Citation: 2025 NBKB 013

Date: 2025-01-17

Docket: FC-53-2014

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

THE PROVINCE OF NEW BRUNSWICK, as represented by the Minister of Economic Development

– and –

RICHARD S. CARPENTER

Date of Trial:	October 28, 29, 30, and 31, 2024
Date of Decision:	January 17, 2025
Subject Matter:	Personal Guarantee
Before:	Justice E. Thomas Christie
At:	Burton, New Brunswick
Appearances:	Christopher Whibbs and Sarah M. Fitzpatrick for the Plaintiff
	Edwin G. Ehrhardt, K.C., for the Defendant

Christie, J.

INTRODUCTION

[1] The Defendant, Richard S. Carpenter, was the Director and President of Industrial Rail Services Inc. (IRSI). IRSI's business included the refurbishment of passenger rail cars and locomotives. In an effort to secure business opportunities, IRSI successfully sought from VIA Rail several contracts for refurbishment and maintenance of certain parts of VIA's fleet. The VIA contracts required that IRSI establish a Letter of Credit to secure the work. IRSI turned to the TD Bank to provide the required letter of credit which TD did in an initial amount of $12,500,000. In turn, the TD Bank sought guarantees on the letter of credit from the Plaintiff, Her Majesty the Queen in Right of the Province of New Brunswick, as represented by the Minister Responsible for Business New Brunswick (PNB). PNB did provide TD with the guarantees on the letter of credit. In turn, PNB sought a personal guarantee from the Defendant in the amount of $3,000,000. In essence, the letter of credit issued by TD was unconditional in that if TD was called upon by VIA, the amounts were to be paid by TD without question. If TD paid on the letter of credit, TD would claim the exact amounts on the guarantee provided to it by PNB, and it would be paid, again, essentially, without question.

[2] As it happened, VIA called upon TD to pay the amounts guaranteed by the letter of credit. TD paid. TD then called upon PNB to pay on its guarantee. PNB paid TD. PNB then called upon the personal guarantee provided by Mr. Carpenter. Mr. Carpenter refused to pay at that time and has made no payment since. Thus, this action followed. While the initial face amount of the TD letter of credit was $12,500,000, that was subsequently reduced and was subject to three separate draws by VIA for amounts that totalled $10,500,000.

OVERVIEW OF EVIDENCE

[3] During the course of the trial, five witnesses testified. Each provided their respective evidence of the events that ultimately led to the collapse of the contractual relationships between IRSI and VIA. In addition, evidence was provided regarding the efforts by PNB and Mr. Carpenter, to salvage what was becoming a dying relationship between VIA and IRSI – a relationship that held such initial promise of a growing local company with highly valued, skilled jobs for New Brunswickers. Ultimately, IRSI was (and with its consent) subject to a court ordered receivership as of April 19, 2012.

[4] The genesis of Mr. Carpenter's personal guarantee can be traced back to a letter dated April 2, 2008, that Mr. Carpenter sent to the Minister Responsible for Business New Brunswick (PNB):

> Further to our meeting I would like to confirm our request for a Provincial Loan Guarantee of up to $12.5 million to support the Letter of Credit requirements to bid *VIA Rail Tender 200801001 for the Major Overhaul of VIA's Passenger Car Fleet*. As the Tender indicates, the credit facility will be required for a six-year term.
>
> As discussed, we will need to increase the mortgage on the facility to raise the working capital funds for the project, but would have no problem allowing the Province to take a second position to secure your guarantee after those needs are met. I am prepared to meet your request for a limited personal guarantee of $3 million to supply comfort to the Province. Again, we thank you for the time and consideration.
>
> R.S. (Dick) Carpenter, President
>
> Industrial Rail Services Inc
>
> [emphasis added]

[5] PNB did provide the guarantee on the TD line of credit and Mr. Carpenter did sign a corresponding personal guarantee to PNB on June 11, 2008. Amongst other terms, Mr. Carpenter's personal guarantee carried an annual interest payment of 4.4%, calculated half-yearly.

[6] The guarantee also included the following provisions:

> 5. The Minister shall not be bound to exhaust his recourses against the Corporation [IRSI] or other parties or against any security the Minister may hold before the Minister requires payment from the Guarantor, and the Minister may enforce and realize upon the security he may hold, or any part thereof, at such time or times and in such order and manner as the Minister may determine.
>
> 6. If any default shall occur under any security the Minister may hold in respect of the Minister's Guarantee, the Guarantor shall forthwith upon demand being made upon the Guarantor by the Minister, pay to the Minister a sum equal to the aggregate of all principle, interest and other monies due and payable by the Corporation on or in respect of the guarantee, limited to $3,000,000.00, together with interest calculated from the date of such demand at the rate and in the manner set forth in Clause 8 hereof.

[7] I note that the parties agree that the mathematical calculation of interest from the date of the demand (January 9, 2013) until November 1, 2024, is $1,989,548.81 for a total due (to that date) and claimed pursuant to the personal guarantee, of $4,989.548.81. With that said, and without conceding the merits of the claim, Mr. Carpenter argues that the amount of interest is grossly inflated due to the failure of PNB to prosecute the claim in a timely manner.

