INSTITUTE OF LAW RESEARCH AND REFORM

EDMONTON, ALBERTA

THE STATUTE OF FRAUDS

AND RELATED LEGISLATION

REPORT NO. 44

JUNE, 1985

INSTITUTE OF LAW RESEARCH AND REFORM

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ACKNOWLEDGEMENTS

The Institute acknowledges the contributions of Professor R.S. Nozick, who, before he became a member of the Institute's Board of Directors, prepared a paper for the Institute which was issued as Background Paper No. 12, and Professor Michael Bridge, who prepared a research paper for the final consideration of the subject which resulted in this

report. The Institute also acknowledges the valuable research papers prepared by D.R. Stollery, then a research assistant with the Institute.

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Statute	Abbreviation
The Statute of Frauds, (1677) 29 Charles II, c. 3 (Eng.)	Statute of Frauds
The Guarantees Acknowledgment Act, R.S.A. 1980, c. G-12	Guarantees Acknowledgment Act
Report	
Law Reform Commission of British Columbia, Report on the Statute of Frauds, 1977.	British Columbia Report.
Manitoba Law Reform Commission, Report on the Statute of Frauds, 1980.	Manitoba Report.

I. Summary of Report

The English Parliament enacted the Statute of Frauds in 1677. It appears that the social conditions and the state of the legal system of the times had led to false claims being accepted by the courts. The Statute attempted to solve this problem by requiring writing for a number of kinds of contracts and for most dispositions of interests in property. Some of its provisions are still the law of Alberta.

This report examines the provisions of the Statute of Frauds to see whether a requirement of writing in the cases to which it applies is still useful. Where the requirement of writing is still useful the report recommends that it be retained and reformed. Where the requirement of writing is not useful the report recommends that it be abolished.

The report also examines the provisions of the Guarantees Acknowledgment Act. This is an Alberta statute which says that a guarantee signed by an individual is ineffective unless the guarantor acknowledges before a notary public that he has executed the guarantee, and unless the notary public certifies that the guarantor is aware of the contents of the guarantee and understands it.

The report recommends that the requirement of writing be abolished in the following cases: an agreement not to be performed within a year; an agreement made in consideration of marriage; the ratification after majority of a contract made by a minor; a promise by an executor or administrator to pay from his own estate damages against the estate of the deceased person whose property he administers; and representations of credit-worthiness. It also recommends that the requirement of writing for some contracts for the sale of goods be abolished. This requirement, though now

contained in section 7 of the Alberta Sale of Goods Act, stems from the Statute of Frauds.

The report recommends retention of requirements of writing in the following cases:

(1) A contract for the sale of an interest in land. The requirement would be dispensed with in the following cases: (a) if the defendant acquiesces in acts of the plaintiff which indicate that a contract consistent with that alleged has been made; (b) if the defendant's conduct indicates that such a contract has been made; (c) if a deposit or part payment of the purchase price has been made and accepted; and (d) if, because the plaintiff has relied on the contract and changed his position, it would be inequitable not to enforce it. Failing compliance with any of these requirements a court could still require the defendant to return to the plaintiff, or to pay for, any benefit received under the contract.

(2) The creation or disposition of an interest in land. This includes such things as a transfer of title, a lease for more than three years, and the creation or transfer of a beneficial interest under a trust.

(3) Guarantees. The requirement of writing would continue to apply to a guarantee signed by a corporation as well as to a guarantee signed by an individual. It would be extended to apply to an "indemnity" under which the guarantor must pay in any event as well as to a "guarantee" under which the guarantor need pay only if the person whose debt is guaranteed does not pay. It would thus get rid of a hair-splitting distinction made by the present law. For land contracts and corporate guarantees, rather less would have to be put in writing than is now required.

The report recommends that the Government and the Legislature decide whether or not to continue the special formalities required by the Guarantees Acknowledgement Act. The recommendation is made in that way because the Institute's opinion is divided.

Some members of the Institute's Board of Directors think that there should be special protection to see that an individual who gives a guarantee understands the nature of the obligation which he is undertaking. They think that the protection should be increased by a requirement that the guarantor must appear before a lawyer instead of a notary public. They think that a maximum $25 fee should be permitted, a change from the $5 which is in the present Act. They think that the Guarantees Acknowledgement Act should be carried forward with some changes.

Other members of the Institute's Board think that there is no reason to single out this kind of contract for special protection or to impose upon those guarantors who do not want and need protection the burden of seeing and paying a lawyer. They also think that the proposal for a maximum fee of $25 is an encroachment upon the independence of the legal profession. They think that the Guarantees Acknowledgement Act should simply be repealed.

The primary purpose of the writing requirement for a land contract is to require it to be proved by objective evidence and thus to avoid false claims being accepted. A secondary purpose is to caution persons, particularly inexperienced or unsophisticated persons, against entering into contracts without proper thought. The writing requirement for a guarantee would serve much the same purpose. The present requirement of the Guarantees Acknowledgment Act that a notary public be satisfied that an individual guarantor understand the nature of the guarantee

obligation, is a further cautionary requirement which would be either dropped or strengthened depending upon which decision is made by the Government and the Legislature.

In summary, the adoption of the recommendations in the report would have the following effects:

(1) The requirements of writing established by the Statute of Frauds and the Sale of Goods Act would be retained only for land contracts, conveyances of interests in land (including equitable interests), and guarantees (including some "indemnities"). For land contracts and guarantees, the rules as to what must be contained in the writing would be relaxed, and for land contracts, additional substitutes for writing would be allowed.

(2) The acknowedgment and certification requirements of the Guarantees Acknowledgment Act would either be dropped or would be continued with some improvements.

(3) Provisions of four old English statutes would be replaced in part by three sections in the Law of Property Act.

(4) The provision in the Statute of Frauds dealing with guarantees, and the whole of the Guarantees Acknowledgment Act, would be replaced by a Guarantee Act.

(5) The Crown would be bound by the legislation.

Drafts of legislation which would give effect to the report's recommendations are attached to the report.

II. Report on the Statute of Frauds

1. Introduction

1.1 This report is about the requirements of writing established by the Statute of Frauds for a number of kinds of contracts and conveyances. It also deals with the requirements of the Guarantees Acknowledgment Act, because that Act establishes additional formalities for a class of contracts to which the Statute of Frauds applies. For convenient reference the relevant sections of the Statute of Frauds and its amendments appear in Appendices A to C and the Guarantees Acknowledgment Act and the regulation enacted under it appear in Appendices D and E.

1.2 The report describes the requirements of the two statutes. It recommends reforms which we think would make the law more suitable to modern conditions. The proposed reforms would abolish writing requirements which serve no useful purpose and would reform useful writing requirements in order to avoid injustice. It puts forward draft legislation which would make the law available in modern Alberta statutes instead of English statutes the principal one of which is a seventeenth century statute which is not readily accessible and is written in archaic language.

1.3 The report accordingly deals with writing requirements in the following cases:

(1) contracts for the sale of interests in land;
(2) the creation and disposition of interests in land ("conveyances");
(3) guarantees and indemnities;
(4) contracts not to be performed within a year;
(5) contracts in consideration of marriage;
(6) ratifications after majority of contracts entered into

by minors;

(7) promises by executors to pay damages personally; and

(8) representations as to credit-worthiness.

It also refers briefly to contracts for the sale of goods.

1.4 Statutes other than the Statute of Frauds and the Guarantees Acknowledgment Act require writing for special purposes. For example, The Land Titles Act requires writing for administrative and record-keeping purposes, and The Real Estate Agents Licensing Act requires listing agreements to be in writing, presumably for the protection of sellers of real estate. Our report does not deal with those other requirements. The provisions of the Statute of Frauds constitute a well known area of law which we think requires attention. We include the Guarantees Acknowledgment Act because of the unnecessary complexity in the law caused by the existence of two statutes setting out formal requirements for the same class of contracts.

1.5 We should at this point make a general comment upon the form and content of this report. That comment is that the report contains only the barest statement of the subject. Our reason for so restricting it is that the learning on the subject can easily be found elsewhere. There is a wealth of learning in the literature, and the Law Reform Commissions of Manitoba and British Columbia have in recent years issued valuable reports to which we will refer. We will say only the minimum which is necessary to make our recommendations understandable. References to the many reforms of the Statute of Frauds in many common law jurisdictions (the most recent being its complete abolition in Manitoba and its abolition in British Columbia except for land contracts not involving trusts and except for guarantees) would, we think, complicate the discussion without throwing additional light on the subject. For a summary of those reforms the interested reader could consult Appendix A to our Background Paper 12, Statute of Frauds, 1979.

1.6 We will now turn to the specific provisions of the Statute of Frauds and, at the appropriate places, The Guarantees Acknowledgment Act and the Sale of Goods Act. These fall under the following general categories: land contracts and dispositions; dispositions of other property; and a miscellaneous group of other kinds of contracts. After we have discussed these provisions and made our recommendations we will put forward draft legislation which we think would give effect to the recommendations.

2. Land

A. Contracts for the Sale of Interests in Land

(1) The need for a writing requirement.

2.1 There are arguments against a requirement of writing for a contract for the sale of an interest in land. The principal ones are as follows:

(1) A requirement of writing, if it is not complied with, gives a contracting party a pretext to repudiate his contract, although the contract may be a perfectly proper one. This is unjust.

(2) There is no reason to think that modern courts cannot assess evidence adequately without the assistance of writing requirements. There is no such requirement for proving other classes of contracts of equal importance and difficulty, or for proving claims in tort. The exceptions which have been created to cure the injustices which would otherwise be created by a requirement of writing are based on the assumption that the courts can determine the facts without a requirement of writing, which is in basic conflict with, and therefore negates, the assumption on which the requirement of writing is based.

(3) There is no evidence that a person who will enter into an improvident contract orally will be deterred from entering into it if it is in writing.

(4) The requirements of the Statute of Frauds have provoked much litigation which is directed to form rather than substance. For example, section 4 provides that no action shall be brought on a contract for sale of land or an interest in land "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 authorized." Every part of this provision has been much litigated: whether a writing includes enough terms of the contract; whether it must be written at the time of the contract; whether it must be intended as a memorandum of the contract; whether and when documents can be read together to constitute a note or memorandum; what constitutes a signature; and who is lawfully authorized to sign for a party.

2.2 Nevertheless, a majority of us think that, subject to some exceptions, there should be a requirement of writing for land contracts. Our reasons are as follows:

(1) Written evidence is the best evidence of a contract. It is objective. If written evidence is not required a rogue can trump up a false claim under a false contract, and his word is likely to appear as good as that of the defendant against whom he claims. If land is involved, he can register a caveat against the title, and he may be able to tie up the defendant's affairs and compel him to capitulate to a false claim.

(2) A requirement of writing protects people from stumbling into an important contract without due reflection. It is easy to make an ill-considered statement or promise without realizing its seriousness. The formality of signing a written document is likely to bring home to the person signing it the seriousness and importance of what he is doing, and thereby to caution him to consider it carefully.

(3) Signing a writing is a signal that the person signing it has got past the stage of discussion and to the point of intending to enter into a relationship which has legal consequences.

(4) Land contracts are often complex. They are often entered into by persons who do not have substantial involvement with business. They are often of great economic importance to those who enter into them. Land contracts should not be entered into lightly, and proof of them should be by way of objective and indisputable evidence, not by oral evidence which may be contrived and which is difficult to refute. The greatest protection against fraud is that there is a wide-spread general knowledge that the law requires contracts about land to be put in writing; if people insist on contracts being in writing they will have the best possible foundation for protection against false claims and against entering into improvident contracts.

2.3 For all these reasons we will recommend that there be a requirement of writing with respect to a contract for the sale of an interest in land (though as will be seen later we think that there should be some substitutes for writing). Our recommendation is somewhat narrower than those contained in the

British Columbia Report at page 79 and in the Manitoba Report at page 68. Those reports would include a contract or agreement "concerning an interest in land". We think that the latter phrase might enlarge the category of land contracts covered by the Statute of Frauds (which we would prefer not to do), and we think it might cause difficulties of interpretation. Our recommendation to this effect is included in Recommendation 1 which appears after paragraph 2.22.

2.4 Under section 4 of the Statute of Frauds, the note or memorandum is sufficient if signed by the party to be charged or by his agent. We think that either mode of signature should continue to be sufficient. It might be said that if the contract is required to be in writing it is illogical that there be no requirement of writing to prove the agency on which the contract is based. Even if the argument is valid, however, we think that the practical difficulties of requiring written agency authority outweigh the advantages of logical elegance.

(2) Nature and extent of the writing requirement.

2.5 Section 4 of the Statute of Frauds, which requires writing for land contracts, provides alternative ways to satisfy the requirement of writing. Either the contract must be in writing, or a "note or memorandum" must be in writing and signed by the party to be charged or his agent. These words have been much litigated. It appears that the note or memorandum may come into existence at any time and need not be intended to be the contract itself. It may be composed of several documents written at different times. It need not contain all the terms of the contract, but the tendency in Canada is to require it at least to show the parties, the property and the price.

