REPORT #5

GUARANTEES ACKNOWLEDGMENT ACT 1970

INSTITUTE OF LAW RESEARCH & REFORM

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GUARANTEES ACKNOWLEDGMENT ACT

I. Introduction

In March, 1970, the Board of Directors received a request from the Attorney General "to undertake a study of The Guarantees Acknowledgment Act, 1969, and to report thereon; and in particular to make recommendations with regard to the need for such a statute." In April, 1970, the Board resolved that the Institute should undertake the study and prepare a report.

Research has involved an examination of the Guarantees Acknowledgment legislation in Alberta and of the litigation which has arisen from that legislation. The opinions of members of the legal profession having experience of the practical application of the legislation have been sought, and those opinions have been carefully considered in the preparation of this report.

II. History and Purpose of the Legislation

The first Guarantees Acknowledgment Act was enacted in 1939. This Act, which was amended in 1940, appeared, subject to minor modifications of wording and the re-arrangement of sections, as Chapter 128 of the Revised Statutes of Alberta of 1942. Further amendments were made in 1947 and 1953, and, subject to certain changes in form, the Act re-appeared as Chapter 136 of the Revised Statutes of Alberta of 1955. Following the 1955 Revision the Act enjoyed a period of quiescence, until amendments were enacted in 1967 and 1968. Then, in 1969, the Act was restricted in its operation to certificates dated prior to September 1st, 1969. Contemporaneously, a new

Guarantees Acknowledgment Act, coming into effect on September 1st, 1969, was enacted. The text of the 1969 Act, as amended in 1970, is set out in Appendix A to this report.

The legislation in effect constitutes an extension of section 4 of the Statute of Frauds 1677, which requires that a guarantee must be in writing, or be supported by a written note or memorandum, and be signed by the party to be charged under the guarantee or by his duly authorized agent.

The common purpose of the Guarantees Acknowledgment Act and of the Statute of Frauds is the prevention of fraudulent practices. More particularly, the Guarantees Acknowledgment Act is designed to protect the ordinary individual who, through lack of experience or understanding, might otherwise find himself subject to onerous liabilities at law, the nature and extent of which he did not properly appreciate when he entered into the undertaking in question. The statute seeks to provide this protection by requiring that the person giving the guarantee must appear before a notary public and that the latter must satisfy himself by examination that the guarantor is aware of the contents of the guarantee and understands it.

III. Reform or Repeal

We consider at the outset the fundamental question of whether the Act, subject to any necessary amendments, should be retained in the law of Alberta or whether its repeal should be recommended. We have been unable to find any evidence of the circumstances that gave rise to the

original Act in 1939. It was passed near the end of the depression in an era when the legislature enacted a great variety of statutes to protect debtors. However we are unable to say whether the Act was related to that protective programme.

Alberta is the only jurisdiction which, so far as we know, has a Guarantees Acknowledgment Act. This fact may on occasion create difficulty for persons who are not familir with the law of the Province. However we do not think the Act should be repealed solely on the ground that no other province has similar legislation.

We have attempted to look at the legislation from a broad perspective. Does it in fact fulfil any really useful purpose in contemporary conditions? Is any advantage which is secured by the legislation outweighed by the inconvenience of the procedural formalities which must be observed? Has the legislation been more productive than preventive of fraud?

We have in this connection received comments, which defy reconciliation, from a number of legal practitioners. The Act has been described to us as "an overwhelming nuisance", "a snare or trap", as "providing an escape for people who have a change of mind about the obligations which they accept, rather than protecting the foolhardy from their own indiscretions", as "creating more problems than it has solved", and as having "permitted a great number of injustices to be perpetrated". One practitioner commented that he could not recall any instance where a guarantor upon receiving an explanation had refused to proceed with the guarantee. Another stated that he could

not recall any case in which the guarantor was not well aware of the significance and legal implications involved in giving a guarantee.

The contrary viewpoint is represented by those practitioners, slightly fewer in number than the critics, who described the Act as "beneficial", "useful", and "in the interest of the individual citizen". We were reminded that each year there are more and more demands for legislation to protect persons against excessive pressures from the commercial world and that the Guarantees Acknowledgment Act constitutes part of the current statutory protection. With reference to the practical impact of the legislation, we were advised by one correspondent that "from my experience as a lawyer for twenty-five years in Alberta, I found many cases in which the protection was justified."

