

About the Author

Don Layh's vocations have been varied - former high school teacher in Langenburg; tender of horses, sheep and cattle; beekeeper; law school professor; lawyer. His interests have generally led him to the historical, the legal, and the outdoors.

The first seven years of Don's education began in Wolverine, a one-room country school on section 29-21-29 WPM, two miles east of the Manitoba Saskatchewan border. (Section 11 and 29 of every township were set aside for rural schools.) After studying at the University of Manitoba and University of Winnipeg he taught high school for four years at Langenburg, Saskatchewan. Don attended the College of Law at the University of Saskatchewan and graduated with distinction in 1986. He articulated with the firm of Stromberg, Young, Prosser and Scharfstein in Saskatoon and was admitted to the Saskatchewan Bar in 1987 with the Award of Excellence for top marks in the Saskatchewan Bar Course. He practiced with Robertson Stromberg from 1987 to 1994 when he and his wife, Jan, an artist and high school teacher, returned to Don's family home on the Assiniboine Valley east of Langenburg, Saskatchewan.

Don has enjoyed a specialized legal practice in Langenburg, providing services in debtor creditor and personal property security law to credit unions and several other creditor granters (as well as farmers) throughout Saskatchewan and Manitoba. He has lectured in many Canadian jurisdictions and in New Zealand on the topic of personal property security law.

Teaching others has been a recurrent theme in Don's life. Aside from teaching high school in Langenburg, he taught for several years at the Saskatchewan Bar Admission Course. He has also taught business law at the College of Commerce and in 2005 - 2006 he accepted a position as Associate Professor at the College of Law at the University of Saskatchewan. For several years he has addressed the first year students on their first day of law school on the topic *Life after Law School*. He has also developed and taught many courses in the private sector in the Prairie Provinces, British Columbia and Ontario.

Don received his Queen's Counsel in 2005 and was appointed Chairperson of the Saskatchewan Law Reform Commission in 2009.

When not practicing, teaching, or writing about law, Don enjoys kayaking, canoeing, and swimming at the family's Duck Mountain retreat. At their farm overlooking the Assiniboine Valley he also enjoys gardening, landscaping, and tending horses. Don is an inveterate tree planter. Cycling,

canoeing and snowboarding often lure Don and his family to more exotic locales.



Table of Contents: Detailed

CHAPTER ONE: WHAT DOES THIS MEAN?

LEGISLATION	4
HISTORY	6
COMMENTARY	7
1 Agricultural Corporations: Ss. 2(1)(a)	7
1.1 Corporate Status: Significance under the SFSA	7
1.2 Agricultural Corporation – When Ss. 2(1)(a) is Determinative	10
1.2.1 Agricultural Corporation as Offered by Subsection. 2(1)(a)	10
1.2.2 Agricultural Corporation: Restricting Vendor’s Rights	11
1.2.3 Corporations: Waiving Notice to Seize Implements	13
1.3 When Agricultural Nature of Corporation is Irrelevant	13
1.3.1 Pre-Action Proceedings for Farm Land	13
1.3.2 Mortgages Securing the Purchase Price of Farm Land	13
1.3.3 Section 27: Right of First Refusal to Purchase Farm Land	15
1.4 Six-year Lease-back and Corporate Status	15
1.5 Homestead Protection and Corporate Status	16
1.6 Farm Ownership and Corporate Status	16
2 Child	16
3 Family	17
4 Farm Land	18
4.1 What is Farm Land?	18
4.2 Farm Land – Significant Threshold under the SFSA	18
5 Farming	19
6 Homestead	20
6.1 Saskatchewan’s History of Homestead Protection	20
6.2 Saskatchewan Introduces New Homestead Protection	22
6.3 One Definition of Homestead – Three Protections	22
6.4 More Qualifications of Homestead	25
6.5 “Homestead” or “Home Quarter”?	26
7 Implements	26
7.1 Confusion: Implement, Article, Equipment and Machine	26
7.2 Implement – A Broad Concept	29
7.3 Can a Non-Implement Become an Implement?	30
7.4 Legislative Error – Can Corporations Own Implements?	31
8 Livestock	32
9 Mortgage – Mortgagee – Mortgagor	33
9.1 Inclusion of the Federal Crown	33

9.2 Terms Inclusively Defined	34
10 Producer	35
11 Purchase Money Security Interest	35
12 Recognized Financial Institution	37
13 Resident Person	39
13.1 Definition of “Resident Person” – Post 2002 Amendments	39
13.2 Right of First Refusal and Resident Person	40
13.3 Six-year Lease-back and Resident Person	40
14 Secured Party – Security Agreement – Security Interest	41
15 Spouse	42

CHAPTER TWO: FARM LAND PROCEEDINGS

LEGISLATION	45
HISTORY	54
COMMENTARY	57
1 What is Farm Land?	57
2 Who is a Mortgagor?	63
3 Who is a Mortgagee?	64
4 What is an Action?	64
4.1 Action Defined	64
4.2 Action: Mortgage or Agreement for Sale?	65
4.3 When an Action Is Not an Action	66
4.4 Debt Also Personal Property Secured	66
4.5 Mortgage Debt and Third Party Guarantee	69
4.6 Mortgage Debt and Parallel Covenants	70
5 Pre-Action Proceedings	72
5.1 The Regiment of a Farm Land Action	72
5.2 Notice of Intention	72
5.2.1 One Hundred Fifty Days	72
5.2.2 Form of Notice	73
5.2.3 Federal Notices	74
5.2.4 Contemporaneous Service of SFSA and Federal Notices	75
5.2.5 Method of Service	77
5.2.6 Expiry of Notice of Intention	79
5.3 Mediation	80
5.3.1 The Parameters of Mediation	80
5.3.2 Issuing a Certificate	82
5.3.3 Mandatory Mediation	82
5.4 Role of the Farm Land Security Board	83
5.4.1 The Board’s Mandate	83

5.4.2 Preparing the Court Report	84
5.5 The Application under Section 11	91
5.5.1 The Correct Judicial Centre	91
5.5.2 The Court's Options	92
5.5.3 Sincere and Reasonable Effort	95
5.5.4 Reasonable Possibility of Meeting Mortgage Obligations	99
5.5.5 Judicial Presumption and Burden of Proof	100
5.5.6 Standard of Review by Court of Appeal	106
5.6 Pre June 24, 1988 Homestead Mortgages	107
5.6.1 The Nature of the Protection	107
5.6.2 Three Years from When?	108
5.6.3 Sincere and Reasonable Effort	108
5.6.4 Bifurcated Foreclosure Proceedings	109
5.6.5 Section 17: Expiry Inevitable	110
5.6.6 Qualifying the Mortgaged Land as a Homestead	110
CHAPTER THREE: PURCHASE PRICE MORTGAGES	
LEGISLATION	113
HISTORY	114
COMMENTARY	117
1 Inclusive of All Vendors and Mortgagees	117
2 What is Farm Land?	118
3 Nature of Agreements for Sale within Section 25	119
3.1 Financing Purchase of Farm Land	119
3.2 When is an Agreement an Agreement for Sale?	120
3.2.1 Agreement for Sale – A Financing Instrument	120
3.2.2. Agreement for Sale – An Executory Agreement	121
3.2.3 Vendor Transfer Title	123
3.2.4 Payment of Real Estate Commissions	124
4 Nature of Mortgages within Section 25	125
4.1 Mortgages in Various Forms	125
4.2 The Lender/Vendor Dichotomy	126
4.3 A Simple Case: Mortgage Respecting the Purchased Land Only	127
4.4 A Less Simple Case: Mortgages Given as Collateral Security	128
4.5 Mortgages Must Secure the Purchase Price	130
4.5.1 Mortgage Secures Consolidated Debts and Purchase Price	130
4.5.2 Paying out Previous Mortgagee's Purchase Money	132
4.5.3 Construction and Improvement Mortgages	134
4.5.4 Breach of Covenants Other than to Pay	135
5 Guarantees	136

