“The Bank Holds the Hammer”: Power and Protection under Alberta’s *Guarantees Acknowledgment Act*

by

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Abstract

In this thesis, I examine the history and purpose of Alberta's *Guarantees Acknowledgment Act* (*GAA*). Through legal history and case analysis, I argue that the *GAA* contains assumptions about power and vulnerability that do not necessarily align with the practical reality of guarantee transactions.

In the first chapter of this thesis, I delve into the origins of the *GAA*. I argue that, having regard to the historical context of hostility towards lending institutions in Alberta in the 1930s, the *GAA* is premised on an understanding of guarantee transactions in which the guarantor is vulnerable relative to the lender. I discuss how this power imbalance is not always borne out in practice, and how the lender may in fact find itself the more vulnerable party. In the second chapter, I explore the campaign to reform the *GAA* in the 1980s in order to provide the guarantor with increased protection. I discuss how the media coverage of this campaign and legislative debate reflected the same understanding of power and vulnerability – in which the guarantor was vulnerable to the lender – as in the 1930s. Finally, in the third chapter, I consider potential issues of power and vulnerability between the guarantor and borrower. I use the phenomenon of relationship debt as a lens through which to explore how the *GAA* may fail to protect against a guarantor's vulnerability to the borrower.

The *GAA* contains certain assumptions about who has power and who requires protection in a guarantee transaction. I conclude that these assumptions are not always reflected in real-life transactions and may, in some instances, result in unjust outcomes and gaps in protection.

Dedication

In memory of Dr. George F. Round.

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Introduction

The title of this thesis is excerpted from the remarks of Progressive Conservative MLA Stan Nelson (Calgary-McCall) in the Legislative Assembly of Alberta on May 23, 1985. That afternoon, Nelson was speaking to his proposed amendments to the *Guarantees Acknowledgment Act.*[1] In discussing the nature of guarantee transactions, he stated: "The bank holds the hammer, and you are not given the opportunity to negotiate clauses in or out of it. The only part you are able to play is whether or not to sign."[2] Nelson referred to a lender (the bank) and a guarantor. But guarantee transactions, in legal terms, are contracts involving not two but three parties: a lender, who extends credit; a borrower, who receives credit; and a guarantor, who promises to pay if the borrower does not.[3] Nelson's description of the transaction distils the fundamental assumptions about power, protection, and vulnerability underlying the *GAA.* The bank holds all the power. The guarantor is – by comparison – effectively powerless. The borrower is not discussed.

In this thesis, I explore the power dynamics at the heart of the *GAA.* In Chapter I, I consider the presumed imbalance of power between guarantors and lenders as understood by the Alberta legislature and courts from 1939, the year of the *GAA*'s enactment, to 1985. I discuss the history of Alberta in the 1930s and the prevailing climate of public and political hostility towards lending institutions; the early interpretation of the *GAA* by the courts as a means of protecting guarantors; and the strange and unjust legal results occasionally produced by the failure to anticipate situations in which the presumed vulnerability of the guarantor and comparative power of the lender might not exist in reality. In Chapter II, I examine the 1980s campaign to amend the *GAA* to require a heightened degree of protection. I set out the history of this campaign, which was led in large part by a single MLA and by an Alberta entrepreneur who found himself embroiled in ligation after a business failure. I consider how both news coverage and legislative debate in this period echoed the early understanding of power and vulnerability, and how this understanding did not necessarily align with the reality of the litigation at the centre of the campaign. Finally, in Chapter III, I consider to what extent the *GAA* provides protection – or fails to provide protection – as between the guarantor and borrower. Reviewing a number of

[1] RSA 2000, c G-11 [*GAA*].
[2] Alberta, *Hansard,* 20-3, Vol 2 (23 May 1985) at 1130.
[3] See Kevin McGuinness, *The Law of Guarantee,* 3rd ed (Markham: LexisNexis, 2013) at §§1.1–1.2. That said, many guarantees are in practical terms really two-party transactions: see the discussion of this point in Chapter I.

Alberta cases involving relationship debt,[4] I argue that the *GAA* fails to offer real protection to a guarantor who is vulnerable as a result of a relationship with the borrower.

I conclude that the presumptions about power and vulnerability underlying the *GAA* both fail to reflect the reality of guarantee transactions and limit its effectiveness as a method of protection. It can protect a guarantor – in some cases. It can also be turned unfairly against a lender. And in certain cases, particularly where the guarantor's vulnerability arises from some connection with the borrower, it may offer no real protection at all.

Purpose of this Thesis

There are several things I am *not* doing in this thesis. I am not offering any opinion on whether the *GAA* itself should be retained or repealed. Nor am I carrying out any sort of comprehensive study of the law of guarantees in Alberta generally. Rather, I am specifically concerned with the history and origins of, and the legislative assumptions contained within, the *GAA*.

Despite the narrow focus of this thesis, I intend to do more than illuminate the history of one rather unremarkable statute. Delving into the assumptions about power and vulnerability "baked into" the *GAA* involves challenging assumptions about guarantees transactions generally.[5] Which party to a transaction is most likely to take advantage of another party's vulnerability or comparative lack of power? Is the guarantor always, and exclusively, in need of protection? If so, from whom? Academic literature recognises guarantees as a site of financial abuse and exploitation.[6] The history of the *GAA* and its body of case law challenges how we think about guarantees, including whom we view as powerful and as vulnerable, and to what extent the purported safety measure of providing a guarantor with information actually amounts to meaningful protection. The implications of my analysis extend beyond the law of guarantees.

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[4] See the definition of "relationship debt" in Chapter III.

[5] Although I discuss issues of power and vulnerability in this thesis, I am not proposing here to comprehensively examine the *GAA* through the lens of vulnerability theory. In my opinion, any such examination would amount to a much grander project and would require not only situating the *GAA* in its historical context, but probing into questions of debt and vulnerability (including gendered vulnerability) in Alberta generally: compare the analysis of Ellen Gordon-Bouvier in "Analysing legal responses to coerced debt" (2024) LS 1. See Chapter III for more discussion of the scope of (and limits on) my analysis.

[6] Susan Barkehall Thomas, Becky Batagol & Madeleine Ulbrick, "Intimate Partner Economic Abuse in Loans and Guarantees: An Empirical Review of 10 Years of Cases" (2023) [unpublished, Monarch University] at 7. See also generally Belinda Fehlberg, *Sexually Transmitted Debt* (Oxford: Oxford University Press, 1997) [Fehlberg, *Sexually Transmitted Debt*].

Within the field of commercial law generally, the *GAA* offers a case study in how an apparently reasonable and straightforward protective measure may fail to take into account hidden intricacies of power and vulnerability, and may produce unexpected complications in practice.

Literature on the *GAA*

Although the *GAA* has managed to consistently generate litigation over the decades,[7] it has not attracted much scholarly attention either in Alberta or elsewhere. There is very little literature to review.[8] Instead, I have drawn upon primary sources such as case law, *Hansard* records, archival records, and newspapers. Throughout this work, however, I refer frequently to the two reports prepared by the Alberta Law Reform Institute on the *GAA* in 1970 and 1985.[9] While I at times question some of the assertions and conclusions in these reports, they are thorough and useful studies. I have additionally relied on a number of historical studies of the Social Credit movement in Alberta. To repeat the historical investigation carried out by these authors would be well beyond the scope of this thesis.

Example Transactions

In this thesis, I use personal names when describing hypothetical transactions:[10] for instance, Gerald and Gina, guarantors, and Sophie, a commercially sophisticated borrower, and so on. I have adopted this practice in order to make these transactions easier for the reader to follow. Although these hypothetical transactions may broadly parallel the facts of actual reported cases, they are not intended to reflect any specific case or individual.

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[7] Vaughan Black, writing in the 1980s, observed that any study of litigation under the *GAA* "would involve the discussion of about 100 reported decisions": Vaughan Black, "The Strange Cases of Alberta's Guarantees Acknowledgment Act: A Study in Choice-of-Law Method" (1987) 11:1 Dalhousie LJ 208 at 215. The number has grown since then: my own research identified more than 350 Canadian decisions involving the *GAA* in some way.
[8] The most complete scholarly study of *GAA* cases is found in Black, *ibid*. This paper is concerned with conflict of laws decisions at common law, rather than the *GAA* specifically.
[9] Alberta Law Reform Institute, *Guarantees Acknowledgment Act, RSA 1970, c 173, 1970*, Report No 5 (Edmonton: ALRI, 1970) [ALRI, *1970 Report*]; Alberta Law Reform Institute, *The Statute of Frauds and Related Legislation,* Report No 44 (Edmonton: ALRI, 1985) [ALRI, *1985 Report*].
[10] I have borrowed this style of naming from the "Alice and Bob" characters frequently found in cryptography and other science literature: see RL Rivest, A Shamir & L Adleman, "A Method for Obtaining Digital Signatures and Public-Key Cryptosystems" (1978) 21:2 Comm ACM 96; Quinn DuPont & Alana Cattapan, "Alice and Bob: A History of the World's Most Famous Couple", online: <https://cryptocouple.com/Alice%20and%20Bob%20-%20DuPont%20and%20Cattapan%202017.pdf>.

Chapter I: "It Shocks One's Sense of Decency and Fair Play"[11]: Guarantor-Lender Relationships and the Legislative and Judicial Conception of Power Dynamics in Guarantees Transactions in Alberta

Introduction

In this chapter, I argue that the *GAA* deals with – and was expressly enacted in order to deal with – one extremely specific and narrow problem in guarantees transactions: a guarantor either recklessly or ignorantly signing a guarantee without understanding it, and ending up in an unexpectedly dire financial position as a result. Reviewing the (very short[12]) statute, the reader may ask what else it could possibly be expected to deal with.[13] However, some case law has suggested that the *GAA* in fact has an additional purpose: protecting lenders. I argue that this interpretation is not supported either by the (scant) information available with respect to the *GAA*'s origins or the early case law applying it. In fact, *GAA* implicitly conceives of the lender-guarantor relationship as *always* involving vulnerability on the part of the guarantor, and *exclusively* on the part of the guarantor.

I will first briefly discuss the nature of guarantees transactions and the requirements of the *GAA*. I will then discuss the historical context of the *GAA*'s enactment and its interpretation by Alberta courts from 1939 through to 1985. I have chosen the end date of 1985 because, as I discuss in the following chapter, the mid-1980s ushered in a protracted campaign to amend the *GAA,* accompanied by significant public and legislative discussion of its failings as a form of debtor protection. Before turning to this notable era in the history of Alberta guarantees law, it is important to understand what the legislature and courts understood the *GAA* to protect against,

[11] See *Great Western Garment Co v Kovnats* (19 December 1969), Edmonton 59462 (ABSC) at 7 [*Kovnats* SC] ("It shocks ones [*sic*] sense of decency and fair play to hear such a case.")
[12] In discussing the *GAA* in the 1980s, one MLA wryly observed that it is "amazingly brief. Somebody other than a legislator or a lawyer must have drafted it" (Alberta, *Hansard,* 20-3, Vol 2 (23 May 1985) at 1133).
[13] The 1970 ALRI report describes the *GAA* as "designed to protect the ordinary individual who, through lack of experience or understanding, might otherwise find himself subject to onerous liabilities at law, the nature and extent of which he did not properly appreciate when he entered into the undertaking in question" (ALRI, *1970 Report, supra* note 9 at 2). The 1985 report essentially repeats this statement of the *GAA*'s purpose (ALRI, *1985 Report, supra* note 9 at 35) and further notes that the *GAA* requirements are "intended for the protection of an unsophisticated individual against undertaking an ill-advised and improvident personal obligation" (*ibid* at 47). The writers of the 1985 report disagreed on whether the *GAA* should be retained. Those who argued in favour of repealing it complained that it was based on several improper assumptions, including that "a guarantor has a unique need for protective legal advice" (*ibid* 36). The *presumption* of vulnerability underlying the *GAA* is thus affirmed here, although the writers of this section were sceptical of the actual vulnerability of guarantors in practice (*ibid* at 37–38). I discuss this difference of opinion further in Chapter III.

and the limits of the *GAA*'s protections. Consistent with this, I will finally discuss the reported cases in which the *GAA*'s conception of power and vulnerability as between guarantor and lender has produced occasionally surprising and unjust verdicts.

Guarantees

Understanding the *GAA* requires, first of all, understanding what a guarantee is. The broadest definition is "a secondary promise by one person to be answerable for the performance of some legal obligation by another person."[14] The *GAA* defines a guarantee somewhat more narrowly as "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."[15] Under either definition the essential nature of the transaction is the same. (At common law, a corporation can of course give a guarantee:[16] the exclusion of corporate guarantees from the *GAA* definition is simply one of several statute-specific exemptions.[17]) Most often answering for somebody else's obligation means promising to pay a debt.[18] For example, Beatrice wants to borrow some money from LendCo. LendCo agrees to lend her the money, but requires that her friend Gerald give a guarantee. If Beatrice fails to pay back the debt, Gerald will be required to do so.[19] Gerald may

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[14] McGuinness, *supra* note 3 at §1.1.
[15] *GAA, supra* note 1*,* s 1(a).
[16] See e.g. *Royal Bank of Canada v Kaburda*, 1986 CanLII 1999 (ABQB) (corporation held liable on a guarantee).
[17] *GAA, supra* note 1, s 1(a)(i)–(iv). These exemptions were described in the 1970 ALRI report as a "motley list of exclusions" (ALRI, *1970 Report, supra* note 9 at 10). Previously debts owed to a hospital or bank or treasury branch under $500 were also expressly excluded (*The Guarantees Acknowledgment Act,* RSA 1955, c 136, s 3 [1955 *GAA*]); the *Hospitals Act,* RSA 2000, c H-12, s 30(1)(d) still excludes operation of the *GAA.* Some of these exclusions are unavoidable, since as the 1970 report observed, "bills of exchange, cheques and promissory notes are matters within federal jurisdiction and constitutional difficulties would arise from any attempt to bring them within the purview of this legislation" (ALRI, *1970 Report, supra* note 9 at 10). This report was critical, however, of the exclusion of guarantees "given on the sale of an interest in land or an interest in goods or chattels" and argued that it ought to be excised as a "technical" distinction (*ibid* at 12). This recommendation was reiterated in 1985 (ALRI, *1985 Report, supra* note 9 at 49–50).

A guarantee and an indemnity are distinct transactions and an indemnity is also not included in the *GAA* (ALRI, *1970 Report, supra* note 9 at 8). The 1970 report lamented the risk of "border-line cases" in which a transaction could be interpreted as either a guarantee or an indemnity, though it stopped short of recommending that the *GAA* be expanded to cover indemnities (*ibid* at 9–10). The 1985 Report, conversely, recommended their inclusion (ALRI, *1985 Report, supra* note 9 at 46). Besides this, the question of whether a particular guarantee is an *Alberta* guarantee, so as to fall under the *GAA*, is a recurring problem in case law: see Black, *supra* note 7.

None of these exclusions implicates the power dynamics at the heart of the *GAA* and I do not propose to discuss them in detail here, particularly since they have already been examined in the 1970 and 1985 ALRI reports. However, they are crucial for a practitioner to keep in mind.
[18] McGuinness, *supra* note 3 at §1.2.
[19] As McGuinness states, "a guarantee has a contingent character when viewed from the perspective of the surety, and is usually a form of performance security, when viewed from the perspective of the creditor": *ibid* at §1.5. As

agree to do this out of the goodness of his heart (or because Beatrice has pressured or coerced him),[20] or he may do so in return for some sort of compensation.[21]

In contrast to a simple loan transaction, there are more than two parties involved in a guarantee transaction: there is LendCo, the lender; Beatrice, the borrower; and Gerald, the guarantor.[22] Practically speaking, however, a great many guarantee transactions really involve only two parties. In *Tucson Properties Ltd v Sentry Resources Ltd*,[23] Master Funduk distinguished between a transaction in which a guarantor is "in fact, if not in law" identical to the borrower and a transaction involving a "third party guarantor."[24] I will refer to these different types of guarantors as "non-third-party guarantors" and "third-party guarantors".

Non-Third-Party Guarantors

As a matter of law, a guarantor and borrower cannot be the same person. In reality, however, a great many guarantee transactions are structured along the following lines: NumberCo, a small company, needs to borrow money from LendCo, and LendCo insists upon a guarantee of the debt from Sophie, who is the sole shareholder and director of NumberCo.[25] The borrower-company is not legally the same person as the guarantor-principal, but as a practical matter NumberCo and Sophie have access to the same information, want the same results, and will get effectively the same benefit from the guarantee. Sophie is obviously better off if her company has access to credit.[26]

Things can (and do) go wrong. Either LendCo or Sophie may engage in misrepresentation or coercion.[27] Either party may simply fail to understand what they are

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McGuinness notes, "[t]he secondary nature of guarantee obligations" raises unique legal issues, such as "to what extent must the creditor look primarily to the principal for performance": *ibid* at §1.6.

[20] See the discussion of borrower-guarantor coercion in Chapter III.

[21] See the discussion of accommodation sureties (guarantors) as opposed to compensation sureties in Chapter III, note 200.

[22] See Felicity Maher & Stephen Puttick, "Reconsidering Independent Advice: A Framework for Analysing Two-Party and Three-Party Cases" (2020) 43:1 UNSWLJ 218 at 220.

[23] 1982 CanLII 1218 (ABQB) [*Tucson*].

[24] *Ibid* at para 58. See also the discussion of guaranteeing corporate debts in ALRI, *1985 Report, supra* note 9 at 35, 37.

[25] For a real-life example of this kind of transaction, see e.g. *Pensionfund Properties Limited v RK Giblin & Associates Ltd*, 1984 CanLII 1179 (ABQB).

[26] McGuinness, *supra* note 3 at §1.4, §2.32 ("Where … the prosperity of the principal and debtor are clearly intertwined, the benefit to the principal may also be of direct benefit to the surety.")

[27] In using the term "coercion," I am referring generally to any sort of coercive behaviour, including undue influence and duress: see generally the discussion in McGuinness, *ibid* at §§11.7–11.64; Ted Tjaden, *The Law of Independent*

signing.[28] But as between the borrower and guarantor, this structure of guarantee does not, and inherently cannot, raise issues with respect to misrepresentation or coercion. You cannot inveigle or bully yourself into giving a guarantee.

Third-Party Guarantors

In other cases, the transaction involves three (or more) parties. Let us rewrite the transaction I have just described. In this version of events, Sophie is still the sole shareholder and director of NumberCo.[29] She approaches LendCo to request a loan to NumberCo. In this case, LendCo is not satisfied with a guarantee from just Sophie. It insists upon a guarantee from Sophie's wife Gina as well.

The presence of another party in fact as well as law means a much greater opportunity for things to go wrong. Sophie may coerce Gina into signing the guarantee. She may misrepresent the transaction to Gina: she may claim that NumberCo is on sounder financial footing than it really is, or that Gina's financial liability is less than it really is, or – at the extreme – that the guarantee is not actually a guarantee at all.[30]

In this chapter, we are concerned primarily with the relationship between the guarantor and the lender. I will discuss the issues that can arise between guarantors and borrowers in more detail in Chapter III. For now, we will simply keep in mind the distinction between non-third-party guarantors and third-party guarantors when we consider what kinds of harms the *GAA* was meant to protect against.

Legal Advice, 2nd ed (Toronto: Carswell, 2013) at 183–98; Belinda Fehlberg, *Sexually Transmitted Debt, supra* note 6 at 181–85; Gordon-Bouvier, *supra* note 5 at 6–8.