2.6 The British Columbia and Manitoba Reports recommend that the requirement be that the contract be "evidenced by memorandum in writing." This is a somewhat less stringent

requirement than the requirement of a "note or memorandum" of the contract imposed by the Statute of Frauds. Our principal reason for advocating a requirement of writing is to provide evidence, and we think that a requirement which is even less stringent than the one recommended in the British Columbia and Manitoba reports would still provide enough evidence. We think that it would be enough that there be some evidence in writing which indicates that a contract has been made between the parties and which reasonably identifies the subject matter. Once the written evidence indicates that there is a contract, we think that the court should be able to look to the whole body of evidence, whether written or oral, in order to determine what the terms of the contract are. Such a requirement would also satisfy the cautionary purpose of the requirement of writing. Our recommendation to this effect appears after paragraph 2.22.

(3) Effect of non-compliance with the writing requirement.

2.7 Under section 4 of the Statute of Frauds, "no action shall be brought" upon a contract for the sale of land unless the requirement of writing has been complied with. The judicial interpretation of this wording is that a contract which does not comply with the writing requirement exists but cannot be enforced by the courts. Because it exists, the contract may have effect for purposes other than enforcement. For example, a party who has received money under a contract which is unenforceable under the Statute of Frauds can retain the money, and a party who enters on land under such a contract has a good defence against a claim for trespass. In each case the result might well be different if the law were to provide that a contract is without any effect whatsoever.

2.8 We think that the law should continue to provide that a land contract exists but is not enforceable if the requirement of writing is not met. First, such a provision would be enough

to satisfy the policy reasons for the requirement of writing which are set out in paragraph 2.2 Second, we think that the law should recognize a writing made at any time, and, if it does, it would be illogical for it to say that the contract does not exist on the day it is made but comes into existence later when the writing comes into existence. Third, if the law were to say that the lack of a signature would render the contract void or ineffective it could hardly permit a party who had not signed the writing to sue a party who had signed it, a result which we think is not required by any of the arguments for the writing requirement and which would be unfair. Finally, we think that the law should accept some kinds of later conduct of the parties as an alternative foundation for the enforcement of a land contract, and that would be inconsistent with saying that the lack of writing renders a contract void or ineffective.

2.9 Our recommendation that a contract not be enforceable unless it complies with the proposed legislation is included in Recommendation 1 which appears after paragraph 2.22. In substance it agrees with the recommendations of the Manitoba and British Columbia Reports, though the drafting is different.

(4) Other grounds for enforcing a contract.

(a) General.

2.10 We think unanimously that, given a requirement of writing, justice requires that relief be given against it on some grounds. We think that the relief should be as follows, though we are unanimous only on the first ground:

(1) a reformed version of the equitable doctrine of part performance,

(2) a provision for the enforcement of the contract if the plaintiff has reasonably relied upon it and changed his position

so that it would be inequitable not to enforce it, and

(3) restitution, including quantum meruit.

We think that all of these should be put in statutory form. We will discuss them individually.

(b) Part performance.

2.11 The courts of equity did not like to allow a defendant to escape from an honest contract merely because the requirement of writing had not been complied with. They accordingly, at a very early date, began to develop a complex and difficult set of rules to determine when to enforce a contract which is not in writing. These rules are usually called the equitable doctrine of part performance.

2.12 Sometimes the doctrine of part performance is defended on the grounds that the acts of part performance and the defendant's acquiescence provide evidence which is as satisfactory as the written evidence required by the Statute of Frauds. Sometimes, however, the doctrine is justified on the grounds that the plaintiff's actions and the defendant's acquiescence create "equities" which make it inequitable, and even fraudulent, for the defendant to refuse to perform the contract.

2.13 If the plaintiff's acts constitute "part performance" of the oral contract which he alleges, and if the defendant has acquiesced in those acts, a court will give the plaintiff at least some of the remedies which would normally be available under the contract. The authorities differ about the relationship which the acts of the plaintiff must bear to the contract in order to constitute part performance of it. A strict view is that the acts must be unequivocally, and in their own nature, referable to some such agreement as that alleged. A

more relaxed view is that the plaintiff's acts must at least establish the probability that they were done in reliance on a contract, though they need not necessarily go so far as to prove the contract which is sued upon.

2.14 The Supreme Court of Canada has enunciated the stricter view: McNeil v. Corbet (1908) 39 S.C.R. 608; Brownscombe v. Public Trustee (1969) 68 W.W.R. 483; Thompson v. Guaranty Trust Co. of Canada (1974) 39 D.L.R. (3d) 408; Deglman v. Guaranty Trust Co. of Canada and Constantineau [1954] S.C.R. 725. The House of Lords, however, moved towards the more relaxed view in Steadman v. Steadman [1974] 2 All E.R. 977. In Colberg v. Braunberger's Estate (1978) 12 A.R. 183 the Alberta Appellate Division stated the law in terms of Lord Reid's judgment in the Steadman case and made no reference to the Supreme Court of Canada decisions or to the stricter test which they applied. In Lensen v. Lensen [1984] 6 W.W.R. 673, 689, Mr. Justice Tallis, speaking for the Saskatchewan Court of Appeal, referred to the Supreme Court of Canada decisions. The Canadian approach, he said, "must also be considered because the Supreme Court of Canada has not expressly re-examined the rule in *Maddison* v. *Maddison* in the light of English authorities such as *Steadman* v. *Steadman* ..." The appellants in the Lensen case had accepted "that the Supreme Court of Canada has indicated that the acts of alleged part performance must be referable to and must be indicative of some contract dealing with the land," but, Mr. Justice Tallis said, the acts need not "of necessity be referable to either *the* interest in the land or *the* contract which is being propounded." He went on to hold that acts of part performance can qualify even if they are not obligatory under the contract; a purchaser's actions in improving land (of which he was in possession under a share crop arrangement) and in refraining from buying other land in the neighbourhood were acts of part performance. It seems likely that a relaxation of the strict view is occurring, but the relaxation is necessarily somewhat cautious until the Supreme Court of Canada reviews the

subject again.

2.15 The doctrine of part performance, as we have said, is complex and difficult. It has led to much litigation. It requires the parties to litigate the questions (1) whether or not the acts and acquiescence are enough to provide alternative evidence of the contract, or (2) to establish equities which call for the enforcement of the contract, although the true questions between the parties should be whether or not there is a contract and what its terms are. Some authorities suggest that the doctrine cannot be applied unless the case is one in which a court would, as an alternative to damages for breach of contract, grant the discretionary equitable remedy of specific performance of the contract, so that there may be many cases in which the doctrine does not apply. For these reasons the doctrine is not entirely satisfactory. However, it is a useful means of avoiding injustices which the Statute of Frauds would otherwise create.

2.16 Perhaps a better means of avoiding injustice could be devised. An exclusively evidentiary requirement, namely, a requirement that oral evidence of a land contract be corroborated, would focus attention upon the question of substance, namely, whether or not the contract is proved. However, we think that a new approach in this area would be more likely to provoke new and extensive litigation than to increase the quality of justice, and we do not recommend it.

2.17 For the reasons which we have given we think that the doctrine of part performance should be retained but that it should be extended in two ways. The first is to allow the enforcement of a land contract if the defendant's conduct indicates that there is a contract consistent with the contract upon which the plaintiff is suing. Later conduct of the defendant which recognises a contract is good evidence of the contract against him and is likely to be an indication of a

considered intention to accept the contract. It therefore satisfies both the evidentiary and the cautionary considerations which are behind the requirement of writing.

2.18 The second extension which we recommend is to provide for the enforcement of a land contract if one party has made a deposit or payment of part of the purchase price and if the other party has accepted it. It is true that the payment of money is not necessarily unequivocal; there can be many reasons for paying money and the fact that a particular contract requires it is only one of the possible reasons for the payment. Payment is however strong evidence that there is a relationship and some evidence that the relationship is contractual. We think that payment of money is also likely to serve a cautionary function. Therefore, it satisfies both the evidentiary and the cautionary considerations.

2.19 Our views are much the same as those expressed in the British Columbia and Manitoba Reports. We propose a marginally narrower formulation of a statutory rule of part performance by proposing that the conduct in question must indicate a contract "consistent with" the contract alleged; the two Reports proposed that the conduct must indicate a contract "not inconsistent with" the contract alleged. We recommend that the draft legislation make it clear that once any of the alternative ways of satisfying the legislation has been complied with, a contract will be fully enforceable. This is implicit in the British Columbia and Manitoba recommendations but we will, from abundance of caution, make it explicit. Our recommendations giving effect to this paragraph and to paragraphs 2.16 and 2.17 are included in Recommendation 1 which appears after paragraph 2.22.

(c) Enforcement to avoid an inequitable situation.

2.20 There may be circumstances in which the plaintiff has acted on the strength of the contract in a way which does not constitute part performance of it, but which makes it inequitable to allow the defendant to refuse to honour the contract. The hypothetical example given in the British Columbia Report and quoted in the Manitoba Report is one in which the buyer of a house under an oral contract resells it or undertakes financial commitments with respect to its purchase or renovation, and in which the seller refuses to complete the sale because he can now get a better price elsewhere. The doctrine of part performance would not apply because there is no knowing acquiescence by the defendant. The solution proposed in both reports is that the Court should have power to enforce the contract if the plaintiff has reasonably and (under the Manitoba formulation), bona fide relied on the contract and changed his position so that there is an inequitable situation which can be avoided only by the enforcement of the contract. Recognizing that a provision along these lines would be an innovation, we nevertheless think that it is in accordance with the spirit behind the doctrine of part performance and its recent relaxation, and we think that it should be adopted. Our recommendation to this effect is included in Recommendation 1 which appears after paragraph 2.22.

(d) Restitution, quantum meruit and compensation.

2.21 The courts have also been able to avoid or ameliorate injustice under the Statute of Frauds by the application of other legal concepts. If a defendant has been unjustly enriched by the receipt of a benefit under a contract which the Statute renders unenforceable, the court may require him to restore the benefit or to pay the cash equivalent. This may be

characterized as restitution or as quantum meruit. These remedies do not, however, give the plaintiff the benefits which he expected under the contract or even money which he expended upon the strength of it. In Deglman v. Guaranty Trust Co. Canada and Constantineau [1954] S.C.R. 725, for example, the Supreme Court ordered executors to pay the deceased's nephew for the value of services which the nephew had rendered to the deceased upon the strength of a promise which the deceased had made to the nephew but which was unenforceable under the Statute of Frauds. The British Columbia and Manitoba Reports recommended that the court's power to order restitution be included in the legislation. A majority of our Board also think that the legislation should refer to restitution in order to avoid an implication that it excludes it and so that it will be apparent on the face of the legislation that this relief is available. Our recommendation to this effect is Recommendation 2 which follows paragraph 2.22 and Recommendation 1.

2.22 The British Columbia and Manitoba Reports also recommended that the court have power to grant to the plaintiff compensation for money reasonably and in good faith expended in reliance on the contract. It should be emphasized that this remedy would be in addition to that described in paragraph 2.19 under which the court could enforce a contract if the plaintiff has changed his position in reasonable reliance upon it and it would be inequitable to refuse enforcement. This further remedy would permit the court to require the defendant to compensate the plaintiff for money expended under the contract by the plaintiff even if the expenditure did not confer a benefit upon the defendant. It would therefore confer a broad additional power on the court, which in theory could provide a more substantial remedy than enforcement of the contract itself. While we agree with the objective of preventing the writing requirement from becoming an instrument of injustice, we do not favour this remedy. It does not seem to us that the defendant should have to compensate the plaintiff unless there has been an

advantage to the defendant or reasonable reliance by the plaintiff, and we make no recommendation on this point.

Recommendation 1

We recommend that:

(1) A contract for the sale or other disposition of an interest in land not be enforceable unless

(a) there is some evidence in writing which indicates that a contract has been made between the parties and reasonably identifies the subject matter of the contract, and which is signed by the party to be charged or his agent,

(b) the party to be charged acquiesces in conduct of the party seeking to enforce the contract which indicates that a contract consistent with that alleged has been made between the parties,

(c) the conduct of the party to be charged indicates that a contract consistent with that alleged has been made between the parties,

(d) either the party to be charged or the party seeking to enforce the contract has made, and the other of the two parties has accepted, a deposit or payment of part of the purchase price, or

(e) the party seeking to enforce the contract has, in reasonable reliance on the contract, changed his position so that, having regard to the position of both parties, an inequitable result can be avoided only by enforcing the contract.

(2) If any of clauses (a), (b), (c), (d) and (e) is satisfied, the contract be enforceable in all usual ways.

[See s. 2 of the proposed Law of Property Act Amendment Act at pages 67-68 of this Report.]

Recommendation 2

We recommend that if a contract is unenforceable under Recommendation No. 1 the court be able to grant to the plaintiff such relief by way of restitution of any benefit received by the defendant as is just.

[See s. 2 of the proposed Law of Property Act Amendment Act, pages 67-68.]

B. Conveyances of Estates and Interests in Land

2.23 The question for consideration here is: what should an owner of land or an interest in land have to do in order to dispose of the ownership of the land or of the interest? We are talking here of every kind of interest, equitable as well as legal. The combined effect of sections 1, 3, 7, 8 and 9 of the Statute of Frauds is that every creation or disposition of a legal interest in land, and every creation or disposition of an interest in land under a trust, must be in writing.