5.1 Guarantees: Historical Treatment	136
5.2 Unorthodox Guarantees	138
6 Personal Property Securing Purchase of Land	141

CHAPTER FOUR: EFFECT OF FINAL ORDER OF FORECLOSURE

LEGISLATION	145
HISTORY	145
COMMENTARY	146
1 Foreclosure Extinguishes Debt	146
1.1 General Principles of Foreclosure in Saskatchewan	146
1.2 General Application of Subsection 26(1)	148
1.3 The Effect of Subsection 26(1)	149
1.3.1 One Mortgage, Two Parcels	149
1.3.2 Subsection 26(1) and Guarantees	151
1.3.3 Subsection 26(1) and Quit Claims	153
1.3.4 Subsection 26(1) and Equitable Mortgages	154
1.3.5 Subsection 26(1) and Court Costs	157
2 Subsections 26(2) and (3)	157
2.1 An Unencumbered Interpretation of Ss. 26(2) and (3)	157
2.2 Could Ss. 26 Have Undetermined Significance?	164
2.3 Case Law and Subsections 26(2) and (3)	168
3 Mechanics of Apportioning the Debt	174

CHAPTER FIVE: RIGHT OF FIRST REFUSAL

LEGISLATION	177
HISTORY	178
COMMENTARY	179
1 Nature of Land	179
1.1 Is the Land Farm Land?	179
1.2 Mineral Titles	180
2 Nature of Sale	180
2.1 Right Triggered upon Sale of All or a Portion of Farm Land	180
2.2 Right Triggered Only if Land is Sold	181
2.3 Right of First Refusal upon Judicial Sale	181
3 Nature of Mortgagor	184
4 Nature of Farmer	185
4.1 All Farmers Given Right of First Refusal	185
4.2 The Case of Multiple Farmers	186
4.3 Bankrupt Farmers	187
4.4 Farmer Faced with Writs of Execution	188

5 Right of First Refusal Assignable	190
5.1 Right to Assign Introduced by Amendment to Act	190
5.2 Assignable or Transferable by Devise	191
6 Nature of Notice to Farmer	191
6.1 Full Disclosure: Withholding Information	191
6.2 Full Disclosure: Altering the Terms of the Offer	193
7 Strictness of Farmer's Compliance	194
7.1 The Time Limits: Two 15-Day Periods	194
7.2 Calculation of 15-Day Periods	195
7.3 Can Farmer and Mortgagee Amend the Time Limitations	196
7.4 Unequivocal and Unconditional Letter of Commitment	198
8 Farmers' Ability to Waive Right	200
9 When Agreement for Sale Arises	201

CHAPTER SIX: SIX-YEAR LEASE-BACK

LEGISLATION	205
HISTORY	218
COMMENTARY	219
1 Four Years: Time for Reflection	219
2 Participants in the Program	220
2.1 Lenders Obligated to Provide Six-year Lease-back	220
2.2 Farmers Entitled to Right to Lease	220
3 Large Farm Restriction	221
4 Nature of Mortgages after September 20, 1992	222
5 Creation of New Board	222
5.1 Farm Tenure Arbitration Board	222
5.2 Retained Jurisdiction of the Court	223

CHAPTER SEVEN: MORTGAGE TERMS CONTROLLED

LEGISLATION	227
HISTORY	233
COMMENTARY	234
1 Limitation of Actions	234
1.1 Limitation Period too Short	234
1.2 Extension of Time	235
1.3 Limitation Period and Effect of Payment	236
2 Renewal of Mortgages	237
3 Executions on Mortgages	238
4 Reserve Bids in Mortgage Sales	239
4.1 Intent of Section 30	239

4.2 Upset Price Only upon Sale at Mortgagee's Request	239
4.3 Determining an Appropriate Upset Price	241
4.4 Nature of the Order for Judicial Sale	242
5 Inspection Fees and Collection Costs	243
5.1 Three Sections of SFSA Regulate Mortgagee's Costs	243
5.2 Section 16: Costs of Section 11 Application	243
5.3 Section 32: Inspection Costs	246
5.4 Costs Cannot Be Charged to Mortgage Account or Farmer	246
5.5 Subsection 33(4): Certain Costs Allowed	249
5.6 Enforcing an Order for Costs	250
5.7 Costs Awarded against Mortgagee	251
6 Fixtures	251
7 Application of Fire Insurance	252
8 Allocation of Payment by Mortgagor	254

CHAPTER EIGHT: GUARANTEES

LEGISLATION	257
HISTORY	258
COMMENTARY	259
1 Who Does Section 31 Protect?	259
1.1 What is a Guarantee?	259
1.2 A Guarantor – Any Individual, Not Necessarily a Farmer	261
1.3 Principal Debtor Must Be a Farmer	261
2 Independent Legal Advice or Something Less?	262
3 Certificates of Acknowledgment	263
3.1 Contents of Certificates of Acknowledgment	263
3.2 Effect of Certificate of Acknowledgment	264
3.3 First Burden: Lack of Good Faith by Creditor	265
3.4 Second Burden: Improper Conduct of Notary or Lawyer	266
3.5 Does Standard Differ for Lawyers and Notaries?	269
3.6 Independence of Lawyer or Notary Public	269
3.7 Idiosyncrasies of the Certificate	270
4 Sum Certain in Money	271

CHAPTER NINE: HOMESTEAD PROTECTION: EXCLUSIONARY ORDERS

LEGISLATION	276
HISTORY	278
COMMENTARY	283
1. Who is a Farmer?	283

1.1 Farmer and Mortgagor – A Goose Chase of Definitions	283
1.2 Mortgagor’s Spouse and Children	285
1.3 Corporate Status of Mortgagor	286
2 What is a Mortgage?	286
2.1 Vendor-Mortgagees Exempted	286
2.2 Farm Credit Corporation – A Special Case	287
2.3 Mortgage Renewals	288
3 The “Old” Act: The “New” Act	289
3.1 A Recipe for Confusion	289
3.2 Epoch One: Mortgages Executed Prior to June 24, 1988	291
3.2(a) Execution and Adjudication Prior to June 24, 1988	291
3.2(a)(i) <i>Bank of Montreal v. Houton</i> : A Seminal Case	291
3.2(a)(ii) Pre-June 24, 1988: What is a Homestead?	293
3.2(b) Execution Before, Adjudication After June 24, 1988	295
3.2(b)(i) The Theory: Dragging the Old Regime Forward	295
3.2(b)(ii) Theory Implemented: Case Law	296
3.2(b)(iii) Ss. 44(15): Accepting the Old Regime	299
3.2(b)(iv) Ss. 44(15): Rejecting the Old Regime	305
3.2(b)(v) Ss. 44(15): A Tentative and Uncertain Application	307
3.3 Epoch Two: Exclusionary Orders Always Necessary	309
3.4 Epoch Three: September 20, 1992 to May 31, 1993	310
3.4.1 The New Liberalizing Amendment of September 20, 1992	310
3.4.2 An Oversight of the New Amendment	311
3.5 Epoch Four: Post May 31, 1993	312
3.6 Execution One Epoch – Adjudication Another Epoch	312
4 Can Non-Homestead Land Become a Homestead?	314
5 The Mechanics of Exclusionary Orders	316
5.1 Applications to the Farm Land Security Board	316
5.2 Conditional Exclusionary Orders	317
5.3 Future Advances under a Homestead Mortgage	318
5.4 Class Exclusionary Orders	318
5.5 When Land is No Longer a Homestead: Subsection 44(4)	320
6 Judicial Sale of the Homestead	320
6.1 What is the Intent of Subsection 44(10)?	320
6.2 <i>Bank of Montreal v. Nevin</i> : A Correct Interpretation?	322
7 Nature of Protection During Stay	325
7.1 Destruction of Residence During Stay	325
7.2 Effect of Stay on Subordinate Interest Holders	326

