Clerk's Stamp

COURT FILE NUMBER	24-2806171
COURT	COURT OF KING'S BENCH OF ALBERTA
	IN THE MATTER OF THE BANKRUPTCY OF ECO-INDUSTRIAL BUSINESS PARK INC.
JUDICIAL CENTRE	EDMONTON
APPLICANT	MNP LTD., in its capacity as the TRUSTEE IN BANKRUPTCY OF ECO-INDUSTRIAL BUSINESS PARK INC., and not in its personal capacity
RESPONDENT	SYMMETRY ASSET MANAGEMENT INC.
DOCUMENT	**BENCH BRIEF OF THE TRUSTEE IN BANKRUPTCY FOR AN APPLICATION TO BE HEARD BY THE HONOURABLE JUSTICE FETH ON DECEMBER 1, 2022**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**OSLER, HOSKIN & HARCOURT LLP** Suite 2700, Brookfield Place 225 – 6th Avenue SW Calgary, AB T2P 1N2 Attention: Randal Van de Mosselaer / Emily Paplawski Telephone: 403.260.7060 / 403.260.7071 Facsimile: 403.260.7024 Email: rvandemosselaer@osler.com / epaplawski@osler.com File Number: 1231987

PART I – INTRODUCTION

1. This Bench Brief is submitted on behalf of MNP Ltd. ("**MNP**" or the "**Applicant**"), in its capacity as the trustee in bankruptcy (the "**Trustee**") of Eco-Industrial Business Park Inc. ("**Eco**") in support of its application declaring that two Assignment and Assumption Agreements, dated December 1, 2019 (the "**Assignment Agreements**") between Eco and a related company, Symmetry Asset Management Inc. ("**Symmetry**") are void as against the Trustee as a transfer at undervalue pursuant to section 96(1)(b)(ii) of the BIA[1] or, in the alternative, pursuant to the FPA[2] and/or the Statute of Elizabeth.[3]

2. The Assignment Agreements constitute transfers at undervalue. They were executed by the same individual on behalf of both the transferee (Eco) and the transferor (Symmetry) within weeks of Eco's secured lender, Romspen Investment Corporation ("**Romspen**"), accelerating an approximately US$87.9 million obligation, demanding repayment from Eco, and serving Eco with a Notice of Intention to Enforce Security. At the time, Eco had independently ceased paying its property tax obligations to the City of Edmonton which, by the end of 2019, were overdue in the amount of $383,387 and which, by 2021, had grown to more than $2 million. Eco was insolvent.

3. In the face of its insolvency and the commencement of enforcement proceedings by its secured lender, Eco executed the Assignment Agreements with Symmetry for no (or nominal) consideration, thereby putting claims with a face value of at least $100 million beyond the reach of Eco's creditors, but preserving such assets and their benefits for Eco's and Symmetry's ultimate shareholder – the Dan White Family Trust. Such a transfer contravenes the BIA, the FPA and the

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[1] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ["**BIA**"] [**TAB 1**].
[2] *Fraudulent Preferences Act*, RSA 2000, c F-24 ["**FPA**"] [**TAB 2**].
[3] *Fraudulent Conveyances Statute*, 13 Eliz 1, Chapter 5 (UK) ["**Statute of Elizabeth**"] [**TAB 3**].

Statute of Elizabeth, and is void as against the Trustee. The value of the claims belongs to Eco's creditors, not its shareholder.

PART II – FACTS

A. The Parties

4. Eco is the registered owner of various properties in Edmonton, Alberta (the "**Eco Lands**"), as well as the licensee of two disposal wells, a disposal facility, and certain physical assets and equipment located on the Eco Lands.[4] Mr. Dan White is the sole director of Eco.

5. Symmetry is a company which the Trustee understands provided management services to Eco and various other related companies.[5] Similar to Eco, Mr. White is the sole director of Symmetry. Both Eco and Symmetry are owned by the same 100% shareholder, 1468527 Alberta Ltd., which, in turn, is owned by the Dan White Family Trust.[6]

B. Eco's Indebtedness

6. Romspen, as lender, and 3443 Zen Garden Limited Partnership ("**Zen Garden**"), as borrower, are party to a loan agreement dated April 27, 2018 (the "**Loan Agreement**") pursuant to which Romspen agreed to advance a loan in the maximum principal amount of US$125 million to Zen Garden for purposes of assisting Zen Garden develop a corporate campus in Austin, Texas.[7] As security for Zen Garden's indebtedness under the Loan Agreement, Eco granted a mortgage to Romspen in the sum of US$40 million (the "**Eco Mortgage**") and provided Romspen with an Assignment of Leases and Rents and a General Security Agreement (together with the Eco Mortgage, the "**Eco Security**"). The Eco Mortgage provided that a default by Zen Garden under

[4] Affidavit of Victor P Kroeger, sworn and filed on August 4, 2022 ["**Kroeger Affidavit**"] at para 15.
[5] Kroeger Affidavit at para 31.
[6] Kroeger Affidavit at para 34.
[7] Kroeger Affidavit at para 16(a)-(b) and Exhibit "J".

the Loan Agreement constituted a cross-default by Eco under the Eco Mortgage, thereby resulting in the whole of the unpaid principal balance under the Loan Agreement becoming immediately due and entitling Romspen to exercise all rights and remedies under the Eco Mortgage.[8] The Eco Mortgage also provided that Romspen could deem the Eco Mortgage to be in default if Eco failed to pay all taxes as they come due.[9]

7. In addition to the Eco Security, Eco signed a guarantee in favour of Romspen, dated April 17, 2018 (the "**Eco Guarantee**") guaranteeing, among other things, the repayment by Zen Garden of all amounts advanced under the Loan Agreement. The Eco Guarantee provided that if a default occurred under the Loan Agreement or any other security document granted in favour of Romspen, Romspen was entitled to call the Eco Guarantee without any demand for payment being made.[10]

C. Default under the Loan Agreement and Eco's Insolvency

8. On October 11, 2019, Romspen demanded that Zen Garden and Eco, among others, repay all amounts due and owing under the Loan Agreement and, with respect to Eco, under the Eco Security and the Eco Guarantee and delivered a Notice of Intention to Enforce Security pursuant to section 244 of the BIA (the "**Demands**").[11] On October 11 and 23, 2019, U.S. counsel for Romspen also issued Declarations of Default and Notices of Acceleration to, among others, Eco and Zen Garden.[12] At the time the Demands were issued, Zen Garden, Eco and the other guarantors were indebted to Romspen in the amount of US$87.9 million, together with interest accruing at a rate of approximately US$29,000 per diem.[13]

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[8] Kroeger Affidavit at para 16(d) and Exhibit "H".
[9] Kroeger Affidavit at para 16(e) and Exhibit "H".
[10] Kroeger Affidavit at para 16(c), 16(f) and Exhibit "J".
[11] Kroeger Affidavit at para 17(a) and Exhibit "K".
[12] Kroeger Affidavit at para 17(c) and Exhibit "L".
[13] Kroeger Affidavit at para 17(b).

9. Ultimately, Zen Garden was petitioned into involuntary bankruptcy in the United States Bankruptcy Court, Western District of Texas (the "**U.S. Bankruptcy Court**").[14] By order dated June 19, 2020, the U.S. Bankruptcy Court determined that Romspen was "the due and lawful owner and holder of an allowed claim under the Loan Documents against the Debtor [Zen Garden] in the amount not less than [US]$96,495,021.72, as of the Petition Date, plus all other costs, fees and obligations owing, including, without limitation, all costs and expenses of administration, collection and enforcement incurred by Lender prior to the Petition Date".[15]

10. In addition to the cross-defaults occurring under the Eco Mortgage and Eco Guarantee as a result of Zen Garden's payment defaults under the Loan Agreement, and Romspen's subsequent enforcement efforts against Zen Garden and Eco (among others), in 2019, Eco was also independently in breach of the Eco Mortgage (separate and apart from any default from Zen Garden under the Loan Agreement) for failing to pay outstanding property taxes for 2019 of approximately $383,387.[16] By November 2020, Eco's unpaid property taxes totalled in excess of $1.385 million, increasing to more than $2 million by October 2021.[17]

11. On April 2, 2020, the Honourable Associate Chief Justice Nielsen appointed MNP as interim monitor (the "**Interim Monitor**") of Eco, among other related companies, with authority to monitor their businesses and operations (the "**Interim Monitor Order**").[18]

12. On November 4, 2021, the Honourable Justice Whitling appointed MNP as receiver (the "**Receiver**") of all current and future assets, undertakings and properties of every nature and kind

[14] Kroeger Affidavit at para 17(e) and Exhibit "M".
[15] Kroeger Affidavit at para 17(f) and Exhibit "N".
[16] Kroeger Affidavit at para 19 and Exhibit "O".
[17] Kroeger Affidavit at para 20 and Exhibits "P", "Q" and "R".
[18] Kroeger Affidavit at para 2(a) and Exhibit "A".

whatsoever and wherever situate, including all proceeds thereof, of Eco and various other related companies (the "**Receivership Order**").[19]

13. On February 18, 2022, MNP was appointed Trustee in Bankruptcy of Eco.[20]

D. The Assignment Agreements

14. On or about December 1, 2019 , Eco purported to execute two Assignment Agreements in favour of Symmetry assigning all right, title and interest in: (a) a claim by Eco against Alberta Diluent Terminal Ltd. ("**ADT**") claiming at least $100 million relating to the sale of lands by Eco to ADT in 2008 and 2013 which resulted in a legal dispute between the parties regarding rail access through the lands acquired by ADT to the remaining Eco Lands (the "**ADT Action**"), and (b) a potential negligence claim against Dentons (who had acted as counsel on behalf of Eco in respect of the same sale transaction) (the "**Dentons Claim**").[21] Mr. White executed the Assignment Agreements on behalf of both Eco and Symmetry.

15. The Assignment Agreements were not disclosed to Romspen at the time of execution (notwithstanding Romspen's ongoing efforts to enforce its security against Eco) and their existence only became known on or about November 8, 2021 when Eco's (then) counsel disclosed the Assignment Agreements to the Receiver in accordance with the terms of the Receivership Order.[22]

16. Each of the Assignment Agreements states as follows:

> D. From the filing date of the Court Action, Symmetry has managed the legal action for Eco by supplying services and paying costs including legal fees;

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[19] Kroeger Affidavit at para 2(b) and Exhibit "B".
[20] Kroeger Affidavit at para 29.
[21] Kroeger Affidavit at para 21 and Exhibit "S".
[22] Kroeger Affidavit at para 22 and Exhibit "T".

> E. Eco has relied on Symmetry for these services but has been unable to pay for those services or costs. As a partial offset Eco is willing to assign the Lawsuit referenced above to Symmetry. Symmetry is willing to accept partial offset from Eco for the Lawsuit referenced above and the assumption thereof.

17. In its role as Interim Monitor, MNP repeatedly requested that Eco and/or Symmetry provide it with, among other things:

(a) a copy of the asset management agreement between Eco and Symmetry;

(b) monthly reports detailing the amounts paid by Symmetry on behalf of Eco; and

(c) monthly invoices detailing the management fees charged by Symmetry to Eco.[23]

While Eco's representative and Symmetry's Vice President of Finance, Mr. David Gamage assured the Interim Monitor that they would "be providing detailed monthly invoices from Symmetry to [Eco and a related company, Absolute Environmental Waste Management] in the next few days" and that "Detailed invoices from Symmetry to Absolute and Eco will be provided and booked in the next few days", no information was ever provided substantiating the alleged payment of costs and legal fees by Symmetry.[24] Mr. Gamage confirmed on cross examination that notwithstanding the various requests by MNP, neither Symmetry nor Eco ever provided such information to MNP.[25] Since 2014, Mr. Gamage was Vice President of Finance for Symmetry and had access to its financial information.[26]

18. In addition to the requests for the foregoing information made by MNP under the Interim Monitor Order, the Receivership Order compelled all persons to "advise the Receiver of the

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[23] Kroeger Affidavit at para 27(f).
[24] Kroeger Affidavit at para 27(e) and Exhibit "X" (see in particular email from David Gamage to Karen Aylward and Victor Kroeger dated March 12, 2021).
[25]Cross Examination of David Gamage, dated November 14, 2022 at p 18 lines 11-12. ["**Gamage Cross Examination**"].
[26] Gamage Cross Examination at page 6 lines 12-15; see also Affidavit of Peter David Gamage, sworn November 11, 2022 ["**Gamage Affidavit**"] at para 4, citing to Exhibit "1" at para 1.

existence of any books, documents…accounting records, and any other papers records and information of any kind related to the business or affairs of [Eco and the other related companies]…"[27] On March 3, 2022, the Honourable Justice Feth ordered:

> Daniel Alexander White ("Mr. White") is hereby Ordered to comply with his disclosure obligations as set out in paragraphs 6 to 7 of the Receivership Order by not later than 14 days after the granting of this Order, including but not limited to: (a) advising the Receiver of the existence of any non-privileged Records (As that term is defined in the Receivership Order) in his possession or control related to the business or affairs of any of the Companies; (b) providing same to the Receiver or permitting the Receiver to make, retain and take away copies thereof; and (c) confirming the existence of any Records of the Companies that are held by a third party;[28]

19. Notwithstanding the foregoing Orders, at no time has Symmetry or Mr. White provided MNP with the alleged asset management agreement between Eco and Symmetry, or with any reports detailing the amounts allegedly paid by Symmetry on behalf of Eco or any invoices detailing the management fees charged by Symmetry to Eco. Instead, it appears from a notation in Eco's bank statements[29] that on March 1, 2019, Eco, in fact, paid Symmetry the sum of $119,549.89 – not vice versa as noted in the Assignment Agreements.[30]

20. Mr. Gamage's Affidavit submitted in response to this Application by the Trustee baldly alleges that a "considerable amount in legal fees" has been incurred by Symmetry on behalf of Eco, but otherwise provides no information regarding such fees, no quantification of such alleged fees, no supporting documentation with respect to such fees, and no information or documentation regarding Symmetry's payment of such fees. As submitted further below, the Trustee submits that an adverse inference should be drawn by this Honourable Court regarding Symmetry's alleged

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[27] Kroeger Affidavit at para 78 and Exhibit "B" at para 6.
[28] Kroeger Affidavit at para 12.
[29] The Trustee was provided with copies of, and reviewed, Eco's bank statements for the period of March 1, 2018 to April 30, 2020. See: Kroeger Affidavit at para 28.
[30] Kroeger Affidavit at para 28.

incursion of costs and expenses on behalf of Eco based on its failure to provide any supporting information or documentation over a more than two year period, notwithstanding the numerous requests of the Interim Monitor for, and the numerous Court orders compelling production of, such information.

PART III – ISSUES

21. The following issues are before this Honourable Court:

(a) Whether the Assignment Agreements are void as against the Trustee as a transfer at undervalue pursuant to section 96(1)(b)(ii) of the BIA?

(b) in the alternative, whether the Assignment Agreements are void as against the Trustee as a fraudulent transfer pursuant to the FPA?

(c) further, in the alternative, whether the Assignment Agreements are void as against the Trustee as a fraudulent conveyance pursuant to the Statute of Elizabeth?

PART IV – LAW AND ARGUMENT

A. Assignment Agreements are Transfers at Undervalue under Section 96 of the BIA

22. Section 96 of the BIA allows a trustee in bankruptcy to challenge a debtor's pre-bankruptcy transfers at undervalue.[31] The purpose of Section 96 of the BIA is to create a framework for challenging transactions that have the effect of diminishing the value of the bankrupt's estate and limiting the ability of creditors to recover all or a portion of their debt from the estate.[32] Section 2 of the BIA defines a "transfer at undervalue" as a disposition of property or

[31] *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2022 ABCA 111 at para 32 [**TAB 4**].
[32] *Ernst & Young Inc v Aquino*, 2022 ONCA 202 at para 23 ["***Aquino***"] [**TAB 5**], citing Robyn Gurofsky, "Fraudulent Preferences and Transfers at Undervalue: A Review of the Legal Developments under the Bankruptcy and Insolvency Act", in Janis P. Sarra, ed., *Annual Review of Insolvency Law*, 2011 (Toronto: Thomson Reuters, 2012) 567, at 584.

provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor.[33]

23. In considering whether a transaction under section 96 of the BIA is "conspicuously less than fair market value", the Court must identify the fair market value and whether the consideration that was paid falls conspicuously below that value based on the evidence before it.[34] The weighing of the adequacy of consideration is not an exercise in precision but one of judgement.[35]

24. Here, there is no evidence before this Court that Symmetry paid any consideration whatsoever for the transfer of the ADT Action and the Dentons Claim under the Assignment Agreements other than a bald statement that "a considerable amount in legal fees"[36] was incurred.[37] Instead, the evidence establishes that:

(a) since 2014 and continuing until mid-November 2021, Mr. Gamage was Vice President of Finance of Symmetry and had access to Symmetry's financial information;[38]

(b) MNP, in its position as Interim Monitor, requested on at least three separate occasions copies of the monthly reports detailing the amounts paid by Symmetry

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[33] BIA s 2 [**TAB 1**] and *Accel Canada Holdings Limited (Re)*, 2020 ABQB 204 at para 72 ["***Accel***"] [**TAB 6**].
[34] *Hofer (Re)*, 2019 ABQB 405 at para 31 ["***Hofer***"] [**TAB 7**]; see also *Accel* at para 81 [**TAB 6**].
[35] *Hofer* at para 31 [**TAB 7**]; *Accel* at para 81 [**TAB 6**].
[36] Gamage Affidavit at para 5(a).
[37] In addition to the Trustee's information that on March 1, 2019, Eco, in fact, paid Symmetry the sum of $119,549.89 (discussed above), the Trustee also notes that various notations in a bank statement for Eco for the period between May 1, 2020 and August 1, 2020 show the following 4 transactions as between Eco and Symmetry related to the payment of legal fees: (1) on June 23, 2020, Eco paid legal fees for Symmetry of $28,746.39; (2) on June 23, 2020, Symmetry reimbursed Eco $35,000 "to pay legal"; (3) on June 16, 2020, Eco paid Dentons $15,000; and (4) on June 16, 2020, Symmetry reimbursed Eco $7,000 "to pay legal". See Kroeger Affidavit at Exhibit E on p. 5 and Response #5 to the Undertakings given at the Questioning on the Kroeger Affidavit held November 4, 2022.
[38] Gamage Cross Examination at p 6 lines 18-21.

on behalf of Eco and monthly invoices detailing the management fees charged by Symmetry to Eco;[39]

(c) while Mr. Gamage confirmed on numerous occasions that such information would "follow" and would be provided "in the next few days", it was never produced;[40] and

(d) Mr. Gamage swore an affidavit in response to the within application by the Trustee and still declined to provide any quantification or supporting information or documentation with respect to such alleged fees and costs.

25. An adverse inference should be drawn against Symmetry based on its ongoing and continuing failure to produce documents which are in its control but which it has failed or refused to produce over a period of years. As this Court has noted, "The failure to bring before the tribunal some circumstances, documents, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so; and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party."[41] The adverse inference is drawn not merely from the failure to produce, "but from non production when it would be natural for the party to produce" such evidence.[42]

26. Further, and in any event, even if Mr. Gamage's bald statement that the legal fees paid by Symmetry on behalf of Eco are "considerable", such consideration is still "conspicuously less than

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[39] Kroeger Affidavit at para 27(e).
[40] Gamage Cross Examination at p 18 lines 5-12.
[41] *Kamitomo v Pasula* (1983), 50 AR 280, 29 Alta LR (2d) 375 (ABQB) at para 86 ["***Kamitomo***"] [**TAB 8**]. See also: *Richards v Richards*, 2013 ABQB 484 at para 64 [**TAB 9**]; *Scott & Associates Engineering Ltd v Finavera Renewables Inc*, 2013 ABQB 273 at para 126 [**TAB 10**], aff'd 2015 ABCA 51, leave to appeal to SCC dismissed, 2015 CanLII 69419 (SCC).
[42] *Kamitomo* at para 88 [**TAB 8**].

fair market value" and, hence, a transaction at undervalue pursuant to section 96 of the BIA. The ADT Action and the Dentons Claim have a face value of at least $100 million.[43] The only alleged consideration for the Assignment Agreements is Symmetry's payment of costs and legal fees with respect to the ADT Action and the Dentons Claim.[44] Such legal fees and litigation costs could not represent more than a small percentage of such claims – likely less than 1% even on a generous estimate. Accordingly, regardless of whether Symmetry's bald assertions on alleged consideration value are accepted, the Assignment Agreements still constitute "transactions at undervalue" under section 96 of the BIA.

27. Section 96(1)(a) of the BIA allows a court to declare a transfer at undervalue void if:

> (a) the party was not dealing at arm's length with the debtor and
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> (i) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event, and
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> (ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it **or** the debtor intended to defraud, defeat or delay a creditor.

28. Here, there is no dispute that Symmetry and Eco are not dealing at arm's length. Each of Eco and Symmetry share the same sole director (Mr. White), shareholder (1468527 Alberta Ltd.) and ultimate shareholder (the Dan White Family Trust).[45] According to Mr. Gamage, both Symmetry and Eco are "businesses held for the benefit of DWFT [the Dan White Family Trust]".[46] Mr. White signed the Assignment Agreements on behalf of both Eco and Symmetry.[47]

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[43] Kroeger Affidavit at para 31.
[44] Kroeger Affidavit at para 31.
[45] Kroeger Affidavit at para 34.
[46] Gamage Affidavit at para 3.
[47] Kroeger Affidavit at para 24 and Exhibit "S".

29. It is also not disputed that the transfer of the ADT Action and the Dentons Claim from Eco to Symmetry occurred in the five year period before the date of the initial bankruptcy event. The Assignment Agreements are dated December 1, 2019.[48] The Receiver was appointed over the current and future assets, undertakings and properties of Eco on November 4, 2021.[49] Eco was petitioned into bankruptcy on February 18, 2022.[50]

30. The only issue is whether (i) Eco was insolvent at the time of the transfer or was rendered insolvent by it, or (ii) Eco intended to defraud, defeat or delay a creditor. While the test is disjunctive and only one need be proved in order for the Court to declare the Assignment Agreements void pursuant to section 96 of the BIA, the Trustee submits that Symmetry fails on either branch.

31. First, at the time of the Assignment Agreements, Eco was insolvent – it was unable to meet its obligations generally as they become due and it had ceased paying its current obligations in the ordinary course of business as they generally become due.[51] Only approximately 7 weeks' prior to the date of the Assignment Agreements, Rompsen had accelerated an approximately US$87.9 million obligation and demanded repayment of such amount from Eco.[52] Notices of Intention to enforce the Eco Mortgage, Eco Guarantee and Eco Security had been served by Rompsen on Eco.[53] Independently, Eco had also ceased paying its obligations to the City of Edmonton in the normal

[48] Kroeger Affidavit at para 4 and Exhibit "S".
[49] Kroeger Affidavit at para 2(b) and Exhibit "B".
[50] Kroeger Affidavit at para 29.
[51] BIA s 2 – definition of "insolvent person" **[TAB 1]**; see also: Kroeger Affidavit at para 33.
[52] Kroeger Affidavit at para 33.
[53] Kroeger Affidavit at para 33.

course for property taxes which, by the end of 2019, were overdue in the amount of $383,387.[54] Eco was subsequently petitioned into receivership by Romspen, and later into bankruptcy.[55]

32. The Trustee need only prove facts that will warrant a reasonable inference of insolvency, at which point Symmetry must adduce evidence to rebut that prima facie evidence.[56] Importantly, neither Mr. Gamage nor Mr. White deny that Eco was insolvent at the time of the Assignment Agreements in either of their respective affidavits filed in response to the Trustee's application. The Trustee's information on this point is uncontradicted – Eco was insolvent at the time it executed the Assignment Agreements. This uncontradicted fact is sufficient to dispose of the Trustee's application.

33. However, even considering the second branch of the test, it is firmly established on the evidence that Eco intended to defraud, defeat or delay a creditor in its execution of the Assignment Agreements, notwithstanding Mr. Gamage's and Mr. White's bald assertions to the contrary.[57] "Badges of fraud" can provide an evidentiary shortcut that may help to establish the subjective intention of a transferor under s. 96 of the BIA.[58] As the Ontario Court of Appeal noted:

> Whether the [fraudulent] intent exists is a question of fact to be determined from all of the circumstances as they existed at the time of the conveyance. Although the primary burden of proving his case on a reasonable balance of probabilities remains with the plaintiff, the existence of one or more of the traditional "badges of fraud" may give rise to an inference of intent to defraud in the absence of an explanation from the defendant. In such circumstances there is an onus on the defendant to adduce evidence showing an absence of fraudulent intent. Where the impugned transaction was, as here, between close relatives under suspicious circumstances, it is

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[54] Kroeger Affidavit at para 33.
[55] *A.E.M. Video Only Inc. (Trustee of) v. Video Only Inc*., [1999] 10 C.B.R. (4th) 49 (BCSC) [in Chambers] at para 26 [**TAB 11**], citing *Metropolitan Trust Co. of Canada v. Novastar Development Corp*. (1993), 79 B.C.L.R. (2d) 100 (BCSC); see also: Houlden, Mr. Justice Lloyd W., Morawetz, Mr. Justice Geoffrey B., and Sarra, Dr. Janis P, § 5:501 "Insolvency of Debtor - Relevant Date for Insolvency" in *Bankruptcy and Insolvency Law of Canada*, 4th ed. [**TAB 12**]
[56] *Servus Credit Union v JRD Investments Inc*, 2020 ABQB 249 at para 37 ["***Servus***"] [**TAB 13**].
[57] Gamage Affidavit at para 7; Affidavit of Daniel Alexander White, sworn September 15, 2022 at para 3 ["**White Affidavit**"].
[58] *Urbancorp Toronto Management Inc (Re)*, 2019 ONCA 757 at para 52 ["***Urbancorp***"] [**TAB 14**]. See also *Accel* at para 76 [**TAB 6**].

> prudent for the court to require that the debtor's evidence on bona fides be corroborated by reliable independent evidence.[59]

34. The following, non-exhaustive "badges of fraud", among others, have been established in the jurisprudence: (a) the transfer was made to a non-arm's length person, (b) the transferor was facing actual or potential liabilities, was insolvent, or about to enter a risky undertaking, (c) the consideration for the transaction was grossly inadequate, (d) the transfer was secret, (e) the transfer was effected with unusual haste, or (f) the transaction was made in the face of an outstanding judgment against the debtor.[60]

35. The vast majority of these "badges of fraud" exist in the current circumstances. Among other things:

(a) the assignments of the ADT Action and the Dentons Claim were made to a non-arm's length person (Symmetry) and the Assignment Agreements were signed by the same individual (Mr. White) on behalf of both the assignor (Eco) and the assignee (Symmetry);[61]

(b) the assignments of the ADT Action and the Dentons Claim were made at a time when Eco was insolvent and within weeks of Romspen serving a Notice of Intention to Enforce Security in accordance with section 244 of the BIA;[62]

(c) the existence of the Assignment Agreements was secret and was not disclosed to Romspen at the time, even though enforcement proceedings against Eco were

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[59] *Urbancorp* at para 52 [**TAB 14**].
[60] *Montor Business Corporation v Goldfinger*, 2016 ONCA 406 at para 73 [**TAB 15**], leave to appeal to SCC dismissed, 2016 CanLII 89830, 2016 CanLII 89828. See also *Builders' Floor Centre Ltd v Thiessen*, 2013 ABQB 23 at para 43 [**TAB 16**].
[61] Kroeger Affidavit at para 36.
[62] Kroeger Affidavit at para 17(a) and Exhibit "K".

underway, and remained secret for almost two years until disclosed by Eco's former counsel in accordance with the Receivership Order;[63] and

(d) no consideration, or grossly inadequate consideration, was provided by Symmetry for transfer of the ADT Action and the Dentons Claim (as discussed further above).

36. Eco's transfer of the ADT Action and the Dentons Claim pursuant to the Assignment Agreements constitutes a transfer at undervalue which, pursuant to section 96 of the BIA, should be declared void so as to bring the value of the ADT Action and the Dentons Claim back into Eco's estate for the benefit of its creditors. Any other result would allow the Dan White Family Trust, as the sole ultimate shareholder of both Eco and Symmetry, to improperly benefit from the assignment of the ADT Action and the Dentons Claim, all to the prejudice of Eco's creditors.

B. The Assignment Agreements are Void under the FPA and the Statute of Elizabeth

37. In the alternative, if the Assignment Agreements are determined to fall outside the scope of section 96 of the BIA, both Assignment Agreements should be declared void pursuant to the FPA and/or the Statute of Elizabeth on the basis that they constitute a fraudulent preference or reviewable transaction.[64]

38. The purpose of the FPA and the Statute of Elizabeth is to strike down all conveyances of property made with the intention of defrauding creditors, except for conveyances made for good consideration and bona fide to persons not having notice of fraud.[65] The legislation is to be interpreted liberally, and includes any kind of transfers or conveyances made with the requisite intent to defraud or hinder creditors, no matter what the form.[66]

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[63] Kroeger Affidavit at para 36.
[64] *Grewal (Re)*, 2022 ABQB 553 at para 51 [**TAB 17**].
[65] *Krumm v McKay*, 2003 ABQB 437 at para 13 ["***Krumm***"] [**TAB 18**].
[66] *Krumm* at para 13 [**TAB 18**].

39. The Trustee submits that the requirements of both statutes are met in the current circumstances and, as a result, the Assignment Agreements should be declared void and of no force or effect.

(a) The FPA

40. The Trustee has standing to pursue claims under the FPA on behalf of the creditors of Eco's estate.[67] The FPA has the effect of "unwinding" or "reversing" transactions which fall into certain categories.[68] Section 1 of the FPA provides that:

> Subject to sections 6 to 9, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made
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> a) by a person at a time when the person is in insolvent circumstances or is unable to pay the person's debts in full or knows that the person is on the eve of insolvency, and
>
> b) with intent to defeat, hinder, delay or prejudice the person's creditors or any one or more of them,
>
> is void as against any creditor or creditors injured, delayed or prejudiced.[69]

41. The requirements of section 1 of the FPA are satisfied with respect to the Assignment Agreements:

(a) First, the Assignment Agreements purport to effect a transfer Eco's personal property (its right, title and interest in and to the ADT Action and the Dentons Claim) to Symmetry.

(b) Second the transfer of Eco's interest in the ADT Action and the Dentons Claim to Symmetry was made at a time when Eco was in insolvent circumstances (as

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[67] *BDO Canada Limited v Dorais*, 2015 ABCA 137 at paras 13-14 ["***Dorais***"] [**TAB 19**].
[68] *Servus* at para 33 [**TAB 13**]. See also *Taylor & Associates Ltd v Louis Bull Tribe No. 439*, 2011 ABQB 213 at para 11 [**TAB 20**].
[69] FPA s 1 [**TAB 2**].

discussed further above). Further, at the time of execution of the Assignment Agreements, Symmetry knew that Eco was in insolvent circumstances as the two companies share a common directing mind (Mr. White) who signed the Assignment Agreements on behalf of both companies.

(c) Third, the transfer of Eco's interest in the ADT Action and the Dentons Claim was made with intent to defeat, hinder, delay or prejudice the person's creditors or any one or more of them. As with section 96 of the BIA, the Court can infer intent if the applicant raise a prima facie inference of such intent by showing that certain badges of fraud existed at the time of transfer.[70] If so, the burden then shifts to the respondent(s) to rebut the inference.[71] Here, as discussed above, numerous "badges of fraud" exist with respect to the purported transfer and, apart from a bald assertion to the contrary, Symmetry has adduced no evidence to rebut the inference of intent.

42. The requirements of section 2 of the FPA are also satisfied with respect to the Assignment Agreements. Section 2 of the FPA provides that:

> Subject to sections 6 to 9, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made
>
> a) by a person at a time when the person is in insolvent circumstances or is unable to pay the person's debts in full or knows that the person is on the eve of insolvency, and
>
> b) to or for a creditor with intent to give that creditor preference over the other creditors of the debtor or over any one or more of them,
>
> is void as against the creditor or creditors injured, delayed, prejudiced or postponed.[72]

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[70] *Myers v AlanRidge Homes Ltd*, 2017 ABQB 631 at para 15, aff'd 2018 ABCA 419 ["***Myers***"] [**TAB 21**].
[71] *Myers* at para 15 [**TAB 21**].
[72] FPA s 2 [**TAB 2**].

43. The question of whether Eco intended to give Symmetry a preference over other creditors is to be ascertained by determining the intent of Eco's governing mind – Mr. White.[73] Here, such intent is indicated on the face of the Assignment Agreements. Preambles "D" and "E" of each Assignment Agreement note that "Symmetry has managed the legal action for Eco by supplying services and paying costs including legal fees" and that "Eco has relied on Symmetry for these services but has been unable to pay for those services or costs". Preamble "E" accordingly states that the purpose of the Assignment Agreements is to provide Symmetry with a "partial offset". While, as noted above, there is no evidence before this Court regarding the existence, quantum, or details of the alleged services provided and costs incurred by Symmetry on behalf of Eco (based on Symmetry's ongoing failure or refusal to produce such information), to the extent Symmetry was a creditor of Eco at the date of the Assignment Agreements, the assignment of the ADT Action and Dentons Claim constitutes a preference under section 2 of the FPA and is void against the Trustee.

44. There is nothing in sections 6 to 9 of the FPA that legitimizes or carves out the Assignment Agreements from the scope of sections 1 and/or 2 of the FPA. The transfer of the ADT Action and the Dentons Claim to Symmetry was neither a bona fide assignment that was made in consideration of a present actual bona fide sale or delivery of goods or other property, nor did such transfer bear a fair and reasonable relative value to the consideration for it.

45. The Trustee submits that transfer of the ADT Action and the Dentons Claim to Symmetry contravenes sections 1 and/or 2 of the FPA and that the Assignment Agreements should therefore be declared void as against the Trustee.

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[73] *Servus* at para 47 [**TAB 13**].

(b) The Statute of Elizabeth

46. The Statute of Elizabeth similarly provides a remedy to void a transfer, but unlike the FPA, the insolvency of the transferor is not an essential element of the fraudulent conveyance.[74] The principles defining the remedy in the Statute of Elizabeth are as follows:

(a) there must be a conveyance of either real or personal property;

(b) the transaction must have been for no or nominal consideration;

(c) it must have been the intent of the settlor to defraud, hinder or delay his creditors. The intent of the settlor may be inferred from his circumstances and the circumstances of the settlement or may be the result of direct evidence. The fact that there was no consideration or voluntary consideration will in most cases justify the inference of the necessary intent absent evidence rebutting that inference. Inference of intent will be strong if the settlor was insolvent at the time of settlement or the settlement effectively denuded him of assets sufficient to cover existing obligations;

(d) the party challenging the conveyance must be a creditor or someone with a legal or equitable right to claim against the settlor; and

(e) the conveyance must have had the intended effect.[75]

47. The Trustee submits that, similar to the FPA, all of the foregoing elements under the Statute of Elizabeth are satisfied. Pursuant to the Assignment Agreements, Eco conveyed a personal

[74] *Fish Creek Finish Carpentry Ltd v Lindner*, 2021 ABCA 348 at para 22 ["***Lindner***"] [**TAB 22**].
[75] *Lindner* at para 22 [**TAB 22**].

property interest in the ADT Action and the Dentons Claim to Symmetry for no or nominal consideration. Eco intended to defraud, hinder or delay its creditors in executing the Assignment Agreements, for all the reasons discussed above. The Trustee has standing to pursue claims under the Statute of Elizabeth on behalf of the creditors of Eco's estate.[76] Finally, the Assignment Agreements had the intended effect, namely, the transfer of the ADT Action and the Dentons Claim to Symmetry so as to preserve their value for the benefit of Symmetry and, in turn, the Dan White Family Trust, while putting such actions beyond the reach of Eco's creditors.

48. The Trustee accordingly submits that transfer of the ADT Action and the Dentons Claim to Symmetry contravenes the Statute of Elizabeth and the Assignment Agreements should therefore be declared void as against the Trustee.

PART V – CONCLUSION

49. The Trustee respectfully requests that this Honourable Court declare the Assignment Agreements void as transfers at undervalue pursuant to section 96 of the BIA or, in the alternative, as fraudulent preferences under sections 1 and/or 2 of the FPA and/or as fraudulent conveyances under the Statute of Elizabeth.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 18th DAY OF NOVEMBER, 2022

Randal Van de Mosselaer / Emily Paplawski
Osler Hoskin & Harcourt LLP
Counsel for the Applicant

[76] *Dorais* at paras 13-14 [**TAB 19**].

TABLE OF AUTHORITIES

TAB	AUTHORITY
[1]	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3
[2]	*Fraudulent Preferences Act*, RSA 2000, c F-24
[3]	*Fraudulent Conveyances Statute,* 13 Eliz 1, Chapter 5 (UK)
[4]	*PricewaterhouseCoopers Inc v Perpetual Energy Inc,* 2022 ABCA 111
[5]	*Ernst & Young Inc v Aquino*, 2022 ONCA 202
[6]	*Accel Canada Holdings Limited (Re),* 2020 ABQB 204
[7]	*Hofer (Re)*, 2019 ABQB 405
[8]	*Kamitomo v Pasula* (1983), 50 AR 280, 29 Alta LR (2d) 375 (ABQB)
[9]	*Richards v Richards*, 2013 ABQB 484
[10]	*Scott & Associates Engineering Ltd v Finavera Renewables Inc*, 2013 ABQB 273
[11]	*A.E.M. Video Only Inc. (Trustee of) v. Video Only Inc*., [1999] 10 C.B.R. (4th) 49 (BCSC) [in Chambers]
[12]	Houlden, Mr. Justice Lloyd W., Morawetz, Mr. Justice Geoffrey B., and Sarra, Dr. Janis P, § 5:501 "Insolvency of Debtor—Relevant Date for Insolvency" in *Bankruptcy and Insolvency Law of Canada*, 4th ed.
[13]	*Servus Credit Union v JRD Investments Inc,* 2020 ABQB 249
[14]	*Urbancorp Toronto Management Inc (Re),* 2019 ONCA 757
[15]	*Montor Business Corporation v Goldfinger,* 2016 ONCA 406
[16]	*Builders' Floor Centre Ltd v Thiessen*, 2013 ABQB 23
[17]	*Grewal (Re)*, 2022 ABQB 553
[18]	*Krumm v McKay*, 2003 ABQB 437
[19]	*BDO Canada Limited v Dorais,* 2015 ABCA 137
[20]	*Taylor & Associates Ltd v Louis Bull Tribe No. 439,* 2011 ABQB 213

TAB	AUTHORITY
[21]	*Myers v AlanRidge Homes Ltd,* 2017 ABQB 631
[22]	*Fish Creek Finish Carpentry Ltd v Lindner,* 2021 ABCA 348

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to November 2, 2022

Last amended on September 1, 2022

À jour au 2 novembre 2022

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to November 2, 2022. The last amendments came into force on September 1, 2022. Any amendments that were not in force as of November 2, 2022 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 2 novembre 2022. Les dernières modifications sont entrées en vigueur le 1 septembre 2022. Toutes modifications qui n'étaient pas en vigueur au 2 novembre 2022 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

income trust means a trust that has assets in Canada if

(a) its units are listed on a prescribed stock exchange on the date of the initial bankruptcy event, or

(b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the date of the initial bankruptcy event; (*fiducie de revenu*)

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (*personne insolvable*)

legal counsel means any person qualified, in accordance with the laws of a province, to give legal advice; (*conseiller juridique*)

locality of a debtor means the principal place

(a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,

(b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or

(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated; (*localité*)

Minister means the Minister of Industry; (*ministre*)

net termination value means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; (*valeurs nettes dues à la date de résiliation*)

official receiver means an officer appointed under subsection 12(2); (*séquestre officiel*)

b) il a résidé au cours de l'année précédant l'ouverture de sa faillite;

c) se trouve la plus grande partie de ses biens, dans les cas non visés aux alinéas a) ou b). (*locality of a debtor*)

localité d'un débiteur [Abrogée, 2005, ch. 47, art. 2(F)]

ministre Le ministre de l'Industrie. (*Minister*)

moment de la faillite S'agissant d'une personne, le moment :

a) soit du prononcé de l'ordonnance de faillite la visant;

b) soit du dépôt d'une cession de biens la visant;

c) soit du fait sur la base duquel elle est réputée avoir fait une cession de biens. (*time of the bankruptcy*)

opération sous-évaluée Toute disposition de biens ou fourniture de services pour laquelle le débiteur ne reçoit aucune contrepartie ou en reçoit une qui est manifestement inférieure à la juste valeur marchande de celle qu'il a lui-même donnée. (*transfer at undervalue*)

ouverture de la faillite Relativement à une personne, le premier en date des événements suivants à survenir :

a) le dépôt d'une cession de biens la visant;

b) le dépôt d'une proposition la visant;

c) le dépôt d'un avis d'intention par elle;

d) le dépôt de la première requête en faillite :

(i) dans les cas visés aux alinéas 50.4(8) a) et 57 a) et au paragraphe 61(2),

(ii) dans le cas où la personne, alors qu'elle est visée par un avis d'intention déposé aux termes de l'article 50.4 ou une proposition déposée aux termes de l'article 62, fait une cession avant que le tribunal ait approuvé la proposition;

e) dans les cas non visés à l'alinéa d), le dépôt de la requête à l'égard de laquelle une ordonnance de faillite est rendue;

f) l'introduction d'une procédure sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*. (*date of the initial bankruptcy event*)

personne

(c) the event that causes an assignment by the person to be deemed; (*moment de la faillite*)

title transfer credit support agreement means an agreement under which an insolvent person or a bankrupt has provided title to property for the purpose of securing the payment or performance of an obligation of the insolvent person or bankrupt in respect of an eligible financial contract; (*accord de transfert de titres pour obtention de crédit*)

transfer at undervalue means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor; (*opération sous-évaluée*)

trustee or ***licensed trustee*** means a person who is licensed or appointed under this Act. (*syndic* ou *syndic autorisé*)

R.S., 1985, c. B-3, s. 2; R.S., 1985, c. 31 (1st Supp.), s. 69; 1992, c. 1, s. 145(F), c. 27, s. 3; 1995, c. 1, s. 62; 1997, c. 12, s. 1; 1999, c. 28, s. 146, c. 31, s. 17; 2000, c. 12, s. 8; 2001, c. 4, s. 25, c. 9, s. 572; 2004, c. 25, s. 7; 2005, c. 3, s. 11, c. 47, s. 2; 2007, c. 29, s. 91, c. 36, s. 1; 2012, c. 31, s. 414; 2015, c. 3, s. 6(F); 2018, c. 10, s. 82.

surintendant des institutions financières Le surintendant des institutions financières nommé en application du paragraphe 5(1) de la *Loi sur le Bureau du surintendant des institutions financières*. (*Superintendent of Financial Institutions*)

syndic ou ***syndic autorisé*** Personne qui détient une licence ou est nommée en vertu de la présente loi. (*trustee* or *licensed trustee*)

tribunal Sauf aux alinéas 178(1)a) et a.1) et aux articles 204.1 à 204.3, tout tribunal mentionné aux paragraphes 183(1) ou (1.1). Y est assimilé tout juge de ce tribunal ainsi que le greffier ou le registraire de celui-ci, lorsqu'il exerce les pouvoirs du tribunal qui lui sont conférés au titre de la présente loi. (*court*)

union de fait Relation qui existe entre deux conjoints de fait. (*common-law partnership*)

valeurs nettes dues à la date de résiliation La somme nette obtenue après compensation des obligations mutuelles des parties à un contrat financier admissible effectuée conformément à ce contrat. (*net termination value*)

L.R. (1985), ch. B-3, art. 2; L.R. (1985), ch. 31 (1er suppl.), art. 69; 1992, ch. 1, art. 145(F), ch. 27, art. 3; 1995, ch. 1, art. 62; 1997, ch. 12, art. 1; 1999, ch. 28, art. 146, ch. 31, art. 17; 2000, ch. 12, art. 8; 2001, ch. 4, art. 25, ch. 9, art. 572; 2004, ch. 25, art. 7; 2005, ch. 3, art. 11, ch. 47, art. 2; 2007, ch. 29, art. 91, ch. 36, art. 1; 2012, ch. 31, art. 414; 2015, ch. 3, art. 6(F); 2018, ch. 10, art. 82.