2.24 The Land Titles Act complicates the discussion. If interpreted literally, its provisions would make it impossible to create or dispose of an interest in land except by using and registering a statutory written form, and would thus make any further requirement of writing unnecessary. However, under judicial interpretation, an unregistered conveyance may convey an equitable title which the courts will recognize as being effective, and the holder of an interest created or conveyed informally can record it on the register by way of caveat. The Land Titles Act therefore does not require writing in all circumstances, and we think that the cases which it does not cover should be dealt with. We note that the British Columbia Report, at pages 58 and 59, recommends that there be a writing requirement for conveyances by way of gift, but not for other conveyances. The Manitoba Report, at page 67, recommends that there be a writing requirement for all conveyances.

2.25 We think that the law should require writing for the creation or disposition of every estate or interest in land, whether legal or equitable. First, we think that objective evidence of such an event should be provided. Second, it would be illogical for the law to require special formalities for the making of a contract for the sale of an interest in land (as we have recommended above) but to allow the creation or disposition of an interest in land, whether or not pursuant to a contract, with no formalities. Third, if the Statute of Frauds were to be made inapplicable in Alberta and were not replaced by Alberta legislation, it would not be at all clear whether a conveyance which is outside the Land Titles Act would have to comply with the pre-1677 law of England or whether the courts would devise new requirements. Our recommendation, however, would leave the court free to enforce an agreement that property will be held as security for a debt, though the agreement would have to satisfy Recommendation 1 as a contract to convey. It would also leave untouched the law which determines when a gift is enforceable. Our recommendation is included in Recommendation 3 which appears after paragraph 2.30.

2.26 Our remarks in paragraph 2.25 apply equally to conveyances which, but for the Land Titles Act, would convey legal interests, and to conveyances which create equitable interests under general rules of equity. We will first deal with beneficial interests under trusts. The British Columbia Report at page 61 recommends that there be no writing requirement for either the creation or assignment of an interest in land under a trust, while the Manitoba Report, at page 69, recommends that there be a writing requirement for both. We think that the law should require a trust to be created in writing. If it did not, any person could assert that an owner of land had orally declared a trust of the land in his favour. We also think that the law should require a previously created beneficial interest in land under a trust to be disposed of in

writing. If it did not, A, the holder of a beneficial interest under a trust, could orally transfer his beneficial interest to B although he could not orally declare himself a trustee for B of the same beneficial interest. The considerations which apply to the disposition of an interest under a trust are similar to those which apply to the creation of a trust and it would be anomalous to treat the two differently. We deal next with other equitable interests. To impose a requirement of writing upon the creation and disposition of all equitable interests would be an extension of the existing requirement of writing, but analysis suggests that it would bring in only interests under restrictive covenants, which we consider appropriate.

2.27 Our recommendation that the creation of trusts in land be required to be in writing raises one question which is also raised by section 7 of the Statute of Frauds. If A effectively transfers the legal ownership of land to B subject to an oral and therefore ineffective trust in favour of C, what should the law do? It is clear that B should not be allowed to retain for his own use land which was transferred to him in trust for another, and the courts have avoided such a result by applying the principle that the Statute of Frauds may not be used as an instrument of fraud. It is not clear, however, whether B should be treated as holding the land for the benefit of A or whether he should be treated as holding it for the benefit of C. The opinion of judges and lawyers on the point is divided, though the view which has usually prevailed in Canadian courts is that he holds it for C, a result which makes section 7 ineffective in such cases. We think that the question is peculiarly one for courts of equity, and we make no recommendation that the Legislature try by legislation to propound an answer for all cases.

2.28 Section 8 of the Statute of Frauds excepted from the writing requirement trusts and confidences arising or resulting by the implication or construction of law. The considerations

which apply to the creation of trusts by law are quite different from those which apply to the voluntary creation of trusts by individuals, and there is no more reason to require the creation of the former to be in writing today than there was in 1677. The same reasoning applies to every case in which an interest, whether legal or equitable, is created by the operation of law rather than by the intention of the parties, and the exception should be framed accordingly. However, the considerations which apply to the disposition of any other legal or equitable interest in land apply also to the disposition of interests created by the operation of law, and we therefore think that a disposition of a trust created by operation of law should have to be in writing unless the disposition itself is effected by operation of law.

2.29 We think that it should be possible for the creation or disposition of an interest in land, whether legal or equitable, to be signed by the agent of the person effecting or making it. However, in view of the importance of the act and of the making of a proper record of it, we think that the agent's authority should be required to be in writing, unlike the case of a mere contract for sale.

2.30 We now turn to a discussion of the effect of a failure to comply with the writing requirement for the creation or disposition of a legal or beneficial interest in land. We have previously said that a failure to comply with the writing requirement for a land contract should merely render the contract unenforceable. However, in the case of a conveyance which creates or disposes of an interest in land we think that the law should go further and declare it ineffective unless it is in writing. Either a conveyance is effective to transfer ownership of an interest or it is not, and we do not think that there is any middle ground. Of course, the courts will continue to be able to find that an informal conveyance embodies a specifically enforceable contract or mortgage, an imperfect but

perfectible gift, or a valid consent to an entry on property, but that is different from finding the conveyance itself to be effective. We think that the same rule should apply to the creation or disposition of a trust interest. We think that our proposals will help to remove some existing uncertainties in the law.

Recommendation 3

We recommend that the law require:

(1) that except as provided below, the creation or disposition of a legal or equitable interest in land be in writing, and signed by the person creating or disposing of the interest or his agent authorized in writing, and that a purported creation or disposition which does not satisfy these requirements be ineffective.

(2) that there be no requirement of writing for the creation or disposition of a legal or equitable interest by operation of law.

[See s. 1(1) of the proposed Law of Property Act Amendment Act, page 66.]

2.31 S. 2 of the Statute of Frauds, makes a well recognized exception to the requirement of writing for conveyances of land. The exception covers a class of relatively minor transactions of a kind which people customarily enter into informally, namely, leases for periods of three years or less. We think that there should be an exception to accommodate such transactions as short term farm, house, apartment and office rentals. The exception should therefore be continued, though some reforms should be made in it. The lease itself should be excepted from the requirement of writing. So should the disposition of a leasehold interest under a lease which was not itself required to be in writing. So should a contract to grant a lease which, if granted according to the contract, would not itself be required to be in writing.

2.32 There are some details about the exception to be considered. These are as follows:

(a) Measurement of term. The present exception from the Statute of Frauds is a lease for a term not exceeding three years "from the making thereof." We think that the exception should be for a lease of three years or less, whether or not the term will end within three years from the making of the lease.

(b) Balance of a longer term. It is arguable that the policy considerations which apply to the granting of a lease for three years or less are the same as those which apply to the assignment of the last three years or less of a longer term. We think, however, that if a lease which was to be in writing because its term was originally more than three years, any disposition of it should also be required to be in writing.

(c) Right to further term. A lease for a term of three years or less may confer upon the lessee a right to obtain an additional term. We think that if the lease contains a provision which is capable of extending its term beyond the three years, the whole lease should be required to be in writing. The exception to the requirement of writing is based upon the relative unimportance and common occurrence of short term leases, and a lease which provides for, say, three successive three-year terms, or for a perpetual succession of three-year terms, is subject to the same policy considerations as a lease for an intial term of more than three years.

(d) Amount of rent. Under the Statute of Frauds, a lease for a term of three years or less is excepted from the requirement of writing only if "the rent reserved to the landlord during such term shall amount unto two-third parts at the least of the full improved value of the thing demised." Because the provision would be absurd if it really means that a short-term lease is excepted only if the rent during the term of the lease is equal to at least two-thirds of the capital value of the property, it has caused confusion. Whatever the correct interpretation of the provision, we see no reason for such a requirement.

Recommendation 4

We recommend that there be no requirement of writing for

(a) the creation or assignment of a lease, if the term granted by the lease together with any additional term provided for in the lease, is three years or less, or

(b) a contract to create or assign a lease described in (a).

[See s. 1(2) and s. 2(4) of the proposed Law of Property Act Amendment Act, page 66 and page 68 respectively.]

2.33 Something which is like a surrender of a lease, and which is sometimes called a surrender by operation of law, can be effected by the conduct of the lessor and lessee. Indeed, both the Landlord and Tenant Act and the common law recognize that tenancies can be terminated by such conduct. We think that there should be an exception from the requirement of writing for the termination of a lease by operation of law.

Recommendation 5

We recommend that the termination of a lease by the operation of law be excepted from the requirement of writing.

[See s. 1(2)(b) of the proposed Law of Property Act Amendment Act, page 66.]

2.34 We now turn to a different but related point. Section 3 of the United Kingdom Real Property Amendment Act of 1845 requires feoffments and other dispositions of land to be made by deed. Such a requirement is entirely inappropriate to Alberta and we recommend that it be declared inapplicable.

Recommendation 6

We recommend that s. 3 of the Real Property Act Amendment Act (U.K.) of 1845 be declared inapplicable to Alberta.

[See s. 3 of the proposed Law of Property Act Amendment Act, pages 68-69.]

3. Property Other Than Land

A. Sale of Goods

3.1 Section 16 of the Statute of Frauds (which has sometimes been called section 17) imposed a requirement of writing on contracts for sale of goods for a price of 10 pounds sterling or more, subject to important exceptions. Section 7 of the 1828 amendment (Lord Tenterden's Act) made it clear that the requirement extended to contracts for the sale of future goods. These provisions were displaced by section 7 of the Sale of Goods Act and its predecessors. We have elsewhere recommended abolition of the requirement of writing for contracts for the sale of goods by way of repealing section 7 of the Sale of Goods Act. That, however, was done in our Report 38, which recommends the adoption of the Uniform Sale of Goods Act, but only if it is adopted by a number of provinces, an eventuality which may not come about soon. We will therefore repeat our recommendation in this report. Our reasons for it appear at pages 128-132 of Report 38. We will add a recommendation that section 7 of Lord Tenderden's Act be made inapplicable in Alberta.

Recommendation 7

> We recommend that section 7 of the Sale of Goods Act be repealed and that section 7 of Lord Tenterden's Act be made inapplicable in Alberta.
>
> [See s. 1(b) and s. 2 of the proposed Statute of Frauds (Inapplicability) Act, page 78.]

B. Transfer of Trust Interests in Personalty

3.2 As we have said in paragraph 2.23, section 9 of the Statute of Frauds requires the transfer of an interest under a trust of land to be in writing. The section in fact goes

further. It requires writing for the transfer of an interest under a trust in any property, whether or not the property is or includes land. The Statute, however, has no requirement that the creation of a trust interest in property other than land be in writing. This raises the question: should the law continue to require°° the transfer of a beneficial interest under a trust in property other than land to be in writing? The Manitoba Report, at page 69, recommended that section 9 be re-enacted.

3.3 The law does not require writing for the transfer of a legal interest in property other than land, and it does not require writing for the creation of a beneficial interest under a trust of property other than land. That being so, we see no reason why it should require writing for the transfer of a beneficial interest in property other than land. We do not recommend that section 9 of the Statute of Frauds be continued or replaced except insofar as it deals with beneficial interests in land under trusts.

3.4 It appears that section 9 of the Statute of Frauds was intended to protect a trustee from having to make a payment to the assignee of a trust interest when he has already paid the assignor. S. 9 however does not protect the trustee because it does not require that notice of an assignment be given to the trustee. We think that the writing requirement is irrelevant to the protection of the trustee, and that the protection of the trustee is something which should be left to the law of trusts.

Recommendation 8

> We recommend that there be no requirement of writing for the disposition of a beneficial interest under a trust of personalty.
>
> [See s. 1(a) of the draft Statute of Frauds (Inapplicability) Act, page 78, which would declare s. 9 of the Statute of Frauds inapplicable in Alberta.]

4. Guarantees and Indemnities.

4.1 We now turn to a discussion of guarantees and indemnities. The Statute of Frauds requires writing for a class of promises which may be compendiously described as guarantees, though the courts have developed some exceptions to the requirement. The Guarantees Acknowledgement Act goes on to require additional formalities for the giving of guarantees by individuals. We will first make a recommendation for the continuation, subject to some changes, of the requirement of writing laid down by the Statute of Frauds. Then we will set out the arguments for and against retaining the principle of the Guarantees Acknowledgment Act, but, because we are divided in our opinions on that question, we will recommend that the Government and the Legislature decide whether or not the principle of the Act should be retained or abolished. If the decision is to abolish the principle of the Act, a simple repeal would be all that is necessary. We will, however, make recommendations for changes in the Act in case the decision is to retain its principle.

A. Statute of Frauds.

4.2 Section 4 of the Statute of Frauds requires writing for a "special promise to answer for the debt default or miscarriage of another person. In more modern language, it requires writing for a promise by A to C that A will perform B's obligation to C if B does not perform it. The obligation of B to C which is guaranteed may be a debt, or a liability under contract or in tort.

4.3 Many of the arguments for and against a requirement of writing in the case of a land contract (see paragraphs 2.1 and 2.2) apply to the case of a guarantee. Arguments for the requirement are that the writing will provide objective and trustworthy evidence of the guarantee; that the formality will caution the guarantor; and that the signing will show an intention

to enter into a legal relationship. Arguments against the requirement are that a guarantor who gives a perfectly legitimate guarantee can escape from it if he can show that the requirement of writing has not been complied with; and that the requirement has provoked much litigation over the meaning of the terms used.