[28] Practically speaking, of course, it is rather unlikely that a sophisticated commercial lending institution would not understand the terms of a loan-guarantee transaction, but as we will see below it is not impossible for the lender to find itself the victimised party.

[29] There are also instances in which a guarantor nominally holds the position of a director-shareholder but has little understanding of or power over the corporation's affairs: see Janine Pascoe, "Women Who Guarantee Company Debts: Wife or Director?" (2003) 8:1 Deakin L Rev 13 at 22; see generally Belinda Fehlberg, "Women in 'Family' Companies: English and Australian Experiences" (1997) 15:6 Company & Sec LJ 348 [Fehlberg "Family Companies"]. As an example, see the case of *Imperial Bank of Canada v McLellan* (1933), [1934] 1 WWR 65, 1933 CarswellAlta 47 (ABSC) [*McLellan* cited to Carswell], which I discuss in Chapter III.

[30] See e.g. Fehlberg, *Sexually Transmitted Debt, supra* note 6 at 166 (remarking on a wife who "had no idea that she was providing security").

GAA *Protections*

The *GAA* applies to both kinds of transactions outlined above. As of 2024, it requires that a prospective guarantor appear before a lawyer, that the guarantor acknowledge that they signed the guarantee, and that the guarantor and lawyer sign a *GAA* certificate.[31] The lawyer before whom the guarantor appears must be "satisfied by examination of the person entering into the obligation that the person is aware of the contents of the guarantee and understands it."[32] No other Canadian jurisdiction features equivalent legislation to the *GAA*.[33]

Enactment of the *GAA*

What commentary there is on the *GAA* tends to regard its origins as a mystery. At most there is a vague suggestion that it may have had something to do with the Depression. S.W. Field's contemporary article sheds no light on the subject.[34] In 1970, only about thirty years on, the Alberta Law Reform Institute was forced to admit that "[w]e have been unable to find any evidence of the circumstances that gave rise to the original Act in 1939."[35] Though the report noted that the *GAA* was enacted "near the end of the depression in an era when the legislature enacted a great variety of statutes to protect debtors," it was "unable to say whether the Act was related to that protective programme."[36] In the mid-1990s, Master Funduk declared that "[n]obody now knows what triggered the creation of the Act but it is part of the consumer protection legislation that the legislators started passing in the depression."[37]

The mystery surrounding the origins of the *GAA* is not easily solved. There are no *Hansard* records from the 1930s or 1940s to shed light on the debates surrounding its enactment.[38] Newspaper reports from 1939 mention its enactment but do not mention any particular inciting incident (a case involving an unconscionable guarantee transaction, for

[31] *GAA, supra* note 1, s 3; *Guarantees Acknowledgment Forms Regulation*, Alta Reg 66/2003.
[32] *Ibid,* s 4.
[33] ALRI, *1970 Report, supra* note 9 at 3. *The Saskatchewan Farm Security Act,* SS 1988-89, c S-17.1, s 31 imposes similar protections with respect to farmland and farm assets only.
[34] SW Field, "The Limitation of the Right of Free Contract in Alberta" (1945) 6:1 UTLJ 86.
[35] ALRI, *1970 Report, supra* note 9 at 2–3.
[36] *Ibid* at 3.
[37] *Hongkong Bank of Canada v 414577 Alberta Ltd* (1995), 167 AR 321 at para 41 (ABQB). Master Funduk cited no source for this: he may have been relying on the 1970 ALRI report, which he cited with respect to the *GAA*'s purpose (*ibid* at para 42).
[38] *Hansard* records are not available in Alberta before 1972: "About Hansard", online: <https://www.assembly.ab.ca/assembly-business/transcripts/about-hansard>.

instance) which might have prompted concern on the part of the legislature.[39] It appears, however, that Premier William Aberhart regarded the *GAA* specifically as an instrument of guarantor protection. In a letter dated November 17, 1942, he described the legislative intention of the *GAA* as being "to give some protection to persons entering into guarantees, the effect of and the liability under which was not fully understood."[40] I argue that, viewed in the context of a public and political climate of intense hostility towards lending institutions, and taking into account the characterisation of early case law, the legislative purpose of the *GAA* clearly emerges as being to protect guarantors – and *only* to protect guarantors.

Public and Political Hostility Towards Lending Institutions

A detailed history of the rise of Social Credit in Alberta is beyond the scope of this thesis.[41] For our purposes, three points are important. First, the Depression of the 1930s afflicted Alberta severely. Second, a significant number of Albertans identified lending institutions as a direct cause of their suffering. Third, and crucially, the Social Credit movement embraced and validated this hostility.

Walter D. Young observes that "[i]t would be difficult to exaggerate the human misery and social dislocation occasioned by the depression in Canada."[42] The Depression caused enormous suffering in Alberta.[43] Public opinion connected the human suffering of the economic

[39] The *GAA*'s introduction was reported briefly along with other legislative news ("Expect House Will Conclude Session Friday", *Calgary Herald* (29 March 1939) 3 ("H.O. Haslam (SC), Nanton-Claresholm, introduced an act for acknowledgment of certain guarantees."); "Many Bills Are Read for Third Time", *The Edmonton Bulletin* (29 March 1939) 11; "Alberta Legislature", *The Calgary Albertan* (29 March 1939) 2; "Under The Dome", *Edmonton Journal* (29 March 1939) 13). No substantive discussion of the *GAA* accompanied the reports.
[40] Letter from William Aberhart to HM Jenner (17 November 1942), Edmonton, Provincial Archives of Alberta (Premiers' Papers) [Aberhart to Jenner].
[41] Several such histories have been written. See CB Macpherson, *Democracy in Alberta: Social Credit and the Party System,* 2nd ed (Toronto: University of Toronto Press, 1962); John Irving, *The Social Credit Movement in Alberta* (Toronto: University of Toronto Press, 1959).
[42] Walter D Young, *Democracy and Discontent: Progressivism, Socialism and Social Credit in the Canadian West,* 2nd ed (Toronto: McGraw-Hill Ryerson, 1978) at 48.
[43] Scholars have argued that Alberta was uniquely vulnerable to, and more affected by, the Depression than other provinces: see Irving, *supra* note 41 at 335; Young, *supra* note 42 at 44 ("The effects of the depression were not the same across the country. The people most severely affected were those engaged in the production of primary products and those out of work. The average annual income of most people fell, but in Saskatchewan, Alberta, Manitoba and British Columbia it fell drastically.") See also Virginia Torrie, "Federalism and Farm Debt during the Great Depression: Political Impetuses for *The Farmers' Creditors Arrangement Act, 1934*" (2019) 82:2 Sask L Rev 203 (discussing farm debt specifically).

downturn with lending institutions. John A. Irving, writing on the rise of Social Credit, observes that by autumn 1932,

> [t]he farmers of the province had experienced every possible agricultural ordeal; they had been made the playthings of the high tariff manipulators; they had built up markets in the United States only to have them ruthlessly cut off; they had suffered drought and every agricultural pestilence from root-rot to grasshoppers; they had seen prices drop to such incredibly low levels that sometimes it did not pay to haul their produce to market. Under such circumstances, they found it well-nigh impossible to keep up the payments on their heavily mortgaged farms. The discouraged farmers, looking for some tangible cause for all their miseries, focused their resentment and hate upon the banks and loan companies.[44]

Inflaming the problem, lending institutions declined to cooperate with government attempts at debt adjustment.[45] Field, in his relatively contemporary analysis, expressly links limitations on lenders' rights and attempts at protecting borrowers (including the *GAA*) partly with "the years of agricultural depression, the insistence of the creditors upon their contractual rights, and the growth of a strong sentiment among the debtor majority that creditors as a class were oppressive and unjust."[46] Irving argues that the hostility towards lending institutions in fact predated the Depression, thought it was intensely aggravated by the economic downturn.[47] Francis Swann, conversely, suggests that "[t]he crushing burden of debt made it seem to many farmers that 'the 'friendly banker' disappeared, transferred to some other locality, and was replaced by a very different kind of person. … His duty was 'to collect'.'"[48] Regardless, "it is not surprising," Irving suggests, "that thousands of people had developed embittered and hostile attitudes towards both

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[44] Irving, *supra* note 41 at 4. See also Irving, *ibid* at 237 ("With the financial position of the farmers steadily deteriorating, their creditors began to press, ever more relentlessly, for the repayment of debts. In interviews with farmers from widely separated regions of Alberta, the story is always the same: the banks and mortgage and machinery companies closed in on the hard-driven farmers."); Macpherson, *supra* note 41 at 144 ("The depths of sudden poverty and insecurity to which almost the whole community had been reduced by the drop in the prices of the goods they produced, and by the consequently overwhelming problem of farm debt, had created an extraordinarily receptive and responsive audience for social credit doctrine."); F Richard Swann, *Progressive Social Credit in Alberta, 1935–1940* (PhD Dissertation, University of Cincinnati, 1971) [unpublished] at 256 ("When the mention of banks and monopolies occurred, the farmer immediately identified his enemies in Eastern Canada. The farmer was a small capitalist and supported the free enterprise system, but he felt the need for protection against the unfeeling mortgage and loan corporations during the depression.") Similar attitudes prevailed amongst retail sellers, who "felt that they were caught in a gigantic squeeze between the farmers and the wholesalers, with the banks applying ever-increasing pressure" (Irving, *supra* note 41 at 242).

[45] Irving, *supra* note 41 at 237–38.

[46] Field, *supra* note 34 at 86.

[47] Irving, *ibid* at 235–36.

[48] Swann, *supra* note 44 at 206, quoting NB James, *The Autobiography of a Nobody* (Toronto: JM Dent, 1947) at 147.

the government and the monetary and financial system."[49] The theme that emerges from this commentary is of the average person being victimised (or at least perceiving themselves as being victimised) by the bank, without any recourse.

The economic theory underlying the social credit movement was first developed by Major Clifford Hugh Douglas.[50] The theory itself was essentially nonsense.[51] Crucially, however, "[o]ne of the cornerstones of social credit was condemnation of the business and financial interests who, it was claimed, were responsible for the perversion of the free enterprise system that produced depressions."[52] Aberhart embraced social credit – or at least a somewhat simplified and distorted version[53] – and his Social Credit party rose to power in Alberta in 1935.[54] Young expressly links Aberhart's rise to the public fury at financial institutions: "Aberhart's brand of social credit explained the deficiencies of the system in terms [Albertan farmers] understood, laying all the blame at the foot of the financiers."[55]

Aberhart did not succeed in actually implementing social credit theories in Alberta.[56] Although his government offered up several pieces of legislation aimed at "bringing the power of finance under control,"[57] these were either disallowed or held to be unconstitutional.[58] Swann argues that the finding that the *Bank Taxation Act,*[59] *Credit of Alberta Regulation Act, 1937,*[60] and *Accurate News and Information Act*[61] were unconstitutional[62] "brought to an end attempts,

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[49] Irving, *supra* note 41 at 335.
[50] *Ibid* at 5.
[51] On this point, see e.g. Macpherson, *supra* note 41 at 96, referring to "the complete fallacy of the social credit monetary theory."
[52] Young, *supra* note 42 at 89.
[53] On Aberhart's (mis)understanding of Douglas's theory, see Macpherson, *supra* note 41 at 149:

> The Douglas theory of the cultural heritage, the case against the financial system, and the technical economic analysis of money, credit, and prices, all strained through Aberhart's powerful and less sophisticated mind, issued in a doctrine cruder and more forceful than the original, and always directly related to the immediate Alberta problem. Douglas's diffuse social and economic doctrine was reduced to a few stereotypes of high emotional and low intellectual content, suitable for proselytizing.

See also Young, *supra* note 42 at 88.
[54] For a very detailed history, see particularly Irving, *supra* note 41.
[55] Young, *supra* note 42 at 97. See also Swann, *supra* note 44 at 107 ("One of the most insistent themes of this and other pronouncements of Aberhart as that the shortage of purchasing power was caused by the financial system or 'the fifty big shots.' To the long term unemployed, the evicted, and to the bankrupt farmer this message explained exactly the terrible conditions under which they struggled.")
[56] See generally Swann, *supra* note 44; Young, *supra* note 42.
[57] Macpherson, *supra* note 41 at 201.
[58] Swann, *supra* note 44 at 193; Young, *supra* note 42 at 98–99
[59] Bill 1, *An Act respecting the Taxation of Banks,* 5th Sess, 8th Leg, Alberta, 1937.
[60] Bill 8, *An Act to Amend and Consolidate The Credit of Alberta Regulation Act,* 5th Sess, 8th Leg, Alberta, 1937.
[61] Bill 9, *An Act to Ensure the Publication of Accurate News and Information,* 5th Sess, 8th Leg, Alberta, 1937.
[62] *Reference re Alberta Statutes* (1938), [1938] SCR 100 (SCC); *Attorney General of Alberta v Attorney General of Canada*, [1938] UKPC 46.

such as they were, to implement social credit in Alberta,"[63] and that between 1938 and 1940 (the next provincial election), "the Social Credit government turned its attention and interests away from creating a new economic order."[64] Young similarly argues that "[b]y 1939 it was clear to most observers that there would be no social credit in Alberta."[65] Instead, Aberhart's government offered up practical, progressive legislation in a variety of areas,[66] including with respect to debt relief[67] – a legislative programme which Swann suggests produced "real financial relief for many citizens."[68]

It was in this period that the *GAA* was enacted.[69] Although I have found no legislative record of the debates or discussion surrounding its enactment, apart from Field's assertion that it "was passed without serious opposition,"[70] it does seem of a piece with the programme described above: a practical, unremarkable bit of legislation intended to assist the average person in dealing with the bank.[71] Assessing it in the context of both this programme and the climate of intense hostility towards lending institutions, it seems reasonable to conclude that what essentially underlies the *GAA* is a view of the guarantor as vulnerable, and the bank as comparatively powerful. The legislative concern was how to protect the former from the latter.

Early Cases and Commentary on the GAA

There are relatively few cases dealing directly with the *GAA* in the decades immediately following its enactment.[72] Of these cases, even fewer discuss it in any detail. In 1964, in *Crédit*

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[63] Swann, *supra* note 44 at 193.
[64] *Ibid* at 199.
[65] Young, *supra* note 42 at 99.
[66] See Swann, *supra* note 44 at 202–54.
[67] *Ibid* at 205.
[68] *Ibid* at 207.
[69] Bill 95, *An Act Providing for the Acknowledgment of Certain Guarantees,* 8th Sess, 8th Leg, Alberta, 1939.
[70] Field, *supra* note 34 at 95.
[71] It is notably included in Field's analysis of protective legislation: Field, *supra* note 34.
[72] I have identified merely ten reported cases involving the *GAA* decided between 1939 and 1969: *Amerongen v Hamilton* (1957), 22 WWR 377 (AB Dist Ct); *Goodyear Tire and Rubber Co of Canada Ltd v Knight* (1960), 33 WWR 287 (ABSC(AD)); *Crown Lumber Co v Engel* (1961), 36 WWR 128 (ABSC(AD)); *Imperial Bank of Canada v Latham* (1962), 41 WWR 33 (ABSC(AD)) [*Latham*]; *Crédit Foncier Franco-Canadien v Edmonton Airport Hotel Co Ltd* (1964), 43 DLR (2d) 174 (ABSC) [*Crédit Foncier* SC]; *Crédit Foncier Franco-Canadien v Edmonton Airport Hotel Co Ltd* (1964), 47 DLR (2d) 508 (ABSC(AD)), aff'g *Crédit Foncier* SC [*Crédit Foncier* AD]; *Crédit Foncier Franco-Canadien v Edmonton Airport Hotel Co Ltd* (1965), [1965] SCR 441 (SCC), aff'g *Crédit Foncier* AD; *Industrial Acceptance Corporation Limited v Hepworth Motors Ltd* (1965), 52 WWR 555 (ABSC) [*Hepworth Motors*]; *Charterhouse Leasing Corporation Limited v Sanmac Holdings Ltd* (1966), 58 DLR (2d) 656 (ABSC) [*Sanmac Holdings*]; and *General Tire & Rubber Company of Canada Limited v Finkelstein* (1967), 62 WWR 380 (ABSC) [*General Tire*]. Possibly there are more such cases, but I have been unable to locate them if so.

Foncier Franco-Canadien v Edmonton Airport Hotel, the Court identified the purpose of a *GAA* certificate as being "to ensure that a party signing a guarantee is aware of and understands the contents of the guarantee."[73] A few years later, in *General Tire & Rubber Co of Canada v Finkelstein*, the Court similarly stated that "the purpose of the Act is that the guarantor will have his liability explained to him."[74] Courts were willing to find guarantees of no effect if the *GAA* was not complied with.[75] These remarks seem to affirm the view that the *GAA*'s purpose was to protect the guarantor from the risk of entering into an unwise transaction.

Field, discussing the *GAA* in his 1945 article, identified it as "a new method for the protection of the debtor."[76] Although noting that the *GAA* would also protect "[t]he honest creditor" from an unscrupulous guarantor pleading "that the contents of the documents were misrepresented, that its nature was misunderstood, and that the guarantor believed himself to be signing not a guarantee but a mere recommendation of the debtor, or some similar document,"[77] Field appears – like the courts above – to have regarded it as primarily intended to protect the guarantor, with any benefit to lenders being a happy side effect.[78] Notably, however, Field raised the possibility that the guarantor might require protecting from the borrower as much as from the lender, referring to cases in which guarantors entered into transactions based on "the general representation of either the creditor *or the primary debtor* that the guarantee was a mere form and that he would never be called upon to implement it."[79] As I discuss in Chapter III, it does not

[73] *Crédit Foncier* SC, *ibid* at 183.
[74] *General Tire, supra* note 72 at 383.
[75] For a sampling of early cases in this line, see *Latham, supra* note 72; *Hepworth Motors, supra* note 72; *Sanmac Holdings, supra* note 72; *General Tire, ibid*.
[76] Field, *supra* note 34 at 94.
[77] *Ibid* at 95. As I discuss both in Chapter III of this thesis and elsewhere, a *GAA* interview may not be quite as effective at this as one might hope: see my discussion of the limits of the *GAA* interview in Rachel Weary, "'That Must Be a Nice Document To Have': *Non Est Factum* and Section 5 of the *Guarantees Acknowledgment Act*" (2024) [unpublished]. In this paper, I observe that Alberta courts have failed to adopt a consistent position on whether section 5 of the *GAA* precludes a plea of *non est factum* by a guarantor. I suggest, however, that the characterisation of section 5 as barring *non est factum* reflects a misinterpretation of the *GAA*.
[78] See, similarly, ALRI, *1970 Report, supra* note 9 at 4–5 ("[W]e believe that, were the Act repealed, a significant minority of persons would sign guarantees without appreciating the nature and extent of the legal obligation thereby undertaken. … Further, it is our opinion that proper compliance with the Act as present constituted affords some useful assurance for creditors with respect to the enforceability of their rights under guarantees.") In this view, the main thrust of the legislation is protecting the guarantor. The fact that it may also benefit the lender is pleasant but incidental.
[79] Field, *supra* note 34 at 95 [emphasis added].

appear that the *GAA* is in fact particularly effective at protecting against borrowers. The crucial point, however, is that it is the *guarantor* who requires protecting.

