By the time RBC had

become involved, as banker for ACC, Len McNeil's money was already tied up in ACC.

[94] Later, RBC was the victim of Paul Burden's fraud. RBC was duped, with his false statements into advancing its own money to ACC. That deception did not involve a fraud on Len McNeil and Tim Moore. They were unwittingly dragged along with him to their detriment. They were exposed to liability because of his fraud but they were not the targets of that fraud. Those false statements and ongoing deceptions were not used to pry more money from them. On the contrary part of the device involved getting more money to them, in the form of interest and dividends. RBC was not unwittingly used to defraud Len McNeil of more money. The bank was not the instrument of the fraud but the primary victim of the fraud.

[95] Mr. McNeil says that RBC's continued willingness to fund ACC amounted to an implied representation that the company was solid. It caused him to remain in the company while his exposure increased. It might also be said though that Len McNeil was used by Paul Burden to lure RBC into a false sense of security. In any event, this is not the same as a situation in which the bank's facilities are used to defraud someone.

[96] The nature of the duty sought to be imposed here is quite distinct from the duty that banks owe to third parties with respect to the fraudulent use of bank facilities. And it is quite distinct from the tort duties that a bank may owe its customers in dealing with the customers' own accounts.

[97] Here RBC had a relationship with both Len McNeil and ACC. It was proposed that the relationship to *both* parties would expand the duty of care. In *Grossman v. Toronto-Dominion Bank*[8] the bank froze the account of its customer the Kaptor Group of companies after becoming aware of a large volume of suspicious transactions. Despite that, TD allowed other customers, including Dr. Grossman to deal with Kaptor Group without warning them. Representatives of TD had conversations with those customers and it was asserted that had the bank been forthright with them, they would not have suffered the losses that they did. In that situation the bank had "serious concerns and suspicions" about the "honesty, integrity and the bona fides" of Kaptor group and its principal.

[98] In that case, the motion to strike the pleadings was not granted. TD argued that Dr. Grossman was a third party to the banking relationship between the bank and Kaptor group. The court held that a bank owes a duty of care to its customers. That was not diminished by the fact that "alleged fraudster" was also a customer of the bank.

[99] The circumstances in that case were significantly different. It involved,

> "actual knowledge by the Bank of a fraud and its silence during communications with existing customers which saw cheques written by the existing customers end up being used by the Bank for purposes other than those intended by the customers –e.g. used by the Bank to its corporate advantage to reduce its expose to Kaptor Group." [9]

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[8] 2014 ONSC 3578

[9] Para. 54

[100] The knowledge or suspicion of fraud is an important component in establishing the duty of care. That knowledge was very much present in *Grossman*. It must be present to found a duty of care with respect to noncustomer victims of a fraud using bank facilities. There appear to be no cases in which a duty has been recognized to be owed by a bank to a customer in the management of another customer's account in the absence of knowledge or suspicion of fraud.

[101] In the absence of an analogous class where a duty has been established, the issue of proximity then turns to the consideration of a number of factors. Those will include the expectations of the parties, representations, reliance and the nature of the property or interest involved. [10] It will include the causal connection between the act and the harm suffered, assumed or imposed obligations, and physical closeness.[11] That isn't a closed list. It is an example of the kinds of things that should be considered.

[102] The relationship that Mr. McNeil had with RBC was separate from the relationship between RBC and ACC. Len McNeil and ACC were not two aspects of one client but two separate interests. RBC could not confuse or conflate them. Mr. McNeil's personal banking arrangements with RBC were not open to view by ACC. Mr. McNeil was a shareholder of ACC, like any other shareholder of any company. He did not have a relationship with the bank with respect to the debt of ACC beyond the guarantee that he signed.