4.4 Some of us think that the requirement of writing should not apply to a guarantee given by a corporation. The reasons of those of us who hold that view are, first, that a person sophisticated enough to engage in business through a corporation does not need the protection of a requirement of writing, and, second, that the shareholders of a corporation already have the benefit of limited liability. However, the majority of us recommend retention of a writing requirement for all guarantees. The supporting arguments in paragraph 2.2 apply with particular strength because of the nature of a guarantee transaction. A guarantor, whether corporate or individual, receives no direct benefit from the transaction, and he often receives no indirect benefit either. A guarantor may not understand the seriousness of the risk he assumes. For these reasons it is of particular importance that he be cautioned by the formality of signing something in writing to consider the extraordinary responsibility which he is undertaking. These arguments apply even though the individual who signs the guarantee does so on behalf of a corporation.

4.5 Section 4 of the Statute of Frauds requires that either the contract be in writing or that there be a note or memorandum signed by the party to be charged or his agent. Section 3 of the 1856 Mercantile Law Amendment Act (U.K.) provides that the consideration received for the guarantee need not be stated in the writing. We think it sufficient that the writing indicate that there is a guarantee and that it reasonably identify the person whose debt is guaranteed. Our recommendation would relax the requirement of writing somewhat more than would the recommendation in either the British Columbia Report or the Manitoba Report.

4.6 The British Columbia Report went on to recommend that a guarantee should be enforceable "if there are acts of the party to be charged which indicate that a guarantee, not inconsistent with that alleged, has been made between the parties," and the Manitoba Report made a similar recommendation. The "acts of the party to be charged" which the Reports contemplate are the making of payments, and that is the only kind of act which could be part performance under the definition of guarantee which we recommend.

4.7 The British Columbia Report shows that the Commission was divided on the point. It appears that a minority thought a payment made by the guarantor should not make a guarantee enforceable. One reason is that a part payment "may indicate no more than the confused reaction of someone confronted by a document purporting to record, or by a demand purporting to be made pursuant to, a transaction the legal effect of which he did not in fact understand." We agree with this, and we do not think that the payment shows that the cautionary function of the requirement of writing has been satisfied. Nor do we think that the part payment of a debt, without more, raises equities between the parties. We do not recommend that the law go on to make a guarantee enforceable on the grounds of the guarantor's part performance.

Recommendation 9

> We recommend that a guarantee should not be enforceable unless there is some evidence in writing signed by the party to be charged or his agent which indicates that the party to be charged has given a guarantee to the party alleging the guarantee and which reasonably identifies the third person whose debt is the subject of the guarantee.
>
> [See s. 3 of the Guarantee Act, page 72.]

B. The Guarantees Acknowledgment Act.

(1) Proposal for a review of the Guarantees Acknowledgment Act

4.8 The Guarantees Acknowledgment Act goes a step beyond the Statute of Frauds. It has no counterpart in any other jurisdiction of which we are aware. Together with the regulation made under it, it provides that a guarantee by a person who is not a corporation has no effect unless the guarantor acknowledges the execution of the guarantee before a notary public who certifies that he has satisfied himself by examination that the guarantor is aware of the contents of the guarantee and understands it.

4.9 In our 1970 Report No. 5, Guarantees Acknowledgment Act, we recommended that the Guarantees Acknowledgment Act be retained subject to some small reforms. However, in the course of preparing this report, we have reviewed that decision. Our reason for the review was that we thought that one statute should cover all formal requirements for guarantees. We did not think that we should simply recommend bringing forward the precise language of the Guarantees Acknowledgment Act without giving some thought to its suitability as the law of Alberta for the present and for the foreseeable future.

4.10 After much thought and debate, we have found ourselves much divided in opinion. Several of us think that the kind of protection which the Guarantees Acknowledgment Act gives should be continued. On the other hand, several of us think that the Act is based upon wrong principles and should be repealed. In these circumstances our Board could adopt a recommendation by majority vote and put it forward as the recommendation of the Institute. However, we do not think that we should, by a bare majority, make a recommendation upon this important question of social policy. We think that under the circumstances we should put forward the arguments for and against retention of the principle of the

Guarantees Acknowledgment Act and recommend that the basic questions be settled by the Government and the Legislature. We think this procedure appropriate. The questions appear to be questions of technical law, but they are really questions of social policy.

4.11 We will accordingly put forward arguments for and against making an individual's guarantee ineffective unless special formalities along the general line of those required by the Guarantees Acknowledgment Act are observed. We will then put forward the arguments on both sides of some subsidiary but important policy questions about the qualifications of the official who should be satisfied that a guarantor understands the nature of a guarantee. We think that these questions should also be answered if it is decided that special formalities should be required. We will then recommend that the Government and Legislature consider whether or not special formalities should be required. If the answer is no, the Guarantees Acknowledgment Act could simply be repealed. However, we will go on to recommend that if the answer is yes, the Government and Legislature go on to answer the subsidiary policy questions. Finally, we will make some recommendations for changes in the provisions of the Act, if it is to be retained, and for putting its provisions in a new Guarantee Act which would also replace the Statute of Frauds provisions about guarantees.

(2) Should the law prescribe additional formalities for guarantees given by individuals?

(a) Arguments for requiring additional formalities

4.12 We will now set out the opinion of those of us who think that the kind of protection given by the Guarantees Acknowledgment Act should be continued.

4.13 The Guarantees Acknowledgment Act is intended to

protect the ordinary individual, who, through lack of experience or understanding, might otherwise find that by signing a guarantee he or she has undertaken an onerous liability without fully understanding the risk. In other words, the Act performs a cautionary function.

4.14 Sometimes a guarantor who signs a guarantee has no financial interest in doing so. The guarantee may cover a loan to a relative or even to a friend. Too often the guarantor does not realize that he or she is undertaking a personal obligation and that if the person whose debt is guaranteed does not pay, the guarantor will have to pay. We believe that the Guarantees Acknowledgment Act procedure is a safeguard, although not a perfect one, against that happening.

4.15 Often a shareholder or a director of a small corporation will be asked to guarantee the corporation's debts. Such a person is more likely to understand business matters than someone who guarantees the debt of another individual. However, there are many small corporations whose shareholders and directors are quite unsophisticated in legal matters and who do not understand that they are giving up the benefits of limited liability when they sign a guarantee. In these cases also, we think that the Guarantees Acknowledgment Act procedure is a useful safeguard.

4.16 We do not think that the Guarantees Acknowledgment Act as it now stands is unfair to creditors. Since it was amended in 1969, it has protected a creditor who accepts a notarial certificate which is substantially complete and regular on the face of it and who has no reason to believe that the requirements of the Act have not been complied with. It is true that in Bank of British Columbia v. Shank Investments Ltd. [1985] 1 W.W.R. 730 Mr. Justice Bracco held that failures to comply with the Act rendered two guarantees invalid, but that was because of his finding that it was the creditor, through its own solicitor, who

had not complied. In Pensionfund Properties v. Giblin (1984) 55 A.R. 345, on the other hand, Madam Justice McFadyen upheld a guarantee although the notary (who on this occasion was the guarantor's solicitor) had issued a certificate which, though proper in appearance, was false in fact, and in Caisse Populaire De Morinville Savings & Credit Union v. Lambert (1985) 58 A.R. 113, the Court of Appeal expressed the opinion that in the absence of reliable evidence impugning the creditor's good faith the notarial certificate is conclusive.

4.17 If no official has examined the guarantor to ensure that the guarantor understands the nature of the guarantee obligation, the guarantor has not received the protection of the Guarantees Acknowledgment Act but may be bound by the guarantee because the creditor is entitled to rely upon a false certificate. We do not think, however, that a creditor who accepts what appears to be a valid certificate and has no way of knowing that it is incorrect, should suffer loss. The guarantor should be protected, but not at the expense of a creditor who is without fault. The protection of the Act is there in the great number of cases in which the statements in the certificate are true.

(b) Arguments against requiring additional formalities

4.18 We will now set out the opinion of those of us who think that the kind of protection given by the Guarantees Acknowledgment Act should not be continued.

4.19 The proposed Act is based on the conclusions that (1) a guarantor has a unique need for protective legal advice, (2) it is proper for the state, through legislation, to force him to a lawyer to obtain that legal advice, and (3) it is proper for the state, through legislation, to require the lawyer to render that legal advice, if at all, at a nominal fee.

4.20 One who signs a contract which guarantees the debt of

another takes a risk, for if the primary debtor refuses to pay the debt, the guarantor may be required to pay. The magnitude of this risk depends, of course, on the amount of the debt. However, anyone who enters into any contractual obligation takes a risk, for, depending on future events, the benefits derived from the contract may be far less than were originally anticipated. Moreover, because most contracts contain clauses using legal language which a non-lawyer may not understand, a prudent person will obtain legal advice before he enters into any contact other than one which is quite simple. A guarantee contract is a very common commercial contract. Yet the proposed Act singles out this particular type of contract and imposes a condition precedent; the guarantee will not be valid unless the guarantor obtains the requisite legal advice. In short, in this one instance, in order to enter into a commercial contract which violates no public policy, legislation will force a contracting party to hire a lawyer.

4.21 It is argued that a guarantee contract is unique because, although in other contracts the benefits may turn out to be less than anticipated, the guarantor derives no benefits from his contract. Technically this is so. In substance, however, it is not so for most guarantee contracts. Research leads us to the conclusion that most guarantee contracts fall into one of two categories. (1) An individual will frequently guarantee a debt of a corporation in which he or she has a significant economic interest in order to secure the loan to the corporation. The guarantor anticipates economic benefits through his or her interest in the corporation. To say that the guarantor derives no benefits in this situation is to confuse form with substance. (2) An individual will frequently guarantee a debt of a close family member, such as a son or a spouse. For what reason? Because the guarantor wants the family member to obtain the loan and to prosper so that the guarantor may obtain an indirect economic benefit, or personal satisfaction, or both. To be sure, there will be cases in which the guarantor anticipates neither economic

nor personal benefit. But we do not believe their number offers even remote justification for the proposed Act.

4.22 Based on the foregoing analysis, we do not believe that there is a sound public policy justification for the proposed Act. Moreover, further considerations lead us to conclude that the disadvantages inherent in the scheme outweigh the supposed benefits.

4.23 The proposed Act requires that a guarantor obtain a lawyer's certificate for every guarantee contract he or she executes. Business persons may enter into many guarantee contracts, and may be quite familiar with their legal implications. Nevertheless, the Act does not differentiate (and we do not see how it could); even when no legal advice is necessary, the guarantor must suffer the nuisance and expense of securing the certificate.

4.24 The proposed Act cannot operate in a very significant category of cases which present the same problem the Act is designed to solve. One of the most common forms of guarantee contract is the endorsement on a promissory note, for one who endorses a note guarantees its payment. Because this area of law is within the exclusive federal jurisidiction, the Act cannot apply to a guarantee by endorsement. Thus the Act cannot solve the perceived problem in many cases.

4.25 In order to ameliorate the problem inherent in requiring a person to secure legal advice, whether or not he or she deems it necessary, the proposed Act requires the lawyer to perform the services for a nominal fee of $25.00 if he performs them at all. We doubt that this tactic will in fact solve the cost problem in many cases, and we believe that it creates a series of further serious problems.

4.26 The lawyer must examine the guarantor and certify that

the guarantor "understands the nature and extent of the guarantee obligation." How many details of the guarantee obligation must the guarantor understand in order to understand its "nature"? Although the test is vague we do not quarrel with the language used for we think that any language would leave the test vague.

4.27 We simply wish to emphasize that the lawyer will have to err on the side of more explanation to secure protection from a professional negligence claim. We doubt that anyone would contend that the lawyer could perform the service competently and recover his time cost at the $25.00 fee. Rather, he is asked to perform the service as a loss leader in the public interest.

4.28 It is one thing for society to expect the members of the legal profession to perform services on a charitable basis frequently. It is quite another thing for government to prescribe, through legislation, what a lawyer can charge for a specific service. In our democracy one of the primary functions of the legal profession is representing clients in disputes with government. The legal profession must be kept independent. The inroad reflected by the proposed Act is innocuous in itself. However, in our view, it represents a precedent for intrusion in the independence of the legal profession which should be resisted.

4.29 The guarantee contract will usually arise in the context of a broader commercial transaction, and the lawyer will frequently be performing all of the services for the guarantor required by the broader transaction. We believe there will at least be a tendency for the lawyer to bill the $25.00 fee for the guarantee service and to recover what would otherwise be lost time in the residual fee for the entire package of services rendered. When this happens the client will pay the full fee, although he or she may not know it.

4.30 There will certainly be cases in which an occasional or first-time client requests a lawyer to perform the guarantee

service. In many cases, the guarantee contract will be a complex document, and even scanning it for unusual provisions will take a fair amount of time. A lawyer might be in a financial situation in which he simply couldn't afford to perform the service properly for the nominal fee. If there are many cases in which lawyers refuse to perform the guarantee service at all, however just their conduct may be in specific situations, there could be adverse publicity and public indignation. We do not think that it is fair and proper to subject the legal profession to this risk.

4.31 We believe that prescribing a nominal fee for a specific legal service by legislation is unsound in principle and will operate unjustly.

(3) Qualifications and remuneration of legal adviser

4.32 Those of us who would retain the special formalities for guarantees given by individuals think that a lawyer rather than a notary public should examine the guarantor and issue the prescribed certificate.