***The Complementary Purpose of the* GAA**

Some more recent cases on the *GAA* have suggested that it serves an additional, complementary purpose: protecting the bank. In *Alberta Agricultural Development Corp v Tiny Tym's Poultry Ltd*,[80] the Court claimed that the *GAA* "was enacted for the protection of both guarantors and creditors. The requirements of the Act ensure that a guarantor is aware of the liabilities created by the guarantee and protects creditors from spurious defences of *non est factum*."[81]

There is reason to question whether this is a correct characterisation. The legislature which first enacted the *GAA* was, to say the least, not especially concerned with protecting banks. The Aberhart government's attitude towards creditors was one of hostility, not benevolent protection. The most persuasive argument that the *GAA* protects the bank arises from section 5 of the *GAA*. Section 5 states that a *GAA* certificate that is "substantially complete and regular" and "accepted in good faith" by the lender is "conclusive proof that [the *GAA*] has been complied with."[82] Following the addition of section 5, one court asserted that "the Act now serves not only to give basic protection to the ordinary individual, but also … the creditor guaranteed is spared from spurious pleas of non est factum."[83] This provision, however, was not added to the *GAA* until 1969.[84] Moreover, there is no consensus in Alberta case law that section 5 eliminates a defence of *non est factum.*[85] While section 5 does unquestionably protect lenders from one possible defence, the defence in question is that the *GAA* was not complied with. In other words, it is protecting lenders from a problem that would not exist but for the *GAA* itself.[86] That is hardly consistent with equally protecting both guarantors and lenders.

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[80] 1989 CanLII 3157 (ABQB).
[81] *Ibid* at para 28.
[82] *GAA*, *supra* note 1, s 5.
[83] *Teachers' Investment and Housing Co-operative v SH Properties Ltd*, 1984 CanLII 1192 at para 22 (ABQB) [*Teachers' Investment*]. See Black, *supra* note 7 at 235, describing *Teachers' Investment* as identifying "an ancillary purpose."
[84] Bill 28, *An Act providing for the Acknowledgment of Certain Guarantees,* 2nd Sess, 16th Leg, Alberta (assented to 7 May 1969), SA 1969, c 41.
[85] See Weary, *supra* note 77. For a case in which a court considered a plea of *non est factum* despite compliance with the *GAA,* see e.g. *Business Development Bank v 1956680 Alberta Inc*, 2021 ABQB 141.
[86] See *Alberta (Treasury Branches) v Ronsdale Construction Inc*, 1984 CanLII 1251 at para 71 (ABQB):

Failures of Protection under the *GAA*

At first glance, the *GAA*'s purpose as I have articulated it may seem reasonable enough. If you are signing a guarantee, you probably do not know as much about what you are signing as the bank does. In the average case, probably the presumed power dynamics underlying the *GAA* are in fact borne out in practice. A look at reported cases involving the *GAA*, however, reveals that in at least a few cases, the presumption is incorrect – with troubling results.

Field's article was optimistic that the *GAA* might also protect against attempts by guarantors to evade their obligations.[87] In fact, however, there are cases in which a sufficiently adept guarantor has been able to put the bank on its back foot by judicious use of the *GAA*'s provisions. The effect of the *GAA* in these cases is to not merely ameliorate but actually invert the presumed power imbalance as between guarantor and lender: it is the lender that finds itself bewildered and stuck with an unexpected financial loss. The failure to anticipate or guard against such a situation reflects the fundamental conception of power dynamics underlying the *GAA*, in which it is the guarantor who is always and exclusively vulnerable in a guarantee transaction. As we see below, the reality is that the lender may occasionally need to be protected against a guarantor.

The unreported case of *Great Western Garment Co Ltd v Kovnats* is notable here. In this case, the defendant guaranteed a debt owed by his company to the plaintiff lender. The lender supplied the defendant with a guarantee form to be completed. It appears from the Court's findings of fact that, with the collusion of the notary public, the defendant deliberately delayed giving the guarantee until after statutory amendments to the required form of the *GAA* certificate

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> If a guarantor could, without more, rebut the truth of the statements in the certificate, a creditor would be forced to conduct his own investigation to ensure that the requirements of the Act had been complied with and that the guarantor did understand he was giving a guarantee, if the creditor wanted to be assured he had an enforceable guarantee. That would obviously be placing an onerous burden on the creditor. *As the Act was designed for the protection of guarantors* it would be illogical to place a burden on creditors to ensure that the protective mechanism was in fact implemented in each case. It would be unfair to impose a burden on the creditor to police each transaction. [emphasis added]

Note the holding of the Alberta Court of Appeal in *Rawluk v Royal Bank of Canada*, 1992 ABCA 165 at para 10 [*Rawluk* CA] that the basic requirement of a *GAA* certificate cannot be waived by the lender:

> It was said for the Bank that the purpose of the statutory requirement for a notarial certificate was merely to benefit the Bank by offering a summary means of proof of compliance. This benefit could be waived, it was argued, and the case proved another way. We do not agree. We think that the mandatory certificate attached to the guarantee document has a broader office: it assures not only the Bank but also the guarantor and others of the validity of the guarantee from the time of execution. It is not something that can be waived by the creditor.

This holding relates to the existence of a *GAA* certificate at all, rather than the conclusive effect of a certificate under s 5 of the *GAA.* See also ALRI, *1970 Report, supra* note 9 at 18 ("This provision [section 5] is aimed at preventing mere technicalities being raised as a defence under the Act").

[87] Field, *supra* note 34 at 95.

had come into effect, with the result that the lender's form no longer complied with the *GAA* requirements.[88] The Court was obliged to find that the guarantee had no effect.[89] "It shocks ones [*sic*] sense of decency and fair play to hear such a case," remarked the presiding judge.[90] But the decision was affirmed on appeal.[91] Decades on, an occasional guarantor is still able to make similarly creative use of the *GAA*. In *Bharwani v Chengkalath*,[92] the defendant was asked to provide a guarantee and collateral mortgage in connection with her husband's purchase of an accounting practice. She refused to do so and instead provided an "Acknowledgment of Indebtedness," which the vendors' lawyer accepted. Although the defendant was a practicing lawyer, she apparently did not realise the *GAA* would also apply to this document. She was subsequently able to avoid liability by, as the Court put it, "rely[ing] on her own error of law" to have the "Acknowledgment" declared of no effect due to noncompliance with the *GAA*. Both the trial judge and the Court of Appeal found that the provisions of the *GAA* could not be waived as a matter of public policy.[93]

By 1970, when ALRI produced its first report, concerns about the *GAA* being misused to the detriment of lenders were evidently fairly widespread. The writers of the report noted comments from lawyers describing the *GAA*

> as "an overwhelming nuisance", "a snare or trap", as "providing an escape for people who have a change of mind about the obligations which they accept, rather than protecting the foolhardy from their own indiscretions", as "creating more problems than it has solved", and as having "permitted a great number of injustices to be perpetrated".[94]

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[88] *Kovnats* SC, *supra* note 11 at 5 ("Is it just a curious coincidence that the guarantee was executed on the 18th day of July shortly after the amendments to the Act came into force? I think not.")
[89] *Ibid* at 7.
[90] *Ibid*. The plaintiff had the small consolation that the Court declined to award costs to the triumphant defendant (*ibid* at 8). Justice O'Byrne was so perturbed by his own decision that he took the step of forwarding a copy to the Deputy Attorney General (Letter from Justice Michael O'Byrne to John E Hart, QC (22 January 1970), Edmonton, Provincial Archives of Alberta (acc GR1979.0289, file 1257)).
[91] *Great Western Garment Co v Kovnats* (25 February 1970), Edmonton 59462 (ABSC(AD)). This case was briefly discussed in the 1970 ALRI report with respect to the duty and potential liability of notaries (ALRI, *1970 Report, supra* note 9 at 15–16).
[92] 2006 ABQB 843 [*Bharwani* QB].
[93] *Bharwani* QB at para 33; *Bharwani v Chengkalath,* 2008 ABCA 148 at para 28. See the discussion of this case in Jonnette Watson Hamilton, "The Guarantees Acknowledgement Act and Equity" (16 May 2008), online (blog): <https://ablawg.ca/2008/05/16/the-guarantees-acknowledgement-act-and-equity/> ("This result might seem unfair, but it is a typical result that follows from the application of a rule of general application applying to situations unforeseen by the legislature.")
[94] ALRI, *1970 Report, supra* note 9 at 3. But see ALRI, *1985 Report, supra* note 9 at 35 ("We do not think that the Guarantees Acknowledgment Act as it now stands is unfair to creditors.")

Courts in the early 1980s appears to have been well aware of (and distinctly unimpressed by) the use of the *GAA* to wriggle out of obligations. In *Canadian Imperial Bank of Commerce v Country Lane Furniture Warehouse (Wetaskiwin) Ltd*,[95] the Court asserted that the *GAA* "has no doubt been used in many instances by guarantors to avoid their obligations to creditors."[96] In *Tucson*, the Court complained of a "a tendency for defendants being sued on guarantees to automatically allege that the guarantee, if given, does not comply with the Guarantees Acknowledgment Act."[97] The judicial perception of the *GAA* had evidently evolved: it was now viewed as a way of stymieing creditors who were entitled to their money.[98]

The reader may not feel much sympathy for lenders who lose out against guarantors – even guarantors who are not very scrupulous. After all, a lending institution is typically a large, sophisticated corporation and can afford to retain legal counsel to protect itself. If it chooses to rely on the good faith and honesty of its customers, it does so rather naïvely and at its own risk. But it is easy to envision a situation where the lender is more sympathetic and the failure to take care more understandable.

Let us go back to our example of Sophie and NumberCo. Remember that Sophie is the sole director and shareholder of NumberCo. In this version of events, Sophie does not approach a lending institution for a loan. She instead approaches her elderly father, Leonard.[99] Leonard agrees to lend money to NumberCo and, after chatting about the transaction with a friend, decides that he had better get a guarantee from Sophie, "just as a formality." Neither Sophie nor

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[95] 1981 CanLII 1056 (ABQB).
[96] *Ibid* at para 7.
[97] *Tucson, supra* note 23 at para 52.
[98] Master Funduk, in particular, regularly and acerbically condemned what he regarded as spurious attempts to invoke the *GAA*: see e.g. *Bank of British Columbia v Sanregret*, 1987 CanLII 3457 at para 5 (ABQB) ("In his statement of defence the defendant raises various defences, including the intellectually obnoxious defence that the note is a guarantee and does not meet the requirements of the Guarantees Acknowledgment Act. I would assume counsel for the defendant has not read the Act, or else thinks the Court is bereft of any intelligence."); *AGT Autotrans Group Inc v 582813 Alberta Ltd*, 1998 ABQB 244 at para 24 ("Welch also pleads that what he gave is a guarantee so it is not enforceable because the Guarantees Acknowledgments Act was not complied with. This constant, wearying defence by indemnitors has no merit."); *Canadian Imperial Bank of Commerce v Gibert*, 1999 ABQB 283 at para 25 ("Once again that hoary defence of non-compliance with the Guarantees Acknowledgment Act is raised.").
[99] The risks associated with loans (and for that matter, guarantees) between elderly parents and adult children have been well-documented: see e.g. Juliet Lucy Cummins, "Relationship Debt and the Aged" (2002) 27:2 Alternative LJ 63; Canadian Centre for Elder Law Studies, *Financial Arrangements Between Older Adults and Family Members: Loans and Guarantees,* CCELS Report No 1, BCLI Report No 32 (2004) [CCELS, *Loans and Guarantees*].

Leonard knows much about the law of guarantee transactions,[100] although Sophie understands she will have to pay back the money if her company cannot do so, and both are uncomfortable with the idea of hiring a lawyer for what is supposed to be a friendly transaction between family members. In any case, lawyers cost money. They find a standard-form loan agreement and guarantee on the Internet, print them off, and sign them. Soon after, NumberCo runs into financial difficulties. It fails to repay Leonard's loan. Leonard cannot afford to lose the money and, reluctantly, is forced to sue on the guarantee. Sophie is in dire financial straits herself and cannot afford to pay him back. At this point, she talks to a lawyer and discovers that pleading the *GAA* can save her from having to do so. Nobody has done anything unscrupulous here. Nobody has consciously tried to take advantage of anybody else.[101] But rather than protecting the guarantor, the *GAA* has instead offered a way for the guarantor to escape her obligations at the lender's expense.

This kind of unfortunate outcome may be the unavoidable cost of having protective legislation for guarantors.[102] You cannot protect a debtor as contemplated by the *GAA* without providing some kind of penalty for failing to comply with the statutory requirements, and because the penalty is that the guarantee is rendered of no effect, the guarantor is incentivised to show a reason why the *GAA* was not complied with. If the guarantor or their associate can engineer such a situation, as in *Kovnats*, so much the better for the guarantor. Certainly, the "automatic" invocation of the *GAA* complained of by Master Funduk appears impossible to avoid. If you offer a possible defence, people will plead it. The outcome in *Kovnats* challenges the assumption, which I have argued underlies the *GAA,* that the guarantor is always vulnerable relative to the lender. In some cases, as in the hypothetical transaction above, the vulnerability may be on both sides. In some cases, it may in fact be on the lender's.

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[100] As was observed in the 1985 ALRI report, "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" (ALRI, *1985 Report, supra* note 9 at 35).
[101] The reality that financial disaster may result even where "[t]here is no exploitation or financial abuse" was noted in CCELS, *supra* note 99 at 2, with respect to a hypothetical transaction between a parent and two adult children.
[102] I wish to add a cautionary note here. Although I am challenging the presumed power dynamics under the *GAA* in this section, this certainly does not mean that lenders will *never* be in a position of power relative to the guarantor, or even that this will not be the case most of the time.

Conclusion

In this chapter, I have sketched a brief history of the prevailing public and political attitudes towards lending institutions at the time of the *GAA*'s enactment. I have argued that this historical context, coupled with the early interpretation of the *GAA*, suggests that it was – as interpreted by subsequent law reform reports – intended as a protective measure towards guarantors. I have further argued that what underlies the *GAA* is a conception of power dynamics in guarantee transactions in which the guarantor is always vulnerable, and the lender never is. I have finally discussed cases in which this presumed power imbalance does not exist in reality, and the protections of the *GAA* have been (mis)used to produce what appear to be unjust results.

Chapter II: Planes, Campaigns, and the Court of Appeal: The Public and Legislative Reassessment of the *GAA* and the 1980s Reform Efforts

Introduction

The *GAA* as enacted in 1939 did not require guarantors to appear before a lawyer specifically. Any notary public would do. The requirement that prospective guarantors appear before a lawyer, and only a lawyer, did not take effect until 2015.[103] This amendment was years in the making, and was the (anti)climax of a battle fought as much in the newspapers as in the Legislative Assembly.

In setting out the history of this amendment, I will first briefly discuss the distinction between the interview prescribed by the *GAA* and an interview in which a prospective guarantor receives independent legal advice. Second, I will review the years-long campaign by Progressive Conservative MLA Stan Nelson, beginning in the 1980s, to introduce a requirement that guarantors appear before a lawyer, and the campaign's connection with the legal woes of Alberta aviation entrepreneur William "Bud" McMurchy. During this period, the *GAA* received an unusual degree of press coverage, much of which focussed on the vulnerability of the guarantor vis-à-vis the lender. I argue that while Nelson's attempt to reform the *GAA* was consistent with the original legislative understanding of power dynamics in guarantees transactions, in which the guarantor was always and exclusively the vulnerable party, his proposals encompassed much more than was originally contemplated in 1939: in effect, Nelson sought not merely to remedy but to totally demolish the power imbalance between guarantor and lender. I will finally briefly discuss, as a postscript to the reform efforts of the 1980s, the unceremonious amendment of the *GAA* in the 2010s and the growing tendency of the Alberta courts to interpret this amendment as requiring independent legal advice.

As we have seen, the understanding of the power dynamics underlying the *GAA* was that the guarantor was always vulnerable to the lender. The same conception of guarantors as always and exclusively vulnerable is frequently reflected in the public and political discussion of the

[103] The *GAA* was amended by the *Notaries and Commissioners Act,* SA 2013, c N-5.5 [*NCA*], which came in force on April 30, 2015. See the discussion in Shaunna Mireau, "Commissioners of Oaths in Alberta Have New Rules" (7 April 2015), online (blog): <https://www.slaw.ca/2015/04/07/commissioners-of-oaths-in-alberta-have-new-rules/>.

mid-1980s. During this period, however, the general view of the *GAA* appears to have been that – far from protecting the unwary guarantor – it was in fact woefully inadequate.

The *GAA* Interview

The *GAA* today requires that the lawyer examining the guarantor be "satisfied by examination of the person entering into the obligation that the person is aware of the contents of the guarantee and understands it."[104] This is also what was formerly required of notaries.[105] Looked at by itself, without any judicial (re)interpretation, this provision does not say anything about the lawyer providing independent legal advice. Independent legal advice encompasses much more than simply making sure that your client is aware of what they are signing.[106] It may include "predict[ing] potential problems" with a transaction, including its financial impact,[107] or ensuring that the prospective guarantor is not subject to coercion.[108] The *GAA* requires nothing of the sort.

I will discuss the issue of legal advice under the modern *GAA* below. For now, it is important to reiterate that during the time period that is the primary focus of this chapter – the mid-1980s through to the early 1990s – the *GAA* only required that a guarantor attend before a notary.[109] A non-lawyer notary cannot (and certainly should not) give legal advice.[110] Even where the notary in question was a lawyer, Alberta courts in this period generally (though not always) distinguished between the *GAA* examination and independent legal advice.[111] It is

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[104] *GAA, supra* note 1, s 4(1).
[105] *Guarantees Acknowledgment Act,* RSA 1980, c G-12, s 1(b) [1980 *GAA*]. In Alberta, notaries public may carry out a variety of duties, including administering oaths and certifying copies of documents (see "Notaries and commissioners", online: <https://www.alberta.ca/notaries-and-commissioners>). Every lawyer in Alberta is a notary (*NCA, supra* note 103*,* s 3(1)(b)). Other persons, such as MLAs and MPs, are also notaries while holding office (*ibid,* ss 3(1)(c), (2)). Notaries may also be appointed (*ibid,* s 2). The crucial point for our purposes is that all notaries public in Alberta are *not* lawyers.
[106] See generally my discussion in Weary, *supra* note 77.
[107] Law Society of Alberta, "Giving Independent Legal Advice," online: <https://www.lawsociety.ab.ca/resource-centre/key-resources/legal-practice/giving-independent-legal-advice/>.
[108] Tjaden, *supra* note 27 at 200. See also *ibid* at 494–95.
[109] 1980 *GAA, supra* note 105, s 3(a).
[110] See *Teachers' Investment, supra* note 83 at para 12 ("If the legislature contemplated compelling guarantors to seek a proper explanation of their guarantees it would have required a certificate of independent legal advice to accompany the guarantee, rather than the certificate of a notary public.") On the other hand, in discussing the responsibilities of notaries, including *GAA* examinations, MLA Ron Ghitter (Calgary-Buffalo) (as he then was) remarked that "If at times [notaries] give a little legal advice, I think we all give legal advice whether or not we are lawyers" (Alberta, *Hansard,* 18-3, No 54 (17 May 1977) at 1387). This rather alarming remark was probably meant facetiously.
[111] See e.g. *Royal Bank v Bradley*, 1988 CanLII 3488 [*Bradley*]; *Central Trust Co v Friedman*, 1989 CanLII 3173 (ABQB), aff'd 1990 ABCA 142. But see *Ohlson v Canadian Imperial Bank of Commerce*, 1997 ABCA 413 at para

important to keep in mind this "baseline" when we look at the attempts to raise the standard of what was required during the *GAA* interview.