Designation of beneficiary

2.1 A change in the designation of a beneficiary in an insurance contract is deemed to be a disposition of property for the purpose of this Act.

1997, c. 12, s. 2; 2004, c. 25, s. 8; 2005, c. 47, s. 3.

Désignation de bénéficiaires

2.1 La modification de la désignation du bénéficiaire d'une police d'assurance est réputée être une disposition de biens pour l'application de la présente loi.

1997, ch. 12, art. 2; 2004, ch. 25, art. 8; 2005, ch. 47, art. 3.

Superintendent's division office

2.2 Any notification, document or other information that is required by this Act to be given, forwarded, mailed, sent or otherwise provided to the Superintendent, other than an application for a licence under subsection 13(1), shall be given, forwarded, mailed, sent or otherwise provided to the Superintendent at the Superintendent's division office as specified in directives of the Superintendent.

1997, c. 12, s. 2.

Bureau de division

2.2 Sauf dans le cas de la demande de licence prévue au paragraphe 13(1), les notifications et envois de documents ou renseignements à effectuer au titre de la présente loi auprès du surintendant le sont au bureau de division spécifié par ses instructions.

1997, ch. 12, art. 2.

3 [Repealed, 2005, c. 47, s. 4]

3 [Abrogé, 2005, ch. 47, art. 4]

Definitions

4 (1) In this section,

entity means a person other than an individual; (*entité*)

Définitions

4 (1) Les définitions qui suivent s'appliquent au présent article.

entité Personne autre qu'une personne physique. (*entity*)

Transfer at undervalue

96 (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

(a) the party was dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

(ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

(iii) the debtor intended to defraud, defeat or delay a creditor; or

(b) the party was not dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

Establishing values

(2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

Opération sous-évaluée

96 (1) Sur demande du syndic, le tribunal peut, s'il estime que le débiteur a conclu une opération sous-évaluée, déclarer cette opération inopposable au syndic ou ordonner que le débiteur verse à l'actif, seul ou avec l'ensemble ou certaines des parties ou personnes intéressées par l'opération, la différence entre la valeur de la contrepartie qu'il a reçue et la valeur de celle qu'il a donnée, dans l'un ou l'autre des cas suivants :

a) l'opération a été effectuée avec une personne sans lien de dépendance avec le débiteur et les conditions suivantes sont réunies :

(i) l'opération a eu lieu au cours de la période commençant à la date précédant d'un an la date de l'ouverture de la faillite et se terminant à la date de la faillite,

(ii) le débiteur était insolvable au moment de l'opération, ou l'est devenu en raison de celle-ci,

(iii) le débiteur avait l'intention de frauder ou de frustrer un créancier ou d'en retarder le désintéressement;

b) l'opération a été effectuée avec une personne qui a un lien de dépendance avec le débiteur et elle a eu lieu au cours de la période :

(i) soit commençant à la date précédant d'un an la date de l'ouverture de la faillite et se terminant à la date de la faillite,

(ii) soit commençant à la date précédant de cinq ans la date de l'ouverture de la faillite et se terminant à la date qui précède d'un jour la date du début de la période visée au sous-alinéa (i) dans le cas où le débiteur :

(A) ou bien était insolvable au moment de l'opération, ou l'est devenu en raison de celle-ci,

(B) ou bien avait l'intention de frauder ou de frustrer un créancier ou d'en retarder le désintéressement.

Établissement des valeurs

(2) Lorsqu'il présente la demande prévue au présent article, le syndic doit déclarer quelle était à son avis la juste valeur marchande des biens ou services ainsi que la valeur de la contrepartie réellement donnée ou reçue par le débiteur, et l'évaluation faite par le syndic est, sauf preuve contraire, celle sur laquelle le tribunal se fonde pour rendre une décision en conformité avec le présent article.

Meaning of *person who is privy*

(3) In this section, a ***person who is privy*** means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

R.S., 1985, c. B-3, s. 96; 1997, c. 12, s. 79; 2004, c. 25, s. 57; 2005, c. 47, s. 73; 2007, c. 36, s. 43.

Définition de *personne intéressée*

(3) Au présent article, ***personne intéressée*** s'entend de toute personne qui est liée à une partie à l'opération et qui, de façon directe ou indirecte, soit en bénéficie elle-même, soit en fait bénéficier autrui.

L.R. (1985), ch. B-3, art. 96; 1997, ch. 12, art. 79; 2004, ch. 25, art. 57; 2005, ch. 47, art. 73; 2007, ch. 36, art. 43.

Protected transactions

97 (1) No payment, contract, dealing or transaction to, by or with a bankrupt made between the date of the initial bankruptcy event and the date of the bankruptcy is valid, except the following, which are valid if made in good faith, subject to the provisions of this Act with respect to the effect of bankruptcy on an execution, attachment or other process against property, and subject to the provisions of this Act respecting preferences and transfers at undervalue:

(a) a payment by the bankrupt to any of the bankrupt's creditors;

(b) a payment or delivery to the bankrupt;

(c) a transfer by the bankrupt for adequate valuable consideration; and

(d) a contract, dealing or transaction, including any giving of security, by or with the bankrupt for adequate valuable consideration.

Transactions protégées

97 (1) Les paiements, remises, transports ou transferts, contrats, marchés et transactions auxquels le failli est partie et qui sont effectués entre l'ouverture de la faillite et la date de la faillite ne sont pas valides; sous réserve, d'une part, des autres dispositions de la présente loi quant à l'effet d'une faillite sur une procédure d'exécution, une saisie ou autre procédure contre des biens et, d'autre part, des dispositions de la présente loi relatives aux préférences et aux opérations sous-évaluées, les opérations ci-après sont toutefois valides si elles sont effectuées de bonne foi :

a) les paiements du failli à l'un de ses créanciers;

b) les paiements ou remises au failli;

c) les transferts par le failli pour contrepartie valable et suffisante;

d) les contrats, marchés ou transactions — garanties comprises — du failli, ou avec le failli, pour contrepartie valable et suffisante.

Definition of *adequate valuable consideration*

(2) The expression ***adequate valuable consideration*** in paragraph (1)(c) means a consideration of fair and reasonable money value with relation to that of the property assigned or transferred, and in paragraph (1)(d) means a consideration of fair and reasonable money value with relation to the known or reasonably to be anticipated benefits of the contract, dealing or transaction.

Définition de *contrepartie valable et suffisante*

(2) L'expression ***contrepartie valable et suffisante*** à l'alinéa (1)c) signifie une contre-prestation ayant une valeur en argent juste et raisonnable par rapport à celle des biens transmis ou cédés, et, à l'alinéa (1)d), signifie une contre-prestation ayant une valeur en argent juste et raisonnable par rapport aux bénéfices connus ou raisonnablement présumés du contrat, du marché ou de la transaction.

Law of set-off or compensation

(3) The law of set-off or compensation applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off or compensation is affected by the provisions of this Act respecting frauds or fraudulent preferences.

R.S., 1985, c. B-3, s. 97; 1992, c. 27, s. 41; 1997, c. 12, s. 80; 2004, c. 25, s. 58; 2005, c. 47, s. 74.

Compensation

(3) Les règles de la compensation s'appliquent à toutes les réclamations produites contre l'actif du failli, et aussi à toutes les actions intentées par le syndic pour le recouvrement des créances dues au failli, de la même manière et dans la même mesure que si le failli était demandeur ou défendeur, selon le cas, sauf en tant que toute réclamation pour compensation est atteinte par les dispositions de la présente loi concernant les fraudes ou préférences frauduleuses.

L.R. (1985), ch. B-3, art. 97; 1992, ch. 27, art. 41; 1997, ch. 12, art. 80; 2004, ch. 25, art. 58; 2005, ch. 47, art. 74.

disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

failli, avec préséance sur les réclamations de tout créancier garanti; le tribunal ne peut toutefois déclarer que la réclamation du séquestre est ainsi garantie que s'il est convaincu que tous les créanciers garantis auxquels l'ordonnance pourrait sérieusement porter atteinte ont été avisés à cet égard suffisamment à l'avance et se sont vu accorder l'occasion de se faire entendre.

Meaning of *disbursements*

(7) In subsection (6), ***disbursements*** does not include payments made in the operation of a business of the insolvent person or bankrupt.

1992, c. 27, s. 89; 2005, c. 47, s. 115; 2007, c. 36, s. 58.

Sens de *débours*

(7) Pour l'application du paragraphe (6), ne sont pas comptés comme débours les paiements effectués dans le cadre des opérations propres aux affaires de la personne insolvable ou du failli.

1992, ch. 27, art. 89; 2005, ch. 47, art. 115; 2007, ch. 36, art. 58.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Préavis

244 (1) Le créancier garanti qui se propose de mettre à exécution une garantie portant sur la totalité ou la quasi-totalité du stock, des comptes recevables ou des autres biens d'une personne insolvable acquis ou utilisés dans le cadre des affaires de cette dernière doit lui en donner préavis en la forme et de la manière prescrites.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

Délai

(2) Dans les cas où un préavis est requis aux termes du paragraphe (1), le créancier garanti ne peut, avant l'expiration d'un délai de dix jours suivant l'envoi du préavis, mettre à exécution la garantie visée par le préavis, à moins que la personne insolvable ne consente à une exécution à une date plus rapprochée.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Préavis

(2.1) Pour l'application du paragraphe (2), le créancier garanti ne peut obtenir le consentement visé par le paragraphe avant l'envoi du préavis visé au paragraphe (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Non-application du présent article

(3) Le présent article ne s'applique pas, ou cesse de s'appliquer, au créancier garanti dont le droit de réaliser sa garantie ou d'effectuer toute autre opération, relativement à celle-ci est protégé aux termes du paragraphe 69.1(5) ou (6), ou à l'égard de qui a été levée, aux termes de l'article 69.4, la suspension prévue aux articles 69 à 69.2.

Idem

(4) This section does not apply where there is a receiver in respect of the insolvent person.

1992, c. 27, s. 89; 1994, c. 26, s. 9(E).

Receiver to give notice

245 (1) A receiver shall, as soon as possible and not later than ten days after becoming a receiver, by appointment or otherwise, in respect of property of an insolvent person or a bankrupt, send a notice of that fact, in the prescribed form and manner, to the Superintendent, accompanied by the prescribed fee, and

(a) in the case of a bankrupt, to the trustee; or

(b) in the case of an insolvent person, to the insolvent person and to all creditors of the insolvent person that the receiver, after making reasonable efforts, has ascertained.

Idem

(2) A receiver in respect of property of an insolvent person shall forthwith send notice of his becoming a receiver to any creditor whose name and address he ascertains after sending the notice referred to in subsection (1).

Names and addresses of creditors

(3) An insolvent person shall, forthwith after being notified that there is a receiver in respect of any of his property, provide the receiver with the names and addresses of all creditors.

1992, c. 27, s. 89.

Receiver's statement

246 (1) A receiver shall, forthwith after taking possession or control, whichever occurs first, of property of an insolvent person or a bankrupt, prepare a statement containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Idem

(4) Le présent article ne s'applique pas dans les cas où une personne agit, à titre de séquestre, à l'égard de la personne insolvable.

1992, ch. 27, art. 89; 1994, ch. 26, art. 9(A).

Avis du séquestre

245 (1) Le séquestre doit, dans les meilleurs délais et au plus tard dans les dix jours suivant la date où il devient, par nomination ou autrement, séquestre à l'égard de tout ou partie des biens d'une personne insolvable ou d'un failli, en donner avis, en la forme et de la manière prescrites, au surintendant — l'avis devant, dans ce cas, être accompagné des droits prescrits — et :

a) s'agissant d'un failli, au syndic;

b) s'agissant d'une personne insolvable, à celle-ci, à tous ceux de ses créanciers dont il a pu, en y allant de ses meilleurs efforts, dresser la liste.

Idem

(2) Le séquestre de tout ou partie des biens d'une personne insolvable est tenu de donner immédiatement avis de son entrée en fonctions à tout créancier dont il prend connaissance des nom et adresse après l'envoi de l'avis visé au paragraphe (1).

Nom et adresse des créanciers

(3) La personne insolvable doit, dès qu'elle est avisée de l'entrée en fonctions d'un séquestre à l'égard de tout ou partie de ses biens, fournir à celui-ci la liste des noms et adresses de tous ses créanciers.

1992, ch. 27, art. 89.

Déclaration

246 (1) Le séquestre doit, dès sa prise de possession ou, si elle survient plus tôt, sa prise de contrôle de tout ou partie des biens d'une personne insolvable ou d'un failli, établir une déclaration contenant les renseignements prescrits au sujet de l'exercice de ses attributions à l'égard de ces biens; il en transmet sans délai une copie au surintendant et :

a) à la personne insolvable ou, en cas de faillite, au syndic;

b) à tout créancier de la personne insolvable ou du failli qui en fait la demande au plus tard six mois après que le séquestre a complété l'exercice de ses attributions en l'espèce.

TAB 2

Province of Alberta

FRAUDULENT PREFERENCES ACT

Revised Statutes of Alberta 2000
Chapter F-24

Current as of January 1, 2002

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FRAUDULENT PREFERENCES ACT

Chapter F-24

Table of Contents

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

Fraudulent transfers

1 Subject to sections 6 to 9, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made

(a) by a person at a time when the person is in insolvent circumstances or is unable to pay the person's debts in full or knows that the person is on the eve of insolvency, and

(b) with intent to defeat, hinder, delay or prejudice the person's creditors or any one or more of them,

is void as against any creditor or creditors injured, delayed or prejudiced.

RSA 1980 cF-18 s1

Intent to prefer

2 Subject to sections 6 to 9, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made

(a) by a person at a time when the person is in insolvent circumstances or is unable to pay the person's debts in full or knows that the person is on the eve of insolvency, and

(b) to or for a creditor with intent to give that creditor preference over the other creditors of the debtor or over any one or more of them,

is void as against the creditor or creditors injured, delayed, prejudiced or postponed.

RSA 1980 cF-18 s2

Preferential effect

3 Subject to sections 6 to 9, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made

(a) by a person at a time when the person is in insolvent circumstances or is unable to pay the person's debts in full or knows that the person is on the eve of insolvency, and

(b) to or for a creditor and having the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them,

is, in and with respect to any action that within one year after the transaction is brought to impeach or set aside the transaction, void as against the creditor or creditors injured, delayed, prejudiced or postponed.

RSA 1980 cF-18 s3

What constitutes transaction

4(1) A transaction is deemed to be one that has the effect of giving a creditor a preference over other creditors, within the meaning of

section 3, if by the transaction a creditor is given or realizes or is placed in a position to realize payment, satisfaction or security for the debtor's indebtedness to that creditor or a portion of it greater proportionately than could be realized by or for the unsecured creditors generally of the debtor or for the unsecured portion of that creditor's liabilities out of the assets of the debtor left available and subject to judgment, writ proceedings, attachment or other process.

(2) Independently of the intent with which the transaction was entered into or of whether it was entered into voluntarily or under pressure, the preferential effect or result of the impeached transaction governs, and no pressure by a creditor or want of notice to the creditor alleged to have been so preferred of the debtor's circumstances, inability or knowledge as aforesaid, or of the effect of the transaction, avails to protect the transaction except as provided by sections 6 and 9.

RSA 1980 cF-18 s4;1994 cC-10.5 s126

Definition

5 In sections 2 to 4, "creditor" includes

(a) a surety, and the endorser of a promissory note or bill of exchange, who would, on payment by the surety or endorser of the debt, promissory note or bill of exchange in respect of which the suretyship was entered into or endorsement was given, become a creditor of the person giving the preference within the meaning of sections 2 to 4, and

(b) a cestui que trust or other person to whom liability is equitable only.

RSA 1980 cF-18 s5

Bona fide transactions

6 Nothing in sections 1 to 5 applies to

(a) a bona fide sale or payment made in the ordinary course of trade or calling to innocent purchasers or parties, or

(b) a payment of money to a creditor, or a bona fide conveyance, assignment, transfer or delivery over of any goods, securities or property, of any kind as above mentioned, that is made in consideration of a present actual bona fide sale or delivery of goods or other property or of a present actual bona fide payment in money, or by way of security for a present actual bona fide advance of money,

if the money paid or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration for it.

RSA 1980 cF-18 s6

Payment to creditor

7 When there is a valid sale of goods, securities or property and the consideration or part of it is paid or transferred by the purchaser to the creditor of the vendor under circumstances that would render the payment or transfer void if it were made by the debtor personally and directly, the payment or transfer, even though valid as respects the purchaser, is void as respects the creditor to whom it is made.

RSA 1980 cF-18 s7

Restoration of security to creditor

8 When a payment that is void under this Act has been made and a valuable security has been given up in consideration of the payment, the creditor is entitled to have the security restored or its value made good to the creditor before or as a condition of the return of the payment.

RSA 1980 cF-18 s8

Saving of payment to creditor

9 Nothing in this Act

(a) affects a payment of money to a creditor when the creditor by reason or on account of the payment has lost or been deprived of or has in good faith given up a valid security that the creditor held for the payment of the debt so paid, unless the value of the security is restored to the creditor,

(b) affects the substitution in good faith of one security for another security for the same debt so far as the debtor's estate is not lessened in value to the other creditors because of the substitution, or

(c) invalidates a security given to a creditor for the pre-existing debt when, by reason or on account of the giving of the security, an advance is made in money to the debtor by the creditor in the bona fide belief that the advance will enable the debtor to continue the debtor's trade or business and pay the debtor's debts in full.

RSA 1980 cF-18 s9

Proceedings by creditor

10(1) One or more creditors may, for the benefit of creditors generally or for the benefit of those creditors who have been injured, delayed, prejudiced or postponed by the impeached transaction, sue for the rescission of, or to have declared void, agreements, deeds, instruments or other transactions made or entered into in fraud of creditors or in non-compliance with this Act or by this Act declared void.

(2) If, in an action under subsection (1), an amendment is made to the statement of claim, the amendment relates back to the commencement of the action for the purpose of the time limited by section 3.

RSA 1980 cF-18 s10

Proceeds of unlawfully transferred property

11(1) If a gift, conveyance, assignment or transfer of any property, real or personal, that in law is invalid against creditors, was made to a person, and that person has sold or disposed of, realized or collected the property or a part of it, the money or other proceeds or that amount, whether further disposed of or not, may be seized or recovered in an action by a person who would be entitled to seize and recover the property if it had remained in the possession or control of the debtor or of the person to whom the gift, conveyance, assignment, transfer, delivery or payment was made.

(2) The right of seizure and recovery exists in favour of all creditors of the debtor.

(3) When the proceeds are of such a character as to be seizable under writ proceedings, they may be seized under the writ of any creditor and shall be distributed among creditors under the *Civil Enforcement Act*.

(4) Whether the proceeds are or are not of such a character as to be seizable under writ proceedings, an action may be brought for them or to recover the amount of them by a creditor, whether a judgment creditor or not, on behalf of that creditor and all other creditors, or any other proceedings may be taken that are necessary to render the proceeds or the amount of them available for the general benefit of the creditors.

(5) This section does not apply as against innocent purchasers of any of the property.

RSA 1980 cF-18 s11;1994 cC-10.5 s126

Bankruptcy and Insolvency Act

12 This Act shall be read and construed subject to the *Bankruptcy and Insolvency Act* (Canada).

RSA 1980 cF-18 s12;1994 c23 s51

TAB 3

Statute of Fraudulent Conveyances, 1571

13 Eliz. 1, c. 5

An act against fraudulent deeds, alienations, &c.

Fraudulent deeds made to avoid the debts of others shall be void, and the penalties of the parties to such fraudulent assurances

FOR the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, more commonly used and practised in these days than hath been seen or heard to heretofore:

2. *which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, not only to the let or hinderance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued:*

All fraudulent conveyances made to avoid the debt or duty of others shall be void

II. Be it therefore declared, ordained and enacted by the authority of this present parliament, That all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise,

2. and all and every bond, suit, judgment and execution, at any time had or made sithence the beginning of the Queen's majesty's reign that now is, or at any time hereafter to be had or made,

3. to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, by such guileful, covinous or fraudulent devices and practices, as is aforesaid, are, shall or might be in any wife disturbed, hindred, delayed or defrauded) to be clearly and utterly void, frustrate and of none effect; any pretence, colour, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

The forefeiture of the parties to fraudulent deeds

III. And be it further enacted by the authority aforesaid, That all and every the parties to such feigned, covinous or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions and other things before expressed, and being privy and knowing of the same, or of any of them;

2. which at any time after the tenth day of *June* next coming shall wittingly and willingly put in ure, avow, maintain, justify or defend the same, or any of them, as true, simple, and done, had or made *bona fide* and upon good consideration;

3. or shall lien or assign any the lands, tenements, goods, leases or other things before-mentioned, to him or them conveyed as is aforesaid, or any part thereof;

4. shall incur the penalty and forfeiture of one year's value of the said lands, tenements and hereditaments, leases, rents, commons or other profits, of or out of the same;

5. and the whole value of the said goods and chattels;

6. and also so much money as are or shall be contained in any such covinous and feigned bond;

Who shall have the forfeiture, and by what means

7. the one moiety whereof to be to the Queen's majesty, her heirs and successors, and the other moiety to the party or parties grieved by such feigned and fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, leases, rents, commons, profits, charges and other things aforesaid, to be recovered in any of the Queen's courts of record by action of debt, bill, plaint or information, wherein no essoin, protection or wager of law shall be admitted for the defendant or defendants;

8. and also being thereof lawfully convicted, shall suffer imprisonment for one half year without bail or mainprise.

Common recoveries against the tenants of freehold

IV. Provided always, and be it further enacted by the authority aforesaid, That whereas sundry common recoveries of lands, tenements and hereditaments have heretofore been had, and hereafter may be had against tenant in tail, or other tenant of the freehold, the reversion or remainder, or the right of reversion or remainder, then being in any other person or persons;

2. that every such common recovery heretofore had, and hereafter to be had, of any lands, tenements or hereditaments, shall as touching such person and persons which then had any remainder or reversion, or right or remainder or reversion, and against the heirs of every of them, stand, remain and be of such like force and effect, and of none other, as the same should have been if this act had never been had ne made.

Making an estate whereby a voucher may be used in a formedon

V. Provided always, and be it further enacted by the authority aforesaid, That this act, or any thing therein contained, shall not extend to make void any estate or conveyance, by reason whereof any person or persons shall use any voucher in any writ of Formedon, now depending or hereafter to be depending, but that all and every such vouchers in any writ of formedon shall stand and be in like force and effect, as if this act have never been had ne made; anything before in this act contained to the contrary notwithstanding.

Estates made upon good consideration, and bona fide

VI. Provided also, and be it enacted by the authority aforesaid, That this act, or any thing therein contained, shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had, made, conveyed or assured, or hereafter to be had, made, conveyed or assured, which estate or interest is or shall be upon good consideration and bona fide lawfully conveyed or assured to any person or persons, or bodies politick or corporate, not having at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud or collusion as is aforesaid; any thing before mentioned to the contrary hereof notwithstanding.

VII. This act to endure unto the end of the first session of the next parliament.

5440
CALGARY

THE

Statutes at Large,

FROM THE

First Year of Queen MARY,

TO THE

Thirty-fifth Year of Queen ELIZABETH, inclusive.

To which is prefixed,

A TABLE containing the TITLES of all the STATUTES during that Period.

VOL. VI.

By DANBY PICKERING, of Gray's-Inn, Esq;
Reader of the Law Lecture to that Honourable Society.

CAMBRIDGE,
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CUM PRIVILEGIO.

CAP. V.

An act againſt fraudulent deeds, alienations, &c.

Fraudulent deeds made to avoid the debts of others ſhall be void, and the penalties of the parties to ſuch fraudulent aſſurances. 2 Bulſtr. 218.

FOR *the avoiding and aboliſhing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, ſuits, judgments and executions, as well of lands and tenements as of goods and chattels, more commonly uſed and practiſed in theſe days than hath been ſeen or heard of heretofore:* (2) *which feoffments, gifts, grants, alienations, conveyances, bonds, ſuits, judgments and executions, have been and are deviſed and contrived of malice, fraud, covin, colluſion or guile, to the end, purpoſe and intent, to delay, hinder or defraud creditors and others of their juſt and lawful actions, ſuits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, not only to the let or hinderance of the due courſe and execution of law and juſtice, but alſo to the overthrow of all true and plain dealing, bargaining and cheviſance between man and man, without the which no commonwealth or civil ſociety can be maintained or continued:*

All fraudulent conveyances made to avoid the debt or duty of others ſhall be void. Raſt. 207. 27 Eliz. c. 4. 2 Leon. 9. 223. 2 Roll. 493. Latch 222. Dyer 295, 351. 3 Co. 80, 81. 5 Co. 60. 8 Co. 171. 9 Co. 108. 10 Co. 56. Co. Lit. 76. a. 1 Leon. 47, 308. Hob. 72.

II. Be it therefore declared, ordained and enacted by the authority of this preſent parliament, That all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any leaſe, rent, common or other profit or charge out of the ſame lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwiſe, (2) and all and every bond, ſuit, judgment and execution, at any time had or made ſithence the beginning of the Queen's majeſty's reign that now is, or at any time hereafter to be had or made, (3) to or for any intent or purpoſe before declared and expreſſed, ſhall be from henceforth deemed and taken (only as againſt that perſon or perſons, his or their heirs, ſucceſſors, executors, adminiſtrators and aſſigns, and every of them, whoſe actions, ſuits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, by ſuch guileful, covinous or fraudulent devices and practices, as is aforeſaid, are, ſhall or might be in any wiſe diſturbed, hindred, delayed or defrauded) to be clearly and utterly void, fruſtrate and of none effect; any pretence, colour, feigned conſideration, expreſſing of uſe, or any other matter or thing to the contrary notwithſtanding.

The forfeiture of the parties to fraudulent deeds. Co. pla. 162. Hob. 166. Dyer 351. Cro. El. 645. Cro. Jac. 270.

III. And be it further enacted by the authority aforeſaid, That all and every the parties to ſuch feigned, covinous or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, ſuits, judgments, executions and other things before expreſſed, and being privy and knowing of the ſame, or any of them; (2) which at any time after the tenth day of *June* next coming ſhall wittingly and willingly put in ure, avow, maintain, juſtify or defend the ſame, or any of them, as true, ſimple, and done, had or made *bona fide* and upon good conſideration; (3) or ſhall alien or aſſign any the lands, tenements, goods, leaſes or other things before-mentioned, to him or them conveyed as is aforeſaid, or any part thereof; (4) ſhall incur the penalty and forfeiture

ture of one year's value of the ſaid lands, tenements and hereditaments, leaſes, rents, commons or other profits, of or out of the ſame; (5) and the whole value of the ſaid goods and chattels; (6) and alſo ſo much money as are or ſhall be contained in any ſuch covinous and feigned bond; (7) the one moiety whereof to be to the Queen's majeſty, her heirs and ſucceſſors, and the other moiety to the party or parties grieved by ſuch feigned and fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, ſuits, judgments, executions, leaſes, rents, commons, profits, charges and other things aforeſaid, to be recovered in any of the Queen's courts of record by action of debt, bill, plaint or information, wherein no eſſoin, protection or wager of law ſhall be admitted for the defendant or defendants; (8) and alſo being thereof lawfully convicted, ſhall ſuffer impriſonment for one half year without bail or mainpriſe.

Who ſhall have the forfeiture, and by what means.

IV. Provided always, and be it further enacted by the authority aforeſaid, That whereas ſundry common recoveries of lands, tenements and hereditaments have heretofore been had, and hereafter may be had againſt tenant in tail, or other tenant of the freehold, the reverſion or remainder, or the right of reverſion or remainder, then being in any other perſon or perſons; (2) that every ſuch common recovery heretofore had, and hereafter to be had, of any lands, tenements or hereditaments, ſhall as touching ſuch perſon and perſons which then had any remainder or reverſion, or right of remainder or reverſion, and againſt the heirs of every of them, ſtand, remain and be of ſuch like force and effect, and of none other, as the ſame ſhould have been if this act had never been had ne made.

Common recoveries againſt the tenants of freehold.

V. Provided always, and be it further enacted by the authority aforeſaid, That this act, or any thing therein contained, ſhall not extend to make void any eſtate or conveyance, by reaſon whereof any perſon or perſons ſhall uſe any voucher in any writ of *Formedon*, now depending or hereafter to be depending, but that all and every ſuch vouchers in any writ of *Formedon* ſhall ſtand and be in like force and effect, as if this act had never been had ne made; any thing before in this act contained to the contrary notwithſtanding.

Making an eſtate whereby a voucher may be uſed in a formedon.

VI. Provided alſo, and be it enacted by the authority aforeſaid, That this act, or any thing therein contained, ſhall not extend to any eſtate or intereſt in lands, tenements, hereditaments, leaſes, rents, commons, profits, goods or chattels, had, made, conveyed or aſſured, or hereafter to be had, made, conveyed or aſſured, which eſtate or intereſt is or ſhall be upon good conſideration and *bona fide* lawfully conveyed or aſſured to any perſon or perſons, or bodies politick or corporate, not having at the time of ſuch conveyance or aſſurance to them made, any manner of notice or knowledge of ſuch covin, fraud or colluſion as is aforeſaid; any thing before mentioned to the contrary hereof notwithſtanding.

Eſtates made upon good conſideration, and *bona fide*.

VII. This act to endure unto the end of the firſt ſeſſion of the next parliament. 50 *Ed.* 3. *c.* 6. 2 *R.* 2. *ſtat.* 2. *c.* 3. 3 *H.* 7. *c.* 4. *made perpetual by* 29 *Eliz. c.* 5. *See* 27 *Eliz. c.* 4.

TAB 4

2022 ABCA 111
Alberta Court of Appeal

PricewaterhouseCoopers Inc v. Perpetual Energy Inc

2022 CarswellAlta 805, 2022 ABCA 111, [2022] A.W.L.D. 1729, 2022 A.C.W.S. 671, 98 C.B.R. (6th) 161

PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity (Appellant / Respondent) and Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp., and Susan Riddell Rose (Respondents / Applicants) and Orphan Well Association, Canadian Natural Resources Limited, Cenovus Energy Inc. and Torxen Energy Ltd. (Intervenors)

Patricia Rowbotham, Ritu Khullar, Jolaine Antonio JJ.A.

Heard: February 10, 2022
Judgment: March 25, 2022
Docket: Calgary Appeal 2101-0021AC

Proceedings: reversing *PricewaterhouseCoopers Inc v. Perpetual Energy Inc* (2021), 2021 ABQB 2, 2021 CarswellAlta 88, D.B. Nixon J. (Alta. Q.B.)

Counsel: R. de Waal, L. Rasmussen, for Appellant
D.J. McDonald, Q.C., P.G. Chiswell, for Respondents, Perpetual Energy Inc. Perpetual Operating Trust, Perpetual Operating Corp.
S.H. Leitl, Q.C., G. Benediktsson, for Respondent, S.R. Rose
K.T. Lenz, Q.C., A.N. Stempien, for Intervenor, Orphan Well Association
G.S. Watson (no appearance), C.W. Ang, S.J.S. Ko, for Intervenors, Canadian Natural Resources Limited, Cenovus Energy Inc. and Torxen Energy Ltd.

***Per curiam*:**

1 The appellant Trustee in bankruptcy filed a statement of claim against the respondents, alleging among other things that an asset transaction was void under s 96 of the Bankruptcy and Insolvency Act, RSC 1985, c B–3 [BIA]. That is, the Trustee alleged the recipient company was insolvent when the assets were transferred at undervalue, or the recipient company was rendered insolvent by the transfer at undervalue. The transferred assets were licenced petroleum assets, mainly shallow gas wells. Almost two thirds of them were shut-in or abandoned, such that the associated end-of-life obligations were significant.

2 Perpetual Energy Inc. (Perpetual Energy Parent), Perpetual Operating Trust (POT) and Perpetual Operating Corp. (collectively, the Perpetual Defendants) twice applied to the same chambers justice to have the s 96 claim dismissed. This appeal arises from the second summary dismissal application, at which the Perpetual Defendants were successful.

3 We have concluded that the chambers judge committed three errors. First, in assessing the effect of end-of-life obligations on insolvency, he focused his analysis on whether end-of-life obligations could be defined as an "obligation due or accruing due", but failed to analyse whether they could have an effect on the value of assets [see paragraphs 30 to 57]. Second, although some of the end-of-life obligations were accounted for in the valuation of the assets, this included only 26% of the abandoned wells and therefore did not adequately represent the depressed value of the assets [see paragraphs 58 to 70] Finally, the second application for the same relief was an abuse of the court's process and should never have been heard [see paragraphs 75 to 103]. The appeal is allowed and the matter is directed to trial.

Background

4 The appellant, PricewaterhouseCoopers Inc., LIT, in its capacity as Trustee in Bankruptcy of Sequoia Resources Corp. (Trustee) sued the Perpetual Defendants and Ms Susan Riddell Rose for their involvement in the October 2016 corporate reorganization and sale of Perpetual Energy Operating Corp. (PEOC) to a third party. The corporate reorganization was effected in October 2016 through a multi-part transaction and sale (Aggregate Transaction). Ms Rose was the sole director of PEOC until the closing of the Aggregate Transaction. After the Aggregate Transaction, PEOC changed its name to Sequoia Resources Corp. (Perpetual/Sequoia) and carried on business for approximately 17 months. It assigned itself into bankruptcy in March 2018.

5 Before the Aggregate Transaction, POT held the beneficial interest in several oil and gas assets. The sole beneficiary of the trust was Perpetual Energy Parent. The legal title to the assets, and the regulatory licences to them, were held by PEOC. PEOC had no other business interests; it only existed to be the Trustee of the assets. At issue in this appeal is the group of mature legacy assets, including several shallow gas wells and related assets, known as the Goodyear Assets.

6 One step in the Aggregate Transaction was the transfer of the beneficial interest in the Goodyear Assets from POT to PEOC (Asset Transaction). The Trustee challenges the Asset Transaction, asserting it was at an undervalue by more than $217 million. It filed a Statement of Claim in August 2018 seeking remedies against the Perpetual Defendants and Ms Rose on the basis of four claims, of which only one is relevant to this appeal: the Asset Transaction was void under s 96 of the BIA since it was not at arm's-length, it was within five years preceding the bankruptcy, and it was a transfer at undervalue.

7 The history of this matter is complicated and involves an earlier appeal to this Court. A detailed chronology is contained in the Appendix at the end of this judgement.

8 In 2018, at the same time it filed its statement of claim, the Trustee applied for summary judgment of all claims. The Perpetual Defendants and Ms Rose responded with applications to summarily dismiss or strike the claims. It was determined that the respondents' applications to summarily dismiss and to strike the Trustee's claims would be addressed first and the Trustee's application was stayed. At first instance, the respondents' applications were largely successful with numerous claims either dismissed or struck (2020 ABQB 6 (Alta. Q.B.) [*First Chambers Decision*,]), but these results were overturned by this Court on appeal (2021 ABCA 16 (Alta. C.A.) [*First Appellate Decision*,]) respectively.

9 In addition to addressing the numerous claims and test for summary judgment, the *First Appellate Decision* provided guidance on the interpretation of Orphan Well Association v Grant Thornton Ltd 2019 SCC 5 [Redwater] and the legal nature of end-of-life obligations.

10 A claim under s 96 of the BIA contains numerous elements, all of which must be satisfied for the Trustee to be successful. In the first chambers application, the Perpetual Defendants challenged the s 96 claim on only one element, namely, that at the Aggregate Transaction level, the parties were at arms-length. If the parties were acting at arms-length, then the one year look-back period applied, and the Trustee was out of time to commence the s 96 claim (the First Chambers Application). In the *First Chambers Decision* , the chambers judge ruled the arms-length issue could not be determined on a summary basis. That result was upheld in the *First Appellate Decision* .

11 After the *First Chambers Decision* was released, but before the first appeal was heard, the Perpetual Defendants filed the second chambers application before the same chambers judge. They sought summary dismissal or striking of the s 96 claim for the second time. This time, however, they argued (i) PEOC was not insolvent at the time of the Asset Transaction or rendered insolvent by it within the meaning of the *BIA* (the insolvency element); and (ii) there was no transfer at undervalue within the meaning of the *BIA* (the transfer at undervalue element) (the Second Chambers Application).

12 In addition to opposing the Perpetual Defendants' submissions on the insolvency and transfer at undervalue elements, the Trustee argued the Second Chambers Application was an abuse of process because: (i) Perpetual Energy Parent's Vice-President, Finance, and Chief Financial Officer, W. Mark Schweitzer, swore two affidavits on May 5, 2020 that took different

positions; (ii) the s 96 *BIA* claim had already been argued and decided at the First Chambers Application; and (iii) Perpetual Defendants' argument at the Second Chambers Application was inconsistent with its pleadings.

Second Chambers Decision: 2021 ABQB 2

13 The chambers judge's discussion of abuse of process was brief. He found that Mr Schweitzer's affidavits addressed different scenarios and focused on two different timeframes. Thus they did not amount to an abuse of process: 2021 ABQB 2 (Alta. Q.B.) at para 47 [*Second Chambers Decision*,].

14 At paragraphs 43-46 and 48 of the *Second Chambers Decision*, the chambers judge relied on the foundational rules and the fact that the different elements of s 96 of the BIA were in issue in each of the two chambers applications. He concluded there was no abuse of process, provided the Second Chambers Application addressed only matters not previously decided.

15 Regarding the merits of the Second Chambers Application, the chambers judge expressly declined to consider the arguments on transfer at undervalue, finding several related issues were not suitable to summary disposition but should instead be explored in the trial proper: *Second Chambers Decision* at para 64. In the result, the chambers judge concluded it was only necessary to consider the insolvency element.

16 The insolvency element of s 96 finds its roots in the definition of "insolvent person" in s 2 of the BIA, which contains three insolvency tests in addition to some criteria that are not in issue here. The third test, known as the Balance Sheet Solvency Test, provides that a person is insolvent if the aggregate of their property "is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due."

17 In its statement of claim, the Trustee pled that Perpetual/Sequoia was either insolvent at the time of the Asset Transaction or rendered insolvent by it. The Trustee primarily defended the Second Chambers Application on the basis that the Balance Sheet Solvency Test was not met.

18 In keeping with the parties' submissions, the chambers judge framed the issue under the Balance Sheet Solvency Test as whether the end-of-life obligations, which he called asset retirement obligations or ARO, associated with the Goodyear Assets were "obligations, due or accruing due": *Second Chambers Decision* at paras 20, 79-83, 126-128, 160; 171, 187, 194, 204, 247, 261, 269.

19 In setting out the framework for his analysis of "obligations, due and accruing due", the chambers judge adopted three financial variables from the Trustee's submissions: (i) the value of the consideration received by Sequoia/Perpetual (Value Variable); (ii) the asset retirement obligations (ARO Variable); and (iii) property taxes (Property Tax Variable) (collectively, the Financial Variables): *Second Chambers Decision* at para 80. For the Value Variable, the chambers judge accepted a value of $5,670,200: *Second Chambers Decision* at paras 189-192, 203. For the Property Tax Variable, he accepted the amount of $1,560,890 as found in his *First Chambers Decision* : *Second Chambers Decision* at paras 202, 257-258. Adopting the chambers judge's findings in the *First Chambers Decision* , the Perpetual Defendants submitted end-of-life obligations were not an obligation due or accruing due and therefore their value for the Balance Sheet Solvency Test was nil.

20 The phrase "obligations, due and accruing due" is not defined in the *BIA*. The chambers judge undertook a statutory interpretation analysis having regard to jurisprudence, established business and accounting principles, organizations such as the Uniform Law Conference of Canada and Alberta Law Reform Institute, and academia. He concluded that to constitute "obligations, due and accruing due" a liability must be completely constituted and presently exigible. He found ARO do not meet this test and therefore have nil value for purposes of the Balance Sheet Solvency Test: *Second Chambers Decision* at paras 194, 204. The chambers judge was of the view that ARO, at best, were a mere estimate of obligations that would be impacted by unknown legislative changes over the decades to come: *Second Chambers Decision* at paras 113, 204.

21 Since the ARO liability was valued at nil, and the value of the assets exceeded the value of the other liabilities, the chambers judge was satisfied that Perpetual/Sequoia was not insolvent or rendered insolvent by the Asset Transaction.

22 The chambers judge declined to strike the Trustee's claim but found summary dismissal was an appropriate remedy given the state of the evidence, his interpretation of the law, and his conclusions on the Financial Variables. He dismissed the s 96 claim.

23 The *Second Chambers Decision* was released several days before the *First Appellate Decision* . As a result, the chambers judge did not have the benefit of this Court's guidance on the legal nature of end-of-life obligations.

Grounds of appeal

24 The Trustee appeals, alleging the chambers judge erred in:

a) failing to consider that end-of-life obligations affected the value of Perpetual/Sequoia's assets;

b) finding that end-of-life obligations are a "mere accounting estimate";

c) his analysis of s 96 of the BIA;

d) excluding end-of-life obligations from the insolvency analysis under s 96 on the basis that it was not "completely constituted and presently exigible";

e) finding that the Second Chambers Application was not an abuse of process.

25 The Orphan Well Association and three oil and gas industry players, Canadian Natural Resources Limited, Cenovus Energy Inc., and Torxen Energy Inc. were granted intervenor status on the application and this appeal. They also assert the chambers judge erred in finding that end-of-life obligations are not considered in applying the test for insolvency.

26 The Perpetual Defendants and Ms Rose agree that end-of-life obligations are real obligations that depress asset value. They submit the chambers judge correctly concluded end-of-life obligations are not "obligations due and accruing due", and therefore are valued at nil on the liability side of the Balance Sheet Solvency Test. His decision should be upheld because the figure he adopted for the Value Variable incorporated end-of-life obligations as depressing the value of the represented assets. Therefore he did not err in dismissing the s 96 claim on the basis of the insolvency element.

27 In the alternative, the Perpetual Defendants assert the decision can be upheld on the basis that there was no transfer, and therefore no transfer at undervalue. In light of our other findings, it is not necessary to address this alternative argument, except to note that on the record available to us, it is not persuasive.

Standard of review

28 The legal status of end-of-life obligations and their proper characterization under the *BIA* is a question of law for which the standard of review is correctness.

29 A court's determination of whether abuse of process is established is a discretionary finding. It is reversible where the court of first instance misdirected itself, gave no or insufficient weight to relevant considerations, or came to a decision so clearly wrong it amounts to an injustice: Penner v Niagara (Regional Police Services Board), 2013 SCC 19 at para 27.

Analysis

A. Section 96 of the BIA and the Balance Sheet Solvency Test

30 The Trustee submits the chambers judge erred in failing to fully consider the impact of end-of-life obligations on the value of the Goodyear Assets. The respondents counter that his legal treatment of the end-of-life obligations was correct, and in any event he did incorporate them into his valuation of the assets, such that the error did not effect the outcome.