It is evident that the views which we have received from practitioners cannot be construed as decisive of the question whether the Act should or should not be repealed.

We have, however, concluded that we should recommend that the Guarantees Acknowledgment Act, 1969, should be retained. We take this position because we believe that, were the Act repealed, a significant minority of persons would sign guarantees without appreciating the nature and extent of the legal obligation thereby undertaken. It is relevant too to note that in many cases the guarantor receives no benefit from the transaction. He enters into it as a matter of accommodation to the principal debtor. Further, it is our opinion that proper compliance with the Act as present constituted affords some useful assurance

for creditors with respect to the enforceability of their rights under guarantees. Although this legislation is so far as we are aware peculiar to this Province, we note that in England the Latey Committee's Report (Cmnd. 3342, 1967) seriously considered a suggestion that guarantees should be enforceable only if entered into after a solicitor has explained the position, albeit the proposal was ultimately rejected.

RECOMMENDATION

> *WE RECOMMEND THAT, SUBJECT TO THE SUGGESTIONS MADE BELOW, THE GUARANTEES ACKNOWLEDGMENT ACT, 1969, SHOULD BE RETAINED.*

IV. Analysis of the 1969 Act

1. Meaning of "Guarantee"

(a) General

That the term "guarantee" has a broad range of meaning in popular usage is demonstrated by the definition of the verb in the Shorter Oxford English Dictionary--viz.,

> . . . to be a guarantee, warrant or surety for; to undertake with respect to (a contract, the performance of a legal act, etc.) that it shall be duly carried out; to make oneself responsible for the genuineness of (an article); hence, to assure the existence or persistence of; to engage to do something; to warrant that something will happen or has happened; to secure the possession of (something) to a person; to secure (a person) against or from (risk, etc.); to secure in (the possession of anything).

In its broadest sense, therefore, the noun may be construed as an undertaking, whether oral or in writing, by virtue of which a person assumes any of the above-mentioned obligations.

In legal parlance, however, the word has a more restricted connotation. The range of meaning ascribed to it by lawyers sufficiently appears from the following extract from a judgment of Brodeur J. in Schell v. McCallum & Vannatter (1918), 57 S.C.R. 15, at p. 27:

> [The contract of guarantee] is an undertaking to answer for another's liability and collateral thereto. It is a collateral undertaking to pay the debt of another in case he does not pay it. It is a provision to answer for the payment of some debt or the performance of some duty in the case of the failure of some person who in the first instance is liable for such payment or performance. . . . It is in the nature of that contract of guarantee that the primary debtor will perform his contract and that the guarantor has to answer for the consequences of the primary debtor's default.

(b) Definition in the 1969 Act

The concept of collateral obligation is the essence of the definition of "guarantee" in the 1969 Act. In other respects, however, the statutory definition is more restrictive and precise than the common law definition cited above. Section 2 of the Act provides:

> In this Act,
>
> (a) 'guarantee' means a deed or written agreement whereby a person, not being a corporation, enters into an obligation to answer for an act or default or omission of another. . . .

It will be noted, first, that guarantees by corporations are not covered by the 1969 Act. Indeed, they have never been within the purview of the Guarantees Acknowledgment Act. Their exclusion is consistent with the view that the legislation is designed to protect persons who lack experience in commercial and legal transactions. Insofar, therefore, as the corporation, not its members, is regarded as the guarantor, there is no need for protection. While it is conceded that it is not always realistic to make a strict dichotomy between a corporation, on the one hand, and its members and directors, on the other, it is probable that those in charge of the affairs of corporations are likely to be reasonably familiar with commercial and associated legal matters and, in any event, will often take professional advice. Extension of the Act in order to cover guarantees by corporations is not, therefore, recommended.

It may be observed, secondly, that the concept of guarantee in the Statute of Frauds 1677 and the definition in the Guarantees Acknowledgment Act, 1969, are not co-extensive. Section 4 of the Statute of Frauds, so far as is material, provides:

> No action shall be brought . . . whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised.

