"THAT MUST BE A NICE DOCUMENT TO HAVE": *NON EST FACTUM* AND SECTION 5 OF THE *GUARANTEES ACKNOWLEDGMENT ACT*

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The Guarantees Acknowledgment Act *(*GAA*) requires that a lawyer be satisfied that a prospective guarantor understands the guarantee they are giving. Section 5 of the* GAA *provides that a* GAA *certificate is "conclusive proof" that the* GAA *has been complied with. This article examines the lack of clarity in Alberta case law on section 5, the* GAA *certificate, and the common-law defence of* non est factum*. Some decisions have permitted guarantors to plead* non est factum *even though a* GAA *certificate has been issued. Others have treated a* GAA *certificate as a total bar to a defence of* non est factum *— an interpretation which, from a lender's point of view, would make a* GAA *certificate a "nice document to have"*[1] *indeed. Despite the growing dominance of this latter interpretation, this article contends that it is not supported by the actual text of the* GAA.

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I. INTRODUCTION

Gina, a prospective client, comes to see Louise, a lawyer.[2] Gina is being sued on a guarantee. But, she protests, she had no idea that that document she signed a year ago was a guarantee. She assumed it was just a formality to help someone else — a spouse, perhaps, or an adult child[3] — obtain a loan. At this point you might expect Louise to contemplate a

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1 From Charles Schulz, *Peanuts* (24 September 1967). From a lender's point of view, depending on how the courts interpret the law, a certificate issued pursuant to the *Guarantees Acknowledgment Act*, RSA 2000, c G-11 [*GAA*] is a very nice document indeed, as it may effectively immunize the lender from claims of *non est factum.*

2 To make the hypotheticals in this article easier to follow, I have borrowed the "Alice and Bob" style of naming from cryptography (and other science) literature: see Quinn DuPont & Alana Cattapan, "Alice and Bob: A History of the World's Most Famous Couple" (2017), online: [perma.cc/Y79M-TGX4].

3 On the particular vulnerability of women and elderly people to taking on financial liability in order to help someone else, see generally: Belinda Fehlberg, *Sexually Transmitted Debt: Surety Experience and English Law* (Oxford: Clarendon Press, 1997); Misty Bailey, "Sexually Transmitted Debt: Criticisms

possible defence of *non est factum*: the defence that Gina did not actually intend to sign what she signed.[4] But what if Gina's guarantee is accompanied by a certificate pursuant to the *Guarantees Acknowledgment Act*?[5] This certificate, according to section 5 of the *GAA*, is "conclusive proof" that before signing the guarantee, Gina met with a lawyer, who was satisfied that she was "aware of the contents of the guarantee and [understood] it."[6] Is Gina still able to plead *non est factum*: to ask the court to find that, despite what the certificate says, she did not in fact understand what she was signing?

In this article, I examine how Alberta courts have interpreted (or misinterpreted) the effect of a *GAA* certificate on the defence of *non est factum*. As of 2024, Alberta case law offers no satisfactory answer to the question of whether section 5 of the *GAA* eliminates *non est factum* as a defence to a guarantee. Some decisions have treated section 5 as irrelevant to a *non est factum* defence. Others — most notably the jurisprudence of Master Funduk — have characterised it as a total bar. Assessing both lines of judicial thought, I argue that the characterization of section 5 as a total bar to *non est factum* reflects a misinterpretation of the statutory text and may deprive an innocent guarantor of a valid defence. From a practitioner's perspective, however, the most crucial point is that the contradictory body of case law in Alberta offers no real guidance with respect to whether a defence of *non est factum* remains available on a guarantee.

II. STATUTORY FORMALITIES UNDER THE *GAA*

The *GAA* was originally enacted in 1939. It is a brief and (apparently) straightforward statute, and courts and commentators have accepted that it is essentially meant to ensure that a layperson understands their potential liability when giving a guarantee.[7] In order for a guarantee to be effective under Alberta law, a person must appear before a lawyer, and that

and Prospects for Reforms" (1999) 8:4 Auckland UL Rev 1001; Juliet Lucy Cummins, "Relationship Debt and the Aged: Welfare vs Commerce in the Law of Guarantees" (2002) 27:2 Alternative LJ 63.

4 See Part III, below, for discussion of the *non est factum* defence.

5 *GAA*, *supra* note 1. Possibly the most noteworthy feature of the *GAA* is its uniqueness. No other province has equivalent legislation: *Canadian Imperial Bank of Commerce v Country Lane Furniture Warehouse (Wetaskiwin) Ltd*, 1981 CanLII 1056 at para 6 (ABQB); Alberta Law Reform Institute, *Guarantees Acknowledgment Act, 1970*, Report No 5 (Edmonton: ALRI, 1970) at 3 [ALRI, *1970 Report*]. (Note, however, that *The Saskatchewan Farm Security Act*, SS 1988-89, c S-17.1, s 31(b) [*SFSA*] contains similar requirements with respect to "farm land or other assets used in farming.") Not every guarantee needs a *GAA* certificate to be effective in Alberta: for instance, if the guarantee is "given on the sale of an interest in land or an interest in goods or chattels" (*GAA*, *ibid*, s 1(a)(iv)), or if Alberta law does not govern the contract (see e.g. *Farm Credit Canada v Chan*, 2021 ABCA 168 at paras 13, 22).

6 *GAA*, *ibid*, s 4(1).

7 The Alberta Law Reform Institute (ALRI) stated in a 1970 report that the *GAA* "is designed to protect the ordinary individual who, through lack of experience or understanding, might otherwise find himself subject to onerous liabilities at law, the nature and extent of which he did not properly appreciate when he entered into the undertaking in question" (ALRI, *1970 Report*, *supra* note 5 at 2). This formulation of the *GAA*'s purpose has been adopted by Alberta courts: see e.g. *Hongkong Bank of Canada v 414577 Alberta Ltd*, 1995 CanLII 18059 at paras 42–43 (ABQB) [*Hongkong Bank*]. Similarly, if more succinctly, one court has described the purpose of the *GAA* as being "to ensure that a person so executing a guarantee knows what he is about" (*National Trust Co v Ultra International Properties Ltd*, 1989 CanLII 3039 at para 61 (ABQB) [*Ultra International*]).

lawyer must issue a certificate stating, more or less, that the person understands (or at least appears to understand) what they are signing. These formalities are set out in two sections:[8]

> 3 No guarantee has any effect unless the person entering into the obligation
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> (a) appears before a lawyer,
>
> (b) acknowledges to the lawyer that the person executed the guarantee, and
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> (c) in the presence of the lawyer signs the certificate referred to in section 4(1).
>
> …
>
> 4(1) Where the requirements set out in section 3 are satisfied, the lawyer, after being satisfied by examination of the person entering into the obligation that the person is aware of the contents of the guarantee and understands it, must issue a certificate in the prescribed form.[9]

This procedure has survived from the *GAA*'s enactment in 1939 to the present day with fairly few amendments. The most significant amendment altered the statutory formalities in 2015 to require that the interview involve a lawyer specifically, rather than any available notary public.[10] I discuss the "2015 Amendment"[11] and its implications with respect to the issue of independent legal advice in more detail below.

Section 5 of the *GAA,* first enacted in 1969,[12] establishes the legal effect of this certificate:

> 5 A certificate issued under this Act
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> (a) substantially complete and regular on the face of it, and
>
> (b) accepted in good faith by the person to whom the obligation was incurred without reason to believe that the requirements of this Act have not been complied with,
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> shall be admitted in evidence and is conclusive proof that this Act has been complied with.

The certificate referred to above is found in the *Guarantees Acknowledgment Forms Regulation* (*GAFR*).[13]

III. *NON EST FACTUM*

Non est factum is a "narrow"[14] defence familiar to anyone who has taken an introductory contracts course.[15] The guarantor argues that they "did not know that [they were] giving (or

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8 Conveniently, this procedure can also be done via videoconferencing since the start of the COVID-19 pandemic: see *GAA*, *supra* note 1, ss 3.1, 4(1.1). These new provisions do not substantively impact any of the legal issues arising under the *GAA.*

9 *GAA*, *ibid*, ss 3, 4.