[8] Mr. Carpenter takes no issue with the facial validity of the personal guarantee he gave. He acknowledges that the signature on the guarantee is his. Nor does he allege that the demands for payment were procedurally defective, having received two demands (January 9, July 2, 2013). Mr. Carpenter's objection to paying on his guarantee is, generally speaking, based on his view that PNB failed to live up to the duties of good faith and honest dealing it owed to Mr. Carpenter. As he wrote, in part, to the responsible Minister on February 22, 2013:

> In conclusion, I wish to confirm that I do not feel the conditions were met to allow a demand on my personal guarantee and therefore will not be providing the funds as requested by your letter of January 9, 2013. The personal guarantee was given in good faith that all parties would take the steps needed to make the

> VIA Rail project a benefit for all involved. This was not the case and I have to take a stand to limit my losses because of the actions of others.
>
> [emphasis added]

[9] The first witness called was Mr. Jean-Bernard Guignard. He was the primary contact between what was then known as Business New Brunswick and Mr. Carpenter. Business New Brunswick was an arm of PNB responsible for stimulating the provincial economy and fostering job growth. Mr. Guignard confirmed that Mr. Carpenter came to his attention in 2008 seeking government loan guarantees for a letter of credit IRSI needed for work on certain contracts with VIA. Mr. Guignard considered it necessary to undertake considerable due diligence on the matter given he assessed the risk to be high. Nevertheless, he considered that the work IRSI was seeking from VIA had the potential to be a win-win for IRSI and the Province's skilled workforce.

[10] Once the due diligence was completed, PNB agreed to Mr. Carpenter's request to guarantee up to $12,500,000 of a line of credit to be issued by TD in relation to IRSI's work with VIA. Mr. Guignard also testified that the personal guarantee from Mr. Carpenter was an essential part of the requested arrangement to secure the financing IRSI needed.

[11] There were three separate contracts for projects between VIA and IRSI that were captured within the overall financing scheme. One contract (being the largest) involved the refurbishment of up to 98 VIA passenger cars known as the LRC contract. Second was a contract to retrofit other passenger cars to make them accessible. This was known as the Renaissance contract. Third, there was a contract to overhaul certain diesel cars. This contract was known as the RDC contract. All three contracts were covered under the blanket of the initial $12,500,000 letter of credit. While all three projects suffered different issues impacting the work, it was the LRC contract (being the largest of the three) which proved to be the most problematic.

[12] In addition to providing guarantees on the TD letter of credit, IRSI asked PNB to provide it directly with additional provincial loan financing of $10,000,000, which PNB did. These funds were intended to allow upgrades to the IRSI facility in Moncton, where the work on the VIA contracts was to take place and to support job creation. Initially, IRSI was making payments on this loan and associated fees. Mr. Guignard estimated that approximately $1,500,000 had been repaid. However, by 2010, PNB was beginning to get requests from IRSI to postpone further payments. Also, in the Fall of 2010, IRSI asked PNB for an additional loan. PNB refused due to a growing concern over the financial affairs of IRSI.

[13] As the work on the VIA contracts continued into mid to late 2011, PNB had become aware that there were issues between VIA and IRSI that could jeopardize the work being done. Mr. Guignard testified that he asked IRSI for copies of correspondence between IRSI and VIA, in order to better understand the issues. By early 2012, Mr. Guignard learned of other concerns that were developing. Those issues included the assertion by IRSI that VIA was holding back payments to IRSI for work done. He described a meeting in Moncton on February 14, 2012, between Mr. Carpenter and PNB and described feeling 'overwhelmed' with all the issues Mr. Carpenter was raising. It became apparent that the issues between VIA and IRSI were significant.

[14] Mr. Guignard testified that it was decided that PNB would get involved in direct discussions with VIA to find some path to a resolution. Mr. Carpenter encouraged this involvement. This might include some type of informal mediation. Mr. Guignard testified to the desire of PNB to see the company succeed and find solutions. He testified that PNB wanted to "safeguard" the company, hoping that there would eventually be spinoff benefits. Nevertheless, he knew that PNB had "huge exposure" in IRSI. It was hoped that by getting involved directly in finding a way to resolve the issues between VIA and IRSI, PNB could not only support the growth of the IRSI but also protect the taxpayers and create jobs.

[15] On March 1, 2012, Mr. Guignard was on a telephone call with officials from VIA. It was clear that VIA was deeply unhappy with IRSI. He came away from the telephone meeting with a

sense that, “there was no coming back from that meeting”. VIA no longer wanted to work with IRSI. More specifically, VIA no longer wanted to work with Mr. Carpenter. It was also discussed during the telephone meeting that having IRSI placed in receivership was an option for consideration because, without the work from VIA, IRSI had no other substantial work.