4.33 Under the Guarantees Acknowledgment Act it is a notary public who must be satisfied that the guarantor is aware of the contents of the guarantee and understands it. When we issued Report No. 5 we thought that it would be desirable, but not practicable, to substitute a requirement that it be a lawyer. However, if the official who examines a guarantor does not himself understand the guarantee, he cannot satisfy himself that the guarantor understands it, and the protection given by the Act is illusory. But many notaries in Alberta and elsewhere (though not in Quebec) are appointed primarily for other functions and with no assurance that they understand the law of guarantees. A lawyer, on the other hand, is qualified to understand and explain the legal effect of contractual obligations, including guarantees. It is for that reason that we would substitute a lawyer for a notary public as the official who must examine guarantor and issue the

prescribed certificate.

4.34 We realize that it would be inconvenient for a guarantor to travel to see a lawyer if no lawyer practises near the guarantor's place of residence. We think that the inconvenience for a few is justified by the protection which a requirement of legal advice would afford to all.

4.35 The question of cost is important. The Guarantees Acknowledgment Act provides that the fee payable to a notary public for the issue of a certificate and incidental services must not exceed $5. We think that some limitation on cost is desirable so that the financial burden which the new legislation would impose upon a guarantor would not exceed the value of the protection. It seems to us reasonable to suggest a limit of $25 upon the fee which may be charged to a guarantor. We do not think the imposition of a statutory limitation on cost is objectionable. What is under discussion is a statutory limit on fees for a procedure which is established and required by statute and not a prescription of fees for work which a client would ordinarily take to a lawyer. The statute would not compel a lawyer to act. Since 1939 lawyers have customarily and willingly officiated as notaries public under the Guarantees Acknowledgment Act which first limited the fee to $1 and then to $5, and do not appear to have suffered adverse results from so doing.

4.36 We have also considered whether the new legislation should provide that the lawyer must be independent of the creditor, a provision which was deleted from the Guarantees Acknowledgment Act in 1970. We think that on balance such a requirement would not be justified. The lawyer's statutory duty would be to assure himself that the guarantor understands the guarantee, and he can do that despite any relationship which the lawyer has with the creditor. Indeed, it is his duty to the creditor to do his duty to the guarantor. This is because a creditor is entitled to rely on the lawyer's certificate only if

the creditor has no reason to believe that the Act has not been complied with. If the creditor's lawyer knows that the Act has not been complied with, that knowledge may well be imputed to the creditor and result in invalidating the guarantee. The inconvenience of complying with the Act would be much greater if a lawyer who does not act for the creditor must be found; the creditor may well be a lending institution which retains several lawyers in a given georgraphical area, resulting in a local shortage of independent lawyers.

4.37 If a guarantee subject to the law of Alberta is executed outside Alberta, the Guarantees Acknowledgment Act applies, and the acknowledgment must be made before a notary public in and for the jurisdiction in which it is executed. It follows from what we say in paragraph 4.33 that we think that an extra-provincial acknowledgment and certificate should be made before, and given by, a person who is entitled to give legal advice either in Alberta or in the other jurisdiction.

Recommendation 10

We recommend that the government and the Legislature consider:

(a) whether or not the law should provide that a guarantee is ineffective unless a legal adviser satisfies himself that the person who signs the guarantee understands the nature and extent of the guarantee obligation.

(b) whether or not the legal adviser should be required to be a lawyer rather than a notary public.

(c) whether or not the lawyer's fee to a guarantor should be limited by statute and, if it should, whether it should be limited to $25 or to some other amount.

(d) whether or not the legal adviser should be required to be independent of the creditor in whose favor the guarantee is made.

(4) Specific reforms

4.38 If the government and the legislature should decide to retain the principle of the Guarantees Acknowledgment Act, we think that the opportunity should be taken to given effect to three recommendations for change contained in the Institute's Report No. 5, the Guarantees Acknowledgment Act.

4.39 The first is to change section 5(1) of the Act so that it will provide that the certificate given by the lawyer shall be in the prescribed form "or to the like effect", words which are not there now and which might avoid an unduly harsh interpretation. In the years since the date of Report 5 the courts have declined to give effect to technical defences based on the form of a certificate (See Canadian Imperial Bank of Commerce v. Country Warehouse (Wetaskiwin) Ltd. (1981) 15 A.L.R. (2d) 127 (Alta. Q.B.; Bank of Nova Scotia v. Peter Kiss Oilfield Contractors Ltd. [1985] 2 W.W.R. 45 (Alta. M.C.) and the cases mentioned in the note to our proposed Forms Regulation), but we think that this change is still desirable. The second change would be to add the words "purporting to" to section 6 of the Act so that a creditor could rely upon a certificate "purporting to be issued under section 5." The third change would be made in the form of certificate set out in Regulation 476/81. We think that the certificate should state that the guarantor is aware of the nature and extent of the obligation rather than that, as the form now says, he is aware of the contents of the guarantee and understands it, which could be interpreted as requiring the official to explain in minute detail every clause of a long and complex guarantee, a process which would be of little value to the guarantor and make the whole procedure unnecessarily costly.

4.40 We think that another minor change should be made. Section 5 of the Guarantees Acknowledgment Act provides that an apparently proper certificate, if accepted in good faith and

without reason to believe that the Act has not been complied with, is "conclusive proof that sections 3 and 4 have been complied with." This could be construed to mean that under those circumstances the certificate is conclusive proof that the guarantor signed the guarantee and was aware of and understood its contents. In C.I.B.C. v. Lee Roy Contracting (1982) 20 A.L.R. (2d) 266 the then Associate Chief Justice Moore ruled that construction inappropriate, holding that an otherwise invalid guarantee would not be validated by compliance with the Act. In recognition of this ruling, and in order to foreclose future litigation in an appellate court, we think section 5 should be changed to rule out a construction to the effect that compliance with the section would cleanse a guarantee of inherent defects under the general law outside of the statute.

Recommendation 11

We recommend that, if the government and legislature decide to continue the principle of the Guarantees Acknowledgment Act the following changes be made:

(a) that instead of being required to issue a certificate in the prescribed form the legal adviser be required to issue a certificate in the prescribed form "or to the like effect."

(b) that the certificate say that the guarantor understands the nature and extent of the guarantee obligation rather than that he is aware of the contents of the guarantee.

(c) that the creditor be entitled to rely upon "a certificate purporting to be" issued under the Act and accepted by him in good faith and without reason to believe that the requirements of the Act have not been complied with.

(d) that if a creditor receives a certificate in the form and under the circumstances mentioned in Recommendation 11(c), the provision requiring the guarantor's

acknowledgment and the lawyer's certificate would not apply.

(e) that the form of certificate prescribed by regulation under the Act state either that the person signing is an active member of the Law Society of Alberta or that he is entitled to carry on the practice of giving legal advice on contracts in the jurisdiction in which the guarantee is executed.

[See ss. 1 and 4-8 of the proposed Guarantee Act, pages 70-74. See also the proposed Forms Regulation, pages 76-77.]

C. Scope of the Proposed Requirements

(1) Guarantees

4.41 We think that there are a number of points about the application of the writing requirement which should be dealt with in the proposed new legislation. The same considerations would apply to the formalities to be required by a successor to the Guarantees Acknowledgment Act. Everything under this heading C is written as if the principle of the Guarantees Acknowledgment Act will be continued. If it is, this part of the Report should be read as it stands. If the principle of the Guarantees Acknowledgment Act is not to be continued, everything under this heading C should be read with reference to the writing requirement only.

4.42 As we have said, section 4 of the Statute of Frauds requires writing for "a special promise to answer for the debt, default or miscarriage" of another. This probably includes a promise to answer for another's torts as well as for his debts and other breaches of contracts. The Guarantees Acknowledgment Act merely uses the word "guarantee", which may or may not be co-extensive with the wording of the Statute of Frauds. We think that the scope of the provisions which the proposed legislation

would substitute for the Statute of frauds should, unless there is reason to the contrary, be the same as the scope of the provisions which it would substitute for the Guarantees Acknowledgment Act. This will simplify the law.

4.43 We think that the problems to be resolved by legislation arise almost entirely in connection with a guarantee by A to C that B will pay a present or future debt to C. We therefore think that the definition of "guarantee", and thus the requirements of writing and acknowledgment, should apply only to an obligation to pay another's debt, although this proposal would somewhat reduce the scope of the requirement of writing. Our recommendation to this effect is included in Recommendation 11, which appears after paragraph 4.24.

(2) Indemnities

4.44 The Statute of Frauds applies to an undertaking by A to perform B's obligation to C if B fails to perform it. In some cases at least, it does not apply to A's undertaking to perform B's obligation to C at all events. The Guarantees Acknowledgment Act is probably subject to the same limitation. This is the kind of hair-splitting distinction which breeds disrespect for law among the public. In Report No. 5 we were conscious of the problem but did not recommend the extension of the Act to include such "indemnities" because we were afraid of intruding upon transactions not previously affected by the writing and acknowledgment requirements. Both the British Columbia and Manitoba Reports recommended the inclusion of "indemnities", and "indemnities" have been included in the British Columbia Statute of Frauds since 1958. We think now that an effort should be made to include guarantee-like indemnities so that a creditor cannot avoid the writing requirement or the acknowledgment and certification requirement merely by casting the obligation in absolute instead of collateral terms. The wording suggested in Recommendation 11 would bring about this result. We think that it

is narrower than the British Columbia and Manitoba wording.

(3) Guarantees by corporations

4.45 The Guarantees Acknowledgment Act exempts from the acknowledgment requirement a guarantee given by a corporation. However, the Statute of Frauds does not exempt it from the writing requirement. The next question is how this difference in scope should be dealt with.

4.46 Our answer is that the proposed legislation should continue the existing difference. The requirement of writing of the Statute of Frauds is based upon evidentiary and cautionary considerations which apply to the giving of a guarantee whether or not the guarantee is given by a corporation. The acknowledgment and certificate requirements of the Guarantees Acknowledgment Act are, however, intended for the protection of an unsophisticated individual against undertaking an ill-advised and improvident personal obligation. Those carrying on business in corporate form are likely to have at least some contact with business affairs, and the law already protects them by providing for limited liability. We therefore think it appropriate that the writing requirement but not the acknowledgment requirement apply to a guarantee given by a corporation. Recommendation 12 at page 50 would give effect to this view.

(4) Exceptions from the proposed Guarantee Act

4.47 The Guarantees Acknowledgment Act exempts four kinds of transactions from its formal requirements of acknowledgment and certification. We think that the proposed Guarantee Act should continue to exempt three of them from the acknowledgment and certification requirements and should also exempt them from the writing requirement which will replace the writing requirement now contained in the Statute of Frauds. Our reasons are as follows:

(a) A bill of exchange, cheque or promissory note (GAA s. 1(a)(i)). In some cases, a person will sign a bill, cheque or note in a way which renders him liable on it if the person primarily liable does not pay. He may do so, for example, by endorsing the bill or note. A signature of this kind is much like a guarantee and may be intended as one. A provincial statute cannot affect bills of exchange or promissory notes, however, and the proposed Act should exempt them as a signal that they are not covered.

(b) A partnership agreement (GAA s. 1(a)(ii)). The formation of a partnership is a transaction the importance of which is apparent to the parties and which involves the prospect of significant benefits to all concerned. If one partner agrees to ensure that debts owing to the partnership are paid, we do not think that he requires the protection either of the requirement of writing or of the requirement of additional formalities.

(c) A bond or recognizance given to the Crown or to a court or pursuant to a statute (GAA s. 1(a)(iii)). We think that the formalities of a bond or recognizance, and the circumstances under which they are given, are sufficient warning to the person involved. The additional formalities are therefore not required. To avoid drafting complexity we would exempt them from the requirement of writing as well; the court practice or the legislation under which they are given will require writing anyway.

4.48 We think that the proposed Act should also exempt one class of guarantees which has been exempted by judicial interpretation. The requirement of writing should not apply to a transaction under which an agent guarantees to his principal that a prospective customer located by the agent will pay his debts to the principal. By its nature, this is a business relationship in which the agent understands his obligations and obtains a benefit from assuming them. Recommendation 14, which appears at page 51 gives effect to this recommendation.

4.49 The proposed Act is not intended to apply to a case in which a party undertakes a direct obligation as his own obligation and without any expectation that a third party will perform it. It should therefore not apply to a novation: a transaction in which C releases B as his debtor and accepts A in substitution for

him. Similar considerations apply if A acquires from B property which is subject to an obligation in favour of C with the understanding that A is assuming the obligation. Nor should the Act apply to an undertaking by the assignor of a lease to remain liable for the rent as it was held to do in Alberta Financial Consultants Ltd. v. Cuthbert, (1984) 55 A.R. 147 (Alta. Q.B.). Recommendation 14 which follows paragraph 4.52 gives effect to these views.

(5) Exceptions to be discontinued

4.50 We think that one exception from the Guarantees Acknowledgment Act and one judicial exception from the Statute of Frauds should be abolished. The exceptions and our reasons for recommending that they be abolished are as follows:

(a) A guarantee given on the sale of an interest in land or an interest in goods or chattels (G.A.A. s. 1(a)(iv)). We are all agreed that there is no reason to exempt a guarantee given on the sale of an interest in land. With regard to a sale of goods, we are somewhat troubled by the example of a merchant who sells a motorcycle to the son upon the strength of the father's guarantee; to require him to send the father out to acknowledge a formal guarantee before a lawyer would cause substantial inconvenience, and some of our Board members think that the requirement would go too far. The majority, however, think that there is no difference between such a case and a guarantee of a loan and that the arguments in favour of the requirement of an acknowledgment apply in full force and should prevail.