The Legislative Campaign To Require Independent Legal Advice

William McMurchy and the GAA

The 1980s campaign to amend the *GAA* did not begin in the Legislative Assembly. In the mid-1980s, William "Bud" McMurchy, a former RCMP officer and pilot turned aviation entrepreneur,[112] found himself in a difficult position. The Royal Bank of Canada (RBC) had extended loans to companies of which McMurchy was a shareholder and director.[113] McMurchy, along with his associates, granted personal guarantees with respect to the loans.[114] The guarantees included *GAA* certificates.[115] McMurchy's companies ran into financial problems,[116] and on March 6, 1984, RBC sued McMurchy and his co-guarantors.[117] In the face of this and other legal proceedings,[118] McMurchy's response was defiant. On April 8, 1984, the *Calgary Herald* reported that McMurchy (joined by Jack Foster, a representative of the Canadian Federation of Independent Business [CFIB]) was "mounting a campaign to limit lenders' power, inviting publicity-shy businessmen to step forward, writing political leaders and researching a potential court challenge."[119] In particular, McMurchy wanted the *GAA* amended to require that a guarantor obtain "advice and endorsement … by lawyers independent of the lender": [120] in other words, independent legal advice or something close to it.[121]

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52 [*Ohlson*] ("A guarantee in the normal case requires independent advice."). See generally my discussion in Weary, *supra* note 77; Tjaden, *supra* note 27 at 200.

[112] McMurchy's flying career, as described in the *Calgary Herald,* included ferrying then-Minister of Justice Pierre Trudeau between Ottawa and Montréal in the 1960s (Vern Simaluk, "Norman Wells oil ready for markets", *Calgary Herald* (10 March 1984) E11).

[113] *McMurchy v Fitzhenry*, 1986 ABCA 99 (Factum, Respondent (RBC) at para 1 [RBC Factum]).

[114] RBC Factum, *ibid* at para 2; Gordon Jaremko, "Tracking legal quarry means burning midnight oil", *Calgary Herald* (8 April 1984) A10 [Jaremko, "Tracking legal quarry"].

[115] RBC Factum, *ibid* at para 3.

[116] RBC Factum, *ibid* at paras 5–7; Jaremko, "Tracking legal quarry", *supra* note 114 (attributing the companies' financial issues to a general economic decline in Alberta).

[117] *McMurchy v Fitzhenry, supra* note 113 (Statement of Claim (RBC), included in Appeal Book at 1).

[118] RBC was far from the only lending institution with which McMurchy had difficulties related to guarantees. April 1984 articles also noted his disputes with Northland Bank and Central Trust (Jaremko, "Tracking legal quarry", *supra* note 114; "Debtor gets back his loan guarantee", *Edmonton Journal* (18 April 1984) A10 ["Loan guarantee"]).

[119] Gordon Jaremko, "Ex-mountie takes aim at loan guarantees", *Calgary Herald* (8 April 1984) A9 [Jaremko, "Ex-mountie"].

[120] Robert Sibley, "NDP to join fight against bank practice", *Edmonton Journal* (13 April 1984) A15 [Sibley, "Bank practice"].

[121] That said, whether McMurchy, a layperson, understood the precisely what is meant in law by "independent legal advice" seems doubtful.

Throughout 1984, Alberta papers covered McMurchy's campaign sympathetically. Much of this coverage reflects the conception of power dynamics in guarantee transactions discussed in Chapter I. It is probably no coincidence that during this period Alberta was in the grip of economic downturn:[122] as we have seen, economic downturns tend to result in loans (and guarantees) being called in, which in turn tends to produce unfriendly feelings towards lending institutions. A lengthy article in April 1984 discussed the perils of personal guarantees, asserting that would-be borrowers had little choice about giving a personal guarantee and emphasising the ruinous financial liability a guarantee might entail.[123] The article alluded to guarantors' potentially being driven to suicide.[124] "The lenders," it reported, "show no signs of accepting limits on their rights."[125] Accompanying the article was an illustration depicting an ordinary-looking family – a mother, father, and two children – looking at a huge, bewilderingly complex guarantee contract.[126] The implications are clear: the lender is ruthless, powerful, and possessed of infinite fine print with which to take advantage of the guarantor, who has little choice or agency and stands to lose everything if the transaction goes wrong.[127] Several articles around this period quoted accusations that lenders were specifically targeting smaller borrowers.[128] Foster,

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[122] "Boom and Bust in Alberta", online: <https://www.cbc.ca/history/EPISCONTENTSE1EP17CH3PA1LE.html>:

> As unpredictably as it began, the Alberta oil boom was over.
>
> In 1982, Dome Petroleum, the country's largest oil company, avoided collapse with a last-minute bailout package with Ottawa and the banks.
>
> Within two years, mirroring trends elsewhere in the country, unemployment in the province rose from 4 to 10 per cent. For the first time in more than a decade, Alberta had more people leaving the province than coming in. The province led the nation in housing foreclosures, bankruptcies and suicides.

[123] Jaremko, "Ex-mountie", *supra* note 119.

[124] *Ibid* ("The standard forms – evoking images of lenders fearing losses from ruined men leaping to their deaths from offices – stipulate the debts are passed on to entrepreneurs' 'heirs, executors, administrators and successors.'")

[125] *Ibid.*

[126] Paul van Ginkel, "Businessmen pledge family assets to keep companies going", *Calgary Herald* (8 April 1984) A9.

[127] News articles on McMurchy's campaign did on occasion quote representatives of lending institutions, who (not surprisingly) rejected accusations that they were behaving abusively: see Jaremko, "Ex-mountie", *supra* note 119 ("On the lenders' side, the president of the Calgary chapter in the Credit Granters' Association of Canada says 'we don't go for the throat, especially in these hard economic times.'"); "Loan guarantee", *supra* note 118 ("While Royal Bank and Central Trust spokesmen were unavailable for comment, both institutions were on record as saying they will assist small businessmen in trouble."); Dennis Hryciuk, "CFIB takes banks to task", *Edmonton Journal* (19 April 1984) G5 [Hryciuk, "CFIB"] ("'We don't want to put businesses under,' said Underwood, Royal's public affairs manager in Calgary.'")

[128] Hryciuk, "CFIB", *ibid* ("Foster said banks have been zeroing in on small, troubled companies in Alberta to try to make up for loan losses at large corporations."); Dennis Hryciuk, "Banks Under Siege", *Edmonton Journal* (11 August 1984) C1 ("The protestors, clearly, feel that Canada's lending companies have become ruthless in their collection of small loans – while going easy on large corporate or international creditors.")

the CFIB representative, accused "major banks in Canada" of "using the small businessmen for their own pleasure."[129]

The *GAA,* McMurchy claimed, did not protect a guarantor in this kind of David-and-Goliath situation. As one article explained McMurchy's position:

> McMurchy … says the personal guarantee documents of banks are so complex that an ordinary businessman can't understand them without good legal advice. Besides, he says, the notaries are often employees of the banks or lawyers on retainer.
>
> The act should be changed to require advice and endorsement of personal guarantees by lawyers independent of the lender to ensure that a businessman is fully informed of what he's getting into when he signs a guarantee, McMurchy says, noting that prior to 1969 the act had such a requirement.[130]

In the interest of accuracy, I note that McMurchy (who it is only fair to point out was not a lawyer, let alone an expert in debtor-creditor law[131]) seems to have been confused about the history of the *GAA*. In fact the *GAA* (at least before 2015) never required that a guarantor appear before a lawyer.[132] In 1969, Bill 28 "largely re-enacted [the *GAA*] with up-dated wording and more certainty of meaning";[133] one significant change was to require that the notary could not be "acting for the person to whom the obligation was incurred."[134] Apparently for reasons of practicality, the independence requirement was removed in 1970.[135] It may be that McMurchy misunderstood the precise effect of this amendment. Central to McMurchy's position appear to have been the notions that (a) the guarantor was always vulnerable relative to the lender, who was always the stronger party, (b) it was possible to ensure perfect or near-perfect understanding on the part of a guarantor, and that (b) this understanding would protect the guarantor from abuse by lenders. [136] These are of course the same principles that underlay the *GAA* in its existing form.

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[129] David Climie, "Business should avoid personal guarantees", *Calgary Herald* (13 May 1984) A9 [Climie, "Personal guarantees"].
[130] Sibley, "Bank practice", *supra* note 120. See also Climie, "Personal guarantees", *supra* note 129 ("Under the 15-year-old Guarantees Acknowledgment Act, all that is required to ensure the guarantor's understanding of the contract is the consent of a notary public, who in many cases is an employee of the lending institution.")
[131] Jaremko, "Tracking legal quarry", *supra* note 114 (noting McMurchy's lack of legal training).
[132] See *Guarantees Acknowledgment Act*, RSA 1942, c 128, s 4; 1955 *GAA, supra* note 17, s 4(a).
[133] Bill 28, *supra* note 84.
[134] *Guarantees Acknowledgment Act, 1969,* SA 1969, c 41, s 3(a).
[135] Bill 24, *An Act to amend The Guarantees Acknowledgment Act, 1969,* 3rd Sess, 16th Leg, Alberta, 1970 (assented to 15 April 1970), SA 1970, c 51. See ALRI, *1970 Report* at 14 ("from a practical standpoint the requirement to this effect … gave rise to difficulty.").
[136] See Robert Sibley, "Loan law revision call 'worth looking at'", *Edmonton Journal* (18 April 1984) A18 ("[McMurchy] wants the government to amend the Guarantees Acknowledgment Act to ensure that businessmen

McMurchy, in other words, essentially wanted to strengthen the *GAA*: raising the level of understanding required of a guarantor, and ensuring that the person tasked with assessing this understanding was wholly on the guarantor's side. Other campaigners, as we will see, had much grander reforms in mind.

As far as McMurchy was concerned, the *GAA* appears to have been merely inadequate.[137] The most extreme reinterpretation of the *GAA,* however, actually re-cast it as an instrument of oppression by creditors. In April 1984, the *Calgary Herald* described the *GAA* as "legislation to ensure ignorance is no defence"[138] on the part of a guarantor. Shortly afterward, MLA Ray Martin (Edmonton-Norwood), one of only two sitting NDP MLAs in this period,[139] raised the issue of the *GAA* in the legislature. The headline of one article, "NDP to join fight against bank practice,"[140] conjures up an image of the New Democratic Party in firm alliance with McMurchy, stridently demanding reform. In reality Martin seems to have confined himself to asking a few rather confused questions of Attorney General Neil Crawford. Martin (who was also not a lawyer[141]) appears to have been under the impression that the *GAA's* purpose was to assist lenders in crushing guarantors:

> Mr. Speaker, I'd like to direct my question to the Attorney General. It's in response to a recent request to his department by a representative of Alberta's business community to curtail the powers of banks in enforcing personal guarantees pledged to cover a company's business loans. My question is: can the minister advise if any consideration has been given to repealing the Alberta Guarantees Acknowledgment Act?[142]

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know what they're getting into when they sign personal guarantees. … The act should be changed to require advice and endorsement of personal guarantees by lawyers independent of the lender to ensure that a businessman is *fully informed* of what he's committing himself to, he [McMurchy] said." [emphasis added]); "Loan policies change wanted", *The Daily Herald-Tribune* (11 May 1984) 7 (quoting McMurchy as referring to "truth in lending"); Climie, "Personal guarantees", *supra* note 129 (quoting McMurchy as describing guarantees as "misleading … because they allow banks to collect over and above the liability signed for on the agreement"). Along with requiring independent legal advice, McMurchy argued that guarantee contracts ought to be "written in plain language" (Climie, "Personal guarantees", *ibid*).

[137] See also Vern Simaluk, "McMurchy loses battle, but is not surrendering" (30 July 1985) D3 [Simaluk, "Not surrendering"], discussing McMurchy's position with respect to the *GAA*.

[138] Jaremko, "Ex-mountie", *supra* note 119. The same article noted McMurchy and Foster's assessment of the *GAA*'s protective effect as a "farce" (*ibid*).

[139] Ray Martin & John Ashton, *Made in Alberta: The Ray Martin Story* (unknown location: unknown publisher, 2017) at 54.

[140] Sibley, "Bank practice", *supra* note 120. An alternate version of the article ran with a more temperate headline: Robert Sibley, "NDP pick up protest against bank practices", *Edmonton Journal* (13 April 1984) A15.

[141] See generally Martin & Ashton, *supra* note 139 for discussion of Martin's career in education.

[142] Alberta, *Hansard,* 20-2, vol 1 (17 April 1984) at 518. It does not appear that Martin was particularly familiar with the legislation: he also described the *GAA* as "setting out how courts shall respond to a lender's demand for

Crawford was evidently nonplussed by this interpretation of the *GAA,* and swiftly clarified that it was in fact meant to protect guarantors:

> I'd be interested in the views of anyone who thought repealing that particular legislation would in any way assist them with respect to dealings with financial institutions. It is really there for the commendable reason of giving people at least some assurance that if a guarantee is to be signed, the person appreciates what he has signed.[143]

Martin does not appear to have raised the issue of the *GAA* again, and this particular (mis)interpretation of the *GAA* appears to have vanished from the legislative debate. I note it here not to denigrate Martin, but to underscore the point that many of the people discussing the *GAA* were not legal professionals and were operating based on distinctly incorrect assumptions.

Before turning to the reform campaign of Stan Nelson, it is worth remarking on what the news coverage of problems with guarantee transactions did *not* discuss. McMurchy was a classic example of what I referred to in Chapter I as a non-third-party guarantor. No doubt his situation was both unexpected and unpleasant by the mid-1980s, but as the shareholder-director of the borrower companies, it can hardly be said that he lacked access to information or that he did not stand to benefit from the transaction. Third-party guarantees were not unheard of in discussion of Alberta guarantees law at this time: the 1985 ALRI report on the *GAA* acknowledged the distinction between types of guarantors,[144] while a news article quoted future Supreme Court Justice Sheilah Martin on the increasingly frequent use of spousal guarantees by lenders.[145] But generally the issue of third-party guarantors does not seem to have prompted much discussion in

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enforcement," which is incorrect, as Crawford pointed out (*ibid* at 519), and expressed concern that the *GAA* certificate might be "forced on" applicants for business loans (*ibid* at 520). Martin referred as well to "British Columbia's practice of independent legal advice" (*ibid* at 519). I note that in fact British Columbia law did not in this period necessarily require independent legal advice for a guarantee to be enforceable: see e.g. *Toronto-Dominion Bank v Wong*, 1985 CanLII 561 (BCCA); *Toronto-Dominion Bank v San-Ric Developments Ltd*, 1987 CanLII 2701 (BCSC); *North West Life Assurance Co of Canada v Shannon Height Developments Ltd*, 1987 CanLII 2754 (BCCA). A news article on McMurchy meanwhile suggested, rather oddly, that a universal requirement of independent legal advice existed in every Canadian jurisdiction *except* Alberta:

> Alberta legislation, [McMurchy] claims, is out of step with the rest of the country.
>
> In Alberta, all a person has to do is swear an oath before a notary public testifying he fully understands the conditions of the contract. Elsewhere, a person must appear before an independent lawyer and be informed of the full repercussions of each clause in the contract before signing. (Simaluk, "Not surrendering", *supra* note 137).

[143] Alberta, *Hansard,* 20-2, vol 1 (17 April 1984) at 519. Crawford himself also misinterpreted the *GAA,* stating that "very often the notary's certificate is in fact completed by a lawyer and, therefore, is independent legal advice the person is receiving" (*ibid*). As I discuss above, this is incorrect. An examination by a lawyer under the *GAA* is not the same thing as independent legal advice.

[144] ALRI, *1985 Report, supra* note 9 at 35, 37.

[145] Jaremko, "Ex-mountie", *supra* note 119 ("Martin reports lenders increasingly cover themselves by having both spouses sign personal guarantees when lines of credit are being created for family [b]usinesses.")

connection with McMurchy's campaign, in comparison to the plight of non-third-party guarantors involved in the small business community.[146] To some extent this is not surprising. McMurchy was a business owner who gave a guarantee; consequently, the news coverage he attracted, and the resulting legislative debate, was about business owners who gave guarantees. But given the *GAA*'s inability to protect against problems in guarantor-borrower relationships as I discuss in Chapter III, the relative lack of discussion during a period of intense focus on its failings as protective legislation is worth remarking on.[147]

Stan Nelson and the GAA

Stan Nelson, himself a business owner,[148] may well have felt some sympathy for McMurchy's financial and legal difficulties in connection with a failed business venture.[149] In October 1984, Nelson introduced a private member's bill to amend the *GAA*.[150] The proposed amendments were fourfold. First, a prospective guarantor was required to appear before a lawyer; second, the lawyer was required to be independent of the lender; third, the lawyer was required to ensure that the prospective guarantor "fully [understood] the contents of the guarantee and his obligations under it"[151]; fourth, the fee cap for a *GAA* certificate was raised to $50.[152] Taking the text of this bill in isolation, it is debatable whether the lawyer's obligation actually rose to the level of giving independent legal advice, but certainly it was closer to that end of the spectrum than what was previously required.

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[146] See e.g. "Pelorus plight 'tip of iceberg'", *Red Deer Advocate* (23 April 1984) 7C; Climie, "Personal guarantees", *supra* note 129; "Bill would help businessmen", *Edmonton Journal* (27 October 1984) A9 ["Businessmen"].

[147] As I note in Chapter III, MLA A Stephen Stiles (Olds-Didsbury) dismissed third-party guarantees as exceptionally rare, but did support extra caution in such cases (Alberta, Hansard, 20-3, Vol 2 (23 May 1985) at 1133).

[148] Rick Pedersen & Chris Van Krieken, "Sunday sales rile PC MLA", *Edmonton Journal* (3 November 1984) A9.

[149] Nelson's sudden interest in the *GAA* was clearly linked with McMurchy's efforts ("Businessmen", *supra* note 146 ("Behind the amendments are the efforts of Calgary businessman Bud McMurchy."); Simaluk, "Not surrendering", *supra* note 137 ("So far, McMurchy … has won one MLA to his cause.")).

[150] Bill 264, *An Act to Amend the Guarantees Acknowledgment Act,* 2nd Sess, 20th Leg, Alberta, 1984 (first reading 26 October 1984); Alberta, *Hansard,* 20-2, vol 2 (26 October 1984) at 1231; "Businessmen", *ibid.*

[151] Bill 264, *supra* note 150, cl 4.

[152] See Nelson's remarks on the identical proposed amendments in 1985 (Alberta, *Hansard,* 20-3, Vol 2 (23 May 1985) at 1132).

Nelson's bill failed to pass.[153] Apparently undaunted, he tried again in 1985.[154] This time, his proposal prompted some debate in the Legislative Assembly during the bill's second reading on May 23, 1985. The themes I have identified in the news coverage of guarantees were reflected in Nelson's remarks. Nelson, too, appears to have viewed guarantee transactions as involving an inherent power imbalance between guarantor and lender. He characterised guarantee transactions as "in most cases" involving "a small business person putting his life on the line to a lending institution,"[155] and argued that as a practical matter prospective guarantors had very little agency in these transactions:

> The bank holds the hammer, and you are not given the opportunity to negotiate clauses in or out of it. The only part you are able to play is whether or not to sign. If it's the survival of your business or associate, it is likely that you will sign a document. Again, it is important to ensure that the person signing has complete knowledge of the document he has before him.[156]

Nelson, like McMurchy, regarded the *GAA* as offering inadequate protection to prospective guarantors. He questioned how a non-lawyer notary could possibly ensure the guarantor understood what they were about to sign, when the notary themselves probably did not understand it.[157] As his remark above indicates, Nelson also appears to have believed in the

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[153] A news article on Nelson's first attempt acknowledged that "[p]rivate member's bills rarely become law" ("Loans bill urged", *Calgary Herald* (27 October 1984) E5).