[16] This deepening rift arose, coincidentally, with the timing of a tragic VIA derailment (February 26, 2012) of a passenger train in Burlington, wherein several VIA employees died. About the same time, IRSI discovered issues with the seat tracks on the LRC cars that, in its opinion, posed a ‘life-safety’ risk for the travelling public. Mr. Carpenter shared these newly discovered concerns with VIA’s Chief Operating Officer, John Marginson, by letter dated February 27, 2012, wherein he wrote, in part:

> Please accept our condolences for the loss of your associates in yesterday's tragic derailment. We are all saddened for the loss of life and injuries caused by this unfortunate accident.
>
> The attached letter in reply to your February 24th letter was penned prior to this tragic news. I apologize for being the bearer of more bad news but our engineers have uncovered additional structural problems and defects in the LRC fleet which may cause a safety hazard to the travelling public and need to be addressed. The details of our findings along with the independent structural engineer’s letter of February 23, 2012 are attached. I know the last thing you need to deal with at this time is such an issue; however, we believe it is a safety concern that needs to be addressed immediately as it could pose a risk to the travelling public if not resolved. It may indeed be appropriate to bring this issue to the attention of the Transport Safety Board as they investigate yesterday's accident.
>
> Here at IRSI, we do not believe it is safe to proceed with any further production of cars until the seat track connection channels have been inspected. As a Director of the Company I cannot accept that liability should there be a structural failure in an accident.
>
> [emphasis added]

[17] Mr. Marginson replied on February 29, 2012, in part, as follows:

> …

> Then, in a second letter, of the same date, IRSI raises for the first time, the specter of a risk involving the most important issue of all: safety. At VIA, safety is paramount to all our efforts. And, in the current context, to raise any doubt about VIA Rail's commitment to safe operations of its trains and the safety of its employees, its passengers and the public in general, can only be qualified as highly contemptible, morally reprehensible and a total lack of respect for those who lost their lives on Sunday and for those who mourn their passing, including the undersigned. I trust that the record will show that this despicable act is nothing more than IRSI's desperate attempt to shift the blame of its own failures.
>
> [emphasis added]

[18] In early March 2012, Mr. Guignard, knowing the financial risk to the Province if IRSI ceased operations, began to gather information in case a court ordered receivership became the best option to consider. He testified that, as a lender to IRSI, who was involved in a dispute with a large federal company, he needed to know the options. As he put it, the Province had a $22,500,000 exposure related to IRSI and its work with VIA. As part of his effort to gather information, Mr. Guignard was working with the other principals involved toward finalizing a so-called, 'stand still agreement', whereby VIA and IRSI would explore options for keeping the relationship (and the employment in Moncton) going.

[19] On March 10, 2012, Assistant Deputy Minister, Jeff Trail, sent an email to Mr. Carpenter and Mr. Marginson (copied to Mr. Guignard) outlining the Province's efforts to move the parties toward resolution. The email includes the following:

> Dear Mr. Marginson and Mr. Carpenter:
>
> I have discussed our current status at length with the Deputy Minister of Economic Development for New Brunswick, Bill Levesque. We believe that a solution to the current contract issues between VIA and IRSI requires a timely resolution in order to meet the goals of the parties: a chance for timely delivery of refurbished cars, continuation of employment and operations at IRSI, and minimal financial impact on all those concerned.
>
> After several days of our direct involvement, and given the situation between the parties is only slowly moving toward

> resolution, we would like to propose a process to accelerate the progress.
>
> …
>
> [emphasis added]

[20] The email continues and described a suggested path, but it was illustrative, Mr. Guignard testified, of the efforts made by PNB to keep the VIA/IRSI relationship going.

[21] On March 20, 2012, Mr. Guignard became aware that VIA had called on $2,500,000 of the letter of credit from TD in relation to the Renaissance contract. TD paid as required and demanded same from PNB. This news came as a surprise to Mr. Guignard as PNB was trying to work out a mediation process between VIA and IRSI. VIA and IRSI were, with PNB's help, still trying to work out arrangements to continue work on the largest contract, being the LRC contract.

[22] Mr. Guignard testified that, by this stage, he was aware that IRSI was contemplating suing VIA on its contracts. IRSI asked PNB if it wished to participate in the intended legal action, but PNB declined, citing the fact that they were not a party to any contract for work with VIA.

[23] IRSI did commence legal action against VIA on April 17, 2012. The refusal of PNB to join in, or otherwise pursue the claim against VIA, was to become a critical piece of Mr. Carpenter's arguments in defence, as will be set out more fully below.

[24] Mr. Guignard testified that, by late March 2012, IRSI had ceased operations and, by early April, PNB was in discussions with Ernst Young regarding its role in handling the receivership process. On April 11, 2012, VIA demanded TD pay out a further $7,000,000 on the letter of

credit. In turn, one day later, TD made the demand on PNB to cover it pursuant to its guarantee to TD. PNB did pay TD.

[25] Shortly thereafter, PNB brought an application to the court for a court appointed receiver over the affairs of IRSI. Ernst Young was appointed receiver. Mr. Carpenter, on behalf of IRSI, consented to the appointment. Mr. Guignard testified that PNB gave no direction or input into how Ernst Young handled the receivership. He testified that it was the decision of the receiver, on the advice of its counsel, that IRSI's legal action against VIA would not proceed. His understanding was that VIA would likely have counter sued. Mr. Guignard noted that PNB was aware that VIA owed IRSI money but made the determination that PNB would stay out of it.