CHAPTER TEN: SOLD ARTICLES – ONE REMEDY

LEGISLATION	329
HISTORY	330
COMMENTARY	331
1 Preliminary Matters	331
1.2 Separating the Protection of Sections 46 and 48	331
1.2 The Title to Part IV – “Possession of Equipment”	332
2 Seize then Sue? Sue then Seize?	332
3 Who is Afforded Protection?	333
3.1 Protection to Those Who Do Not Own an Article	333
3.2 Guarantors of the Purchase Price of an Article	337
3.3 Protection for Non-Farmer Purchases	339
4 Who is a Vendor?	340
4.1 When is a Lease a Sale?	340
4.2 Vendors, Not Lenders	343
4.3 No Exclusion for Vendor-Neighbour	343
5 What is an Article? – Section 46(1)	344
5.1 The Definition of Article – Section 46	344
5.2 Sale of Land and Chattels – Subsection 46(3)(a)	346
5.3 Sale of Livestock – Subsection 46(3)(b)	348
5.4 Sale of Article Affixed to Realty – Subsection 46(3)(c)	348
6 When Does a Lien Arise? – Subsection 46(2)	349
6.1 A Lien – An Advantage or Disadvantage?	349
6.2 What is a Lien	350
7 The Nature of the Vendor’s Restrictions	351
7.1 Recovering Dishonoured Cheques	351
7.2 Recovering Dishonoured Promissory Notes	353
7.3 Negotiable Instruments and Matters of Constitutionality	354
7.4 Security Interest in Non-Purchased Personal Property	356
7.5 Securing Purchase Price with a Mortgage Interest	357
7.6 Recovery of Rent for Use of Article	358
7.7 Recovery of Damages in Conversion from Third Party	359
8 Subsection 46(5): What Does It Mean?	360
9 Reports to Credit Reporting Agency	364
10 Subsection 46(6) and (7): Relief for Vendors	365
10.1 Actions Other Than to Recover the Unpaid Purchase Price	365
10.2 Murky Legislation Provides Three Measures of Relief	366
10.3 Article Substantially Destroyed or Damaged	369
10.4 Damaged, but Not Substantially Destroyed	369
10.4.1 Subsection 46(7): Court Adjudication Necessary	369

10.4.2 Qualifying Conduct under Subsection 46(7)(a)	370
10.5 Reasons of Inequity	371
10.6 Just Orders	374
11 Conflict of Laws	376

CHAPTER ELEVEN: SEIZING IMPLEMENTS

LEGISLATION	379
HISTORY	384
COMMENTARY	386
1 What is an Implement?	386
2 Who is a Secured Party?	386
2.1 Definition of Secured Party	386
2.2 Lessor – Disguised Secured Party	388
2.3 Vendor Assigns Security Interest	389
2.4 Other Types of Liens	390
3 Who is a Farmer?	391
3.1 Farmer – The Definition: Sections 45 and 47	391
3.2 Representatives of Deceased Farmer – Section 49	392
3.3 Farmer Transfers Interest in Implement	392
3.4 More Than One Farmer	394
4 No Possession without Notice	395
4.1 What Constitutes Possession?	395
4.2 Can a Farmer Voluntarily Surrender Possession?	396
5 Nature of Breach that Triggers Part IV	399
6 Waiver of Agricultural Corporations	400
6.1 Waiver under SFSA – Subsection 105(4)	400
6.2 Secured Party Abandoning Waiver	401
7 Degree of Compliance Required	402
7.1 Time Frames for Farmer’s Application to Court	402
7.2 The Contents of Notice	407
7.3 Serving Notice of Sale	407
7.4 Service of Notice under SFSA and <i>Farm Debt Mediation Act</i>	407
7.5 Honest Mistake as to Application of Part IV	411
8 Choice of Judicial Centre	412
9 Judicial Discretion under Section 53	413
9.1 The Legislative Mandate for Orders	413
9.2 The 1940s and the <i>Cockshutt Plow Co.</i> Cases	413
9.3 The 1960s and the Anomalous <i>Ingold</i> Case	414
9.4 A Brief Return to a Judicially Restrictive Approach	415
9.5 Jurisdiction to Grant Relief against Unscrupulous Vendors	416

9.6 Complaints of Malfunction of Implements	418
9.7 Decisions Post <i>Belarus v. Chernoff</i>	420
10 Payment Cancels Notice	423
11 Burden of Proof	426
12 Remedies Available to Farmers	427
12.1 Section 55: Powerful Remedies	427
12.2 Cancellation of the Agreement: Subsection 55(a)	427
12.3 Release from Liability: Subsection 55(b)	431
12.4 One and a Half Times Fair Market Value: Subsection 55(c)	431
12.5 Time for Repeal	432

CHAPTER TWELVE: EXEMPTIONS

LEGISLATION	436
HISTORY	439
COMMENTARY	441
1 Early Amendments	441
1.1 Protecting Survivors and Denying Absconders	441
1.2 1915 Amendment – Preventing Secured Parties from Seizing	441
1.3 Exempt Personal Property: A Historical Review	442
2 Who Benefits from Exemption Protection?	443
2.1 The Definition of a Farmer	443
2.2 Property of the Farmer’s Family	444
2.3 Shared Personal Property	445
2.4 Property of Deceased Farmer	445
2.5 Exemptions Unavailable to Corporations	448
2.6 Absconding Debtors Disqualified	450
2.7 Conduct of the Debtor	451
2.8 Property Owned by a Third Party	453
3 Creditors Unaffected by Exemption Protection	454
3.1 Crown Immunity	454
3.2 Banks and Exemption Legislation	454
3.2.1 Banks and the Doctrine of Paramountcy	454
3.2.2 Banks and Subsection 427(1)(h) of the <i>Bank Act</i>	458
3.3 Execution Creditors Financing Purchases	460
3.4 Secured Parties Holding Purchase Money Security Interests	461
3.4.1 Purchase Money Security Interest: Goods Not Exempt	461
3.4.2 The Hallmarks of Purchase Money Security Interests	463
3.4.2(a) Purchase Money Security Interests: A Muddled Affair	463
3.4.2(b) Purchase Before Loan is Advanced	464
3.4.2(c) Multi-Purpose Advance of Funds	465

3.4.2(d) Co-Mingled Sources of Payment	466
3.4.2(e) Consolidating Debt	466
3.4.2(f) Paying Another's Purchase Money Security Interest	467
3.4.2(g) Proceeds of Purchase Money Security Interest	468
3.4.3 Is Perfection a Prerequisite?	469
3.4.4 Non Perfection of Purchase Money Security Interest	470
3.5 Production Money Security Interests	474
3.6 Commercial Liens	474
4 Section 66: Exemption of Specific Property	475
4.1 Subsection 66(a) and (b): Clothing and Furniture	475
4.2 Subsection 66(c): Produce of a Farm	475
4.3 Subsection 66(d) and (e): Machinery and Equipment	477
4.3.1 What is Farm Machinery and Equipment?	477
4.3.2 What is Next 12 Months?	478
4.3.3 When Exemption to be Determined	478
4.3.4 Farm Assets Necessary for Efficient Agricultural Operation	481
4.3.5 One Motor Vehicle	482
4.4 Livestock Exemption	485
4.5 Motor Vehicle for Business or Trade	487
4.6 Subsection 66(f) and (g): Books, Tools, and Implements	487
4.7 Crops	487
4.8 Subsection 66(h), (k), and (l): Exemption for Residences	489
4.8.1 Three Types of Residences Exempt	489
4.8.2 Is More Than One Residence Exempt?	491
4.9 Subsections 66(m) and (n): Right of First Refusal and Lease-back	492
5 Sale or Transfer of Exempt Property	492
5.1 Exempt Property – What Can a Farmer Do with It?	492
5.2 Proceeds of Voluntary Sale Not Exempt	495
5.3 Effect of Registration of Writ against Exempt Chattels	497
5.4 Effect of Registration of Writ against Exempt Real Property	499
5.5 Fraudulent Conveyance of Exempt Property	503
5.5.1 Basic Principles	503
5.5.2 Fraudulent Conveyances of Exempt Real Property	506
5.5.3 Fraudulent Conveyances of Exempt Personal Property	512
6 Forced Sales and Priority to Proceeds of Sale	514
7 Matters of General Importance	520
7.1 Sale Cannot Be Forced to Allow Minimum Exemption	520
7.2 Exemption Choices	520
7.3 Pre-emptive Application to Determine Exemptions	520
7.4 Principles of Interpretation	522