It will be noted that the Statute of Frauds admits as valid and enforceable not only written guarantees but also parol guarantees which are evidenced by some note or memorandum

in writing. It is at least arguable that the definition of "guarantee" in section 2 of the 1969 Act does not include this latter class, since it refers expressly to "a deed or written agreement". Although the difference between the two statutes has not been raised in any of the reported cases, and one may assume that modern business practice does not normally permit of parol guarantees, it is considered desirable that there should be complete correspondence between the two statutes with respect to the concept of guarantee. In other words the definition of guarantee would as a matter of form be more comprehensive and appropriate if it embraced all guarantees under the Statute of Frands. This however is a minor point.

The third point which requires comment is that, since the concept of collateral obligation is the essence of the definition of "guarantee" in the 1969 Act, contracts of indemnity are not covered (Crown Lumber Company Limited v. Engel and Engel (1961), 36 W.W.R. 128). The distinction between a contract of indemnity and a contract of guarantee is that in the case of the latter there must always be three parties in contemplation--a principal debtor (whose liability may be actual or prospective), a creditor, and a third party who promises to discharge the debtor's liability if the debtor should fail to do so. In a contract of indemnity, however, the promisor makes himself primarily liable and undertakes to discharge the liability in any event (Anson's Law of Contract, 23rd. ed., at p. 69).

While the distinction between guarantee and indemnity is well recognized, difficulty arises from the fact that the question whether the undertaking is primary or collateral must be determined by reference to the substance

of the transaction, the terminology used by the parties not being conclusive. The difficulty of properly characterizing the legal nature of the obligation is demonstrated by Crown Lumber Company Limited v. Engel and Engel (1961), 36 W.W.R. 128 where the Appellate Division of the Supreme Court of Alberta had to consider a document entitled "Guarantee of Accounts", which read:

> We, the undersigned, in consideration of credit extended by Crown Lumber Company Limited to Viking Construction Company Limited hereby indemnify and undertake to save Crown Lumber Company Limited harmless from any liability or loss which Crown Lumber Company Limited might suffer arising out of the extension of credit to Viking Construction Company Limited.

The court held that this undertaking constituted, not an indemnity, but a guarantee within the meaning of the Guarantees Acknowledgment Act, and that failure to comply with the provisions of the Act rendered the undertaking void.

We have considered whether contracts of indemnity should be brought within the ambit of the Act. There may be difficulty in determining whether any particular undertaking amounts to a guarantee or an indemnity, and some danger that if the distinction between guarantees and indemnities is preserved for the purposes of the Guarantees Acknowledgment Act border-line cases may occur which will give rise to "hair-splitting distinctions of exactly that kind which brings the law into hatred, ridicule and contempt by the public" (per Harman, L.J. in Yeoman Credit Ltd. v. Latter [1961] 2 All E.R. 294 at 299). We have, however, concluded that indemnity contracts should not be brought

within the Act, since the effect would be to intrude, with unpredictable result, upon a vast number of commercial transactions which have never previously been affected by this legislation.

(c) Exclusions

Excluded from the meaning of "guarantee" for the purposes of the 1969 Act are:

(i) a bill of exchange, cheque or promissory note;

(ii) a partnership agreement;

(iii) a bond or recognizance given

(A) to the Crown, or
(B) to a court or judge, or
(C) pursuant to a statute;

(iv) a guarantee given on the sale of

(A) any interest in land, or
(B) any interest in goods or chattels.

This motley list of exclusions dates back to the original enactment of 1939. The rationale of certain of the exclusions is clear. For instance, bills of exchange, cheques and promissory notes are matters within federal jurisdiction and constitutional difficulties would arise from any attempt to bring them within the purview of this legislation. It may be added that business transactions would be unnecessarily and unprofitably impeded were the

validity of every endorsement of a cheque dependent upon compliance with the Guarantees Acknowledgment Act.

Bonds or recognizances given to the Crown, a court or a judge are obviously so different in nature and purpose from commercial guarantees that there is no question of suggesting that the Act should apply. Similar considerations arise in respect of bonds or recognizances given pursuant to statute.

More difficulty is caused by the exclusion of (a) partnership agreements, and (b) guarantees given on the sale of any interest in land, goods or chattels. It is difficult to conceive of a partnership agreement, as such, as a guarantee, except in the broad sense that each partner becomes liable jointly with the other partners for the firm's debts and obligations. Given that such agreements may fall within the meaning of "guarantee", however, we cannot see what useful purpose would be served by requiring their acknowledgment before a notary public.