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[10] *Odhavji Estate v. Woodhouse* [2003] 3 S.C.R. 263 para 50

[11] *Elliot v. Insurance Crime Prevention Bureau* 2005 NSCA 115

[103] That guarantee is relevant. It establishes the real nature of his contractual relationship with RBC with respect to the borrowing of ACC. It also informs but does not define the relationship as it relates to the tort claim. As a guarantor, the security of Mr. McNeil's assets formed part of the consideration for lending money to ACC. That guarantee makes it very clear that RBC could grant renewals, indulgences, and extensions to ACC, and essentially deal with ACC as its customer as it saw fit without limiting or lessening Mr. McNeil's liability under the guarantee. The relationship with respect to the ACC debt was not one in which the interests of guarantor should form part of the considerations of the bank in dealing with the borrower. Mr. McNeil knew that by signing the guarantee his interests, as guarantor, were not part of RBC's consideration. Whether he was also a customer of the bank in his personal capacity wouldn't change that.

[104] Mr. McNeil's personal relationship with RBC did not involve any representation whatsoever that RBC would monitor the activities of ACC, much less do so on his behalf and with his interests in mind. Mr. McNeil said that he assumed that RBC would use due diligence in administering the loan to ACC. The basis of that assumption was in no way related to anything that was told to him or expressed in even the most indirect way by RBC. He was never told that RBC would monitor its account with ACC in any particular way and was never given any assurances of that. ACC had reporting obligations in favour of RBC. They were not obligations that were in any way intended for the benefit of Mr. McNeil.

[105] What Len McNeil assumed was also that RBC would get audited financial statements, check for errors in its borrowing limit certificates, perform an exercise by which the monthly operating accounts were analyzed to determine that the amounts claimed for accounts receivable were consistently grossly overstated and

demand corporate income tax assessments. Yet, Mr. McNeil himself invested over $1 million in ACC. He did so based on unaudited and, as it turns out, fraudulent financial statements. At that time he didn't review the operating accounts at the Bank of Montreal which would have disclosed much lower volumes of transactions than were being claimed. During the time ACC was operating he never reviewed the bank statements or did the kinds of calculations that he says he believed RBC should have done. He never requested income tax assessments to assure himself that taxes were being paid in the amounts claimed. Mr. McNeil is seeking to impose a duty on RBC with respect to his investment that he himself was not willing to fulfill.

[106] The information that was available to RBC was not information that was solely in the possession of RBC. Each piece of information that Mr. McNeil asserted should have been reviewed by RBC was equally or perhaps even more available to him.

[107] Mr. McNeil's claim is that RBC should have scrutinized ACC's account more closely. There is no suggestion whatsoever that he at any point suggested that RBC should be requiring more detailed information from ACC. If anything, he was unwittingly used by Paul Burden to pressure RBC to loosen its audit requirements to compete with other lenders. Mr. McNeil was quite satisfied that another lender would provide more credit with a review engagement rather than an audit.

[108] The loss itself did was not directly related to what RBC did. Paul Burden perpetrated the fraud. He got Mr. McNeil to invest based on fraudulent information. RBC had no part of that. He then proceeded to defraud RBC of $ 9 million, using Mr. McNeil's reputation as part of the scheme. He paid almost

$800,000 to Mr. McNeil to enable him to keep the fraud going. The direct cause of the loss to RBC and Mr. McNeil was Paul Burden's fraud. RBC took a risk and has taken its losses. Mr. McNeil also took a risk.

[109] Mr. McNeil didn't rely on RBC in deciding to invest. He says that he did rely on RBC to assure him that ACC was a profitable going concern. What he actually relied on were cheques from ACC. While the company made money it was far from his mind that he or RBC were being defrauded. Furthermore, it was Mr. McNeil who insisted to RBC that the company was actually more valuable than they believed. He asserted that they should give him credit for company shares to allow him to make other investments. That did not sound at all like someone who was relying on RBC's valuation. Mr. McNeil said that he relied on RBC, while at the same time, it's clear that RBC relied on his involvement to give some of the assurances that were needed.