[26] Mr. Guignard noted that, in the discussion leading toward the appointment of the receiver, VIA had undertaken that, if the receiver was unable to cover its fees from the administration of IRSI's affairs, VIA would contribute up to $150,000 toward the receiver's fees and expenses.

[27] Mr. Guignard noted that it was during the period of the receivership that VIA called a final draw on the letter of credit in the amount of $1,000,000. TD paid as required, as did PNB, in turn, pay TD. Mr. Guignard testified that PNB had put $22,500,000 into the IRSI venture. On the receivership, PNB received $357,000.

[28] On January 9th and July 2, 2013, PNB made it demands on Mr. Carpenter's personal guarantee. Mr. Carpenter has paid nothing.

[29] The next witness to testify was Mr. Dan Seems, Executive Director of what was then known as Business New Brunswick (PNB). Mr. Seems became involved in the IRSI/VIA file in March 2012. He recalled that Mr. Carpenter was open to the idea of IRSI being placed in

receivership, although he could not understand why. Mr. Seems sought to understand the issues between IRSI and VIA. He came to learn that the relationships, both business and personal, between the principals of IRSI and VIA, were bad. His recollection was that VIA and IRSI could not agree on anything. Mr. Seems testified that his goal was to find some way that IRSI could continue to operate in Moncton.

[30] Mr. Seems confirmed that he was aware of the seat track safety concerns expressed by IRSI. He did not discuss these issues with VIA as he was not certain if they were legitimate, and it was VIA's job to ensure its passenger cars were safe. In his discussions with VIA, it became apparent that VIA was threatening to call on the letters of credit and Mr. Seems saw his role as trying to, 'calm the waters', in hope of finding some way to make the whole situation work.

[31] Mr. Seems testified that he saw the receivership option as being 'plan B' and hoped that the largest IRSI project, the LRC project, could continue. As for the request by IRSI to join the legal action against VIA, Mr. Seems testified that, 'we were given no compelling reason to pursue it'. He knew that if PNB joined in an action against VIA, that would be the end of any further VIA contracts for work in Moncton. While Mr. Seems acknowledged that the legal action against VIA could be considered as an asset on the books of IRSI, it was, at best, a 'contingent' asset as it had no value on its own.

[32] Mr. Seems testified that the overall purpose of his involvement (and that of others at PNB) was to try and keep the relationship between VIA and IRSI alive, as PNB had considerable financial exposure of its own and PNB wanted to keep employment in Moncton. Mr. Seems knew that it was VIA that was pushing the process toward receivership for IRSI and was aware that VIA was pushing to have Mr. Carpenter step aside from his role with IRSI. Mr. Carpenter, much to his credit, was prepared to do so.

[33] Mr. Seems noted that he received correspondence from VIA on April 11, 2012, confirming that it was cancelling the LRC contract and would call on the letter of credit in the amount of $7,000,000. VIA also expressed hope that certain work could continue under the direction of the anticipated receiver. Mr. Seems testified that it was for that reason that VIA undertook to be responsible for certain of the receiver's costs. Regarding IRSI's legal action against VIA, Mr. Seems testified that he had received advice that it was not worth pursuing. Much could be spent only to find that, 'VIA left town anyway.' Moreover, there was the claim that VIA asserted that it was owed money by IRSI. There was no expectation the IRSI claim would be viable.

[34] Mr. Mike Boyd, senior commercial credit manager for TD Bank, testified. He was involved in establishing the required financing of the VIA contracts with IRSI. Mr. Boyd confirmed that the required letter of credit would only issue if backed by PNB's guarantee. Mr. Boyd explained that, while the letter of credit was for a face amount of $12,5000,000, the terms permitted a call to be made on lesser amounts, but not to exceed the $12,5000,000 in total. That is what did happen.

[35] Mr. Boyd was aware that there were certain issues as between VIA and IRSI. On March 16, 2012, TD received the first demand from VIA for $2,500,000. This coincided with VIA's cancellation of the Renaissance contract. PNB was given notice of this on March 21, 2012, and shortly thereafter PNB paid over to TD as per its guarantee. VIA made another demand to TD for payment of $7,000,000 on April 11, 2012, in relation to the LRC contract. TD paid VIA and then sought reimbursement from PNB which was received by TD on or about April 25, 2012.

[36] Although not specifically addressed by Mr. Boyd in his testimony, a final call on TD in the amount of $1,000,000 was subsequently made by VIA, on or about October 31, 2012. This related to work on several diesel cars. PNB was called upon by TD to cover this demand, which it did.

[37] The Defendant, Richard Carpenter, also testified. He testified as to his involvement in various businesses including property re-development, textile business and elevator business. In 1999 he purchased what was known as the Gordon Yard, formerly part of CN's eastern operations. There was a need to continue to service rail cars and locomotives and IRSI was incorporated for that purpose. Early in the 2000s, IRSI did several small project for VIA. Mr. Carpenter wanted his company to get experience working on such machinery.

[38] In 2008, Mr. Carpenter was invited by VIA to bid on the LRC project which involved renovating 98 passenger cars. VIA wanted the bid below $100,000,000. IRSI was awarded the contract (LRC contract). The contract required that IRSI secure a $8,000,000 letter of credit. This letter of credit was secured by PNB's guarantee. Work began on the contract in 2010.