10 *Notaries and Commissioners Act*, SA 2013, c N-5.5 [*NCA*]; *Justice Statutes Amendment Act*, SA 2014, c 13, s 7 [*JSAA*] (referred to in text as the "2015 Amendment"). For a contemporary discussion, see Brent W Mescall, "Changes to the Alberta Guarantees Acknowledgment Act" (March 2015), online: [perma.cc/TT4T-TPVQ].

11 *JSAA*, *ibid*; *NCA*, *ibid*.

12 *The Guarantees Acknowledgment Act, 1969*, SA 1969, c 41 [*GAA* 1969].

13 *Guarantees Acknowledgment Forms Regulation*, Alta Reg 66/2003 [*GAFR*].

14 On the limited availability of *non est factum*, see Kevin P McGuinness, *The Law of Guarantee*, 3rd ed (Markham: LexisNexis Canada, 2013) at §11.66: "The defence of *non est factum* is a narrow one. While it is frequently raised as a defence in guarantee cases, it is only rarely successful."

15 For an introductory overview, see e.g. John D McCamus, *The Law of Contracts*, 3rd ed (Toronto: Irwin Law, 2020) at 600–608.

offering) a guarantee to the creditor at the time of signing the guarantee document."[16] As an Alberta court recently summarized the law:

> [T]he non est factum defence requires the Respondents to show that the document that they each signed is radically or fundamentally different from what they believed they were signing. If there is an evidentiary basis for that position, then they must not have been careless; that is, they have to have taken reasonable measures to inform themselves of the substance and effect of the document on its terms. Failure to exercise reasonable care prevents them from relying on the non est factum doctrine as a defence.[17]

Sometimes the guarantor will not know what they are signing because they are illiterate or visually impaired.[18] Other times they may assert that their signature was the result of a "misrepresentation as to [the] nature and character" of the contract.[19] The upshot is that what the guarantor signed was not what they meant to sign.[20]

All of this is straightforward enough. The complicating factor in a guarantee transaction is that a guarantee does not involve just two parties. A guarantee is "an obligation to answer for an act or default or omission of *another*."[21] Three parties are involved: the lender, the borrower, and the guarantor. Suppose that something has gone wrong between the borrower and guarantor. The borrower gave the guarantor the wrong impression about the nature of the document to be signed.[22] It seems not quite fair to the lender to set aside the guarantee on the basis that the guarantor did not know what they were signing, when the lender had nothing

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16 McGuinness, *supra* note 14 at §11.66.

17 *Farm Credit Canada v Pacific Rockyview Enterprises Inc*, 2020 ABQB 357 at para 49 [*Pacific Rockyview*]. See the discussion of carelessness in McCamus, *supra* note 15 at 601–607; McGuinness, *supra* note 14 at §11.70.

18 McGuinness, *ibid* at §11.68: "The plea of *non est factum* has been invoked with most success by the blind and illiterate (since by reason of those disabilities they are necessarily dependent upon others when entered into written agreements)."

19 *Marvco Colour Research Ltd v Harris*, 1982 CanLII 63 at 778 (SCC). See also McCamus, *supra* note 15 at 600 (referring to a "fraudulent representation as to the nature of the document"); McGuinness, *ibid* at §11.70 ("[a]s a practical matter, the courts have been most willing to relieve the defendant from liability where a defendant has been misled (even innocently) as to the character or content of a document" [footnotes omitted]). The guarantor may be misled without any misconduct by the creditor (*ibid* at §11.69).

20 Ted Tjaden, *The Law of Independent Legal Advice*, 2nd ed (Toronto: Carswell, 2013) at 42; McCamus, *supra* note 15 at 600. McGuinness, *supra* note 14 at §11.67 states that "it is essential to a successful defence of *non est factum* for the defendant to prove that he did not know the actual contents or character of the document that he signed" and that "the contents of the document which the person signed must be radically and fundamentally different from the characteristics of the type of document which he believed he was signing."

21 *GAA*, *supra* note 1, s 1(a) [emphasis added].

22 For an example from the pre-*GAA* period in Alberta, see *Imperial Bank of Canada v McLellan*, 1933 CanLII 481 (ABSC) [*McLellan*], in which the guarantor wife signed whatever her husband told her to sign and was totally unaware she was giving a personal guarantee.

to do with this state of affairs and knew nothing about it.[23] In *Trans Canada Credit v. Judson*,[24] the Court referred to the potential presence of an innocent third party as a "complicating factor";[25] similarly, in *Duplessis v. Wilson*,[26] the Court stated that "where there is an innocent third party who would be affected by *non est factum* … this is a consideration to further motivate the court away from invoking the doctrine."[27] Even in a three-party guarantee transaction, however, *non est factum* may still be available[28] — unless of course a statute such as the *GAA* bars the guarantor from raising it as a defence.

IV. THE LAWYER'S INTERVIEW AND *NON EST FACTUM*

A. THE *GAA* AND INDEPENDENT LEGAL ADVICE

Any discussion of *non est factum* as a defence to a guarantee requires giving some thought to the issue of independent legal advice, since a guarantor who has received independent legal advice will find it "very difficult" to successfully make out a defence of *non est factum*.[29] At common law, a lender must in some circumstances recommend that a prospective guarantor obtain independent legal advice,[30] or even ensure that the guarantor obtains legal advice.[31] Independent legal advice "may cover the situation in which a lawyer explains, independently,

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[23] McGuinness, *supra* note 14 at §11.66:

> In applying the concept of *non est factum*, the courts must reconcile two conflicting goals. The first is to grant relief to those who have innocently signed a document evidencing a particular obligation when they had no intent to enter into such an obligation. The second goal is the desire to protect innocent persons who may have acted on the strength of an apparently regular and properly executed document, for it would certainly open an enormous gap in the law of contract if a person could escape liability under a disadvantageous contract merely by stating that the contract was not the agreement that he intended to sign.

See also McCamus, *supra* note 15 at 580, 601.

[24] 2002 PESCTD 57.

[25] *Ibid* at para 12.

[26] 2014 SKQB 207.

[27] *Ibid* at para 57.

[28] McGuinness, *supra* note 14 at §11.68 ("[t]here are rare cases in which a defence of *non est factum* has succeeded even though there was no wrongdoing on the part of the creditor"). See also the discussion of the impact on third parties in McCamus, *supra* note 15 at 580, 600–601.

[29] Tjaden, *supra* note 20 at 54. In one case where a defendant received independent legal advice and was still able to make out a defence of *non est factum*, the Court found that the advice given was woefully insufficient given the guarantor's lack of understanding and extreme reluctance to sign the documents at issue: *National Bank of Greece (Canada) v Mboutsiadis*, 2002 CarswellOnt 1487 at para 14 (ONSC) ("I am not satisfied that the defendant would have signed the documents if she had received all the information to which she was entitled, and if she was treated as an extremely reluctant accommodation guarantor, which I find that she was"). See also the discussion of this case in Tjaden, *ibid* at 56–57.

[30] Tjaden, *ibid* at 103–29; *Bank of Montreal v Duguid*, 2000 CanLII 5710 (ONCA); *Royal Bank of Scotland plc v Etridge (No 2)*, [2001] UKHL 44. The general advice given by lawyers and law firms is that it is a useful precaution to recommend obtaining independent legal advice: see e.g. Gail Wartham, "Loan guarantee can benefit both sides," *The Western Producer* (9 August 2012) 23 ("[i]t would be impractical and expensive to investigate every loan so lenders now require guarantors to obtain independent legal advice"); Kelby Carter, "Some Benefits of Independent Legal Advice" (18 December 2013), online: [perma.cc/SM7T-6NVG] ("independent legal advice is a useful litigation avoidance tool," even if there are "cases where the dollar value of the loans guaranteed does not justify the costs involved in having a guarantor obtain independent legal advice"). See also McGuinness, *supra* note 14 at §14.15 ("to be on the safe side, many lenders now require sureties to obtain independent legal advice at the time of providing a guarantee").