[110] On the proximity analysis it would be neither just nor fair to impose a duty of care in these circumstances. Justice and fairness are not code words for sympathy or for the redistribution of wealth. RBC lost a great deal of money and could afford to lose a great deal more. The McNeils will feel the loss in a much more direct, profound and human way. It might well be more humane to have RBC bear the loss. But the law can't work that way. Any certainty in common business relationships would then give way to judicial whim.

Policy Implications of Imposing a Duty of Care

[111] If such a duty were to be imposed here, it would also be necessary to consider the policy implications of that. If a duty were to be imposed it would mean that commercial lenders would be required to monitor the accounts of their

clients for the benefit of every other client who might be a shareholder of that company. Commercial customers would be placed under financial surveillance for the benefit of their shareholders. That would be a significant obligation.

[112] The duty would allow bank customers in that situation to assume, that if the bank were willing to loan money to any company, it must be a safe investment. If the bank is required to take reasonable steps to detect fraud, its duty is to provide some level of monitoring. The shareholder/bank customer then becomes a "free rider' with respect to the bank.

[113] The bank might be able to identify the customer/shareholders to whom such a proposed duty might be owed but its potential liability would be expansive with regard to the purposes to which they might put the information. If the bank's willingness to extend credit is seen as an implicit affirmation of the integrity the company's financial statements, shareholders could make any number of decisions based on that. It could be, as in the McNeils' case the decision to retire, or just about anything else. The liability in that sense is indeterminate.

[114] A bank in making risk management decisions has to be aware of its own risk tolerance and competitive business considerations. The risk to other shareholders who might also be customers of the bank would be consideration that would fundamentally change the way lending is done. The bank would not only have to consider its own risk and its own risk tolerance but factor into its decisions the potential risk to other investors in the business. While the bank might be prepared to offer credit on terms that are reasonable in light of the bank's own risk, it might not be prepared to do so if it had to consider the broad range of losses that could be incurred by investors. A potential borrower might not be pleased to hear that the

cost of borrowing had increased to account for not only the risk to the bank's own money but to cover the risk to its own shareholders.

[115] A personal guarantee would be caught up in a tautology. It's a guarantee of the company's indebtedness but it would only work if the risk the bank has taken is reasonable and is managed reasonably, which in turn depends on the strength of the personal guarantee. A personal guarantee is an additional security for the benefit of the bank. It might permit the bank to offer credit where it might not otherwise do so. But, if the person who signs the guarantee is able to argue that the bank took too great a risk and the guarantee should not be honoured, its very purpose is defeated.

[116] The duty of care as proposed should not be imposed.

[117] The second broad part of the *Anns* test involves a consideration of other policy considerations. In this case, the policy considerations all relate to the relationship.

[118] Based on the *Anns* test, there is no analogous relationship in which a duty of care has been found to be owed. The relationship here is not one to which a duty should be extended. In the absence of a duty of care, there can be no successful claim for negligence.

The Standard of Care if a Duty were Imposed

[119] If a duty were to be imposed liability would come from that general duty to exercise reasonable care. Mr. McNeil asserts that if the bank had exercised the care that a reasonable bank should exercise, it would have been suspicious, and then would have had to step in to stop itself from being defrauded.

Evidence

[120] RBC was defrauded by Paul Burden. It did not act as an unreasonable banking institution in advancing money based on Burden's fraud.

[121] Part of the sad story makes itself clear in Mr. McNeil's own decision about how to manage the litigation. No expert gave evidence on his behalf about the usual manner in which banks operate to manage risks. An expert isn't always required to establish whether a standard of care has been met. The standard of care isn't always based on industry standards. Knowing what those industry standards are would be helpful though.

[122] Mr. McNeil said specifically, that he wanted to be his own expert. He wanted to tell his story himself and explain how RBC was wrong. He asserted that anyone who knew what a borrowing certificate was would know that this was just wrong. Mr. McNeil was not qualified as an expert to give opinion evidence. He was given a fair bit of latitude to speak to his own experience with banks and banking but that could not be transformed into an expert report. Mr. McNeil's firm and principled conviction that the bank was wrong cannot be given the weight of an expert opinion. There was no evidence to establish the standard used by banks in monitoring the borrowing of commercial clients.