[39] IRSI also secured a second VIA contract to renovate nine Renaissance cars (Renaissance contract) to make them accessible. VIA required a letter of credit of $2,500,000. This too was ultimately guaranteed by PNB.

[40] In addition, IRSI was successful in securing a third contract with VIA for work on rail diesel cars (RDC contract) for which it needed to provide a $2,000,000 letter of credit.

[41] Mr. Carpenter testified that his relationship with VIA leadership, at that time, was good. However, in 2011 there was new leadership at VIA and the relationship changed. In 2011, getting paid by VIA became an issue. On September 16, 2011, Mr. Carpenter wrote to Via's Chief Financial and Administrative Officer saying, in part:

> The immediate matter to be resolved is for IRSI to collect monies that it believes it is owed from VIA Rail.
>
> …

> Would you please confirm that we do indeed have a commitment on this $2 million and a timeline for this payment? I need a confirmation of this no later than 2pm EST today, September 16th, 2011.

[42] Mr. Carpenter testified that the outstanding payments from VIA had become a significant issue, noting that it led to IRSI suspending its operations. This impacted the work on all contracts IRSI had from VIA. The issues of payments from VIA persisted through the end of 2011. Mr. Carpenter was still hopeful that, with the help of PNB, issues could be resolved with, if necessary, the help of a mediator. Moreover, by this time, PNB was fully aware of the type of problems IRSI was having with VIA.

[43] Mr. Carpenter testified that he signed the present guarantee in 'good faith' and that he expected the same from PNB. Mr. Carpenter acknowledged during cross examination that he previously had signed other personal guarantees and knew, 'what they were about'. In his experience, PNB did not have an established history of calling on these types of personal guarantees. He understood that PNB would typically seek, 'carve outs', to try and keep businesses operating. He testified that it was, "*beyond my wildest dreams that they would move on me or the company*". With that said, he acknowledged that nothing was said by PNB in the lead up to signing the guarantee that would lead him to think the Province was undertaking not pursue its full rights thereunder if need be.

[44] Mr. Carpenter testified that, at the beginning of his work with VIA, and based on his discussions with PNB around how PNB could support his work, he was optimistic that he had found a 'real partner' in fostering the growth of his company and the employment opportunities it provided skilled workers.

[45] Mr. Carpenter did not agree with the evidence given by Mr. Seems that he (Mr. Carpenter) was in favour of having IRSI put into receivership. In his experience, there were always steps that could be taken to avoid that route.

[46] Much of Mr. Carpenter's evidence focused on IRSI's view that it had discovered defects in the seat rails which held passenger seats securely to the floor in the LRC cars. These defects were not visible at the time of its bid on the LRC contract. Mr. Carpenter noted not only the Burlington derailment, but also referred to another derailment in Argentina where many people were killed, as reasons why he needed to focus on safety issues for VIA passengers. He was concerned that the work, as contracted, could result in passenger cars being put back into service that did not conform with Transport Canada regulations.

[47] Mr. Carpenter's concerns over the safety issue were so profound that he felt his company could not do the work any longer. In his view, peoples' lives were being put at risk. Moreover, to have continued with the work would have been in violation of Transport Canada regulations. In as much as it was a business decision to not put unsafe cars into the system, it was as much a moral choice for Mr. Carpenter to leave the issue unresolved. Mr. Carpenter was adamant that "life-safety" issues were engaged in this dispute with VIA. VIA disagreed. The relationship had deteriorated to such a degree that VIA wanted nothing more to do with him. Mr. Carpenter described himself as being the 'target'. For that reason, Jeff Trail, the Assistant Deputy Minister, essentially took over the communications with VIA. Mr. Carpenter noted that Mr. Trail kept him up to date and that Mr. Trail had his trust.

[48] Mr. Carpenter testified that, in his view, PNB should have 'gotten behind' his plan to keep IRSI functioning. With that said, he acknowledged that Mr. Trail put in significant effort to get VIA 'to the table' in hopes of finding a solution. The Deputy Minister, Bill Levesque, was also helpful in trying to salvage the situation.

[49] In Mr. Carpenter's view, he was doing all he could to keep the business operating. He testified that he should not have to pay on his guarantee because:

> "I don't think I did anything wrong except try and keep the business going. The Province folded under these people from VIA hollering at them. They didn't know what to do.
>
> …
>
> We could have kept the business going and if it went into receivership, we were confident that we could deal with all these issues, bring it out of receivership, and continue on."

[50] As for the legal action IRSI had started against VIA, Mr. Carpenter was of the view that PNB had a duty to pursue it, in fulfillment of its duty under the guarantee to act in good faith. Nevertheless, Mr. Carpenter acknowledged that there was nothing in the wording of the guarantee that required PNB to do anything before it called on him to pay, i.e. there were no conditions on PNB's right to call on Mr. Carpenter. Mr. Carpenter testified that had PNB supported IRSI's claim against VIA, it would have been possible to keep IRSI operating. In his view, PNB had a duty to pursue the legal claim.