31 We find the chambers judge erred in law by framing too narrow a question: whether end-of-life assets could be considered "obligations, due or accruing due". Contrary to *Redwater* and the *First Appellate Decision* , he did not consider whether the entirety of the end-of-life obligations could or should be incorporated elsewhere in the Balance Sheet Solvency Test. This omission tainted the entire insolvency analysis. On the record before us, we cannot conclude the error was without consequence. The appeal is allowed on this ground.

i. Section 96 of the BIA

32 Section 96 of the BIA allows a trustee in bankruptcy to challenge a debtor's pre-bankruptcy transfers at undervalue. It provides:

> 96 (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if
>
> (a) the party was dealing at arm's length with the debtor and
>
> (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,
>
> (ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and
>
> (iii) the debtor intended to defraud, defeat or delay a creditor; or
>
> (b) the party was not dealing at arm's length with the debtor and
>
> (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or
>
> (ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and
>
> (A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or
>
> (B) the debtor intended to defraud, defeat or delay a creditor.

33 A "transfer at undervalue" is defined as a "disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor": BIA, s 2.

34 As noted by the chambers judge at paragraphs 52-56 of the *Second Chambers Decision*, there are five distinct elements embedded in the framework of s 96 of the BIA. The focus of the *Second Chambers Decision* was the insolvency element: whether "the debtor was insolvent at the time of the transfer or was rendered insolvent by it." The chambers judge correctly concluded the insolvency element engaged the definition of insolvent person in s 2 of the BIA:

> **insolvent person** means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

The only contentious element of the insolvent person test was subparagraph (c), the Balance Sheet Solvency Test.

ii. The Balance Sheet Solvency Test

35 Applying the Balance Sheet Solvency Test post-*Redwater* to pre-*Redwater* affidavits, proved to be something of a linguistic and legal minefield. Even in 2020, when the Second Chambers Application was argued, the parties demonstrated uncertainty as to how *Redwater* influenced the interpretation of pre-existing accounting records and opinions.

36 In their submissions on the Balance Sheet Solvency Test, the parties used accounting terms such as "liabilities" and "obligations". For example, the Trustee argued that all line items listed in the "liabilities" section of the balance sheet are to be included in assessing the insolvency element and that every "obligation" is to be included when applying the Balance Sheet Insolvency Test: *Second Chambers Decision* at para 93. The Trustee's estimated valuation of the PEOC transaction recorded a positive value for some of the Goodyear Assets, net of end-of-life obligations, while recording a separate negative value for "working interest ARO liability for PEOC wells". An affidavit filed on behalf of the intervener CNRL described different purpose-dependent treatments of end-of-life obligations. For instance, they are incorporated into the market value of an asset for purposes of evaluating and negotiating an asset transaction but they are included in a licencee's financial documents, including balance sheets, as a liability.

37 On both sides, the parties characterized the issue as whether end-of-life obligations were liabilities. To sidestep the linguistic traps and to avoid any assumption that a line item within the liabilities section of a party's balance sheet was automatically a "genuine liability" as a matter of law, the chambers judge used the term "the right-hand side of the balance sheet" instead of "the liability side": see discussion at footnote 4 of the *Second Chambers Decision*.

38 Nonetheless, the chambers judge followed the parties' framing of the argument and "view[ed] the characterization of the ARO as being the sole legal issue": *Second Chambers Decision* at para 245. At paragraph 127 he narrowed "the underlying question" to "the scope of the phrase 'obligations, due and accruing due' within clause (c)" of the insolvency test. At paragraph 261 he reiterated, "The issue pivots on whether an accounting estimate concerning a future cash outflow falls within the ambit of 'obligations, due and accruing due'". If it were "properly characterized as falling within the scope of 'obligations, due and accruing due' for purposes of the Insolvency Element", the matter would go to trial. If not, "then the Section 96 *BIA* Claim fails because the Insolvency Element would not be satisfied": *Second Chambers Decision* at para 247. Put still more starkly at para 269, "the substantive issue concerns the characterization of the ARO. If the ARO is not captured by the phrase 'obligations, due and accruing due', then the foundation for the Section 96 *BIA* Claim crumbles." The chambers judge concluded that end-of-life obligations were not "obligations, due and accruing due" and therefore their value was "Nil for purposes of clause (c) of the Insolvent Person Definition": *Second Chambers Decision* at para 204.

39 This narrow framing of the legal issue led to error, since the chambers judge did not consider whether the end-of-life obligations should have been accounted for in another way. As *Redwater* and the *First Appellate Decision* have made clear, end-of-life obligations are an inherent part of asset value. When they do not constitute a conventional debt payable to an identifiable creditor, it will be appropriate to account for them as depressing values on the left-hand side of the balance sheet. The *BIA* claim would not necessarily crumble because the obligations did not amount to "obligations, due and accruing due" on the right-hand side.

40 It is easy to see how the chambers judge was led into error given the parties' submissions. Regardless, he was obliged to evaluate the arguments and evidence in light of the relevant law. The correct legal approach is not defined by the industry's accounting practices or the accounting evidence: *Second Chambers Decision* at para 23 and sources cited therein. As noted by the chambers judge, "the issue of how the ARO is dealt with is a question of law": *Second Chambers Decision* at para 260.

iii. Error in the legal characterization of end-of-life obligations

41 Stripped of jargon, the point of the Balance Sheet Solvency Test was to determine whether, after the Asset Transaction, Perpetual/Sequoia's assets exceeded its liabilities.

42 *Redwater* and the *First Appellate Decision* did not specifically address the insolvency issue. However, both decisions provided guidance about the nature of licenced oil and gas operations and the legal character of end-of-life obligations.

43 *Redwater* confirmed that the Alberta Energy Regulator is not a "creditor" with respect to end-of-life obligations and that end-of-life obligations cannot be a "claim provable in bankruptcy". These conclusions do not mean that end-of-life obligations are nonexistent, mere assumptions or speculations, or of nil value. Rather, end-of-life obligations are real and omnipresent, forming "a fundamental part of the value of the licensed assets": *Redwater* at para 157. They serve "to depress the tenure's value at the time of sale": *First Appellate Decision* at paras 95-96.

44 The Perpetual Defendants argued this case is not about regulating energy policy, and we agree. But the fact is that no well produces forever, so end-of-life obligations are as inevitable as death and taxes. As stated by this Court in the *First Appellate Decision* at paras 86-87:

> Abandonment and Reclamation Obligations (or "end-of-life", or "asset retirement" obligations) are inherent in any oil well, from the moment it is drilled and comes into production. At that point in time the Abandonment and Reclamation Obligations can be said to be "contingent", but only in the sense that the moment when the well will cease production is unknown. However, they are not "contingent" in the sense that they will only come into existence if, and only if, a condition precedent comes to pass: ***Redwater*** at para. 36; ***Canada v McLarty***, 2008 SCC 26 at paras. 14-18, [2008] 2 SCR 79. The only issue is when they will come into existence. A well may produce for decades. However, while the Abandonment and Reclamation Obligations may not crystallize for some time, they are inevitable; no well produces forever.
>
> The time at which the Abandonment and Reclamation Obligations with respect to any particular well must be performed is variable:
>
> > (a) With respect to a newly drilled well the Abandonment and Reclamation Obligations may only manifest themselves decades in the future.
> >
> > (b) Once the production of a well has peaked, and its most productive years are behind it, it may be possible to predict with some degree of certainty when the Abandonment and Reclamation Obligations will have to be performed. The closer one gets to the end of production, the more precise the date of reclamation will become.
> >
> > (c) But once a well has been exhausted, production has stopped, and the well has been shut-in, the Abandonment and Reclamation Obligations have crystallized. The Abandonment and Reclamation Obligations may be unperformed, but they are no longer "contingent" in either sense. The owner of the well is under a public duty to shut in the well and reclaim the surface.
>
> The further reclamation is in the future, the more difficult it will be to quantify the Abandonment and Reclamation Obligations. Even if Abandonment and Reclamation Obligations can be said to be "contingent" liabilities, that is sufficient in law for some purposes: ***Tannis Trading Inc v Coldmatic Refrigeration of Canada Ltd***, 2010 ONSC 5747 at paras. 24-25, 85 BLR (4th) 77; ***Manufacturers Life Insurance Co v AFG Industries Ltd***, 2008 CanLII 873 at para. 30, 44 BLR (4th) 277 (ONSC). Further, the present value of the Abandonment and Reclamation Obligations will directly depend on how far into the future they will arise. Abandonment and Reclamation Obligations are unliquidated, some of them may be more immediate than others, and their quantum is uncertain, but they are still inevitable. They exist whether or not abandonment notices have been issued by the Alberta Energy Regulator. Abandonment and Reclamation Obligations may not be entirely a current liability or obligation, but they are a real liability or obligation. They are routinely reported on the balance sheets of oil and gas companies, including those of Perpetual Energy Parent. [Emphasis in the original]

45 This analysis governs the application of the Balance Sheet Insolvency Test. During the producing life of an asset, end-of-life obligations will likely not be represented by fixed amounts currently owing to identified creditors. Accordingly, they will not be best characterized as conventional debts, claims provable in bankruptcy, or obligations currently due. It is more likely they will "operate by depressing the value of the assets": *First Appellate Decision* at para 97. At later stages, when reclamation work is underway, end-of-life obligations may take the form, in whole or in part, of obligations owed to identifiable creditors. In other words, time and context may determine whether it is appropriate to account for end-of-life obligations under the heading of assets or liabilities or both. As submitted by counsel for the Orphan Well Association, however, before end-of-life obligations are fully performed the only thing they cannot be is nil.

46 Lacking the benefit of the *First Appellate Decision* , the chambers judge erred in law by narrowing his legal focus to the right-hand side of the balance sheet, thereby omitting to expressly consider whether end-of-life obligations could depress the value of some or all of the assets on the left-hand side of the balance sheet.

47 Among his reasons for valuing the end-of-life obligations at nil, the chambers judge characterized them as mere estimates of uncertain future obligations: *Second Chambers Decision* at paras 104, 113, 155-156, 204. Further, the chambers judge felt there was "too much uncertainty concerning a probable obligation that is potentially payable 25 or 60 years in the future, especially when there is a very high likelihood that there will be technical and legislative changes which will impact on the 'probable obligation'": *Second Chambers Decision* at para 255.

48 Ms Rose submits the chambers judge's comments on the difficulty of quantifying end-of-life obligations were directed at the calibre of evidence, not the legal characterization of end-of-life obligations. At its highest, Ms Rose's submission may explain why the chambers judge found the end-of-life obligations did not amount to "obligations due or accruing due". It does not explain why the majority of them were valued at nil for all purposes. In any event, if the record was insufficient to establish the value of the assets and inherently associated obligations, then the Perpetual Defendants did not meet their burden on summary judgment and the matter ought to have proceeded to trial.

49 We acknowledge that valuing the end-of-life obligations, and the assets of which they are an inherent component, is unlikely to be a straightforward task. Valuation may depend on various contingencies and assumptions, as complex accounting often does. But the difficulty of assigning value to end-of-life obligations does not justify assigning them nil value. Non-zero end-of-life obligations are routinely recorded on balance sheets in the industry, and Perpetual Energy itself has done so: see, for example, the affidavits of the industry intervenors about their corporate procedures and calculations for end-of-life obligations (the Affidavit of Ron Laing, sworn August 12, 2020 at paras 10-20, the Affidavit of Antonio Jackson, sworn August 17, 2020 at paras 3-6, and the Affidavit of J.K. Brannan, sworn August 12, 2020 at paras 3-7); the Affidavit of Paul Darby, sworn September 22, 2020 at paras 10-15 and Exhibit "1" , being Perpetual Energy's 2016 Consolidated Financial Statements for the year ending December 31, 2016; and the *First Appellate Decision* at para 87.

50 The chambers judge's reference to "a very high likelihood that there will be technical and legislative changes which will impact on the 'probable obligation'" suggests a subtle but problematic misunderstanding of *Redwater*: *Second Chambers Decision* at para 255; see also para 113. This comment could be interpreted as implying that end-of-life obligations are creatures of regulation, arising when the regulator forces a licensee to undertake abandonment and reclamation work. To the contrary, the *First Appellate Decision* made clear that end-of-life obligations are an intrinsic part of a license, existing "whether or not abandonment notices have been issued by the Alberta Energy Regulator": *First Appellate Decision* at para 87; see also *Redwater* at para 29 and PanAmericana de Bienes y Servicios v Northern Badger Oil & Gas Ltd,1991 ABCA 181 at paras 32–33. It seems the term "ARO" may have traditionally had a connotative association with regulatory enforcement. In these reasons we have instead used the term "end-of-life obligations" to underscore that the obligations are inevitable and inherent to licenced assets regardless of regulatory involvement after the moment of licensing. To the extent the chambers judge understood end-of-life obligations to arise from regulatory enforcement, he was incorrect.

51 Finally, at paragraph 124 of the *Second Chambers Decision*, the chambers judge expressed concern that including end-of-life obligations in the Balance Sheet Solvency Test would immediately render many of the oil and gas entities insolvent:

> I also note with particular interest that in ***Industries Cover***, Pinsonnault, JCS cites Justice Fournier in ***Bonneau (Faillite de)***, 1997 CanLII 8560 (QC CS) at paras 36 to 29 that it would be non-sensical to adopt an expansive interpretation of "obligations, accruing due" for the purposes of determining insolvency because including all future payments as due on the spot in the balance sheet test would result in a good part of the population being insolvent: ***Industries Cover*** at para 425; see also ***Villeneuve c Villeneuve***, 2007 QCCS 4468 at paras 31 and 32. Given the economic climate in Canada that is currently impacting the oil and gas industry, I infer that the same concern exists for the participants in that economic sector. That is, applying the Trustee's interpretation would likely render many of the oil and gas entities operating in Canada insolvent as at the date of this decision.

The authorities cited in the above paragraph hold that if everyone obligated to make monthly payments toward a large debt were to adopt the fiction that the entire debt was "accruing due" at a given moment, a significant portion of the population could or should declare bankruptcy. That would be nonsensical; therefore the *BIA* should not be so interpreted. Instead, the nature and timelines of all obligations "accruing due" should be considered when interpreting the Balance Sheet Insolvency Test.

52 The chambers judge's reference to these authorities was inapt. Refusing to collapse all future debt payments to the present moment will be a sound analysis of obligations "accruing due" in certain contexts, such as individual homeowners with mortgages. But it is not a useful approach to end-of-life obligations, which generally exert a depressing effect on value but are not conventional debts and are not subject to structured payments. They cannot be analogized to mortgages.

53 In *Daishowa-Marubeni International Ltd v Canada*, 2013 SCC 29, the Supreme Court considered the tax treatment of forest tenures subject to reforestation obligations. At paragraphs 28-29, it rejected the mortgage analogy, finding that a more apt comparison would be to a property in need of repair:

> DMI, supported by the industry interveners, submits that the analogy to a mortgage is misplaced. In their view, a forest tenure with reforestation obligations that have arisen from past harvesting is better analogized to property that is in need of repair. The need for repairs has the effect of depressing the property's value. If property in need of repair is sold, the purchaser's assumption of the cost of repairs does not form an additional part of the sale price of the property. And, as the Minister acknowledged at the oral hearing, the vendor would not be required to include in its proceeds of disposition an amount to reflect the estimated repair costs assumed by the purchaser. This would be true even if the parties attributed a value to the cost of those repairs in their contract and even if the repairs were required by law; see M. Colborne and S. Suarez, "Timber! Consequences of Assuming Reforestation Obligations" (2012), 60 *Can. Tax J.* 137, at p. 142.
>
> I agree with Mainville J.A., DMI and the industry interveners that the assumed reforestation obligations are not appropriately characterized as the assumption of an existing debt of the vendor that forms part of the sale price of the property. The obligations — much like needed repairs to property — are a future cost embedded in the forest tenure that serves to depress the tenure's value at the time of sale. This is different from a mortgage, which . . . does not affect the value of the property it encumbers. [Emphasis added]

In *Redwater* at paragraph 157, the Supreme Court noted its conclusion that end-of-life obligations form a fundamental part of licenced petroleum assets, potentially depressing their value, was consistent with *Daishowa.*

54 Building on the repair analogy, end-of-life obligations could be loosely thought of as asbestos in the walls of a house. It will need to be rectified sooner or later, and someone will have to pay for it. If work is underway or complete, any outstanding payment for the work may be an obligation due or accruing due. Until then, however, the house is worth less than a similar asbestos-free house. The asbestos depresses the value of the house.

55 Finally, applying the mortgage analogy, the chambers judge inferred that an expansive interpretation of "obligations due or accruing due" would likely render many industry players insolvent immediately. There was little evidence to support this inference. To the contrary, the record suggests industry actors routinely account for end-of-life obligations on their own balance sheets in some fashion but are not routinely rendered insolvent by that accounting. After a well has finished producing, it is likely to be a net liability, but that is a fact of life, not an error in accounting or law.

56 At paragraphs 185 and 187 of the *Second Chambers Decision* the chambers judge acknowledged the industry intervenors' arguments that the end-of-life obligations impacted the determination of the fair market value of the Goodyear Assets. However, he concluded this point went to the issue of whether there was a transfer at undervalue and transfer under undervalue should not be decided by way of summary dismissal:

> . . . In its written submissions, the Industry Intervenors argued that the relevant consideration of ARO in the Balance Sheet Solvency Test was not focused on the whether it was an obligation or a debt. Rather, the Industry Intervenors argued that the ARO was a critical and fundamental component of the determination of the fair market value of the person's aggregate property.
>
> . . .
>
> Concerning the arguments provided by the Industry Intervenors, its substantive focus was on the impact that ARO has on the determination of the fair market value of the person's property. That point goes to the issue of whether there was a transfer at undervalue, as opposed to whether the ARO falls within the ambit of the phrase "obligations, due and accruing due". That raises a number of issues, which is why I stated above that if it was the Transfer at Undervalue Element that was in issue, it should not be decided by way of summary judgment under Rule 7.3.

57 Though not perfectly clear, it appears the chambers judge felt that while "obligations, due and accruing due" could be determined summarily, valuation of the assets and consideration could not. Of course, the determination of asset value is also a component of the Balance Sheet Solvency Test. If valuation could not be summarily determined for purposes of the transfer at undervalue analysis, it follows it could not be summarily determined for purposes of the insolvency analysis.

iv. The legal error affected the result

58 The respondents acknowledge that, following *Redwater*, end-of-life obligations must be accounted for when valuing licenced assets, likely by depressing the values on the left-hand side of the balance sheet. They submit the chambers judge adopted asset values that incorporated end-of-life obligations; therefore even if his analytical focus on the right-hand side was legally incorrect, it did not impact the result. To the contrary, they say, he would have erred if he had acceded to the Trustee's request to include end-of-life obligations on the right-hand side as well, resulting in wrongful double-counting.

59 After a careful review of the record, we have concluded the chambers judge did not fully account for the end-of-life obligations.

60 The chambers judge adopted $5,670,200 as the value of the Goodyear Assets, drawn from the Affidavit of Paul Darby filed in support of the Trustee's 2018 summary judgment application. The source of the figure was one of four reserve reports prepared by the Perpetual Defendants in advance of the Aggregate Transaction. The full reserve report was not included in the evidence and its methodology was not explained.

61 At the time of the Second Chambers Application, the Perpetual Defendants were amenable to using $5,670,200 as the value of the Goodyear Assets: see the Affidavit of W. Mark Schweitzer May 5, 2020 at para 11. By contrast, in the First Chambers Application, the Perpetual Defendants objected to using the reserve reports for valuation. Mr Schweitzer deposed to various reasons reserve reports are not sufficient to establish the fair value of assets (Affidavit of October 3, 2018 at para 12): reserve reports are based on numerous assumptions regarding, for instance, available financing, timing of planned expenditures, capital and operating costs and forecasted prices; reserve report information is effective at a fixed point in time; reserve reports do not include the value of other assets, such as pipelines, other surface facilities, prospect drilling inventory and undeveloped acreage; they do not account for a buyer's view of its ability to increase the value of the reserves and other assets under its own business plan; they do not consider price risk management positions or cost structure reductions that a buyer and seller may negotiate in determining fair market value; and they do not consider the cost of financing, timing of planned expenditures, changes in development and operating strategies and costs that a buyer may bring to the assets.

62 Mr Darby's Affidavit included excerpts from the Perpetual Defendants' reserve reports, some assumptions about the reports, and an explanation of how the Trustee concluded the Asset Transfer was made at undervalue. The $5,670,200 value for the Goodyear Assets came from a 2016 reserve report and was said to be net of associated end-of-life obligations. Importantly, Mr Darby noted the value only included 652 of the 2,502 wells comprising the Goodyear Assets. In other words, the value included about 26% of the wells but excluded about 74%.

63 The existence of a reserve report for the 652 wells suggests those assets were still producing to some degree. In the *First Appellate Decision* at paragraph 88, this Court noted the Goodyear Assets included 910 shut-in wells and 727 abandoned wells, for a total of 1,637 non-producing wells. End-of-life obligations weigh more heavily in the valuation of non-producing wells.

64 Mr Darby provided details on how the Trustee approached end-of-life obligations in assessing whether the Asset Transaction had been effected at undervalue. He attributed values of $192,127,247 for abandonment and reclamation of the Goodyear Wells and $26,831,000 to abandon and reclaim the facilities associated with the Goodyear Wells, for a total ARO value of $218,958,247. He also identified property taxes totalling $10,047,744.20. Net liabilities therefore amounted to $229,005,991, while the net asset value was at most $5,670,200. Based on these numbers, Mr Darby deposed that PEOC had a net negative value of $223,241,000 immediately after the Asset Transaction.

65 Finally, he provided the opinion of the Trustee as to the value of the consideration received and given by PEOC in the Asset Transaction:

> 44. In the opinion of the Trustee:
>
> 44.1. the Goodyear Assets, transferred to PEOC pursuant to the Asset Transaction, had no positive fair market value at the time of the Asset Transaction, but represented a significant net liability of at least $223,241,000;
>
> 44.2. the value of the actual consideration given by PEOC in the Asset Transaction was therefore at least $223,241,000; and
>
> 44.3. the value of the actual consideration received by PEOC in the Asset Transaction was at most $5,670,200.

66 Importantly, he recognized the potential double-counting of end-of-life obligations, but found any such effect would be of no consequence to his conclusions:

> the McDaniel Report value of $5,670,200 includes an estimate of abandonment costs for those Goodyear Wells included in the report, as well as estimates for salvage value. For this reason, the amount for ARO included in the schedule, Exhibit N, may be overstated as it has to some extent already been included in the value of some of the Goodyear Wells. The Trustee does not consider this to be material to its analysis.

67 In short, in the Asset Transaction PEOC "paid" over $223 million by assuming debt, and received under $6 million in value in return. The Trustee acknowledged some double-counting of end-of-life obligations, but opined, in effect, that the degree of double-counting could not have closed the $217 million consideration gap that created the transfer at undervalue and net negative value of PEOC. No contrary opinion was in evidence.

68 The chambers judge acknowledged the $5,670,200 figure related to only 26% of the Goodyear Assets, but nonetheless adopted it as their full value on the basis that the Trustee failed to submit further and better evidence: see *Second Chambers Decision* at footnote 9 and para 252. But the burden of proof was on the Perpetual Defendants as applicants. The Trustee, as respondent on the application, only had to resist summary dismissal of the transfer at undervalue and insolvency elements. Its evidence clearly stated that the value PEOC received in the Asset Transaction was at most $5,670,200; that it "paid" over $220 million; and that the resulting value of PEOC was negative $223,241,000.

69 The respondents assert the chambers judge's adoption of a $5.67 million asset value properly accounted for all end-of-life obligations. To the contrary, his analysis left much of their value unaccounted for. Nothing in his reasons suggests he believed

their full value was included in the $5,670,200 and was therefore accounted for on the left-hand side. Had that been his belief, it would have made little sense to devote his analysis to the potential inclusion of end-of-life obligations on the right-hand side.

70 After concluding that the obligations should not fall on the right-hand side, the chambers judge gave no further consideration to the abandonment and reclamation obligations the Trustee had valued at $218,958,247. Accepting that the chambers judge did account for the end-of-life obligations associated with 26% of the wells, the values associated with 74% were excluded. While we do not know the net value of the 74%, the high number of shut-in and abandoned wells among the Goodyear Assets, along with the Trustee's total valuation of end-of-life obligations, suggests it could be a large negative number. The record does not permit us to determine what it is. We cannot conclude the chambers judge's analytical error was of no consequence. The appeal is therefore allowed on the basis of the legal error.

v. Interpretation of "obligations, due and accruing due"

71 The Trustee argues the chambers judge erred in his approach to statutory interpretation when he held the *BIA* was the equivalent of a penal statute and should therefore be interpreted strictly. No party or intervenor seriously defended the chambers judge's approach; nevertheless it merits comment.

72 There is one approach to statutory interpretation. According to the modern principle, the "words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": Rizzo & Rizzo Shoes Ltd (Re), [1998] 1 SCR 27 at para 21, 36 OR (3d) 418. This is consistent with s 12 of the Interpretation Act, RSC 1985, c I–21, which provides that every "enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". The modern approach does not preclude interpreting the words of a statute strictly when that is the most appropriate way to ensure the attainment of its objects, for instance when interpreting an exception to a principle: Alberta Securities Commission v Hennig, 2021 ABCA 411 at para 25.

73 The *BIA* furthers two purposes: to provide for the equitable distribution of a bankrupt's assets among creditors and to facilitate a bankrupt's financial rehabilitation: Alberta (Attorney General) v Moloney, 2015 SCC 51 at para 32; and Husky Oil Operations Ltd v Minister of National Revenue, [1995] 3 SCR 453 at para 7, 128 DLR (4th) 1. Punishment is not among the purposes of the *BIA*. Given the non-penal nature of the *BIA* and the modern principle of interpretation, we are not satisfied that strict construction of s 96 was warranted.

74 We will not comment any further on whether the chambers judge properly interpreted *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60, *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6, and Stelco Inc., Re2004 CanLII 24933, 48 CBR (4th) 299 (Ont SC) except to point out that at times, various parties to this action have tried to push purposive interpretations of "obligations, due and accruing due" farther than the words can bear. Further, the chambers judge's conclusion that an item must be "completely constituted and presently exigible" to factor into "obligations, due and accruing due" seems unduly narrow.

B. Abuse of Process

75 The Trustee argues the Second Chambers Application constituted an abuse of the court's process in three ways. We agree with the Trustee that the chambers judge erred in agreeing to hear the Second Chambers Application. The Perpetual Defendants' attempt to seek summary dismissal of the same claim a second time, in the absence of any material change, was an abuse of process. The Second Chambers Application should never have been heard. Therefore, rather than returning this matter for a fresh hearing of the summary dismissal application on the basis of the error in law, we direct the matter to proceed to trial.

76 This finding makes it unnecessary to consider the Trustee's other abuse-of-process arguments in any detail, but we note we would have upheld the chambers judge's decisions on those points.

i. Abuse of process by relitigation

77 At common law, courts have wide discretionary power to prevent their processes from being abused. This power has its roots in a court's inherent and residual discretion to safeguard its authority from being undermined by disruptive, oppressive, or otherwise inappropriate use of court procedures: see the discussion in Behn v Moulton Contracting Ltd, 2013 SCC 26 at para 39 and Adrian Zuckerman, *Zuckerman on Civil Procedure*, 4th ed (London: Sweet & Maxwell, 2021) at 671.

78 The doctrine of abuse of process is flexible, unencumbered by specific requirements and is used in a variety of legal contexts. It engages the "inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute" Toronto (City) v CUPE, Local 79, 2003 SCC 63 at paras 36–37, 42 and *Behn* at para 40.

79 In *CUPE*, the Supreme Court of Canada discussed the differences amongst *res judicata*, abuse of process and collateral attack. While there are some differences between *res judicata* and abuse of process by relitigation, both doctrines are supported by the same rationales, namely "that there be an end to litigation and that no one should be twice vexed by the same cause, . . . to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice": *CUPE* at para 38 citing Donald J Lange, *The Doctrine of Res Judicata in Canada*, (Markham, Ont: Butterworths, 2000) at 347-348.

80 Similarly, the doctrine of abuse of process prevents relitigation of matters where the strict requirements of issue estoppel may not be met, but which would nonetheless violate the principles of judicial economy, consistency, finality, and the integrity of the administration of justice: *CUPE* at para 37. The British Columbia Court of Appeal has also been clear that the doctrines of *res judicata* and merger prevent relitigation of arguments that ought to have been made in the first action: see the discussion in HY Louie Co Limited v. Bowick, 2015 BCCA 256 at paras 62–65.

81 Related to relitigation is the concept of litigation by installment. Alberta courts have held that litigation by installment can constitute an abuse of process and have established a strong policy against it: 385268 BC Ltd v Alberta (Treasury Branches), 2000 CanLII 28273 (Alta QB) at para 29, 267 AR 384, aff'd in 2001 ABCA 289; Robertson v Wasylyshen, 2003 ABCA 279 at para 19; Paramount Energy Operating Corp v Alberta (Energy and Utilities Board), 2004 ABCA 273 at para 26; Arbour Energy Inc v Alberta (Securities Commission), 2009 ABCA 278 at para 25; Enmax Energy Corporation v Alberta Utilities Commission, 2016 ABCA 276 at para 18; Tallcree First Nation v Rath & Company, 2020 ABCA 433 at para 20; and Scott v Alberta Health Services, 2021 ABCA 249 at para 17. The premise of the rule against litigation by installment is that a litigant should not be allowed to have a "second bite at the cherry": Zuckerman at 1368.

82 Underlying these doctrines is the recognition that "parties to an action have a duty to bring their whole case to the court's attention and not to reserve some aspect of the matter against the possibility of a decision in the opponent's favour as a means of preserving a way to come at the opponent again": *H.Y. Louie* at para 63 citing *Wolverton Securities Ltd. v. Schemel*, 2009 BCSC 1048. This duty is a long-standing one and was fully articulated by Wigram V.C. in *Henderson v. Henderson*, (1843), 3 Hare 100 at 114-15, 67 E.R. 313 at 319.

ii. The Second Chambers Application was an abuse of process

83 In the First Chambers Application, the Perpetual Defendants applied under r 7.3 of the Alberta Rules of Court, Alta Reg 124/2010 for summary dismissal of the Trustee's claim for relief under s 96 of the BIA. They chose to argue that only one element of s 96 — whether the parties were at non-arms-length -- was unmeritorious. In the Second Chambers Application, the Perpetual Defendants again applied under r 7.3 for summary dismissal of the Trustee's claim for relief under s 96 of the BIA, this time on the basis that the insolvency and transfer at undervalue elements were unmeritorious. The Trustee argued this was abusive relitigation.

84 The chambers judge found no abuse of process. He invoked the foundational rules, implying he viewed the Second Chambers Application as an efficient use of court resources. We note that efficiency is not a stand-alone answer to an allegation of abuse of process.

85 The remainder of the chambers judge's reasoning on the relitigation argument was as follows:

> In framing the Perpetual October 2018 Application in an effort to strike and/or dismiss the claim of the Trustee under section 96 of the *BIA*, the Perpetual Defendants focused only on the "arm's length" issue: *PWC QB Reasons* at paras 60 and 90. In contrast, in the Perpetual February 2020 Application, the Perpetual Defendants focus on other elements that the Trustee most prove in order to establish its case. [at para 46]

In effect, he asked himself whether the same argument would be made on both applications.

86 This framing of the question was misdirection. Arguments that could have been made, but were not, are captured by the rationales underlying abuse of process, *res judicata*, issue estoppel, merger, and the jurisprudence prohibiting relitigation and litigation by instalment. The result was to allow the Perpetual Defendants a second shot at the same claim, a practice this Court has consistently discouraged.

87 Rule 7.3(1)(b) permits summary judgment of "all or part of a claim" where "there is no merit to a claim or part of it". If the application is successful, the court may dismiss one or more claims and refer the balance of the claim to trial: r 7(3)(a) and (c). As the words of the section make clear, an application for summary judgment is not an application to resolve a particular question or issue, which would fall under r 7.1. Rather, a r 7(3) claim is meant to determine of the merits of a claim. As set out in Weir-Jones Technical Services Incorporated v Purolator Courier Ltd, 2019 ABCA 49 at para 47, one of the key considerations under r 7.3 is whether the moving party has met the burden to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial. At a threshold level, the facts of the case must be proven on a balance of probabilities, or the application will fail.

88 A successful summary judgment application is a final judgment, subject to appeal. Only unsuccessful summary judgment applications are considered interlocutory. Doctrines such as *res judicata*, issue estoppel and merger do not apply *per se* to interlocutory orders: Kent v Watts, 2019 ABCA 326 at para 23 and cases cited. However, the limited scope of the formal doctrines does not constitute an invitation to relitigate unsuccessful summary judgment applications. We proceed, as other courts have done, on the basis that even if *res judicata* and related doctrines do not apply directly, their rationales influence the abuse of process analysis as applied to unsuccessful summary judgment applications.

89 Serial summary judgment applications were considered by this Court in *Milne v Barnes*, 2013 ABCA 379. At paragraph 6 the Court outlined applicable principles:

> While serial summary judgment applications are obviously to be discouraged, interlocutory applications generally do not create an issue estoppel. A judgment granting summary judgment creates *res judicata*. But, unless it decides a discrete issue that is reflected in the formal judgment, a decision dismissing a summary judgment application generally only decides that on the then existing record there is a "genuine issue for trial". Repeated applications on the same or a similar record are dealt with as an abuse of process, not as an issue estoppel, and are controlled by costs sanctions. Nevertheless, a second application is possible, subject to the court's discretion, for example where brought on a new record, after extensive discoveries, based on an issue not raised or finally determined in the prior application. [citations omitted]

90 The leading authority on whether relitigating an interlocutory application amounts to abuse of process is *Alberta v Pocklington Foods Inc*, 1995 ABCA 111. In November 1991, Alberta refused to produce certain records based on public interest immunity. On application by Pocklington Foods, a chambers judge determined that 105 of them did not need to be produced. Pocklington Foods appealed unsuccessfully. In October 1993, within a few months of receiving the Court of Appeal decision, Pocklington Foods filed another application before the original chambers judge for Alberta to produce the same 105 documents. The chambers judge decided the matter was not *res judicata* and heard the application. Alberta appealed.

91 The Court of Appeal confirmed *res judicata* and issue estoppel did not apply to the second application; however, that did not mean that courts are powerless to deal with attempts to relitigate issues already decided. A second interlocutory application

for the same relief may be permitted where the second application is not truly relitigation. The following factors, listed at paragraph 8, are relevant:

> (a) if the ruling on the first application was not based on the merits of the issue but on a technical objection;
>
> (b) if upon the first application the applicant failed to prove essential facts from mistake or inadvertence;
>
> (c) if there is new evidence that seriously justifies reconsideration of the issue;
>
> (d) if there is a material change of circumstances of a non-evidentiary nature.

Notably absent from this list of exceptions is the wish to advance an argument that could have been made at the first application but was not.

92 With its second application, Pocklington Foods sought the same relief on the same pleadings and material which had earlier resulted in the dismissal of the application. It did not file new evidence deposing to new facts or circumstances or amend its pleadings. It appears the second application was better argued than the first. The Court of Appeal at paragraph 14 set out the rationale for refusing to re-hear applications in these circumstances:

> . . . We do not agree that counsel, having made an application, argued it, and having taken out the order, should be permitted to reargue the application on the basis that this time he might do a better job. It appears to us that to permit a party to reopen a decision on the merits on such a ground would merely encourage counsel to try again and to engage in re-litigation which is unfair to the other party and a waste of the valuable resources of the court. If the first argument failed, then another tactic might work. If the first argument failed before one judge, it might work in a slightly modified form before another. The case against permitting such process becomes even stronger when the party seeking review of the decision has appealed and has been unsuccessful in the appeal. Where the second application seeks only to re-argue the first application, or to make arguments which were available at the time of the first, it should be dismissed as an abuse of the court process, or as frivolous and vexatious. [Emphasis added]

93 *Pocklington Foods* was applied *in Proprietary Industries Inc v Workum*, 2006 ABCA 226. The respondent applied twice to strike an exhibit to an affidavit. At both applications, the allegation was that the exhibit contained hearsay. The same chambers judge dismissed the application the first time but allowed it the second time, noting the respondent had advanced a legal argument not previously made. On the appeal of the second application, this Court overturned the second chambers decision. Nothing new had arisen between the first decision and the second application. "All that was advanced was an additional argument that should have been made on the first occasion. That is exactly what *Pocklington* precludes": at para 7. The Court of Appeal concluded the second application should never have been heard. It reversed the second chambers decision, effectively restoring the result of the first chambers decision.

94 Similar principles can be found in the cases concerning *res judicata* and related doctrines. In Summer Village of Argentia Beach v Warshawski, 1991 ABCA 322 at para 5, this Court held "[*r*]*es judicata* is not limited to what was argued and decided in the previous suit. It extends to what reasonably should then have been raised. Litigation by instalments is interminable." See also Hill v Hill, 2013 ABCA 137 at paras 55–62.

95 The crux of this issue is that the Perpetual Defendants *could have made* their arguments on the insolvency and transfer under value elements in the First Chambers Application, but chose not to. They proceeded with the arms-length argument only, and when that did not work, they tried another tactic to overcome the s 96 claim.

96 It is conceivable that a chambers judge could direct a summary judgment application to be held in stages, delineating certain issues such that the parties are on notice of how and when issues will be determined, but that is not what happened here. It was only after the Perpetual Defendants received the chamber judge's detailed decision in the First Chambers Application highlighting the strengths and weaknesses in their arguments that they filed the Second Chambers Application.

97 In the First Chambers Application the Perpetual Defendants sought summary dismissal of the s 96 claim and were presumed to have put their best foot forward, yet they provided no explanation as to why the insolvency and transfer at undervalue elements were not challenged in the First Chambers Application. They obtained a judgment, took out an order, launched an appeal and responded to a cross-appeal.

98 In our view, the Second Chambers Application was a blatant attempt to relitigate, making arguments that were available and reasonably should have been made at the First Chambers Application. As set out in *Pocklington* at paragraph 14 it is "unfair to the other party and a waste of the valuable resources of the court" to permit this type of conduct.

99 Finally, the primary focus of the doctrine of abuse of process is to ensure fairness and to preserve the integrity of the courts: *CUPE* at para 43; *Behn* at para 41. Inconsistency of position, and the potential for inconsistent results, are another danger of litigation by slice. This danger is manifest here, since some positions taken by the Perpetual Defendants have changed between the First and Second Chambers Applications.

100 One example is the Perpetual Defendants' change in stance on the acceptability of reserve report valuations, as discussed above. In oral argument, counsel for the Perpetual Defendants explained that they understood the *First Chambers Decision* to mean they should accept the reserve report value.

101 Another example pertains to the level of the analysis and the arms-length issue. In the First Chambers Application, the Perpetual Defendants asserted the transfer should be assessed at the aggregate level, where POC and PEOC were engaged at arms-length with the third-party purchaser. The chambers judge and this Court held the arms-length issue could not be summarily determined. In the Second Chambers Application, the Perpetual Defendants asserted the transfer should be assessed at the asset level, where, in effect, the transaction was even closer than arms-length: there was no "reviewable transfer" under s 96 at all because the Asset Transaction simply redefined the assets as being held by PEOC as trustee for POT to PEOC on its own behalf. In oral argument, counsel for the Perpetual Defendants explained that they learned from the outcome of the *First Chambers Decision* and relaunched the summary dismissal application with a new strategy.

102 These explanations do not dispel the dangers of relitigation and litigation by instalment. They confirm them.

103 The chambers judge erred. This situation is indistinguishable from *Workum*. The question of whether the s 96 claim could be summarily dismissed was foreclosed by the *First Appellate Decision* . The Second Chambers Application was an abuse of process and never should have been heard. As a result, the s 96 claim must proceed to trial.

Conclusion

104 In light of our conclusions, it is unnecessary to consider the remaining grounds of appeal.

105 The appeal is allowed. As set out above, the chambers judge erred in law in his handling of the end-of-life obligations and in allowing the Second Chambers Application to proceed. On the latter basis, and consistent with the *First Appellate Decision* at paragraph 97, we direct the s 96 issue to proceed to trial.

Appeal allowed.

APPENDIX

Date	Step
February 15, 2018	Oral hearing at Supreme Court of Canada on *Redwater*
March 23, 2018	Perpetual/Sequoia assigned itself into bankruptcy and the Trustee was appointed
August 2, 2018	Statement of Claim filed by the Trustee
August 2, 2018	Application for summary judgment and Affidavit of Paul Darby sworn August 2, 2018 filed by the Trustee
August 27, 2018	Statement of Defence filed by the Perpetual Defendants
August 27, 2018	Statement of Defence filed by Ms Rose

August 27, 2018	First Chambers Application filed by the Perpetual Defendants —Application to resolve questions and to stay the plaintiff's application filed by the Perpetual Defendants
August 27, 2018	Application to resolve particular question and to stay the plaintiff's application filed by Ms Rose
October 4, 2018	Affidavit of W. Mark Schweitzer sworn October 3, 2018 filed
October 19, 2018	Amended, Amended Application for summary dismissal and striking pleadings and Affidavit of Ms Rose sworn on October 19, 2018 filed by Ms Rose
October 22, 2018	Questioning of Mr Darby on Affidavit sworn August 2, 2018
November 8-9, 2018, and December 17, 2018	Hearing on the First Chambers Application and Ms Rose's application
January 31, 2019	*Redwater* released by the Supreme Court of Canada
June 4, 11 and 14, 2019	Further written submissions on the First Chambers Application and Ms Rose's application
August 15, 2019	Oral reasons (*First Chambers Decision*)
August 23, 2019	Notice of Appeal of the *First Chambers Decision* filed by the Trustee
August 26, 2019	Notice of Appeal of the *First Chambers Decision* filed by the Perpetual Defendants
August 26, 2019	Notice of Appeal of the *First Chambers Decision* filed by the Trustee
September 9, 2019	Notice of Appeal of the *First Chambers Decision* filed by Ms Rose
September 10, 2019	Amended Notice of Appeal of the *First Chambers Decision* filed by the Perpetual Defendants
January 14, 2020	Written reasons (*First Chambers*)
February 25, 2020	Second Chambers Application filed by the Perpetual Defendants
May 5, 2020	Affidavits of W. Mark Schweitzer sworn May 5, 2020 filed
June 30, 2020 to August 17, 2020	Affidavits of representatives for the Orphan Wells Association and Industry Intervenors filed
September 15-16, 2020	Questioning on affiants for Orphan Wells Association and Industry Intervenors
September 23, 2020	Affidavit of Paul Darby sworn September 22, 2020 filed by the Trustee
October 1-2, 2020	Oral hearing on the Second Chambers Application
October 6, 9, 16, 20, 2020	Further written submissions on the Second Chambers Application
December 10, 2020	Oral hearing of the appeal of the *First Chambers Decision*
January 14, 2021	*Second Chambers Decision* released
January 21, 2021	Notice of Appeal of the *Second Chambers Decision* filed by the Trustee
January 25, 2021	*First Appellate Decision* released

TAB 5

2022 ONCA 202
Ontario Court of Appeal

Ernst & Young Inc. v. Aquino

2022 CarswellOnt 3170, 2022 ONCA 202, 100 C.B.R. (6th) 18,
160 O.R. (3d) 284, 2022 A.C.W.S. 737, 473 D.L.R. (4th) 571

Ernst & Young Inc., in its capacity as Court-Appointed Monitor of Bondfield Construction Company Limited (Applicant / Respondent) and John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, Lucia Coccia a.k.a. Lucia Canderle, The Estate of Michael Solano, Giovanni Anthony Siracusa a.k.a. John Siracusa, 2483251 Ontario Corp. a.k.a. Clearway Haulage, 2420595 Ontario Ltd. a.k.a. Strada Haulage, 2304288 Ontario Inc., 2466601 Ontario Inc. a.k.a. MMC Contracting, 2420570 Ontario Ltd. a.k.a. MTEC Construction, Time Passion, Inc. and RCO General Contracting Ltd. (Respondents / Appellants)

KSV Kofman Inc. in its capacity as Trustee-in-Bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited (Applicant / Respondent) and John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, The Estate of Michael Solano, Lucia Coccia a.k.a. Lucia Canderle, 2483251 Ontario Corp. a.k.a. Clearway Haulage, MMC General Contracting, MTEC Construction, Strada Haulage, 2104664 Ontario Inc. and 2304288 Ontario Inc. (Respondents / Appellants)

KSV Kofman Inc. in its capacity as Trustee-in-Bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited (Applicant / Respondent) and John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, The Estate of Michael Solano, Lucia Coccia a.k.a. Lucia Canderle, 2483251 Ontario Corp. a.k.a. Clearway Haulage, MMC General Contracting, MTEC Construction, Strada Haulage, 2104664 Ontario Inc. and 2304288 Ontario Inc. (Respondents / Appellant)

Ernst & Young Inc., in its capacity as Court-Appointed Monitor of Bondfield Construction Company Limited (Applicant / Respondent) and John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, Lucia Coccia a.k.a. Lucia Canderle, The Estate of Michael Solano, Giovanni Anthony Siracusa a.k.a. John Siracusa, 2483251 Ontario Corp. a.k.a. Clearway Haulage, 2420595 Ontario Ltd. a.k.a. Strada Haulage, 2304288 Ontario Inc., 2466601 Ontario Inc. a.k.a. MMC Contracting, 2420570 Ontario Ltd. a.k.a. MTEC Construction, Time Passion, Inc. and RCO General Contracting Ltd. (Respondents / Appellant)

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KSV Kofman Inc. in its capacity as Trustee-in-Bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited (Applicant / Respondent) and John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, The Estate of Michael Solano, Lucia Coccia a.k.a. Lucia Canderle, 2483251 Ontario Corp. a.k.a. Clearway Haulage, MMC General Contracting, MTEC Construction, Strada Haulage, 2104664 Ontario Inc. and 2304288 Ontario Inc. (Respondents / Appellants)

Ernst & Young Inc., in its capacity as Court-Appointed Monitor of Bondfield Construction Company Limited (Applicant / Respondent) and John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, Lucia Coccia a.k.a. Lucia Canderle, The Estate of Michael Solano, Giovanni Anthony Siracusa a.k.a. John Siracusa, 2483251 Ontario Corp. a.k.a. Clearway Haulage, 2420595 Ontario Ltd. a.k.a. Strada Haulage, 2304288 Ontario Inc., 2466601 Ontario Inc. a.k.a. MMC Contracting, 2420570 Ontario Ltd. a.k.a. MTEC Construction, Time Passion, Inc. and RCO General Contracting Ltd. (Respondents / Appellant)

P. Lauwers, Coroza, Sossin JJ.A.

Heard: September 1-2, 2021
Judgment: March 10, 2022
Docket: CA C69263, C69264, C69278, C69305, C69306, C69318, C69321

Proceedings: affirming *Ernst & Young Inc. v. Aquino* (2021), 88 C.B.R. (6th) 60, 2021 CarswellOnt 42212021 ONSC 527, Dietrich J. (Ont. S.C.J.)