[31] Robert A Klotz, "Sexually Transmitted Debts" (2008) 27 Can Fam LQ 245 at 254; McGuinness, *ibid* at §§ 14.15–16.

the nature and consequences of an agreement" or "may extend, as it does in cases of undue influence, to the need to give informed advice."[32]

The *GAA* does not state that prospective guarantors must obtain (or even be advised to obtain) independent legal advice.[33] It requires simply that the lawyer be satisfied that the prospective guarantor "is aware of the contents of the guarantee and understands it"[34] — nothing more. In contrast, the Law Society of Alberta's guidelines for giving independent legal advice require significantly more of a lawyer:

> Gather enough information about the circumstances surrounding the transaction to be able to explain them to your client and predict problems. In particular, gather information on the client's age and level of experience, the client's motivation, the relationship of the parties, and their relative bargaining power. Find out enough about the client's financial situation to know the financial impact of the transaction.[35]

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[32] *JB v LB*, 1989 ABCA 241 at para 22, discussing independent legal advice in the family law context. One might ask what the difference is (or if there is any difference at all) between ensuring that a guarantor understands what they are about to sign and giving "informed advice." On this point, the discussion of the "two aspects" of independent legal advice in McGuinness, *ibid* at §14.43 is helpful:

> The role of the lawyer providing the advice essentially has two aspects, which may overlap in some respect, but which nevertheless are distinct. The first is to exercise some degree of due diligence with a view towards discovering any apparent lack of understanding or voluntariness on the part of the surety. For instance, it is not unusual for a lawyer to discover that his client may be under the mistaken impression that she (or, more rarely he) is in some way legally obliged to provide a guarantee for the debts of a spouse. The lawyer should therefore inquire to determine whether a proposed spousal guarantee is operating under such a misapprehension. The second aspect of providing independent legal advice is to provide advice to the proposed surety as to the *legal* merits of a transaction. These aspects overlap because while in the course of inquiring into the client's understanding of the nature and consequences of a transaction, some advice will usually be given as to the merits of the transaction. This is especially so where the dealing with a proposed surety who stands to enjoy little benefit from providing the guarantee [emphasis in original, footnotes omitted].

[33] *Teachers' Investment and Housing Co-operative v SH Properties Ltd*, 1984 CanLII 1192 at para 12 (ABQB) [*Teachers' Investment*]: "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." See also Tjaden, *supra* note 20 at 200; Vaughan Black, "The Strange Cases of Alberta's Guarantees Acknowledgment Act: A Study in Choice-of-Law Method" (1987) 11:1 Dal LJ 208 at 212 ("[t]he Act does not go so far as to require potential guarantors to obtain independent legal advice but it goes some way to ensure that they contract with some measure of informed consent").

The *GAA* also does not require a lawyer to give business advice: see *Independent Wholesale Ltd v Steinke*, 1996 CanLII 19902 at para 49 (ABQB) ("[e]ven the *Guarantees Acknowledgment Act* does not require that the guarantor be told whether he should give the guarantee"); *Credit Foncier Trust Co v 212731 Alberta Ltd*, 1985 CanLII 1372 at para 13 (ABQB) [*Credit Foncier*]. See also Tjaden, *ibid* at 495, warning lawyers against giving business advice even in the context of giving independent legal advice on a guarantee; McGuinness, *ibid* at §14.43 ("lawyers giving independent legal advice are required to explain to prospective sureties the legal responsibilities and liabilities arising from the execution of the guarantee. They are not required to give business advice" [footnotes omitted]); *ibid* at §14.53–55.

[34] *GAA*, *supra* note 1, s 4(1).

[35] Law Society of Alberta, "Giving Independent Legal Advice," online: [perma.cc/5ZNL-QAAX]. For an overview of professional standards with respect to independent legal advice, see Tjaden, *supra* note 20 at 7–13. See also McGuinness, *supra* note 14 at §14.24 ("[g]iving independent legal advice is never routine, not even if the person seeking advice has already made a decision and just wants it rubber stamped.… It is essential that the lawyer who provides this advice diligently interview the client, gather information, analyze the issues, and formulate advice that is suited to the circumstances of the client and the transaction at hand" [footnotes omitted]).

Ted Tjaden, setting out what is required of a lawyer giving independent legal advice in the context of a spousal guarantee transaction (in which one spouse guarantees a loan to the other spouse), identifies "a number of steps that should be taken,"[36] including "[o]btain[ing] from the bank all relevant information and documentation that would impact the risk the spouse is undertaking by providing the guarantee"[37] and "[l]et[ting] the spouse know of the possible alternatives and that the spouse has a choice to not sign the guarantee."[38] The *GAA,* of course, requires none of this.[39]

Unfortunately, Alberta courts have not always been careful to distinguish between a *GAA* interview and independent legal advice, particularly following the 2015 Amendment.[40] Some courts have clearly understood the *GAA* interview and independent legal advice as two different things.[41] In *Royal Bank v. Bradley*,[42] the guarantors gave a guarantee to assist their son and daughter-in-law. The same lawyer acted for the bank, the guarantors, and their son.[43] The Court found that although the lawyer met his obligations under the *GAA*,[44] his duty as the guarantors' lawyer was to recommend independent legal advice.[45] In *Central Trust Co. v. Friedman*,[46] the Court found that the lawyer who examined a group of guarantors was "simply acting in the capacity of a notary public" and was not required to provide them with independent legal advice.[47] If they wanted legal advice, they should have sought it out.[48] In *Canadian Imperial Bank of Commerce v. Dzeryk*,[49] the Court acknowledged the existence of a *GAA* certificate, but considered whether the lender's failure to ensure that the guarantor received independent legal advice (which the lender itself noted that she ought to have)

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36 Tjaden, *ibid* at 128.

37 *Ibid.*

38 *Ibid.* See also *ibid* at 494–95, setting out further matters to be discussed when giving independent legal advice on a guarantee; McGuinness, *supra* note 14 at §§14.30–31.

39 I note this point, referencing an earlier unpublished draft of this paper, in Rachel Weary, "'The Bank Holds the Hammer': Power and Protection under Alberta's *Guarantees Acknowledgment Act*" (LLM Thesis, University of Alberta, 2024) [unpublished] at 21.

40 *Supra* note 10.

41 See my discussion in Weary, *supra* note 39 at 21, referring again to the earlier unpublished draft of this paper.

42 1988 CanLII 3488 (ABQB) [*Bradley*].

43 *Ibid* at para 34.

44 *Ibid* at para 44.

45 *Ibid* at paras 47–48:

> In the circumstances, however, I believe Mr. Wilson, as solicitor for Mr. and Mrs. Bradley senior, ought to have satisfied himself that the Bradleys truly understood the serious consequences of their action in guaranteeing the increased loan from the bank to their son. In this connection I believe Mr. Wilson's responsibility to make inquiries of the Bradleys senior went beyond the scope of the notarial examination contemplated by the Guarantees Acknowledgment Act. Because of the fact that Mr. Wilson was acting for the bank, the son and the Bradleys senior all at the same time, one cannot be sure that Mr. Wilson properly carried out this duty to Mr. and Mrs. Bradley senior.
>
> I am of the view that Mr. Wilson could have properly carried out his obligation to the Bradleys senior only by disclosing to them that he was also acting for the bank as well as for their son, and by recommending they obtain independent legal advice. Should they have insisted that Mr. Wilson continue to act for them, Mr. Wilson ought to have had them sign a waiver before doing so.

46 1989 CanLII 3173 (ABQB) [*Friedman*]; aff'd *Central Trust Company v Abugov*, 1990 ABCA 142 [*Abugov*].

47 *Friedman*, *ibid* at para 33.

48 *Ibid* at para 11. See also *Abugov*, *supra* note 46 at para 13 ("[i]t is not disputed that Mr. Mackie was not obliged to give legal advice to the appellants. He did not attempt or purport to do so. Nor did the appellants rely on him for legal advice").