7.5 Burden of Proof	523
7.6 Damages for Improper Seizure	527
7.7 Debtor's Obligation to Claim Exemption	528
8 1992 Amendment: Waiving Exemption Protection	528
8.1 The Need for a Waiver of Exemption Protection	528
8.2 Three Enactments over Ensuing Twelve Years	530
8.2.1 September 20, 1992: The Initial Provision	530
8.2.2 December 1, 1993: A Tailoring of Section 68	530
8.2.3 November 15, 2004: A Need to Allow Consolidation	531
CHAPTER THIRTEEN: FARM OWNERSHIP	
LEGISLATION	534
HISTORY	544
COMMENTARY	545
1 Basic Principles Continue to Apply	545
2 A Call for Liberalizing Non-Residency Rules	548
3 Liberalized Rules Beg Re-evaluation of SFSA	550
CHAPTER FOURTEEN: GENERAL PROVISIONS	
LEGISLATION	552
COMMENTARY	556
1 Immunity from Liability	556
2 Offences	557
3 Service of Documents	557
3.1 When Service Is Required by SFSA	557
3.2 Methods of Service	558
4 Waiver of SFSA	559
TABLE OF CASES	571
INDEX	587
APPENDICES	593
1 Regulations to SFSA	593
2 Co-Application to Farm Land Security Board	604
ACKNOWLEDGMENTS	
ABOUT THE AUTHOR	

BOOK REVIEWS

A LEGACY OF PROTECTION

A masterly treatise on an esoteric but important area of the law that closely affects the Saskatchewan farmer, scrupulously researched and critically analyzed – a great source book for anyone concerned with this heretofore uncharted corner of the law, its history, complexities and current application.

The Honourable E. D. Bayda, retired Chief Justice of Saskatchewan, S.O.M., Q.C., LL.D.

This book is a “must” for Saskatchewan judges and lawyers who deal with one of the most “byzantine” of Saskatchewan’s statutes: The Saskatchewan Farm Security Act, an Act replete with uncertainty, anomalies and inconsistencies. One of many admirable aspects of this book is the historic record it provides, so important to an understanding of the Act. Layh’s style eschews the turgid prose often found in legal texts addressing complex law. While not suggesting the book is a casual read for a winter day, readers without expertise in commercial law will find a “story” of the development of this important Saskatchewan law.

Professor Ronald C. C. Cuming, Q.C., College of Law, University of Saskatchewan

This volume drills to the core of Saskatchewan farm law through Layh’s examination of The Saskatchewan Farm Security Act. Even in its thoroughness and painstaking detail, the work is **eminently readable and interesting**. The analysis will provide to legal practitioners a savoury mouthful; to legal historians and scholars, it will serve up a full meal. Bravo.

Dr. Donald E. Buckingham, LL.D., Dip. Int. Law. LL.B., D. Int.

Layh’s text has a place on the shelf of every **commercial lawyer**. He demystifies a unique and complex piece of legislation. Although his subject is in one sense limited – an Act of the Province of Saskatchewan – he has highlighted important commercial concepts that apply beyond the Act, and beyond the borders of the Province.

Michael W. Milani, Q.C.

Chapter Eight

GUARANTEES

Section 31

In 1988, with the enactment of the SFSA, the Saskatchewan legislature decided to offer protection to guarantors ó persons who agree to answer for the act, default, omission, or indebtedness of another's performance of an obligation, often repayment of a loan. Section 31 was oddly placed in Part II of the SFSA ó *Farm Land Security* ó where it made no pretense to apply to all guarantees, unlike the Alberta legislation ó *The Guarantees Acknowledgement Act, 1969*¹ ó that stood as the model for section 31. If one assumed that section 31 was to protect all farmers who executed guarantees, that assumption, too, would be inaccurate. Nor did section 31 really have much to do with farm land security and the section could more appropriately have been placed in a separate and distinct part of the Act.

Guarantees are rather unusual contractual obligations ó that is why custom or legislation in many Canadian provinces has made commonplace a guarantor's attendance upon a lawyer or notary public to ensure guarantors understand their obligations. Guarantors receive little consideration, only the credit granter's willingness to confer a benefit upon the principal obligant. In turn, though, a guarantor promises much ó to answer for the principal obligant's default. Commonly, a guarantor has a strong relationship with the principal obligant, like the parent of a child or the principal of a corporation.

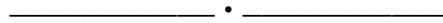
Guarantees fall subject to the *Statute of Frauds*² passed in the reign of Charles II and still in force in Alberta and Saskatchewan in its original form, although repealed in England. The statute requires guarantees be in writing, a sensible requirement since guarantors receive little consideration and the

¹ S.A. 1969, c. 41.

² (U.K.), 1677, 29 Car. 2, c. 3.

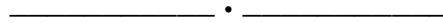
obligation is continuous and contingent. If the contract obligates the person as a principal debtor, it is not a guarantee and need not be in writing.

Prior to September 1, 1988, Saskatchewan law did not require guarantors to receive independent advice before their promises were enforceable. Section 31 of the SFSA was modeled on Alberta's Act. The inherent problems with the Alberta legislation were compounded with the SFSA's qualification of certain guarantees that fell within the scope of the Act and disqualification of other guarantees that fell beyond the scope of the Act. Unfortunately the qualifications were unclear ó were the characteristics of the principal obligant or of the guarantor to determine the application of section 31? Additionally, what was the nature of the independent advice that had to be afforded the guarantor to comply with section 31? These questions, even after 20 years, have not all come before the Saskatchewan courts.



GUARANTEES

LEGISLATION	257
HISTORY	258
COMMENTARY	259
1 Who Does Section 31 Protect?	259
1.1 What is a Guarantee?	259
1.2 A Guarantor – Any Individual, Not Necessarily a Farmer	261
1.3 Principal Debtor Must Be a Farmer	261
2 Independent Legal Advice or Something Less?	262
3 Certificates of Acknowledgment	263
3.1 Contents of Certificates of Acknowledgment	263
3.2 Effect of Certificate of Acknowledgment	264
3.3 First Burden: Lack of Good Faith by Creditor	265
3.4 Second Burden: Improper Conduct of Notary or Lawyer	266
3.5 Does Standard Differ for Lawyers and Notaries?	269
3.6 Independence of Lawyer or Notary Public	269
3.7 Idiosyncrasies of the Certificate	270
4 Sum Certain in Money	271



LEGISLATION

Limits and acknowledgment of guarantees

31(1) In this section:

- (a) "creditor" includes a mortgagee and a secured party;
- (b) "guarantee" means a deed or written agreement whereby an individual enters into an obligation to answer for an act, default, omission or indebtedness of a farmer in relation to farm land or other assets used in farming, but does not include guarantees entered into prior to the coming into force of this Act;
- (c) "lawyer" means a lawyer who has not prepared any documents on behalf of the creditor relating to the transaction and who is not otherwise interested in the transaction;
- (d) "notary public" means:
 - (i) with respect to an acknowledgment made in Saskatchewan, a notary public in and for Saskatchewan;
 - (ii) with respect to an acknowledgment made in a jurisdiction outside Saskatchewan, a notary public in and for that jurisdiction;
 who has not prepared any documents on behalf of the creditor relating to the transaction and who is not otherwise interested in the transaction.

(2) No guarantee has any effect unless the person entering into the obligation:

- (a) appears before a lawyer or notary public;
- (b) acknowledges to the lawyer or notary public that he executed the guarantee; and
- (c) in the presence of the lawyer or notary public signs the certificate in the prescribed form.

(3) The lawyer or notary public, after being satisfied by examination of the person entering into the obligation that he is aware of the contents of the guarantee and understands it, shall issue a certificate in the form prescribed in the regulations.

(4) If a notary public issues a certificate pursuant to subsection (3), he shall do so under his hand and seal.

(5) Every certificate issued pursuant to this section by a lawyer or notary public shall be:

- (a) attached to; or
- (b) noted on;

the instrument containing the guarantee to which the certificate relates.