Counsel: Michael Citak, Chris Junior, for Appellants, John Aquino and 2304288 Ontario Inc.
George Corsianos, for Appellant, Marco Caruso
Terry Corsianos, for Appellants, Giuseppe Anastasio and Lucia Coccia-Canderle
Brian Belmont, for Appellant, 2104664 Ontario Inc.
Alan Merskey, Evan Cobb, Stephen Taylor, for Respondent, Ernst & Young Inc., in its capacity as Court-Appointed Monitor of Bondfield Construction Company Limited
Jeremy Opolsky, Craig Gilchrist, for Respondent, KSV Restructuring Inc. in its capacity as Trustee-in-Bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited

***P. Lauwers J.A.*:**

A. OVERVIEW

1 John Aquino was the directing mind of Bondfield Construction Company Limited and its affiliate Forma-Con Construction. He and his associates carried out a false invoicing scheme over a number of years by which they siphoned off tens of millions of dollars from both companies.

2 The monitor and the trustee challenged the false invoicing scheme and sought to recover some of the money under s. 96 of the *BIA* [1] and s. 36.1 of the *CCAA*. [2] They asserted that the false invoicing schemes were implemented by means of "transfers at undervalue" [3] by which John Aquino "intended to defraud, defeat or delay a creditor".

3 John Aquino and most of the other participants, as the application judge noted, "have conceded that no value was provided" to Bondfield and Forma-Con for the fraudulent transfers. However, they boldly assert that at the time they took the money, both companies were financially strong and healthy enough to sustain the frauds. They say this establishes that they did not intend to defeat any actual creditors. They also argue that John Aquino's intent cannot be imputed to either Bondfield or Forma-Con so that s. 96(1)(b)(ii)(B) of the BIA cannot be used to require them to repay what they took.

4 The application judge required John Aquino and the other participants to repay the money they took through the false invoicing scheme and held them jointly and severally liable. [4]

5 I would dismiss the appeals for the reasons that follow. I begin with the basic facts, next set out the issues, and then carry out the analysis.

B. THE FACTS

6 Bondfield was a construction company that operated in the Greater Toronto Area and elsewhere. Its affiliate, 1033803 Ontario Inc., commonly known as Forma-Con, was in the concrete forming business. Bondfield and Forma-Con were part of the Bondfield Group, [5] a full-service group of construction companies that carried on business in the Greater Toronto Area and Southern Ontario starting in the mid-1980s.

7 Before its insolvency, the Bondfield Group was run by the Aquino family. Ralph Aquino founded the enterprise. He was joined by his son, John Aquino, in 1994 and by his son, Steven Aquino, in 2000.

8 By 2018, the Bondfield Group was in financial trouble. Bondfield's bonding company, Zurich Insurance Company Ltd., engaged Ernst & Young Inc. to review the financial situation of the Bondfield Group. This eventually led Bondfield to start proceedings under the *CCAA* on April 3, 2019. The court appointed Ernst & Young Inc. as the monitor of Bondfield and some of its affiliates. On December 19, 2019, the court appointed KSV Restructuring Inc. as the trustee in bankruptcy of Forma-Con.

9 The monitor and the trustee discovered that Bondfield and Forma-Con had illegitimately paid out tens of millions of dollars to John Aquino and several of the other appellants under a false invoicing scheme, which is described in detail by the application judge. Both the monitor and the trustee brought applications for various forms of declaratory relief, the monitor under a combination of s. 36.1 of the CCAA and s. 96 of the BIA and the trustee under the latter only.

(1) The Bondfield Application

10 The monitor learned that between April 3, 2014 and April 3, 2019, which was the five-year statutory review period under the *BIA*, John Aquino and his associates took $21,807,693 from Bondfield by means of a false invoicing scheme. [6]

11 In cross-examination, Mario Caruso, Giuseppe Anastasio, and Lucia Coccia-Canderle - individuals who were involved in operating the Bondfield supplier parties - conceded that the suppliers who falsely invoiced Bondfield provided no value for the transfers. John Aquino made the same admissions. However, these participants denied an intent to defraud, defeat, or delay Bondfield's actual creditors because the company was not then insolvent or in danger of insolvency. The Solano Estate insisted that it had no knowledge of the impugned Bondfield transactions, while Anthony Siracusa and Time Passion did not respond.

12 The application judge granted the declarations the monitor sought concerning the Bondfield false invoicing scheme and required the Bondfield parties to repay $21,807,693 on a joint and several liability basis (other than Coccia-Canderle, whose liability was limited to $88,008).

(2) The Forma-Con Application

13 The trustee discovered that between 2011 and 2017, Forma-Con had paid more than $34 million to certain suppliers under the false invoicing scheme. Between December 19, 2014 and December 19, 2019, which was the five-year review period under the *BIA*, Forma-Con paid over $11 million to certain purported suppliers. [7]

14 As in the Bondfield application, under cross-examination, John Aquino, Caruso, Anastasio, and Coccia-Canderle conceded that suppliers that falsely invoiced Forma-Con provided no value for the transfers (not including 230 [8]), but maintained that they had no intent to defraud, defeat, or delay Forma-Con's actual creditors.

15 664 Ontario contended that it had provided value in the form of consulting services to Forma-Con regarding a hospital project in Hawkesbury. The Solano Estate asserted that it had no knowledge of the impugned Forma-Con transactions.

16 The application judge granted the declarations the trustee sought concerning the Forma-Con false invoicing scheme, and required the Forma-Con parties to repay $11,366,890 on a joint and several liability basis (other than 664 Ontario, whose liability was limited to $90,400, and Coccia-Canderle, whose liability was limited to the value of the cheques paid to her by the Forma-Con suppliers).

C. THE ISSUES

17 There are four issues, which I address in turn:

1. Did the application judge err in finding that s. 96 of the BIA could be used by the monitor and the trustee to recover the money John Aquino and his associates took from Bondfield and Forma-Con?

2. Are the defences of legal and equitable set-off available to John Aquino and the other appellants who claim them?

3. Did the application judge err in finding 664 Ontario to be part of the false invoicing scheme?

4. Should the application judge have converted the applications into an action, or, if not, have required a trial on the financial position of Bondfield and Forma-Con?

D. ANALYSIS

(1) Can s. 96 of the BIA be used by the monitor and the trustee to recover the money John Aquino and his associates took from Bondfield and Forma-Con?

18 The interpreter's task in statutory interpretation is to discern the legislature's intention in order to give effect to it.[9] The interpreter must attend to text, context, and purpose.[10] After discussing the text, purpose, and legislative history of s. 96, I attend to the governing principles and to their application to the facts in this case.

(a) The text and purpose of s. 96 of the BIA

19 Section 96 of the BIA permits trustees to seek a court order voiding a transfer by the debtor to another party at "undervalue", which is an improvident transaction from the debtor's perspective. Section 96 provides, in part:

> 96(1) On application by the trustee, a court may declare that a transfer at undervalue is void as against... the trustee — or order that a party to the transfer or any other person who is privy to the transfer[11] , or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if
>
> . . . . .
>
> (b) the party was not dealing at arm's length with the debtor and
>
> (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or
>
> (ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and
>
> (A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or
>
> (B) the debtor intended to defraud, defeat or delay a creditor. [Emphasis added.]

20 Textually speaking, the contrast between paras. (A) and (B) makes it clear that there are circumstances in which s. 96 will apply even though the "transfer at undervalue" occurs at a time that the debtor, in this case Bondfield or Forma-Con, is not insolvent. This scenario gives rise to a problem about the meaning to be given to "creditor" in para. (B). Section 2 of the Act defines "creditor' as "mean[ing] a person having a claim provable as a claim under this Act". The reasonable interpretation is that there must be a person to whom the debtor owes money at the moment the fraudulent transaction occurs who would be a creditor with a provable claim if the debtor were immediately insolvent.[12] There is an inescapable contingency to the test. There is also a prospectivity, which comes from the contrast between para. (A) ("was insolvent") and para. (B), which lacks that language and therefore implies that the debtor is not yet insolvent.

21 Next, I would interpret the words "a creditor" in para. (B) as denoting any such creditor, not a target creditor or one necessarily known to the fraudulent debtor. It is reasonable to infer that any large enterprise in financial difficulty will have many such creditors, many of whom would not be actively known by the fraudster.

22 I understand s. 96 to be remedial in nature. [13] The Supreme Court has said with respect to provincial legislation governing fraudulent conveyances and preferences: "All the provincial fraud provisions are clearly remedial in nature, and their purpose is to ensure that creditors may set aside a broad range of transactions involving a broad range of property interests, where such transactions were effected for the purpose of defeating the legitimate claims of creditors." [14] This remedial purpose led the court to conclude that the legislation "should be given the fair, large and liberal construction and interpretation that best ensures the attainment of their objects". [15] In my view this approach applies equally to the interpretation of s. 96 of the BIA.

23 Section 96 was included in the 2009 amendments to the *BIA*. The section "combines and simplifies the principles that were established pursuant to sections 91 and 100 in the pre-2009 amendments addressing settlements and reviewable transactions, respectively", as Robyn Gurofsky explains. [16] In her view: "Section 96, like section 95, is intended to create a framework for challenging transactions that have the effect of diminishing the value of the bankrupt's estate and limiting the ability of creditors to recover all or a portion of their debt from the estate." [17]

24 Michael Myers explains the genesis of s. 96: "The law has long recognized the need to protect creditors from insolvent debtors who give away assets to third parties instead of using those assets to repay their debts." [18] This is an historic concern: "[L]egislation prohibiting debtors from fraudulently dissipating their assets when heavily indebted was first enacted in England during the reign of Queen Elizabeth I in the 1500s and has been embodied into the Fraudulent Conveyances Act of Ontario since the late 1800s." [19] Gurofsky and Myers both point out that the idea was to prevent the dissipation of assets, especially to related recipients. They both cite Lord Hatherley L.C.'s statement from *Freeman v. Pope* that "persons must be just before they are generous and that debts must be paid before gifts can be made." [20] The policy of the *BIA* goes beyond this modest origin.

(b) The governing principles and their application

25 In *Urbancorp Toronto Management Inc. (Re)*, van Rensburg J.A. noted that "s. 96 is a remedy to reverse an improvident transfer that strips value from the debtor's estate, where its conditions are met." [21] She added: "The interpretation of the section must be considered in relation to the remedy that is sought." This echoed her earlier comments that even though s. 96 is a "tool to address 'asset stripping' by a debtor", a "bankruptcy trustee or *CCAA* monitor that seeks to impugn a transfer under that provision must nevertheless meet the requirements of the... specific words used" in the section. [22]

26 In order to require John Aquino and the other beneficiaries of the false invoicing scheme to repay the money they took under s. 96(1)(b)(ii)(B) of the BIA, the monitor and the trustee had to prove two elements: first, John Aquino and the other participants were not dealing with Bondfield and Forma-Con at arm's length; and second, at the time they took the money (during the statutory review period), they "intended to defraud, defeat or delay a creditor" of Bondfield or Forma-Con. The first element is amply established by the evidence. This case turns on the second element.

27 The obvious gap in the second element concerns the reach of the fraudsters' intention. No doubt John Aquino and the other participants intended to defraud Bondfield and Forma-Con, but this does not immediately lead to the conclusion that they also intended at that time to defraud the creditors of Bondfield and Forma-Con. The application judge bridged the gap by imputing John Aquino's fraudulent intention to the debtors, Bondfield and Forma-Con, and on that basis found that it could be said that "the debtor intended to defraud, defeat or delay a creditor."

28 Several aspects of the legal analysis are no longer in active dispute. John Aquino and his associates in the false invoicing scheme do not seriously contest their non-arm's length status, that the transfers at issue were at undervalue, or their active intent to defraud the debtors, Bondfield and Forma-Con. Nor is there any doubt, as the application judge noted, that the transactions bristled with "badges of fraud", including the value of the transactions being nil, the non-arm's length status of the participants, the secrecy, and the unusual haste with which the transactions were completed. [23]

29 John Aquino and his associates nonetheless dispute liability under s. 96 on two grounds. The first is that their fraudulent acts were not carried out *at a time* when Bondfield and Forma-Con were financially precarious. The second is that the fraudulent intentions of John Aquino *cannot be imputed* to Bondfield and Forma-Con. These are the two deep issues to be addressed in this appeal.

(i) The timing of the fraudulent transfers

30 Recall the bold assertion made by John Aquino and his associates that at the time they took the money, both Bondfield and Forma-Con were sufficiently financially healthy to sustain the losses, which establishes that they did not intend to "defraud, defeat or delay" any actual creditors. The focus is on the fraudster's intent to defraud a creditor of these companies.

31 The court must not indulge the temptation to engage in hindsight bias. In *Montor Business Corp. (Trustee of) v. Goldfinger*, Brown J. (as he then was) stated the principle on which the appellants rely:

> When inquiring into the intention of a debtor for the purposes of *BIA* s. 96(1)(a)(iii) - and the provincial preferences statutes for that matter - a court must ascertain the intention at the time of the transfer or transaction in light of the information known at that time.
>
> A court must resist the temptation to inject back into the circumstances surrounding the impugned transaction knowledge about how events unfolded after that time. The focus must remain on the belief and intention of the debtor at the time, as well as the reasonableness of that belief in light of the circumstances then existing. [24]

32 Brown J. added a caution about the parties' beliefs as to the value of certain properties in that case: "In hindsight one might question the reasonableness of [their] belief, but the evidence given... about the parties' thinking at the time indicated a genuine belief in the value of the properties." [25] This he found to be evidence on which he placed "significant weight".

(a) The application judge's reasons on the timing of the transfers

33 The application judge instructed herself correctly on the applicable legal principles by reference to the appropriate cases whose reach was also argued before us. She heard and recited the arguments made by John Aquino and his associates, who said that when they took the money, Bondfield and Forma-Con were financially strong. [26] This strength, they claim, was evidenced by the Deloitte audited financial statements [27] and by the report of Ross Hamilton of Cohen Hamilton Steger & Co. Inc., the forensic and investigative accounting experts retained by John Aquino (the "CHS report"). [28] John Aquino argued that the amounts they took were relatively small, so that inferentially the thefts did not impact the companies' financial condition. [29] He cast the blame for the companies' collapse on the actions of Zurich as well as on the National Bank's having denied Bondfield Group an increase in its credit facility. [30]

34 The application judge did not accept the CHS report as a reliable indicator of the companies' financial health because it was based on unreliable information received from the companies. [31] She took a similarly skeptical view of the reliability of Deloitte's financial statements, which are now the subject of litigation. [32]

35 In the application judge's opinion, a debtor's financial health is relevant but not determinative regarding the debtor's intent to defraud, defeat or delay creditors, particularly where, as here, there is evidence of a number of badges of fraud. These "provide a strong evidentiary basis on which to find that each of BCCL and Forma-Con, through the actions of its president John Aquino, intended to defraud, defeat or delay its creditors." [33]

36 The application judge concluded that the presence of badges of fraud "creates a rebuttable presumption of the intention to defraud, defeat or delay creditors" that has the effect of shifting the evidentiary burden "to those defending the fraud to adduce

evidence to show the absence of fraudulent intent". [34] She found that John Aquino and his associates had "not rebutted the presumption of fraudulent intent". [35]

37 The application judge noted that there is "a divergence of opinion between the parties on the financial condition of the Bondfield Group during the Bondfield review period and the Forma-Con review period." [36] She concluded her lengthy analysis: "The true financial condition of each of BCCL and Forma-Con at the time of each impugned transaction cannot be determined on the record before the court." [37] The appellants referenced this statement in argument to attempt to undermine the certainty of the application judge's factual findings and her conclusions. However, doing so mischaracterizes the meaning of her observation.

38 The application judge mustered a phalanx of facts in support of her conclusions:

> The transferors, being the corporate debtors, also had actual and potential liabilities, or were about to enter risky undertakings. According to the reports of the Monitor and the Trustee, both BCCL and Forma-Con had significant long-term and off-balance sheet liabilities during the relevant review periods and were guarantors on BCCL's credit facility in respect of which there were contingent obligations in the tens of millions of dollars at the end of fiscal years 2014, 2015 and 2016. Ralph, Steven and John Aquino's sister Maria Bot, were all creditors of BCCL with substantial shareholder loan accounts. The Bondfield Group was facing actual and potential liabilities, and by John Aquino's own admission was embarking on a significant expansion in its construction activities at a time when its lender, National Bank, was not prepared to increase its lending. During the relevant period, John Aquino and Ralph were temporarily transferring funds to BCCL for the sole purpose of misleading BCCL's stakeholders, including its lenders, into believing that BCCL was in a stronger financial position than it was. [38]

39 The application judge noted there were a number of unusual accounting practices at Bondfield and Forma-Con:

> According to the Monitor's reports, just as accounts payable were understated in BCCL's records, accounts receivable were overstated in a problematic fashion. While BCCL's contract revenues were going up, the collectability of those revenues was going down. Throughout the Bondfield review period, BCCL's accounts receivable collection was in continual decline.
>
> . . . . .
>
> These [unusual accounting practices] include John Aquino's admission that, during the Bondfield review period, he and Ralph routinely injected capital into BCCL to mislead BCCL's stakeholders into thinking that the Bondfield Group was financially stronger than it was; the fact that suppliers' cheques were withheld to give BCCL an opportunity to extend the time it could use the funds owing to suppliers; the fact that BCCL was entering a date later than the date shown on the supplier invoice into its accounting system, which allowed its payables to remain outstanding longer; the fact that significant adjusting journal entries had to be made regarding BCCL's revenue and profit once the Monitor was appointed; and the fact that a claim has been brought against Deloitte with respect to its audit of Bondfield Group financial statements (which it is defending). In light of these concerns, it is reasonable to infer that the financial records provided to Deloitte and to Mr. Hamilton were likely not reliable. [39]

40 Even though getting an absolutely accurate picture of the financial condition of Bondfield and Forma-Con was not possible, such precision was unnecessary. The application judge accepted the description of the state of affairs discovered in the monitor's investigation. She listed the findings:

> a) BCCL's financial records, prepared under the supervision of John Aquino, vastly overstated the revenues and profitability of its projects in the relevant period, causing BCCL to have to book significant adjusting journal entries under the supervision of the Monitor; b) Zurich had encountered stated losses of over $300,000,000 to date in paying sub-trades and completing BCCL projects, which losses arose from projects and project activities started many years before the *CCAA* filing; c) BCCL's loan was placed in "special loans" by its prior lender, The National Bank, no later than the start of 2017; d) BCCL faced persistent liquidity challenges as evidenced in part by John Aquino's steps to inject cash into BCCL temporarily at the beginning of 2014 through 2017 in order to improve the appearance of BCCL's liquidity for the purposes of its bonding and lending arrangements; and e) the Bondfield Group's auditors, Deloitte, are the subject of litigation by

> both BCCL and Zurich with respect to the accuracy of the financial statements that the defending Bondfield Respondents and Forma-Con Respondents rely upon. [40]

41 The application judge added context, emphasizing that John Aquino "signed a number of the cheques associated with the impugned transactions [and that in] cross-examination he stated that he would have been familiar with 100 percent of the suppliers and subtrades." [41] Meanwhile, "[a]t the same time as he was authorizing payments on false invoices, [John Aquino] was injecting capital into BCCL from time to time in an attempt to disguise the true financial condition of BCCL." [42] In her view: "It is reasonable to infer that John Aquino took these actions to avoid BCCL's and Forma-Con's obligations and defeat their creditors." [43] She added that he had not "given evidence of an alternative explanation."

42 The application judge also addressed the question of the relatively small value of the amounts paid out on the false invoices as compared to Bondfield's gross revenue or net profit. She was not persuaded that this ratio "absolves John Aquino of an intent to defeat creditors." [44] She put the transfers in context, adding: "The amounts, whatever the quantum, were paid out at a time when John Aquino was taking deliberate steps to mislead the stakeholders of BCCL with respect to its financial position and these payments bore a number of badges of fraud", and "[e]ach of these payments reduced the funds available to pay long-term creditors and increased bank indebtedness". [45]

43 The evidence led the application judge to conclude: "The totality of the evidence demonstrates a pattern of an intent by John Aquino, on behalf of each of BCCL and Forma-Con to defraud, defeat or delay the creditors of BCCL and Forma-Con." [46] This conclusion built on her earlier finding:

> The totality of the evidence, in my view, provides a firm basis for finding that John Aquino, as principal and directing mind of BCCL and Forma-Con, had fraudulent intent - an intent to defraud, defeat or delay creditors. It was in no way reasonable for him to believe that, throughout the period of the impugned transactions, BCCL and Forma-Con did not have long-term creditors, like lenders, including Ralph, who would not be defeated or delayed by the draining of tens of millions of dollars from BCCL and Forma-Con through the false invoicing schemes. [47]

44 The requirement noted in *Montor* is that the "court must ascertain the intention at the time of the transfer or transaction in light of the information known at that time." [48] In particular, a court must not rely on hindsight by injecting into the circumstances surrounding the impugned transactions knowledge about how events unfolded after that time. Contrary to the appellants' submissions, this is not what the application judge did.

45 At the time of the fraudulent transactions under the false invoicing scheme, the interests of creditors were imperilled by the transfers because Bondfield and Forma-Con were already experiencing mounting financial difficulties. As noted above, the application judge determined that it would have been entirely unreasonable for John Aquino to believe that, during that time, the interests of the companies' creditors would not be endangered by this fraudulent scheme. [49] He and his associates continued on nonetheless. The application judge found that because the companies had outstanding debts at the time of the transfers, including a substantial loan from its primary lender, "there was a creditor or creditors toward whom BCCL's and Forma-Con's intent to defraud, defeat or delay could be directed", even though the companies were then "paying off current liabilities". [50] In other words, the fact that current liabilities were being paid did not mean that "the fraudulent transfers were never intended to defeat then-current creditors."

46 In short, the application judge took a pragmatic view on the totality of the evidence. She found that during the review periods both Bondfield and Forma-Con were experiencing increasing financial difficulties, to the knowledge of John Aquino, who carried on with the false invoicing scheme. She inferred that he did this with the intent to defeat the companies' creditors. This court owes deference to the application judge's findings of fact and findings of mixed fact and law. The appellants have not established any palpable and overriding errors nor legal errors with these findings.

47 The application judge also accepted that the false invoicing scheme might not have been solely motivated by an intention to defeat creditors. However, she noted that the monitor and trustee only had to demonstrate that *one of* the motives or intentions was to defraud, defeat, or delay a creditor. [51] As Wilton-Siegel J. explained:

> [T]he relevant wording in s. 96 is to the effect that "the debtor intended to defraud, defeat or delay a creditor." Of significance, it is not that "the intention of the debtor was to defraud, defeat or delay a creditor." If it were the latter, I think an applicant would be required to establish that the principal intention of the debtor was to defeat his or her creditors. However, the wording of s. 96 does not require such a determination. Instead, I think it requires only that an applicant establish that one of the debtor's motives or intentions was to defraud, defeat or delay a creditor. [52]

48 Finally, as discussed, John Aquino was aware that the interests of the companies' creditors were potentially imperilled by the false invoicing scheme. Although the application judge did not make findings with respect to recklessness, it is clear that at a minimum, John Aquino was reckless as to whether the scheme would defraud, defeat, or delay creditors. In the criminal context, the Supreme Court has held that fraud can be established on the basis of recklessness as to the consequences of a fraudulent act. As McLachlin J. put it:

> I have spoken of knowledge of the consequences of the fraudulent act. There appears to be no reason, however, why recklessness as to consequences might not also attract criminal responsibility. Recklessness presupposes knowledge of the likelihood of the prohibited consequences. It is established when it is shown that the accused, with such knowledge, commits acts which may bring about these prohibited consequences, while being reckless as to whether or not they ensue. [53]

49 I see no reason why John Aquino's recklessness as to the consequences of the fraudulent transfers with respect to the interests of the companies' creditors would not be similarly sufficient for establishing the requisite intent under s. 96 of the BIA. [54]

(ii) The imputation of John Aquino's fraudulent intent to Bondfield and Forma-Con

50 For the purpose of construing the words, "the debtor intended to defraud, defeat or delay a creditor" in s. 96(1)(b)(ii)(B), the debtors are Bondfield and Forma-Con. The application judge imputed the fraudulent intention of John Aquino in the false invoicing scheme to Bondfield and Forma-Con, and found that the trustee and the monitor could pursue the repayment of the funds taken from the fraudsters under the *BIA*.

51 The appellants argue that the application judge erred legally because John Aquino's fraudulent intent cannot be imputed to Bondfield or Forma-Con as a matter of law, even though he was one of their directing minds. They assert that the binding principles of the common law doctrine of corporate attribution set out in *Canadian Dredge & Dock Co. v. The Queen*, [55] do not permit the imputation of his intention to either defrauded company. Accordingly, s. 96(1)(b)(ii)(B) of the BIA cannot be used to require John Aquino, or his associates as "privies" to the impugned transactions, to repay the money they took.

52 This argument raises a thorny question about the interplay between the provisions of the *BIA* and common law doctrine. When can common law doctrine be engaged by the court in construing and applying the *BIA*? I begin by setting out the application judge's reasons. I next address this legal question and then turn to its implications for the application of the corporate attribution doctrine in this appeal.

(a) The application judge's reasons on corporate attribution

53 The application judge reviewed and considered the law concerning corporate attribution. She agreed that "the actions of John Aquino were not intended to benefit BCCL and Forma-Con and they did not do so." [56] In her view, if the *Canadian Dredge* test "were applied strictly, it would mean that John Aquino's intent could not be attributed to the debtor corporations." [57]

54 However, the application judge took a different tack and concluded: "[T]he corporate attribution doctrine as set out in *Canadian Dredge* ought not to apply in these applications made pursuant to s. 96 of the BIA, and John Aquino's intent to defeat creditors ought to be attributed" to Bondfield and Forma-Con. [58] She founded this result on several interrelated considerations:

- The incompatibility of the *Canadian Dredge* formulation "with the very purpose of s. 96 of the BIA, which is aimed at restoring value for the benefit of the debtor's creditors; [59]
- The policy factors in *Canadian Dredge*, particularly the "social purpose" of holding a corporation responsible for the acts of its employees and the view that the doctrine's application should only be by "judicial necessity" where it would "advantage society by advancing law and order"; [60]
- The remedial purpose of s. 96, which is "directed towards recovering funds for creditors"; [61] and
- The principles of statutory interpretation, particularly the purposive approach, "[g]iven that the *BIA* is concerned with providing proper redress to creditors". [62]

55 In *DBDC Spadina Ltd. v. Walton*, van Rensburg J.A. took a strict approach to the application of the *Canadian Dredge* test, which the Supreme Court expressly approved on appeal. [63] However, based on the reasoning set out above, the application judge expressed "hesitancy about whether [van Rensburg J.A.'s reasoning in *Walton*] ought to apply in the context of s. 96." [64]

56 As I will explain, the application judge did not err in her approach and in her judgment. I review several points of intersection between common law doctrine and the *BIA* before turning to the specific application of the corporate attribution doctrine.

(b) Intersections between common law doctrine and the BIA

57 There are several examples of situations in which common law doctrines have been used to interpret, apply, or supplement the *BIA*, apart from the corporate attribution doctrine. [65] I pick out four but could extend the list: the common law principles around the priority of secured claims; the doctrine of good faith; the anti-deprivation rule; and unjust enrichment.

58 The Supreme Court has held that "Parliament is presumed to intend not to change the existing common law unless it does so clearly and unambiguously". [66] This frames the legal context.

59 First, regarding the priority of secured claims, Houlden, Morawetz, and Sarra note: "If no statutory provisions are applicable, then common law and equitable principles will be applied." [67] For example, the common law rule of "first in time" will *prima facie* be followed.

60 Second, various provisions of the *BIA* engage principles of "good faith", including the duties of receivers under s. 247, as well as the recent addition of the s. 4.2 good faith provision. These provisions engage the common law doctrine of good faith, which also exists in the civil law. But "good faith" is not a codified concept. For example, in *CWB Maxium Financial Inc v. 2026998 Alberta Ltd*, Mah J. considered the meaning of "good faith" in the *BIA* context and applied the principles of good faith derived from *Bhasin v. Hrynew* [68] and *C.M. Callow Inc. v. Zollinger* [69] to give content to s. 4.2, while being cognizant of the policy objectives of the *BIA*. [70]

61 The third example is the doctrine of "fraud on the bankruptcy law" and the associated anti-deprivation rule. These are common law doctrines applicable in commercial bankruptcies, as I noted in *Hutchingame Growth Capital Corporation v. Independent Electricity System Operator*:

Professor Wood explains that the anti-deprivation rule invalidates contractual provisions that remove assets otherwise available to creditors in the event of insolvency. He discusses the fraud on the bankruptcy law doctrine in *Bankruptcy and Insolvency Law* at p. 88:

> Canadian courts have recognized that a contractual provision that is designed to remove value from the reach of an insolvent person's creditors is void on the basis that it violates the public policy of equitable and fair distribution on bankruptcy. This is referred to as the "fraud on the bankruptcy law principle." The principle can be usefully broken down into two distinct components: the anti-deprivation rule and the *pari passu* rule. The anti-deprivation rule operates by invalidating provisions that withdraw an asset that would otherwise be available to satisfy the claims of creditors upon the insolvency of the party or the commencement of insolvency proceedings. [Internal citations omitted.]

The common law anti-deprivation rule applies in commercial bankruptcies, including Greenview Power's bankruptcy. [71]

62 The Supreme Court affirmed this understanding of the law in *Chandos* . The majority held "that the rule has existed in Canadian common law and has not been eliminated by either this Court or Parliament" and noted that "[t]he anti-deprivation rule renders void contractual provisions that would prevent property from passing to the trustee and thus frustrate s. 71 and the scheme of the *BIA*." [72] The common law anti-deprivation rule thus "maximizes the assets that are available for the trustee to pass to creditors." [73]

63 The fourth example of the active engagement of common law doctrine in supplementing the *BIA* is in the area of unjust enrichment and restitution. Professor Wood points to situations in which a trustee can avoid a transaction in which an innocent recipient of the bankrupt's assets has paid some consideration to the debtor or added value. He notes that "[u]njust enrichment law may be relevant in respect of the recovery of these gains." [74] He continues: "These are not matters that are governed by the statutes dealing with impeachable transactions, and therefore the issue may be properly resolved through the application of principles of unjust enrichment." The common law doctrine of unjust enrichment can be used to supplement the *BIA* in circumstances where the statute itself does not fully govern the transactions at issue.

64 I would draw several principles from this discussion of the active engagement of common law doctrine in the application of the *BIA*. Common law doctrine can be enlisted by a court to interpret and supplement the *BIA* where necessary to better achieve its purposes, one of which is to protect the interests of the bankrupt's creditors. The common law can add content to the terms of the *BIA* not otherwise defined. In particular, the common law doctrine known as the anti-deprivation rule and its purpose of preventing a fraud on the bankruptcy is especially pertinent in this case. The use of common law doctrine must respect the policy of the *BIA*. But these principles do not license a court to do whatever it likes; the common law doctrines impose their own discipline.

65 I turn now to the common law doctrine of corporate attribution.

(c) The common law doctrine of corporate attribution in the bankruptcy context

66 Corporations are not natural persons. In view of separate corporate personality, it is no small thing to impute to a corporation the intention of its "directing mind". On the other hand, there is the spectre that corporations might commit criminal acts and civil delicts with impunity because these engage mental elements relevant to intentions. The corporate attribution doctrine creates a bridge between the corporation and the natural person whose "directing mind" caused the corporation to act as it did. The doctrine attributes the intent of the corporation's directing mind to the corporation itself, whose conduct is then evaluated against the legal standard that applies to the implicated criminal or civil area of law.

67 The Supreme Court's current substantive teaching on the doctrine of corporate attribution is found in *Deloitte & Touche v. Livent Inc. (Receiver of)*, [75] which contextualizes *Canadian Dredge*. In *Livent*, the court restated the *Canadian Dredge* test:

> To attribute the fraudulent acts of an employee to its corporate employer, two conditions must be met: (1) the wrongdoer must be the directing mind of the corporation; and (2) the wrongful actions of the directing mind must have been done within the scope of his or her authority; that is, his or her actions must be performed within the sector of corporate operation assigned to him. For the purposes of this analysis, an individual will cease to be a directing mind unless the action (1) was not totally in fraud of the corporation; and (2) was by design or result partly for the benefit of the corporation. [76]

68 In the result, the court did not allow the doctrine to be used by the auditor Deloitte to defend against Livent's claim for negligence based on the fraudulent activities of its directing minds.

69 The Supreme Court in *Dejong* clarified that *Livent* invited a flexible application of the *Canadian Dredge* test, but only to make clear that courts retain discretion *not* to apply the test in circumstances where attributing the actions of a directing mind to a corporation would not be in the public interest. Courts must take seriously the elements of the corporate attribution test in *Canadian Dredge*.

(d) The corporate attribution doctrine and the BIA

70 Thus far, the corporate attribution doctrine has been applied in the fields of criminal and civil liability. Courts have yet to consider the doctrine in the bankruptcy and insolvency context under s. 96 of the BIA, making this a case of first impression.

71 I would extract three principles from *Livent* and *Canadian Dredge* to guide the application of this doctrine in this setting. First, the court is sensitive to the context established by the field of law in which an imputation of intent to a corporation is sought to be made.

72 Second, the court recognizes that the attribution exercise is grounded in public policy. [77] I would generalize the point made by the *Livent* court about *Canadian Dredge* by paraphrasing: In the legal field of inquiry - civil, criminal, or bankruptcy - the underlying question is "who should bear the responsibility for the [impugned] actions of the corporation's directing mind?" [78] The policy factors that weigh in favour of imputing to a corporation the wrongdoing intent of its directing mind flow from the "social purpose" of holding the corporation responsible. In *Livent*, the court stated: "[A]s Estey J. himself recognized [in *Canadian Dredge*], the doctrine is only one of 'judicial necessity' and where its application 'would not provide protection of any interest in the community' or 'would not advantage society by advancing law and order', the rationale for its application 'fades away'". [79]

73 Third, these principles "provide a *sufficient* basis to find that the actions of a directing mind be attributed to a corporation, not a *necessary* one". [80] Accordingly, "[a]s a principle that is grounded in policy, and which only serves as a means to hold a corporation criminally responsible or to deny civil liability, courts retain the discretion to refrain from applying it where, in the circumstances of the case, it would not be in the public interest to do so." [81]

74 While this court must take the elements of the corporate attribution doctrine seriously, the genius of the common law is in its robust circumstantial adaptability.

75 The circumstances in which the corporate attribution doctrine has traditionally been applied - the criminal and civil contexts - are quite different from the bankruptcy context. In the criminal context, the issue is whether it would be just to visit criminal liability on a corporation. As *Canadian Dredge* instructs, if the corporation benefited from the directing mind's criminal activity, imposing criminal liability might be justified. But if the criminal activities do not, by design or in result, benefit the corporation, then it is not criminally liable.

76 The rule in the civil context seeks to determine whether it is just to visit civil liability on a corporation. Where a corporation benefits from the improper activities of the directing mind, that intent might be attributed to the corporation. But if it does not get a benefit, there is no attribution and no liability.

77 The application of these principles is not clear in the bankruptcy arena, where the policy currents flow rather differently. In particular, attributing the intent of a company's directing mind to the company itself can hardly be said to unjustly prejudice the company in the bankruptcy context, when the company is no longer anything more than a bundle of assets to be liquidated with the proceeds distributed to creditors. An approach that would favour the interests of fraudsters over those of creditors seems counterintuitive and should not be quickly adopted.

78 In light of these considerations, I would reframe the test for imputing the intent of a directing mind to a corporation in the bankruptcy context this way: The underlying question here is who should bear responsibility for the fraudulent acts of a company's directing mind that are done within the scope of his or her authority - the fraudsters or the creditors?

79 Permitting the fraudsters to get a benefit at the expense of creditors would be perverse. The way to avoid that perverse outcome is to attach the fraudulent intentions of John Aquino to Bondfield and Forma-Com in order to achieve the social purpose of providing proper redress to creditors, which is the core aim of s. 96 of the BIA. The application judge did not err in finding that the "intention of the debtor" under s. 96 can include "the intention of individuals in control of the corporation, regardless of whether those individuals had any intent to defraud the corporation itself." [82]

(2) Are the defences of legal and equitable set-off available to John Aquino and the others claiming them?

80 I deal with the set-off claims of Anastasio and John Aquino separately.

(a) Anastasio's claim to set-off

81 The application judge found Anastasio to be an active participant in the false invoicing scheme. [83] The companies associated with Anastasio - MMC and RCO - received more than $4 million through the scheme. [84] Anastasio takes the same position as John Aquino on the merits of this appeal. He concedes that the transactions were at undervalue, essentially nil. [85] He also concedes that the transactions were not at arm's length. [86]

82 Anastasio asserts that he is owed US$3.75 million as his fee for introducing the Bondfield Group to Deutsche Bank, who considered providing the Group a credit facility of US$150 million. [87] The application judge rejected this claim. She set out the factual background to this assertion:

> Prior to Zurich's *CCAA* application, in 2016, National Bank denied the Bondfield Group an increase in its credit facility from $60,000,000 to $120,000,000. Then, the Bondfield Group entered into an $80,000,000 loan facility with Bridging for one year at an interest rate of 13.5 percent calculated daily. In late 2017, the Bondfield Group negotiated long-term financing with Deutsche Bank, but it required an insurance policy for the construction holdbacks in which it would have priority. The insurance policy was obtained. However, a disagreement between Zurich and Deutsche Bank regarding the loan facility in relation to Zurich's bonds could not be resolved and the Deutsche Bank facility did not proceed. [88]

83 Anastasio argues that his US$3.75 million fee remains unpaid. [89] He claims a set-off for that amount against any order for repayment of the proceeds of the false invoicing scheme. However, the application judge noted that he "provided no documentary or corroborating evidence in support of his alleged claim against the Bondfield Group in this amount." [90] She added that while John Aquino agreed that Anastasio introduced Bondfield to Deutsche Bank, he made "no mention of any fee owing to Anastasio for his services." The application judge concluded that Anastasio did not establish an entitlement to any legal or equitable set-off.

84 These are essentially factual findings to which this court owes deference. Anastasio has not pointed to any palpable and overriding error, nor error of law, with respect to these findings. I would not give effect to this ground of appeal.

(b) John Aquino's claims to set-off

85 The statutory basis for a claim to set-off is s. 97(3) of the BIA, which provides:

> The law of set-off or compensation applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off or compensation is affected by the provisions of this Act respecting frauds or fraudulent preferences. [Emphasis added.]

86 Houlden, Morawetz, and Sarra comment on the operation of the exception under s. 97(3): "It may be that the purpose of the concluding words of s. 97(3) is to make it clear that a creditor who has to return property to the trustee as a result of the setting aside of a fraudulent preference has no right to assert a set-off." [91] This is because the effect of according a set-off would be to give a preference to that creditor over other creditors. Houlden, Morawetz, and Sarra note that "the effect of the set-off is to prefer one creditor over the general body of creditors", which "has the effect of securing the claim of the party entitled to it." [92] Doing so would give a fraudster priority over other creditors for the amount set off, which is contrary to the *pari passu* principle of bankruptcy law.

87 John Aquino asserts that his liability for any s. 96 repayments should be reduced by a total of $19,009,987. He claims set-offs in the amounts of: (1) $11,922,811, which is the alleged amount of his shareholder's loan to Bondfield [93] ; (2) $3,270,631 on behalf of his holding company, 230, which is the difference between the inflows and outflows of cash between 230 and Bondfield during the review period ($17.3 million cash injections against repayment of $14,029,369) [94] ; and (3) $3,816,545, which is the amount he argues would account for Harmonized Sales Tax input credits on the sums found to be transfers at undervalue.

88 Although the application judge recited the evidence about the first claim, she rejected it perfunctorily on the basis that John Aquino "has not provided evidence to establish an entitlement to legal or equitable set off in the context of these insolvency and bankruptcy proceedings." [95] An insight into her reasoning would have been helpful, but I would not hesitate to come to the same conclusion.

89 The logic of the language of s. 97(3), particularly the underlined words quoted above, as explained by Houlden, Morawetz, and Sarra, is determinative. Giving effect to John Aquino's argument would perversely reward him for his fraud. This is sufficient to dispose of John Aquino's set-off claims. Neither legal nor equitable set-off is available to John Aquino. In support of the refusal to grant equitable set-off, I would paraphrase a hoary old equitable maxim: The one who comes to Equity must come with clean hands. John Aquino's hands are not clean.