49 1993 CanLII 7018 (ABQB) [*Dzeryk*].

rendered it unconscionable for the lender to rely on its guarantee.[50] In *Canadian Imperial Bank of Commerce v. 3L Trucking Ltd.*,[51] while the creditor saw to it that the statutory formalities under the *GAA* were fulfilled by sending the guarantors to a notary, the guarantee was nonetheless held unenforceable on the basis that the creditor should have ensured that the guarantors received independent legal advice, which the notary did not provide.[52] On appeal from *3L Trucking* 1993, however, the Court "[had] some considerable difficulty in seeing how the cases relied upon [by the lower court with respect to independent legal advice] [were] triggered by the facts found, *even if we were to assume that those cases are correct and apply in Alberta even when the* Guarantees Acknowledgment Act *is fully satisfied*."[53] In other words, the Court of Appeal took no position on whether independent legal advice might be needed where a transaction already complied with the *GAA*.[54]

Several recent cases have — albeit in passing — conflated the *GAA* interview and independent legal advice.[55] In *P & C Lawfirm Management Inc v Sabourin*,[56] most notably, the Court of Appeal stated that a "certificate of independent legal advice is statutorily required with respect to a guarantee."[57] This is incorrect. First, the *GAA* is clear about what is required of a lawyer. It is the same thing that was required of any notary public before the 2015 Amendment: talk to the guarantor and satisfy yourself that they understand what they are

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50 *Ibid* at paras 60–65.

51 1993 CanLII 7228 (ABQB) [*3L Trucking* 1993].

52 *Ibid* at paras 14–17. Specifically, the trial judge found that the female guarantor did not know that the company whose debt she was guaranteeing was in default, although the lender and male guarantor did (*ibid* at para 12). The lender knew it was not in the interest of the female guarantor to sign a guarantee, with the result that it "should have ensured that she was fully apprised of the hazardous course she was taking and of the free choice open to her, and that she received independent legal advice" (*ibid* at para 12). The trial judge also found that the male guarantor "might have chosen not to give a personal guarantee, if it had been explained to him that by doing so he was imperilling his home," such that the bank also required him to obtain independent legal advice (*ibid* at para 13).

Importantly, it is not the law of Alberta that *every* guarantee will be invalid without independent legal advice. On this point, see Tjaden, *supra* note 20 at 103 ("[t]he courts have been relatively consistent in maintaining that a bank is under no duty to recommend independent legal advice to a guarantor in the absence of the bank being aware of any factors, such as undue influence, duress or misrepresentation, that would affect the enforceability or fairness of the guarantee."); McGuinness, *supra* note 14 at §14.12 ("[t]he lack of independent legal advice is not a stand-alone defence" [footnotes omitted]). See also the discussion of when independent legal advice is required in above in notes 30–31.

53 *Canadian Imperial Bank of Commerce v 3L Trucking Ltd*, 1995 ABCA 54 at para 2 [emphasis added] [*3L Trucking* ABCA]. The Court of Appeal ultimately ordered a new trial owing to the trial judge's misapprehension of the relevant facts.

54 See the note on this case in Tjaden, *supra* note 20 at 200, n 260: "[E]ven if it could be said that ILA was required where there has been compliance with the *Guarantees Acknowledgment Act*, the circumstances did not give rise to the need for it."

55 *Ohlson v Canadian Imperial Bank of Commerce*, 1997 ABCA 413 at para 52 ("[a] guarantee in the normal case requires independent advice. Thus, where the substance of a transaction is a guarantee, one should examine the transaction carefully to see if it is the kind of transaction which the *Act* is intended to protect"); *Agriculture Financial Services Corporation v Optilume Inc*, 2020 ABQB 340 at para 6 [*Optilume*] ("[t]he Certificate … is at least some evidence that Tara subjectively, having received independent legal advice and having acknowledged she had executed a 'Guarantee' dated October 31, 2007, knew the import of the guarantee so far as AFSC was concerned"); *Pacific Rockyview*, *supra* note 17 at para 142 ("s 3 of the Alberta *Guarantees Acknowledgement Act*, which requires independent legal advice, and s 4 of that *Act* which requires a Certificate of Independent Legal Advice to be attached to a personal guarantee"). See, relatedly, the discussion of what is potentially required of a lawyer under the *SFSA*, *supra* note 5 in Donald H Layh, *A Legacy of Protection: The Saskatchewan Farm Security Act: History, Commentary and Case Law* (Langenburg, SK: Twin Valley Books, 2009) at 269.

56 2020 ABCA 449.

57 *Ibid* at para 46.

signing.[58] That is all. If the legislature meant for the 2015 Amendment to require that a guarantor now obtain independent legal advice, it was quite capable of saying so in the statutory text.[59] It is rather unreasonable to expect a lawyer to "read into" the provisions of the *GAA* a requirement that they carry out a potentially much more detailed and rigorous sort of interview. Second, the *GAA* does not specifically require that the lawyer giving a *GAA* interview be independent.[60] Depending on the circumstances of the transaction, the Law Society of Alberta's *Code of Conduct* may permit the lawyer acting for the lender or borrower to conduct the *GAA* interview;[61] nothing in the *GAA* forbids this. Having the bank's lawyer see to the interview may be all right in most cases,[62] but this can hardly be said to constitute independent legal advice.[63]

In any case, the issue of independent legal advice is something of a red herring, because many of the cases dealing with *non est factum* and section 5 of the *GAA* were decided well before the 2015 Amendment. Non-lawyer notaries obviously cannot provide independent legal advice.[64] It seems clear therefore that if the *GAA* certificate does eliminate the defence

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58 Tjaden, in distinguishing the *GAA* interview from independent legal advice, observes that "there is no requirement for the notary public to satisfy him or herself that the guarantor was free from undue influence, duress, misrepresentation or subject to unconscionability" (Tjaden, *supra* note 20 at 200).

59 For instance, the *Family Law Act*, SA 2003, c F-4.5, s 62(3)(a) uses the express words "independent legal advice" in setting out when a court may make a support order that differs from an existing support agreement. Remarks in *Hansard* with respect to the *NCA* refer to "ensur[ing] [guarantors] fully understand the risks associated with any guarantees that they may enter into" (Alberta, Legislative Assembly, *Alberta Hansard*, 28-1, No 71a (21 November 2013) at 3028) and "afford[ing] lay notaries protection from pressure to perform these duties for which they have little to no expertise" (Alberta, Legislative Assembly, *Alberta Hansard*, 28-1, No 75e (27 November 2013) at 3190). These remarks suggest that the legislature did not intend to impose a higher standard of protection, but rather was concerned with the possibility that non-lawyers might not be able to provide guarantors with even the fairly basic degree of protection contemplated by the *GAA*. Compare the concerns expressed in the 1985 ALRI report (Alberta Law Reform Institute, *The Statute of Frauds and Related Legislation*, Report No 44 (Edmonton: ALRI, 1985) at 40 [ALRI, *1985 Report*]). See my discussion of the 2015 Amendment in Weary, *supra* note 39 at 34–36 (also citing the earlier unpublished version of this paper).

60 This has not always been the case (*GAA* 1969, *supra* note 12, s 3(a) required that the guarantor be interviewed by "a notary public who is not acting for the person to whom the obligation was incurred"). The independence requirement was removed by *An Act to amend The Guarantees Acknowledgment Act, 1969*, SA 1970, c 51, s 1. Originally, the amendment requiring that guarantors appear before a lawyer also required that the lawyer "not represent or be employed by a person or corporation who stands to benefit as a result of the guarantee" (Bill 44, *Notaries and Commissioners Act*, 1st Sess, 28th Leg, Alberta, 2013, cl 31(3)). This requirement was removed before the new legislation came into force by the *JSAA*, *supra* note 10, s 7(2).