(6) A certificate issued pursuant to this section that is:

- (a) substantially complete and regular on the face of it; and
- (b) accepted in good faith by the creditor;

is admissible in evidence as conclusive proof that this section has been complied with.

(7) Every guarantee shall specify the maximum financial obligation in sum certain plus interest from the date of the demand on the guarantor to which the guarantor is liable.

(8) A guarantee that does not comply with subsection (7) is null and void and of no effect.

1988-89, c.S-17.1, s.31.

HISTORY

Prior to the introduction of section 31 of the SFSA, Saskatchewan had not previously seen legislative intervention to protect the rights of guarantors. The legislative intention of section 31, modeled almost verbatim on Alberta's *Guarantees Acknowledgment Act*, must be the same as the Alberta legislation, which McBain J. in *National Trust Co. v. Ultra International Properties Ltd.* aptly described as follows:

The object of s. 4(1) of the Act is to provide protection to a prospective guarantor against entering into the severe contingent liability that a guarantee may place on him when he was not aware of the contents of the guarantee and did not understand it. The legislated objective is to ensure that a person so executing a guarantee knows what he is about.³

So, too, the intention of section 31 of the SFSA is to ensure, albeit on a more restrictive basis, that guarantors involved in agricultural lending are given similar protection in Saskatchewan.

Although the intention of section 31 may have been well-placed, the draftpersons of the provision would have been well-advised to look at the confusion that virtually identical legislation had caused the Alberta courts in the years previous to the enactment of the SFSA. Well-drafted legislation will not unnecessarily draw litigants to court to determine their respective rights. On the contrary, legislation, especially commercial legislation, should provide certainty and clarity to avoid litigation. Such had not been the case with Alberta's experience with the *Guarantees Acknowledgment Act*. This confusion in Alberta was clearly documented before the Saskatchewan legislature began its adventurous foray into the legal regulation of guarantees. A quick glance westward would have forewarned the draftpersons of section 31 of the SFSA to be more wary about mimicking legislation from Alberta that had created as much confusion as it had protected guarantors.

Compounding the inherent problems of the Alberta legislation, the Saskatchewan version of guarantor protection legislation invented its own anomalies and confusion. Within section 31 of the SFSA lie embedded gaffes that can only be described as drafting blunders. Surprisingly these gaffes have not seen the light of judicial comment, even though they are apparent and bewildering.

³ (1989), 72 C.B.R. (N.S.) 60 at 79 (Q.B.).

COMMENTARY

1 WHO DOES SECTION 31 PROTECT?

1.1 What is a Guarantee?

Section 31(1)(b) defines a guarantee as a written agreement whereby an individual enters into an obligation to answer for an act, default, omission or indebtedness of a farmer. Agreements with titles less than "guarantee" and obligors with monikers less than "guarantor" might still find protection under section 31. Lenders tend to wield vague labels to describe borrowers and the agreements they sign. Principal borrowers, co-covenantors, co-makers, co-lessees, co-buyers, and guarantors may be asked to sign variously titled agreements such as leases, conditional sales agreements, promissory notes, mortgages, letters of commitment, postponements, and loan applications. Could the parties signing these agreements suggest that, in substance, they create an obligation to answer for an act, default, omission or indebtedness of a farmer? If so, the agreement will be void unless section 31 has been satisfied.

Several defendants in Alberta cases⁴ have argued that the agreement they signed was a "guarantee" and, therefore, deficient in not having a certificate of acknowledgment attached to it. All have been resolved against the defendant's position as the certificate ordinarily required for a guarantee was determined to be unnecessary and the guarantee withstood the defendant's challenge.

In *32262 B.C. Ltd. v. G. Pataki Enterprises Ltd.* the defendant signed a document entitled "Assignment and Assumption of Sign Rental Agreement" in which she was named as a "Co-Assignee." Although the title to the agreement made no reference to "guarantee," the agreement stated:

SIGNING THIS AGREEMENT as 'Co-Assignee' means personal liability. It is expressly agreed that where an Assignee and Co-Assignee are named in this Agreement, then all grant, covenants, agreements, rights and privileges and liabilities shall be construed and held to be the several as well as the joint grants, covenants, agreements, rights, privileges and liabilities of the Assignee and Co-Assignee.⁵

After referring to the definition of "guarantee" found in the Alberta Act as the same definition as section 31 of the SFSA as the Court of Appeal upheld the lower court's finding that the agreement was not a "guarantee," stating that the co-assignee had personal liability that was joint and several with the

⁴ See *Hunter Douglas Canada Inc. v. Allan*, 2001 ABQB 535 and *James v. Oraas*, 2005 ABQB 539.

⁵ *32262 B.C. Ltd. v. G. Pataki Enterprises Ltd.* (1998), 216 A.R. 78 at 8 (C.A.).

assignee. While accepting that the agreement was not drafted in the clearest language, the court found absolutely nothing to suggest any difference in the liability of the two signatories to the agreement. The agreement was not a guarantee so the defendant was not entitled to the protection afforded to guarantors under the legislation. The Alberta cases show that the substance of an agreement, not its form, will govern the court's determination whether a particular agreement constitutes a guarantee for the purposes of section 31 of the SFSA.

Any agreement, even if it is in the nature of a guarantee as defined by subsection 31(1)(b), if executed before September 1, 1988 (the date that section 31 came into force), cannot be a guarantee because subsection 31(1)(b) expressly excludes guarantees entered into prior to the coming into force of this Act.⁶

Although arising in a different context than section 31 of the SFSA, the comments in *Confederation Life Insurance Co. v. Peddie*⁷ show the court's inclination to look to the substance, not the form, of a guarantee-like agreement. Shareholders of a corporate borrower signed a written agreement that, in strict form, was not a guarantee. Barclay J. described the agreement as a co-covenant clause which was attached to the mortgage [of the corporate borrower], imposing a joint and several obligation upon the shareholders to pay a limited amount of \$125,000. Barclay J. quickly equated the obligations under the co-covenanting clause to a guarantee (in determining whether a final order of foreclosure respecting the obligations of the corporate borrower extinguished the obligations of the co-covenantors). Extrapolating Barclay J.'s comments to an analysis of what might constitute a guarantee under section 31 should offer a caution to creditors seeking to have a third party answer for the default of a principal borrower by describing him as a co-borrower or co-covenantor without offering the protection of section 31 of the SFSA. The substance of such a covenant falls within the definition of guarantee under subsection 31(1)(b). Making a party a co-covenantor in a mortgage may well create an obligation falling within the definition of guarantee under section 31. Without satisfying the conditions of section 31, such agreements could easily be void.

⁶ See *Agricultural Credit Corp. of Saskatchewan v. Path Head Farms Ltd.* 121 Sask. R. 81 (Q.B.), the court struck the mortgagor's statement of defence respecting non compliance with section 31 because one guarantee was executed prior to September 1, 1988 and the guarantee on the second loan was attended by a certificate issued by a notary public and served as conclusive proof by virtue of subsection 31(6) that section 31 had been satisfied.

⁷ (1993), 108 Sask. R. 235 (Q.B.).

1.2 A Guarantor – Any Individual, Not Necessarily a Farmer

One would reasonably expect that section 31 was introduced under the SFSA to protect the interests of farmers and their farm assets, a general aim of the Act. But one would be mistaken to think that all farmers who choose to guarantee debts of another person receive the protection of the Act. Section 31 protects only guarantors falling within these criteria: (1) the guarantor must be an "individual" – corporate guarantors have no protection under section 31; (2) the individual must have signed a "deed or written agreement" answering for a third party's "act, default, omission or indebtedness"; (3) the third party must be a "farmer," as that term is defined in Part II; and (4) the farmer's indebtedness must be "in relation to farm land or other assets used in farming."

Strangely, section 31 may be more noteworthy for whom it chooses *not* to protect, rather than those it does protect. Section 31 does not necessarily protect a guarantor, who, in every real sense is a Saskatchewan farmer, but protects many guarantors who have no association with farming. This anomaly is driven by the Act's insistence that the principal borrower's vocation, not the guarantor's, determines whether or not the guarantor receives the benefits of section 31.