90 Concerning the second set-off claim on behalf of 230, the application judge noted that the monitor did not dispute that: "Within the Bondfield review period, accounting for all ins and outs, 230 is in a net positive position at the end of the period and appears to be owed $3,270,631." [96] The monitor took the position that the cash flows were part of an illicit "fund cycling scheme" that were also transfers at undervalue. However, the application judge found that the monitor had not proven that claim. [97]

91 But the application judge's findings do not reinforce 230's claim to set-off. That claim suffers from the same fundamental deficiency as John Aquino's claims, and I would dismiss this ground of appeal on that basis.

92 The third claim, that the application judge did not take into account HST credits, is correct. The HST issue was not addressed in her reasons. The reason the monitor gives is that this issue was not raised before her but is a new issue raised for the first time on appeal. I agree with the monitor that it is not an issue this court should consider.

(3) Did the application judge err in finding that 664 Ontario was part of the false invoicing scheme?

93 The application judge noted that unlike most of the other participants in the false invoicing scheme, 664 Ontario denied involvement and asserted that it provided value for the payment by Forma-Con of an invoice in the amount of $90,400. [98]

94 The application judge analyzed 664 Ontario's claim in a number of paragraphs in her decision and concluded: "Because the evidence indicates that 664 Ontario was not involved in the false invoicing scheme during the Forma-Con review period to the same degree as the other Forma-Con Supplier Respondents, and it has not benefited to the same extent, its liability is limited to the benefit it derived from its involvement, which I find to be $90,400." [99]

95 In reaching this conclusion, the application judge said: "I am left with serious doubt about the legitimacy of 664 Ontario's explanation of the payment to it. On a balance of probabilities, in light of the pattern of the false invoicing scheme, I find that 664 Ontario's invoice, like many others produced as part of the false invoicing schemes, was a transaction in which no service was given for the value received." [100]

96 This conclusion was well-supported. Although 664 Ontario said that the work related to consulting services on the Hawkesbury hospital project: "The Trustee has not been able to find, and 664 Ontario has not produced, any internal records to corroborate the work or the agreement." [101] The application judge noted that the consulting service 664 Ontario asserts that it provided required a "high degree of structural engineering experience", which 664 Ontario did not possess as a matter of fact. She pointed out that 664 Ontario failed to provide relevant documents and correspondence regarding the involvement of a sub-consultant, refused to produce original documents, and refused to answer a number of questions in cross-examination. [102] The invoice at issue was solicited by Solano, who had no responsibility in the area in which 664 Ontario was operating. The method of invoicing was consistent with the other false invoices, including Solano's shady role.

97 Finally, the application judge found that 664 Ontario was not acting at arm's length with Forma-Con, largely based on her finding that no consulting services were actually supplied. [103]

98 However, because 664 Ontario's participation was limited, she did not make the company jointly and severally liable, but instead only made it liable for the payment actually received from Forma-Con.

99 I would dismiss 664 Ontario's appeal on the basis that it failed to discharge its evidentiary burden of answering the case put forward by the trustee. It was open to the application judge to draw the adverse inferences she did. I do not discern any palpable and overriding error or error of law.

(4) Did the application judge err in permitting the matter to proceed as an application?

100 John Aquino brought a motion to the application judge at the outset of the hearing to convert the combined applications of the monitor and trustee into an action, which Hainey J. had earlier refused to do. The application judge's endorsement on the motion noted that the *BIA* permitted an application as the "default procedural rule". She was aware that the *Rules of Civil Procedure* [104] gave her discretion to convert the application into an action or to order the trial of an issue. She instructed herself on the jurisprudence and declined to do so, concluding:

> I find that Mr. Aquino has not produced sufficient evidence to persuade me that there are material facts in dispute or credibility issues that cannot be resolved without the benefit of a trial. At the heart of the application is the question of whether the impugned transactions were carried out with intent to defraud, defeat or delay creditors. The facts relevant to this fundamental question remain much the same as they were at the time Justice Hainey heard the moving parties' motion. If anything, the application has become less complex because the Respondents have now admitted that the transfers (other than the transfers relating to 230) occurred at undervalue, and they do not dispute any of the details or the operation of the false invoices scheme. Accordingly, the motion is dismissed. [105]

101 John Aquino identifies as the first issue in the appeal "whether the applications should have been converted into an action, and if not, whether there should have been a trial of an issue on the financial position of BCCL and Forma-Con and its application to the issues thereon".

102 John Aquino advances several grounds. First, he argues that he was not the only "directing mind" at Bondfield and Forma-Con and believes that his father Ralph and brother Steven should also have been embroiled, noting: "The machinery of a trial was necessary in order for the Court to test the credibility of these material players, most fundamentally on whether the Bondfield Group had an intention to defeat creditors, and whether Ralph and Steven were privy to the impugned transactions." I agree with the application judge that this internecine fight is not relevant to the applications the monitor and the trustee brought. The application judge pointed out that it was open to John Aquino to pursue his father and sibling elsewhere. She found, quite rightly, that the participation of all three directing minds was not necessary to trigger s. 96 liability on the part of one of them. [106]

103 Second, John Aquino asserts, as noted earlier, that Bondfield and Forma-Con were in strong financial shape and had no creditors at the time that he and his associates were looting them. He claims that expert evidence and cross-examination about the "true financial condition" of each company "at the time of each impugned transaction" was therefore required. I noted above that the application judge acknowledged that there was "a divergence of opinion" on the financial condition of the companies and that the "true financial condition of each of BCCL and Forma-Con at the time of each impugned transaction cannot be determined on the record before the court." [107] But as described earlier, there was enough evidence to support the application judge's conclusion: "The totality of the evidence demonstrates a pattern of an intent by John Aquino, on behalf of each of BCCL and Forma-Con to defraud, defeat or delay the creditors of BCCL and Forma-Con." [108]

104 The application judge's discretionary decision not to convert the consolidated applications into an action or to order the trial of an issue is entitled to appellate deference, in the absence of a legal error, an error in principle, or a palpable and overriding factual error. The appellants have not identified any. I would dismiss this ground of appeal.

E. DISPOSITION

105 I would dismiss the appeals by all of the appellants with costs. With respect to the appellants other than 664 Ontario, costs in the agreed upon amount of $75,000 all-inclusive are awarded to the respondents.

106 If 664 Ontario and the respondents are unable to agree on costs, then the respondents may file a written submission no more than three pages in length within ten days of the date of the release of these reasons and 664 Ontario may file a written submission no more than three pages in length within ten days of the date the respondents' submission is due.

***Coroza J.A.*:**

I agree.

***Sossin J.A.*:**

I agree.

Appeal dismissed.

Footnotes

1 Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (“BIA”).

2 Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (“CCAA”).

3 Defined in s. 2 of the BIA as: "a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor."

4 The application judge also found that transactions relating to an alleged fund cycling scheme were not captured under s. 96, but that scheme is not at issue in this appeal.

5 I use "Bondfield" to denote Bondfield Construction Company Limited, as distinct from the Bondfield Group. The application judge referred to Bondfield Construction Company Limited as "BCCL".

6 The suppliers involved in this scheme were 2483251 Ontario Corp. a.k.a. Clearway Haulage ("Clearway"), 2420595 Ontario Ltd. a.k.a. Strada Haulage ("Strada"), 2466601 Ontario Inc. a.k.a. MMC Contracting ("MMC"), 2420570 Ontario Ltd. a.k.a. MTEC Construction ("MTEC"), Time Passion, Inc. ("Time Passion"), and RCO General Contracting Inc. ("RCO").

7 The Forma-Con suppliers were Clearway, MMC, MTEC, Strada, 2304288 Ontario Inc. ("230"), which was John Aquino's personal holding company, and 2104664 Ontario Inc. ("664 Ontario").

8 Despite the individual Forma-Con parties' exclusion of 230 from their concessions, the application judge found that 230 was involved in the false invoicing scheme: *Ernst & Young Inc. v. Aquino*, 2021 ONSC 527, 88 C.B.R. (6th) 60 ("Decision Below"), at paras. 120, 242.

9 Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, 441 D.L.R. (4th) 1, at para. 121.

10 *Vavilov* , at paras. 117-24.

11 Section 96(3) of the *BIA* defines a "privy" as "a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person."

12 Section 121(1) of the BIA concerns what constitutes a provable claim: "All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act".

13 This court has held that, in general, the "*BIA* is remedial legislation and should be given a liberal interpretation to facilitate its objectives": Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc., 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 43.

14 Royal Bank of Canada v. North American Life Assurance Co., [1996] 1 S.C.R. 325, at para. 59.

15 *Royal Bank of Canada* , at para. 59, citing the Interpretation Act, R.S.C. 1985, c. I-21, s. 12.

16 Robyn Gurofsky, "Fraudulent Preferences and Transfers at Undervalue: A Review of the Legal Developments under the *Bankruptcy and Insolvency Act*", in Janis P. Sarra, ed., *Annual Review of Insolvency Law*, 2011 (Toronto: Thomson Reuters, 2012) 567, at p. 584.

17 Gurofsky, at p. 584 (footnote omitted).

18 Michael S. Myers, "Transfers at Undervalue Under Section 96 of the Bankruptcy and Insolvency Act - A Primer", prepared for the Law Society of Ontario's Six-Minute Debtor-Creditor and Insolvency Lawyer Seminar (October 17, 2018), at p. 2, online: Papazian Heisey Myers, Barristers & Solicitors <www.phmlaw.com/site_files/content/pdf/published_works/michael_myers/2018_lso_seminar_6_minute_ debtor-creditor_and_insolvency_law.pdf>. Myers' analysis of s. 96 has been cited in M.A. Springman *et al.*, *Frauds on Creditors: Fraudulent Conveyances and Preferences*, loose-leaf (2022-Rel. 1) (Toronto: Thomson Reuters, 2021).

19 Myers, at pp. 2-3 (footnote omitted).

20 Freeman v. Pope1870L.R. 5 Ch. App 538, at p. 540.

21 Urbancorp Toronto Management Inc. (Re), 2019 ONCA 757, 74 C.B.R. (6th) 23, at para. 48.

22 *Urbancorp*, at para. 40.

23 Decision Below, at paras. 156-60.

24 *Montor Business Corp. (Trustee of) v. Goldfinger*, 2013 ONSC 6635, 8 C.B.R. (6th) 200, at para. 272 (emphasis added), aff'd 2016 ONCA 406, 351 O.A.C. 241, leave to appeal refused, and [2016] S.C.C.A. No. 361 and rev'd in part on other grounds, 2016 ONCA 407, 398 D.L.R. (4th) 266, leave to appeal refused, [2016] S.C.C.A. No. 360.

25 *Montor*, at para. 274.

26 Decision Below, at paras. 48, 144 and 163.

27 Decision Below, at paras. 98, 165, and 167.

28 Decision Below, at paras. 102-3, 165-66.

29 Decision Below, at para. 181.

30 Decision Below, at paras. 96-97.

31 Decision Below, at paras. 169, 176-77 and 193.

32 Decision Below, at paras. 99, 165 and 193.

33 Decision Below, at para. 145.

34 Decision Below, at para. 161, citing *Purcaru v. Seliverstova*, 2015 ONSC 6679, 69 R.F.L. (7th) 388, aff'd 2016 ONCA 610, 80 R.F.L. (7th) 28.

35 Decision Below, at para. 164.

36 Decision Below, at para. 165.

37 Decision Below, at para. 193.

38 Decision Below, at para. 158.

39 Decision Below, at paras. 170, 193.

40 Decision Below, at para. 168.

41 Decision Below, at para. 190.

42 Decision Below, at para. 191.

43 Decision Below, at para. 192.

44 Decision Below, at para. 182.

45 Decision Below, at para. 182.

46 Decision Below, at para. 197.

47 Decision Below, at para. 160.

48 *Montor*, at para. 272.

49 Decision Below, at para. 160.

50 Decision Below, at para. 204.

51 Decision Below, at para. 189.

52 *Juhasz Estate v. Cordiero*, 2015 ONSC 1781, 24 C.B.R. (6th) 69, at para. 54 (emphasis added).

53 *R. v. Théroux*, [1993] 2 S.C.R. 5, [1993] S.C.J. No. 42, at para. 26.

54 Recklessness is also generally sufficient in cognate areas such as knowing assistance or fraudulent misrepresentation.

55 *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662.

56 Decision Below, at para. 217.

57 Decision Below, at para. 217.

58 Decision Below, at para. 230.

59 Decision Below, at para. 218.

60 Decision Below, at para. 219.

61 Decision Below, at para. 224.

62 Decision Below, at paras. 226-29.

63 DBDC Spadina Ltd. v. Walton 2018 ONCA 60, 419 D.L.R. (4th) 409 ("Walton"), *per* van Rensburg J.A., in a dissenting opinion adopted by the Supreme Court as its reasons on appeal in Christine DeJong Medicine Professional Corp. v. DBDC Spadina Ltd. 2019 SCC 30, [2019] 2 S.C.R. 530 ("Dejong").

64 Decision Below, at para. 224.

65 In this context, for terminological clarity, I treat the two somewhat distinct spheres of common law and equity as together comprising "common law".

66 Chandos Construction Ltd. v. Deloitte Restructuring Inc., 2020 SCC 25, 449 D.L.R. (4th) 293, at para. 29.

67 Lloyd W. Houlden, Geoffrey B. Morawetz and Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf, (Toronto: Thomson Reuters, 2009), at para. 6-163. See *Bulut v. Brampton (City)*, 48 O.R. (3d) 108 (C.A.), leave to appeal refused, [2000] S.C.C.A. No. 259.

68 *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494.

69 *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, 452 D.L.R. (4th) 44.

70 CWB Maxium Financial Inc v. 2026998 Alberta Ltd2021 ABQB 137Alta. Q.B. , 25 Alta. L.R. (7th) 3, at paras. 41, 58. See also Houlden, Morawetz, and Sarra, at paras. 1-68 and 4-82 for further discussion on good faith in the *BIA* and Ari Y. Sorek and Charlotte Dion, "Good Faith in Insolvency and Restructuring: At the Intersection of Civilian and Common Law Paradigms, at a Fork in the Road or in a Merging Lane?" in Jill Corraini and the Honourable Blair Nixon, eds., *Annual Review of Insolvency Law*, 2020 (Toronto: Thomson Reuters, 2021) 34.

71 *Hutchingame Growth Capital Corporation v. Independent Electricity System Operator*, 2020 ONCA 430, at paras. 41-42 (emphasis added; citations omitted), leave to appeal refused, [2020] S.C.C.A. No. 312.

72 *Chandos* , at paras. 25, 30.

73 *Chandos* , at para. 30.

74 Roderick Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law Inc., 2015), at p. 195.

75 Deloitte & Touche v. Livent Inc. (Receiver of), 2017 SCC 63, [2017] 2 S.C.R. 855, at paras. 100-4.

76 *Livent*, at para. 100 (citations omitted).

77 *Livent*, at para. 104.

78 *Livent*, at para. 102.

79 *Livent*, at para. 103 (citations omitted).

80 *Livent*, at para. 104 (emphasis in original).

81 *Livent*, at para. 104.

82 Decision Below, at para. 229.

83 Decision Below, at paras. 24, 136.

84 Decision Below, at paras. 72-73.

85 Decision Below, at paras. 35, 119 and 157.

86 Decision Below, at para. 138.

87 Decision Below, at para. 106.

88 Decision Below, at para. 97.

89 Decision Below, at para. 106.

90 Decision Below, at para. 284.

91 Houlden, Morawetz, and Sarra, at para. 5-547.

92 Houlden, Morawetz, and Sarra, at para. 5-543, discussing *King Insurance Finance (Wines) Inc. v. 1557359 Ontario Inc. (Willowdale Autobody Inc.)*, 2012 ONSC 4263, 99 C.B.R. (5th) 227.

93 Decision Below, at para. 93.

94 Decision Below, at para. 255.

95 Decision Below, at para. 283.

96 Decision Below, at para. 255.

97 Decision Below, at paras. 269, 278.

98 Decision Below, at paras. 36, 108.

99 Decision Below, at para. 282.

100 Decision Below, at para. 128.

101 Decision Below, at para. 123.

102 Decision Below, at paras. 124-25.

103 Decision Below, at para. 140.

104 Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 38.10(b).

105 Endorsement of Dietrich J., dated September 15, 2020, at para. 18.

106 Decision Below, at para. 196.

107 Decision Below, at paras. 165, 193.

108 Decision Below, at para. 197.

TAB 6

2020 ABQB 204
Alberta Court of Queen's Bench

Accel Canada Holdings Limited, Re

2020 CarswellAlta 558, 2020 ABQB 204, [2020] A.W.L.D. 1913, 318 A.C.W.S. (3d) 538, 79 C.B.R. (6th) 66

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of Accel Canada Holdings Limited and Accel Energy Canada Limited

K.M. Horner J.

Heard: March 5-6, 13, 2020
Judgment: March 13, 2020
Written reasons: March 26, 2020
Docket: Calgary 1901-16581

Counsel: William Roberts, Jonathan Selnes, for Accel Canada Holdings Limited and Accel Energy Canada Limited
Michael Bokhaut, for Accel Canada Holdings Limited and Accel Energy Canada Limited
Chris Simard, Alexis Teasdale, Keely Cameron, for Third Eye Capital Corporation
Paul G. Chiswell, for TransAlta Energy Marketing Corp.
Courtney Kachur, for BP Canada Energy Group ULC
Robyn Gurofsky, Jack Maslen, for PricewaterhouseCoopers Inc.
Sam Gabor, for ICC Credit Holdings Limited
John Sandrelli, for ICC Credit Holdings Limited
Gordon Cameron, Guy Martel, for Stream Asset Financial Winterfresh LP and Stream Asset Financial Sega LP
Gordon Mason, Danny Vue, for Stream Asset Financial Winterfresh LP and Stream Asset Financial Sega LP
Jeffrey Oliver, for B.E.S.T. Active 365 Funds LP, B.E.S.T. Total Return Fund Inc. and Tier One Capital Limited Partnership
David Legeyt, for ARC Resources Ltd.

K.M. Horner J. **(orally):**

I. Background

1 On March 13, 2020 I delivered an Oral Decision on this Application and noted that written Reasons would follow. These are those Reasons.

2 In these proceedings, Accel Canada Holdings Limited and Accel Energy Canada Limited (collectively "Accel" and separately "Holdings" and "Energy") applied on November 22, 2019 to this Court for an Order in proceedings they had commenced under Part III of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] to continue under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*], which was granted. On November 27, 2019, that Order was amended and restated with the Stay granted therein extended to January 31, 2020, and then on January 21, 2020 further extended to March 13, 2020. On March 13, 2020, that Stay was further extended to April 24, 2020.

3 The application before the Court was brought forward by Third Eye Capital Corporation ("TEC") and is opposed by four other parties in these proceedings: Accel; Stream Asset Financial Winterfresh LP and Stream Asset Financial Sega LP (collectively "Stream"); ICC Credit Holdings Limited ("ICC"); and the Monitor.

4 TEC is seeking an Order providing that:

1) TEC has a valid and enforceable claim against Energy for $12,205,838.90 (as of January 27, 2020), plus all applicable interest and costs, pursuant to the September 13, 2019 agreement (the "Term Sheet") executed by TEC, Energy and Regent Equipment Leasing Ltd ("Regent");

2) TEC has a valid and enforceable security interest in all of Energy's assets pursuant to the September 20, 2019 Fixed and Floating Charge Debenture (the "Debenture"), which secures Energy's obligations under the Term Sheet;

3) TEC's security interest ranks in priority to those of all other creditors in the assets of Energy;

4) The Term Sheet be rectified to replace "Regent Holdings LLC" with "Regent Equipment Leasing Ltd"; and

5) The Debenture be rectified to reflect the intent of the parties to provide a fixed and floating charge debenture to secure the obligations under the Term Sheet.

II. Facts

5 TEC is the primary secured lender of Holdings. On September 13, 2019, TEC entered into the Term Sheet with Energy and Regent. Under the Term Sheet, TEC provided Energy with $800,000 at an interest rate of 12% per annum in order to satisfy Accel's emergency payroll obligations. According to Accel, Energy performed payroll functions for both itself and Holdings, such that the $800,000 advance provided payment to employees of both Accel entities.

6 In exchange for the $800,000 payroll advance, the Term Sheet requires Energy to undertake additional obligations as well as provide mandatory payments on or before September 20, 2019 or September 25, 2019, as specified within the Term Sheet. The additional obligations that Energy undertook pursuant to the Term Sheet include:

a) Payment of $4,400,702.65 plus all accrued and unpaid interest, fees or penalties thereon, pursuant to a Reservation of Rights letter dated June 3, 2019 and executed by TEC, several individuals, and several Accel entities including Holdings but not including Energy (the "Standstill Agreement");

b) Payment of $7,350,000 plus all accrued and unpaid interest, fees or penalties thereon, owed by various Accel entities to TEC and other related entities; and

c) An unspecified amount in relation to all other fees, interest, penalties and obligations owing and outstanding under certain agreements as between TEC, Holdings, ACCEL Energy Limited and ACCEL Canada Resources Limited (the "Accel Credit Agreements").

7 The Monitor notes that in these proceedings TEC appears to only be claiming the $4,400,702.65 and $7,350,000 plus the initial $800,000 as secured against Energy and not the amount relating to the Accel Credit Agreements. The Monitor indicates that those other obligations set forth in the Term Sheet appear to refer to an additional $300 million of debt obligations, presumably being the debt addressed by the Standstill Agreement, as discussed below.

8 The Term Sheet also provides for "Regent LLC" to subordinate its security against Energy to that of TEC, regardless of any registration or other priority ranking. "Regent LLC" is also listed as a Guarantor under the Agreement. However, Regent is the party that executed the Term Sheet, there does not appear to be any security held by "Regent LLC" against Energy, and "Regent LLC" is not listed in the Alberta Corporate Registry.

9 TEC and Energy subsequently entered into the Debenture dated September 20, 2019. TEC relies on the Debenture as providing security to TEC against Energy for the obligations arising under the Term Sheet. The Monitor notes that the Debenture fails to define the "Credit Agreement" that it intended to secure, such that the actual effect of the Debenture is arguably unclear. On September 20, 2019, TEC registered a security agreement and land charge against Energy's property.

10 The Standstill Agreement, which is referenced in the Term Sheet, indicates that TEC will defer from exercising its rights and remedies arising from the "ACHL Debt Documents" during the Standstill Period, which ends on September 30, 2019 or upon other specified occurrences. The Standstill Agreement states that the outstanding amount of Holdings' debt owed to TEC under the ACHL Debt Documents is $321,669,513.15.

11 As the Monitor points out, the Standstill Agreement, although signed by several Accel entities, was not signed by Energy, and Energy had no obligations to TEC under the Standstill Agreement until the Term Sheet was executed.

12 The Standstill Agreement also provides that Holdings will "irrevocably authorize and direct its customers, marketers and production settlement payors" to provide TEC with at least $4 million per month from June — September of 2019. Those payments would go toward the debt owing to TEC from Holdings, all of which would become due if those monthly payments were not made to TEC's satisfaction.

13 In accordance with this provision in the Standstill Agreement, Holdings issued certain orders in the form of an irrevocable direction to pay ("IDP") to BP Canada Energy Group ULC ("BP Canada"). While several IDPs were issued by Holdings to BP Canada, of particular relevance in this proceeding is the IDP dated August 2, 2019 (the "August IDP"), in which Holdings stated that:

> You are hereby irrevocably authorized and directed to pay out any net funds owing now, or that may be owing in the future from the ACHL July 2019 production settlement, up to the sums listed below, to ACHL from BP Canada, netting any agreed set-offs and/or other rights and remedies available to BP Canada under any agreement between BP Canada and ACHL or under law, as follows:
>
> 1. All net funds to Third Eye on or before August 29, 2019.
>
> with a balance of zero dollars to be paid to ACHL, and for so doing this shall be your full and irrevocable authority.

14 The funds contemplated by the August IDP were paid to Holdings instead of TEC.

15 After the August IDP payment was provided to Holdings, approximately $8.3 million was diverted from an inter-company Accel bank account to Regent in relation to certain agreements involving Energy, Regent, and Stream (the "Regent/Stream Agreement").

16 The Regent/Stream Agreement functioned to assign Stream's status as Energy's primary secured creditor to Regent. Of relevance to this application is that Stream also received a Gross Overriding Royalty through a series of subsequent transactions, which Stream could cause Regent to purchase back for 90 million dollars by exercising Streams' "Put Option" right. Energy also agreed to guarantee Regent's obligation to the pay the $90 million payment that would be owing from Regent to Stream if the Put Option were exercised.

17 Stream assigned Energy's debt to it to Regent on August 29, 2019, and subsequently exercised its Put Option for $90 million on September 13, 2019.

III. Analysis

18 First, I will address whether TEC has a valid and enforceable claim against Energy that gives rise to a security interest in Energy's assets by virtue of the Term Sheet and Debentures (collectively, the "Agreements").

19 The parties generally advance two arguments in this regard. First, whether the Agreements giving rise to TEC's claim are enforceable in light of alleged ambiguity, the circumstances of the transaction, and certain drafting deficiencies. TEC's requests for rectification of the Agreements also relate to certain of the drafting issues in the Agreements. Second, whether the Agreements are voidable as a reviewable transaction under the *BIA*, RSC 1985, c B-3.

20 The disputes concerning the enforceability of the Agreements as well as rectification would be rendered moot if the transaction is voided under the *BIA*. Therefore, and given the time sensitive nature of these proceedings, I will first address whether the Agreements constitute a reviewable transaction, assuming that they are enforceable as against Energy and Regent and that the Debenture was intended to secure the Term Sheet.

21 The Monitor urges this court to set aside the Agreements, whether as a reviewable transaction under the *BIA* or through an exercise of this Court's discretion to determine the amount of a secured claim under section 20(1)(b) of the *CCAA*. The Monitor further urges this court to consider the *CCAA's* underlying objectives. The Monitor also notes the recent imposition of a duty of good faith under section 18.6 of the *CCAA*, which came into force on November 1, 2019, although that provision has yet to be judicially interpreted. Section 18.6 provides that:

> **Good faith**
>
> **18.6 (1)** Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> **Good faith - powers of court**
>
> **(2)** If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

22 The Supreme Court of Canada discussed the nature of a Court's discretion under the *CCAA* in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) [hereinafter Century Services]. The Supreme Court discussed potential limits to a court's authority in *CCAA* proceedings, especially considering the contrast between *CCAA* sections that provide for specific orders and section 11 of the *CCAA*, which states that:

> Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

23 The Supreme Court stated that the general language within the *CCAA* should not be restricted by the availability of more specific orders, although a court must bear in mind the requirements of appropriateness, good faith, and due diligence when exercising its authority under the *CCAA*: *Century Services* at para 70. *CCAA* decisions are often exercised through the court's judicial discretion with the purpose of furthering the *CCAA*'s purposes: *Century Services* at paras 58 — 59. The *CCAA* provides for maintaining the *status quo* of an organization while attempts are made to ensure a reorganization that is fair to all stakeholders: *Century Services* at para 77. Finally, it should be noted that "because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful": *Century Services* at para 23.

24 Although the Monitor suggests that it is not necessary to rely directly on the *BIA* reviewable transaction provisions in order to exercise my discretion, the Supreme Court in *Century Services* at para 65 notes that it is most appropriate for a court to first consider the specific statutory provisions and powers of the *CCAA* before turning to any equitable or inherent jurisdiction of the court.

25 Accordingly, I will consider whether the Agreements are reviewable under either section 95 or 96 of the *BIA* before deciding whether to exercise my discretion under the *CCAA*.

26 Each of the Monitor, Stream, ICC, and Accel agree that the Agreements should be declared void as an improper preference under section 95 of the *BIA* or as a transfer at undervalue under section 96 of the *BIA*. TEC disputes that the evidence before the Courts meets of the requirements of either section.

27 Section 36.1(1) of the *CCAA* incorporates sections 95 and 96 of the *BIA* into compromises or arrangements under the *CCAA*.

28 Section 36.1(2) further clarifies that:

> **(2)** For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*
>
> (a) to "date of the bankruptcy" is to be read as a reference to "day on which proceedings commence under this Act";
>
> (b) to "trustee" is to be read as a reference to "monitor"; and
>
> (c) to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor company".

29 I will therefore consider whether the Agreements constitute a reviewable transaction under the *BIA*, keeping in mind the underlying objectives of insolvency legislation and proceedings.

Did the transaction constitute a preference?

30 Section 95 of the *BIA* states that

> **95 (1)** A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person
>
> > **(a)** in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and . . .

31 The parties agree that the transaction occurred within the period prescribed in section 95 of the *BIA*; Energy was insolvent at the date of the transaction; and TEC was dealing with Energy and Regent at arm's length.

32 TEC disputes that Energy intended to prefer, or that the transaction had the effect of preferring, one creditor over another as required under section 95 of the *BIA*. Specifically, TEC argues that the Agreements have no preferential effect on the basis that TEC's initial interest was in the form of a trust, by virtue of the August IDP, such that taking the security interest actually weakened TEC's priority as a creditor.

33 I must therefore determine whether the August IDP constitute a trust in order to determine whether the transaction had the effect of preferring one creditor over another.

Is the August IDP a trust?

34 TEC states that the August IDP makes it clear that BP Canada was to pay certain amounts owing to Holdings directly to TEC, and that the nature of the arrangement constitutes a trust in favour of TEC. TEC argues that an IDP is a class trust and that Energy intended to create a trust in the circumstances. TEC also refers to statements by Holdings that indicate that funds removed from the Accel inter-company account would be "replenished" as evidence of "trust language". Those statements were made after the inter-company payment was made to Regent, allegedly in part by funds provided to Holdings in violation of the August IDP.

35 ICC and Stream each refute this argument and submit that the IDP simply created a commercial agreement for funds to be paid from BP Canada directly to TEC, instead of to Holdings.

36 TEC relies on *Van Melle v. Muir*, [2000] O.J. No. 5717 (Ont. S.C.J.) for the statement that than an IDP is a classic trust document: at paras 34 — 35.

37 *Van Melle* states at para 34 that:

> An irrevocable direction for a valuable consideration requiring that funds shall be applied to the debt owing to a creditor, creates a beneficial property interest in favour of the creditor. Such a direction, followed by receipt of the funds, on closing, makes a solicitor liable for failure to honour the equitable assignment, provided there is consideration for the direction: [citations omitted].

38 Stream notes that *Van Melle* relates to a solicitor-client relationship, and that subsequent case law referring to *Van Melle* always occurs under the same circumstances of a solicitor-client relationship. Stream argues that the nature of that relationship distinguishes *Van Melle* from the present circumstances because of the fiduciary nature of the solicitor-client relationship: *Allan Realty of Guelph Ltd., Re* (1979), 24 O.R. (2d) 21, 97 D.L.R. (3d) 95 (Ont. Bktcy.), pp 19-20.

39 *Van Melle* has been relied upon in three subsequent cases. In both *Lucas v. Puthon*, 2013 ONSC 2799 (Ont. S.C.J.) and *Bilek v. Salter Estate*, [2009] O.J. No. 4454, 181 A.C.W.S. (3d) 1032 (Ont. S.C.J.), the circumstances again involved solicitor-client relationships, where the funds arose from an estate or property interest and were directed to be paid to the solicitors. Further, the IDPs in both *Lucas* and *Bilek* refer to the funds being "in trust", unlike the present circumstances. In *Thomas Gold Pettinghill LLP v. Ani-Wall Concrete Forming Inc.*, 2012 ONSC 2182 (Ont. S.C.J.), a lawyer, based on an agreement to transfer a file to that lawyer from a previous lawyer, gave a personal undertaking to the previous lawyer that he would pay the previous lawyer's unpaid account. There was no IDP in this case, and no instructions given by the client in that respect. The Court noted at para 69 that:

> 69 Under the law of equitable assignments, if a debtor, to repay a debt, gives his or her creditor an order upon a person who holds a specific fund for the debtor that the fund be used to repay the debt, there is an equitable assignment of the fund. There must be both an agreement to pay out of a specific fund and the intent to create a property interest in that fund: *Burn v. Carvalho* (1839), 4 My. & C. 690 (Eng. Ch. Div.); *Rodick v. Gandell* (1852), 1 De G.M. & G. 763 (Eng. L.C.); *Carey v. Palmer*, [1926] A.C. 703 (Australia P.C.); *Family Trust Corp. v. Morra* (1987), 60 O.R. (2d) 30 (Ont. Div. Ct.); *Rawlings, Sumner, Tilson Electric Ltd. v. Commercial Courts of London Ltd.* (1980), 32 O.R. (2d) 377 (Ont. H.C.); *Bilek v. Salter Estate*, [2009] O.J. No. 4454 (Ont. S.C.J.).

40 Considering the distinguishable relationship central to the circumstances in *Van Melle* and the fact that *Van Melle* is not binding on this court, I agree with Stream and ICC that an IDP does not necessarily create a trust agreement. Therefore, it is necessary to consider the circumstances of this particular IDP and the relevant requirements to establish a trust so as to determine whether a trust arose in these circumstances.

41 In order for a trust to exist, three elements must be present: (1) certainty of intent; (2) certainty of subject matter; and (3) certainty of object: *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787 (S.C.C.) at para 23; *Okanagan Equestrian Society v. North Okanagan (Regional District)*, 2018 BCSC 800 (B.C. S.C.) at para 192. In order to find certainty of intention, there must be an imperative obligation to hold property on trust for the benefit of another: *BA Energy Inc., Re*, 2009 ABQB 647 (Alta. Q.B.) at para 14.

42 For the reasons described below, I decline to find that a trust exists in these circumstances because there was no certainty of intention to create a trust. I rely on three significant reasons to support my decision that the August IDP did not constitute a trust.

43 First, there was no certainty of intention to create a trust in the language of either the August IDP itself or the Standstill Agreement, which outlined Holdings' agreement to issue the August IDP.

44 Stream relies on *Luscar Ltd. v. Pembina Resources Ltd.*, 1994 ABCA 356 (Alta. C.A.), leave to appeal to SCC refused 24496 (17 April 1995) [[1995] 3 S.C.R. vii (S.C.C.)] to show that the August IDP did not create a trust. In *Luscar* at para 112, the Court of Appeal noted that, while the words "in trust" or "on trust" are not essential requirements to create a trust, the sophisticated nature of the parties in that case, being oil and gas corporations, should have rendered them aware of the onerous duties of a trustee such that they would have clearly stated if they wanted to impose those obligations. In addition, the fact that the parties used the term "shall be held in trust" in a separate part of the agreement indicated an intention not to create a trust in the provision at issue, where trust language was not used. Specifically, the Court of Appeal stated at paras 111 — 112 that:

111 D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984), at p. 107 indicated that the language must be imperative:

> For a trust to come into existence, it must have three essential characteristics . . . first, the language of the alleged settlor must be imperative ... This means that the alleged settlor, whether he is giving the property on the terms of a trust or is transferring property on trust in exchange for consideration, must employ language which clearly shows his intention that the recipient should hold on trust.

112 In this case the parties were informed and capable of fully setting out their intended rights and duties in an agreement. The AMI Clause contained none of the usual indicia of trust. While the words "in trust" or "on trust" are not an iron-clad requirement to finding the existence of a trust, one would have expected them here, and their absence is telling. Their use in cl. 24(g) indicates that the parties understood the use of the trust relationship and employed trust wording when desired. There, it is stated that on the assignment of an interest, it "shall be held in trust" until the obtaining of necessary consents where required. It is anomalous that the parties did not use similar language in regard to cl. 18, if a trust was intended. There are many authorities which refer to the onerous duties that trustees bear, and a party should not be saddled with trust obligations where that intention is not clearly expressed. As sophisticated parties, they would have been aware of a trustee's onerous duties, and if they intended to impose those obligations, they would have so stated. [emphasis added].

45 While not a determinative factor, there is no language to indicate that the parties intended to create a trust. Neither the language in the Standstill Agreement nor the August IDP express an intention to create a trust relationship, whether explicitly or implicitly. Holdings simply directed BP Canada to provide funds directly to TEC, without any imposition of specific duties or creating a requirement to hold funds for TEC's benefit. These are sophisticated parties capable of rendering a clear agreement to hold funds in trust, yet there is was no indication of any intention to create a relationship beyond the simple payment arrangement contemplated in the Standstill Agreement and August IDP.

46 Second, I find the circumstances that surround the creation of the August IDP do not indicate an intention to create a trust.

47 Accel relies on *Alberta Treasury Branches v. Samco Holdings Ltd.*, 2003 ABQB 963 (Alta. Q.B.) for the premise that a simple direction to pay does not create a trust with the object of the trust being the proceeds. Accel says that the August IDP functions to direct that Holdings' production proceeds be paid to TEC rather than directly to Holdings, but does not indicate that those funds belong to TEC upon execution of the document.

48 In *Samco* at paras 46, 49 — 53, the Court found that a simple direction to pay, albeit not necessarily in the precise form of an IDP, did not constitute a trust agreement. The Court at paras 51 — 53 provided some guidance on arrangements to pay proceeds from one party to another:

> 51 Suppose, for example, the direction was to pay ATB's mortgage on the property (which was in fact the case for part of the proceeds but not this part) and the mortgage was to be discharged before ATB actually received payment. It would be important that the proceeds be held for ATB's benefit in those circumstances as its security would disappear before it had actually received payment.
>
> 52 That approach is sometimes used in commercial transactions. In such circumstances, the protection given the creditor for giving up its security before it has received payment is the acknowledgment from the debtor that the funds to be received will on receipt be held in trust for the benefit of the creditor. Property held by a bankrupt for the benefit of another under a trust is not divisible among bankruptcy creditors. See s. 67(1)(a) of the *BIA*.
>
> 53 That kind of arrangement was not put in place in this case. The parties, through their Counsel, simply agreed that the proceeds held by Mr. Sparling would be paid to ATB rather than the Slezaks.

49 The nature of the arrangement by the parties in this case similarly does not indicate an intention to create a trust in order to secure payment owed to TEC. The arrangement did not arise in order to provide security to TEC in lieu of giving up security

directly against Holdings. Rather, TEC simply agreed not to enforce any debt owed to it by Holdings as long as it received regular payments as effected by Holdings' promise to provide an IDP to its "customers, marketers and production settlement payors", which lead to the August IDP.

50 The Standstill Agreement specifically contemplates that payment might not be made, or might not be made to TEC's satisfaction, despite the IDPs, in which case TEC would be entitled to enforce its rights to the funds directly against Holdings. Any payments that were made to TEC by BP Canada would be applied against the debt owed by Holdings to TEC, and any payments that weren't made would be enforceable against Holdings. The fact that the Standstill Agreement contemplates that the IDPs might not be paid, and directs enforcement rights against Holdings, rather than BP, is not akin to a trust relationship: *Van Melle* at para 36. If the August IDP constituted a trust arrangement and BP Canada failed to pay TEC, then TEC would gain the unfair advantage of having recourse against both BP Canada as trustee and Holdings as debtor for the same funds.

51 For these reasons, both the Standstill Agreement and August IDP clearly underscore that there was not an intention to hold BP Canada responsible to hold and provide funds in the form of a trust to TEC.

52 Finally, in addition to a lack of clear language or evidence in the circumstances of an intention to create a trust arrangement, there is no indication that BP Canada was acting, or intended to act, in the role of a trustee.

53 In *Van Melle*, the Court noted that if "an individual takes dominion and control of the trust property, *and knows of the trust relationship*, and acts inconsistently with the trust terms, he will be liable to the beneficiary of the trust" [emphasis added]: at para 35. The importance of clearly establishing a trust arrangement, rather than a simple relationship of agency is further explained in Donovan WM Water, Mark R Gillen & Lionel D Smith, ed, *Waters' Law of Trusts in Canada*, 4th ed (Toronto, Ontario: Thomson Reuters Canada, 2012), ch 3 at s 3.III:

> However, it is essential if the agent is to be an express trustee, or to be made by law a constructive trustee, that there be property which the agent was required to keep separate from his own assets. If the agent, who is collecting moneys from third parties for the principal, or is required to pay over the principal's money to a third party, is to be considered a trustee of any kind, it strengthens the case if it is shown the agent was required, contractually or otherwise, to keep those moneys identifiable from other assets. Otherwise, the agent may be a debtor only.

54 The present circumstances do not indicate that BP Canada knew it was in the position of a trustee or that the parties directed it to act as a trustee. Rather, the August IDP was the creature of an arrangement, by way of the Standstill Agreement, that did not involve BP Canada. BP Canada simply received a direction to pay to TEC the funds that it would otherwise pay directly to Holdings. There is no evidence at all from BP Canada of an intention to take on the arguably onerous duties of a trustee; BP Canada was not a signatory of the Standstill Agreement or the August IDP and is not a party in this application. It is not clear that BP Canada took on the role of a trustee or intended to act as a trustee.

55 Overall, there was no indication that the parties intended to create a trust relationship. Rather, the August IDP created a simple commercial agreement. Considering the circumstances of this case and the necessary requirements to create a trust, I decline to find that a trust exists in these circumstances.

Were the Agreements entered into in order for Energy to continue in business?

56 Given my finding that the August IDP did not create a trust, TEC's submission that there was no preference because TEC actually weakened its interest against Accel no longer applies. Rather, the effect of the transaction is that it gave TEC a security interest in preference to other creditors, as explicitly stated in the Term Sheet. The Term Sheet states that Energy shall provide TEC with a "[p]erfected first priority security interest in all assets of the Borrower including all tangible and intangible assets now owned or hereafter acquired".

57 Since I have found that the transaction resulted in a preference, section 95(2) of the *BIA* applies.

58 Section 95(2) states that if a transaction within the meaning of section 95(1)(a) has the effect of giving the creditor a preference, it is presumed to have been done with a view to giving the creditor that preference, absent any evidence to the contrary.

59 The onus is on the creditor to prove on a balance of probabilities that the dominant intention of the debtor was not to prefer the creditor. It is the intention of the insolvent debtor which governs, and not the motivation of the creditor: *Orion Industries Ltd. (Trustee of) v. Neil's General Contracting Ltd.*, 2013 ABCA 330 (Alta. C.A.) at para 10. The dominant intent of the debtor is an objective test: *St. Anne-Nackawic Pulp Co. (Trustee of) v. Logistec Stevedoring (Atlantic) Inc.*, 2005 NBCA 55 (N.B. C.A.) at para 6.

60 TEC submits that any presumption of an intent to prefer is rebutted because the transaction was entered into with the *bona fide* expectation that it would enable the debtor to continue in business.

61 In order to show that a payment would help the debtor continue in business, there must be evidence to show that "the payment is tied to the continuation of the business or a reasonably held hope or expectation of continuance": *Principal Group Ltd. (Trustee of) v. Anderson* (1994), 164 A.R. 81 (Alta. Q.B.) at paras 55, (1994), 29 C.B.R. (3d) 216 (Alta. Q.B.), aff'd on other grounds (1997), 200 A.R. 169, [1997] A.J. No. 500 (Alta. C.A.). When that test is applied to the facts of this case, the question is whether Energy reasonably held a belief that the security it granted to TEC in exchange for the payroll funding would allow Energy to continue in business.

62 Accel states that it was experiencing "extreme financial difficulties" throughout 2019. By March 1, 2019, Holdings had informed TEC that it was unable to make the required payments to TEC as they became due under the relevant credit agreements between the parties. Subsequently, and with the representation by Holdings that it was working on refinancing its debt, TEC entered into the Standstill Agreement with Holdings. In July of 2019, TEC was advised that both Holdings and Energy needed funding because they were both faced with lawsuits from vendors.

63 While Accel states that it hoped to improve its financial circumstances through the Regent/Stream Agreement, Accel's financial circumstances continued to deteriorate to the point that on September 11, 2019, Accel could not meet its payroll obligations, which were due two days later on September 13, 2019. Accel states that failure to meet its payroll obligations would risk losing employees and thereby lead to a high probability of Accel assets being left untended, resulting in a risk of theft, liability, and potential environmental issues.