(b) A guarantee given to preserve the guarantor's property, for example, if A acquires goods over which C has a lien and, in order to obtain delivery of the goods, gaurantees payment of the debt of an earlier owner, B, upon which the lien is based. This is a judicial exception from the Statute of Frauds. It can be argued that such a guarantee is given as part of a larger transaction, and that, since it is given in order to obtain a benefit, it is not as one-sided as a simple guarantee. It appears to us, however, that the arguments in favour of both the requirement of writing and the requirement of an acknowledgment apply.

Recommendation 14, which, with Recommendations 11 to 13, follows paragraph 4.52, gives effect to these views.

(6) Insurance contracts.

4.51 Some insurance contracts might fall within our proposed definition of "guarantee". We would not like to suggest that an unincorporated insurer be required to give the necessary acknowledgment before a lawyer, and we therefore recommend that contracts to which the Insurance Act applies be specifically excluded from the proposed legislation.

4.52 We note in passing that the definition of "insurance" in the Insurance Act could be construed as extending to an ordinary guarantee. However, no one appears to have suggested that an ordinary guarantor must comply with the provisions applicable to an insurer, and we think that any hypothetical problem can be left to be resolved by the good sense of the courts.

Recommendation 12

> We recommend that, subject to exceptions referred to in later recommendations, the proposed legislation apply to an agreement under which one person enters into an obligation to another person to pay an existing or future debt of a third person, whether or not the obligation is conditional upon the default of the third person.
>
> [See s. 1(a) of the proposed Guarantee Act at page 70 of this Report.]

Recommendation 13

> We recommend that the requirement of writing, but not the requirement of acknowledgment and certification, apply to a guarantee given by a corporation.
>
> [See ss. 3 and 4 of the proposed Guarantee Act, pages 72-73.]

Recommendation 14

We recommend that the following be exempted from the proposed requirement of writing and also from the proposed acknowledgment and certificate requirements:

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

(b) a guarantee given by an agent to his principal of an obligation of a person who is introduced by the agent to the principal or with whom the agent enters into a contract on behalf of the principal;

(c) an agreement under which the principal debtor is discharged from liability;

(d) the assumption of a debt secured by property being acquired by the guarantor;

(e) an undertaking by the assignor of a leasehold interest that the rent or other money which will become due under the lease will be paid;

(f) a partnership agreement;

(g) a bond or recognizance given to the Crown or to a court or pursuant to a statute; or

(h) a contract of insurance to which the Insurance Act applies.

[See s. 2 of the draft Guarantee Act, pages 71.]

Recommendation 15

We recommend that both the requirement of writing and the requirements of acknowledgment and certification apply to the following:

(a) a guarantee given on the sale of an interest in land or an interest in goods or chattels, and

(b) a guarantee given to preserve the guarantor's property.

[Recommendation 15(a) would be implemented by omitting the exception now contained in GAA s. 1(a)(iv). For Recommendation 15(b) see s. 1(a)(ii) of the proposed Guarantee Act, page 70.]

5. Other Contracts

5.1 There are a number of classes of contracts to which the Statute of Frauds applied a requirement of writing for which there is no justification today. We think that everyone who has considered the subject has agreed that the requirement of writing in these cases should be abolished, and that we therefore need ascribe for our next recommendation no other reason than that the requirement of writing with respect to each of them is anachronistic and unjustified under today's conditions. They are listed in the recommendation. The last item mentioned in the recommendation is not a class of contracts but is conveniently dealt with here.

Recommendation 16

We recommend that the requirement of writing imposed by the Statute of Frauds and by sections 5 and 6 of the Statute of Frauds Amendment Act 1828 (Lord Tenterden's Act) be abolished in the following cases:

(a) an agreement that is not to be performed within a year from the making thereof.

(b) an agreement made upon consideration of marriage.

(c) a promise made after full age to pay a debt contracted during infancy, or a ratification after full age of a contract made during infancy.

(d) a special promise by an executor or administrator to answer damages out of his own estate.

(e) a representation of credit-worthiness.

[See s. 1 of the draft Statute of Frauds (Inappplicability) Act at page 78 of this Report.]

6. General Considerations

A. Position of the Crown

6.1 It appears to us that the Crown should be bound by any writing requirement. We recommend that the legislation so provide.

Recommendation 17

> We recommend that the proposed legislation bind the Crown.
>
> [See s. 4 of the draft Law of Property Act Amendment Act and s. 9 of the draft Guarantee Act which respectively appear at page 69 and page 74.]

B. Transitional Provision

6.2 An argument can be made for the proposition that the legislation which we propose should apply to all cases, whether or not they will have arisen before the effective date of the legislation. The argument is that the proposed legislation is remedial and procedural and should apply to everyone. The writing requirement, however, does affect rights, even if it is procedural in form, and we think that it is best that the proposed legislation leave existing positions unaffected. Therefore, we recommend that the proposed legislation not apply to conveyances effected and contracts concluded before the effective date of the Act.

Recommendation 18

> We recommend that the proposed Acts not apply to conveyances effected or contracts entered into before the commencement dates of the proposed Acts.
>
> [See s. 5 of the proposed Law of Property Act Amendment Act, s. 11 of the draft Guarantee

Act, and s. 3 of the proposed Statute of Frauds (Inapplicability) Act, which appear respectively at pages 69, 74 and 78.]

C. Effective Date

6.3 We think that the legislation should come into force on a date sufficiently long after its enactment to allow it to come to the attention of the public, or at least of the legal profession. We suggest a period of approximately three months.

Recommendation 19

That there be a period of at least three months between the enactment dates and effective dates of the proposed Acts.

[See s. 6 of the draft Law of Property Act Amendment Act, s. 12 of the draft Guarantee Act and s. 4 of the draft Statute of Frauds (Inapplicability) Act which appear respectively at pages 69, 74-75 and 78 of this Report.]

D. Structure of Proposed Legislation

6.4 We think that our recommendations about requirements of writing for land contracts and conveyances might well go into the Law of Property Act. Part IV of this report therefore contains a draft of amendments to that Act which would give effect to those recommendations, including a declaration that the 1845 Real Property Amendment Act does not apply in Alberta.

6.5 We think that our recommendations about guarantees and indemnities might well go into a separate Guarantee Act. Part IV therefore contains a draft of such an Act which would give effect to those recommendations.

6.6 If the Legislature should decide to retain the protection for guarantors which the Guarantees Acknowledgment Act now provides, it might well go in the same Guarantee Act. The

draft Act in Part IV would give that protection. It is based upon the recommendations which we have made to cover that eventuality. If the Legislature should decide not to retain the protection, the provisions which would confer it can be disregarded.

6.7 We recommend that the Guarantees Acknowledgment Act be repealed in any event. If the Legislature's decision is to discontinue the special protection which the Act gives to individual guarantors the Act would have no further function to perform. If the Legislature decides to continue the special protection, we think that one statute should deal with both the ordinary writing requirement and the special protection.

6.8 If our recommendations are accepted there will be nothing of value left in the Statute of Frauds. We propose that a special statute declare that it and its 1828 amendment do not apply in Alberta. We propose that the same statute repeal section 7 of the Sale of Goods Act.

6.9 In the result, Albertans would be free of the necessity of finding English statutes of 1677, 1828, and 1845. The Guarantees Acknowledgment Act would be repealed. Instead there would be some writing requirements for land contracts and conveyances in the Law of Property Act and some writing requirements (and possibly additional formalities) about guarantees and indemnities in a new Guarantee Act.

Recommendation 20

> That legislation be enacted which would have the general effect of the draft legislation contained in Part IV of this report; provided that the provisions which would give special protection to government and the individual guarantors should be deleted from the draft Guarantee Act if the Legislature decide that the special protection should be discontinued.

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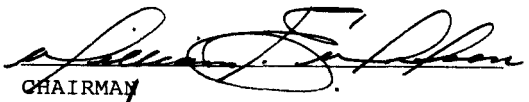
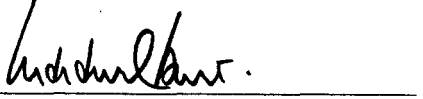


CHAIRMAN



DIRECTOR

June 1985

PART III. RECOMMENDATIONS

Recommendation 1

We recommend that:

(1) A contract for the sale or other disposition of an interest in land not be enforceable unless

(a) there is some evidence in writing which indicates that a contract has been made between the parties and reasonably identifies the subject matter of the contract, and which is signed by the party to be charged or his agent,

(b) the party to be charged acquiesces in conduct of the party seeking to enforce the contract which indicates that a contract consistent with that alleged has been made between the parties,

(c) the conduct of the party to be charged indicates that a contract consistent with that alleged has been made between the parties,

(d) either the party to be charged or the party seeking to enforce the contract has made, and the other of the two parties has accepted, a deposit or payment of part of the purchase price, or

(e) the party seeking to enforce the contract has, in reasonable reliance on the contract, changed his position so that, having regard to the position of both parties, an inequitable result can be avoided only by enforcing the contract.

(2) If any of clases (a), (b), (c), (d) and (e) is satisfied, the contract be enforceable in all usual ways.

[See s. 2 of the proposed Law of Property Act Amendment Act at pages 67-68 of this Report.]

[Page 20.]

Recommendation 2

We recommend that if a contract is unenforceable under Recommendation No. 1 the court be able to grant to the plaintiff such relief by way of restitution of any benefit received by the defendant as is just.

[See s. 2 of the proposed Law of Property Act Amendment Act, pages 67-68.]

[Page 21.]

Recommendation 3

We recommend that the law require:

(1) that except as provided below, the creation or disposition of a legal or equitable interest in land be in writing, and signed by the person creating or disposing of the interest or his agent authorized in writing, and that a purported creation or disposition which does not satisfy these requirements be ineffective.

(2) that there be no requirement of writing for the creation or disposition of a legal or equitable interest by operation of law.

[See s. 1(1) of the proposed Law of Property Act Amendment Act, page 66.]

[Page 25.]

Recommendation 4

We recommend that there be no requirement of writing for

(a) the creation or assignment of a lease, if the term granted by the lease together with any additional term provided for in the lease, is three years or less, or

(b) a contract to create or assign a lease described in (a).

[See s. 1(2) and s. 2(4) of the proposed Law of Property Act Amendment Act, page 66 and page 68 respectively.]

[Page 27.]

Recommendation 5

We recommend that the termination of a lease by the operation of law be excepted from the requirement of writing.

[See s. 1(2)(b) of the proposed Law of Property Act Amendment Act, page 66.]

[Page 27.]

Recommendation 6

We recommend that s. 3 of the Real Property Act Amendment Act (U.K.) of 1845 be declared inapplicable to Alberta.

[See s. 3 of the proposed Law of Property Act Amendment Act, page 68-69.]

[Page 27.]

Recommendation 7

We recommend that section 7 of the Sale of Goods Act be repealed and that section 7 of Lord Tenterden's Act be made inapplicable in Alberta.

[See s. 1(b) and s. 2 of the proposed Statute of Frauds (Inapplicability) Act, page 78.]

[Page 28.]

Recommendation 8

We recommend that there be no requirement of writing for the disposition of a beneficial interest under a trust of personalty.

[See s. 1(a) of the draft Statute of Frauds (Inapplicability) Act, page 78, which would declare s. 9 of the Statute of Frauds inapplicable in Alberta.]

[Page 29.]

Recommendation 9

We recommend that a guarantee should not be enforceable unless there is some evidence in writing signed by the party to be charged or

his agent which indicates that the party to be charged has given a guarantee to the party alleging the guarantee and which reasonably identifies the third person whose debt is the subject of the guarantee.

[See s. 3 of the Guarantee Act, page 72.]

[Page 32.]

Recommendation 10

We recommend that the government and the Legislature consider:

(a) whether or not the law should provide that a guarantee is ineffective unless a legal adviser satisfies himself that the person who signed the guarantee understands the nature and extent of the guarantee obligation.

(b) whether or not the legal adviser should be required to be a lawyer rather than a notary public.

(c) whether or not the lawyer's fee to the guarantor should be limited by statute and, if it should, whether it should be limited to $25 or to some other amount.

(d) whether or not the legal adviser should be required to be independent of the creditor in whose favor the guarantee is made.

[Page 42.]

Recommendation 11

We recommend that, if the Government and Legislature decide to continue the principle of the Guarantees Acknowledgment Act the following changes be made:

(a) that instead of being required to issue a certificate in the prescribed form the legal adviser be required to issue a certificate in the prescribed form "or to the like effect."

(b) that the certificate say that the guarantor understands the nature and

extent of the guarantee obligation rather than that he is aware of the contents of the guarantee.

(c) that the creditor be entitled to rely upon "a certificate purporting to be" issued under the Act and accepted by him in good faith and without reason to believe that the requirements of the Act have not been complied with.

(d) that if a creditor receives a certificate in the form and under the circumstances mentioned in Recommendation 11(c), the provision requiring the guarantor's acknowledgment and the lawyer's certificate would not apply.

(e) that the form of certificate prescribed by regulation under the Act state either that the person signing is an active member of the Law Society of Alberta or that he is entitled to carry on the practice of giving legal advice on contracts in the jurisdiction in which the guarantee is executed.

[See ss. 1 and 4-8 of the proposed Guarantee Act, pages 70-74. See also the proposed Forms Regulation, pages 76-77.]