[123] There was no evidence to indicate whether banks generally permit borrowing based on unaudited review engagement statements. There was a tangential suggestion that at least on other lender was prepared to do that. That's hardly evidence of a standard.

[124] There was no evidence to indicate whether banks generally require commercial borrowers to file income tax assessments to prove the income claimed in filed financial statements.

[125] There was no evidence to indicate whether banks review the operating accounts of their commercial clients to verify the accuracy of the amounts reported.

[126] RBC advanced money to ACC based on its determination of the risk. It initially requested audited financial statements but that requirement was not enforced. The company did not want to provide audited statements. RBC continued to advance funds based on fraudulent borrowing limit certificates. There is nothing to suggest that it would reasonably have anticipated that those would be fraudulent. They knew who they were dealing with.

[127] It was noted on Mr. McNeil's behalf that those certificates were obviously wrong. Some of them contained amounts that were not even supported by the company balance sheets that accompanied them. They were clearly wrong. In hindsight that might have been a clue. But the purpose of the document is to make sure that the company remains within its borrowing limits. Based on the figures that were in the balance sheets, it was always within those limits.

[128] But, said Mr. McNeil, RBC should have known that the balance sheets were a fraud. It had only to look at the company's operating bank statements. The amounts going in and out of those statements were nowhere near enough to generate the kind of income or accounts receivable that were being claimed. If it was so obvious one might ask why he didn't catch it. But, RBC account managers don't monitor its corporate customers' bank statements to confirm that they are not

being lied to in the monthly reports. If they did, they would be required to go through each statement from each bank where the company has accounts and be alert to inconsistencies. Failing to do that is hardly unreasonable. Banks are not as a general rule required to maintain surveillance over their corporate customer's accounts.

[129] There was nothing to suggest that ACC was not able to meet its obligations. It had been doing so for a number of years. It was not missing payments and not falling behind.

[130] There was no requirement for notices of assessment from Canada Revenue Agency. Once again, in retrospect that would have alerted RBC, Mr. McNeil and Mr. Moore to the fraud. No one asked for them. There is nothing to suggest that a reasonable bank must require notices of assessment to be provided for its corporate clients. It might be suggested as well that if such an obligation were imposed it would require the report to be in a form that could not be fraudulently altered or misrepresented.

[131] If RBC owed a duty of care to Mr. McNeil it would have been to manage the lending of money to ACC as a reasonable bank. It was defrauded of a large sum by Paul Burden. It could have taken steps to prevent that, by requiring more and different forms of reporting and monitoring of accounts. Just because the fraud could have been prevented that doesn't mean that RBC's lending practices were unreasonable. A reasonable bank is not required to demand audited financial statements. It is not required to demand tax assessments. It is not required to demand audited statements of accounts receivable. It is not required to review the banking statements of its corporate clients to check against fraud. A reasonable

bank is entitled to depend to some extent that the principals of its corporate clients will not commit criminal fraud.

[132] If a duty of care were owed to Mr. McNeil, to administer it's lending to ACC as a reasonable commercial lender, it did not breach that standard of care.

The $400,000 Guarantee

[133] Part of the financing arrangement was a personal guarantee signed by Mr. McNeil himself. The document dated 24 May 2007 says on its face that it's a $400,000 personal guarantee. Mr. McNeil says he can't recall ever signing a $400,000 guarantee. He only remembers a $100,000 guarantee. He's firmly convinced that he did not sign a document for $400,000. He suspects forgery but there is no evidence at all to support that. There are in fact other documents that suggest that what was being discussed was a $400,000 guarantee.

[134] Each shareholder in ACC was to sign a personal guarantee in the proportion of their ownership of the company. Mr. Moore signed a $400,000 personal guarantee based on his 20% ownership and the term sheet from RBC confirms that Len McNeil did the same. Todd Strickland the RBC account manager at the time, gave evidence that when he spoke with the investors about providing guarantees in proportion to their ownership there was no disagreement. Like Mr. Moore, Mr. McNeil had a 20% share so his proportion of the total guarantee would be $400,000. Mr. McNeil recalled a draft term sheet which was followed by the actual term sheet. No draft term sheet was located and Mr. Strickland's evidence was that a draft term sheet was not prepared.