64 On October 21, 2019, Accel filed its Notice of Intention.

65 The Monitor suggests that the parties could not have reasonably believed that a Payroll Advance of only $800,000 would preserve Energy's business beyond that single payroll period and points out that Energy's financial circumstances were dire, such that it filed a Notice of Intention just one month after the Agreements were executed.

66 I must consider whether Energy's dominant intent was to enter into the transaction for the purpose of continuing in business. There are several key features that I consider significant in the circumstances.

67 At the time that Energy entered into the Agreements, it had been experiencing significant financial difficulties for an extended period of time. Despite attempts to pursue alternate financing and remain afloat, Energy was aware of its precarious financial circumstances, including potential lawsuits against Accel, Accel's failure to meet its obligations as they became due, including those owing to TEC, and the likely inevitability of a restructuring. It is also telling that Energy filed its Notice of Intention within approximately one month of entering into the Agreements.

68 Despite all that knowledge, Energy effectively took on more than $12 million of secured debt in exchange for the relatively minimal amount of $800,000, which would only provide funding for one additional pay period to Accel. Further, in between execution of the Term Sheet and the Debenture, Stream exercised its Put Option, thereby triggering Regent's obligation to pay $90 million to Stream as well as Energy's guarantee to Stream for that obligation. Even considering TEC's assertion that it was

told by Accel that the $800,000 would be enough to keep them afloat because of a possible future cash injection, the significant and ongoing "dire financial circumstances" of Energy does not support a finding that the Energy could have reasonably believed the transaction would have allowed it to continue in business.

69 Considering all of the foregoing, I find that TEC has failed to rebut the presumption of an intention to prefer a creditor under section 95(1) of the *BIA*. In this case, I find that the dominant intent of Energy in creating the preference was to provide immediate funding to its employees, likely to protect its assets in the short term from the harm that would likely result if funds were not provided, and not for the purpose of continuing on business.

70 Accordingly, I find that the Agreements created a preference of TEC over other creditors and are therefore voidable under section 95(1) of the *BIA*.

IV. Is it a transfer at undervalue?

71 Although my finding that the transaction created a preference is sufficient to find the Agreements void as requested by the Monitor, Stream, ICC and Accel, I will nonetheless also consider whether the transaction constituted a transfer at undervalue.

72 A transfer at undervalue is defined in section 2 of the *BIA* as a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor.

73 Section 96(1)(a) of the *BIA* allows a court to declare a transfer at undervalue void if:

> (a) the party was dealing at arm's length with the debtor and
>
> > (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,
> >
> > (ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and
> >
> > (iii) the debtor intended to defraud, defeat or delay a creditor; . . .

74 TEC submits that the only relevant factors in these circumstances are whether the debtor intended to defraud, defeat, or delay a creditor and whether Energy received sufficient consideration.

75 TEC relies on the same arguments as addressed with the analysis of section 95 of the *BIA* to show that Energy did not intend to defraud, defeat, or delay a creditor. As I have already discussed, the transaction clearly caused a preference, and the circumstances as a whole show an objective intention by Energy to defeat or delay a creditor, particularly because Energy agreed to provide a new, first priority security interest to TEC to the detriment of other creditors while Energy was insolvent.

76 The Monitor further submits that proof of an intention under section 96(1)(a)(iii) of the *BIA* is usually based on circumstantial evidence and is established through "badges of fraud", citing *Rehman, Re*, 2015 ONSC 188 (Ont. S.C.J. [Commercial List]) at para 52. I would note that the use of badges of fraud to show intent is generally relevant to conveyances under provincial fraudulent conveyance legislation or the *Statute of Fraudulent Conveyances*, 1571, 12 Eliz 1, c 5 ["*Statute of Elizabeth*"], although it has also been accepted as one means of showing intent under section 96 of the *BIA* in Ontario case law: *Urbancorp Toronto Management Inc. (Re)*, 2019 ONCA 757 (Ont. C.A.) at para 52. While I have already found an objective intent within section 96(1)(a)(iii) in the circumstances, I would nonetheless further agree with the Monitor that certain badges of fraud do appear to be evident in this case. For example, in the present circumstances, the consideration was grossly inadequate as discussed below, the transfer was accomplished quickly, and the transfer was of a general nature such that it included virtually all assets of the transferor: *Builders' Floor Centre Ltd. v. Thiessen*, 2013 ABQB 23 (Alta. Q.B.) at para 43.

77 Accordingly, I find that Energy intended to defeat or delay a creditor within the meaning of section 96(1)(a)(iii) of the *BIA*.

78 In order to fall within the meaning of a transfer at undervalue, it is also necessary to determine whether there was adequate consideration in the circumstances.

79 The Monitor, Stream, Accel, and ICC all submit that there was not adequate consideration advanced by TEC in these circumstances.

80 TEC argues that there was adequate consideration in this case and that it is permissible for consideration to be for the benefit of a third party, such as Regent. TEC submits that its consideration was more than adequate, especially considering the increased risk to TEC in advancing the funds despite Holdings' past defaults and given TEC's willingness to accept a lower priority security interest rather than enforce the alleged misappropriation of trust funds held by Holdings for TEC. Specifically, TEC states that it provided adequate consideration through the following means:

a) TEC did not take action directly against Energy and Regent to recover misappropriated trust property that was taken from Holdings;

b) TEC did not take action to enforce Energy and Regent's promises to replenish the diverted trust funds at the direct request of Accel;

c) Energy received $800,000 on an emergency basis, without which TEC says would have caused Energy's entire business to fail; and

d) TEC did not take action to enforce Holdings' defaults under the Standstill Agreement, including failure to pay TEC $4 million in August 2019 and the diversion of trust funds to Energy in August 2019.

81 This Court recently discussed how a court should determine whether a transaction under section 96 of the *BIA* is "conspicuously less than fair market value" in *Hofer (Re)*, 2019 ABQB 405 (Alta. Q.B.) at para 31. Justice Woolley noted that the Court must identify the fair market value and whether the consideration that was paid falls conspicuously below that value based on the evidence before it, yet noted that "weighing the adequacy of consideration is not an exercise in precision but one of judgement": *Hofer* at para 31, citing *Montor Business Corp. (Trustee of) v. Goldfinger*, 2016 ONCA 406 (Ont. C.A.) at para 53.

82 Weighing the adequacy of the considerations in the present circumstances leads me to find that this transaction was undertaken for consideration "conspicuously less than market value". I reach this determination by considering the transaction as a whole, and in particular on the basis that:

a) There is an obvious and significant disparity between the $800,000 advance by TEC in exchange for more than $12 million of security provided against all the assets of Energy, not to mention the potential additional obligations possibly in an amount of over $300 million as described in the Term Sheet, and especially considering that Energy did not previously owe any security obligations to TEC;

b) TEC did not provide consideration to Energy by refraining from enforcing its rights under the Standstill Agreement. The Agreements do not reference any agreement by TEC to forbear from enforcing rights under the Standstill Agreement.

Further, Energy was not a party to the Standstill Agreement. To that end, Stream submits that Energy and Holdings, while related companies, are separate corporations with separate operations, structures, lenders, and assets, such that any forbearance is not to the benefit of Energy at all. While the present proceedings do not involve a full assessment as to the interrelatedness of Energy and Holdings, I would note that TEC itself treated Energy and Holdings as at least distinct enough entities to initially operate only as the senior secured lender of Holdings and then to warrant seeking separate security from Energy.

In any event, TEC had already agreed, by virtue of the Standstill Agreement itself, to forbear from asserting any rights against Holdings until September 30, 2019, such that consideration was not provided in that respect; and

c) As previously discussed, TEC was not in a trust relationship with Holdings such that it had a right to take action against Energy to recover trust funds that TEC alleges were misappropriated by Holdings, a portion of which was then transferred to Energy, and then used by Energy. Since there was no trust, and accordingly no ability to trace those funds as advanced by TEC, TEC did not have any right against Energy in that respect and therefore could not provide consideration through forbearance.

83 Overall, it is clear that this was a transfer at undervalue that was intended to prefer TEC over the interests of other creditors while Energy was insolvent. For these reasons, I conclude that the transaction contemplated by the Agreements constituted a transfer at undervalue within the meaning of section 96 of the *BIA*.

What is the appropriate remedy in the circumstances?

84 The transaction arising from the Agreements is therefore a voidable transaction under either section 95 or section 96 of the *BIA*.

85 Section 95(1)(a) of the *BIA* provides that a payment determined to be a preference is void as against the trustee. Section 96(1) states that a court "may" declare a transfer at undervalue as void against the trustee or "order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor".

86 In arguments provided to this Court with respect to a subsequent application in these proceedings, the parties disagree as to whether this Court has ability to void a transaction other than as of the date of judgment.

87 The Alberta Court of Appeal stated in *Principal Group* at para 11:

> 11 The *Act* does more than forbid preferences and allow a suit to recover them. It makes such payments fraudulent and void: s. 95(1). If they are void, then no property passed, and the payees are in possession of some of the bankrupt's property. The duty of the trustee to collect the property of the bankrupt is elementary.

88 The Saskatchewan Court of Queen's Bench recently elaborated on that statement of the law. In *HXP Debenture Trust v. Guillaume*, 2015 SKQB 225 (Sask. Q.B.), the Court states at para 16 that:

> It is clear that the law is not as one dimensional as the quote from Principal Group might suggest. It is well established a transaction that is found to be a fraudulent preference is "voidable", and not "void ab initio" (See *Bernard Motors Ltd., Re*, [1960] S.C.R. 385 (S.C.C.)). Further, s. 3 of *The Queen's Bench Act*, 1998, SS 1998, c Q-1.01 confirms that this Court is a superior court of record. As such, it has the inherent jurisdiction to craft a remedy that does justice between the parties. As Baynton J. noted in *PCL Industrial Constructors Inc. v. CLR Construction Labour Relations Assn. of Saskatchewan Inc*. (1999), 178 Sask. R. 161 (Sask. Q.B.):
>
> > **86** The inherent jurisdiction of this court includes the jurisdiction to provide an injured party with an effective and appropriate remedy. In situations in which no specific remedy is provided by the statute law, the court is required to be innovative and craft a remedy that appropriately redresses the plaintiff for the wrong that has been suffered. Obviously such a remedy must not contravene any lawful statutory provision.

89 Although *HXP* involved a transfer of real and personal property, rather than a security interest, the comments of the Court are useful in determining the appropriate remedy to grant under section 95 of the *BIA*. *HXP* indicates that a preference is not *necessarily* void *ab initio*, but rather is voidable: at para 16. Further, any remedy must be crafted in light of the overarching objectives of the *BIA* and with consideration to the discretion of the court: *HXP* at para 16.

90 As discussed above, I must also keep in mind the objectives underlying the *CCAA*, including appropriateness, good faith, and maintaining the *status quo* in order to be fair to all stakeholders: *Century Services* at paras 70, 77.

91 Of note, the $800,000 payroll advance that initiated this transaction has already been repaid within these proceedings, presumably to the satisfaction of the Monitor, who directed the repayment, and to any stakeholders, as there are none seeking to overturn that payment at this time.

92 In reaching my decision as to an appropriate remedy, I have considered the relevant statutory provisions, objectives, and the present circumstances. Accordingly, given my findings that the transactions should be set aside and in light of the aforementioned considerations, I order that the Agreements be set aside as void as of the date that repayment was made by Energy to TEC of the $800,000 loan, that being November 22, 2019. The Term Sheet and Debenture are set aside, with the result that TEC does not have a valid and enforceable claim against Energy arising from the Agreements.

93 I find that I am able to exercise my authority to provide that remedy under section 95 of the *BIA*, or alternatively as a means of providing for repayment to the estate under section 96 of the *BIA*, and further as an exercise of my discretion to provide a fit and appropriate remedy in light of the provisions and objectives of the *CCAA*.

Is the subordination valid?

94 TEC argued in oral submissions that it is open to this Court to find the subordination agreement valid even if the transactions are found to be void. TEC relies on section 96 of the *BIA*, which provides a court with discretion in determining the remedy to address a transfer at undervalue. TEC suggests that, for example, I could find the trust claim valid such that TEC's forbearance from enforcing such a claim could remain as valid consideration, even if declaring other aspects of the transaction void. In that case, TEC suggests, the subordination agreement would remain in place.

95 Based on my determination that TEC does not have a valid and enforceable claim against Energy, and in light of the fact that TEC did not have a trust interest arising out of the August IDP, there are no remaining Agreements or interests against which TEC could seek to subordinate the interests of either Regent or Stream.

Conclusion

96 As previously stated, the further relief sought by TEC in this application need not be addressed given my finding with respect to the provisions of the *BIA* and *CCAA*.

97 TEC's application is denied. TEC does not have a valid and enforceable claim against Energy with respect to the Agreements. The transaction is void as of the date of re-payment of the $800,000 from Energy to TEC, and no outstanding interests of TEC against Energy that otherwise would have arisen out of the Agreements remain.

98 Should the parties wish to address costs of these applications, their respective right to do so is reserved.

Application dismissed.

TAB 7

2019 ABQB 405
Alberta Court of Queen's Bench

Hofer (Re)

2019 CarswellAlta 1102, 2019 ABQB 405, [2019] A.W.L.D. 2277,
2 Alta. L.R. (7th) 139, 306 A.C.W.S. (3d) 237, 70 C.B.R. (6th) 243

In the Matter of the Bankruptcy of Randall James Hofer

HSBC Bank Canada (Applicant) and 1768192 Alberta Ltd (Respondent)

A.C. Woolley J.

Heard: May 16-17, 2019
Judgment: June 4, 2019
Docket: Calgary BK01 094484

Counsel: Russell N. Avery, for Applicant
Frank H. Monaghan, for Respondent

***A.C. Woolley J.*:**

Introduction

1 On March 3, 2014 Randall Hofer filed a Notice of Intention to Make a Proposal pursuant to s. 50.4(1) of the Bankruptcy and Insolvency Act, RSC 1985 c B–3 (“BIA”). On May 29, 2014 he issued a Notice of Proposal to Creditors pursuant to s. 51 of the BIA. On June 11, 2014 the creditors rejected the Proposal and Mr. Hofer became a bankrupt by operation of law.

2 This application by HSBC Bank Canada deals with a discrete issue in relation to that bankruptcy: was Mr. Hofer's December 18, 2013 transfer of his 100 Class "A" Common Shares in 965431 Alberta Ltd. ("965431"; "965431 Common Shares") to 1768192 Alberta Ltd. ("1768192") a transfer at undervalue contrary to s. 96(1)(b) of the BIA? 1768192 is a company controlled by Mr. Hofer's parents-in-law, Tom and Donna Trenerry.

3 HSBC's entitlement to any funds arising from an award under s. 96(1)(b) arises from an order of this Court dated November 7, 2014, which permitted it to bring this application pursuant to s. 38 of the BIA. That order provided that HSBC (and any other creditor that joined it) would both bear the cost of the application and receive any funds that resulted from it.

4 In support of its application HSBC claims that: the transfer of the 965431 Common Shares occurred within one year of the initial bankruptcy event; the transfer was not at arm's length; and, the $23,000.00 paid by 1761892 was "conspicuously less than the fair market value" of the 965431 Common Shares: BIA, s. 2. As such, HSBC submits, the transfer was a transfer at undervalue contrary to s. 96(1)(b), and 1768192 must pay to HSBC the difference between $23,000.00 and the fair market value of the 965431 Common Shares.

5 1768192 resists HSBC's claim. 1768192 claims that: the transaction was not a transfer at undervalue when assessed against the fair market value of the 965431 Common Shares; the parties ought to be treated as at arm's length; and that, even if the transfer was at less than fair market value and between related persons, in the totality of the circumstances the transfer was nonetheless not a transfer at undervalue.

6 I grant HSBC's application. I find that 1768192 and 965431 were not dealing at arm's length and that this transaction occurred within one year of the initial bankruptcy event. I further find that the fair market value of the 965431 Common Shares

as of December 17, 2013 was $129,907.00 and that the purchase price of $23,000.00 was conspicuously less than that fair market value. As a result, I find that this was a transfer at undervalue for the purposes of s. 96(1)(b) of the BIA and HSBC is entitled to judgment in the amount of $106,907.00 plus interest calculated pursuant to the Judgment Interest Act, RSA 2000, c J–1, from December 18, 2013.

Issues

7 The issues raised by HSBC's application are:

(a) Was the transfer of the 965431 Common Shares to 1768192 a transfer between parties not dealing at arm's length within one year of the date of the initial bankruptcy?

(b) Was the transfer of the 965431 Common Shares to 1768192 a transfer at undervalue?

Background Facts

8 965431 was incorporated in Alberta on December 17, 2001. At incorporation all of the shares in 965431 were held by Mr. Hofer. As of December 2013, Mr. Hofer held 2264 Class "E" Preferred Shares and 100 Class "A" Common Shares.

9 965431 owns two parcels of land and buildings in Red Deer County. In 2013 it rented the buildings to another business owned and operated by Mr. Hofer, Silverado Oilfield Ventures Ltd. ("Silverado").

10 At that time, both 965431 and Silverado were indebted to a number of parties, including HSBC. Further, Mr. Hofer had given guarantees in relation to Silverado's indebtedness. Both companies also had significant financial challenges. 965431 had not paid its mortgage, and HSBC had issued a demand for payment. 965431 was not insolvent, but its loan was in arrears. Silverado's financial difficulties were more acute. On November 13, 2013 HSBC filed a Statement of Claim against both Silverado and Mr. Hofer; it sought $1,511,517.01 from Silverado and $511,106.29 from Mr. Hofer. Other creditors also brought claims against Silverado and Mr. Hofer in the fall of 2013.

11 Silverado's financial circumstances at that time were complicated by a serious dispute between it and its former bookkeeper, Shelley Davidson. Silverado alleged that Ms. Davidson had defrauded the company of $1,500,000.00; Ms. Davidson denied the allegation and claimed that Silverado had improperly withheld salary, commissions and work expenses in addition to committing other legal wrongs: *Silverado Oilfield Ventures Ltd. v. Davidson*, 2014 ABQB 218 (Alta. Q.B.) at para 3; *1773907 Alberta Ltd. v. Davidson*, 2015 ABCA 150 (Alta. C.A.).

12 On October 17, 2013 Deloitte Restructuring Inc. was appointed as Receiver over Silverado pursuant to a General Security Agreement executed by Silverado in favour of HSBC. On November 19, 2013, the Receiver accepted an offer for the purchase of Silverado's assets for $675,000.00 from 1773907 Alberta Ltd., a company incorporated on October 25, 2013 and the sole directors and shareholders of which were Mr. and Ms. Trenerry. On December 4, 2013 Justice Eidsvik approved 1773907's offer to purchase Silverado's assets.

13 1773907 now operates as Aquila Fabrication and Equipment Ltd. ("Aquila"). The shares in Aquila are owned by Mr. and Ms. Trenerry. Mr. Trenerry is the sole director of Aquila. Counsel advised, and it was not disputed, that Mr. Hofer and his wife work for Aquila, and that Aquila continues to lease the properties owned by 965431 and formerly leased by Silverado.

14 On August 26, 2013, 1768192 was registered with the Alberta Corporate registry. Mr. and Ms. Trenerry were (and remain) the sole directors and shareholders of 1768192.

15 On November 22, 2013, 965431 discharged its debt to HSBC. The money to pay HSBC was obtained through financing arranged by 1768192.

16 On December 17, 2013, 1768192 entered into an agreement to purchase the 965431 Common Shares for $23,000.00. Mr. Hofer retained ownership of the 965431 preferred shares that he had owned previously.

17 On March 3, 2014, Mr. Hofer filed a Notice of Intention to Make a Proposal. His proposal was issued on May 29, 2014, and rejected by the creditors on June 11, 2014, at which point he became bankrupt.

18 At the time the proposal was made, in May 2014, the proposal trustee, Hardie & Kelly Inc., made inquiries to counsel for 1768192 with respect to how the $23,000.00 purchase price for the 965431 Common Shares had been calculated. Counsel for 1768192 provided the proposal trustee with: the financial statements of 965431 as of December 31, 2012; an appraisal of the properties owned by 965431 dated February 12, 2013 by Waters Mackie Valuations Inc.; and, a "Calculated Liquidation Value" of 965431 from which the purchase price of the 965431 Common Shares was derived. Because assuming liquidation, the Calculated Liquidation Value deducted the entire notional costs of disposing 965431's properties in the amount of $263,343.00. 965431 did not have any plans to dispose of the properties at that time. An Alberta Land Titles Certificates from May 2019 shows that 965431 still owns the properties.

Analysis

19 Section 96(1)(b)(i) of the BIA provides:

> 96(1) On application by the trustee, a court may declare that a transfer at undervalue is void as against . . . the trustee — or order that a party to the transfer or any other person privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if . . .
>
> (b) the party was not dealing at arm's length with the debtor and
>
> (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy . . .

20 To fall within s. 96(1)(b)(i) the transfer must thus occur less than one year before the date of the initial bankruptcy event, be between non-arm's length parties, and be a transfer at undervalue.

Was the transfer of the 965431 Common Shares to 1768192 a transfer between parties not dealing at arm's length within one year of the date of the initial bankruptcy?

21 The transfer of the 965431 Common Shares took place within one year of the date of the initial bankruptcy event. Part (c) of the definition of "date of the initial bankruptcy event" in s. 2 of the BIA identifies "a notice of intention by the person" as an initial bankruptcy event. Mr. Hofer filed his notice of intention to make a proposal on March 3, 2014. The transfer took place 2 $^{1}/_{2}$ months earlier, on December 18, 2013.

22 The approach to defining "arm's length" in the tax context informs how that term is defined in the context of *BIA* proceedings: *Piikani Nation v. Piikani Energy Corp.*, 2013 ABCA 293 (Alta. C.A.) at para 30. An arm's length transaction is one where there are "no bonds of dependence, control or influence" between the parties: *Piikani* at para 34, citing *Galaxy Sports Inc., Re*, 2004 BCCA 284 (B.C. C.A.) at para 56. The relationship needs to be such that the transaction "will reflect ordinary commercial dealing between parties acting in their separate interests": *McLarty v. R.*, 2008 SCC 26 (S.C.C.) at para 43, citing *Swiss Bank Corp. v. Minister of National Revenue* (1972), [1974] S.C.R. 1144 (S.C.C.) at 1152. Indicia which suggest parties are not at arm's length include the existence of a common mind directing the bargaining for both parties, the two parties acting in concert without separate interests, and one party exercise *de facto* control over the other: *McClarty* at para 62.

23 Here, the main evidence I have about the relationship between Mr. Hofer and 1768192 is that in 2013 Mr. Hofer was (and remains) the son-in-law of the directing minds of 1768192. I have no evidence or information about how the parties conducted their negotiations — if they even had negotiations — or about how decisions were made regarding the purchase and sale of the 965431 Common Share as between the Trenerrys and Mr. Hofer. The summary trial order of Justice Horner dated April 25, 2018 permitted affidavit evidence to be filed. Despite this, Mr. Hofer did not submit any affidavit evidence and the affidavit of

Mr. Trenerry does not speak to the conduct of the negotiations or how decisions were made. I do have evidence that the parties attempted to identify the fair market value of the 965431 Common Shares; that evidence does not, however, show that there were no bonds of dependence, control or influence between the parties, or that the transaction reflected ordinary commercial dealings.

24 I find that Mr. Hofer and 1768192 were not at arm's length. I make this finding based on the close familial relationship between Mr. Hofer and the Trenerrys, from which I infer that Mr. Hofer and 1768192 had bonds of dependence, control and influence, and that the transaction did not reflect ordinary commercial dealings of parties acting in their separate interest. I also draw an adverse inference from the failure of the Trenerrys or Mr. Hofer to provide any evidence about their negotiations or how decisions about the share purchase were made; it suggests that they did not have any evidence to rebut the ordinary inference that a son-in-law and parents-in-law do not negotiate at arm's length.

25 Mr. Hofer and 1768192 are also not at arm's length by virtue of sections 4(2), (3) and (5) of the BIA. Section 4(2) provides that persons are related where they are connected by marriage, and that a person is related to an entity if they are related to the person who controls the entity. Section 4(3) says that people are connected by marriage if one is married to a person who is "connected by blood relationship" to the other, and further says connected by blood relationship includes the child-parent relationship. Mr. Hofer is married to the child of the persons who control 1768192; as a result, Mr. Hofer and 1768192 are related persons under the *BIA*.

26 Section 4(5) says that persons who are related to each other are deemed not to deal with each other at arm's length. Section 4(5) further specifically provides that, "[f]or the purpose of paragraph 95(1)(b) or 96(1)(b), the persons are, in the absence of evidence to the contrary, deemed not to deal with each other at arm's length". For the reasons set out above, there is no evidence to contradict the deeming force of s. 4(5); that provision thus deems Mr. Hofer and 1768192 not to be at arm's length for the purposes of s. 96(1)(b).

27 In sum, the timing of the transaction and the relationship between the parties brings it within s. 96(1)(b)(i); the remaining question is whether it was a "transfer at undervalue" such that 1768192 may be ordered to pay to HSBC the difference between the price that they paid for the shares, and the value of those shares.

Was the transfer of the 965431 Common Shares to 1768192 a transfer at under value?

28 Section 2 of the BIA defines "transfer at undervalue" as:

> a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor.

29 Once it has been determined that the transfer was between non-arm's lengths parties and occurred less than one year prior to the initial bankruptcy event, the only issue is whether it was a transfer at undervalue. The Court does not need to consider: whether the debtor was insolvent at the time of transfer or rendered insolvent by it; the intention of the transferee; or, whether the debtor intended to defraud, defeat or delay a creditor: *Lee, Re*, 2017 ONSC 388 (Ont. S.C.J.) at para 16; *Pitblado LLP v. Houde*, 2015 MBQB 85 (Man. Q.B.) at para 45.

30 The language of s. 96(1)(b)(i) makes this restriction in the scope of the court's analysis clear; it triggers the court's power to declare a transfer at undervalue and give relief simply because the parties were not at arm's length and "the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy". Other parts of s. 96, which apply where the parties are at arm's length or where the transfer is further removed in time from the initial bankruptcy event, additionally require that the court find either or both that the debtor was insolvent at the time or the transfer or rendered insolvent by it, and that the debtor intended to defraud, defeat or delay a creditor. No such additional requirements are imposed in s. 96(1)(b)(i).

31 The Ontario Court of Appeal has suggested that "weighing the adequacy of consideration is not an exercise in precision but one of judgment:" *Montor Business Corp. (Trustee of) v. Goldfinger*, 2016 ONCA 406 (Ont. C.A.) at para 53. That conclusion

seems correct; the calculation of fair market value after the fact, and whether consideration is "conspicuously less" than fair market value, necessarily requires judgment rather than the application of a mathematical formula. At the same time, however, the Court must follow the straightforward direction of the statute. Based on the evidence before it, the Court must identify fair market value, and whether the consideration paid falls conspicuously below that value. I find helpful in this regard the observation of Justice Eamon that "[t]here is no exact range, but the cases appear to suggest that 17% below fair market value is conspicuously less, while 6% might not be:" *Royal Bank of Canada v. Racher*, 2017 ABQB 181 (Alta. Q.B.) at para 116; see also: *Indarsingh, Re*, 2015 ABQB 158 (Alta. Q.B.) at para 15.

32 In his submissions counsel for 1768192 suggested that the meaning of a transfer at undervalue ought to be interpreted in light of s. 97(2) of the BIA, which defines "adequate valuable consideration". The term "adequate valuable consideration" is used in s. 97(1) to identify certain transactions that are permitted when made in good faith even though occurring between the initial bankruptcy event and the date of bankruptcy. Counsel submitted that in determining whether a transfer is at undervalue, the Court ought to similarly consider the "known or reasonably to be anticipated benefits of the contract, dealing or transaction", and the broader commercial circumstances.

33 I do not accept this submission. Section 97(2) has no application to the definition of "transfer at undervalue." First, the permitted transactions in section 97(1) are expressly made subject to the "provisions of this Act respecting preferences and transfers at undervalue" — that is, to s. 96. That makes using language of s. 97 to qualify the scope of s. 96 problematic, since s. 97 itself makes s. 96 paramount. Second, the *BIA* explicitly defines transfer at undervalue; the definition in 97(2) of an entirely different term, "adequate valuable consideration" ought not to be used to change that explicit definition. As noted, the definition of transfer at undervalue is straightforward and its direction is clear: the court must identify fair market value and whether the transfer was for an amount conspicuously less than that. It does not invite the court to consider broader benefits of the transfer except insofar as those benefits are properly included in the calculation of either the fair market value or the consideration that was paid.

34 Based on this analysis of the law, the question for me to decide is, what was the fair market value of the 965431 Common Shares as of December 17, 2013 and was the $23,000.00 that 1768192 paid for those shares conspicuously less than that fair market value?

35 The parties both retained experts in relation to the fair market value of 965431 Common Shares. HSBC filed an expert report from Lorne D. Siebert of Siebert Valuation Services Ltd. on June 13, 2016. Mr. Siebert then amended his report after receiving a July 14, 2017 historical appraisal by Soderquist Appraisals Ltd. of the two pieces of property owned by 965431. The Soderquist Appraisal assessed the value as of December 17, 2013 of the two pieces of property owned by 965431. HSBC filed Mr. Siebert's amended expert report on March 6, 2018. On February 9, 2017, 1768192 filed an expert report from Scott Lawritsen of Hemens Lawritsen Valuation Group Ltd. In his report Mr. Lawritsen relied on the February 12, 2013 Waters Mackie Valuations Inc. appraisal of the properties owned by 965431.

36 Both Mr. Siebert and Mr. Lawristen were qualified as experts with respect to the valuation of the 965431 Common Shares. They have both provided expert testimony to this Court on previous occasions, and both have extensive qualifications and experience related to business valuations.

37 HSBC's submissions on fair market value, and on this being a transfer at undervalue, relied entirely on the evidence of Mr. Siebert. It submitted that Mr. Siebert's evidence clearly showed that the $23,000.00 paid by 1768192 was conspicuously less than the fair market value of the 965431 Common Shares.

38 For its part, 1768192 relied on the expert evidence of Mr. Lawritsen. It also submitted, however, that the $23,000.00 it paid needed to be considered in the broader context of the dealings between companies controlled by the Trenerrys, those controlled by Mr. Hofer, and HSBC. It noted in particular that 1773907 purchased the assets of Silverado in a transaction approved by this Court, and that 1768192 arranged for financing so that 965431's loan from HSBC could be discharged. 1768192 submitted that these other transactions must be considered when determining whether $23,000.00 was conspicuously less than the fair market value of the 965431 Common Shares.

39 In some circumstances it may be appropriate to assess a transfer in a broader context to identify whether it was made at conspicuously less than fair market value. If a person purchases three items from a debtor, for example, it may be unfair or inaccurate to assess that transaction on an item by item basis. Here, however, I do not have any evidence to demonstrate that a holistic assessment is warranted. Specifically, I have no evidence to show that the transfer of the 965431 Common Shares was related to or arose from the other transactions. Notably, the Sale of Shares Agreement dated December 18, 2013 makes no direct reference to 1773907, to Silverado, or to 1768192's refinancing which allowed 965431's HSBC mortgage to be discharged. The Agreement refers only to the purchase and sale of the 965431 Common Shares. I also have no evidence that the transactions between 1773907 and Silverado, or the refinancing of 1768192, were made at above fair market value so as to offset the extent to which the 965431 Common Share purchase was made at less than fair market value. All I know about those transactions is that they occurred, that they involved the Trenerrys, Mr. Hofer and companies controlled by them, and that they occurred proximate to the impugned transaction. That information is not sufficient to permit those transactions to counter or mitigate a finding that the purchase of the 965431 Common Shares was a transfer at undervalue.

40 Thus, the evidence about the fair market value of the 965431 Common Shares, and as to whether that transfer was made at conspicuously less than that value, arises from the expert reports of Mr. Siebert and Mr. Lawritsen. I have also considered the contemporaneous documentation, including the Calculated Liquidation Value, provided by counsel for 1768192 to the proposal trustee in May 2014, where relevant to my analysis.

41 Mr. Siebert and Mr. Lawritsen agreed on a number of general matters. They agreed that 965431 had to be assessed as a going concern — that is, they both rejected the liquidation value approach used by 965431 and 1768192 at the time of the transaction. They agreed that the fair market value should be determined on an asset-based approach using the adjusted net book value methodology. They both defined fair market value as the highest price available between informed and willing parties acting at arm's length in an unrestricted and open market, and under no compulsion to act, expressed in cash. They relied upon similar or identical documentation and information. They also agreed on many of the specific line items to be included in calculating the adjusted net book value of 965431.

42 In his report Mr. Lawritsen concluded that as of December 17, 2013, the 965431 Common Shares had a fair market value of between $0.00 and $79,279.00. The difference between the high and low values arose primarily from Mr. Lawritsen's application at the low end of a $75,000.00 discount to the appraised value for 965431's properties, as well as a $11,333.00 discount to reflect unknown contingent liabilities.

43 In his amended expert report, Mr. Siebert concluded that the fair market value of the 965431 Common Shares was between $75,256.00 and $207,225.00 as of December 17, 2013, with a mid-point of $141,240.00. The mid-point was the adjusted net book value based on the historical appraisal by Soderquist Appraisals Ltd of the properties owned by 965431. The higher and lower adjusted net book values arose from the application of a +/-2.5% adjustment to the Soderquist appraisal of the properties owned by 965431.

44 The variance between the outcomes of Mr. Siebert's and Mr. Lawritsen's reports arose from the following:

(a) *The appraised value of the properties owned by 965431*. The appraised values provided by Waters Mackie Valuations Inc. and Soderquist Appraisals Ltd. are very similar. However, as noted, at the lower end and, by inference, at the mid-point, Mr. Lawritsen discounted the property appraisal to reflect potential discrepancies between market rental rates and the actual rents being paid to 965431 in relation to its properties. Mr. Siebert did not view such an adjustment as warranted. As noted, at the midpoint Mr. Siebert used the Soderquist Appraisals Ltd. valuation as they had provided it; he created his low and high range by applying a +/- 2.5% adjustment to that appraisal.

(b) *The calculation of a cash loss of 965431 for 2013*. Mr. Siebert calculated the cash loss for 2013 based on an average of the losses in 2011 and 2012. Mr. Lawritsen used only the loss amount for 2012, which was higher.

(c) *The calculation of income tax and disposal costs related to the potential disposition of the properties owned by 965431, and the discount that ought to be applied given that there were no immediate plans to dispose of the properties owned by*

965431. Mr. Lawritsen calculated a higher level of income tax as applicable to the properties, a higher level of disposal costs, and a lower discount rate.

(d) *The application of a discount for contingent liabilities.* Mr. Siebert did not include a deduction for contingent liabilities; Mr. Lawritsen took the position that the adjusted net book value should be reduced by $11,333.00 to take into account the possibility of such liabilities.

45 With respect to the first difference, I accept Mr. Siebert's mid-point approach — that is, that the appraisal of the properties owned by 965431 should be based on the expert appraisals completed by Waters Mackie Valuations Inc. and Soderquist Appraisals Ltd. As Mr. Siebert noted, the property appraisals were prepared by experts and reached similar outcomes. They are the best evidence available to the business valuators and to this Court as to the value of 965431's properties as of December 17, 2013. Of the two appraisals, I adopt the number from Soderquist Appraisals Ltd. because it was completed after December 17, 2013 and can properly account for the time period after the Waters Mackie Valuation.

46 I do not accept Mr. Lawritsen's suggestion that the appraised value of the properties owned by 965431 ought to be subject to a discount of $75,000.00. Mr. Lawritsen acknowledged that he did not have the credentials necessary to qualify him as an expert property appraiser. Further, Mr. Lawritsen's theory, that the actual rents being paid to 965431 were below market, and that a purchaser of the shares would discount the purchase price of the property to reflect the time it would take to increase the rents to market levels, was plausible but also speculative and insufficient to displace the considered opinion of the property appraisers. I note in this respect that Soderquist states at page 15 of its appraisal that it assumed that the property was "owner occupied." Soderquist thus appears to have already taken into account that market rents were not being earned at the property.

47 With respect to the cash losses, I accept Mr. Siebert's approach of calculating the losses for 2013 by averaging the losses for 2011 and 2012. I note in this respect that the company's 2012 losses were the highest of the four-year period between 2009 and 2012. Averaging the losses from two years, rather than assuming that 2013 would be as bad as the worst year the company had, seems more likely to be accurate, even if the worst year was the year immediately prior to the year in question.

48 I also accept Mr. Siebert's approach to the calculation of income taxes, disposal costs and the discount.

49 The two reports adopted the same methodology for calculating income taxes — in terms of, for example, the applicable tax rate, recapturing the capital cost allowance and the calculation of taxable capital gains. The differences in the income tax calculation thus arose not from the tax methodology they used, but rather from the financial data each valuator used in the calculations. In particular, the differences arose from how the valuator identified the value of the properties, the calculation of 965431's 2013 losses and the treatment of unpaid loans from Mr. Hofer as a shareholder of 965431.

50 As previously discussed, I agree with Mr. Siebert that the value of the property ought to be based on the expert property appraisals without the application of a discount. I also agree that the 2013 losses should be calculated based on the average losses for 2011-2012.

51 In terms of the unpaid shareholder loans, the evidence before me is insufficient to permit a considered conclusion as to the appropriate accounting or tax treatment of those loans. Mr. Sibert's explanation of his approach was cursory, and Mr. Lawritsen gave his opinion in reliance on his discussion with "several accountants and tax practitioners", rather than based on his own opinion or analysis. Neither identified the provisions of the Income Tax Act, RSC 1985 c 1, on which they were relying, or guidance provided by Revenue Canada with respect to how such loans are treated in the hands of the defalcating shareholder or the company issuing the loan. I have accepted Mr. Siebert's approach for two reasons. First, Mr. Lawritsen did not claim that Mr. Siebert's approach was improper as a matter of law or accounting practice; he only suggested it was not preferable. Second, a person acquiring shares in a company is likely to value those shares on the basis that the company would take the most advantageous tax position it could in the circumstances. Mr. Lawritsen raised the possibility that Mr. Siebert's position would not be the most advantageous because of penalties for late remittances if the unpaid shareholder loans are treated as salary, but he provided no numerical or legal analysis to substantiate this assertion. Based on the record before me, Mr. Siebert's

position is proper and the most advantageous, and I accept that it is what a reasonable purchaser would rely on in identifying the value of the shares.

52 With respect to disposal costs, Mr. Siebert used 3.5% of the appraised value of the properties to calculate those costs, based on the assumption that legal fees and real estate commissions would be in the range of 3-4% of market value. Mr. Lawritsen used 4%. Mr. Lawritsen noted that commercial relators charge 3-4%, but that there are also associated accounting and taxation fees, which in his opinion justified using 4%. I prefer Mr. Siebert's approach to this issue because a reasonable purchaser of the shares would — and would assume that they could — keep disposition costs as low as possible.

53 The most significant difference between Mr. Siebert and Mr. Lawritsen arises from the percentage discount they apply to the notional costs of disposition associated with the assets owned by 965431. This is the case even though, methodologically, there is little difference between them. Mr. Siebert and Lawritsen agree that a discount ought to be applied to reflect the fact that 1768192 did not intend to dispose of the properties on acquiring the shares. They agree that the discount should be calculated over a ten-year period. They agree that the discount should be calculated based on the time value of money over that period.

54 The difference between them is that Mr. Lawritsen calculates the time value of money based on an ordinary inflationary increase while Mr. Siebert calculates the time value of money based on the rate of return associated with the properties not being disposed of — that is, the rate of return associated with land and buildings owned by 965431. Mr. Lawritsen used 3% to reflect inflation at the valuation date while Mr. Siebert used 8.1%, which was the overall rate of return used by Soderquist Appraisals to appraise the 965431 land and buildings. Mr. Siebert essentially reasons that since the funds that would be used to pay the income tax and disposal costs are currently invested in particular land and buildings, it makes sense to assume that the amount those funds will earn in the period before the land and buildings will be sold is the rate of return expected to be earned by those land and buildings. Mr. Lawritsen, on the other hand, argues that given the lack of variability in the income tax that will ultimately be paid, the time value of those savings should be treated on a straightforward inflationary basis. Mr. Siebert's 8.1% discount rate over 10 years discounted the costs of disposition by 55.7% at the midpoint, while Mr. Lawristen's 3% discount rate over 10 years discounted them by 25.6% at the midpoint.

55 The question of how to discount not yet incurred disposition costs has been considered by this Court. In *M. (P.M.) v. M. (R.W.)*, 2003 ABQB 432 (Alta. Q.B.) at para 97 Justice Smith adopted the approach of the Ontario Court of Appeal in *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (Ont. C.A.) suggesting that each case must be assessed on its own facts and in light of overall principles of fairness: "Each case must be dealt with its own facts, considering the nature of the asset involved, the probable tax and other costs of disposition, and the present value of them." In *Segmueller* the Ontario Court of Appeal also noted that some disposition costs should be deducted "except in the situation where 'it is not clear when, if ever' there will be a realization of the property": *Segmueller* at para 33.

56 In *Koch v. Koch*, 2017 ABQB 596 (Alta. Q.B.) at para 28 Justice Kenney applied a 25% discount to the taxes associated with the sale of a plumbing company. She relied on the evidence of Mr. Lawritsen in that proceeding, and his position that the value of the company arose in significant part from its building, which would be taxable at disposition.

57 In *Canadian Rocky Mountain Properties Inc., Re*, 2006 ABQB 251 (Alta. Q.B.) Justice Romaine did not apply a discount to disposal costs associated with properties that had been or were about to be disposed of but applied a 50% discount where there were no plans to dispose of the property. She identified this as "an appropriate and fair approach, consistent with the prudent purchaser test. Such a discount recognizes the possibility of tax minimization strategies and the probable deferral of realization of such tax if the property an asset of a going-concern business:" *Canadian Rocky Mountain Properties Inc., Re* at para 22.

58 In *RFG Private Equity Limited Partnership No. 1B v. Value Creation Inc.*, 2016 ABQB 391Alta. Q.B. (aff'd 2018 ABCA 85 (Alta. C.A.)) Justice Romaine clarified that a discount should not always be applied. The discounting strategy in *Canadian Rocky Mountain Properties Inc., Re* was appropriate because the company was a holding company, some of the properties were to be imminently sold, and the other property was "on non-depreciable land and a capital gain at some point was unavoidable:" *RFG Private Equity Partnership* at para 252. On the facts of *RFG Private Equity Partnership* Justice Romaine declined to deduct taxes that would be payable on an assumed sale of assets.

59 Read together these cases suggest that when valuing an asset — or a company based on the assets it holds — it may be appropriate to consider the costs of disposition associated with the asset. Whether to do so, and to what extent, must be decided fairly and with regard to facts and evidence about the particular asset — its nature and the likelihood it will be sold. Where costs of disposition are inevitable — such as for non-depreciable assets — those costs must be included in valuation. Where disposition is imminent, costs of disposition should be included at or close to their full amount. Where the possibility of disposition is merely speculative or remote, costs of disposition should not be included, or should be significantly discounted.

60 Here the assets owned by 965431 are significantly non-depreciable. As a result, whenever 965431 disposes of them disposition costs will be incurred. At the same time, however, there were no plans to dispose of those assets in 2013. 965431 still holds the assets. That means that, as both Mr. Siebert and Mr. Lawritsen contemplated, disposition costs should be deducted from the adjusted net book value of 965431 but at a discounted rate. This means that the liquidated value approach used by 1768192 and Mr. Hofer in 2013 was significantly inaccurate in identifying the fair market value, since it applied no discount to the costs of disposition. Of the discount rates proposed by Mr. Siebert and Mr. Lawritsen, I prefer that of Mr. Siebert. It makes sense to assume that the benefit realized by a delay in disposing of a particular asset will be that which arises from continuing to own that particular asset. As such, I accept Mr. Sibert's 55.6% reduction to the notional disposition costs.