[Page 44-45.]

Recommendation 12

We recommend that, subject to exceptions referred to in later recommendations, the proposed legislation apply to an agreement under which one person enters into an obligation to another person to pay an existing or future debt of a third person, whether or not the obligation is conditional upon the default of the third person.

[See s. 1(a) of the proposed Guarantee Act at page 70 of this Report.]

[Page 50.]

Recommendation 13

We recommend that the requirement of writing, but not the requirement of acknowledgment and certification, apply to a guarantee given by a corporation.

[See ss. 3 and 4 of the proposed Guarantee Act, pages 72-73.]

[Page 50-51.]

Recommendation 14

We recommend that the following be exempted from the proposed requirement of writing and also from the proposed acknowledgment and certificate requirements:

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

(b) a guarantee given by an agent to his principal of an obligation of a person who is introduced by the agent to the principal or with whom the agent enters into a contract on behalf of the principal;

(c) an agreement under which the principal debtor is discharged from liability;

(d) the assumption of a debt secured by property being acquired by the guarantor;

(e) an undertaking by the assignor of a leasehold interest that the rent or other money which will become due under the lease will be paid;

(f) a partnerhsip agreement;

(g) a bond or recognizance given to the Crown or to a court or pursuant to a statute; or

(h) a contract of insurance to which the Insurance Act applies.

[See s. 2 of the draft Guarantee Act, page 71.]

[Page 51.]

Recommendation 15

We recommend that both the requirement of writing and the requirements of acknowledgment and certification apply to the following:

(a) a guarantee given on the sale of an interest in land or an interest in goods or chattels, and

(b) a guarantee given to preserve the guarantor's property.

[Recommendation 15(a) would be implemented by omitting the exception now contained in GAA s. 1(a)(iv). For Recommendation 15(b) see s. 1(a)(ii) of the proposed Guarantee Act, page 70.]

[Page 51.]

Recommendation 16

We recommend that the requirement of writing imposed by the Statute of Frauds and by sections 5 and 6 of the Statute of Frauds Amendment Act 1828 (Lord Tenterden's Act) be abolished in the following cases:

(a) an agreement that is not to be performed within a year from the making thereof.

(b) an agreement made upon consideration of marriage.

(c) a promise made after full age to pay a debt contracted during infancy, or a ratification after full age of a contract made during infancy.

(d) a special promise by an executor or administator to answer damages out of his own estate.

(e) a representation of credit-worthiness.

[See s. 1 of the draft Statute of Frauds (Inapplicability) Act at page 78 of this Report.]

[Page 53.]

Recommendation 17

We recommend that the proposed legislation bind the Crown.

[See s. 4 of the draft Law of Property Act Amendment Act and s. 9 of the draft Guarantee

Act which respectively appear at page 69 and page 74.]

[Page 54.]

Recommendation 18

We recommend that the proposed Acts not apply to conveyances effected or contracts entered into before the commencement dates of the proposed Acts.

[See s. 5 of the proposed Law of Property Act Amendment Act, s. 11 of the draft Guarantee Act, and s. 3 of the proposed Statute of Frauds (Inapplicability) Act, which appear respectively at pages 69, 74 and 78.]

[Page 54-55.]

Recommendation 19

That there be a period of at least three months between the enactment dates and effective dates of the proposed Acts.

[See s. 6 of the draft Law of Property Act Amendment Act, s. 12 of the draft Guarantee Act and s. 4 of the draft Statute of Frauds (Inapplicability) Act which appear respectively at pages 69, 74-75 and 78 of this Report.]

[Page 55.]

Recommendation 20

That legislation be enacted which would have the general effect of the draft legislation contained in Part IV of this report; provided that the provisions which would give special protection to government and the individual guarantors should be deleted from the draft Guarantee Act if the Legislature decide that the special protection should be discontinued.

[Page 56.]

PART IV. Proposed Legislation

A. LAW OF PROPERTY ACT AMENDMENT ACT

Section 1

1(1) Except as provided in this Act, no legal or equitable interest in land can be created or disposed of except in writing signed by the person creating or disposing of the interest or by his agent duly authorized in writing.

Source: Recommendation 3(1), page 25.

(2) Subsection (1) does not apply to

(a) the creation or disposition of a lease under which the total of

(i) the term granted by the lease, and

(ii) all additional terms which the lessee is entitled to obtain under the lease

is three years or less,

(b) the termination of a lease by the operation of law, or

(c) the creation or disposition of a legal or equitable interest by operation of law.

Source: Recommendation 3(2), page 25, Recommendation 3(1), page 25, Recommendation 4, page 26-27, and Recommendation 5, page 27.

(3) A purported creation or disposition of an interest in land which does not satisfy the requirements of subsection (1) has no effect.

Source: Recommendation 4, page 26-27 and Recommendation 5, page 27.

NOTES

1. S. 1 is intended to apply to conveyances which are not registered under the Land Titles Act.

2. The writing would have to contain whatever is necessary for a conveyance. The proposed legislation does not say what that is. The general law about conveyances does so.

3. S. 1(3) is intended to make it clear that if there is no writing, there is no transaction.

4. The purpose of s. 1(2) is to except from the writing requirement of s. 1 all leases the original term of which is three years or less.

5. If a lease is originally for a term of more than three years, the fact that there is less than three years left to run would not bring the lease or a transfer of it within the exception created by the subsection. A transfer or surrender of the lease would have to be in writing.

6. If the original term of the lease is three years or less, but the lease includes a right of renewal so that the total term could exceed three years, s. 1(2) would exclude the lease from the exception created in s. 1(2), and the lease would have to be in writing.

Section 2

2(1) A contract for the sale or other disposition of interest in land is not enforceable unless:

(a) there is some evidence in writing which

(i) indicates that a contract has been made between the parties,

(ii) reasonably identifies the subject-matter of the contract, and

(iii) is signed by the party to be charged or his agent,

(b) the party to be charged acquiesces in conduct of the party seeking to enforce the contract which indicates that a contract, consistent with that alleged, has been made between the parties,

(c) there is conduct of the party to be charged which indicates that a contract consistent with that alleged has been made between the parties,

(d) either the party to be charged or the party seeking to enforce the contract has made and the other of the two parties has accepted a deposit towards the purchase price or payment of part of the purchase price, or

(e) the party seeking to enforce the contract

has, in reasonable reliance on the contract, changed his position so that, having regard to the position of both parties, an inequitable result can be avoided only by enforcing the contract.

Source: Recommendation 1, page 20.

(2) If any of clauses (a), (b), (c), (d) and (e) is satisfied, the contract be enforceable in all usual ways.

Source: Recommendation 1, page 20.

(3) Where a contract is not enforceable under subsection (1), a court may grant to the party alleging the contract such relief by way of restitution of or payment for any benefit received by the party to be charged as is just.

Source: Recommendation 2, page 21.

(4) Subsection (1) does not apply to a contract to create or dispose of a lease if the lease falls or would when granted fall within section 1(2)(a).

Source: Recommendation 4(b), page 27.

NOTES

1. If any of the alternative requirements of s. 2 is met a contract would be fully enforceable. This would clear up a doubt which exists under the present law.

2. S. 2(a) to (d) would relax the writing requirement and would add to the kinds of conduct which would make the contract enforceable.

3. S. 2(e) would provide a new grounds for enforcement.

4. S. 2(3) states the existing law.

Section 3

3 Section 3 of the Real Property Amendment Act, (U.K.), 8 and 9 Vict. c. 106, no longer applies in Alberta.

Source: Recommendation 6, page 27.

NOTE

Section 3 of the Real Property Amendment Act provides that certain conveyances of land are void at law unless made by deed.

Section 4

4 The Crown is bound by this Act.

Source: Recommendation 17, page 54.

NOTE

Section 4 would make it clear that the Crown could not enforce a contract if the proposed legislation would preclude any other person in the same position from doing so.

Section 5

5 Sections 1 to 4 do not apply to the creation or disposition of an interest in land or to a contract if the creation or disposition was completed or the contract entered into before the effective date of this Act.

Source: Recommendation 18, page 54-55.

Section 6

6 This Act comes into force on _____.

Source: Recommendation 19, page 55.

NOTE

1. It is recommended that the proposed Act come into force approximately three months after enactment so that it may be brought to public attention in the meantime.

B. THE GUARANTEE ACT

NOTE

If the Legislature decides that the special protection which the Guarantees Acknowledgment Act now gives individual guarantors should be discontinued, s. 1(b) and ss. 4-8 should be deleted.

Section 1

1 In this Act,

(a) "guarantee"

(i) means a deed, agreement or other undertaking under which one person undertakes an obligation to another person to pay an existing or future debt of a third person, whether or not the obligation is conditional upon the default of the third person, and

(ii) includes a guarantee given to protect the guarantor's own property.

(b) "legal adviser" means

(i) an active member of the Law Society of Alberta, and

(ii) if an acknowledgment under section 4 is made in a jurisdiction other than Alberta, a person who is entitled to carry on in that jurisdiction the practice of giving legal advice on contracts.

Source: For s. 1(a)(i) see Recommendation 12, page 50. For s. 1(a)(ii) see Recommendation 15, page 51-52. For s. 1(b) see Recommendation 11, page 44-45.

NOTE

S. 1(a)(ii) would include a limited class of "indemnities" at least some of which are now excluded from s. 4 of the Statute of Frauds by judicial interpretation and which are probably excluded from the Guarantees Acknowledgment Act as well.

Section 2

2 This Act does not apply to

(a) an agreement described in clause (a) of section 1 if

(i) the third person is discharged from liability for the debt,

(ii) the debt is secured by property which the person who enters into the obligation acquires as part of a single transaction, or

(iii) the debt is for rent or other money which will be payable under a lease which is assigned by the person who undertakes the obligation;

(b) a guarantee given by an agent to his principal of an obligation of a third person who is introduced by the agent to the principal or with whom the agent enters into a contract on behalf of the principal;

(c) a partnership agreement;

(d) a bond or recognizance given to the Crown or to a court or pursuant to a statute; or

(e) a contract of insurance to which the Insurance Act applies;

(f) a bill of exchange, cheque, or promissory note.

Source: Recommendation 14, page 51.

NOTES

1. The cases mentioned in s. 2(a) are cases in which the reasons for the requirements of the Statute of Frauds and the Guarantees Acknowledgment Act do not apply and in which the imposition of the requirements would constitute a trap.

2. The courts have exempted from the writing requirement of the Statute of Frauds what is referred to as a del credere agency. Section 2(b) would put the spirit of the exception into statutory form.

3. The exceptions in s. 2(c), (d) and (e) are in the existing Guarantees Acknowledgement Act. The proposed Act would exempt them from the simple writing requirement as well.

Section 3

3(1) A guarantee is not enforceable unless there is some evidence in writing signed by the party to be charged or by his agent which indicates that the party to be charged has given a guarantee to the party alleging the guarantee and which reasonably identifies the third person whose debt is the subject of the guarantee.

Source: Recommendation 9, page 32.

NOTE

1. The Statute of Frauds requires that there be "some Memorandum or Note" of the guarantee "in Writing". Section 3 would be less strict.

Section 4

4 Subject to section 6, no guarantee other than a guarantee given by a corporation has any effect unless the party who gives the guarantee

(a) appears before a legal adviser as defined in section 1(1)(b)

(b) acknowledges to the legal adviser that he executed the guarantee, and

(c) in the presence of the legal adviser signs a statement in the prescribed form on the certificate required by section 5.

Source: Recommendation 11, page 44-45;
Recommendation 13, page 50-51.

NOTE

1. S. 4 would carry forward GAA s. 3. However, while GAA s. 3 requires the acknowledgment to be made before a notary public, s. 4 of this draft would require it to be made before a "legal adviser" as defined in s. 1(1)(b). An active member of the Law Society of Alberta would be a "legal adviser" wherever the acknowledgment is taken. If the acknowledgment is taken outside Alberta, the "legal adviser" would have to be someone who is entitled to carry on the practice of advising on contracts in the jurisdiction in which the acknowledgment is made.

2. S. 4 is made subject to s. 6. Madam Justice Veit in the Gibbin case referred to in paragraph 4.8 thought that there

is a conflict between GAA s. 3, which says that a guarantee is ineffective unless the formalities are complied with and GAA s. 5 (which is the existing counterpart of our proposed s. 6), which says that an apparently regular certificate is conclusive proof that the formalities have been complied with. Although she had no difficulty in applying GAA s. 5, we think that the conflict might as well be resolved. As the point is one of drafting only, we have not made a formal recommendation about it.

Section 5

5(1) The legal adviser, after being satisfied by examination of the person entering into the guarantee that he understands the nature and extent of the guarantee obligation, shall issue a certificate in the prescribed form or to the like effect.

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

Source: Recommendation 11, page 44-45.

NOTE

1. S. 5 would carry forward the substance of GAA s. 4, with the substitution of a "legal adviser" for a notary public, and with the addition of the words "or to the like effect."

Section 6

6 Section 4 does not apply if the person to whom the obligation is incurred

(a) receives a certificate purporting to be issued under section 5 which is substantially complete and regular on the face of it, and

(b) has no reason to believe that the requirements of sections 4 and 5 have not been complied with.

Source: Recommendation 11, page 44-45.

NOTE

1. Section 6 would carry forward GAA s. 5. The words "purporting to be" have been added. The section has been revised to make it clear that the certificate will not establish the truth of its contents for all purposes, but only to show that the proposed Act is satisfied.