Sometimes the Act provides protection to a guarantor in surprising circumstances, but leaves another guarantor without protection. For example, if a farming father were to guarantee his farming son's debt the father would receive the Act's protection. If the same father were to guarantee his daughter's non-farm loan, he would not receive the Act's protection. One wonders: was section 31 intended to protect the farm assets of individuals who have chosen to guarantee another's debts? If so, a "guarantee" should have been defined as a "written agreement whereby an individual engaged in farming answers for default of any other person."

1.3 Principal Debtor Must Be a Farmer

The principal borrower must be a "farmer" before section 31 applies because a guarantor is any individual who answers for the debt of a "farmer." But who is a "farmer"? Subsection 2(2) of Part I states that the relevant definition of "farmer" is provided in each Part of the Act. Section 31 falls under Part II of the Act where subsection 3(c) states, that for the purposes of Part II, a "farmer" is a "mortgagor." But, not all farmers whose obligations are guaranteed are mortgagors. If a father agrees to guarantee the debt of his daughter who has purchased a combine (the daughter is not a mortgagor and, therefore, not a "farmer"), has the father executed a "guarantee" as defined by the Act? Apparently, he has not because the daughter is not a "farmer" as defined in Part II – that is, she is not a "mortgagor." Such a result could not have been the intention of the legislature.

Additionally, subsection 31(1)(b) requires that the obligations of the farmer, that is, a mortgagor, be in relation to farm land or other assets used in farming. The phrase "other assets used in farming" does not lend meaning to an already confusing definition if a farmer must be a mortgagor, the farmer's obligations must necessarily relate to farm land, but not to other assets used in farming.

One statement can be made with certainty: an individual who guarantees a principal borrower's financial obligation is *not* protected by section 31 if the obligation is not, in some way, farm-related.

Perhaps guarantors' protection should have been in a different or separate Part of the Act, unrelated to mortgages, and not in a Part II, entitled "Farm Land Security." And if the definition of "guarantor" had been simply defined as a "producer" or an "individual engaged in farming" then all individuals engaged in farming who execute guarantees for any borrowers, farmers or otherwise, would have been given the Act's protection. One must think that this may have been the legislature's intention.

2 INDEPENDENT LEGAL ADVICE OR SOMETHING LESS

Subsections 31(1)(c) and (d) approximate a requirement that guarantors seek independent legal advice or the guarantee will be invalid. Even though lenders and lawyers in Saskatchewan often state that a guarantee requires a "certificate of independent legal advice," section 31 does not contain the phrase "independent legal advice" even though the phrase is used in three other provisions of the SFSA.⁸ Instead, section 31 requires that the lawyer or notary public who provides the certificate cannot have prepared documents for the creditor, nor be "otherwise interested in the transaction," thereby requiring that the lawyer or notary have some measure of independence from the transaction.

Because a notary public can issue the certificate, the requirement for advice falls short of "independent legal advice," because a notary cannot provide legal advice. Perhaps a more appropriate description of the requirement of section 31, one that has been used in Alberta, would say that the guarantee must be "certified."⁹

The Alberta courts have said in *Teachers' Investment and Housing Co-operative v. S.H. Properties Ltd.*¹⁰ that a notary public is not required to explain a guarantee. The Alberta legislation is different than section 31 of the SFSA because the Alberta Act does not specifically state that a "lawyer

⁸ s. 27.2(8)(b), s. 68(3)(b)(ii) and s. 105(4).

⁹ *Lambert v. Caisse Populaire de Morinville Savings & Credit Union Ltd.* (1984), 40 Alta. L.R. (2d) 206 (C.A.) [*Lambert*].

¹⁰ (1984), 33 Alta. L.R. (2d) 132 (Q.B.).

is able to provide the certificate. The Alberta Act contemplates only a notary providing the certificate which includes a lawyer, because lawyers are, by definition, notaries public. Section 31 of the SFSA, on the other hand, allows both lawyers and notaries to issue the certificate.

In *Credit Foncier Trust Co. v. 212731 Alberta Ltd.* the guarantor maintained that the solicitor who signed the certificate did not explain the financial implications of the guarantee. Veit J. held that neither the Act nor common law imposed a duty upon the notary public to explain the guarantee to the guarantor. Veit J. dismissed the notion that the notary had an obligation to explain the guarantee, stating:

[K]eeping in mind that the person who is to sign the certificate is only a notary and therefore could be a real estate agent, or a lawyer, or a secretary, it would be extraordinary to imagine that there should be such an obligation read into the provisions of s. 4 of the Act.¹¹

3 CERTIFICATES OF ACKNOWLEDGMENT

3.1 Contents of Certificates of Acknowledgment

Form B ó Acknowledgment of Guaranteeö prescribed by the regulations to the SFSA¹² details those matters that a notary or lawyer must satisfy, as outlined in section 31:

1. The certificate states that it must be öattached toö or önoted uponö the guarantee. Certifying the guarantee without seeing it attached to the certificate would not satisfy the terms of the certificate. Subsection 31(5) of the Act also states that a certificate must be attached to or noted on the instrument containing the guarantee.
2. The guarantor must appear in person before the notary or lawyer. This condition is found in the certificate and in subsection 31(2)(a) of the Act.
3. The guarantor must acknowledge that he or she has executed the guarantee, a condition of the certificate and subsection 31(2)(b) of the Act. Apparently, then, whether or not the guarantor signs the guarantee in the presence of the notary public or lawyer is irrelevant.
4. The notary or lawyer must öexamine the guarantor,ö a condition expressly required by subsection 31(3).
5. Under subsection 31(4), the examination conducted by the notary or lawyer must allow him to reach two conclusions: a) that the guarantor is

¹¹ (1985), 64 A.R. 282 at para. 13 (Q.B.).

¹² *Saskatchewan Farm Security Regulations*, c. S-17.1, Reg. 1. See Appendix I, Form B ó *Acknowledgment of Guarantee*.

aware of the contents of the guarantee, and b) that the guarantor understands the guarantee.

6. Unlike Alberta, the notary or lawyer must state that he has not prepared any documents on behalf of the creditor and is not otherwise interested in the transaction, a condition contained in the definition of "notary public" and "lawyer" in subsection 31(1)(c) and (d).
7. The notary or lawyer must see the guarantor sign the "Statement of Guarantor," a rather innocuous statement in which the guarantor simply agrees that he is "the person named in the certificate." This condition is specified in both the certificate and in subsection 31(2)(c) of the Act.

Any prudent notary or lawyer should ensure that he has satisfied these conditions before signing the certificate. To do otherwise may ground an action by the guarantor. However, a larger question looms: what effect does the substandard work of a notary or lawyer have upon the creditor who relies upon the certificate?

3.2 Effect of Certificate of Acknowledgment

Even though a notary or lawyer might fail to satisfy all the obligations imposed by the certificate and subsection 31(2), the certificate, nonetheless, may appear complete and regular because it bears the appropriate signatures when presented to and accepted by the creditor. The legislation in Alberta and Saskatchewan contemplates that the creditor may not know whether the guarantor received the intended benefits from the notary or lawyer as mandated by the legislation and ostensibly confirmed by the certificate. Who, then, the creditor or the guarantor, should bear the brunt of the careless work of the notary or lawyer?

Section 31 provides an answer. While subsection 31(2) emphatically states that "no guarantee has any effect" unless the guarantor appears before a notary or lawyer, has acknowledged that he has signed the guarantee, and has signed the certificate before the notary or lawyer, subsection 31(6) states that if a certificate is "substantially complete and regular" on its face and accepted in "good faith" by the creditor, compliance with section 31 has been conclusively proven. Subsection 31(6) favours the creditor's reliance on the certificate. A guarantor will have a difficult task proving the guarantee is void in face of a properly issued certificate. The similar section of the Alberta Act has essentially been rendered a deeming provision by the courts: if the certificate is complete, the guarantor's failure to actually appear before a lawyer or notary public is irrelevant.