61 Finally, on the accounting for contingent liabilities Mr. Siebert assumed that 965431 had "no contingent liabilities, unusual contractual obligations or substantial commitments, other than tin the ordinary course of business, or litigation pending or threatened, other than disclosed herein". Mr. Lawritsen made a similar assumption in calculating the adjusted net book value. However, he opined that after calculating the adjusted net book value it was appropriate to apply a reduction to take into account "contingent liabilities, indeterminate requirements for subsequent legal, professional fees, unforeseeable liabilities, and unknown requirements of the new owner's time and funds to attend to such issues".

62 In my view Mr. Lawritsen's approach to this issue is preferable. It makes sense to assume that an arm's length purchaser for value would apply some reduction for contingent liabilities given the difficulty in obtaining perfect information even in an open and unrestricted market and given the uncertain financial circumstances of 965431 and its tenant in 2013. For that reason, I apply a reduction for contingent liabilities of $11,333.00 as proposed by Mr. Lawritsen.

63 The result of my analysis of the evidence is that, except with respect to the treatment of contingent liabilities, I have adopted the mid-point of Mr. Siebert's amended expert report as the best assessment of the fair market value of the 965431 Common Shares as of December 17, 2013. I thus find that the fair market value of the 965431 Common Shares as of December 17, 2013 was $129,907.00 ($141,240.00 less $11,333.00). I also find that the purchase price of $23,000.00 — which is 82% less than $129,907.00 — is conspicuously less than the fair market value of the 965431 Common Shares. The variation between the price paid for the shares and value of those shares is simply too large to permit any other conclusion; 82% far exceeds the 17% variation recognized by prior case law as likely to make something a transfer at undervalue.

Conclusion

64 1768192 and Mr. Hofer were not dealing at arm's length. The transfer of the 965431 Common Shares from Mr. Hofer occurred within one year of the initial bankruptcy event. The fair market value of the 965431 Common Shares as of December 17, 2013 was $129,907.00, and the purchase price of $23,000.00 was conspicuously less than that fair market value. As a result, I find that this was a transfer under value for the purposes of s. 96(1)(b) of the BIA and HSBC is entitled to judgment in the amount of $106,907.00 plus interest calculated pursuant to the *Judgment Interest Act* from December 17, 2013.

65 If necessary, the parties may make submissions with respect to costs within 30 days of this decision. Those submissions must be in writing and must not exceed 10 pages.

Application granted.

TAB 8

1983 CarswellAlta 219
Alberta Court of Queen's Bench

Kamitomo v. Pasula

1983 CarswellAlta 219, [1983] A.J. No. 703, [1984] A.W.L.D. 84, 24
A.C.W.S. (2d) 6, 25 B.L.R. 60, 29 Alta. L.R. (2d) 375, 50 A.R. 280

KAMITOMO et al. v. PASULA et al.

Kryczka J.

Judgment: December 19, 1983
Docket: Calgary No. 139400

Counsel: *A. Bloomenthal* , for plaintiff.
L. Manning , for defendant Pasula.
M. O'Byrne , for defendant Macleods.

***Kryczka J.* :**

1 This action proceeded to trial in the latter part of June 1983, following which counsel were requested to submit written argument. By agreement of all the parties, the action was heard on the basis of an agreed statement of facts which was Ex. A at trial and which reads as follows:

Statement of Agreed Facts

1. It is agreed that the Plaintiffs, Douglas Kamitomo and Alice Kamitomo carried on business at all times material hereto under the firm name and style of KAMITOMO HOLDINGS.

2. It is agreed that Douglas Kamitomo and Alice Kamitomo were together or separately the registered owners at all material times hereto, of the lands described in a lease dated February 22nd, 1977 and made between Kamitomo Holdings as lessor and Bernard Pasula and Sharon Pasula as lessees.

3. It is agreed that the premises demised by the said lease were located wholly on the lands described therein and that the lessor had the right and power to enter into the said lease.

4. It is agreed that the Defendants will raise no argument at the trial of this action relating to the right or title of the Plaintiffs' to the lands described therein or otherwise as to the validity of the said lease.

5. It is agreed that:

(a) the rent in arrears from October 1, 1978 to June 28, 1983 is $42,750.00;

(b) the interest on rent in arrears calculated at the Canadian Imperial Bank of Commerce prime lending rate plus 1% is $20,715.00;

(c) the property taxes in arrears is $510.00;

(d) the interest on property taxes in arrears is $83.00;

(e) the utility payments in arrears is $1,558.00;

(f) the interest on utility payments in arrears is $645.00;

(g) the present value as of June 28, 1983 of rental losses expected to be incurred during the period from July 1, 1983 to August 31, 1987 is $30,012.00;

(h) the present value of property tax losses is $1,211.00;

(i) the present value of utility cost losses is $2,273.00.

The issues to be decided in this action are the following:

2 (1) Is there a binding contract in the form of a 10-year lease between the Kamitomos and Pasula?

3 (2) Did the representations which are alledged to have been made by Mr. Sweeting to both the Kamitomos and the Pasulas amount to a collateral contract or agreement of indemnity which were relied upon by the Pasulas and the Kamitomos in undertaking an obligation?

4 (3) What inference, if any, should the court draw from the failure of the defendant Macleods to call Donald Sweeting as a witness, and to make him available for cross-examination?

5 In order to answer the questions as posed, it is necessary to review the evidence adduced at trial in some detail.

(1) Re: The Lease

6 The evidence of Douglas Kamitomo was that prior to the time at which the lease was prepared, he had met with Mr. Sweeting on several occasions and they had discussed the requirements of a Macleods' store. During these meetings, Mr. Sweeting made a lease proposal to Mr. Kamitomo which, on Mr. Kamitomo's evidence, include the following:

7 (a) lease of the building to Macleods;

8 (b) 10 year term;

9 (c) 5 year additional term or option;

10 (d) monthly rental of $750;

11 (e) Macleods to be responsible for utilities.

12 Mr. Kamitomo's evidence was that these matters were discussed and that agreement was reached between him and Mr. Sweeting with respect to each point. At this point in time, the Pasulas had neither met the Kamitomos nor had they been accepted as a "dealer".

13 Some time later, Mr. Sweeting returned to Mr. Kamitomo and had a form of lease prepared for him to sign, which form reflected the agreement which had previously been reached except for one point — that Macleods did not appear as lessee.

14 Mr. Kamitomo's evidence was that he refused to sign the lease because Mcleods' name did not appear on it. This was a decision he reached after discussion with Mrs. Kamitomo. Both Mr. and Mrs. Kamitomo took this view. They had in mind a contract with Macleods, and refused to enter into a contract with someone about whom they knew nothing.

15 When Mr. Kamitomo relayed this concern to Mr. Sweeting, it is Mr. Kamitomo's evidence that Mr. Sweeting advised him: don't worry, Macleods never sign leases; Macleods will take care of everything; you are dealing with Macleods; if the dealer doesn't work then Macleods will either put a new dealer in or take over the store itself.

16 After these promises were made to Mr. Kamitomo, his evidence is that he agreed to sign the lease on the express understanding that he was dealing with Macleods.

17 The Pasulas argue that what had transpired was that Mr. Sweeting had made an offer to lease the premises, which offer was rejected by the Kamitomos. Subsequently, the matter was discussed further and a new offer was made by Mr. Sweeting, namely, one in which the Pasulas were shown as being the lessee but with Macleods liable on the obligations contained in the lease.

18 The Pasulas also argue that because they were not accepted as a dealer until July 1977, there could not have been lessees of the premises in February 1977. With all due respect, I do not agree with that position. During the period February 1977 to July 1977, there were ongoing discussions between the Pasulas and the representatives of Macleods, and the lease was only one of many documents which led to the establishment of a dealership.

19 In my view, on the basis of all of the evidence adduced at trial, there was as between the Kamitomos and the Pasulas a binding contract in the form of a 10-year lease between the parties, and the answer to Q. (1) above is "Yes".

(a) Re: The Alleged Indemnity vis-à-vis Pasulas

20 It is argued by counsel for the Pasulas that in the event there is a finding that a 10-year lease was entered into between the Kamitomos and the Pasulas, then on the evidence I should find that the lease was entered into by them only after Macleods made express representations which were relied upon and which amount to a collateral contract or agreement to indemnify the Pasulas.

21 The evidence in this regard discloses that Mr. and Mrs. Pasula had never ventured into a business of their own prior to their introduction to Macleods. Mr. Pasula made this known to Macleods at the very beginning of their relationship. The parties were clearly of unequal experience in the ways of business and not unnaturally the Pasulas trusted Macleods and relied on representations made by it throughout their relationship.

22 After the initial meeting in January 1977, Mr. Pasula met with Mr. Sweeting, with Mrs. Pasula present, at their home in February 1977, on or about 24th February.

23 Prior to the February meeting, Mr. Pasula had received Ex. 17, the brochure entitled "a business of your own" and had met Mr. Petrick and Mr. Sweeting in January 1977. During the January meeting, Mr. Petrick's evidence indicated that he explained to Mr. Pasula what Macleods was all about, how they operated, and the successful record Macleods' stores have had.

24 Prior to this meeting, Mr. Petrick's evidence indicated that an extensive market survey had been carried out by Macleods and a decision made to put a store in the Raymond area. The survey was based in part on a 10-year sales projection. Insofar as Macleods was concerned, the Raymond area was a viable one, at least according to their self-initiated market survey.

25 If then Macleods was confident in its own mind of the potential of the area, it seems to me to be reasonable to conclude that if Macleods were asked what would happen in the event Mr. Pasula was not able to make a go of the store, Macleods would — based on their survey — state that the area would be taken over by Macleods itself or another dealer.

26 In point of fact, Macleods relies heavily on its market survey as a tool in establishing stores. Reference need only be made to Ex. 17 under the heading "Location", where the following passage appears, to gain an understanding of the nature of representations made by Macleods with respect to the viability of the area:

> We will not grant a franchise for the opening of a store in a district that will not be worthy of one of our outlets! We will help you find a town that will make your business successful, profitable and permanent.

27 In cross-examination by Mr. O'Byrne, Mr. Pasula was asked what statements were made by Mr. Sweeting which Mr. Pasula relied upon in deciding to become a dealer. One of the items mentioned in response to Mr. O'Byrne's question was the survey. Mr. Pasula was told a survey had been performed by Macleods which indicated the Raymond area to be able to provide that which would be required to operate a successful Macleods' store. A store in a town which "we

28 [Macleods] believe are suitable for a *Macleods' Authorized Dealer Store* ": Ex. 17, p. 2.

29 At the meeting of February 1977, Mr. and Mrs. Pasula gave evidence that Exs. 1, and 20 through 26, were presented by Mr. Sweeting for signature. Both Mr. and Mrs. Pasula testified that they may have taken a brief look through the documents and that they asked questions of Mr. Sweeting during the meeting. The questions were directed at the effect of the documents and were answered by Mr. Sweeting. In particular, Mrs. Pasula remembered questioning Mr. Sweeting about the lease because it "was for such a long term" (i.e., 10 years) and she was concerned over what would have happened if for some reason the business did not make a go of it. The lease was one of the few documents Mrs. Pasula recalled distinctly, in part because she was worried that the 10-year term was much greater than the usual one-year term she had experience in dealing with before, in renting an apartment.

30 Both Mr. and Mrs. Pasula's evidence is that prior to signing the documents, in particular the lease, they received the following explanations and assurances from Mr. Sweeting:

31 — that Macleods doesn't sign leases itself, but that they had nothing to worry about because that was the way Macleods did business;

32 — that if for any reasons the store did not work out Macleods would not let anything happen to them, and specifically that: Macleods would put in another dealer; or take over the store itself; and that the Pasulas would be free from all obligations connected with the store.

33 Mr. Sweeting was the authorized dealer development superintendent of Macleods. He was, as Mr. Petrick testified, a smooth-talking fellow who was capable of putting people at ease and inspiring trust. In fact both the Pasulas trusted him and relied on what he said entirely. To the Pasulas, Mr. Sweeting was obviously Macleods, and they saw no reason to mistrust or disbelieve anything he said.

34 Mr. Sweeting had come to the Pasulas' home that evening with the purpose of obtaining the Pasulas' signature on the documents, but more importantly with the intention of having the Pasulas entered into the "contracts", relative to the dealership, which he had brought with him. Mr. Sweeting's objective was to "achieve a sale by convincing [the Pasulas] that a particular location [was] right for [them]": Ex. 46, item 9. The representations made by Mr. Sweeting were made with the intention on convincing the Pasulas to sign the documents; they were intended thus. Mr. and Mrs. Pasula relied on them and signed the documents.

35 Mr. Sweeting was a Macleods' representative, someone with special knowledge and skill in the retail hardware business, someone who professed to know the facts by reason of having completed an exhaustive survey; in short, someone who was in a much better position to make a forecast intending the Pasulas to act on it.

36 It is significant, in my view, that Mr. Kamitomo's evidence is essentially that identical representations were made to him by Mr. Sweeting. These representations were made by Mr. Sweeting prior to his meeting with the Pasulas in February 1977. I have no hesitation in finding that the evidence before the court establishes beyond any doubt that Mr. Sweeting made similar representations to both Mr. Kamitomo and the Pasulas.

37 The principle relating to collateral contract is set forth succinctly in *J. Evans & Son (Portsmouth) v. Merzario*, [1976] 1 W.L.R. 1078, [1976] 2 All E.R. 930 at 933 (C.A.) :

> When a person gives a promise, or an assurance to another, intending that he should act on it by entering into a contract, and he does act on it by entering into the contract, we hold that it is binding ...

38 The court in *Evans* further stated at p. 933 that the principle applies to promises relating to representations of fact or to those as to the future.

39 The consideration which supports the existence of a separate collateral contract is the entering into of a further contract.

40 In *Evans* , the plaintiff, an importer of machinery, had for years been dealing with the defendant, a forwarding agent. The machinery was susceptible to rusting in the sea and had for this reason always been transported below deck. The defendant proposed to the plaintiff that a new container system be used to transport the machinery and gave the plaintiff verbal assurances that the containers would be shipped below deck. On the basis of these assurances the plaintiff agreed to the change and gave the defendants an order for carriage. As it turned out, the container was shipped on deck and was lost overboard. The standard terms of the contract of "forwarding" provided inter alia that the defendants would be exempted from liability for loss or damage to the machinery unless the loss or damage occurred whilst the machinery was in its possession. The plaintiff sued, alleging the defendant to be in breach of contract in that the machinery was to have been shipped below deck.

41 The court found in the plaintiff's favour, on the basis that the oral assurances given by the defendant amounted to an enforceable contract. The assurance was binding as a collateral contract.

42 In *Esso Petroleum Co. v. Mardon*, [1976] 1 Q.B. 801, [1976] 2 W.L.R. 583, [1976] 2 All E.R. 5 , the English Court of Appeal found Esso liable in contract and held that representations made by it to Mardon as to the potential traffic to be expected at a proposed location for a gas/service station amount to a binding promise.

43 The court held that Esso was liable in contract as the representation made with respect to the potential traffic was a collateral contract (collateral warranty). The representation was a factual statement made by a party who professed to have special knowledge and skill with the intention of inducing the other party to enter into a contract, and that it did induce Mardon to enter a contract of tenancy in respect of the service station.

44 The Pasulas argue that the representations made by Macleods, regarding the survey and the potential of the Raymond area, are very similar if not identical to the type made in *Esso* and that they are entitled to damages for breach of this collateral contract.

45 It is submitted on behalf of the Pasulas that the representations made to them created a binding promise which became a collateral contract when the Pasulas relied on them in executing the documents and becoming a dealer. It is argued that the effect of the promises which were made amount to an agreement to indemnify the Pasulas.

46 I find on all of the evidence that Macleods has offered no credible evidence which answers the evidence of the Pasulas and Mr. Kamitomo that the representations were made.

47 Dealing firstly with Mr. Breadner's evidence, it is important to note that it was his evidence that at the closing meeting July 1978 a lot of "hand holding" took place. Mr. Breadner admitted that it is customary in this type of meeting to discuss the possibility of Macleods taking over a store itself or putting in another dealer in the event things did not work out. The meeting lasted from approximately 9:30 a.m. to 3:30 p.m. Mr. Breadner recalled many questions being asked by the Pasulas and that Mrs. Pasula was especially concerned. Aside from this, Mr. Breadner specifically recalled little of the meeting. One point worthy of note is that Mr. Breadner did testify that because the Pasulas had met with Mr. Sweeting many times before, there was not a need to explain much. It follows, in my mind, that Mr. Breadner can be said to have adopted that which was said by Mr. Sweeting, and which includes the representations made by him.

48 Mr. and Mrs. Pasula's evidence is that the same type of representations were made to them at the July 1978 meeting that had been made by Mr. Sweeting. Mr. Breadner believed that such representations would not have been made. He did not specifically recall they were not. Mr. Odosyk was present at the meeting but, strangely, was not called upon to give evidence by Macleods.

49 The Pasulas understood that they were going to operate a Macleods store, that they had invested their savings and that there was a risk their savings might be lost if they could not make a go of the store. They also understood that if that happened, Macleods would take over for them, either by itself or by putting in another dealer, and that that would be the extent of their exposure.

2(b) The Alleged Indemnity vis-à-vis Kamitomos — Relevant Law

50 In order to answer Q. (2) properly, the applicable provisions of the Statute of Frauds, 1677 (29 Car. 2), c. 3, must be considered to determine whether the representations, if they amount to an indemnity, are enforceable.

51 The applicable provision of the Statute of Frauds to be considered in this regard is:

> 4. ... No action shall be brought ... whereby to charge the defendant upon any special promise ... to answer for the debt, default or miscarriages of another person .... unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

52 The simple question to be answered is whether the action brought by the plaintiffs against Macleods is for the purpose of charging Macleods "upon any special promise to answer for the debt, default or miscarriage of another person".

53 There are a great number of cases which have considered the meaning of this clause of the Statute of Frauds. The earliest case which is referred to in all later cases is *Forth v. Stanton* (1669), 1 Saund. 210, 85 E.R. 217 at 224. The portion of the case which has been adopted in later cases is a note taken from the case, as follows:

> There is considerable difficulty in the subject, occasioned perhaps by unguarded expressions in the reports of the different cases; but the fair result seems to be, that the question, whether each particular case comes within this clause of the statute or not, depends not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.

54 In *Thomas v. Cook* (1828), 8 B. & C. 727, 108 E.R. 1213 , a partnership of Cook and Morris was dissolved. Cook agreed to assume certain debts of the partnership, and the plaintiff and others agreed to enter into a bond of indemnity to secure the payment of those debts. The plaintiff executed the bond of indemnity upon receiving the oral undertaking of Cook to save him harmless and indemnify him from all damages he might incur by reason thereof. The plaintiff sought to enforce the oral agreement. Bayley J. held at p. 1215:

> A promise to indemnify does not, as it appears to me, fall within either the words or the policy of the Statute of Frauds ...

Park J. said on the same page:

> This was not a promise to answer for the debt, default, or miscarriage of another person, but an original contract between these parties, that the plaintiff should be indemnified against the bond. If the plaintiff, at the request of the defendant, had paid money to a third person, a promise to repay it need not have been in writing, and this case is in substance the same.

55 From this case, it can be seen that an indemnity is not within the Statute of Frauds and that an "original contract" does not fall within the Statute.

56 Another case which is helpful in this area is the decision of the English Court of Appeal in *Guild & Co. v. Conrad*, [1894] 2 Q.B. 885 (C.A.) . A particularly illuminating statement is that of Davey L.J. found at p. 896:

> In my opinion, there is a plain distinction between a promise to pay the creditor if the principal debtor makes default in payment, and a promise to keep a person who has entered, or is about to enter, into a contract of liability indemnified against that liability independently of the question whether a third person makes default or not. In my opinion this was a promise to indemnify, and therefore not within the statute; and the authorities entirely bear that out.

57 The evidence of the Kamitomos is that they were prepared to enter into the lease with the Pasulas only if they could look to Macleods for payment. This, it is argued, was an "original contract" between these parties that the plaintiffs should be indemnified against any losses they might incur by reason of entering into the lease.

58 The rules to be applied in determining whether an oral promise to pay falls within the statute or not can be shortly stated, based upon the authority of *Guild & Co. v. Conrad, supra, Beattie v. Dinnick* (1896), 27 O.R. 285 (C.A.) , and *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K.B. 778 (C.A.) .

59 1. A promise made to a person who is a creditor or is about to become a creditor to pay the debt due or to become due from another to the creditor is a guarantee, whether the promise to pay is conditional or unconditional.

60 2. A promise made to one who is not a creditor that if he will incur liability, the promissor will indemnify him against it, is an indemnity which does not fall within the statute.

61 3. If the object of an agreement between the plaintiff and the defendant is to induce the plaintiff to assume a liability which does not then exist and is being assumed as a consequence of the agreement, then a promise of the defendant made incidentally thereto to pay the debt of a third person is an indemnity which does not fall within the statute.

62 Based on the rules set out above and on the cases to which I have referred, it is submitted on behalf of the plaintiffs that the agreement between Macleods and the Kamitomos was an indemnity which does not fall within the Statute of Frauds.

63 But do the facts supporting this submission support such a conclusion?

64 It is alleged on behalf of the plaintiffs that the agreement induced the Kamitomos to enter into a contract which gave rise to a fresh liability which did not exist prior to the agreement. The Kamitomos were unwilling to incur the cost of renovating the theatre building on the strength of the convenant of the Pasulas to pay rent. They advised Mr. Sweeting accordingly. When Macleods promised to be responsible for the lease, the Kamitomos entered into a contract with Morris Walker for the construction of the renovations and thereby became liable to pay him for the renovation, and entered into an agreement with the Federal Business Development Bank to borrow money to pay for the renovations and became liable to the bank for the repayment of the loan.

65 lt is further argued on behalf of the plaintiffs that the promise of Macleods to be responsible for the lease and therefore, payment of the debt of the Pasulas was merely incidental to the larger contract or "main contract" as referred to by Vaughan William L.J. in the *Harburg India Rubber Comb* case, supra, namely the contract pursuant to which the Kamitomos would renovate the theatre building in order to make it suitable for a Macleods store.

66 There is another test mentioned in the cases which should also be referred to. In *Fitzgerald v. Dressler* (1859), 7 C.B.N.S. 374, 141 E.R. 861 at 868 , in a quotation from Cockburn C.J. it is stated that an indemnity does not fall within the statute,

> ... if there be something more than a mere undertaking to pay the debt of another, as, where the property in consideration of the giving up of which the party enters into the undertaking is in point of fact his own or is property in which he has some interest ....

67 In *Sutton & Co. v. Grey*, [1894] 1 Q.B. 285 (C.A.) , Lord Esher M.R. said at p. 288:

> There the test given is, whether the defendant is interested in the transaction, either by being the person who is to negotiate it or in some other way, or whether he is totally unconnected with it. If he is totally unconnected with it, except by means of his promise to pay the loss, the contract is a guarantee; if he is not totally unconnected with the transaction, but is to derive some benefit from it, the contract is one of indemnity, not a guarantee, and s. 4 does not apply.

68 The application of the test of "interest" has been discussed in *Harburg India Rubber Comb Co. Ltd. v. Martin* , supra, and in *Davys v. Buswell*, [1913] 2 K.B. 47 (C.A.) . In the *Harburg* case the defendant was a major shareholder and a director of the company whose debt he promised to pay. Vaughan Williams L.J. said that the relationship between the defendant and the company merely provided the motive for the promise. The object of the contract, nevertheless, was to obtain forebearance by undertaking to pay the debt of the company to the plaintiff. Hence, the object was to make himself liable to the creditor for the payment of the debt owing by a third person.

69 The facts in the *Davys v. Buswell* , supra, case are similar, and the limitation on the application of the "interest" rule is again dealt with.

70 It is submitted on behalf of the plaintiffs that the facts in this case fall within the rule enunciated by Cockburn L.J. in *Fitzgerald v. Dressler* , supra, as the appropriate kind of interest exists. The interest goes to object and not to motive. The object of the contract between Macleods and the Kamitomos was to renovate the building in order to make it suitable for a Macleods store. Macleods clearly had an interest in that object because it stood to make profit from the operation of a Macleods store by a dealer or from the operation of a Macleods store as a company store. In order to stand to make that profit, the existing theatre building had to be renovated.

71 To the two tests mentioned above, there can be added a third test, namely: if the object of the agreement between the defendant and the plaintiff is to accrue a benefit to the defendant, then the incidental promise of the defendant made for the purpose of attaining that object to pay the debt of a third person is an indemnity which does not fall within the Statute of Frauds.

72 A useful passage from the Canadian case of *Sarbit v. Hanson and Booth Fisheries (Can.). Co.*, [1950] 2 W.W.R. 545, [1950] 4 D.L.R. 34 , reversed on appeal 58 Man. R. 377, 1 W.W.R. (N.S.) 115 at 125, [1951] 2 D.L.R. 108 , Coyne J.A., delivering the judgment of the Court of Appeal, said:

> Perusal of cases and text books indicates clearly that whether the statute does not or does apply, turns on whether the agreement was a direct promise to pay, or whether, a third person being primarily liable, the agreement was to pay only on default of such person. That involves determination of what language was used by the parties, and its interpretation. If there is any doubt of the proper interpretation of that language, the acts of the parties and the surrounding circumstances may be looked at in aid. It is the substance and intent of the admission, not its particular form, that is material ...

73 The texts and the cases to which I have been referred emphasize that the words used by the parties are not determinative of whether the agreement created is an indemnity falling within the statute or not and that the court is required to take into consideration all of the surrounding circumstances and to determine the true intent of the parties in order to reach a conclusion. In the *Harburg India Rubber* case, supra, Vaughan Williams L.J. said at p. 784:

> ... I think, the form of the promise given by the promisor has never been held to be conclusive of the matter. He may, or he may not, promise in terms to answer for the debt of another; but whether he does so or not, it is the substance, not the form, which is regarded.

Coyne J.A. in the *Sarbit* case, supra, said at p. 125:

> If there is any doubt of the proper interpretation of that language, the acts of the parties and the surrounding circumstances may be looked at in aid. It is the substance and intent of the admission, not its particular form, that is material ...

74 The contract sought to be enforced, being oral in nature, of necessity creates a difficulty in determining its precise nature. The passages referred to, however, are authority for the proposition that the precise words used by the parties will not necessarily determine the nature of the contract made between them. Where the precise words of the agreement cannot be accurately ascertained, the court is required, as in the case where the words can be ascertained, to look at all of the surrounding circumstances. Here, the important surrounding circumstances appear to me to be the following:

75 1. The Kamitomos refused to sign the lease with the Pasulas only as tenants.

76 2. Only after they received the assurance of Macleods that it would be responsible for the lease did they agree to sign it.

77 3. Macleods had a substantial interest in having Mr. and Mrs. Kamitomo enter into the lease with the Pasulas because arrangements had been made for the Pasulas to operate as dealers and to purchase their inventory from Macleods, and further, Macleods had the right upon termination of the dealership to take an assignment of the balance of the term of the lease from the Kamitomos.

78 4. The Kamitomos entered into a contract with Morris Walker for the renovation of the building in order to make it suitable for a Macleods store and incurred liability to Morris Walker and to the Federal Business Development Bank as a result.

79 It is further submitted on behalf of the plaintiffs that the said agreement is not otherwise enforceable by reason of the provisions of the Statute of Frauds.

80 The Statute of Frauds further provides that no action shall be brought unless there is a memorandum in writing:

> 4. ... to charge any person upon ... any contract, sale of lands, tenements or hereditaments or any interest in or concerning them [and] upon any agreement that is not to be performed within the space of one year of the making thereof ...

81 It is submitted that the contract in this case is not a contract for the sale of lands or any interest in lands. The agreement here sought to be enforced is one pursuant to which Macleods has made itself liable to save harmless and indemnify the Kamitomos with respect to any losses they may suffer as a result of the failure of the Pasulas to comply with the terms of the lease. The indemnity agreement, it is argued, does not create a contract for the sale of land, tenements or hereditaments or any interest in or concerning them.

82 In my view, the Pasulas understood Macleods to have indemnified them from any exposure over their initial investment and the Kamitomos understood that they would be saved harmless and indemnified by Macleods as a result of any failure of the Pasulas to comply with the terms of the lease. I find that the oral representations made by Sweeting to Kamitomos and Pasulas amount to an indemnity which does not fall within the Statute of Frauds.

83 The answer to Q. (2) therefore is "Yes".

3. Adverse Inference

84 The only evidence of Donald Sweeting introduced at trial was evidence taken on commission and I find it to be of little or no assistance to the court. The court had the opportunity to hear the Pasulas and assess their credibility; similarly, the court has been able to assess Mr. Kamitomo. Mr. Sweeting was not called upon by Macleods although he could have been, by way of extra-provincial subpoena, if necessary. The substance of both Mr. Kamitomo's and Pasulas' evidence deals with respresentations made by Mr. Sweeting.

85 I am invited to, and I draw the inference that the failure of Macleods to adduce viva voce evidence, through witnesses who were present at the material times that the representations were made, must lead to the presumption that had the defendants adduced such evidence, it would not have been favourable to their case.

86 The principles of law on adverse inference are well known. The leading statement is to be found in Wigmore, Evidence in Trials at Common Law, Chadbourn revision (1979), at vol. 2, p. 192, para. 285.

> The failure to bring before the tribunal some circumstances, documents, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so; and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.

87 See also *Barnes v. Union SS. Ltd.*, 13 W.W.R. 72, [1954] 4 D.L.R. 267, 71 C.R.T.C. 334 , affirmed 14 W.W.R. 673, [1955] 2 D.L.R. 564, 72 C.R.T.C. 280 , which was reversed [1956] S.C.R. 842, 5 D.L.R. (2d) 535 adopting and citing Wigmore.

> It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

Per Lord Mansfield, *Blatch v. Archer* (1774), 1 Cowp. 63, 98 E.R. 969 at 970; see also Sopinka & Lederman, The Law of Evidence in Civil Cases (1979), at p. 535.

> ... if the opposite party has it in his power to rebut it by evidence, and yet offers none ... then we have something like an admission that the presumption is just.

Per Bets J., *R. v. Burdett* (1820), 4 B. & Ald. 95 at 122, 106 E.R. 873 ; see also Wigmore, vol. 2 at p. 198.

> Every man will do what he can to shield himself from ... the burden of punishment. We all know this. We all expect it ... A failure to offer an explanation must tend to create a belief none exists.

Per Brener J., *State v. Grebe* (1877), 17 Kan. 458 at 459; see also Wigmore, vol. 2 at p. 199.

88 The adverse inference is drawn not merely from the failure to produce, "but from non production when it would be natural for the party to produce" such evidence: Wigmore, vol. 2 at p. 199.

89 Macleods failed to produce either Mr. Sweeting to answer the allegations of the plaintiff and the Pasulas, or Mr. Odysyk, who was present at the July 1978 meeting. It would have been natural for these people to have been produced. Their evidence would go to the heart of Macleods' contention that the representations and promises were not made.

90 In *Panarctic Oils Ltd. v. Menasco Co.* (1983), 41 A.R. 451 (C.A.) the appellant raised the issue that an adverse inference should have been drawn against the respondent because of the failure of the respondent to call certain witnesses. At p. 464 Laycraft J.A. stated:

> Again we are invited to draw adverse inference against the plaintiff from the absence of witnesses. lt is said that the plaintiff was required to call *all* the passengers aboard the aircraft and that failure to do so must result in inferences adverse to the plaintiff. I am at a loss as to the inference to be drawn. Presumably all that the passengers would be qualified to do would be to describe the noise heard; they would not be qualified to state the result that good airmanship would require from it. One or the other of them with happy gift of expression may have produced a more descriptive phrase than "thud" "bang" "crunch" "bump" "judder" "shudder". I would doubt that 17 more witnesses on this point would have produced much enlightenment. The trial judge declined to draw any inference from their absence and I respectfully agree with him.

91 The test set forth in determining whether the adverse inference was to be drawn was: could the witnesses who were not produced have produced much enlightenment?

92 It is clear that Mr. Sweeting could have provided enlightenment. He was the one who is alleged to have made the representations and he is best able to make answer to the allegations. In *Levesque v. Comeau*, [1970] S.C.R. 1010, 16 D.L.R. (3d) 425, 5 N.B.R. (2d) 15 , the court accepted the principle that the failure to produce a witness whom one would naturally expect a party to call upon in proving its case should lead to the presumption that such evidence would adversely affect the party's case (per Pigeon J. at p. 1012):

> She alone could bring before the Court the evidence of those facts and she failed to do it. In my opinion, the rule to be applied in such circumstances is that a Court must presume that such evidence would adversely affect her case.

93 I think I need not say more than that. I am more than satisfied that this is a proper case for the drawing of an adverse inference against Macleods.

94 It is abundantly clear on the whole of the evidence that the lease between the Kamitomos and the Pasulas was breached by the Pasulas commencing in October 1978 when they first failed to pay the monthly rent due thereunder. That breach has continued in each month thereafter up to the date of trial by similar failures to pay rent.

95 I find that by reason of the continuing breaches of the said lease by the Pasulas, the Pasulas are liable in damages to the plaintiffs and that Macleods is in turn liable to the plaintiffs for those damages as a result of the verbal representations which I have found to be an indemnity.

96 It is not contradictory or inconsistent that, at the same time, the Pasulas can be liable as tenants under the lease and Macleods can be liable as indemnitor. In *Morin v. Hammond Lumber Co.*, [1923] S.C.R. 140, [1923] 1 D.L.R. 519 , Iddington J. said at p. 142:

> The learned trial judge, and Chief Justice Hazen who wrote the opinion which prevailed in appeal, seem, I most respectfully submit, to attach too much importance to the persistent contention of counsel for appellant that, short of an actual novation of contract, whereby the original debtor would be absolutely discharged, no contract involving an obligation for the payment of the debt of another could be maintained unless reduced to writing.
>
> I cannot assent to such a proposition. There are numerous cases — indeed too numerous to mention — conflicting entirely therewith.
>
> If there happens to be an actual novation of contract of course that ends all doubt or difficulty. But by no means do the cases resting thereon decide that there must be novation of contract before liability can arise on a verbal contract which involves the obligation of payment of another's debt.

97 It has been argued by counsel for the Pasulas and pleaded by them in para. 7 of their statement of defence, that it would be unconscionable to enforce the lease as against the Pasulas. Both of the Pasulas testified however that they understood they were being asked to sign a lease, that they read it over and asked a number of questions to Mr. Sweeting, and that they understood the lease before they signed it. There is, in my view, nothing unconscionable or even unusual about the terms of the lease. The Pasulas signed it of their own free will and are liable thereunder. Any representations which may have been made to the Pasulas by Mr. Sweeting which induced them to enter into the lease were made on behalf of Macleods and not on behalf of the Kamitomos, and accordingly that argument fails.

98 The plaintiffs are accordingly entitled to judgment against Macleod Stedman Limited pursuant to the oral representations which I have found to be an indemnity in the amounts set out in para. 5 of the statement of agreed facts together with costs on a solicitor-client basis.

99 The plaintiffs are also entitled to judgment against the Pasulas pursuant to the lease in the amounts set out in para. 5 of the statement of agreed facts.

100 In my view, this is also a proper case for awarding the Pasulas costs against Macleod Stedman Limited on the basis of three times col. 5 of the Rules of Court including examinations for discovery, no limiting rule to apply.

Judgment for plaintiffs.

TAB 9

2013 ABQB 484
Alberta Court of Queen's Bench

Richards v. Richards

2013 CarswellAlta 1581, 2013 ABQB 484, [2013] A.W.L.D. 4781, [2013] A.W.L.D. 4792, [2013] A.W.L.D. 4794, [2013] W.D.F.L. 5308, [2013] W.D.F.L. 5400, [2013] W.D.F.L. 5411, 232 A.C.W.S. (3d) 1043, 568 A.R. 302

Linda Jean Richards, Plaintiff and Timothy Owen Richards, Defendant

C.S. Phillips J.

Heard: May 6, 2013; May 7, 2013; May 8, 2013; May 9, 2013; May 10, 2013
Judgment: August 23, 2013
Docket: Calgary 4801-145709

Counsel: Mr. N. Makins, Ms E. Kruger, for Plaintiff
Mr. T. Richards, Defendant, for himself

***C.S. Phillips J.*:**

I. Introduction

1 Linda and Timothy Richards were married on October 8, 1988. After 21 years of marriage, the Richards separated on August 29, 2009. Linda Richards (the "Plaintiff") filed a Statement of Claim for Divorce and Division of Matrimonial Property on September 20, 2010. The Statement of Defence was filed by Timothy Richards (the "Defendant") in respect of this matter on November 17, 2011 and a Counterclaim for Divorce and Division of Matrimonial Property was filed by him on November 17, 2011. The parties are not yet divorced.

2 The matter came to trial almost three and three quarters years after the parties separated.

3 As the Defendant is now bankrupt and a Trustee in Bankruptcy (the "Trustee") has been appointed, I am unable to deal with the property issues and have therefore stayed that part of the Plaintiff's application, such that the matter with respect to all property issues is effectively adjourned *sine die*.

4 Furthermore, the Plaintiff has filed a claim with the Trustee and is taking the position that the assignment of the Calgary West Campground (the "Campground") lease from the Defendant's company 333582 Alberta Inc. in favour of Mr. Frederick (Fred) Richards' company, Stardust Ranching Ltd. on January 17, 2013 was done to defeat his creditors' claims and the Plaintiff's claimed interest in 333582 Alberta Inc. and in the operation of the Campground and to defeat her claim for spousal support.

II. Issues

5 The Plaintiff filed a Statement of Claim for: (1) a Divorce Judgment; (2) an Order for Spousal Support; and (3) an Order directing that the Defendant pay costs of the action on a solicitor and client basis.

6 On May 2, 2013, the Plaintiff made an Application: (1) that the division of matrimonial property be adjourned *sine die*; (2) that a declaration be made at trial that the Plaintiff has an interest in the Campground lease previously held by 333582 Alberta Inc. (the "Declaration"); and (3) that the Defendant be held in contempt of the Order made by this Court on December 6, 2011 and that he also be held in contempt of the direction by the case conference Justice that the Defendant provide a sworn statement respecting the Campground lease and for making false representations to this Court at a domestic special hearing on February 20, 2013 and at case conference on March 25, 2013, in respect of disposing of property.

7 As I noted, I have stayed the Plaintiff's request that a Declaration be made at trial; I believe this is a finding that speaks to matrimonial property issues and can be reviewed pending the outcome of the Trustee's investigation.

8 Having stayed the property portion (both the division of matrimonial property and the Declaration) of the Plaintiff's application, I am therefore left to determine three issues: first, if the Plaintiff is entitled to spousal support and, if so, in what amount. Second, whether to hold the Defendant in contempt of court. Third, if the Plaintiff is entitled to costs on a solicitor and client basis.

III. Facts and History of Proceedings

9 At the time the parties were married in 1988, they were young. The Plaintiff was 20 and the Defendant was 30 years old. Like all young couples, the parties had very little by way of assets at the time of their marriage. Both parties have a high school diploma, having successfully passed grade 12. Further, there are no children of the marriage.

10 Prior to becoming involved in managing the Campground known as the Calgary West Campground, which is operated through 333582 Alberta Inc., the Defendant worked as a realtor and property manager and also worked at Prudential selling life insurance. The Plaintiff at that time worked as a resident manager for rental suites which were owned by the brother of the Defendant, Fred Richards, and/or the Defendant's father, William Richards.

11 Also, during this period of time the Plaintiff's role in the marriage was to run the whole household and was primarily responsible for housekeeping and the like while the Defendant went out to work.

12 In 1995, the Plaintiff and Defendant took up residence on the large, well known Calgary West Campground and became the managers of this operation which was a 24/7 operation for all practical purposes. During the time that the parties managed the Campground, which included hands-on work, the parties were each paid a salary of an equal amount. The Plaintiff and Defendant jointly managed this Campground and RV park and storage facility for 13 years while it was owned by third parties.

13 In 2005 the Campground was sold and then leased back to 333582 Alberta Inc. and operated as a leasehold by the Defendant's brother Fred Richards, who was the sole shareholder and director of 333582 Alberta Inc. at the time. According to Fred Richards, 333582 Alberta Inc. received $3,600,000.00 as its share of the net sale proceeds after repayment of financial obligations. Prior to the sale of the Campground, 333582 Alberta Inc. had an undivided 1/3 interest in title to the Campground property.

14 One of the terms of the leaseback of the Campground to 333582 Alberta Inc. as lessee was that it held a three year lease, expiring on October 15, 2008 for a yearly rental of $400,000.00. Apparently, the decision as to how to allocate the sale proceeds from the Campground sale was made by the Defendant's late father, William Richards, together with the Defendant's brother, Fred Richards. According to Fred Richards, although he was the shareholder of record of 333582 Alberta Inc., the beneficial owner was his father, up until the sale of the Campground in 2005 and thereafter he was the legal and beneficial owner of 333582 Alberta Inc. until the transfer to the Defendant, effective October 15, 2008, as noted below. There is no paperwork to document this arrangement with his father. Furthermore, Fred Richards says that he and his late father, William Richards, decided to gift out of the net sale proceeds $1,000,000.00 to his brother Tim Richards, the Defendant; $1,600,000.00 to his father's wife, Iris Richards; and $1,000,000.00 to Fred, himself.

15 On September 27, 2005, 1184499 Alberta Ltd. (a company solely held by Fred Richards) transferred/paid the $1,000,000.00 gifted to the Defendant through to 1194925 Alberta Ltd. (a company solely held by the Defendant, Tim Richards). The parties later renamed 1194925 Alberta Ltd. to "Darkhorse Capital Incorporated" (which name was reflected in both their e-mail addresses). There is no paperwork to substantiate this gift or transfer of $1,000,000.00 and the Defendant and his brother Fred Richards claim that it was a gift to only the Defendant and not the Plaintiff. At the time, the Defendant also gifted $100,000.00 of the $1,000,000.00 to the Plaintiff, which was used by the Plaintiff to make investments in the stock market. It is very much in dispute as to whether the $1,000,000.00 gift to the Defendant is exempt as he claims or whether it was a gift to both the Plaintiff and Defendant as the Plaintiff claims. Notably, the Defendant reluctantly admitted at trial when asked:

Q: Did you not handle that gift in a manner in which you informed Linda (the Plaintiff) that this was your and her money?

that it was a gift to both of them for he stated: "... I'm not about to start a fight in my house, all right. So to make things work easily, it was understood that we'd work together ..." In any event, however this $1,000,000.00 gift is ultimately characterized when the property issues between the parties are dealt with, it is clear this money was invested in the stock market for both their benefit and traded by both parties and in particular by the Plaintiff, who in my view subsequently became the main trader and administrator of the parties' stock portfolio.

16 The parties continued to manage the Campground and to collect a salary from 333582 Alberta Inc. while conducting trading on their joint stock portfolio.

17 The parties continued to live at the Campground until early 2008, when mould was discovered in their residence at the Campground. They then moved out of the Campground residence into a rental property, which rent was paid for by 333582 Alberta Inc.

18 During this time, the parties both became disgruntled with managing the Campground. They were concerned about the mould in their unit (which caused them to move off the Campground); they were concerned about vacation pay and other benefits and pay they claimed was owing to them, and both parties filed a request for payment initially with Fred Richards, who retroactively paid one year of bonuses to the parties and deferred other bonuses owed to a later date, which were never paid. The parties then demanded payment of the bonuses and vacation pay by making Employment Standards applications. The Plaintiff's evidence speaks to approximately $37,500.00 owing to each of them, plus a $10,000.00 performance bonus, which I accept. At one point, Fred Richards claims that the Plaintiff and Defendant quit the Campground over this but then through their father, Bill Richards, acting as mediator, the Defendant came back to the Campground.