Section 7

7 The fee payable by a guarantor to a legal adviser for the issue of a certificate under section 6 shall not exceed $25.

Source: Recommendation 10, page 42.

NOTE

1. Section 7 would carry forward GAA s. 6 but would increase the maximum fee payable for the issue of a certificate.

Section 8

8 The Lieutenant Governor in Council may make regulations prescribing forms for the purposes of sections 4 and 5.

Source: Recommendation 11, page 44-45.

NOTE

1. Section 8 would carry forward GAA s. 7.

Section 9

9 The Crown is bound by this Act.

Source: Recommendation 17, page 54.

NOTE

S. 4 would make it clear that the Crown could not enforce a guarantee which an ordinary creditor could not enforce.

Section 10

10 The Guarantees Acknowledgment Act is repealed.

Source: Recommendation 20, page 56.

Section 11

11 This Act does not apply to a guarantee entered into before the effective date of this Act.

Source: Recommendation 18, page 54-55.

Section 12

12 This Act comes into force on _____.

Source: Recommendation 19, page 55.

NOTE

1. It is recommended that the proposed Act come into force approximately three months after its enactment so that it may be brought to public attention in the meantime.

C. FORMS REGULATION UNDER GUARANTEE ACT

1. The form in the Schedule is the form prescribed for the purposes of section 5 of the Guarantee Act.

SCHEDULE

FORM

GUARANTEE ACT

(Section 5)

CERTIFICATE OF LEGAL ADVISER

Pursuant to section 5 of the Guarantee Act, I hereby certify that

1 ..... of .....
in the province of.....,
the guarantor in the guarantee dated .....
made between the guarantor 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 understands the nature and extent of the obligation which he has undertaken by entering into and executing the guarantee.

GIVEN at ..... this ..... day of ....., 19..... under my hand.

.....

AN ACTIVE MEMBER OF THE LAW SOCIETY OF ALBERTA

OR

A LEGAL ADVISER ENTITLED TO CARRY ON IN THIS JURISDICTION THE PRACTICE OF GIVING LEGAL ADVICE ON CONTRACTS

STATEMENT OF GUARANTOR

I am the person named in this certificate.

Signature of Guarantor

Source: Recommendation 11, page 44.

Note: At present the prescribed form of certificate leaves a blank after the words "made between". In so doing, the form seems to lend itself to error, as there are three reported cases (Credit Foncier Franco-Canadien v. Edmonton Airport Hotel and Superstein (1965) 51 W.W.R. 431 (S.C.C.), Industrial Acceptance Corporation v. Hepworth (1965) 52 W.W.R. 555 (Alta. Q.B.), and Teachers' Investment and Housing Co-operative v. S.H. Properties Ltd. and Halabi, [1984] 6 W.W.R. 334 (Alta. Q.B.) in which the certificate has described the guarantee as being made between the principal debtor and the creditor although it should of course describe it as being made between the guarantor and the creditor. While the courts have had no difficulty in holding certificates valid despite such errors, we think that the occasion for the error might as well be removed. In the Halabi case Mr. Justice Sulatycky thought that there is a redundancy in requiring the certificate both to refer to the guarantee by date and to refer to it as being attached, but we are inclined to the view that each form of reference performs a useful office and that both should be retained.

D. THE STATUTE OF FRAUDS (INAPPLICABILITY) ACT

Section 1

1 The following no longer apply in Alberta:

(a) The Statute of Frauds (Eng.), 29 Car. II, c. 3, and

(b) sections 5, 6 and 7 of the statute of the United Kingdom known as 9 Geo. IV, c. 14.

Source: With respect to assignments of beneficial interests under trusts of personalty see Recommendation 8, page 29. With respect to part of s. 4 of the Statute of Frauds and ss. 5 and 6 of the 1828 Act see Recommendation 16, on page 53. See, in general, Recommendation 20 on page 56.

NOTE: We have concluded that all remaining provisions of the Statute of Frauds which would not be replaced by the proposed legislation are otiose.

Section 2

2 Section 7 of the Sale of Goods Act is repealed.

Source: Recommendation 7, page 28.

Section 3

3 Notwithstanding sections 1 and 2, the enactments referred to therein apply as if this Act had not been enacted, to contracts and representations made, creations and dispositions of interests effected, and transactions concluded, before the effective date of this Act.

Source: Recommendation 18, page 54-55.

Section 4

4 This Act comes into force on ----------.

Source: Recommendation 19, page 55.

Part V. Appendices

APPENDIX A

STATUTE OF FRAUDS

(1677) 29 Car. II. c. 3

(An Act for prevention of Frauds and Perjuryes)

For prevention of many fraudulent Practices which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury Bee it enacted by the Kings most excellent Majestie by and with the advice and consent of the Lords Sprituall and Temporall and the Commons in this present Parlyament assembled and by the authoritie of the same That from and after the fower and twentyeth day of June which shall be in the yeare of our Lord one thousand six hundred seaventy and seaven All Leases Estates Interests of Freehold or Termes of yeares or any uncertaine Interest of in to or out of any Messuages Mannours Lands Tenements or Hereditaments made or created by Livery and Seisin onely or by Parole and not putt in Writeing and signed by the parties soe makeing or creating the same or their Agents thereunto lawfully authorized by writeing, shall have the force and effect of Leases or estates at will onely and shall not either in Law or Equity be deemed or taken to have any other or greater force or effect, Any consideration for makeing any such Parole Leases or Estates or any former Law or Usage to the contrary notwithstanding.

II. Except neverthelesse all Leases not exceeding the terme of three yeares from the makeing thereof whereupon the Rent reserved to the Landlord dureing such terme shall amount unto two third parts at the least of the full improved value of the thing demised.

III. And moreover That noe Leases Estates or Interests either of Freehold or Terms of yeares or any uncertaine Interest not being Copyhold or customary Interest of in to or out of any Messuages Mannours Lands Tenements or Hereditaments shall at any time after the said fowler and twentyeth day of June be assigned granted or surrendered unlesse it be by Deed or Note in Writeing signed by the party soe assigning granting or surrendering the same or their Agents thereunto lawfully authorized by writeing or by act and operation of Law.

IV. And bee it further enacted by the authorities aforesaid That from and after the said fower and twentyeth day of June noe Action shall be brought whereby to charge any Executor or Administrator upon any speciall promise to answere damages out of his owne Estate or whereby to charge the Defendant upon any speciall promise to answere for the debt default or miscarriages of another person or to charge any person upon any agreement made upon consideration of Marriage or upon any Contract or[1] Sale of Lands Tenements or Hereditaments or any Interest in or concerning them or upon any Agreement that is not to be performed within the space of one yeare from the makeing thereof unlesse the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in Writeing and signed by the partie to be charged therewith or some other person thereunto by him lawfully authorized.

am. Mercantile Law Amendment Act 1856 (19 & 20 Vict. c. 97), s. 3:

> No special Promise to be made by any Person after the passing of this act to answer for the Debt, Default, or Miscarriage of another Person, being in Writing, and signed by the Party to be charged therewith or some other Person by him thereunto lawfully authorized, shall be deemed invalid to support an Action, Suit, or other Proceeding to charge the Person by whom such Promise shall have been made, by reason only that the Consideration for such Promise does not appear in Writing, or by necessary Inference from a written Document.

VII. And bee it further enacted by the authoritie aforesaid That from and after the said fower and twentyeth day of June all Declarations or Creations or Trusts or Confidences of any Lands Tenements or Hereditaments shall be manifested and proved by some Writeing signed by the partie who is by Law enabled to declare such Trusts by his last Will in Writeing or else they shall be utterly void and of none effect.

VIII. Provided alwayes That where any Conveyance shall bee made of any Lands or tenements by which a Trust or Confidence shall or may arise or result by the

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1 The word "or" is generally read as if it were "for".

Implication or Construction of Law or bee transferred or extinguished by an act or operation of Law then and in very such Case such Trust or Confidence shall be of the like force and effect as the same would have beene if this Statute had not beene made. Any thing herein before contained to the contrary notwithstanding.

IX. And bee it further enacted That all Grants and Assignments of any Trust or Confidence shall likewise be in Writeing signed by the partie granting or assigning the same [or[1]] by such last Will or devise or else shall likewise be utterly void and of none effect.

[1] interlined on the Roll.

XVI. And bee it further enacted by the authority aforesaid That from and after the said fower and twentyeth day of June noe Contract for the Sale of any Goods Wares or Merchandises for the price of ten pounds Sterling or upwards shall be allowed to be good except the Buyer shall accept part of the Goods soe sold and actually receive the same or give some thing in earnest to bind the bargaine or in part payment, or that some Note or Memorandum in writeing of the said bargaine be made and signed by the partyes to be charged by such Contract or their Agents thereunto lawfully authorized.

APPENDIX B

STATUTE OF FRAUDS AMENDMENT ACT

[LORD TENTERDEN'S ACT] (1828) 9 GEO. IV, C. 14, SS. 5, 6 and 7.

V. and be it further enacted, that no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during Infancy, unless such Promise or Ratification shall be made by some Writing signed by the Party to be charged therewith.

VI. And be it further enacted, That no Action shall be brought whereby to charge any Person upon or by reason of any Representation or Assurance made or given concerning or relating to the Character, Conduct, Credit, Ability, Trade, or Dealings of any other Person, to the indent or Purpose that such other Person may obtain Credit, Money, or Goods upon[1], unless such Representation or Assurance be made in Writing, signed by the Party to be charged therewith.

VII. And whereas by an Act passed in England in the Twenty-ninth Year of the Reign of Kind Charles the Second, intituled An Act for the Prevention of Frauds and Perjuries, it is, among other Things, enacted, that from and after the Twenty-fourth Day of June One thousand six hundred and seventy-seven, no Contract for the Sale of any Goods, Wares, and Merchandizes, for the Price of Ten Pounds Sterling or upwards, shall be allowed to be good, except the Buyer shall accept Part of the Goods so sold, and actually receive the same, or give something in earnest to bind the Bargain, or in part of Payment, or that some Note or Memorandum in Writing of the said Bargain be made and signed by the Parties to be charged by such Contract, or their Agents thereunto lawfully authorized: And whreas a similar Enactment is contained in an Act passed in Ireland in the Seventh Year of the Reign of King William the Third: And Whereas it has been held,

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1 The significance of the word "upon" is not clear.

that the said recited Enactments do not extend to certain Executory Contracts for the Sale of Goods, which nevertheless are within the Mischief thereby intended to be remedied; and it is expedient to extend the said Enactments to such Executory Contracts; Be it enacted, That the said Enactments shall extend to all Contracts for the Sale of Goods of the Value of Ten Pounds Sterling and upwards, notwithstanding the Goods may be intended to be delivered at some future Time, or may not at the Time of such Contract be actually made, procured, or provided, or fit or rready for Delivery, or some Act may be requisite for the making or completing thereof, or rendering the same fit for Delivery.

APPENDIX C

REAL PROPERTY AMENDMENT ACT

(1845) 8 & 9 Vict. c. 106

Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows; (that is to say,)

III. That a Feoffment, made after the said First Day of October, One thousand eight hundred and forty five, other than a Feoffment made under a Custom by an Infant, shall be void at Law, unless evidenced by Deed; and that a Partition, and an Exchange, of any Tenements or Hereditaments, not being Copyhold, and a Lease, requied by Law to be in Writing, of any Tenements or Hereditaments, and an Assignment of a Chattel Interest, not being Copyhold, in any Tenements or Hereditaments, and a Surrender in Writing of an Interest in any Tenements or Hereditaments, not being a Copyhold Interest, and not being an Interest which might by Law have been created without Writing, made after the said First Day of October One thousand eight hundred and forty-five, shall also be void at Law, unless made by Deed: Provided always, that the said Enactment so far as the same relates to a Release or a Surrender shall not extend to Ireland.

Appendix D

GUARANTEES ACKNOWLEDGMENT ACT

Chapter G-12

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

1 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,

(ii) a partnership agreement,

(iii) a bond or recognizance given to the Crown or to a court or pursuant to a statute, or

(iv) a guarantee given on the sale of an interest in land or an 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 a jurisdiction outside Alberta, a notary public in and for that jurisdiction.

2 This Act applies to guarantees entered into on or after September 1, 1969.

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

(a) appears before a notary public,

(b) acknowledges to 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 prescribed form.

4(1) The notary public, after being satisfied by examination of the person entering into 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 prescribed form.

(2) Every certificate issued under this Act shall be attached to or noted on 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 must not exceed $5.

7 The Lieutenant Governor in Council may make regulations prescribing forms for the purposes of this Act.

APPENDIX E

Alberta Regulation 476/81

GUARANTEES ACKNOWLEDGMENT ACT

Forms Regulation

1 The form in the Schedule is the form prescribed for the purposes of section 3 of the Guarantees Acknowledgment Act.

2. This regulation comes into force when the Revised Statutes of Alberta 1980 come into force.

SCHEDULE

FORM

GUARANTEES ACKNOWLEDGMENT ACT
(Section 3)

CERTIFICATE OF NOTARY PUBLIC

I HEREBY CERTIFY THAT;

1 ..... of .....
in the province 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)

A Notary Public in and for

.....

STATEMENT OF GUARANTOR

I am the person named in this certificate.

.....
Signature of Guarantor