[154] Bill 214, *An Act to Amend the Guarantees Acknowledgment Act,* 3rd Sess, 20th Leg, Alberta, 1985 (first reading 19 March 1985).

[155] Alberta, *Hansard,* 20-3, Vol 2 (23 May 1985) at 1130.

[156] *Ibid* at 1131. As this excerpt suggests, Nelson did make reference to third-party guarantees at least in passing. In the same remarks, he also referred to "guaranteeing the loan for another person or your little company" (*ibid*). Nelson seems, however, to have misunderstood or at least misstated the distinction between accommodation sureties (see the discussion in Chapter III, note 200) and non-third-party guarantors of corporate debts:

> It is relevant to note, too, that the guarantor receives no benefit from the transaction. He enters into it as a matter of accommodation to the principal debtor, and in most cases it is a small business person putting his life on the line to a lending institution particularly because of his entrepreneurial spirit and desire to have some freedom of choice in the business community. (Alberta, *Hansard*, 20-3, Vol 2 (23 May 1985) at 1130)

Again, it is worth bearing in mind that Nelson was not a lawyer.

[157] *Ibid* at 1130. Relatedly, see the discussion in ALRI, *1970 Report, supra* note 9 at 13–14 ("Ideally we think that acknowledgments under this Act should be taken by legal practitioners.") Nelson also expressed some concern that, as notaries, he or his colleagues could be sued for misrepresenting a guarantee during an examination (Alberta, *Hansard,* 20-3, Vol 2 (23 May 1985) at 1130). See the discussion of notaries' liability, cited by Nelson, in ALRI, *1970 Report*, *supra* note 9 at 15–16. In support of his proposed amendment, Nelson cited the *Report of the Committee on the Age of Majority* (July 1967) (Chair: Justice John Latey) [Latey Report], stating that "in England the Latey committee's report seriously considered a suggestion that guarantees should be enforceable only if entered into after a solicitor has explained the position" (Alberta, *Hansard,* 20-3, Vol 2 (23 May 1985) at 1130). This slightly misrepresented the conclusions of the Latey Report. The Latey Report in fact deemed it expensive and unworkable to require legal advice on guarantees and merely recommended including a warning in red ink as to the effect of a guarantee contract. Moreover, the Latey Report was concerned exclusively with "infants' undertakings"

curative effect of information. He linked understanding with protection: "[I]t is our duty to ensure the protection of some of these people who are unable to obtain full information in the manner in which the Act is presently written."[158] But close examination of Nelson's remarks reveals scepticism about whether *GAA*-style requirements could actually remedy the power imbalance. Nelson conceded that a better understanding of a guarantee might, practically speaking, make little difference to whether a guarantor actually chose to enter into it:

> Of course, there is the argument that a person confronted with the facts of a guarantee would in all possibility still sign that guarantee. Maybe that is the case, but when they sign it and are given the opportunity to understand by full disclosure the horror in some of these documents, at least they would know what they are signing.[159]

In fact, his fundamental objection seems to have been as much to the legal and commercial reality of guarantees as to the inadequacies of the *GAA.*

Much of what Nelson had to say ostensibly about his amendments to the *GAA* was really about guarantees generally. Reviewing a standard-form Royal Bank of Canada guarantee, Nelson referred to it as a "document of horror,"[160] and expressed dismay at such aspects as the continuing nature of the guarantee and the possibility of liability for interest payments or legal fees.[161] The word "unconscionable" occurs twelve times in Nelson's speech of May 23.[162] The

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and expressly took no position on whether its recommendation ought to apply to "all guarantees and indemnities" (Latey Report, *ibid* at 95).

[158] Alberta, *Hansard,* 20-3, Vol 2 (23 May 1985) at 1132.

[159] *Ibid* at 1130. See the news coverage of Nelson's proposed amendments in Don Martin, "MLA makes pitch for small business", *Calgary Herald* (4 June 1985) E1 [Martin, "MLA"] ("'This amendment doesn't mean the businessman won't sign the guarantee, but it's just to make sure he understands what he's signing,' said Nelson.")

Several of Nelson's colleagues stressed the lack of impact that an improved understanding would have on a guarantor's decision to sign. Stiles, describing his usual experience in a *GAA* examination, stated, "They get past about the first five lines and say: 'Oh well, what's the difference? I have to sign this thing anyway, if I want the money.' That's the basis upon which most people sign these things." (Alberta, *Hansard,* 20-3, Vol 2 (23 May 1985) at 1133. MLA R Keith Alexander (Edmonton Whitemud) offered a similar objection:

> I have difficulty with the whole problem of understanding obligations. In the real world when you go into a bank, usually in some kind of cold sweat or in a hurry, in order to obtain a loan or to help somebody else obtain a loan and are asked to sign a complex document, you usually want to get the job done knowing broadly speaking what the obligations are going to be. The reality of the fact is that the pressure of obtaining the result over-rides in the short term the problem of what is contained in the document. (*ibid* at 1135)

In making these observations, the members found themselves unwittingly aligned with future academic commentary on the issue of relationship debt. Commentators have noted that in cases of relationship debt, independent legal advice may have little impact on whether a guarantor enters into a transaction (Fehlberg, *Sexually Transmitted Debt, supra* note 6 at 172–73; Jenni Millbank & Jenny Lovric, "Relationship Debt and Guarantees: Best Practice v Real Practice" (2004) 15:7 J Banking Fin L & Prac 89, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=700501> at 31–32 [cited to SSRN]).

[160] Alberta, *Hansard,* 20-3, Vol 2 (23 May 1985) at 1131.

[161] *Ibid.*

[162] *Ibid* at 1129–32.

GAA says nothing about unconscionability; taken in isolation, it would permit a guarantor to enter into the most unconscionable transaction imaginable, as long as somebody was prepared to issue a certificate stating that the guarantor understood what they were getting into.[163] Nelson expressly identified his proposed amendments to the *GAA* as "only a first step" and suggested, in future, that the government "examine all guarantees, postponements of claims, continuing guarantees, and assignments" and even potentially mandate the use of a standard-form guarantee.[164] This, needless to say, went well beyond merely strengthening the *GAA* examination.

Nelson's colleague, MLA A. Stephen Stiles (Olds-Didsbury), agreed that more ought to be done. His remarks reflect the understanding of a power imbalance: "After all, the banks never take a risk. The risk is always with the borrower. It is the borrower who takes the chance that his business won't succeed, not the bank. The banks always take sufficient security to protect themselves and their depositors."[165] He complained that the issue of banks taking excess security was not included in Nelson's proposed legislation.[166] The issue of excess security is rather far removed from the original issue of guarantors not understanding what they are signing, and seems to reflect a broader distaste for guarantees – and lending institutions – generally.

Once again, Nelson's efforts came to nothing.[167] Another proposed bill in April 1986 also bore no fruit.[168] In September 1986, Nelson tried once more.[169] In introducing his proposed legislation, he reiterated much of what he had said in 1985.[170] The discussion of the lender-guarantor-borrower relationship again touched on the imbalance of power and the onerous nature

[163] Of course, the *GAA* is not in fact the only piece of law that governs a transaction of this kind. There are in reality (fortunately) a number of restrictions on unconscionable transactions in Alberta, including the common law of unconscionability (see *Burby v Ball*, 2018 ABCA 22 at para 5 for a brief summation of the general test for unconscionability), the *Unconscionable Transactions Act,* RSA 2000, c U-2 (empowering courts to intervene in unconscionable loan transactions specifically), and the federal restrictions on what rate of interest may be charged (*Criminal Code,* RSC 1985, c C-46, s 347). For a general overview see Tjaden, *supra* note 27 at 90–96.
[164] Alberta, *Hansard,* 20-3, Vol 2 (23 May 1985) at 1132.
[165] *Ibid* at 1134.
[166] *Ibid.*
[167] Martin, "MLA", *supra* note 159.
[168] Bill 202, *An Act to Amend the Guarantees Acknowledgment Act*, 4th Sess, 20th Leg (first reading 7 April 1986).
[169] Bill 213, *An Act to Amend the Guarantees Acknowledgment Act,* 1st Sess, 21st Leg (first reading 17 June 1986).
[170] Alberta, *Hansard,* 21-1, Vol 3 (11 September 1986) at 1611–14. More than one MLA agreed that improving a guarantor's understanding of what they were signing (whether through independent legal advice or not) would be beneficial: see the remarks of MLA Stanley B Cassin (Calgary-North West) (*ibid* at 1616, objecting to the potential cost of involving a lawyer in every transaction, but suggesting "a very simplified, perhaps a standard form, in large and bold print"); MLA Leo R Piquette (Athabasca-Lac La Biche) (*ibid*).

of guarantees. One MLA described a hypothetical guarantor being potentially required to surrender "your home, your car, your first-born child, et cetera."[171] Another stressed his own inexperience as a young business owner.[172] On the other hand, MLA James P. Heron (Stony Plain) strongly disagreed with Nelson's characterisation of the banks: "I simply will not buy the argument that banks are usurious. It is up to the individual to obtain sufficient advice and negotiate the amount of security, the interest rate, and the financial institution he chooses."[173] Heron's remarks appear to attack the necessity of any sort of protective measures at all.[174]

Nelson's efforts at amendment failed again. Over the next several years, he made further attempts to sell his proposed amendments.[175] He was unsuccessful.

Despite the failure of the 1980s reform attempts, they are an important chapter in the history of the *GAA.* The discussion of potential amendments reflected a continued understanding of the guarantee transaction in which the guarantor was always and exclusively vulnerable in

[171] Cassin proposed that a standard-form guarantee should expressly warn the guarantor that these assets might be lost: "I would suggest that perhaps the paragraph over the signature, besides being in bold print, should read 'Borrower beware,' and list those personal assets that the lender, in many cases, may have to render to the bank, whether it be your home, your car, your first-born child, et cetera. I feel that many people enter into these agreements without recognizing the full implications" (*ibid* at 1616).

[172] Piquette, reflecting on his experience signing a guarantee, suggested that a lawyer would have helped him understand what he was getting into:

> For a little loan I had negotiated for the purchase of a business, I had signed *without my knowledge*, with the signature signed by a notary public, personal guarantees to the extent that if I defaulted on that loan I would have to lose my car and so on all the way down the line. … When I saw my lawyer after the bank guarantees had been signed, he advised me, "Why did you do that?" I said: "They asked me to sign that, and nobody told me of the implication. I didn't see any danger in doing that." He said, "That's why you should always contact a lawyer before you sign any documents." (*ibid* [emphasis added])

The language used by Piquette ("I would have to lose my car and so on all the way down the line") parallels the language used by Cassin with respect to the potentially dire consequences to the guarantor.

[173] *Ibid* at 1615.

[174] Heron appears to have been in favour of the *GAA* in its present form ("I believe that the present Guarantees Acknowledgment Act has served the business community for many, many years, and I do not support the proposed changes": *ibid* at 1614), but his remarks suggest that the onus ought to lie totally on the prospective guarantor to inform themselves:

> I for one do not need a lawyer to explain the ramifications and implications contained by signing a simple bank guarantee. If I feel uncomfortable with any document, the onus is upon me as a prudent man to obtain that amount of advice which will lower the risk level generated by insufficient knowledge. The same applies to all businesspeople, and this government should advocate, instead of more legislation and more control, a higher level of self-sufficiency by encouraging caveat emptor, which is Latin for "let the buyer beware." Existing legislation does just that and does not force extra costs upon those businesspersons who have taken it upon themselves to study this security instrument. (*ibid*).

[175] Bill 230, *An Act to Amend the Guarantees Acknowledgment Act*, 2nd Sess, 21st Leg (first reading 10 March 1987); Bill 232, *An Act to Amend the Guarantees Acknowledgment Act,* 3rd Sess, 21st Leg (first reading 8 April 1988); Bill 309, *An Act to Amend the Guarantees Acknowledgment Act,* 3rd Sess, 22nd Leg.

comparison to the powerful lender. Faced with this imbalance, Nelson, at least, felt the *GAA* in its current form was not up to the task of protecting the guarantor.[176]

William McMurchy at the Court of Appeal

On June 26, 1985, a justice of the Court of Queen's Bench (as it then was) granted summary judgement to RBC against McMurchy.[177] This extremely routine ruling nonetheless made it into the papers.[178] McMurchy appealed and lost.[179] As I have noted, news coverage of McMurchy's campaign in the mid-1980s was largely sympathetic: the treatment of his court proceedings was no different. The *Calgary Herald* reported on the appeal, stating that McMurchy was "[s]till looking for his day in court" and that "[w]hat bothers [McMurchy] is that so far, in the civil law process, he claims he has no opportunity in court to present extenuating circumstances, or to challenge the evidence."[180]

Put in these terms the situation of course outrages anyone's sense of justice. It is bad enough to be hounded for money by the bank; it is absurdly unfair not to even be allowed to state your side of things. But the average lawyer can probably read between the lines. In fact, the summary judgement on the guarantees was entirely unremarkable: there was simply no issue to be tried.[181] McMurchy's appeal was self-evidently hopeless and included a farfetched argument that summary judgment violated a guarantee to "a full and fair impartial hearing" contained in

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[176] The 1985 ALRI report notably also recommended enhancing the *GAA*'s protections. Those of the report's writers who favoured retaining the *GAA* argued for requiring guarantors to attend before a lawyer specifically, citing the fact that "[a] lawyer … is qualified to understand and explain the legal effect of contractual obligations, including guarantees" (ALRI, *1985 Report, supra* note 9 at 40). Despite references to "legal advice" (see e.g. *ibid* at 45), what these writers really recommended appears to have been something less than independent legal advice. They expressly did not recommend requiring that an independent lawyer conduct the GAA examination (*ibid* at 41–42). With respect to the requirements of the interview, the proposed amendment would require the lawyer to be satisfied that the guarantor "understands the nature and extent of the guarantee obligation" (*ibid* at 42). As I note above, this falls well short of what would be considered professionally acceptable when giving legal advice about a transaction. See also Weary, *supra* note 77 on the distinction between assuring oneself of a guarantor's understanding and giving independent legal advice.
[177] RBC Factum, *supra* note 113 at para 14.
[178] Simaluk, "Not surrendering", *supra* note 137.
[179] *McMurchy v Fitzhenry*, *supra* note 113.
[180] Vern Simaluk, "Two long-time directors of Norcen Energy retire", *Calgary Herald* (22 April 1986) C8.
[181] *McMurchy v Fitzhenry, supra* note 113 at para 6 ("We agree with the learned chambers judge that the defendant and appellant did not raise any serious issue to be tried.")

section 7 of the *Canadian Charter of Rights and Freedoms*.[182] Not surprisingly, the Court of Appeal dismissed the appeal from the bench without calling upon counsel for RBC.[183]

News coverage of McMurchy prior to this point described him as feverishly trying to educate himself about the law.[184] This may well have been the case, but it is only fair to point out that McMurchy was represented by counsel.[185] Given the reality of McMurchy's appeal, it is hard not to conclude that the news coverage of his plight to some degree reflects a case of the *perceived* power dynamics (and resulting unfairness) of a generic guarantee transaction overriding the reality of a specific transaction. McMurchy was presented as hapless, bewildered, and the victim of yet another crushing injustice. In reality he had the benefit of professional legal help and did, in fact, get his day in court.

Independent Legal Advice under the *GAA* in the Modern Period

The New Notaries and Commissioners Act

It appears that there was no significant legislative discussion of the *GAA* in Alberta between 1991, the year of Nelson's last attempt at reform, and 2013, when the *GAA* was abruptly and unceremoniously amended to require prospective guarantors to attend before a lawyer rather than simply any available notary. This amendment was included in a general package of legislative changes to notaries and commissioners of oath contained in the new *Notaries and Commissioners Act*[186] and took effect in 2015.[187]

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[182] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; *McMurchy v Fitzhenry, supra* note 113 (Factum, Appellant at 4) [McMurchy Factum].
[183] *McMurchy v Fitzhenry, supra* note 113 (Notes of 11 April 1986).
[184] Jaremko, "Tracking legal quarry", *supra* note 114:

> Now the ex-RCMP officer labors nightly with a law dictionary at his elbow in his basement study, while his wife and children sleep upstairs.
>
> He pores over fine print until 3 a.m., surrounded by guarantee forms and copies of enactments, legal documents and articles on civil procedure.
>
> He puzzles over the intricacies of legal usages, preparing charts and tables to guide him through the courts' customs and definitions.
>
> He finds everyday words can carry far different meanings for lawyers than laymen.

[185] McMurchy Factum, *supra* note 182 at 20. It appears McMurchy was also represented by counsel during the lower court proceedings: see *McMurchy v Fitzhenry*, *supra* note 113 (Appeal Book, containing various documents reproduced from the chambers decision).
[186] Bill 44, *Notaries and Commissioners Act,* 1st Sess, 28th Leg, Alberta, 2013.
[187] "Changes to the Alberta Guarantees Acknowledgment Act" (March 2015), online: <https://www.parlee.com/news/changes-to-the-alberta-guarantees-acknowledgement-act/>.

I have been unable to determine whether there was some inciting incident that motivated the amendment with respect to the *GAA* in particular. Unlike Nelson's reform efforts in the 1980s, there appears to have been no hard-fought campaign, no news coverage,[188] and no spirited legislative debate about the unconscionability of guarantees generally. MLA Cathy Oleson (Sherwood Park), in introducing Bill 44, referred without elaboration to "protect[ing] Albertans and … [ensuring] they fully understand the risks associated with any guarantees that they may enter into,"[189] while MLA Shayne Saskiw (Lac La Biche-St. Paul-Two Hills) cited a need to "afford lay notaries protection from pressure to perform these duties for which they have little to no expertise."[190]

It is important to note that this amendment did not introduce a statutory requirement to obtain independent legal advice, or even raise the level of understanding on the part of the guarantor as Nelson's unsuccessful amendments would have required. Although the amendment initially required that the lawyer be independent, this requirement was removed before the new legislation came into effect.[191] It may be that the legislature simply felt lay notaries were not capable of meeting the existing standard.[192] Confusingly, however, Minister of Justice Jonathan Denis at one point suggested that the amendment to the *GAA* reflected some sort of history of requiring guarantors to appear specifically before lawyers. In response to a question about whether the new legislation would in fact require a guarantor to attend before a lawyer, Denis stated:

> It is the intention of the legislation that attestation for a guarantees acknowledgement certificate, which is typically to guarantee the debt of a third party, be done before a lawyer. The reason for that is because if you look back many years in our jurisprudence in this province, *there's always been that protection*, just to ensure that a person knows that they are held fully responsible for the debt of another by executing or attesting … the guarantees acknowledgement certificate.[193]

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[188] A search of online newspaper records via Newspapers.com from 2010 to 2020 for "Notaries and Commissioners Act" in Alberta yields no results.
[189] Alberta, *Hansard,* 28-1, No 71a (21 November 2013) at 3028.
[190] Alberta, *Hansard,* 28-1, No 75e (27 November 2013) at 3190. This point was also discussed by Nelson nearly thirty years earlier: "Isn't this lovely? Members of this Legislature could be sued for giving information that could be misleading or incorrect because they didn't understand a document and its implications" (Alberta, *Hansard,* 20-3, Vol 2 (23 May 1985) at 1130).
[191] *Justice Statutes Amendment Act, 2014,* SA 2014, c 13, s 7.
[192] I discuss this theory in Weary, *supra* note 77.
[193] Alberta, *Hansard,* 28-1, No 78e (3 December 2013) at 3351 [emphasis added].