[51] The final witness called on behalf of Mr. Carpenter, was Mr. Chris Evers. He worked as a contract manager with IRSI, having started in 1999. He was familiar with all three contracts which were covered by the TD letter of credit. His duties included work on preparing the bids and in managing how the work was being done. In particular, he noted how there were thirteen change requests from VIA once work began. Mr. Evers referred to this as, "scope creep". It made managing the VIA contracts difficult.

[52] Mr. Evers also spoke of the structural issues with the cars that IRSI was expected to repair without the extra work being paid for. Moreover, the prototype car VIA provided for the purpose of bidding was not reflective of what VIA expected in the end. Mr. Evers also was concerned that VIA did not have a manager on its end to whom IRSI could turn for timely

answers to issues as they arose. These were all problems facing IRSI and PNB was aware of them. Nevertheless, Mr. Evers felt that these contract disputes could be overcome.

[53] Mr. Evers stressed that the seat track issue was a life-safety issue. His recollection of VIA's response to the expressed concern was that it should be ignored and that IRSI was to proceed with the contract. IRSI could not do so holding the view, as it did, that doing so would put the lives of passengers at risk. IRSI stopped work on the LRC contract as a result and laid off employees. IRSI advised PNB of these safety issues, but Mr. Evers acknowledged it was not within PNB's capacity to do anything about it.

[54] Once the safety issue came to light, Mr. Evers testified that it was then that VIA began to call on the amounts secured by the letter of credit and to remove their inventory and materials from IRSI's Moncton facility. IRSI did not notify TD that there was a life-safety issue that had arisen, nor did IRSI advise TD that it should not pay out on the requested draws on the letter of credit. Nor, to Mr. Evers' knowledge, did PNB advise TD that it should not pay out on any requested draws on the letter of credit. Mr. Evers noted that, as the issues with VIA were piling up in the period prior to the granting of the IRSI order of receivership, PNB was putting forward its best efforts to protect its interests and keeping the jobs in Moncton. PNB was continuing to assist in a mediated solution and working directly with VIA representatives to find a solution that would keep the VIA/IRSI contracts viable.

ARGUMENT

[55] PNB argued that the obligations on Mr. Carpenter under the guarantee are clear and unambiguous. If the proper conditions existed to call on the guarantee, Mr. Carpenter was obliged to pay. In the present case, there was no dispute that the proper circumstances were in place to call on the guarantee (subject to Mr. Carpenter's argument that the terms of the guarantee required 'something more' from PNB). The conditions existed to put IRSI into

receivership and that step, on its own, created a basis for default triggering the call upon Mr. Carpenter's guarantee. Nothing was paid by Mr. Carpenter.

[56] The duty falls upon Mr. Carpenter to establish a basis for not paying on his guarantee. PNB relies on the reasons of the Supreme Court of Canada in *Bank of Montreal v. Wilder*, [1986] 2 S.C.R. 551, to support the proposition that, if the holder of the guarantee (i.e., in this case PNB) unjustly caused the underlying default, then the guarantor (Mr. Carpenter) may be excused from honouring the guarantee given. Similarly, if there is some type of deceit on the part of PNB in its dealings with Mr. Carpenter, he may be relieved of his obligation to pay on his guarantee (*Pax Management v. Canadian Imperial Bank of Commerce*, ([1992] 2 S.C.R. 998). In addition, if there was known fraud in relation to the call on the letter of credit, that PNB knew about, that too could be sufficient ground to vitiate Mr. Carpenter's guarantee. On all fronts, there is no evidence that PNB acted in any way that could be construed as justifying Mr. Carpenter's decision to refuse to pay.

[57] It was also argued that Mr. Carpenter fully trusted PNB (through its employees, in particular Assistant Deputy Minister Jeff Trail) as Mr. Carpenter actively sought PNB's assistance to keep the contracts going. All participants were working toward or keeping the jobs going. I had the benefit of PNB's pre-trial brief wherein, at para. 122, can be found a useful summary of the closing argument made by counsel at trial:

> The evidence in this matter was that VIA and IRSI were in a long and protracted contractual fight with no end in sight and asked the Province to help mediate, which was unsuccessful. The Province wanted to keep the contracts and industry going in that part of the Province and, as such, exercised a discretion to put IRSI into a receivership, which was allowed pursuant to the terms of the Debenture once the Provincial guarantees had been fulfilled, as that was an act of default under the Debenture.

[58] As it pertains to the 'life-safety' identified by IRSI, PNB argues that there was no onus on PNB to involve itself in resolving that issue. PNB had no contract with VIA. The life-safety issue

was between IRSI and VIA and had no impact on the personal guarantee at issue. It was IRSI's position that PNB was obligated to pursue IRSI's legal action against VIA, being an asset of IRSI's which Mr. Carpenter claimed to have a monetary value. On this point, PNB says that there is no obligation on it to pursue a lawsuit which could, at best, be considered a contingent asset. Of course, it was up to the court appointed receiver to decide what was to happen with the lawsuit. Furthermore, PNB argued that it acted in all good faith in trying to engage with the principals of VIA and IRSI to work out a solution. Regardless of how one may define the scope of PNB's duty to act honestly and in good faith toward Mr. Carpenter, PNB argued that it acted in accordance with that duty.