The exclusion of guarantees given on the sale of (i) any interest in land, or (ii) any interest in goods or chattels, appears to be of considerable practical significance, for it must be a common occurrence for a vendor of land or chattels to take a guarantee in respect of payment of the purchase price. There is no distinction in principle between the case where A borrows money from B and C guarantees its repayment and the case where A buys goods from B on terms which permit payment to be deferred and C guarantees that payment. Yet in the former case the guarantee must be acknowledged under the Guarantees

Acknowledgment Act, whereas in the latter case the Act does not apply.

The statutory exclusion was narrowly construed by the Appellate Division in Goodyear Tire & Rubber Company of Canada Ltd. v. Knight and Kunsli and Russill (1960), 33 W.W.R. 287, where a continuing guarantee was given in respect of payment for goods from time to time sold to a company. As the guarantee had not been acknowledged in accordance with the Guarantees Acknowledgment Act, the plaintiff contended that it fell within the exceptions to the Act, being a guarantee given on the sale of any interest in goods or chattels. The court held that where some goods are sold prior to and others sold after the guarantee is executed, but no goods are sold at the time of its execution, the guarantee is not one given on the sale of any interest in goods or chattels, and, therefore, does not fall within that exception to the Act.

The interpretation adopted by the court is logically beyond criticism, but the ordinary man, for whose protection it is surmised that the Guarantees Acknowledgment Act was designed, is unlikely to appreciate its subtlety. The elimination of purely technical distinctions is desirable, and as there appears to be no good reason for these particular exclusions, it is our view that they should not be retained.

RECOMMENDATION

WE RECOMMEND THAT GUARANTEES GIVEN ON THE SALE OF ANY INTEREST IN LAND OR ANY INTEREST IN GOODS OR CHATTELS SHOULD BE BROUGHT WITHIN THE SCOPE OF THE ACT. IF THIS IS DONE THEN THE QUESTION WILL ARISE AS TO WHETHER THE ACT SHOULD APPLY WHEN A SALE OF GOODS IS IN A SMALL AMOUNT, E.G., UNDER $100. THERE IS

NO MINIMUM IN THE ACT NOW AND THERE IS NO DIFFERENCE IN PRINCIPLE WHETHER THE GUARANTEE IS OF THE PURCHASE PRICE OF GOODS OR A LOAN OR OTHER DEBT. HENCE WE RECOMMEND NO MINIMUM.

In connection with the last recommendation we realize there may be reluctance at present to remove long-standing exceptions, especially in view of the 1969 re-enactment.

2. Notary Public

(a) General

The Act requires that guarantees be acknowledged before a "notary public", defined as (i) with reference to an acknowledgment made in Alberta, a notary public in and for Alberta, and (ii) with reference to an acknowledgment made in a jurisdiction outside Alberta, a notary public in and for that jurisdiction. This definition was first enacted by S.A. 1968, c. 36, to avoid the inconvenient implications of Auto-Marine Acceptance Corp. Ltd. v. Brockie, Hogarth, and Hogarth (1967, unreported), where it was held that the notary public who completed the certificate required by the 1955 Act must be a notary public in and for the Province of Alberta. The definition satisfactorily remedies the difficulties caused by that decision, and no suggestion for amendment in this respect is made.

(b) Qualifications of Notaries

The Notaries Public Act (R.S.A. 1955, c. 222) does not limit the issue of commissions to barristers and solicitors. We do not know the number of notaries who are not barristers and solicitors. Ideally we think that

acknowledgments under this Act should be taken by legal practitioners. However, this is not practicable, at least for the present. There are rural areas without a solicitor. Moreover it would be necessary to require that notaries taking an acknowledgment outside the province must also be solicitors. Finally it would enable a guarantor trying to escape liability to attempt to go behind the certificate and to contend that the notary was not in fact a solicitor. For these reasons we do not recommend any change.

(c) Independence of Notaries

The Guarantees Acknowledgment Act, 1969, as originally enacted, required that a notary public before whom a guarantee is acknowledged should not be acting for the person to whom the obligation is incurred. This requirement was repealed by S.A. 1970, c. 51. While in principle it is manifestly proper that the notary should be independent of the party in whose favour the guarantee is made, it is appreciated that from a practical standpoint the requirement to this effect in the 1969 Act gave rise to difficulty. We do not, therefore, recommend any amendment in this respect.