[135] Todd Strickland recalled specifically where and when the document was signed, confirmed his signature and confirmed that it was indeed a $400,000 guarantee. He said that it was signed at the Sunnyside Restaurant in Bedford, though noted as being signed in Halifax. His personal calendar records meeting with Mr. McNeil on that day. There was a rush to get it done and he had to go to Kentville early that morning to have Paul Burden sign his documents. Once the document was signed it was in the possessions of RBC. There was no opportunity for anyone, except an unknown person at RBC to alter the document.

[136] When Mr. McNeil was presented with a demand to honour that guarantee in April 2012, he acknowledged that the signature was his but had several issue with the document itself. He said that it was "unprofessional". He did not know who witnessed it and there were no seals on the document. Presumably he meant red legal seals. He asked who the guarantee was joint and several with. (His other guarantees with RBC were all noted as being joint and several as well.) He noted that he did not see his initials at the bottom of each page, and that placing his initials there would be his usual habit. (His other personal guarantees, in the same form, did not have his initials on each page.) He was suspicious about the validity of the document. Mr. McNeil said that he would want his lawyer to review the document and if his lawyer accepted it as valid, he would accept it. Otherwise, he would not. Though offered an opportunity to look the impugned document he didn't actually look at it until the trial.

[137] The form of the guarantee was exactly the same as the other guarantees that Mr. McNeil signed with RBC. The original was presented in court as an exhibit. Mr. McNeil could offer no explanation whatsoever for how the document had been

altered. He pointed to no one who had access to the original document held by RBC who could be suspected of altering it.

[138] Paul Burden's word that he didn't forge the guarantee is hardly much reassurance. His word doesn't count for much. It doesn't have to. Mr. McNeil recalled the document being presented to him by Paul Burden, which would indeed leave open the possibility that Burden altered it. There is no explanation for how the RBC document might have got into Paul Burden's hands. But in any event, Mr. Strickland said he was the one who took it to Len McNeil and he is the one who witnessed it. It was done at the same time that the other lending documents were signed on the same day. They each have Mr. Stitckland's signature as the witness. Paul Burden did not have access to the original document in order alter it. No one else has been implicated. I accept Mr. Strickland's precise recollection that the guarantee was signed in his presence.

[139] The only evidence that Mr. McNeil had to support his view was his own email in which he stated that he had signed a $100,000 guarantee. No one at RBC caught that reference and corrected him on it. It just wasn't relevant to what they were dealing with at the time. Mr. McNeil was just setting out his assets and obligations. He wasn't asking for confirmation.

[140] Len McNeil can't remember a $400,000 guarantee and that should be accepted as a fact. The fact that he can't remember it doesn't mean it didn't happen. The documents that support the guarantee suggest no element of fraud. Nevertheless Mr. McNeil remains steadfast and unshaken in his conviction that he is right in the face of both the document, the supporting documents and Mr. Strickland's evidence.

[141] Mr. McNeil did sign a $400,000 guarantee in the form presented by RBC.

Conclusion

[142] RBC does not owe a duty of care to the plaintiffs to prevent itself from being defrauded. If it does owe such a duty RBC met the standard of a reasonable bank in extending credit to ACC. The plaintiffs' claims are dismissed.

[143] The guarantee signed by Mr. McNeil in the amount of $400,000 is enforceable. The total amount owing under that guarantee by Mr. McNeil is $437,316.71 which included interest to the date of trial.

[144] The total amount owing by Big X to RBC under its line of credit and operating loan is $412,111.47. Mr. and Mrs. McNeil are personally liable for that amount under the terms of the $850,000 guarantee on behalf of Big X.

[145] I will hear the parties on the issue of costs.

J.