It is hard to know exactly how to interpret this remark. If Denis meant that Alberta law always required that prospective guarantors appear before a lawyer, that is both wrong, given that no such requirement ever previously existed under the *GAA,* and nonsensical, given that the very purpose of the amendment he was discussing was to introduce just such a requirement. If he meant that there was always a requirement that a prospective guarantor be made aware of what they were about to sign, that had nothing to do with lawyers specifically.

One thing that is reasonably clear, however, is that the changes reflect the original purpose of the *GAA:* to make sure that a guarantor realises what they are signing. What primarily emerges from the legislative discussion of the 2010s is concern for the vulnerability of guarantors, but notably without the extreme anti-bank rhetoric or opposition to the commercial reality of guarantees generally that characterised Nelson's earlier reform efforts.[194] As in the 1930s, the guarantor had to be protected, and the *GAA* (albeit slightly modified) was felt to be more or less up to the job.

***The Courts and Independent Legal Advice under the* GAA**

Despite the lack of any actual change to the *GAA* interview requirements, courts appear to have gradually drifted – whether consciously or not – towards imposing a higher standard. Alberta courts did occasionally conflate the *GAA* examination and independent legal advice before the above amendment. [195] The requirement that a guarantor appear before a lawyer has not helped matters in this respect.[196] Recently, in *P & C Lawfirm Management Inc v Sabourin*, the Court of Appeal stated that a "certificate of independent legal advice is statutorily required with respect to a guarantee."[197] I have argued elsewhere, and maintain, that nothing in the *GAA* actually supports this reinterpretation.[198] It appears that courts are simply assuming that, because a lawyer is involved, and that lawyer is talking to somebody, there is some sort of legal advice

[194] In his remarks, Denis stressed that the guarantor was assuming responsibility for somebody else's debt (*ibid*). This contrasts with the discussion in the 1980s, which was more concerned with non-third-party guarantees in the small business context.
[195] See *Ohlson, supra* note 111, as previously discussed.
[196] See my discussion in Weary, *supra* note 77. In particular, see *Agriculture Financial Services Corporation v Optilume Inc,* 2020 ABQB 340 at para 6; *Farm Credit Canada v Pacific Rockyview Enterprises Inc,* 2020 ABQB 357 at para 142.
[197] 2020 ABCA 449 at para 46.
[198] Weary, *supra* note 77.

being given. But if the Court of Appeal maintains this view, it may be that McMurchy and Nelson's desire for a higher standard will prevail in the end.

Conclusion

In looking back on the public and legislative reassessment of the *GAA* in the 1980s, it is important to keep in mind that many (if not most) of the people speaking and writing about the *GAA* in this period were not lawyers. Much of the commentary on the *GAA* reflects misunderstandings and mischaracterisations of both the *GAA* and guarantees law generally. But there is a clear theme. Guarantors were vulnerable, while lenders were enormously powerful. In light of this it was essential that a guarantor understand what they were getting into – though this understanding might be of little help given that a guarantor had little practical choice in the transaction. It is not really surprising, given this reality, that some legislators went further and attacked guarantee transactions generally. The understanding of the dynamics of vulnerability in a guarantee transaction remained the same as around the time of enactment, but by the 1980s, both media and legislators seriously questioned whether the *GAA* was a sufficient remedy.

This period appears to be somewhat unique in the history of Alberta guarantees law. Given the lack of *Hansard* records prior to the 1970s it is not possible to know with certainty whether similar legislative debates took place, but I have not located any news coverage of a similar campaign before or since. The unexciting sequel to the campaign of the 1980s was a quiet amendment in the 2010s and, the years since, a gradual judicial drift towards an assumption that independent legal advice is required.

Chapter III: "Bob Needs the Money":[199] Borrower-Guarantor Relationships and Failures of Protection under the *GAA*

Introduction

In the previous chapters, I identified the *GAA* as a statute enacted specifically to protect one person in the guarantor-borrower-lender transaction: the guarantor. In Chapter I, I discussed guarantor-lender relationships in the context of a climate of general hostility towards lending institutions in the 1930s, and in Chapter II, I discussed how much of the media coverage and legislative discussion of the *GAA* during the 1980s reform efforts was concerned with the perceived abuses on the part of lending institutions and the inequality of the relationship between guarantor and lender. Here I address another aspect of the transaction: the relationship between borrower and guarantor.

Recall from Chapter I that, in a third-party guarantee, the guarantor and borrower are practically as well as legally distinct. This can be a purely transactional relationship: Gerald agrees to guarantee Beatrice's debt in return for some sort of payment.[200] In many cases, however, the motivation for granting a guarantee is the existence of a family or intimate partner relationship between the borrower and guarantor. This is an example of the broader phenomenon of relationship debt. In this chapter, I argue that the *GAA* is largely unsuccessful as a means of protecting prospective guarantors from assuming relationship debt. I first briefly summarise the phenomenon of relationship debt. I then examine Alberta cases involving relationship debt in guarantee transactions to determine to what extent, if any, the *GAA* can protect against assuming potentially disastrous liabilities in these particular circumstances.

What emerges from the case law is a failure of the *GAA* to consistently ensure that a prospective guarantor understands what they are signing or to dissuade a prospective guarantor from an unwise transaction. Relationship debt cases involve guarantors at perhaps their most vulnerable: swayed by emotion and feelings of obligation, and often less commercially

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[199] *Wekherlien v McCord,* 1993 CanLII 7021 at para 14 (ABQB), aff'd 1995 ABCA 168.

[200] In law, the distinction is between a "compensated surety," who "[guarantees] performance and payment in return for a premium," and an "accommodation surety," who gives a guarantee "in the expectation of little or no remuneration and for the purpose of accommodating others or of assisting others in the accomplishment of their plans": *Citadel Assurance v Johns-Manville Canada*, [1983] 1 SCR 513 at 521–22, 147 DLR (3d) 593 [*Johns-Manville*]. See also McGuinness, *supra* note 3 at §§7.127–7.128. Although I generally use the term "guarantor" in this thesis, I occasionally use the specific term "accommodation surety" in deference to the terminology employed in *Johns-Manville, ibid.*

sophisticated than the borrower who has arranged the transaction. The inability of the *GAA* to provide protection in such cases both reflects the underlying assumption that the powerful (and problematic) party to the transaction is generally the lender, and justifies questioning its effectiveness as a means of protection.

Relationship Debt

"Relationship debt" is a general term. It refers to any situation in which a person takes on some kind of financial liability because of a family connection or an intimate relationship.[201] In this chapter, I am specifically concerned with guarantees as a form of relationship debt.[202] For example, Sophie is the sole director and shareholder of NumberCo. LendCo is only willing to lend money to NumberCo if Sophie agrees to provide a personal guarantee of the debt – and if Sophie's wife Gina also provides a guarantee.[203] Gina may or may not know anything about NumberCo's operations. She may or may not understand what she is signing. What is clear is that, if not for her relationship with Sophie, Gina would not have assumed liability for NumberCo's debts. If her relationship with Sophie ends, she will still be liable. And if NumberCo becomes insolvent, Gina may find herself in financial peril.

[201] See e.g. the following definition given in a booklet on financial abuse:

> Sometimes the debts you are left with due to financial abuse are referred to as 'sexually transmitted debt' or 'relationship debt'. Relationship debt is common and serious – it happens when you have to pay your partner's, or ex-partner's, debts. Your partner might have forced or tricked you into signing a loan contract as a co-borrower or guarantor, or signing a mortgage so they could obtain a loan. (WIRE, "Money Problems with your Partner: Information Booklet", online: <https://www.wire.org.au/wp-content/uploads/2020/03/wire-money-problems-with-your-partner-information-booklet-2020.pdf>)

The term "sexually transmitted debt" appears to precede, and is sometimes used instead of, "relationship debt." "Emotionally transmitted debt" has also been employed (Paula Baron, "The Free Exercise of Her Will: Women and Emotionally Transmitted Debt" (1995) 13:1 Law Context: A Socio-Legal J 23 at 24). One paper identifies "sexually transmitted debt" as having originated in Australian scholarship around 1990 (G Gretton, "Sexually Transmitted Debt" (1999) 1999:3 J S Afr L 419 at 419, n 1). Sexually transmitted debt involves intimate partnerships specifically (see Gretton, *ibid*). However, debt can be transmitted between people other than intimate partners: see, for instance, Baron, *ibid* ("women's assumption of debt is not confined to the debts of their partners: many women assume liability for the debts of their relatives and friends"); Misty Bailey, "Sexually Transmitted Debt: Criticisms and Prospects for Reforms" (1999) 8:4 Auckland U L Rev 1001 at 1002 ("the transfer of responsibility for the debt is based on a wider range of relationships than simply that of sexual partners").

[202] As noted in the definition given above, guarantees are not the only form relationship debt can take. They are simply the particular form I am examining here.

[203] Despite the use of a same-gender partnership as an example here, some literature on relationship debt argues that it is a fundamentally gendered phenomenon, with men benefitting at the expense of women: see e.g. Bailey, *supra* note 201 at 1003; Rosemary Auchmuty, "Men Behaving Badly: An Analysis of English Undue Influence Cases" (2002) 11:2 Soc & Legal Stud 257 at 259 ("the assumption in this area of law that the wrongdoer will be male and the victim female or elderly is nearly always borne out in practice"). Note that I am specifically not concerned in this chapter with investigating the gender (or age, or racial) dynamics of relationship debt.

Relationship debt is a useful lens through which to examine how a guarantor may be vulnerable to the borrower as well as to the bank, and in how this vulnerability may manifest differently. A lender can of course take advantage of a guarantor's lack of sophistication,[204] or use its comparatively greater access to legal resources to effectively dictate the terms of a particular transaction.[205] But a bank is unlikely to threaten to break up with you, subject you to physical violence, or insist that you are morally obliged to take on liability in order to help it after everything it has done for you. Not every case in which a borrower coerces, manipulates, or takes advantage of a guarantor is a case of relationship debt: it is quite possible for an arm's-length commercial guarantee transaction to involve some sort of bad behaviour on the part of the borrower. But every case of relationship debt involves a guarantor who is in some way vulnerable at the hands of the borrower.[206] The *GAA's* failure to protect against this vulnerability is striking.

Cases involving this kind of situation are not difficult to find. This fact has itself been remarked on in the Alberta jurisprudence. In *Bank of Montreal v Danial*,[207] Master Funduk observed that

> [i]f one were to search the records of the financial institutions of this country one would literally find thousands of promissory notes "co-signed" by spouses where the co-signer could say he or she did not see a cent of the loan and did not receive any direct or indirect benefit from the loan.[208]

This is as true of guarantees as it is of promissory notes and other loan transactions, and was true before the enactment of the *GAA*. In 1933, for instance, the Supreme Court of Alberta heard the case of *Imperial Bank of Canada v McLellan*.[209] In that case, the defendant wife was vice-

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[204] See e.g. *Lewis v Bank of Nova Scotia,* 1985 CanLII 4289 (NBQB).
[205] It was this fact which Nelson specifically complained of in the quote that forms the title of this thesis (Alberta, *Hansard,* 20-3, Vol 2 (23 May 1985) at 1130).
[206] On this point, see the analysis of vulnerability in transactions between parents and children in Teresa Somes, "Identifying Vulnerability: The Argument for Law Reform for Failed Family Accommodation Arrangements" (2019) 12:1 Elder L Rev 1 at 24–38. The factors identified by Somes as creating vulnerability, such as feelings of affection or responsibility or unwillingness to bring legal proceedings against the other party to the relationship, are equally applicable to intimate partner relationships or other kinds of relationships. It is of course possible for a guarantor to be the more dominant party in one respect or another, in the sense of, for instance, being financially better off (see e.g. CCELS, *supra* note 99 at 4, discussing the vulnerability of parents vis-à-vis adult children and noting that "[t]oday's older adults are more likely than previous generations to be relatively asset rich"). But the relationship itself still creates a degree of vulnerability.
[207] (1983) 46 AR 64, 1983 CarswellAlta 388 (ABQB) [cited to Carswell].
[208] *Ibid* at para 11.
[209] *Supra* note 29.

president of a corporation along with G, her business partner. On a practical level, she had nothing to do with the business: her husband acted for her. The corporation's debts were guaranteed by her husband and G. When G left the corporation, the husband arranged for his wife to take G's place as guarantor. The wife's evidence was that she did not realise she was signing a personal guarantee:

> She says … that she does not remember signing it and does not remember anything about it, that she had never been asked by anybody to sign a guarantee to the bank and that her doing so had not been discussed with her by anyone; that she had only recently found out that she had done so; that she had an opportunity of reading over it and all other documents brought to her but that she did not do so as she thought it was unnecessary. She also says in this connection:
>
> > I had all faith in my husband; I felt anything he told me to do would be all right, or anything that Mr. Meyers [the corporation's bookkeeper] told me, I felt it would be all right. I trusted Mr. Meyers.[210]

The wife did not know that the corporation was borrowing money and would not have been willing to sign the guarantee if she had understood what it was.[211] The Court accepted her defence of *non est factum.*[212] It is difficult to conceive of a more classic case of relationship debt than this.[213]

As I have argued, the *GAA* reflects particular suspicion of and hostility towards lenders (especially large commercial lenders). In theory, however, there is no reason why it should not protect against the kind of transaction in *McLellan*, where the borrower rather than the lender is the one to lead the guarantor into an unwise transaction. Field remarked on this possibility in 1945.[214] We can easily reimagine the situation in *McLellan* after the enactment of the *GAA*. The

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[210] *Ibid* at para 13.
[211] *Ibid* at para 16.
[212] *Ibid* at paras 29–38. On the same facts (and disregarding the issue of the *GAA*), it is possibly less likely this defence would be made out today given the holding of the Supreme Court in *Marvco Colour Research Ltd v Harris*, [1982] 2 SCR 774, 1982 CanLII 63 (SCC) that carelessness precludes a defence of *non est factum.* See Tjaden, *supra* note 27 at 52–54.
[213] The Court asserted that this was not a case "of a wife being sought to be held as the guarantor of the indebtedness of her husband," noting that the wife was an officer in and held shares in the company (*McLellan, supra* note 29 at para 21). It is worth bearing in mind, however, that the wife had nothing actually to do with the business, and that women in particular may hold positions in a family company but have little authority or knowledge (see Pascoe, *supra* note 29 at 22; Fehlberg, *Sexually Transmitted Debt, supra* note 6 at 139; Fehlberg "Family Companies", *supra* note 29). But see Pascoe, *supra* note 29 generally, warning against "reinforc[ing] gender stereotypes about the non-participation of women in corporate life" (*ibid* at 48).
[214] Field, *supra* note 34 at 95 (noting the possibility of "the general representation of either the creditor *or the primary debtor* that the guarantee was a mere form and that [the guarantor] would never be called upon to implement it." [emphasis added])

husband seeks to substitute the wife as a guarantor. This time the *GAA* requires that she attend before a notary. The notary interviews the wife and, finding that she does not seem to understand what she is signing, explains it to her. The wife is shocked and horrified: she had no idea what kind of liability she was about to take on. She refuses to sign. This is what we would like to see happen. But does the *GAA* actually afford this kind of protection?

Political and academic commentary on the *GAA* has at times acknowledged that it might indeed protect against relationship debt specifically.[215] In the 1970 ALRI report, the writers observed, without really exploring the issue, that "in many cases the guarantor receives no benefit from the transaction. He enters into it as a matter of accommodation to the principal debtor."[216] The report did not discuss *why* the guarantor might choose to assist the borrower in this way. The writers of the 1985 report, meanwhile, were divided as to whether the *GAA* ought to be repealed or retained. Those in favour of repealing it argued that the fact that the guarantor did not receive any direct benefit from the transaction did not warrant special protection. The writers instead argued that in these cases, the guarantor really benefitted along with the borrower:

> 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.[217]

This excerpt is rather remarkable in what it does *not* identify as possible motives for guaranteeing the debt of a loved one: fear of physical violence,[218] sustained badgering or harassment,[219] emotional manipulation,[220] threats to end the relationship,[221] wrongly believing

[215] Albeit without actually referring to relationship debt by name.
[216] ALRI, *1970 Report, supra* note 9 at 4.
[217] ALRI, *1985 Report, supra* note 9 at 38. The writers also argued, more justifiably, that there was a clear practical benefit to the guarantor in cases where the guarantor guaranteed the debts of their own corporation, such that "[t]o say that the guarantor derives no benefits in this situation is to confuse form with substance" (*ibid* at 37). This reflects the practical reality of the non-third-party guarantee as discussed in Chapter I.
[218] Fehlberg, *Sexually Transmitted Debt, supra* note 6 at 173–74; Angela Littwin, "Coerced Debt: The Role of Consumer Credit in Domestic Violence" (2012) 100:4 Cal L Rev 951 at 989 [Littwin, "Coerced Debt"] ("An additional segment of coerced debt is obtained by force rather than fraud. This might include forcing a victim to sign a financial document against her will or threatening that she would be unwise to question a given transaction." [footnotes omitted]).
[219] See e.g. the "huge guilt trip" and "emotional blackmail" recounted by guarantors in Fehlberg, *Sexually Transmitted Debt, ibid* at 181–82.
[220] *Ibid.*
[221] *Ibid* at 183.

the transaction is merely a formality,[222] or a feeling that there is simply no choice in the matter.[223] The failure to canvass these possible reasons for signing, and the blithe assertion that in every such transaction the guarantor must be getting something out of it, reflects a failure of imagination on the part of the writers. This failure of imagination goes some way towards explaining the unfavourable view of the *GAA* and its protective function expressed by these writers. If you do not accept the existence of a problem, you are not likely to see the need for any specific solution.

On the other hand, the writers who favoured retaining the *GAA* expressly identified it as a potential means of stopping unwary guarantors from assuming liabilities on behalf of relatives or friends. These writers stated:

> 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.[224]

The words "relationship debt" or "sexually transmitted debt" do not appear in this excerpt.[225] The report does not discuss the gendered nature of relationship debt or other risk factors such as age, nor does it explore the many potentially unhappy reasons for entering into the transaction. All the same, it is fairly clear what is being discussed here: not merely accommodation sureties generally, but accommodation sureties who (possibly unwittingly) take on financial liability, to their own detriment, at the behest of a loved one. That is relationship debt in a nutshell.

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[222] Millbank & Lovric, *supra* note 159 at 17–18; Littwin, "Coerced Debt", *supra* note 218 at 989 ("In a different set of cases, victims would sign financial documents without knowing their contents. This could be because the victim could not read English and so would sign without reading or would sign after the abuser gave her an incorrect translation of the terms. Sometimes the victim would know English but would not be given sufficient time to read the document." [footnotes omitted]).