61 Law Society of Alberta, *Code of Conduct* (Calgary: LSA, 2024), ch 3.4.

62 But recall *Bradley*, *supra* note 42, in which the Court held that a lawyer acting for the guarantors, the borrower, and the bank ought to have disclosed the joint representation and advised that the guarantors obtain independent legal advice.

63 Tjaden, *supra* note 20 at 1 (defining "independent legal advice" as "legal advice from a lawyer that is independent and free of any bias or interest that the lawyer or the lawyer's other clients may have"), and at 487 (discussing guarantees specifically). See, however, McGuinness, *supra* note 14 at §14.80, noting that non-independent legal advice may still provide a creditor with some protection: "While the lawyer who is acting for the principal or creditor (and members of that lawyer's firm) are not able to provide *independent* legal advice, it does not follow that a surety will not be bound by a guarantee, if such a lawyer actually does provide appropriate legal advice to the surety concerned" [emphasis in original].

64 Compare the discussion on this point with respect to the *SFSA*, *supra* note 5 in Layh, *supra* note 55 at 262: "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."

of *non est factum,* this is *not* specifically because the guarantor has received independent legal advice. There is some other reason.

B. REQUIREMENTS UNDER THE *GAA*

Assembling the requirements of sections 3 and 4 of the *GAA* into a checklist for lawyers, the result looks something like this: (1) have the guarantor appear before you;[65] (2) have the guarantor acknowledge that the guarantor executed the guarantee; (3) examine the guarantor; (4) satisfy yourself that the guarantor is aware of the guarantee's contents and understands the guarantee; and finally (5) issue a certificate (signed by both you and the guarantor). Steps (1), (2), and (5) are straightforward enough. But for the cautious lawyer, questions arise with respect to steps (3) and (4). What does it mean to examine a guarantor: does this involve a few questions, or a cross-examination? What qualifies as understanding a guarantee? And how is a lawyer to assess this?

The platonic ideal of the *GAA* interview as expressed by various Alberta courts appears to be fairly detailed. The Court of Appeal summarized with approval the following procedure adopted by a lawyer under the *GAA*:

> The practice would consist of reviewing the essential elements of the guarantee … that is the name of the debtor, whose debt they were guaranteeing, the name of the lender, the amount of the loan, the extent to which they were guaranteeing that loan; whether there was any limitation on their liability, whether the individual, if there were more than one individual, … whether they were jointly or both liable or whether one of them might be held liable for the entire amount; and whether the lender had to take action against the borrower before he could make demand against the guarantor.[66]

This level of detail is consistent with the purpose of ensuring that the unwary and inexperienced guarantor understands what they are about to sign. That said, the form of the interview may depend on the guarantor's level of sophistication and other circumstances.[67] A hard-nosed and experienced businessperson will presumably require a less stringent interview than a commercially unsophisticated homemaker signing a guarantee at the behest

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[65] This includes identifying the person who is appearing before you: Law Society of Alberta, *Rules of the Law Society of Alberta* (Calgary: LSA, 2025), ss 119.45–55. See also McGuinness, *supra* note 14 at §14.30 (discussing client identification in the context of independent legal advice).

[66] *Abugov*, *supra* note 46 at para 8. McGuinness, in his discussion of the *GAA* at §5.57 (*supra* note 14), cites *Canadian Imperial Bank of Commerce v 3L Trucking Ltd*, 1995 CanLII 9226 at para 31 (ABQB) [*3L Trucking* 1995] as "[a] good guide to the responsibilities of a notary":

> [The notary] testified … that he always explained to the person attending upon him to execute a guarantee that in signing the guarantee, he or she is personally responsible for paying the loan of the company if the company is unable to pay the debt or any part of it, or goes broke. His practice was the same whether the person before him was a stranger or someone he knew well. He testified that the signing party was always present when he completed the Notary's Certificate.

[67] *Economy Floor Coverings v Anthony's Italian Restaurant Inc*, 1986 CanLII 1604 at paras 28–30 (ABQB). See also McGuinness, *supra* note 14 at §5.58: "In some cases (as, for instance, where the surety is a sophisticated business [person]) the examination may be cursory." See Weary, *supra* note 39 at 50, n 263, citing this point in an earlier unpublished version of this paper.

of their spouse, or a newcomer to Canada who has little fluency in English or understanding of the Canadian legal system.[68]

In determining the precise level of understanding which must be established by the person conducting the interview, courts have occasionally referred to the fact that before 2015, the *GAA* permitted the interview to take place before any notary public. In *Teachers' Investment*, the Court held that "[n]o more than a general understanding of the nature of the obligation can be expected when the legislature entrusts the examination of the guarantor to persons not necessarily trained in the interpretation of legal documents."[69] In *3L Trucking* 1993, a statement by a notary that "if the company goes bankrupt you are responsible for its debts" was held to be "far from … comprehensive" but good enough for the purposes of the *GAA*.[70] Does the 2015 Amendment require something more now that only lawyers may issue certificates? If we accept the line of judicial thought that *GAA* mandates independent legal advice, then the answer is yes. But the *GAA* in fact mandates nothing of the sort, and it does not appear that any court has expressly identified the 2015 Amendment as requiring a deeper level of understanding on the part of the guarantor.[71]

What the *GAA* requires, then, is neither an interrogation of the guarantor nor, in every case, a detailed explanation of the guarantee. It requires simply that the lawyer convey, or at least confirm the existence of, a basic degree of understanding as to the guarantor's legal liabilities. The extent to which the lawyer explains the guarantee will be dictated to some degree by the particular perspective and circumstances of the guarantor.

The obvious problem with the *GAA* procedure is that it leaves open a potential "mismatch" between what the lawyer *thinks* the client understands and what the client *actually* understands. This has been described by one court (in the context of spousal acknowledgments in family law) as the difference between "external reality" and "internal

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[68] These examples are not simply stereotypes. Any realistic discussion of the protective effect of the *GAA* requires acknowledging the special vulnerability that certain groups may face in connection with guarantee transactions. On the possible lack of knowledge or understanding of guarantors entering into a transaction to support their spouse's business, see e.g. Fehlberg, *supra* note 3 at 163–66. On the difficulties faced by newcomers to Canada in navigating the legal system, see e.g. Canada, Department of Justice, *A Qualitative Look at Serious Legal Problems Faced by Immigrants in Greater Victoria and Vancouver, British Columbia*, (Study), (Ottawa: Department of Justice, 2021) at 31–33, online: [perma.cc/VWB9-K2QR]. Examples are found quite easily in case law. See e.g. *Ampex of Canada Limited v Thompson*, 1979 CanLII 1110 at para 25 (ABQB) [*Ampex*] (the Court found that a guarantor was "an unsophisticated and uncomplicated housewife, totally naive in the world of business" who "did not understand the nature of the document that she signed nor that it rendered her personally liable"); *Canadian Imperial Bank of Commerce v Chang*, 1985 CanLII 1231 (ABQB) (both guarantors were recent immigrants and their fluency in English was at issue).

[69] *Supra* note 33 at para 21.

[70] *3L Trucking* 1993, *supra* note 51 at para 15.

[71] The writers of the 1985 ALRI report were divided on whether the *GAA* should be repealed: ALRI, *1985 Report*, *supra* note 59 at 33. The pro-*GAA* camp argued in favour of requiring that lawyers carry out the interview (*ibid* at 40), and appear to have regarded this proposed amendment primarily not as imposing a heightened level of understanding but as avoiding situations where the interviewer could not convey even a basic understanding: "[I]f the official who examines a guarantor does not himself understand the guarantee, he cannot satisfy himself that the guarantor understands it" (*ibid*). That said, the 1985 report consistently refers to "legal advice" (see e.g. *ibid* at 41: "We think that the inconvenience for a few is justified by the protection which a requirement of legal advice would afford to all").

reality."[72] It is very possible for the lawyer to be mistaken in their assessment of the guarantor's level of understanding. Suppose that Gina, an apparently sophisticated businessperson, attends at Louise's office to sign a guarantee of her husband's business debts. Louise fails to realize that Gina has no actual business experience and is merely parroting terms she has heard her husband use. Wrongly believing that Gina knows what she is doing, Louise simply asks, "Do you realize that the bank can come after you if the business fails?" Gina has been told by her husband that the guarantee is merely a formality.[73] She decides that Louise is probably mistaken, but declines to "correct" her about what she believes to be the legal effect of the document, as she wants to get to her next appointment. She tells Louise, "Yes, I understand." Gina did not actually understand what she just signed. But Louise was satisfied that she did.[74] As a practical reality, the *GAA* certificate can be issued notwithstanding a lack of actual understanding on the part of the guarantor.