In *Alberta (Treasury Branches) v. Ronsdale Construction Inc.*, Funduk M. offered the trump-like effect available to a creditor upon an appropriate inspection of a certificate, attended by good faith:

The legislature intended that a certificate which was apparently regular on its face and which was accepted in good faith would be conclusive proof that the provisions of the Act had been complied with. The legislature did not intend that the courts were to go behind such a certificate to determine if in fact there was compliance with the Act.¹³

To escape liability under a guarantee, then, a guarantor must be able to successfully make two arguments. The first argument must be against the creditor ó that it failed to notice an irregularity in the preparation of the certificate, or it lacked good faith in accepting the certificate. The second argument must be against the notary or lawyer ó that he failed to satisfy one or more of the several conditions mandated by the certificate and section 31 of the Act. Only if the guarantor can successfully attack the creditor and then the notary or lawyer, will he be able to draw the protection of section 31 to avoid liability under a guarantee.

3.3 First Burden: Lack of Good Faith by Creditor

Attacking the creditor's lack of good faith is a prerequisite to making the second argument ó proving the shabby work of the notary or lawyer. If guarantors are unable to impeach the effect of the certificate they cannot then be heard to say they did not understand they were executing a guarantee,ö ó sound logic provided by Funduk, M. in *Economy Floor Coverings v. Anthony's Italian Restaurant Inc.*¹⁴ Master Funduk's comment reiterated statements he made in two other cases: *Victoria Insurance Co. of Canada v. Genereux Workshop (Bonnyville) Ltd.*¹⁵ and *Alberta (Treasury Branches) v. Ronsdale Construction Inc.* In the first case, in face of a guarantor's challenge to the validity of a certificate of acknowledgment, he stated:

Where the guarantee was signed by the guarantor, where the certificate was signed by the notary, where the certificate was signed by the guarantor and where the certificate is substantially complete and regular on the face of it, a guarantor can successfully avoid the mandatory evidentiary consequence of the certificate where the Act has not been complied with only by showing that the creditor had not "accepted in good faith" the certificate. In other words, a guarantor can overcome a certificate which is "substantially complete and regular on the face of it" by showing, first, that the Act was not complied with and, second, that the creditor had not accepted the certificate in "good faith".

¹³ (1984), 35 Alta. L.R. (2d) 44 at 54 (Q.B.) [*Ronsdale*].

¹⁴ (1986), 42 Alta. L.R. (2d) 361 (Q.B.) [*Economy Floor*].

¹⁵ (1985), 40 Alta. L.R. (2d) 288 (Q.B.).

í There are two essential fact requirementsí for a successful defence, being those mentioned above. First, the Act must not have been complied with. Second, the creditor did not accept the certificate in "good faith". Both must exist in order to defeat the conclusive evidentiary effect of the certificate.¹⁶

Examples of lack of good faith might arise if a creditor has specifically instructed a guarantor to attend before a certain notary, knowing the notary automatically executes certificates without examining the guarantor. Funduk, M. in *Economy Floor Coverings v. Anthony's Italian Restaurant Inc.* gave another example. If a notary does not examine the guarantor *and* the creditor knows when it accepts the certificate that the notary did not examine the guarantor, the creditor will be unable to demonstrate the mandatory good faith.

3.4 Second Burden: Improper Conduct of Notary or Lawyer

If a guarantor can show either that the certificate was not regular and complete or that the creditor lacks good faith, he must meet further burdens to render the guarantee invalid.

Under subsection 31(2) he has three chances to discharge the burden: 1) he can prove that he did not actually appear before the notary or lawyer; 2) that he did not acknowledge to the notary or lawyer that he executed the guarantee; or 3) that he failed to sign the certificate in the presence of the notary or lawyer.

Under subsection 31(3) the guarantor might suggest that the notary or lawyer did not "examine" him to ensure that he was "aware of the contents of the guarantee" or that he "understood it."

And finally, under subsection 31(5), the guarantor might show that the certificate was not attached to or noted on the guarantee, a fact easily satisfied if the notary public or lawyer saw only the certificate without the guarantee.

The easiest example of challenging the propriety of a notary's certificate would arise if the guarantor never appeared before the notary who completed the certificate. In *Saskatchewan Wheat Pool v. Hawryluk*¹⁷ the notary obviously flubbed the certificate when Mrs. Yakubchuk guaranteed her daughter-in-law's debt in favour of the Wheat Pool. Yakubchuk's son had her sign the certificate and then presented the certificate to a notary public, who completed the certificate without seeing Yakubchuk. Wright J. found the certificate was regular and complete and accepted in good faith and stood

¹⁶ (1985), 40 Alta. L.R. (2d) 208 at 53-54 (Q.B.). See, too, *Credit Foncier Trust Co. v. 212731 Alberta Ltd.*

¹⁷ 2000 SKQB 582.

as conclusive proof of compliance with the Act. The guarantee was valid even though Yakubchuk had not received the intended benefits of the Act.

Aside from not being present when the notary or lawyer has signed the certificate, a guarantor might point to the notary or lawyer's failure to ensure that the guarantor was aware of the contents of the guarantee or that the guarantor understood the guarantee. Whether a notary or lawyer has failed to discharge these duties has been the subject of comment by the Alberta courts. In *Economy Floor Coverings v. Anthony's Italian Restaurant Inc.* Funduk, M. offered the following explanation of the duties of a notary providing the certificate:

A notary cannot properly issue a certificate under the Act unless he examines the guarantor and is satisfied that the guarantor is aware of the contents of the guarantee and understands it.

í There must be an examination, although the extent of the examination may vary from case to case, depending on the circumstances. í [I]n any particular case, the notary must be satisfied that the guarantor is aware of the contents of the guarantee and understands it.

In some cases the examination might be most cursory and satisfy the requirements of the Act. For example, I doubt a notary would need to do much to satisfy himself if the guarantor was a superior court judge or a sophisticated businessman who had granted numerous guarantees in the past.

On the other hand, the examination might require considerable caution by the notary when the guarantor is someone he does not know and does not know that person's educational, business and other background.¹⁸

The requirement that the notary must examine the person entering into the guarantee and be satisfied that he is aware of the contents of the guarantee and understands it, is an odd requirement given that the notary has no obligation to explain the terms of guarantee to the guarantor.¹⁹ Does the Act contemplate a hypothetical discussion between the notary and the guarantor, as follows:

Notary: Are you aware of the contents of this guarantee and do you understand its terms?

Guarantor: Well, no. I have not read the guarantee and, if I did, I would not be able to understand its complicated terms anyway.

¹⁸ *Economy Floor* note 14 at 368.

¹⁹ See *Credit Foncier Trust Co. v. 212731 Alta Ltd.* and *Teachers' Investment and Housing Cooperative v. S.H. Properties Ltd. and Halabi*.

Notary: Well, then, I will be unable to sign this certificate. I suggest you attend before a lawyer and make sure you are aware of the contents of the guarantee and understand it. I am not a lawyer and I am not qualified to give you that sort of advice. After you have consulted a lawyer, you can return to my office and I will complete the certificate.

One wonders if this hypothetical discussion has ever occurred between a notary and a guarantor. Probably not. As well, what happens if the guarantor provides a different response, as follows:

Notary: Are you aware of the contents of this guarantee and do you understand its terms?

Guarantor: Yes, more or less. I think it means that if the corporation does not pay, the creditor will judicially sell the mortgaged land and I will have to pay for the shortfall. (In fact, the guarantee specifically states that the creditor need not take action against the land before exercising rights under the guarantee.)

Notary: Well, if you are comfortable that you know what you are doing, I will sign the certificate.

In this discussion, little benefit accrues to the guarantor unless the notary simply refuses to execute the certificate before the guarantor educates himself respecting the terms of the guarantee and its consequences, presumably by attending before a lawyer.