[223] See the discussion in Fehlberg, *Sexually Transmitted Debt, supra* note 6 at 181 ("Five sureties said that the idea that they had a choice had never entered their minds. It was just assumed by themselves, and by those around them, that they would sign.") Fehlberg also observes that in other cases, economic dependence on the borrower in some cases left sureties feeling that they had no practical choice (*ibid*). See also Millbank & Lovric, *supra* note 159 at 14–15; Littwin, "Coerced Debt", *supra* note 218 at 977–78 (discussing the relationship between coercive control and coerced debt generally).

[224] ALRI, *1985 Report, supra* note 9 at 35.

[225] References to "sexually transmitted debt" began to appear in academic literature in the very early 1990s (Gretton, *supra* note 201 at 419).

At least one participant in the 1980s debate around reforming the *GAA* also identified it, albeit implicitly, as potentially protecting against relationship debt. In speaking to Bill 214 in the spring of 1985, MLA A. Stephen Stiles (Olds-Didsbury), himself a lawyer, asserted that third-party guarantee transactions were highly unusual in general:

> Offhand I can't think of a case where someone has come to me when he's been asked to sign a guarantee because some other individual is borrowing money and he's guaranteeing that person's loan. That happens very, very seldom.[226]

Stiles did, however, argue that in such cases, extra caution was warranted, and in supporting the proposed amendments to this extent indicated that the *GAA,* in its present form, might not go far enough:

> In those cases, I think it's very important that the individual signing the guarantee knows exactly what he's getting into. I support the hon. Member for Calgary McCall in bringing this forward in the sense that in those cases it's very important that the person signing the guarantee be able to obtain legal advice from someone who knows the nature of the document he's being asked to sign. In that context I can certainly support the principle of this Bill.[227]

Stiles's remarks here do not, again, touch on the possible pressures associated with these kinds of transactions. But they do at least acknowledge the special vulnerability of a prospective guarantor in such a situation.[228] What is significant about both the 1985 ALRI report and Stiles's remarks is the emphasis on *understanding*: in this view of guarantee transactions, simply making sure the guarantor knows what they are getting into can afford a reasonable safeguard against the special vulnerability associated with a third-party guarantor who is in a relationship with the borrower, and the *GAA* can accomplish this (if not perfectly). As we will see, neither assumption consistently hold true in practice.

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[226] Alberta, *Hansard,* 20-3, Vol 2 (23 May 1985) at 1133. Stiles asserted, in fact, that "most times" an individual gave a personal guarantee, it was because they had incorporated a small business (*ibid*). Stiles was basing his remarks on his own personal experience, but it is worth pointing out that the issue of guarantors who did not get even an indirect benefit from the transaction was expressly discussed in the 1970 ALRI report, as noted above (ALRI, *1970 Report, supra* note 9 at 4).
[227] Alberta, *Hansard,* 20-3, Vol 2 (23 May 1985) at 1133.
[228] On this point, I think it is worth noting the use of the gendered pronoun "he" in Stiles's remarks. These remarks do not even hint at the arguable special susceptibility of women guarantors to coercion (see note 203, *supra*).

Relationship Debt under the *GAA*

Analytical Limitations

Before I turn to cases involving the intersection of the *GAA* with relationship debt, it is important to acknowledge some limitations on my analysis. These limitations relate to the scope of my analysis and the nature of the evidence analysed. With respect to scope, this is a very restricted review of case law. I am not purporting here to carry out a sweeping analysis of the issue of relationship debt in Alberta:[229] nothing in the analysis below should be taken as indicating the typical gender or age dynamics of relationship debt in guarantees transactions, the circumstances in which they usually arise, or the expected legal outcomes.[230] Neither am I purporting to carry out any sort of comprehensive review of how the courts have interpreted or applied the *GAA* generally. I am specifically looking at cases involving both relationship debt *and* the *GAA* in a more than incidental manner.[231]

With respect to the nature of case law itself, it is not always possible to know, based on the reported facts of a case, whether a particular guarantor signed a guarantee at the behest of a family member or intimate partner or friend. It is certainly not possible to look inside the guarantor's head and see exactly what sort of pressures or emotional appeals they were subject to at the time of signing, or what legal or financial misconceptions they may have been labouring under. There are very likely any number of cases involving these factors "behind the scenes" that are not included in my analysis, because the reported decision does not set out what really happened.[232]

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[229] Compare the approach of e.g. Fehlberg, *Sexually Transmitted Debt, supra* note 6 at 12.

[230] A significant issue in relationship debt cases under the *GAA* (as in all cases involving the *GAA*) are the "technical" exemptions and jurisdictional quibbles discussed in Chapter I, note 17. These are not specific to the relationship between debtor and borrower, and often reflect an attempt to set aside a transaction for noncompliance with the *GAA*: they are consequently are outside the scope of my analysis with respect to whether compliance with the *GAA* provides a guarantor with adequate protection. However, from a practitioner's point of view they are important to keep in mind when working on guarantee transactions and when conducting litigation involving guarantees: see e.g. *Cascade Organ Centre Ltd v Craig*, 1978 CanLII 3250 (ABSC) (a guarantee prepared in Vancouver was not subject to the *GAA,* although a defence of *non est factum* did succeed); *Thompson v Maracaibo Holdings Co*, 1979 CarswellAlta 598 (ABQB) (the transaction at issue was a mortgage, not a guarantee, and not subject to the *GAA*).

[231] For greater clarity, this chapter does not discuss cases involving obvious situations of relationship debt where the *GAA* was merely referenced or mentioned incidentally.

[232] See Gary D Finley in "Langdell and the Leviathan: Improving the First-Year Law School Curriculum by Incorporating *Moby-Dick*" (2011) 97:1 Cornell L Rev 159 at 168 ("[T]he information in judicial opinions is two steps removed from the actual events that began the dispute.")

Moreover, case law is a highly imperfect source of data when to comes to illustrating what guarantees transactions are "really like".[233] Most transactions, even those which result in litigation, do not make it to the courtroom.[234] The reported decisions on guarantee cases show particular instances in which the protections offered by the *GAA* have either succeeded or failed. But it is crucial to note that these cases, while *illuminative,* are not *representative.* I am examining them simply as a way to answer the question: Faced with a guarantor who is especially vulnerable due to a relationship with the borrower, does the *GAA* provide effective protection? I suggest, based on the below, that the answer is no.

Methodology

The cases discussed below were located by searching for cases involving the *GAA* via the Westlaw legal research service and then analysing each result in order to conclude whether or not it was a case of relationship debt.[235] As noted, it is not always possible to gauge the dynamics of a particular transaction merely by reading the reported decision. In trying to determine whether a guarantor entered into a transaction because of their relationship with the borrower, and for the borrower's benefit, I have generally had to rely on the assessment of the presiding justice or master (applications judge). I have not included cases where the effect of the relationship was ambiguous. I have similarly generally relied on the assessment of the presiding justice or master with respect to whether a guarantor actually understood what they were signing.[236]

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[233] See Millbank & Lovric, *supra* note 159 at 40 (noting that cases reviewed by the authors "represent a very small fraction of disputed transactions"). See also Anna Jane Samis Lund, *Trustees at Work: Financial Pressures, Emotional Labour, and Canadian Bankruptcy Law* (Vancouver: University of British Columbia Press, 2019) at 35–38 (noting the divergence between reported case law and files from the Office of the Superintendent of Bankruptcy with respect to the treatment of pre-bankruptcy misconduct).

[234] Shannon Salter, "Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal" (2017) 34:1 Windsor YB Access Just 112 at 119; Jeffrey Q Smith & Grant R MacQueen, "Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?" (2017) 101:4 Judicature 26; Marc Galanter, "The Vanishing Trial" (2004) 10:4 Disp Resol Mag 3; Millbank & Lovric, *supra* note 159 at 36–40 (noting the barriers to litigation, and to defending against ligation, facing guarantors); Gretton, *supra* note 201 at 430 ("The experience of legal problems which a judge has is, by the very nature of things, a onesided and partial one. A judge sees the casualties, the disasters, the cases where things went dreadfully wrong.")

[235] My search process included carrying out searches for common mis-namings of the *GAA* (for instance, the "Guarantor Acknowledgment Act"). For reasons of accessibility, where possible, I have cited cases to CanLII rather than to Westlaw.

[236] I am not suggesting here that the court can never misapprehend a guarantor's motives for signing or level of understanding. (On this point generally, see Jerome Frank, "A Plea for Lawyer-Schools" (1947) 56:8 Yale LJ 1303 at 1307.) However, a person reading reported cases is almost certainly not better positioned than the actual trier of

The Protective Function of the GAA

Much of the discussion in the last chapter involved the (perceived) need to protect the guarantor from the lender, and to what extent the *GAA* did or did not succeed in doing that. In at least one case, however, the Court of Appeal of Alberta has also identified the *GAA*'s function as being to protect against relationship debt. In *Canadian Imperial Bank of Commerce v Ohlson*,[237] an eighty-two-year-old mother gave what was in substance a guarantee (though structured as a loan) to allow her son to purchase land. The Court of Appeal found that the bank had behaved unconscionably: specifically, "it was unconscionable on these facts for the Bank to prepare the documents in the form of a loan and thereby deprive [the guarantor] of independent advice."[238] It drew a link between the *GAA* interview and protection against relationship debt:

> The relationship of elderly parent/adult child is frequently one of dependency and therefore one which can be subject to abuse or pressure. It is a relationship which bears some of the earmarks of a husband/wife relationship. The person who is not gaining from the financial transaction may be subject to pressure arising from the relationship. Dependent relationships are not uncommon to financial institutions and indeed Mr. Murray acknowledged that the Bank has a practice of sending a spouse for independent advice when signing for the other spouse's loan. A financial institution would do well to adopt a similar practice in an elderly parent/adult child transaction where the elderly parent is risking the asset for the sole benefit of the child. Independent advice is required for a guarantee. While the *Guarantee Acknowledgement Act* [*sic*] excludes promissory notes from the definition of "guarantee", that does not authorize a bank to structure as a loan a transaction which is, in substance, a guarantee and thereby avoid the protection the law requires. This, of course, would not apply to third party holders of the note.[239]

I have reproduced this paragraph in full because it bears examining in detail. This is, unfortunately, a confused and unhelpful articulation of the law from Alberta's highest court. It misstates what the *GAA* requires: a guarantee does not require independent advice, only confirmation of the guarantor's understanding.[240] What is important for our purposes, however,

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fact to determine what "really happened," and for this reason I do not think it (usually) appropriate to try to second-guess these assessments.

[237] *Supra* note 111.

[238] *Ibid* at para 4. See also *ibid* at para 50 ("What is unfair is that the Bank was able to accomplish this end by structuring a transaction that was in substance a guarantee as though it were a loan. The necessity of independent advice is avoided as a promissory note is excluded from the requirements under the ***Guarantees Acknowledgement Act***, R.S.A. 1980, Chap. G-12.")

[239] *Ohlson, supra* note 111 at para 52.

[240] Recall the previous chapter, in which I discussed at length the attempt to amend the *GAA* to actually require advice. See also Weary, *supra* note 77. This misstatement recurs throughout *Ohlson*: see paras 4, 50–52. In some

is that the Court does correctly identify the special vulnerability involved in a dependent relationship, and appears to have understood the *GAA* as protecting against it. It does not suggest that anything *would* have necessarily been different if the guarantor had had the benefit of a *GAA* interview. But there is an implicit possibility – which I propose now to examine – that things *might* have been different.[241]

Cases under the GAA

There is reason to question the implicit suggestion in *Ohlson.* Literature on relationship debt has expressed scepticism about the extent to which information about a transaction, even in the form of independent legal advice, can protect against relationship debt. Belinda Fehlberg's study in the United Kingdom found that a number of women were uncertain whether independent advice, in the sense of "being advised as to the wisdom of entering the transaction by a solicitor who was chosen by the surety and acted solely in the surety's interests,"[242] would have dissuaded them from entering into the transaction. They frankly admitted that such advice "would not necessarily have changed their ultimate decision."[243] Given that the advice described by Fehlberg goes well beyond what is required under the *GAA*,[244] it seems only reasonable to ask whether the *GAA* can do what actual independent advice apparently does not.

But if the *GAA* can serve any sort of protective function as between the borrower and guarantor, it is by making sure the guarantor knows what they are signing, driving home the seriousness of it, and giving them a chance to think it over, which in at least some cases will mean thinking better of it.[245] As a practical reality it is not possible to know simply by reading

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cases, a lender may have a duty at common law to recommend a guarantor seek independent legal advice (see generally Tjaden, *supra* note 27 at 180–83).

[241] The Court expressly declined to consider whether the outcome would have been different in this particular case. "I do not accept that the appellant need call evidence of whether she would have signed the document regardless of the advice received. If the transaction is unconscionable, it is unenforceable" (*Ohlson, supra* note 111 at para 53).

[242] Fehlberg, *Sexually Transmitted Debt, supra* note 6 at 172.

[243] *Ibid* at 173. See also MH Ogilvie, "The Fiduciary Nature of Spousal Surety Agreements in Banking Law" (2005) 42:2 Can Bus LJ 245 at 269 ("The surety might still not fully understand the substance of the transaction [after receiving independent legal advice], and even if the surety does, might still enter the transaction for other reasons, including deliberate choice and undue influence."); Charles YC Chew, "Another Look at the Giving of Independent Advice to Sureties: Some Uncertainties and Evolving Concerns" (2006) 18:1 Bond L Rev 45 at 48 ("Whilst the provision of advice to those individuals who might assume the debt of their partner because of undue influence, misrepresentation or deception will be relatively valuable, it may have little effect upon those who enter the transaction because of emotional ties."); Robert A Klotz, "Sexually Transmitted Debts" (2008) 27 CFLQ 245 at 255–56;

[244] See the discussion of this point in Chapter II.

[245] This is more or less what was described by Stiles in the excerpt above.

case law in what percentage of cases this has actually happened: for obvious reasons, situations in which a person speaks with a lawyer, reflects on their potential liability, and then prudently refuses to sign a guarantee do not usually result in litigation on that guarantee. In a number of cases, however, the *GAA* has clearly failed to dissuade people from signing. These cases can be grouped into two categories: cases in which the *GAA* interview failed to convey an adequate level of understanding, and cases in which understanding did not deter the prospective guarantor.

Lack of Understanding

Literature on mandatory disclosure in various contexts, from healthcare to software licensing, has observed that many people simply do not understand what is being disclosed to them.[246] The *GAA* interview may seem an improvement over the most obviously inaccessible forms of disclosure in that it at least involves speaking directly with a lawyer, rather than being presented with an incomprehensible slab of text purporting to set out your rights and responsibilities.[247] But Alberta case law offers reasons to question the extent to which the *GAA* can actually make a guarantor understand their potential liability under a guarantee. An obvious example is found in *Ampex of Canada Ltd v Thomson*.[248] The husband and wife were shareholder-directors of a company, but the wife was "never directly involved" in the company's operations and was an "unsophisticated and uncomplicated housewife, totally naive in the world of business."[249] She and her husband both gave guarantees of the company's debt. The lawyer who carried out the *GAA* interview testified that the wife "appeared to understand" the transaction.[250] The Court found, however, that the wife did not understand that she was personally liable under the guarantee, and allowed her defence of *non est factum.*[251] Similarly, in

[246] Omri Ben-Shahar & Carl E Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton: Princeton University Press, 2014) at 79–93 [Ben-Shahar & Schneider, *More Than*]; Tess Wilkinson-Ryan, "A Psychological Account of Consent to Fine Print" (2014) 99:4 Iowa L Rev 1745 at 1751 ("Most user agreements, terms of credit, informed-consent forms, and product warranties (to name a few) are long and difficult to understand.")

[247] See e.g. the description of electronic terms and conditions in Ben-Shahar & Schneider, *More Than, supra* note 246 at 67–68. But see Omri Ben-Shahar & Carl E Schneider, "The Failure of Mandated Disclosure" (2011) 159:3 U Pa L Rev 647 at 714 ("Extracting complex information from speech is like listening to a foreign language you almost know. At first you think you understand; you hear a word you do not instantly recognize; you pause to identify it; you return to find the speaker several stops along in the sentence and you struggle to catch up. Soon you are lost.")

[248] 1979 CanLII 1110 (ABQB) [*Ampex*].

[249] *Ibid* at paras 23, 25.

[250] *Ibid* at para 24.

[251] On the issue of to what extent a claim of *non est factum* can be allowed where a *GAA* certificate has been issued, see Weary, *supra* note 77.

Royal Bank v Bradley,[252] the elderly guarantors gave guarantees and collateral mortgages in connection with loans to their son and daughter-in-law. The defendant, a lawyer, acted for the guarantors, the bank, and the son. The Court found that the lawyer did what was required of him under the *GAA*: "[H]e explained to them the significance of the guarantee and collateral mortgage, the amount that was at risk and the potential liability that faced them if their son failed to repay the bank."[253] Despite this, the Court was uncertain that the guarantors "really appreciated the risk that was involved" and that the scope of their potential liability "never really sunk [*sic*] home to them."[254] Based on this, the Court held that the lawyer had failed to comply with his professional duty *as a lawyer* to the guarantors.[255] *Ampex* and *Bradley* both suggest that the *GAA* interview, in fact as well as in law, may fail to provide an unsophisticated guarantor with an adequate understanding of "the effect of and the liability under" a guarantee contemplated by Aberhart.[256]

This particular problem is obviously not limited to situations of relationship debt. However, I suggest that relationship debt situations present particular risks. Unlike in a situation where the borrower and guarantor are practically the same person,[257] the knowledge of the debtor is not the knowledge of the guarantor. The most obvious danger is that the debtor may be in a more precarious financial position than the guarantor appreciates.[258] But there are more subtle dangers. Consider the example above in which Sophie and her wife Gina agree to personally guarantee the debts of Sophie's company, NumberCo. Let us say the guarantee is for a hundred thousand dollars. In this example, Sophie is a reasonably experienced and sophisticated businessperson. She is not an expert in either finance or law, but she has been a director-shareholder in other small companies and has signed guarantees before. She knows basically

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[252] *Bradley*, *supra* note 111.
[253] *Ibid* at para 44.
[254] *Ibid* at para 45.
[255] *Ibid* at paras 47–49.
[256] Aberhart to Jenner, *supra* note 40.
[257] See the discussion of non-third-party guarantees in Chapter I.
[258] See Fehlberg, *Sexually Transmitted Debt, supra* note 6 at 163–66. See also Pascoe, *supra* note 29 at 43, discussing women who at least nominally hold positions in family corporations ("In many of the cases it is evident that, despite the fact that the guarantor is a company director, there is an information imbalance about both the extent of her liability and the risk of the company defaulting.") This need not involve a deliberate attempt to pull the wool over the guarantor's eyes. Fehlberg observes that "[t]he selective manner in which debtors often relayed information to sureties did not always amount technically to a misrepresentation, but rather the optimistic views of a hopeful debtor … which nevertheless fell far short of an unbiased assessment of the situation, or the risk" (Fehlberg, *Sexually Transmitted Debt, supra* note 6 at 164).

what she is getting into. Gina, on the other hand, has never started or operated a company, and is rather intimidated by any sort of legal document. She is not quite sure what it means to guarantee something. On her own, it is fairly unlikely Gina would find herself guaranteeing a business debt, and if she did, the lawyer who interviewed her would most likely quickly realise she had little real understanding of what she was about to sign.[259] But Sophie's presence may complicate things, as the following case illustrates.