What about section 5 of the *GAA*? I will turn to the ambiguous status of section 5 as a bar to *non est factum* momentarily. What is quite unambiguous is that, unless there is some legitimate argument that the creditor did not accept the *GAA* certificate in good faith, section 5 is a decisive bar to any complaint that the *GAA* was not complied with.[75] Once the certificate has been issued, the guarantor cannot later claim that they were not examined, or that the

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[72] See the discussion of the Court of Queen's Bench of Alberta with respect to spousal acknowledgment requirements under the *Family Property Act*, RSA 2000, c F-4.7 in *Hicks v Gazley*, 2020 ABQB 178 at para 37:

> [I]deally, the "external reality" (i.e. the attending party acknowledging that (for instance) she was aware of the required elements and signing "freely") will match the "internal reality" i.e. the party *actually* so aware and *actually* signing freely. However, they might not match:
>
> a. the attending party may have presented to the lawyer as being "fully aware" and "fully voluntary", with no inkling of any mismatch, even after questioning, and even explanations, by the lawyer;
> b. the mismatch may stem from the attending party so presenting (albeit lacking full awareness and volition) and the lawyer failing to dig into the awareness and volition;
> c. it may result from the same presentation (apparently "aware and free" party), the lawyer (regardless) offering advice and explanations, and the party failing to absorb sound advice from the lawyer or receiving unsound advice (whether absorbed or not);
> d. it may come from the party presenting with subpar awareness or volition and the lawyer not picking up on either aspect ("okay, it looks like you're good to go … let's get this acknowledgment signed up");
> e. it may result from the party presenting with subpar awareness, the lawyer offering sound advice and explanations, and the client not absorbing them but presenting to the lawyer as sufficiently "aware", or from subpar advice from the lawyer (whether absorbed or not) and the party similarly presenting as "aware"; and
> f. other possibilities may exist. [footnotes omitted, emphasis in original].

[73] This is far from implausible. See, for instance, *McLellan*, *supra* note 22. See also Fehlberg, *supra* note 3 at 166 (noting the case of a wife whose husband misrepresented what she was signing).

[74] This risk was touched on in passing in ALRI, *1970 Report*, *supra* note 5 at 17 (noting that "there is genuine difficulty in certifying as to another's degree of comprehension"). Similar observations have been made in the context of independent legal advice: see MH Ogilvie, "The Fiduciary Nature of Spousal Surety Agreements in Banking Law" (2005) 42:2 Can Bus LJ 245 at 269 ("[t]he 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"); Klotz, *supra* note 31 at 256 ("[c]ommon misconceptions in the meaning of legal terms … can remain unclear due to passivity, shame, or poor communication skills"). Compare the example transaction discussed in Layh, *supra* note 55 at 268 (dealing specifically with the competence of notaries, and discussing a situation in which neither the guarantor nor the notary understands what they are faced with).

[75] *Lambert v Caisse Populaire de Morinville Savings & Credit Union Ltd*, 1984 ABCA 73 at para 10; *Pensionfund Properties Limited v RK Giblin & Associates Ltd*, 1984 CanLII 1179 at para 18 (ABQB) [*Pensionfund*]. See also the discussion in ALRI, *1985 Report*, *supra* note 59 at 35–36.

lawyer was not satisfied that they were aware of the guarantee's contents and understood them. But as we have just seen, the fact that a lawyer is sincerely satisfied on this point does not necessarily mean that the guarantor actually understood anything.

C. ELIMINATION OF *NON EST FACTUM*

The question of whether section 5 totally eliminates *non est factum* as a defence against a guarantee has produced protracted judicial disagreement in Alberta.[76] In a few cases decided in the late 1970s and early 1980s, courts appear to have regarded the defence as available despite the existence of a *GAA* certificate. In *Ampex of Canada Limited v. Thomson*,[77] the Court unhesitatingly accepted a defence of *non est factum* on the part of a defendant wife who, along with her husband, had guaranteed their company's debts. Both defendants appeared before a lawyer and *GAA* certificates were issued.[78] The Court found that the defendant wife "did not understand the nature of the document that she signed nor that it rendered her personally liable."[79] The decision did not discuss the legal effect of her *GAA* certificate on the defence of *non est factum.* On this point specifically, in *Canadian Imperial Bank of Commerce v. Lee Roy Contracting Ltd.*,[80] the Court held that a *GAA* certificate was merely "some evidence which would indicate that the guarantors did, in fact, understand the legal effect of the document" and "far from conclusive."[81] Shortly thereafter, in 1984, the Court in *Pensionfund* held that "the existence of a certificate does not purport to preclude defences available at common law."[82]

In the same year as the *Pensionfund* decision, however, the Court in *Teachers' Investment* asserted that the *GAA*'s purpose, besides protecting guarantors, was in fact specifically to eliminate a defence of *non est factum* in most cases:

> In my view the Act now serves not only to give basic protection to the ordinary individual, but also, once a notary public is satisfied that a guarantor understands the essential nature of the obligation he has entered, and issues the certificate required, *then the creditor guaranteed is spared from spurious pleas of non est factum*. I would not say that the provisions of s. 5 absolutely exclude the plea, but it would only be in the

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[76] Section 5 has no effect on other contractual defences, such as undue influence or duress: see Tjaden, *supra* note 20 at 203. See also *Dzeryk*, *supra* note 49 at para 71: "[A]n unimpeached certificate does not prevent a guarantor … raising the defence of undue influence. The certificate says nothing about the notary having been satisfied that there was no undue influence."

[77] *Supra* note 68.

[78] *Ibid* at para 7.

[79] *Ibid* at para 25.

[80] 1982 CanLII 1146 (ABQB) [*Lee Roy*].

[81] *Ibid* at para 13. *Lee Roy* was adopted in *Bank of British Columbia v Shank Investments Ltd*, 1984 CanLII 1233 (ABQB) [*Shank*], in which the Court found that the lawyer examining the guarantor did not adequately confirm that the guarantor understood what she was signing. The Court held that this non-compliance with the *GAA* rendered the guarantee invalid and went on to consider the issue of *non est factum.* This decision was explained by Master Funduk in *Edmonton Savings & Credit Union v 124968 Construction Company*, 1985 CanLII 1311 (ABQB) as the result of the good faith requirement in s 5(b) of the *GAA*: "In that decision [*Shank*] the notary was the solicitor for the creditor, so the notary's knowledge that he had not performed the duties required by the Act was also the creditor's knowledge. That knowledge by the creditor negates the good faith required by s. 5" (*ibid* at para 36).

[82] *Pensionfund*, *supra* note 75 at para 18. See also *Credit Foncier*, *supra* note 33 at para 13, which appears to leave open the possibility of a plea of *non est factum*, although the guarantor in that case did not plead *non est factum*: "Among the possible defences, to mention one situation which appears to have arisen frequently in the cases, a defence of *non est factum* can be pleaded as a different defence from the defence of noncompliance with the *Guarantees Acknowledgment Act*."