(d) Liability of Notaries

One matter of substance which has not been judicially examined, but which is of real importance since the decision in Hedley Bryne & Co., Ltd. v. Heller & Partners, Ltd. [1964] A.C. 465, is the potential liability of the notary (1) to the guarantor or (2) to the person in whose favour the guarantee is made.

A claim by the guarantor could only arise where the guarantee is enforceable and the guarantor alleges that the notary misled him as to the nature of the guarantee. Such an allegation is presumably rare and difficult to prove. However if it were established then we see no reason to relieve the notary from his common law liability.

A claim by the person in whose favour the guarantee is made could only arise where the guarantee is unenforceable because of non-compliance with the Act and because the curative provision, section 5, does not apply. Assuming the notary owes the creditor a duty of care under Hedley Bryne, then there is no more reason to relieve him of liability than in the case of a claim against him by the guarantor.

Arising directly from the decision in Great Western Garment Co. v. Kovnats (1970, unreported), a more specific suggestion has been made to clarify the duty and responsibility of the notary. In that case the defendant personally guaranteed to the plaintiff the payment of money owing to the plaintiff by a company, Barrhead Mercantile Ltd., of which the defendant and his wife were the only shareholders. The guarantee forms, which were supplied by the plaintiff and which were executed on July 18, 1967, did not comply with amendments to the Guarantees Acknowledgment Act which came into force on July 1, 1967. The Appellate Division, affirming the decision of Mr. Justice O'Byrne, reluctantly held that the guarantee was void. The court did not consider the duty of the notary in these circumstances, but it has been suggested to us that if the Act is retained it should be amended to make it clear that

(a) any notary public notarizing, as required by statute, any guarantee form prepared by another party is under no duty to complete, amend, alter or in any way guarantee the validity of such guarantee forms, and (b) the responsibility for ensuring the validity of the guarantee form itself rests solely with the party who has asked for the guarantee form to be executed. It appears to us that, where the guarantee form is supplied by or on behalf of the party in whose favour the guarantee is to be executed, there is no legal (as opposed to ethical) duty on the notary to correct or point out defects in the form. However we think it wise to spell this out in the Act.

RECOMMENDATION

> *FOR THE SAKE OF CLARITY A SECTION SHOULD BE ADDED TO DECLARE THAT WHERE A FORM OF GUARANTEE IS PROVIDED BY ANY PERSON OTHER THAN THE NOTARY HE IS UNDER NO DUTY TO POINT OUT OR TO CORRECT ANY DEFECTS IN THE FORM.*

3. Statutory Requirements

The statutory requirements for acknowledgment of guarantees are set out more clearly in sections 3 and 4 of the 1969 Act than in the earlier Acts, and little difficulty arises in connection with them. The cases establish that failure to comply with the requirements renders any claim on the guarantee abortive (Amerongen (Liquidator) and Colinton & District Savings and Credit Union Limited v. Hamilton (1957), 22 W.W.R. 377), but that the notarial certificate need not be executed contemporaneously with the guarantee (Industrial Acceptance Corporation Limited v. Hepworth Motors Ltd. and Hepworth

(1965), 52 W.W.R. 555; General Tire & Rubber Company of Canada Limited v. Finkelstein (1968), 62 W.W.R. 380).

The only suggestion we have is in connection with the requirement in section 4(1), reiterated in clause 2 of the Certificate of Notary Public in the Schedule to the Act, to the effect that the notary must satisfy himself by examination of the guarantor that the latter is aware of the contents of the guarantee and understands it. It is our opinion that the emphasis on the "contents" of the guarantee is misplaced, and that attention should instead be directed to the legal significance of the obligation. We have in mind the fact that the instrument creating the obligation which the proposed guarantor is asked to guarantee is sometimes a complicated document. Furthermore, there is genuine difficulty in certifying as to another's degree of comprehension.

Our suggestion is that section 4(1) and clause 2 of the Certificate of Notary Public in the Schedule to the Act be amended so as to require simply that the notary should satisfy himself by examination of the guarantor that the latter is aware of the nature and extent of his obligation as guarantor.

RECOMMENDATION

THAT THE ACT BE AMENDED SO AS TO REQUIRE SIMPLY THAT THE NOTARY SHOULD SATISFY HIMSELF BY EXAMINATION OF THE GUARANTOR THAT THE LATTER IS AWARE OF THE NATURE AND EXTENT OF HIS OBLIGATION AS GUARANTOR BUT TO AVOID DIFFICULTY, THAT HAS ARISEN IN THE PAST BECAUSE OF STATUTORY CHANGE IN THE CERTIFICATE, THAT EITHER FORM BE VALID.