In *Bank of British Columbia v Shank Investments Ltd*,[260] the litigation involved four defendants. Two were the principal shareholders of a corporation; one was the wife of one of the shareholders; the other was the mother of the other shareholder. The wife and the mother agreed to give mortgages on their homes. The wife attended at a lawyer's office, accompanied by the two shareholders, to sign the documents. She did not realise that she was signing an unlimited guarantee of the corporation's debt as well as a mortgage. The lawyer "did not single out the attached guarantee and explain its nature and impact," despite preparing a *GAA* certificate.[261] The Court appears to have regarded this as an understandable mistake in the circumstances:

> I am satisfied that Mr. Sitko, in dealing with the many documents before him with two obviously well-informed and knowledgeable businessmen in the presence of Gloria Mercier, assumed that Mrs. Mercier, although not primarily involved in her husband's business activities, understood the nature and import of all the documents. Her affirmative response to his question whether she understood what she was signing would confirm his assumption and lead him to sign the certificate without qualm.[262]

Based on the wife's lack of understanding of what she was signing, and the fact that the lawyer (as the bank's agent) had been careless in failing to comply with the requirements of the *GAA*,[263]

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[259] But see Weary, *supra* note 77, in which I explore how a well-meaning lawyer may fail to realise that a prospective guarantor does not really understand as much as they seem to. See also ALRI, *1970 Report, supra* note 9 at 17 ("there is genuine difficulty in certifying as to another's degree of comprehension"); Ogilvie, *supra* note 243 at 269, on independent legal advice ("The Law Lords do not require that the surety actually understand the transaction, only that the formal steps be taken of advising that independent advice be got and such advice be given.")

[260] 1984 CanLII 1233 (ABQB) [*Shank*]. The mother was also released from liability on the basis that her interview did not strictly comply with the requirements of the *GAA* (*ibid* at para 19).

[261] *Ibid* at para 6.

[262] *Ibid* at para 8.

[263] From the practitioner's point of view this is a good example of how *not* to conduct a *GAA* interview. However, not every *GAA* interview looks alike, and the nature of the interview can depend to some degree on the level of sophistication of the prospective guarantor: *Economy Floor Coverings v Anthony's Italian Restaurant Inc*, 1986 CanLII 1604 at paras 28–30 (ABQB). See generally my discussion of what is required of a practitioner in Weary, *supra* note 77.

the Court allowed her defence of *non est factum.*[264] *Shank* exposes a rather serious flaw in the *GAA*'s ability to guard against an unwary guarantor stumbling into a financially ruinous transaction: in cases where the transaction involves a borrower who is relatively sophisticated in commercial matters, the interviewer may fail to realise that this sophistication is not shared by the guarantor. This disparity in sophistication is not uncommon in guarantor-borrower relationships.[265]

The guarantor in *Shank* discussed above successfully defended against the guarantee. However, guarantors who do not understand what they are signing are not always able to escape liability. In *Canadian Imperial Bank of Commerce v Chang*,[266] involving a woman who signed a guarantee for a family friend, the Court was willing to accept that the guarantor had not actually understood the guarantee despite a *GAA* interview. It found, however, that she had been careless in signing something she had not read and did not understand.[267] The upshot of *Chang* is this: it is quite possible for a transaction to technically comply with the *GAA* when in reality the guarantor has no idea whatsoever what they just signed.[268]

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[264] Again, whether *non est factum* is generally available in cases where a *GAA* certificate has been issued remains an unsettled point of law: see Weary, *supra* note 77.
[265] See e.g. Fehlberg, *Sexually Transmitted Debt, supra* note 6 at 176 ("Sureties often emphasized that they had other things on their minds … During meetings at which documents were executed, they described themselves as being preoccupied or silent and as trusting more business-like debtors to look after their interests.") See also Fehlberg's discussion of (lack of) involvement in a debtor's business (*ibid* at 138–39) and lack of knowledge about business problems (*ibid* at 144–45). See also Littwin, "Coerced Debt", *supra* note 218 at 985.

The same gaps in actual knowledge and general sophistication can of course occur in arm's-length transactions. I suggest, however, these gaps are more likely to be problematic in in non-arm's-length third-party guarantees. The guarantor in an arm's-length guarantee will generally have no reason to sign what the borrower tells them to sign without taking some steps to protect their own interest (such as retaining their own counsel or, at minimum, asking a few questions during the *GAA* interview): the considerations of emotion, loyalty, and obligation at play in third-party guarantees between family members, intimate partners, or even friends do not hold much sway in an arm's-length transaction – that is, an ordinary commercial relationship "characterized by self-interest" (of the kind identified in *Hodgkinson v Simms* (1994), [1994] 3 SCR 377 at 415). I suggest too that while it may be understandable (if certainly not professionally defensible) to assume that a guarantor spouse or family member knows something about the borrower's business, it is less likely that the lawyer giving the *GAA* interview will assume that that the debtor must possess the same knowledge and commercial sophistication as the borrower in cases where the debtor and borrower have no pre-existing relationship.
[266] 1985 CanLII 1231 (ABQB) [*Chang*].
[267] *Ibid* at para 33.
[268] Relatedly, see *Victoria Insurance Company of Canada v Genereux Workshop (Bonnyville) Ltd,* 1985 CanLII 1228 (ABQB), involving wives who signed guarantees at their husbands' request. The Court similarly held the guarantees enforceable despite the wives' claim they did not understand what they were signing. In this case, the guarantors asserted that the *GAA* interviews were not actually carried out despite the existence of the signed certificates (*ibid* at paras 10, 21).

Failure to Dissuade

Even in cases where the guarantor understands what they are getting into, this may not suffice to protect them. In the consumer context, providing people with information – even assuming they comprehend the information given to them – does not necessarily, or even typically, cause them to make different decisions.[269] Nelson, in the course of his 1980s reform efforts, conceded that "there is the argument that a person confronted with the facts of a guarantee would in all possibility still sign that guarantee."[270] An onlooker (or reader of case law) may struggle to understand how a guarantor can obtain no direct benefit from a transaction, take on significant liability, and – despite apparently fully appreciating both of these facts – plunge ahead anyway. Yet literature on relationship debt specifically suggests that providing third-party guarantors with information about the transaction and its implications may still fail to dissuade them.[271] Alberta case law appears to suggest much the same thing.

On the plausibility of a guarantor's lack of understanding, see *Bank of Montreal v Hardy*, 1985 CarswellAlta 704 (ABQB). The husband gave a guarantee and mortgage in connection with a loan to his wife's business. He did not read the guarantee before signing it and claimed to have relied on his wife and the bank. The Court found that he was "obviously an experienced businessman" who had signed guarantees before (*ibid* at para 15), and refused to accept a defence based on his lack of understanding of the liability he was taking on. Taking the guarantor at his word, this is another example of the *GAA* interview apparently failing to provide the guarantor with a proper understanding of his liability under the guarantee, although it appears this particular guarantor was unusually determined *not* to understand. See also *Canadian Imperial Bank of Commerce v 3L Trucking Ltd*, 1995 CanLII 9226 at paras 40, 84 (ABQB), in which the Court was similarly sceptical of a guarantor's argument that she did not understand what she was signing. Note, however, that the Court in this case did accept that the guarantor did not realise she was also mortgaging her home (*ibid* at paras 78–80).

The case of *Alberta Agricultural Development Corp v Ackroyd,* 1991 CanLII 5848 (ABQB) is also notable when evaluating the *GAA*'s ability to ensure the guarantor's understanding. This transaction involved a father and son. The father owned land in Alberta and had agreed to sell some land (along with cattle and farm machinery) to his son; the son required financing for the purchase, and the lender demanded as security a collateral mortgage on lands owned by the father. At the time of the transaction, the father was out of Alberta and had granted his son a general power of attorney. The son executed the collateral mortgage and a *GAA* certificate as his father's agent. The father apparently did not discover that his land had been mortgaged until much later. The Court found that the transaction complied with the *GAA*:

> Where the power of attorney by its terms authorizes the giving of a guarantee or where, as here, the language of the power of attorney is sufficiently broad and permissive to encompass the giving of a guarantee, the "person entering into the obligation" as referred to in ss. 3 and 4 of the *Guarantees Acknowledgment Act* is the grantor of the power of attorney as represented by the attorney. *(ibid* at para 36).

Although this case is not totally relevant to the discussion of the *GAA* interview, since no interview involving the guarantor actually took place, it still stands as a remarkable failure to ensure any sort of useful understanding. You can have your guarantor grant you a power of attorney, arrange for them to guarantee your debt, and then certify that they understand what they are doing – while they in reality know nothing about it. A statute that reduces guarantor protection to a formality offers no real protection at all.

[269] See generally Ben-Shahar & Schneider, *More Than, supra* note 246 at 59–118.

[270] Alberta, *Hansard,* 20-3, Vol 2 (23 May 1985) at 1130.

[271] Fehlberg, *Sexually Transmitted Debt, supra* note 6 at 172–73; Millbank & Lovric, *supra* note 159 at 31–32.

In *Rawluk v Royal Bank of Canada*,[272] an elderly woman guaranteed the debts of a company set up by her son and grandson. She met with a lawyer to have a letter of independent legal advice signed in connection with the transaction. (As we have established, this is more than what is required of a lawyer giving a *GAA* interview.[273]) The lawyer failed to complete a *GAA* certificate, but did explain the nature of the transaction and the possibility that she might lose her money. The lawyer's notes (cited in the written decision) indicated that the guarantor "fully" understood this and that she had advised him if she did not go ahead with the transaction, her son and grandson would lose their money.[274] The Court found that the guarantor, by her own admission, "understood the nature and effect of the guarantee, its amount and the consequences of default in payment."[275] At Queen's Bench, the Court held that the *GAA* had been complied with in substance.[276] But it condemned "[t]he irresponsible and self-focused actions of the plaintiff's son and grandson," which had "deprived her of the financial security she deserves at her time of life."[277] Practical (if not technical) compliance with the *GAA* did not protect the guarantor from serious financial loss as a result of her relationships with the borrowers. The decision was reversed on appeal.[278] The Court of Appeal found that there had not been "substantial compliance"[279]: the guarantor had not acknowledged her signature on the guarantee as the *GAA* required. The obvious implication is that if this requirement had been met, the guarantor would have been held liable.[280] *Rawluk* suggests that the level of understanding conferred by the *GAA* may afford no protection at all against feelings of family obligation. Recall Fehlberg's finding that women sureties, by their own admission, probably would not have acted differently had they had the benefit of independent legal advice. In the words of one of

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[272] 1991 CanLII 5846 (ABQB) [*Rawluk* QB].

[273] See the discussion in Chapter II; Weary, *supra* note 77.

[274] *Rawluk* QB, *supra* note 272 at para 14.

[275] *Ibid* at para 33.

[276] *Ibid* at paras 22–33.

[277] *Ibid* at para 40.

[278] *Rawluk* CA, *supra* note 86.

[279] *Ibid* at para 5.

[280] Also notable is the case of *Alberta Agricultural Development Corporation v Rowley*, 1995 ABCA 1, in which a father guaranteed a loan to his son. The case turned on whether the terms of the guarantee permitted the lender and borrower to renegotiate the mortgage despite the guarantor's objections. The Court of Appeal held that the existence of a *GAA* certificate rebutted any claim that the terms of the transaction were ambiguous: "The certificate before us … indicates that this man did not simply sit down as a layman trying to understand this thing" (*ibid* at para 6) Assuming this to be so (it is unclear from the reported decision whether the guarantor did in fact understand what he was getting into), it appears that the guarantor nonetheless went ahead with a transaction that was (to say the least) disadvantageous.

Fehlberg's interviewees, "It might have made a difference to how I'd felt, but I don't think it would have made a difference to what I'd done."[281] Independent legal advice made no difference to what the guarantor did in *Rawluk.* The lesser measure of the *GAA* interview, I suggest, is similarly unlikely to make any real difference.

The guarantor in *Wekherlien v McCord*[282] appears to have had less altruistic motives. In that case, the guarantor's ex-husband borrowed money from a company and pledged his shares in that company as security. With the loan coming due and the shares at risk, he asked the guarantor to pledge title to the matrimonial home, which was in her name, as security for another loan. Until this loan was repaid, he would place his shares in the hands of a third party. The guarantor's lawyer advised her against the transaction. The Court considered the guarantor's motives for proceeding in spite of this warning:

> What it was that enabled Mr. Wekherlien to come back to his deserted and denigrated wife to borrow money on her only asset – her home – is difficult to comprehend. She could scarcely have been more badly treated by Mr. Wekherlien. … The plaintiff told the Defendant to complete the documents because "Bob needs the money". Was the plaintiff acting out of some deep, residual, all forgiving love? Or, rather, was it her knowledge that Mr. Wekherlien still controlled the subject shares which were at that time the only asset of considerable value that Mr. Wekherlien had?[283]

Ultimately the Court found that the guarantor "was eager to protect property to which she would, at some future time, assert a claim in a matrimonial property action" and that her "intention … was simply to preserve her husband's property against the day when its value was greater".[284] The guarantor's lawyer executed a guarantee and *GAA* certificate along with other documents. Soon after, the ex-husband died, leaving the loan mostly unpaid and his estate bankrupt.[285]

The reasons in this case deserve some scrutiny. It is easy enough to conclude (as the Court appears to have done) that the guarantor was acting out of purely mercenary motives. Yet it is hard to blame her for wanting to protect, as best she could, assets to which she might be

[281] Fehlberg, *Sexually Transmitted Debt, supra* note 6 at 173.
[282] *Supra* note 199.
[283] *Ibid* at para 14.
[284] *Ibid* at para 35.
[285] The substance of this case was a claim by the guarantor against her lawyer in negligence and breach of contract. The specifics of this claim are not relevant to the analysis here.

entitled, but which were not in her hands.[286] The ex-husband had a kind of power over her by virtue of having control of these assets. It is worth noting too that Fehlberg's study raised the possibility that "even in cases where sureties were divorced or separated, the private dynamic of the relationship was still influential."[287] In the circumstances, it is perhaps not surprising that the guarantor – despite receiving advice about the risks – chose to plunge ahead.[288]

Conclusion

These are not happy cases. And they do not give much reason to be optimistic about the protective powers of the *GAA.* Transactions in which a relationship of some kind (whether an intimate partner relationship or a family relationship) exists between the guarantor and the borrower present special perils. The *GAA* is ill-suited to protect against these perils. Where there is a gap in sophistication between the borrower and guarantor, the *GAA* interview may not suffice to provide the guarantor with a real understanding of what they are about to sign. Even if the guarantor does understand, feelings of family obligation or financial pressures may cause them to enter into the transaction all the same.[289]

The implications of this are twofold. First, as I previously stated, this chapter is not intended as, and should not be interpreted as, any sort of comprehensive study on the issue of relationship debt in Alberta. All the same, the failures of protection identified here may give some pause when considering the extent to which providing prospective guarantors (and other relationship debtors) with information or legal advice can really make a difference to these potentially disastrous financial decisions.

Second, these failures of protection may cause us question whether the *GAA* deserves to be identified as an effective method of debtor protection at all. Third-party guarantees involve three relationships: borrower-lender, lender-guarantor, and guarantor-borrower. A statute which fails to seriously address the vulnerability in the guarantor-borrower relationship is, frankly, a rather shoddy protective measure. In Chapter II, I noted that Alberta courts have recently drifted towards interpreting the *GAA* as requiring some sort of legal advice. As we have seen, however,

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[286] It is perhaps significant that the guarantor was the "principal bread winner" earlier in the marriage (*ibid* at para 13).
[287] Fehlberg, *Sexually Transmitted Debt, supra* note 6 at 187.
[288] See also Fehlberg, *Sexually Transmitted Debt, ibid* at 181, discussing the role of economic pressures.
[289] Again, this aligns with the conclusions of studies in other jurisdictions (see Fehlberg, *ibid* at 172–73; Millbank & Lovric, *supra* note 159 at 31–32).

even this heightened standard may make no practical difference to a guarantor who is motivated by affection or loyalty towards the borrower. The *GAA*'s inefficacy in this respect is of a piece with the underlying assumptions, identified in Chapters I and II, that in guarantee transactions the vulnerability lies exclusively with the guarantor, and the potential to abuse that vulnerability lies exclusively with the lender. In these cases, the guarantor is indeed vulnerable – but the source of that vulnerability is the borrower, and it is the borrower from whom the guarantor ought to be, and is not, protected.

Conclusion

In this thesis, I have argued that – taking into account the historical context in which the *GAA* was enacted, as well as the early court decisions interpreting it – the concern of the *GAA* was with protecting the guarantor from the bank. At the heart of the statute lies a conception of guarantee transactions in which the power is on the lender's side, and the guarantor is inherently vulnerable. I have observed that this conception remained in the legislative consciousness at least into the 1980s, when a protracted campaign to reform the *GAA* revealed essentially the same preoccupation with the perceived power of the bank vis-à-vis the guarantor. I have further argued that this conception of power dynamics did not necessarily reflect of the reality of guarantee transactions, in which the guarantor can – and sometimes does – take advantage of the lender. Further, as I have argued in the final chapter of this thesis, the *GAA* is largely ineffective at protecting the guarantor in cases where the guarantor's vulnerability arises from a relationship with the borrower, rather than from the comparative power of the bank.

In the introduction to this thesis, I stressed that I was taking no position on whether the *GAA* should be retained. I do suggest, however, that if the *GAA* is to be both retained and made effective, any real effort at reform must begin by reassessing the assumptions that were baked into it at the time of enactment. The imperfect and incomplete conception of power and vulnerability at the *GAA*'s core – the view of a guarantee transaction as one in which the bank always, and only, "holds the hammer" – both presents unexpected dangers (a guarantor can at times weaponise the *GAA* against a lender) and leaves gaps of protection (a guarantor enjoys limited and fairly ineffective protection as against the borrower). Some reforms may be relatively minor: it is easy to imagine, for instance, a provision requiring that the borrower not be present during the *GAA* examination in order to reduce the risk of coercion.[290] Other reforms may

[290] Compare the recommendation of Tjaden, *supra* note 27 at 128 that when giving independent legal advice on a guarantee, the lawyer should arrange "a face-to-face meeting … without the other spouse present"; Kimberly A Whaley, "Independent Legal Advice: Risks Associated with ILA Where Undue Influence and Capacity Are Complicating Factors" (2017) 47:4 Advoc Q 459 at 499 ("No one else should be present in the meeting but the client."). Also see Klotz, *supra* note 243 at 255, warning about "[t]he husband … waiting in the lobby, creating pressure unknown to the advisor." Of course, any reform along these lines would need to take into account the existence of non-third-party guarantees.

involve looking far beyond the *GAA* itself: analyses of debt in abusive relationships, for instance, have argued in favour of reforming credit reporting.[291]

It is not the purpose of this thesis to advocate for any sort of comprehensive teardown of the law of guarantees or debtor-creditor law generally. The complicated history of the *GAA* and its failings as a protective measure should, however, give pause to drafters in the commercial law sphere generally. Protective legislation implicates complex issues of power and vulnerability – and, once enacted, can produce surprising results.

[291] Littwin, "Coerced Debt", *supra* note 218 at 1006–1008; Angela Littwin, "Escaping Battered Credit: A Proposal for Repairing Credit Reports Damaged by Domestic Violence" (2013) 161:2 U Pa L Rev 363; Gordon-Bouvier, *supra* note 5 at 16–17.

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