> most exceptional circumstances that the plea might successfully result from the conduct of the notary public.[83]

Teachers' Investment was subsequently cited by the Court in *Seattle-First Bank Canada v. Wildrose Industries (Road) Ltd.*[84] in striking out a defence of *non est factum.*[85]

The mid-1980s onward saw growing judicial hostility toward *non est factum* in *GAA* cases. In *Alberta (Treasury Branches) v. Ronsdale Construction Inc.*,[86] Master Funduk asserted that section 5 "strip[ped] the guarantor of two possible defences: first, that the requirements of the Act have not been complied with; second, a defence of non est factum."[87] Master Funduk elaborated on how exactly section 5 eliminates *non est factum*:

> The section does not expressly state that the certificate is conclusive evidence that the guarantor was aware of the contents of the guarantee and understood it. However, that is the necessary result of the section. The certificate is conclusive proof of the facts set out in the certificate. One of those facts is that the notary examined the guarantor *and the guarantor was aware of the contents of the guarantee and understood it.* A guarantor cannot, in the face of that, say he did not understand he was executing a guarantee.
>
> Unless the guarantor raises an issue about the good faith of the creditor in accepting the certificate, the contents of the certificate cannot be impeached.[88]

In other words, *non est factum* is unavailable under the *GAA* unless the guarantor can argue that the lender did not accept the certificate in good faith: for instance, the lender or the lender's agent knew that the *GAA* interview had not been carried out properly.[89] Master Funduk reiterated his view of the law in *Victoria Insurance Company of Canada v. Genereux Workshop Ltd*.[90]

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83 *Teachers' Investment*, *supra* note 33 at para 22 [emphasis added].

84 1984 CanLII 1227 (ABQB).

85 *Ibid* at paras 5–8.

86 1984 CanLII 1251 (ABQB) [*Ronsdale*].

87 *Ibid* at para 75.

88 *Ibid* at paras 77–78 [emphasis in original].

89 For an example of a lender who did not accept a certificate in good faith, see *Ultra International*, *supra* note 7, in which the lawyer giving the *GAA* interview failed to properly examine the defendant guarantors (and in fact wrongly claimed to one guarantor that the guarantee would probably not be enforced: *ibid* at para 62). The lawyer was the plaintiff's agent and, because of this, the plaintiff was deemed to know that the *GAA* had not been complied with (*ibid* at paras 63–64).

90 1985 CanLII 1228 at paras 74–76 (ABQB) [*Victoria Insurance*]:

> I am unable to accept that a guarantor can successfully raise a defence of non est factum *even if he is unable to successfully challenge the certificate*. An unimpeached certificate and a defence of non est factum cannot stand together.
>
> If a certificate is unimpeached, that is, the effect given to it by s. 5 remains, a defence of non est factum "outside" the scope of the Act flies in the face of the certificate. A defence of non est factum and an umimpeached certificate is a [contradiction].
>
> …
>
> If a certificate is unimpeached a defence of non est factum "outside" the scope of the Act would contradict the evidence given in para. 2 of the certificate. As the evidence in para. 2 is conclusive proof the guarantor was aware of the contents of the guarantee and understood it, if the certificate is unimpeached an "outside" defence of non est factum is not available [emphasis in original].

Master Funduk was unfortunately mistaken about the precise legal effect of section 5. Section 5 of the *GAA* states that the certificate "is conclusive proof that this Act has been complied with,"[91] *not* that the facts asserted in the certificate are true. What this means is that the certificate is conclusive proof that the lawyer (formerly notary) was "satisfied by examination of the person entering into the obligation that the person [was] aware of the contents of the guarantee and [understood] it."[92] This wording is essentially replicated in the *GAFR*,[93] such that even if the certificate were "conclusive proof of the facts set out in the certificate,"[94] it would still be proof only that (a) the guarantor appeared before the lawyer and acknowledged having executed the guarantee, and (b) the lawyer "satisfied [themselves] by examination of the guarantor that he/she [was] aware of the contents of the guarantee and [understood] it."[95] The certificate is proof only that the lawyer was *subjectively satisfied.* The certificate is not proof that the guarantor actually was aware of or understood anything, because nothing in the *GAA* requires this.[96] It is possible for a lawyer to be subjectively satisfied that the guarantor possesses the awareness and understanding required by section 4(1) of the *GAA* when this is not in fact the case. The lawyer is not expected to telepathically look inside the head of the guarantor.[97]

This distinction between the lawyer being satisfied and the guarantor actually understanding the guarantee does not appear to have been much considered in the development of Alberta case law on *non est factum* and the *GAA,*[98] which after some years' meandering eventually came to align mostly with the Fundukian view.[99] Master Funduk's position was adopted in *Standard Trust Co. v. Vickers*,[100] in *Canadian Commercial Bank v. Otte*,[101] and in *3L Trucking* 1995.[102] In *Alberta Agricultural Development Corp. v. Tiny Tym's Poultry Ltd.*,[103] the Court expressly identified one of the purposes of the *GAA* as being to protect lenders "from spurious defences of non est factum."[104] At the appellate level, in *Shaw*

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91 *GAA*, *supra* note 1, s 5.
92 *Ibid*, s 4(1).
93 *Supra* note 13.
94 *Ronsdale*, *supra* note 86 at para 77.
95 *GAFR*, *supra* note 13, Schedule, Form 1.
96 In the 1985 report, ALRI appears to have regarded Master Funduk's interpretation as incorrect. The fact that section 5 "could be construed to mean that under those circumstances the certificate is conclusive proof that the guarantor signed the guarantee and was aware of and understood its contents" was grounds to recommend amending the *GAA* "to rule out a construction to the effect that compliance with the section would cleanse a guarantee of inherent defects under the general law outside of the statute" (ALRI, *1985 Report*, *supra* note 59 at 44).
97 See again the discussion in *Hicks v Gazley*, *supra* note 72 at para 37. See also Weary, *supra* note 39 at 50, n 259, citing an earlier unpublished draft of this paper.
98 The distinction was, however, correctly articulated by Justice Michalyshyn in passing in *Optilume*, *supra* note 55 at para 6, in which he characterised a *GAA* certificate as "evidence" that the lawyer was satisfied and "some evidence" of the guarantor's subjective knowledge.
99 I am not the first person to refer to "Fundukian" judicial thought: see *Agracity Ltd v The Queen*, 2020 TCC 91 at para 105.
100 1987 CarswellAlta 914 (ABQB). The Court repeated Master Funduk's assertion in *Victoria Insurance* that "an unimpeached certificate and a defence of non est factum cannot stand together" (*ibid* at 10–11, echoing *Victoria Insurance*, *supra* note 90 at para 74).
101 1988 CanLII 3906 at paras 303–10 (ABQB).
102 *3L Trucking* 1995, *supra* note 66 at para 45 ("[h]aving concluded that the certificate of notary public issued pursuant to the *Guarantees Acknowledgment Act* could not be impeached, no plea of non est factum is available to either of the Defendants in respect of their execution of the personal guarantees").
103 1989 CanLII 3157 (ABQB) [*Tiny Tym's*].
104 *Ibid* at para 28.

United Lease Ltd. v. Cantest Production Services Ltd.,[105] the majority cited *Teachers' Investment* with approval.[106]

There were contrary views. In *Canadian Imperial Bank of Commerce v. Chang*,[107] the Court considered a defence of *non est factum* (ultimately rejecting it on the basis of the defendants' carelessness) despite finding that *GAA* certificates had been issued. In *Bank of Montreal v. 255344 Alberta Ltd.*,[108] the Court cited *Teachers' Investment* approvingly but somewhat ambiguously in rejecting an argument of *non est factum*, describing a *GAA* certificate as being "conclusive proof that the *Act* had been complied with"[109] and relying on the *GAA* interview to rebut the assertion of a lack of understanding, but not expressly identifying the certificate as a complete bar to *non est factum.*[110] Citing *Lee Roy*, Justice McDonald in *Dzeryk* rejected Master Funduk's view of the law: "Compliance with s. 5 of the Act does not preclude the defence of non est factum.… I respectfully disagree with the view that an unimpeached certificate prevents a guarantor from successfully raising the defence of non est factum."[111]

In the same year, Justice McDonald again considered section 5 in *3L Trucking* 1993. In this case, he held that

> the certificate in each case is not only conclusive proof that [the notary] conducted an examination and satisfied himself that each was aware of the contents of the guarantee and understood it, but also, if adopted by the notary as a witness as a document which he prepared at the time, it is evidence of past recollection recorded and thus becomes some evidence in itself that he did conduct an "examination" and that he satisfied himself that each was aware of the contents of the guarantee and understood it.[112]

This verdict in this case turned not on section 5, but (as discussed above) on Justice McDonald's view that the banks should have sent the guarantors to obtain independent legal advice.[113] It is debatable whether Justice McDonald departed from his earlier view of section 5 in this case: he again seems to describe a *GAA* certificate as proof that the notary was satisfied, nothing more. Even so, Master Funduk declared victory: "Even the trial judge in [*Dzeryk*] has now come around to the correct view."[114]

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105 1996 ABCA 81.