4. Curative Provision

It has been suggested to us that the language of sections 3 and 4 should be tempered to permit the court to grant relief in those cases where it is obvious that the spirit of the act has been complied with but the technical details are deficient. It is our view that this end will be in considerable measure attained if the courts are prepared to give a liberal interpretation to section 5, which, in the specified conditions, provides that a certificate which is "substantially complete and regular on the face of it" is conclusive proof that the Act has been complied with. This provision is aimed at preventing mere technicalities being raised as a defence under the Act, as was unsuccessfully attempted in Edmonton Airport Hotel Co. Ltd. and Superstein v. Credit Foncier Franco-Canadien [1965] S.C.R. 441. There, indeed, without the aid of section 5, the courts manifested a readiness to hold that if the requirements of the Acts were in substance fully complied with technical defects and errors would not invalidate the guarantee.

There may, however, be cases where the procedural defect is of such a character that neither section 5 nor the dicta in the Superstein case can be successfully relied upon. One of the criticisms of the Act is that it encourages guarantors to attempt to evade on technical grounds the obligations which they had incurred with full knowledge. Our final recommendations are designed to silence that criticism.

RECOMMENDATIONS

(1) THAT THE WORDS "OR TO THE LIKE EFFECT" WHICH IS A PHRASE SOMETIMES USED WHEN A STATUTORY FORM IS NOT INTENDED TO BE RIGID BE ADDED TO THE END OF SECTION 4(1) SO IT WILL READ:

4(1) The notary public, after being satisfied by examination of the person entering the obligation that he is aware of the content of the guarantee and understands it, shall issue a certificate under his hand and seal of office in the form set out in the schedule or to the like effect.

(2) THAT THE CURATIVE PROVISION BE WIDENED BY REMOVING (a) FROM SECTION 5 ("SUBSTANTIALLY COMPLETE AND REGULAR ON THE FACE OF IT") AND ADDING THE WORDS UNDERLINED BELOW SO THAT THE SECTION WILL READ:

5. A certificate purporting to be issued under this Act accepted in good faith by the person to whom the obligation was incurred without reason to believe that the requirements of this Act have not been complied with, shall be admitted in evidence and is conclusive proof that this Act has been complied with.

V. Recapitulation of Recommendations

RECOMMENDATION (1)

We recommend that, subject to the suggestions made below, the Guarantees Acknowledgment Act, 1969, should be retained.

RECOMMENDATION (2)

We recommend that guarantees given on the sale of any interest in land or any interest in goods or chattels should

be brought within the scope of the Act. If this is done then the question will arise as to whether the Act should apply when a sale of goods is in a small amount, e.g., under $100. There is no minimum in the Act now and there is no difference in principle whether the guarantee is of the purchase price of goods or a loan or other debt. Hence we recommend no minimum.

RECOMMENDATION (3)

For the sake of clarity a section should be added to declare that where a form of guarantee is provided by any person other than the notary he is under no duty to point out or to correct any defects in the form.

RECOMMENDATION (4)

That the Act be amended so as to require simply that the notary should satisfy himself by examination of the guarantor that the latter is aware of the nature and extent of his obligation as guarantor but to avoid difficulty that has arisen in the past because of statutory change in the certificate, that either form be valid.

RECOMMENDATION (5)

(1) That the words "or to the like effect" which is a phrase sometimes used when a statutory form is not intended to be rigid be added to the end of section 4(1) so it will read:

> 4(1) The notary public, after being satisfied by examination of the person entering the obligation that he is aware of the content

> of the guarantee and understands it, shall issue a certificate under his hand and seal of office in the form set out in the schedule or to the like effect.

(2) That the curative provision be widened by removing (a) from section 5 ("substantially complete and regular on the face of it") and adding the words underlined below so that the section will read:

> 5. A certificate purporting to be issued under this Act accepted in good faith by the person to whom the obligation was incurred without reason to believe that the requirements of this Act have not been complied with, shall be admitted in evidence and is conclusive proof that this Act has been complied with.

D. T. Anderson
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H. G. Field
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by _____
Chairman

_____
Director

October 20, 1970

NOTE: Dr. Kreisel as Vice-President (Academic) of the University of Alberta is a member of the Board of the Institute. He has no responsibility for nor did he participate in the preparation of this report.