[59] PNB accepts that the general duties of honesty and good faith between parties to a contract described in *Bhasin v. Hrynew*, 2014 SCC 71, are applicable. With that said, PNB argues that it went beyond what was needed in that respect by overtly trying to assist VIA and IRSI (and doing so at IRSI's request).

[60] Mr. Carpenter began his closing argument focusing on the distinction to be drawn between a guarantee which gives PNB the absolute discretion to call on the guarantee, and the use of that discretion in the face of IRSI's decision that it could not continue to work on passenger cars if doing so put the lives of the traveling public at risk. In Mr. Carpenter's view, IRSI was in the dire financial situation it was in because it could not, in good conscience, perform work knowing that that work would be hazardous to the life and safety of the public. In his view, PNB should have supported IRSI more in its attempt to force VIA to address the life-safety issue.

[61] When asked by the court as to what PNB specifically failed to do that it should have, counsel for Mr. Carpenter stated that PNB did nothing to investigate or undertake any sort of analysis as to the position IRSI found itself in because of the life safety issue. IRSI was in an impossible situation. While it is accepted that transactions tainted by fraud may vitiate a personal guarantee, the circumstances facing IRSI were worse - lives were at stake.

[62] In addition, Mr. Carpenter asserts that PNB did not properly assess the lawsuit that IRSI had filed against VIA. Moreover, once the receivership was ordered, PNB 'owned' that lawsuit. The responsibility rested with the Province to pursue it and it was required to do so. This failure, it was argued, was a lost opportunity that should have been fully pursued before calling on Mr. Carpenter's guarantee. Moreover, it must be understood, according to Mr. Carpenter, that this was not simply a commercial agreement between borrower and lender, but there was a genuine 'partnership' between IRSI and PNB toward establishing skilled and well-paid work for New Brunswickers. Looked at in that light, Mr. Carpenter argues that PNB should have done more in meeting the legitimate expectations arising from the distinctive relationship between them – it was not simply a business transaction – PNB was indeed a partner.

[63] Mr. Carpenter argues that IRSI ended up in a position where it could do nothing (morally or contractually) considering the life-safety issue it identified. PNB, IRSI argues, should have done more. With that said, Mr. Carpenter acknowledges that PNB did engage in trying to resolve the issues between VIA and IRSI. As counsel argued, 'the Province did well to a point, but then threw in the towel'. PNB was aware of the IRSI lawsuit, it was aware of the life-safety issue and background, it knew IRSI was facing a financial loss, it knew it had a personal guarantee of Mr. Carpenter, but it did, essentially, nothing. Furthermore, referencing handwritten notes of Mr. Seems from a March 2, 2012, meeting of PNB officials, Mr. Carpenter notes that PNB was aware of the need to not prejudice IRSI or, "the $3M personal guarantee of Dick Carpenter".

[64] Mr. Carpenter's argument can be summarized in the following portion of his pre-trial brief, at para. 3:

> Carpenter states that the Province and IRSI entered into various agreements to allow IRSI to pursue, obtain and complete those contracts, but the Province breached the duties owed by it to IRSI under said agreements, in particular, breached its duty of honest performance, its duty to cooperate and achieve contractual objectives, and the duty to exercise contractual discretionary

> powers reasonably in good faith, and as such Carpenter is released from his liability under the Guarantee.

[65] Finally, Mr. Carpenter argues that there is authority allowing the court to adjust the total accumulated interest, as it is unfairly high. He argues that there would be no basis to adjust the stated *rate* of interest, but the total due can be adjusted as a matter of equity. In this case, the demands on the guarantee were in 2013 and the trial in late 2024. There is no explanation from PNB to justify the delay in getting this matter to trial. On its face, Mr. Carpenter argues, the equities require an adjustment. PNB, he argues, sat back and allowed the interest to accumulate. Discoveries were in 2016 and 2019 and then nothing happened until 2023. It was argued that the accumulated interest should be reduced by four years (*Baniuk v. Filliter and Mockler*, 2010 NBQB 272 at paras. 234-240). In round figures, it was suggested that the amount be two-thirds of what the mathematical calculation would otherwise dictate.

ANALYSIS

[66] Both parties acknowledge that Mr. Carpenter may be released from his guarantee if there was some act by a bank (or in this case, PNB) which undermined the underlying contract between the parties causing the default to occur (*Wilder*, *supra*). Similarly, *Pax Management, supra*, provides that if there was an element of deceit on the part of the lender which caused prejudice to the guarantor, and a resultant call on the guarantee is made, then relief from the guarantee may follow. In this case, there is no allegation of deceit or fraud at any stage of the proceedings. Mr. Carpenter relies on his allegations that PNB did not live up to the contractual obligations of honesty and good faith dealings it had with IRSI or Mr. Carpenter.

[67] It is also accepted by the parties that such duties of honesty and good faith do exist as described in *Bhasin v. Hrynew*, *supra*. While a court should look closely for conduct by either party that may illustrate bad faith or dishonest acts it should not, in my view, imply a scope to those duties beyond what can reasonably be expected given the nature of the contract in dispute.