106 *Ibid* at para 23. Note, however, that this case did not actually involve the *GAA*. See also *Alberta Agricultural Development Corporation v Rowley*, 1995 ABCA 1, in which the Court of Appeal held that a *GAA* certificate "indicates that this man did not simply sit down as a layman trying to understand this thing" (*ibid* at para 6).

107 *Supra* note 68.

108 1990 CanLII 5872 (ABQB) [*255344 Alberta*].

109 *Ibid* at para 33.

110 *Ibid* at paras 27–33.

111 *Dzeryk*, *supra* note 49 at para 70. Justice McDonald also cited *Pensionfund*, *supra* note 75 and *Shank*, *supra* note 81 in support of his position.

112 *3L Trucking* 1993, *supra* note 51 at para 15.

113 *Ibid* at para 16.

114 *Hongkong Bank*, *supra* note 7 at para 22. Even the passage directly quoted by Master Funduk only seems to stand for the proposition that, as far as Justice McDonald is concerned, a *GAA* certificate is proof that *the notary was satisfied*: "[A *GAA* certificate] is therefore 'conclusive proof' that [the guarantors] each appeared before [the notary], acknowledged that they had executed their respective guarantees, and signed the statement at the foot of the notary's certificate, and that the notary satisfied himself by examination of each of them that each was aware of the contents of the guarantee and understood it" (*3L Trucking* 1993, *supra* note 51 at para 14, quoted in *Hongkong Bank*, *ibid* at para 22).

But the counter-Fundukian view, though down, is not yet out. In *Alberta Treasury Branches v. Fennig*,[115] as in *255344 Alberta*, the Court appears to have relied on the interview, rather than the certificate, to rebut an assertion of *non est factum*. In rejecting the defendant's argument, the Court held that the defence could not be made out because she "knew the nature of the document she was signing and furthermore had it explained to her by solicitor Welling [the lawyer conducting the *GAA* interview]."[116] Left undiscussed was the question of whether she could have made out a defence of *non est factum* had the lawyer failed to adequately explain the guarantee, but nonetheless issued a *GAA* certificate. Recently, in *Business Development Bank v. 1956680 Alberta Inc.*,[117] the Court considered a defence of *non est factum* despite acknowledging the existence of a properly completed certificate under section 5. The Court appears to have interpreted *Ronsdale* as standing only for the proposition that a section 5 certificate defeats a defence of noncompliance with the *GAA.*[118] In light of these decisions, it remains unclear what section 5 actually accomplishes — or what the Alberta courts are prepared to hold that it accomplishes — with respect to *non est factum*.[119]

The practical effects of the Fundukian view are unfortunate. In both approaches, the requirement that the creditor have accepted the certificate in good faith does eliminate situations involving obvious misfeasance. For instance, if LendCo sends Gina, a guarantor, to a lawyer, Louise, to obtain a *GAA* certificate, and instructs Louise to mislead Gina about her possible liability ("Don't tell her it's an unlimited guarantee!"), LendCo can hardly claim to have accepted the certificate in good faith.[120] In such a case, section 5 will not bar Gina from asserting *non est factum* against LendCo. The exception would not, however, cover a situation where Germaine, another guarantor, attends at the office of an independent lawyer, Isabel, who has nothing to do with LendCo. Germaine, unbeknownst to Isabel, cannot read English well and has no idea what the guarantee says. She has been told by her husband that it is simply a formality. Isabel is in a hurry and simply asks Germaine, "Do you understand what all this means?" "Yes," says Germaine, "I understand." Isabel issues the certificate. It can be argued that there was no compliance with the *GAA* in this case — Isabel did not properly examine Germaine — but that is not important.[121] LendCo knows nothing about this. It accepts the certificate in good faith and thus acquires *conclusive*, irrebuttable proof both that the *GAA* was complied with and, in the Fundukian view, that Germaine understood what she was signing. Germaine, who did not understand at all, is barred from pleading *non est factum.* The *GAA,* as interpreted by Funduk, creates an unpalatable legal "gap" in Alberta:

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115 2001 ABQB 151.

116 *Ibid* at para 73.

117 2021 ABQB 141.

118 *Ibid* at para 26. The Court did find that there was no issue to be tried with respect to *non est factum*, citing both the lack of evidence of any misunderstanding and the carelessness of the guarantors (*ibid* at paras 37–38). But it did not discuss section 5 as a bar.

119 Both McGuinness and Tjaden identify the *GAA* as eliminating *non est factum*: McGuinness, *supra* note 14 at §5.57; Tjaden, *supra* note 20 at 200–201. This argument, reflecting an earlier unpublished draft of this paper, is cited in Weary, *supra* note 39 at 13–14, 32, n 176, 46, n 240, 48, n 251, 51, n 264, 53, n 273.

120 Compare the misrepresentation made by the lawyer (and creditor's agent) in *Ultra International*, *supra* note 7.

121 Of course, Germaine could potentially seek to recover from Isabel in professional negligence. (On the potential liability of a lawyer who fails to carry out their duties under the *GAA*, see ALRI, *1985 Report*, *supra* note 59 at 38–39.) This is not very helpful, however, if you are Germaine's lawyer and you are attempting to plead *non est factum* in a lawsuit on the guarantee. (See also Layh, *supra* note 55 at 268; McGuinness, *supra* note 14 at §14.76, on the liability of a lawyer in the context of independent legal advice on a guarantee: "[I]f (unbeknownst to the creditor) the lawyer fails to provide competent legal advice, that is a client issue for the lawyer, not a collections problem for the creditor.")

a person may have a legitimate defence of *non est factum* to a guarantee, but be barred, through no fault of their own, from raising it.

V. CONCLUSION

The body of case law on section 5 of the *GAA* is contradictory and, from the practitioner's point of view, unhelpful. It remains open to debate what section 5 actually accomplishes. Does it eliminate *non est factum*? If so, this is based on an apparent misunderstanding of the *GAA* and creates a regime under which an innocent guarantor may be unable to plead a sincere lack of understanding. Does it leave *non est factum* available? This flies in the face of a significant portion of the case law and leaves open the possibility of "spurious" defences,[122] but avoids denying a plea to an innocent guarantor — albeit at the price of potentially barring an innocent lender from being able to enforce a guarantee.[123] The latter interpretation is more defensible in that it at least reflects the true text of the statute. For now, however, all that can really be gleaned from the case law is this: if you are in the position of the lawyer described in the introduction to this article, it is probably worth pleading a defence of *non est factum* on your client's behalf. But it is anyone's guess how the court will respond.

[122] *Teachers' Investment*, *supra* note 33 at para 22; *Tiny Tym's*, *supra* note 103 at para 28.

[123] ALRI, *1985 Report*, *supra* note 59, would appear to favour protecting the lender rather than the guarantor in such a case:

> If no official has examined the guarantor to ensure that the guarantor understands the nature of the guarantee obligation, the guarantor has not received the protection of the Guarantees Acknowledgment Act but may be bound by the guarantee because the creditor is entitled to rely upon a false certificate. We do not think, however, that a creditor who accepts what appears to be a valid certificate and has no way of knowing that it is incorrect, should suffer loss. The guarantor should be protected, but not at the expense of a creditor who is without fault. (ALRI, *1985 Report*, *ibid* at 36).