Even if a notary has miserably failed in his duty to conduct himself as represented in the certificate of acknowledgment, no remedy is available to the guarantor as against the creditor if the certificate remains regular and complete and the creditor has accepted it in good faith. In *Alberta (Treasury Branches) v. Ronsdale Construction Inc.*,²⁰ the certificates appeared regular but the notary's conduct fell well below the standard expected by section 31. Although the guarantors had signed the guarantees, they had not acknowledged to the notary public, their own lawyer, that they had executed the guarantee and had not in his presence signed the statement at the foot of the certificate acknowledging that they were the individuals named in the guarantees. McFadyen J. was satisfied that the lawyer failed to satisfy himself that the guarantors were aware of the contents of the guarantees and understood them. He also found the lawyer caused what purported to be the signatures of the guarantors to be affixed by a person other than the guarantors. This grievous misconduct by the lawyer would have been sufficient to set aside the guarantees, had the certificate been incomplete or had the creditor illustrated less than good faith. Such, though, was not the case. While the contents of the certificates were false, they were issued by

²⁰ *Ronsdale* note 13.

the lawyer under the Act and were complete and regular on their face and accepted in good faith by the creditor who had no reason to believe that the requirements of the Act had not been satisfied.

3.5 Does Standard Differ for Lawyers and Notaries?

In *Alberta (Treasury Branches) v. Ronsdale Construction Inc.*, Master Funduk stated that no common law or statutory duty requires notaries public to provide legal advice or to explain the terms of the guarantee to the guarantor; they need only be satisfied that the guarantor is aware of the contents of the document and understands it. Does the standard change, though, if a guarantor has retained a lawyer to provide the certificate, particularly in Saskatchewan where, unlike Alberta, section 31 specifically allows a guarantor to retain either a notary public or a lawyer? After all, most lawyers will charge a fee for issuing the certificate and arguably should be held to a higher standard than a notary public, notwithstanding that the legislation seemingly does not place a higher standard on them.

In the Alberta case of *Central Trust Company v. Abugov*²¹ a group of experienced businessmen and professionals guaranteed repayment of a corporate loan. Donald Mackie, a Calgary lawyer, issued the certificate prescribed by the Act, testifying at trial that he had described the principal elements of the guarantee and asserted that the guarantors understood their obligations. The Court of Appeal accepted the trial judge's conclusion that Mackie was not obliged to give legal advice to the guarantors, even though he was a lawyer. Mackie's only obligation, as a notary public, was to be satisfied, by examination of the guarantors, that they were aware of and understood the contents of the guarantee.

Would the results be different in Saskatchewan where section 31 of the SFSA, unlike the Alberta legislation, specifically contemplates that lawyers or notaries can issue the certificate? Although a lawyer issues the same certificate as a notary, will a lawyer be held to a higher standard?

3.6 Independence of Lawyer or Notary Public

Subsections 31(1)(c) and (d) require that lawyers and notaries meet two requirements: they must not have "prepared any documents on behalf of the creditor relating to the transaction" and they must not be "otherwise interested in the transaction." Currently, no Saskatchewan jurisprudence interprets the meaning of "lawyer" and "notary public," as defined in these subsections.

The Alberta legislation does not state the measure of independence the notary public must have from the creditor. In the Alberta case of *Economy*

²¹ (1990), 74 Alta. L.R. (2d) 89 (C.A.).

Floor Coverings v. Anthony's Italian Restaurant Inc., Master Funduk provided a rationale for keeping the guarantor's advisor separate from the creditor's advisor. In that case a default judgment had been entered against the guarantors and they sought an order to set aside the judgment, alleging, in part, that they did not understand the terms of the guarantee. Since the lawyer who signed the certificate had also represented the creditor, Master Funduk had little problem in setting aside the certificate and allowing the judgment to be set aside. He stated:

If the notary did not examine the Valentis to be satisfied that they were aware of the contents of the guarantee and understood it, he, the notary, obviously knows that the requirements of the Act were not complied with. In that case the notary's knowledge is the plaintiff's knowledge because the notary was the plaintiff's solicitor, and hence agent for the plaintiff. The agent's knowledge is the principal's knowledge.²²

This situation should not arise in Saskatchewan because section 31 of the SFSA forewarns notaries public and lawyers that they cannot issue the prescribed certificate if they have prepared any documents for the creditor or a potential inconvenience in rural Saskatchewan where towns commonly have no or only one law firm. The section also prevents notaries public and lawyers from notarizing certificates if they have any other interest in the transaction, even though notaries do not provide legal advice.

The Act poses further questions. One must assume that a lawyer who has seen to the principal borrower's execution of a mortgage cannot issue a certificate to a guarantor. Can a lawyer or notary who has issued a certificate respecting one guarantor, issue another certificate respecting a joint guarantor, especially when the common law allows guarantors to seek indemnification from each other upon payment by one of the guarantors of the jointly guaranteed debt? Can a notary public who is also a member of the board of directors of a locally controlled credit union issue a certificate when a credit union member is the beneficiary of the guarantee?

3.7 Idiosyncrasies of the Certificate

The statutorily prescribed certificate itself has a misleading appearance. The numeral "1" which intends to mark the first paragraph of the certificate appears directly before a blank with no distinguishing punctuation. Thus "1" may appear to be an "I" and often causes lawyers and notaries to insert their names in the first blank, thereby immediately making the certificate less than regular and complete. Lawyers or notaries' names should not be inserted anywhere in the certificate. They only place their signatures at the foot of the certificate.

²² *Economy Floor* note 14 at 368.

If the lawyer or notary's signature is illegible, as it often is, the identity of the lawyer or notary public may be unknown to the creditor relying on the certificate. Some years hence, when the creditor wishes to prove that a lawyer or notary properly executed the certificate, the creditor may be stymied in mounting appropriate evidence of compliance without knowledge of the identity of the lawyer or notary.

Ensuring that guarantors understand the obligations under a guarantee has become *de rigueur* among creditors in Canada who commonly insist that all guarantees are accompanied by certificates of acknowledgment or certificates of independent legal advice. Seldom does one see a guarantee without an accompanying certificate. Forms of certificates developed by national lenders often do not pay close attention to the idiosyncrasies of section 31 of the SFSA. A certificate different than the certificate statutorily prescribed by section 31 may not suffice as "a certificate in the form prescribed in the regulations."

A certificate containing clauses superfluous to the statutorily prescribed form may not be calamitous. The Alberta Court of Appeal in *Lambert v. Caisse Populaire Credit Union de Morinville Savings & Credit Union Ltd.* has stated "mere surplusage [in the wording of the certificate], with nothing else, cannot affect the validity of the certificate."²³ A similar judicial statement, though, may not be as forthcoming if the certificate is shy of compliance with the statutorily prescribed certificate.

4 SUM CERTAIN IN MONEY

Subsection 31(7) requires that every guarantee must specify the maximum financial sum certain plus interest from the date of demand. Failure to disclose such sum is emphatically dealt with under subsection 31(8): the guarantee is "null and void and of no effect."

So long as the guarantee states a sum certain, nothing in subsection 31(7) suggests that the guarantee must be specific to the loan advanced to the principal debtor. Guarantees can be continuing guarantees, guaranteeing repayment of any indebtedness, past, present or future, so long as they are limited to a sum certain.

After the Saskatchewan legislature enacted section 31 many lawyers refused to provide a certificate of acknowledgment in face of a continuing guarantee, even when the guarantee was limited to a stated sum. Some credit granters, including Saskatchewan credit unions, developed a specific loan guarantee in which the guarantor had the comfort of knowing that the guarantee was limited both to a sum certain and to a particular advance of

²³ *Lambert* note 9.

money to the principal debtor. After the principal debtor retired the loan obligation, the guarantee had no further value.

Credit granters should be aware that mere compliance with the rigours of section 31 of the SFSA does not deny the guarantor common law defences, particularly in face of a continuing guarantee. Continuing guarantees, even when limited to a stated sum certain, have been called a "ticking financial time bomb waiting to explode" and may jeopardize the creditor's ability to enforce the guarantee in certain circumstances.²⁴ Continuing guarantees can be particularly explosive if the guarantor is unaware of further advances that the creditor grantor may make to the principal debtor as one might find when a parent guarantees the loan obligations of a child. Less explosive, though, is the use of a continuing guarantee when the officer of the principal corporate borrower guarantees repayment of the obligations of a corporation since the guarantor must necessarily be aware of the borrowing activities of the principal borrower since further loan advances could only have been made with the officer's approval.

²⁴ *Royal Bank v. Fazakas* (1994), 118 Sask. R. 120 (Q.B.)

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