Here we are dealing with a general security agreement between IRSI and PNB which says nothing about PNB engaging in oversight of the contractual relations between VIA and IRSI. PNB's responsibility under the contractual arrangements was to underwrite certain financing arrangements. It did so.

[68] Similarly, the terms of the personal guarantee say nothing about PNB being directly involved in the business affairs of IRSI. PNB was asked by Mr. Carpenter to do only one thing – provide a guarantee to TD on the letter of credit. In turn, PNB asked Mr. Carpenter for his personal guarantee. It is important to recall that of the various guarantees in place, the substantive obligations, on the face of the documents, required nothing more than payment on demand.

[69] In other words, VIA asked TD to pay on the various draws on the letter of credit and it did so, on each occasion, without reservation. When TD called upon PNB to pay on its guarantee of those payments, PNB did so without delay. That was the nature of the guarantee PNB had given to TD. When PNB asked Mr. Carpenter to pay on his guarantee, Mr. Carpenter would not – and has paid nothing on it. While Mr. Carpenter argues that PNB did not live up to its duties of good faith and honesty implicit in the terms of the guarantee, it begs the question as to what the scope of the corresponding duties on Mr. Carpenter in such a situation was. In essence, Mr. Carpenter wanted all the benefits of the financial arrangements he had made with PNB but appeared to accept none of the corresponding responsibilities.

[70] In my view, Mr. Carpenter's defence is, with respect, without merit. It attempts to imply into Mr. Carpenter's personal guarantee a scope of duties much broader than the terms and general intent of the arrangement was meant to achieve. In my view, the extent of the duty on PNB toward IRSI was to do its part by paying TD on demand if draws were made on the letter of credit. It did so. Moreover, PNB provided millions of dollars in additional loans to IRSI to assist it in fulfilling its contracts with VIA – money which is now long lost. This is hardly a sign of diminished support for IRSI. Moreover, PNB became, I find, significantly involved in attempting

to keep IRSI afloat by actively intervening in the deteriorating relationship between VIA and IRSI/Mr. Carpenter. PNB was not legally obligated to do so (pursuant to the terms of any of the agreements at issue). Both Mr. Carpenter and Mr. Evers testified to what PNB did in an attempt to keep the VIA/IRSI relationship viable. PNB knew that it was going to lose millions of dollars if the relationship failed. PNB acted as it did to protect its interests which, coincidently, mirrored in many respects the interests of IRSI. It is a hollow defence to testify, as Mr. Carpenter did, as to all that PNB did to keep the IRSI operation afloat, and to then say that it was not enough.

[71] In my view, the obligations PNB had toward IRSI/Mr. Carpenter were met the minute it paid out $10.5 million on demands from TD. In turn, it had every right to demand, and expect payment, from Mr. Carpenter on his personal guarantee. The terms of the guarantee were clear in that there were no conditions precedent to calling on the guarantee, other than, perhaps, PNB having paid TD when called upon to do so. I note in passing, that I can find no legal obligation on PNB to pursue IRSI's lawsuit against VIA. That was a decision within the responsibility of the court appointed receiver. As I understand the thrust of Mr. Carpenter's defence, it essentially draws PNB deeper into the business affairs of IRSI than any of the relevant agreements require.

[72] As noted, in the chain of demands for payment – from VIA to TD and from TD to PNB, all paid as expected, except when Mr. Carpenter was called to pay. I find that Mr. Carpenter is responsible to pay on the guarantee at issue. He has, I find, no discernible defence.

[73] Finally, I turn to the request to reduce the period over which the calculated interest should accrue. As noted above, Mr. Carpenter argues that if he is found to be liable on the guarantee he should be given a reprieve on the accumulated interest due to the failure of PNB to prosecute the file in a timely way. Mr. Carpenter argued that it should be reduced by one-third of the accumulated interest.

[74] While I have some sympathy for the amount of accumulated interest, as it is not insignificant, I am not moved to provide relief from the express terms of the guarantee. The defence Mr. Carpenter offered was, respectfully stated, without merit. It is the court's practice to search diligently for any threads of legitimacy to any submission offered by the parties. This was even more important here as the merits of the defence remained unclear to me throughout this proceeding. To put it simply, as hard as the court looked to grab onto any threads of a legitimate defence, it could find none. The accumulation of the interest is the fault of only Mr. Carpenter, as he refused to pay on his guarantee when called.

[75] As a result, PNB is entitled to the full amount of interest claimed to date of trial, that being $1,989,548.81. Thus, including the amount of the $3,000,000 guarantee at issue, the total which I find is owed by Mr. Carpenter to PNB is $4,989,548.81.

COSTS

[76] Where Mr. Carpenter's concern with PNB's delay in moving the file forward does find fertile ground is with respect to my discretion over the award of costs. While counsel for PNB offered a degree of explanation for the delay, it was insufficient to explain why a file commenced in 2014 took ten years to get to trial. I decline to order costs against Mr. Carpenter for that reason.

[77] PNB is entitled to judgement against Mr. Carpenter in the amount of $4,989,548.81. Post-judgement interest is set at 7% per annum as per the *Rules of Court*.

Justice E. Thomas Christie
Court of King's Bench of
New Brunswick, Trial
Division