Appendix A

The Guarantees Acknowledgment Act, 1969
[S.A. 1969, c. 41, as amended by S.A. 1970, c. 51]

1. This Act may be cited as The Guarantees Acknowledgment Act, 1969.

2. In this Act,

(a) "guarantee" means a deed or written agreement whereby a person, not being a corporation, enters into an obligation to answer for an act or default or omission of another but does not include

(i) a bill of exchange, cheque or promissory note, or

(ii) a partnership agreement, or

(iii) a bond or recognizance given

(A) to the Crown, or
(B) to a court or judge, or
(C) pursuant to a statute,

or

(iv) a guarantee given on the sale of

(A) any interest in land, or
(B) any interest in goods or chattels;

(b) "notary public" means,

(i) with reference to an acknowledgment made in Alberta, a notary public in and for Alberta, and

(ii) with reference to an acknowledgment made in jurisdiction outside Alberta, a notary public in and for that jurisdiction.

3. No guarantee has any effect unless the person entering into the obligation:

(a) appears before a notary public,

(b) acknowledges before the notary public that he executed the guarantee, and

(c) in the presence of the notary public signs a statement, at the foot of the certificate of the notary public in the form set out in the Schedule.

4. (1) The notary public, after being satisfied by examination of the person entering the obligation that he is aware of the contents of the guarantee and understands it, shall issue a certificate under his hand and seal of office in the form set out in the Schedule.

(2) Every certificate issued under this Act shall be attached to or noted upon the instrument containing the guarantee to which the certificate relates.

5. A certificate issued under this Act

(a) substantially complete and regular on the face of it, and

(b) accepted in good faith by the person to whom the obligation was incurred without reason to believe that the requirements of this Act have not been complied with

shall be admitted in evidence and is conclusive proof that this Act has been complied with.

6. The fee payable to a notary public for the issue of a certificate under this Act and all incidental services shall not exceed $5.

Schedule

The Guarantees Acknowledgment Act, 1969

Certificate of Notary Public

I hereby certify that:

1. _____of_____the guarantor in the guarantee dated _____made between _____and_____, which this certificate is attached to or noted upon, appeared in person before me and acknowledged that he had executed the guarantee;

2. I satisfied myself by examination of him that he is aware of the contents of the guarantee and understands it.

Given at_____this_____day of_____, 19__ under my hand and seal of office.

[Seal]

Notary Public in and for

_____

Statement of Guarantor

I am the person named in this certificate.

_____

Signature of Guarantor

Appendix B

Acknowledgements

The Institute acknowledges with thanks the helpful comments received from the following persons.

The Honourable Mr. Justice H. G. Johnson - Supreme Court of Alberta, Appellate Division.

The Honourable Mr. Justice W. G. Morrow - Supreme Court of North West Territories.

E. G. Anderson - Fitch, Kenney, Anderson & Peterson, Calgary.

J. B. Ballem, Q.C. - Ballem, McDill & MacInnes, Calgary.

R. Cipin, Q.C. - Friedman, Lieberman, Newson, Cipin, Caffaro, Heffernan & Maher, Edmonton.

P. L. Herring - Milner & Steer, Edmonton.

J. H. Jamieson, Q.C. - Emery, Jamieson, Agrios, Bercov, Lewis & Drewry, Edmonton.

D. M. McDonald - McDonald & O'Connor, Calgary.

G. Power - Liden, Ackroyd, Philion, Piasta & Neuman, Edmonton.

W. S. Ross, Q.C. - Ross, McLennan, Ross, Geddes & Ranson, Edmonton.

W. S. Russell, Q.C. - Virtue, Russell, Morgan, Virtue, Morrison & Hembroff, Lethbridge.

V. Schwab - Schwab, Melnyk & Co., Edmonton

W. E. Simpson, Q.C. - Edmonton

E. C. Snider - McCaffery, Snider & McCaffery, Calgary

J. J. Stratton, Q.C. - Saucier, Jones, Peacock, Black, Gain, Stratton & Laycraft, Edmonton

W. G. White - White, Trott, White, Loney & Robertson, Edmonton.

W. E. Wilson - Bryan, Andrekson, Wilson, Ostry, Bryan, Boyer & Olesen, Edmonton.

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