19 After the parties had moved off of the Campground, the Defendant continued to work at the Campground while the Plaintiff continued to be the main trader and administrator of their stock portfolio. By a joint decision of the parties, the Plaintiff attended investment seminars and travelled to Toronto and Vancouver to research investments. She had trading authority and power of attorney on any accounts in the name of the Defendant and exercised these powers. Notwithstanding her involvement with the parties' stock portfolio, the Plaintiff continued to be involved in the administration and management of the Campground, although to a lesser extent than she was previously. The Plaintiff testified when the parties lived at the Campground as resident managers, they were on call 24 hours a day, 7 days a week. However, after moving off the Campground with the Defendant, her duties at the Campground changed. She advised that an arrangement was made whereby senior staff at the Campground started taking on more responsibilities (responsibilities that she and the Defendant used to be responsible for), and these senior staff would also supervise junior staff at the Campground. Nevertheless she would still advise the senior staff over the phone when they had issues or questions, and she would also attend the Campground in person to check on inventory, and to perform orders to keep the general store stocked, which she could do online from her computer. The Plaintiff testified that the Defendant told her she needn't be at the Campground every day, however:

> I did continue to contribute to the campground, however in the absence of — of being at the campground to watch the stock portfolios I did not know, in essence, that my employment had come to an end because I was still performing duties for the campground and was still receiving pay.

20 A resolution of the dispute over the bonuses and holiday pay owed to the Plaintiff and Defendant by 333582 Alberta Inc. through Fred Richards appears to have occurred effective October 15, 2008 for effective that date, the shareholding and directorship of 333582 Alberta Inc., which held the lease of the Campground and the right to operate the Campground, was transferred to the Defendant. It appears that the Defendant acquired the shares of 333582 Alberta Inc., and claims that he was the sole shareholder of that company. This is of course disputed by the Plaintiff, for she claims that in October 2008 she became a beneficial owner jointly with the Defendant who holds the shares in this company. The Sale Agreement dated October 15, 2008, (which Fred Richards admits to something that he devised with no input from the Defendant) states that the Defendant paid $68,000.00 to Fred Richards for the Campground lease, which consideration the Plaintiff claims she contributed towards.

Also noteworthy in this Sale Agreement is the fact that Mr. Fred Richards was to be paid $2,500.00 per month for accounting services, which I will discuss further below.

21 After the transfer of the shareholding and directorship of 333582 Alberta Inc. to the Defendant, the parties were terminated from the payroll of the Campground because they were no longer employees as their status had changed with the transfer.

22 The parties' stock portfolio lost most of its value in October 2008 when the Defendant had used margin to buy stock.

23 Unbeknownst to the Plaintiff, her employment with the Campground was terminated on October 15, 2008 (the same date as the transfer referred to above), and a Record of Employment was issued, which was not provided to her at that time. The Plaintiff first received this Record of Employment in September 2009, (after the parties had separated) giving the reason for her termination of employment as "Shortage of work/End of contract", when to the Plaintiff's knowledge there never was a shortage of work at the Campground as she continued to work there after October 15, 2008 until the date of separation on August 29, 2009.

24 I find as a matter of fact that during the period between the time the $1,000,000.00 gift was made to the company that became Darkhorse Capital Incorporated up to the termination of the Plaintiff's employment at the Campground, the Defendant knowingly and intentionally took steps to "phase out" the Plaintiff from her involvement in operating the Campground. The Defendant quite deliberately limited the Plaintiff's involvement from her role in the operation of the Campground and subsequently terminated her employment with the Campground without her knowledge, going so far as taking steps to attempt to prevent her from gaining access to her Record of Employment. The Plaintiff testified, and I accept, that she was never provided with a physical copy of her Record of Employment when it was issued on January 28, 2009 by an accountant in Fred Richard's office. The Defendant, however, must have been provided with her Record of Employment, because he had given a copy of it to the parties' accountant.

25 The Plaintiff continued to attend at the Campground up until the time the parties separated on August 29, 2009, after which she did not attend. She was not gainfully employed from August 29, 2009 until her recent employment in January 2013.

26 When the parties separated, the Defendant moved out of their residence and continued to operate the Campground without any involvement from the Plaintiff.

27 The parties attended at "Civilized Divorce" for mediation. They also attended several times at mediation, and a draft separation agreement was prepared by the mediator. However, the Defendant failed to keep contact with the mediator, and the parties each retained legal counsel.

28 For the months of September, October, November and December 2009, the Defendant paid the Plaintiff an amount of $7,500.00 per month, equalling a total amount of $30,000.00 paid in spousal support for 2009.

29 The parties later entered into an Interim Spousal Support Agreement dated June 16, 2010, which agreement retroactively characterized the Defendant's 2009 payments to the Plaintiff (which she claims were being paid to her in part as her salary from the Campground) as spousal support, and stated that spousal support payments in the amount of $4,900.00 per month were to be paid to the Plaintiff commencing January 1, 2010 up to and including December 1, 2010. The Interim Spousal Support Agreement also stated that from and after January 1, 2011, the Plaintiff reserved her right to further spousal support.

30 The Defendant made such spousal support payments as outlined in the Interim Spousal Support Agreement to the Plaintiff for the year 2010, equalling a total amount of $58,800.00 paid in spousal support for 2010.

31 The parties attended a DRO on June 22, 2011, and entered into a written agreement with respect to disclosure and the payment of spousal support. The main terms of this agreement were: financial disclosure per FL-17 for the period of August 29, 2009 until the date of the signing of the agreement; and spousal support in the amount of $4,000.00 per month was to be paid for six months from July 1, 2011 up to and including December 1, 2011.

32 In 2011, the Defendant paid the Plaintiff six months of spousal support, equalling a total amount of $24,000.00 in spousal support for 2011 plus $50.00 to defray non-sufficient funds charges for a dishonoured spousal support cheque. This $24,000.00 was the Plaintiff's total income for 2011.

33 On December 6, 2011, Justice Bensler of this Court made an Order that: (1) the Defendant pay to the Plaintiff the amount of $4,000.00 spousal support on January 1, 2012; (2) spousal support was to be reviewed on January 25, 2012; (3) the investment account of Darkhorse Capital Incorporated was frozen; (4) the Defendant may pay the Plaintiff's $4,000.00 spousal support from the Darkhorse Capital Incorporated trading account; (5) the Defendant shall not further dissipate any assets or matrimonial assets; (6) the matter was to proceed to a trial subject to the parties first attending a JDR; (7) costs shall be in the cause; (8) each party shall continue to provide the other party with a complete copy of his or her income tax return and any notices of assessment and reassessment issued to him or her by the Canada Customs and Revenue Agency on an annual basis, on or before July 1 st of each year and in the event that a party has notfiled an income tax return for the previous year, he or she shall provide the other party with copies of his or her T4, T4A and all other relevant tax slips and statements disclosing any and all sources of income, including self-employment income; and (9) amounts owing under this Order shall be paid to the Director of Maintenance Enforcement, and shall be enforced by the Director.

34 The Defendant paid the spousal support payment of $4,000.00 on May 29, 2012, five months after it was ordered by Justice Bensler to be paid on January 1, 2012.

35 The parties attended a JDR on March 16, 2012, but were not able to settle.

36 The Defendant's counsel filed a Notice of Withdrawal of Lawyer on January 15, 2013.

37 The Defendant through his company 333582 Alberta Inc. entered into an Assignment of Lease and Business (drafted by his brother Fred Richards) with Stardust Ranching Ltd. (a company held by his brother Fred Richards and his wife, Heesung Kim) on January 17, 2013, backdated effective as of January 1, 2013 (the "Assignment of Lease and Business"). For the nominal amount of $2.00 consideration, 333582 Alberta Inc. assigned the Campground lease and business to this non-arm's length company held by his brother, Fred Richards and his brother's wife. Although the agreement provides that Stardust Ranching Ltd. will enjoy all revenues and be responsible for all expenses associated with the lease and the operation of the business accruing from January 1, 2013, the Assignment of Lease and Business did not include an assumption by Stardust Ranching Ltd. of the existing liabilities of the Campground.

38 The Affidavit of Fred Richards sworn on April 26, 2013 and filed with the Clerk of the Court on the same day (the "Fred Richards Affidavit"), as well as his testimony, state that the cash flow problems being experienced by the Campground (and alleged by Fred Richards to be due to the Defendant's uncontrollable personal spending) were "unsolvable" and that outstanding liabilities as at December 31, 2012 in the amount of $134,087.82 forced Fred Richards to take over the operational management of the Campground as of January 2013 before the season started. Fred Richards maintains that his taking over the Campground was the only way to save the Campground from the financial difficulties associated with these outstanding liabilities. I do not accept Fred Richards' testimony on this point, and have serious issues with his credibility, which I will elaborate on further.

39 I find as a matter of fact that this Assignment of Lease and Business was done by the Defendant intentionally for less than fair market value to a non-arm's length party and in contravention of this Court's previous Orders for the sole purpose of diverting the Defendant's income derived from the Campground in order to avoid his spousal support obligations. I also note that the Defendant denied any existence of this Assignment of Lease and Business when the parties appeared before Justice Gates on February 20, 2013 for a domestic special hearing. Instead, the Defendant represented on February 20, 2013 that the transfer "hasn't been done completely yet", that "nothing has been completed" and "all I've done so far is put together a letter stating that — put just — that my brother would be handling things and covering the expenses, and probably be setting up a new corporation in order to cover — to make sure things are at his end covering". Justice Gates warned the Defendant that he needed to understand what Justice Bensler's Order meant, that he couldn't get rid of the Campground business, or any assets that were potentially matrimonial assets, and if he did so he could be found in contempt of Court and go to gaol. Justice Gates, taking the

Defendant's representation that the transfer of the Campground had not yet been finalized, also reiterated at the domestic special hearing on February 20, 2013 that the Defendant was not allowed to dispose of the Campground without permission of the Court.

40 At the February 20, 2013 hearing Justice Gates ordered: (1) the matter to be set down for a trial commencing May 6, 2013 for five (5) days; (2) the matter was to be set down for a case conference on March 25, 2013 at 3:00 pm; (3) the Defendant was to forthwith provide to the office of counsel for the Plaintiff all documentation relating to any disposition of any nature whatsoever, executed or otherwise, pertaining in any way to any contemplated transfer of the campground operation/management/control of 333582 Alberta Inc. operating as Calgary West Campground; and (5) Rule 9.4(2)(c) of the Alberta *Rules of Court* was invoked. Clearly, by this Order, Justice Gates was not aware nor had he been advised of the Assignment of Lease and Business that had been made effective January 1, 2013.

41 The parties attended a case conference on the afternoon of March 25, 2013 before Justice Jeffrey. The morning of March 25, 2013 the Defendant and his brother, Fred Richards attended at the office of the Trustee.

42 The Defendant assigned himself into bankruptcy the day following the parties' case conference, on March 26, 2013. In his Statement of Affairs (Non-Business Bankruptcy (Form 79), the Defendant swore his total amount of debt was $276,679.54. The Defendant failed to make any mention of his impending assignment into bankruptcy to this Court or to the Plaintiff the day before at the case conference before Justice Jeffrey on March 25, 2013. Also, it is worthy of note that the Defendant's brother, Fred Richards, attended with him at the Trustee's office on the morning of March 25, 2013, where the Trustee met and asked questions of both of them prior to the filing of the paperwork putting the Defendant into bankruptcy. Thereafter, in the afternoon of March 25, 2013, the Defendant attended with his brother, Fred Richards, at the case conference held by Justice Jeffrey.

43 The Plaintiff asserts that the Defendant's Assignment of Lease and Business in respect of the Campground, and his assignment into bankruptcy, were both entered into as a scheme designed to be prejudicial to the Plaintiff and to the Defendant's other creditors and to defeat their claims. The Plaintiff has already filed a claim with the Trustee to that effect. I find that the Defendant's actions in totality point to a deliberate and willful attempt to evade his legal obligations to the Plaintiff and were done in defiance of orders granted by Justices of this Court and without any prior notice to the Plaintiff. I also agree with the Plaintiff's assertions that there is no reason the Defendant was compelled to assign the Campground lease. His brother, Fred Richards could have simply carried out his obligations under the Sale Agreement of October 15, 2008 and set up an orderly payment plan of debts with its creditors, if there were early concerns that the Campground might end up in financial difficulties. There was no reason he could not have done so. Furthermore, the Campground's unpaid liabilities as at December 31, 2012 were $134,087.82, which could have been more than covered and absorbed by the Campground's gross revenue which had been over $1,200,000.00 and $1,100,000.00 historically in 2010 and 2011, respectively and had netted the couple and in more recent years the Defendant between $200,000.00 and $300,000.00 at least in income. The Defendant's general lack of transparency and fulsome disclosure to this Court point to his lack of credibility, which I will deal with further.

44 The Defendant currently lives onsite at the Campground and has little to no monthly expenditures for housing. He states he is making $2,000.00 a month employed at the Campground and is charged $100.00 a week for rent by his brother's company. The Defendant claims to be a manager at the Campground while his brother, Fred Richard, states that he is a consultant, although he is represented as a manager to Campground employees. In any event, I do not see a significant distinction between his current duties at the Campground and those he was responsible for when he was the Campground manager when 333582 Alberta Inc. held the Campground lease prior to January 1, 2013.

45 The Plaintiff has been employed part-time as a receptionist since January 2013 for $17.00 per hour, approximately 28 hours per week.

46 Neither party has any post-secondary education.

IV. The Defendant's Failure to Disclose and Dissipation of Assets

A. Mr. Tim Richards' Failure to Disclose

47 The Defendant has not provided a complete and accurate record of financial evidence to this Court. As Justice Martin stated in *McPherson v. McPherson*, 2012 ABQB 581 (Alta. Q.B.) at para 92 (".*McPherson*"):

> [I]n a trial there is an independent and ongoing obligation to provide relevant and material documentation touching on the matters in issue. In the case at bar this means all documents that relate to [the Defendant's] personal and business financial resources, as his capacity to pay child and spousal support is very much in issue. [The Defendant] did not provide complete, reliable or up to date information for all the entities at play, with the result that a complete and accurate picture of his financial resources was not in evidence.

48 As in *McPherson*, the Defendant has not met his independent and ongoing obligation to provide this Court with the relevant and material documentation relating to his financial situation, both personal and business. A complete and accurate picture of his financial situation is simply not in evidence before this Court. This is so, notwithstanding the parties as earlier noted on June 22, 2011 at a DRO had agreed in writing to provide such disclosure from their separation date, and furthermore in questioning, undertakings were given to provide disclosure up to and including one month before trial, which was not done by the Defendant.

49 One example of the Defendant's failure to disclose and lack of transparency with the Court, although I note there are many, is the fact that despite Justice Bensler's Order on December 6, 2011, the Defendant quite deliberately undertook to dissipate assets by assigning the Campground lease away from his company 333582 Alberta Inc. through the Assignment of Lease and Business to Stardust Ranching Ltd. executed on January 17, 2013. As noted earlier, he also failed to disclose that fact to this Court on multiple occasions, stating on February 20, 2013 to Justice Gates that "nothing has been completed it, it was actually just a matter of finding where we stand in order..." and on March 25, 2013 to Justice Jeffrey: "[t]hat (referring to the assignment) hasn't been done" — when in fact it had. He went further to state before Justice Jeffrey: "After coming to court before, I realized that that wasn't to be done, and it was actually just a consideration. Now it has been stopped and nothing has been done." The Defendant was contradicted on this point by his brother, Fred Richards, who interjected: "That's not correct. No, he's completely incorrect on that. It will be transferred." Notably, Fred Richards also misled the Court on this, as later discussed, for the Campground lease and business had already been transferred and assigned by March 25, 2013.

50 The Defendant also failed to disclose before Justice Jeffrey at that same case conference on March 25, 2013 that he was assigning himself into bankruptcy, despite his own testimony at trial that he and his brother Fred Richards met with the Trustee earlier that day to discuss his assignment into bankruptcy.

51 Another example of the Defendant's failure to fully disclose financial evidence includes the fact that in his sworn Schedule A (his Statement of Income, Assets and Liabilities) to Form FL-17 dated December 1, 2011, he lists his other income as $17,250.00 from dividends from 333582 Alberta Inc., yet in financial statements from 333582 Alberta Inc. prepared to September 30, 2011 and his T5 Statement of Investment Income from 2011, total dividends paid by that company to the Defendant are in the amount of $210,000.00. No explanation for that discrepancy was offered by the Defendant.

52 There are numerous inconsistencies and dishonesties — simply too many to mention — in the sparse financial disclosure the Defendant has provided to this Court. Examples of these include: financial disclosure provided where the Defendant represented in another Schedule A (Statement of Income, Assets and Liabilities) to his Form FL-17 on January 20, 2011 that "333582 Alberta Inc. has a lease on the campground that expires October 1, 2011", when in fact the lease had been renewed by an agreement dated October 6, 2010 for an extension of the term of the lease to April 15, 2012 — which term was further renewed to April 15, 2014 on March 19, 2012; his 2010 Ford F150 truck being listed as an asset in one affidavit and not another; and his explanation as to inconsistencies and disappearing money in accounts has simply been to say: that he gambled it away, made loans to third parties (when he was fully aware that the money may never be repaid), spent it on drugs (cocaine to be specific), and other unaccounted for personal expenses.

53 Since the parties ceased cohabiting and throughout the parties' proceedings before this Court, the Defendant has concealed financial evidence from this Court, and likely from the Trustee as well. By his own testimony, the Defendant has not provided the Trustee with five years of the Campground's tax returns, nor with five years of financial statements respecting the Campground,

nor has he had any discussion with the Trustee as to what the Campground's gross annual revenue was or what his previous typical income was as owner/operator of the Campground.

54 As the Defendant has not provided this Court with accurate and fulsome financial disclosure on his part, it is left to the Court to use its best efforts to impute his financial income and make certain findings of fact with respect to the Defendant's financial position and the financial position of the Campground. I accept the Plaintiff's contention and find the Defendant left the marriage in August of 2009, controlling $750,000.00 in assets and a business — the Campground — which provided him with over $200,000.00 (as a conservative figure) in income each year from his salaried position as Campground manager and dividends payable to him from 333582 Alberta Inc. Yet as the Plaintiff points out the Defendant still assigned himself into bankruptcy in March of 2013 with personal debt in the order of approximately $276,000.00. Notably, this spending was over and above the income received by the Defendant and the cashing in of assets, such as his stocks.

55 Overall, it is clear to me the Defendant has conducted himself in a blameworthy and *non-bona fide* manner during the litigation of this matter as far as disclosure is concerned.

B. Mr. Tim Richards' Dissipation of Assets

56 The Defendant has not been forthright nor honest with this Court about his income and assets. He has made deliberate efforts to dispose of and dissipate assets, with the most significant disposition being the Assignment of Lease and Business in respect of the Campground for nominal consideration to the non-arm's length party, Stardust Ranching Ltd.; all of which was done in direct contravention of Justice Bensler's Order of December 6, 2011. This has been highly prejudicial to the Plaintiff from the point of view that the Defendant has lost significant income from what he had previously earned as an owner prior to this disposition.

57 Since at least the time the parties ceased cohabiting in August of 2009, the Defendant has not conducted his personal or business affairs with any measure of transparency, including those of his companies, 333582 Alberta Inc. and Darkhorse Capital Incorporated. Rather, I find that the Defendant has engaged in a covert manner of disposing of and transferring assets and remaining intentionally underemployed in order to avoid his legal obligation to pay any meaningful amount of spousal support to the Plaintiff, to which she is entitled. Consequently, it is simply not clear to this Court what the Defendant's true financial picture is.

58 The Defendant's own testimony has been that, despite not being known to gamble during the entirety of his more than twenty-year relationship with the Plaintiff, after separation money in excess of at least $500,000.00 was spent on gambling in the range of anywhere between $15,000.00 to $30,000.00 per month and $500.00 per day was spent on his cocaine drug habit over a six month period in 2012. Given the Defendant's lack of transparency and the general dearth of financial evidence before me, I cannot ascertain if this is in fact the case, as he claims. As the Plaintiff herself testified, anything could have happened to the money.

59 Since the separation, the Defendant has frittered away his money and intentionally disposed of financial assets and has not been forthright about his income. For example, the Defendant himself admitted that at some point in 2012 (the exact date of which is not clear to me), he sold all of his stocks in his RRSP accounts because he had been told by his then-lawyer that his accounts may be frozen, so as he said he "decided to take care of business and clear it all out" and that he did. I also accept the Plaintiff's assertion on the evidence before me that the Campground business accumulated payables in the amount alleged to be owing as at December 31, 2012 because revenue from that business was siphoned off by the Defendant. In fact, the Defendant's own testimony speaks to this as he admitted at trial to using the incoming cash from the Campground as his own personal income. The Defendant alone was responsible for collecting and depositing the incoming cash at the Campground. The Plaintiff testified, and I accept, that approximately 25 percent of the incoming revenue from the Campground was received as cash. During peak season, this could be as much as $5,000.00 per day.

60 Another example of the Defendant intentionally diverting revenue from the Campground for his own personal use is the fact that when he ought to have been paying spousal support to the Plaintiff, he instead made loans to his friends of approximately

$40,000.00 in total over a period of the past four to six years. The most recent of these loans, which the Defendant testified to were not disclosed to the Trustee as receivables, were made in 2012.

61 The Plaintiff testified, and I accept, that the Defendant stated to her in 2008 before the parties' separation that he would "destroy her financially". His spending habits, his use of Campground cash for his own personal spending, his dissipation of assets, and lending considerable amounts of money to friends instead of paying spousal support to the Plaintiff, demonstrate this intention.

V. Credibility

A. Mr. Tim Richards

62 The behaviour of the Defendant described above, and the continued and deliberate lack of honesty, transparency and cooperation on his part with this Court, demonstrates his lack of credibility. I am conscious of this lack of credibility in reviewing his financial disclosure (what little we have), his testimony and the evidence he has provided. The Defendant has not been forthright nor honest with this Court, which reflects directly on his lack of credibility.

63 As I stated in *Campbell v. Campbell*, 2007 ABQB 637 (Alta. Q.B.) at para 77 (".*Campbell*"), the Defendant's reluctance to cooperate does not reflect well on his credibility. As in *Campbell*, where the evidence of the Defendant differs from that of the Plaintiff, I accept and prefer the evidence of the Plaintiff.

64 I similarly draw an adverse inference against the Defendant from his consistent failure to provide a thorough and accurate record of financial disclosure to this Court. As Justice Kryczka stated in *Kamitomo v. Pasula* (1983), 50 A.R. 280 (Alta. Q.B.) at para 69, (1983), 29 Alta. L.R. (2d) 375 (Alta. Q.B.):

> The principles of law on adverse inference are well known. The leading statement is to be found in Wigmore, *Evidence in Trials at Common Law*, 1979 (Chadbourn Rev.) at vol. 2, 285, page 192.
>
> > The failure to bring before the tribunal some circumstances, documents, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so; and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.

65 The Defendant's behaviour and conduct towards the Plaintiff and this Court adversely affects his credibility. The record includes a multitude of examples of his clandestine behaviour, of which I will mention a few significant examples. These include his direct contravention of Court Orders on numerous occasions (and one of particular importance not to further dissipate any assets or matrimonial assets, as ordered by Justice Bensler on December 6, 2011), as well as his lack of honesty testifying on certain points. His responses at times veered towards being flippant, disingenuous, and disrespectful, including such explanations for his conduct as spending all of his money because he thought the world was going to end, and that he thought the Campground business was slow because of the Aztec calendar, despite the fact he was aware the Campground's telephone service may have been shut off in November and December 2012 due to the bill not having been paid and therefore, it was unable to take bookings. Further, he stated that he neither read nor understood the significance of Court Orders. His explanation for this unbelievably was that although represented by legal counsel until January 15, 2013, there was so much material "After a while, I just got tired of looking at it."

66 His conduct also lacked transparency and honesty towards the Plaintiff concerning the proposed addition of her as a shareholder and director of the company that became Darkhorse Capital Incorporated, and why he failed to effect that change when quite opposite representations were made to her in September 2005 and documents had been drafted to effect that change. Similarly, the underhanded way that he sought to terminate the Plaintiff from her employment at the Campground without her knowledge, and attempted to prevent her from receiving a physical copy of her Record of Employment, speak to his lack of

honesty and credibility. This latter action by the Defendant served to prejudice the Plaintiff, who was not eligible to receive any substantial employment insurance benefits until September 2009 because she had not filed for such Employment Insurance benefits until nearly eleven months after her actual termination of employment. This is because she was not made aware of her termination on October 15, 2008 until she first received a copy of her Record of Employment in early September 2009 — nearly a year after the fact. Furthermore, the Record of Employment the Plaintiff did receive in early September 2009 was dated January 28, 2009, when it should have been issued and delivered to her within five calendar days after the end of the pay period in which an employee's interruption of earnings occurs.

B. Mr. Fred Richards

67 The Fred Richards Affidavit and the testimony provided by the Defendant's brother, Fred Richards is generally of limited value, as I found him to similarly lack credibility. His testimony, although polished, ultimately lacked candour and honesty. He chose his words carefully and was at times evasive in his responses (example: "[Stardust] has assumed the obligations [of 333582] as required") in order to present facts in a way he clearly intended they be portrayed. That is to present a version of events to this Court to have it believe that the Assignment of Lease and Business in respect of the Campground made effective January 1, 2013 was necessary in order to save the Campground from impending financial ruin. On cross-examination, Fred Richards had difficulty recollecting facts to questions put to him that did not seem to advance "his version of events" in any way. For example, clearly a successful business man, Fred Richards suddenly for the most part became non-responsive and almost clueless when asked what the value of the Campground business would be if listed for sale as at May 2013. He admitted that he did not know what the Campground business was worth but that he would not have taken it over, if he didn't think it was something worth saving. He suggested that the business may not be financially successful in 2013, full well knowing that the Campground virtually has a monopoly within the city limits of Calgary, and that he would save between $200,000.00 and $300,00.00 in income by not paying his brother, the Defendant the equivalent of what the Defendant had previously taken out of the Campground business as an owner but was no longer receiving since the Assignment of the Lease and Business in January 2013.

68 I find Fred Richards not only participated in this scheme designed to transfer and assign the Campground and its business to his and his wife's company, Stardust Ranching Ltd., by way of the Assignment of Lease and Business but he was the mastermind behind it and exerted pressure on the Defendant to enter into and comply with it. In fact, Fred Richards acknowledged at trial that he probably said to the Defendant he didn't think the Defendant had any choice but to do what he was proposing. I accept the Defendant's testimony on this point that he was actually "reluctant" to assign the Campground lease, but he did so on the advice of his brother, Fred Richards. As Fred Richards himself further testified on this:

> I had already resolved in my own mind that I was going to speak to the owners and have them re-enter the campground and appoint me [...] as the new lessee, or lessor, of the [...] campground ... I've written to them and advised them and that asset is gone forever from the standpoint of ever being renewed to anything associated with [the Defendant] because of the mishandling of it.

69 That Fred Richards both created and implemented this scheme is supported by his own testimony that it was entirely his idea for the Defendant to assign himself into bankruptcy, and that Fred Richards personally drafted the Defendant's Statement of Accounts payable to his creditors, which was provided to the Trustee and used to prepare the forms to assign the Defendant into bankruptcy. Similarly, instead of the Defendant providing a sworn statement as per this Court's (Justice Jeffrey's) direction of March 25, 2013 during the case conference, Fred Richards drafted the Fred Richards Affidavit and the Defendant provided a Statutory Declaration on May 2, 2013 adopting the Fred Richards Affidavit in its entirety, without having reviewed the final Fred Richards Affidavit together with its exhibits.

70 Although I accept that the Campground was in some financial difficulty due to the Defendant's mismanagement of the business, and diverting revenue to cover his excessive personal spending habits, I do not accept the "version of events" as it was repeatedly advanced by the Defendant and his brother, Fred Richards, that the Campground no longer had value as an asset and the immediate assignment of the lease to Fred Richards and his wife's company, Stardust Ranching Ltd., was necessary to save it. As I will discuss further in my analysis, the entirety of evidence on record has established that the Campground was a

thriving business that offered to the public camping and RV sites and facilities during April to October and daily access to RV and trailer storage facilities throughout the year but during limited hours from mid-October to March. I reject the proposition that the only way to address the financial liabilities facing it was to assign the Campground lease (property that was subject to Justice Bensler's Order not to be dissipated) away from the Defendant's company. Rather, the cumulative effect of the Defendant and his brother's participation in and testimony justifying this scheme speaks directly to their lack of credibility.

71 Many of Fred Richards' assertions were simply not substantiated in any way and he offered little in the way of explanations. Fred Richards is a successful and astute business man, and his actions demonstrate the thoughtful and measured steps he takes in business, such as running the $1,000,000.00 gift through his numbered shelf companies to the Defendant's renamed company, Darkhorse Capital Incorporated to avoid "tracking", to use his words, and sending emails and other paperwork to document actions after the fact. Examples of the latter are: making the Assignment of Lease and Business effective January 1, 2013 when it was signed on January 17, 2013 and sending emails to the Campground landlord after the fact confirming his company's assumption of the Campground lease. However, his testimony and evidence were not consistent with this persona when it served his purposes. Repeatedly, Fred Richards had difficulty recollecting an event put to him, or he claimed to have no knowledge of something, such as his claim not to have known when he became aware of Justice Bensler's Order, and that he didn't look very closely at it in any event.

72 Similarly, documentation was provided by him when it advanced his "version of events" but several of his claims were not documented in any way. Thus, he offered no documentation to support his claims to initially be holding 333582 Alberta Inc. as a company in trust for his late father, who he testified was the beneficial owner of the company prior to 2005. Neither did he have any documentation from the landlord to support his contention that the Campground was in arrears of 2012 rent until November 2012. In fact, Fred Richards acknowledged on cross-examination that the landlord was not aware of any defaults, other than a delay in paying the rent, until he had spoken to him. Likewise, although Fred Richards was adamant that the Campground was in a desperate situation and on the brink of financial ruin, he could not offer any budgets or financial statements or forecasts for the Campground that he had done to ascertain how he had come to such a conclusion, and what steps he would take to "save" the Campground. His response, when challenged on that point on cross-examination, was to state that he had done a handwritten budget but not a serious budget, which he could not produce nor was offered as evidence at trial. Curiously, neither did Fred Richard's provide a fully-signed copy of the Lease Extension and Amending Agreement dated March 19, 2012 with the landlord's signature despite the claimed negotiations and discussions with the landlord. In any event, the Schedule "C" of monthly base rental payments attached to this March 19, 2012 Amending Agreement shows there was no rental payment owing to the landlord until June; something both the Defendant and Fred Richards acknowledged was done so as to accommodate the seasonal month-to-month fluctuations of the Campground business; thereby in my view, making Fred Richards' claim they would be in jeopardy with their landlord in early 2013 unless he stepped in to save it in January 2013, not credible.

73 The Defendant testified on more than one instance that he withheld information from this Court on the advice of his brother, Fred Richards. While I do not accept that the Defendant can absolve his responsibility by blaming his brother, Fred Richards, for his lack of candour and dishonesty, his testimony speaks to the lack of credibility of both himself and his brother, Fred Richards, and their joint participation in this scheme. This includes the fact that the Defendant testified he did not inform the Court of both the Campground lease assignment and his impending assignment into bankruptcy because he was advised not to by his brother. Fred Richards denied issuing such instructions to the Defendant, stating that he must have been confused. I reject that and accept the Defendant's testimony that Fred Richards has been the person who ultimately created this scheme and has made every effort to advance it before this Court.

74 Moreover, Fred Richards was not honest nor forthright with this Court as to what had transpired when he accompanied the Defendant to Court on the afternoon of March 25, 2013 and then disputed the transcribed evidence from March 25, 2013 presented to him on cross-examination at trial. Fred Richards accompanied the Defendant to Court on the afternoon of March 25, 2013 after the Campground lease had already been assigned to Stardust Ranching Ltd., a company he controlled with his wife, stating to Justice Jeffrey that such assignment "will be done"; not that it had been done. On this, I accept the Plaintiff's assertion that Fred Richards without reservation attached no importance to Justice Bensler's Order of December 6, 2011, and his actions and testimony and advice to the Defendant demonstrate as much. Also, the Defendant's Form 79 bankruptcy disclosure,

which was based on a Statement of Accounts payable to the Defendant's creditors prepared by Fred Richards and provided to the Trustee to aid in the preparation of Form 79, failed to disclose the correct consideration of $2.00 for the assignment by the Defendant of the Campground lease to Stardust Ranching Ltd. Form 79 in Box 13 shows the consideration for the assignment of the Campground lease to be $1.00, when it should have been $2.00. Although this is a minor discrepancy, one would have thought for such a major transaction involving a significant asset such as the Campground being disposed of by the Defendant, where previously the Defendant's whole livelihood had been dependant upon it, that the information provided to the Trustee on this would have been correct.

75 Further, Fred Richards well knew that by paying nominal consideration of $2.00 for the Assignment of Lease and Business, he was doing so to the clear prejudice of the Plaintiff and the Defendant's creditors. Fred Richards knew of the Defendant's financial situation and his personal debt of approximately $276,000.00 and as an astute businessman must have known that this Assignment of Lease and Business was suspect and at the very most prejudicial to the Plaintiff's and Defendant's creditors. He conceded he was present with the Defendant at the first two hour meeting with the Trustee on the morning of March 25, 2013 and that no tax returns for the Defendant, nor financial statements and tax returns for 333582 Alberta Inc., were provided to the Trustee. Clearly, if the Trustee had been provided with that information, which would have shown that the Campground had historically been a thriving business, it may have raised a number of red flags and further inquiries. Certainly, on the face of it as Plaintiff's counsel suggests (with which I agree) that for Fred Richards' company, Stardust Ranching Ltd., "its got to be one of the sweetest deals in this City."

76 I reject Fred Richards' testimony that the Defendant was hired back in January 2013 as a consultant rather than a manager at the Campground. Fred Richards' company re-hired the Defendant into what is effectively his former position as Campground manager, simply for less remuneration and a different title. I find the difference between the Defendant's former role and current role to be negligible, especially in light of the fact that both the Defendant and Fred Richards are representing the Defendant as being the manager to Campground employees. Furthermore, I find it difficult to accept why Fred Richards would re-hire the Defendant back at the Campground at all, given his serious concerns about the Defendant's mismanagement of the Campground. Fred Richards offered no credible explanation to this Court as to why the Defendant was re-hired back at the Campground in 2013.

77 I also find Fred Richards' testimony and the Fred Richards Affidavit regarding the necessity of his taking over of the Campground lease problematic, especially after having reviewed the Sale Agreement of October 15, 2008 which specifically states that Fred Richards was to be paid $2,500.00 a month for his providing "accounting services". The "accounting services" enumerated under the 2008 Sale Agreement for which Fred Richards was to be responsible include such tasks as: preparing weekly cash-flow reports; preparing month-end [operating statements] within two weeks from month end and year-end operating statements within seven weeks of year end; managing cash to ensure all payments are met; paying accounts per invoices/ statements provided on approval from Tim Richards and writing cheques; preparing bi-weekly and monthly payroll and writing cheques; and preparing GST reports quarterly and paying overdue GST due to Revenue Canada.

78 The Defendant's testimony was that the Campground business was in jeopardy, a risk which he stated, upon the advice of his brother alone, required the Campground lease be assigned from his company 333582 Alberta Inc. to his brother and wife's company, Stardust Ranching Ltd. He stated that a debt had accumulated that he (the Defendant) hadn't taken care of, which by his account put the financial viability of the Campground at risk for 2013. The debts not paid, according to the Defendant's testimony, included GST, maintenance, electrical and gas bills. I am at a loss, however, to understand why accounts were suddenly not paid in 2012 when Fred Richards was responsible for and obligated to take care of these "accounting services" since October 15, 2008 as per the terms of the Sale Agreement. By his own testimony, Fred Richards indicated the reason he took over the accounting services on October 15, 2008 is because the accounting "is the backbone of the campground business. Without the accounting someone like Tim would not probably be able to have managed the Campground or in the alternative the accounting services would have been too onerous in terms of the expense..."

79 Fred Richards testified that he never signed a single cheque for the Campground until recently, that he never looked at any of the Campground's financial statements, and that to suggest he was responsible for such tasks is to confuse accounting services with managerial financial services. I reject this argument; on its face, the Sale Agreement provided for Fred Richards

(or his designated employee) to provide accounting services and managerial type financial services for the Campground. By his own testimony, he was to look after the accounting for the Campground. It is disingenuous for Fred Richards to argue that he was only apprised of the problematic financial situation and liabilities of the Campground in early 2013 — at a point when he claims the only solution was for him to take over the Campground lease — when by his own Sale Agreement he was responsible for reviewing its finances and paying its accounts and in particular, paying overdue GST due to Revenue Canada.

80 On this point I accept the Plaintiff's argument that, under the terms of the Sale Agreement of October 15, 2008 and specifically the "accounting services" for which he was responsible, Fred Richards was already in a position to review the Campground's finances and to know whether the invoices were being paid up to and including December 31, 2012. Performing all of the "accounting services" included in the Sale Agreement was already Fred Richard's responsibility per the terms of that agreement, and I do not accept his Affidavit evidence that he only became aware of the "initial cash flow problems" besetting the Campground at a point where they "would have become unsolvable".

81 Furthermore, Fred Richards was evasive on the issue of why 333582 Alberta Inc. continued to exist after the Assignment of Lease and Business, when it was insolvent and appeared to serve no further purpose. His explanation was that it was required to be kept intact because of its liabilities. He was evasive as to what the agreement was in respect of dealing with the liabilities and acknowledged there was nothing in writing concerning whose obligation it was for the liabilities that had accrued prior to the Assignment of Lease and Business. Moreover, he stated that "having read the documents..., there's no obligation on the part of Stardust to assume any obligations of 333582."

82 I also reject Fred Richards' claim that a covenant in the Campground lease had been breached, which breach would have put the lease with the landlord in jeopardy. Nothing was advanced to support this claim, and I have seen no documentation to that effect or any notice that would have been served on the Defendant by the landlord.

83 Finally, Fred Richards tried to minimize the Plaintiff's work done at the Campground; denied that she attended meetings when in fact she did; and tried to allocate blame solely to her when it was not only her but the Defendant as well, who did not want to live at the Campground as a result of the Campground residence mould problem. In fact, the Defendant did not live at the Campground residence for a period of two years because of the mould problem.

C. Ms. Linda Richards

84 I do not question the credibility of the Plaintiff; I accept in large part her testimony and find she presented an accurate representation of the facts and of her financial circumstances. I also accept her evidence and testimony with respect to much of the Defendant's financial circumstances, including the Campground operation and financials. I also accept the Plaintiff's assertion that she is employable and has made every effort to secure employment. More specifically, I found the Plaintiff gave her evidence in a detailed, forthright, and honest manner at trial. It was evident that she had spent hours preparing the Binders, Exhibits 1 to 3, presented at trial and that she knew full well the case she had to make as a Plaintiff before this Court. There was no evidence whatsoever to suggest that she had not been fully cooperative with this Court; if anything she had attempted to resolve this matter with the Defendant but had been stymied at every step of the way in the Court process.

VI. The Position of the Parties

85 The Plaintiff requests spousal support for herself retroactively for twenty-two months and ongoing support of $2,767.00 per month, both on a without prejudice basis pending the result of the Defendant's bankruptcy proceedings and the investigation of the Trustee.

86 The Defendant responds that the Plaintiff is not entitled to spousal support, as she has not suffered any economic disadvantages arising from the marriage or its breakdown such that she should be awarded spousal support to relieve any economic hardship based on the factors identified in section 15.2(4) of the *Divorce Act*, RSC 1985, c 3 (2d Supp) (the "*Divorce Act*").

87 In the alternative, the Defendant argues that if the Plaintiff has suffered economic disadvantages arising from the marriage or its breakdown and is entitled to spousal support, the spousal support already paid by the Defendant is a reasonable period of time for the Plaintiff to have secured employment and is an amount sufficient to promote the economic self-sufficiency of the Plaintiff. On this point the Defendant argues that the Plaintiff has failed to establish on a balance of probabilities that she has made reasonable efforts to better her economic position either by way of education or by applying for positions suited to her skills and physical abilities.

88 The Defendant also claims that the spousal support payments that he has made to date meet the objectives of section 15.2(6) of the *Divorce Act*, which are described as "autonomy and finality" by the Supreme Court of Canada in *Miglin v. Miglin*, 2003 SCC 24 (S.C.C.) at para 57, [2003] 1 S.C.R. 303 (S.C.C.), and are in an amount of and of a duration that is an adequate contribution towards the promotion of economic self-sufficiency for the Plaintiff and adequate to alleviate any economic disadvantages that she may have suffered from the marriage, or its breakdown. In any event, the Defendant submits he does not have the income or funds to pay the Plaintiff the retroactive or ongoing spousal support she claims is owing to her.

89 The Defendant also contests the Plaintiff's request for solicitor-client costs, on the basis that the Plaintiff is financially capable of paying her own costs and the Plaintiff's claim for solicitor-client costs is not justified.

VII. Analysis

A. Spousal Support

90 The main issue for me to determine is whether the Plaintiff is entitled to spousal support and, if so, in what amount, and for what period(s) of time.

i. The Plaintiff's Entitlement to Spousal Support

91 The framework for determining whether spousal support is warranted in the Plaintiff's case is set out in the *Divorce Act*. In making an order for spousal support, section 15.2(4) requires the Court to take into consideration the condition, means, needs and other circumstances of each spouse, including the 21 years the Richards cohabited and the functions performed by each of them during cohabitation; and any order, agreement or arrangement relating to support of either spouse.

92 The objectives of an order for spousal support are set out in section 15.2(6) of the *Divorce Act*. An order under that section should (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown; ... (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and (d) insofar as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

93 As the Supreme Court of Canada in *Moge v. Moge*, [1992] 3 S.C.R. 813, 99 D.L.R. (4th) 456 (S.C.C.) ("*Moge*") found no priority is to be given in the factors considered or objectives sought. The Court at p 866-67 further stated:

> The exercise of judicial discretion in ordering support requires an examination of all four objectives set out in the Act in order to achieve equitable sharing of the economic consequences of marriage or marriage breakdown. This implies a broad approach with a view to recognizing and incorporating any significant features of the marriage or its termination which adversely affect the economic prospects of the disadvantaged spouse. Not all such elements will be equally important, even if present, to the awarding of support in each case.

94 In essence, the *Divorce Act* gives a court flexibility to deal with different marital situations on a case by case basis. Justice McLachlin (as she then was) also discussed entitlement to spousal support in the Supreme Court of Canada case of *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 (S.C.C.) at para 37, 169 DLR (4th) 577 ("*Bracklow*"), finding there are three grounds for entitlement to spousal support: compensatory, contractual and non-compensatory. The Court went on to state that the judge must consider all three grounds for entitlement, and any or all of them may figure in the ultimate order, as may be appropriate in the circumstances of the case.

95 Taking into account all of the facts of this case and the circumstances of both parties, I find that Ms. Richards, the Plaintiff, is entitled to spousal support from Mr. Tim Richards, the Defendant, on both compensatory and non-compensatory grounds. While the Plaintiff is certainly entitled to spousal support on compensatory grounds, a broad consideration of all of the factors relating to the parties' financial positions (i.e. their condition, means, needs and other circumstances) entitles her to spousal support on non-compensatory grounds as well. See *Bracklow* at para 40.

96 The Plaintiff's entitlement to spousal support is based on a careful review of all of the evidence before me, including the condition, means and needs of each of the parties. This was a 21 year marriage. During the marriage, the parties functioned as an economic unit. While the parties jointly worked at the Campground, the Plaintiff also continued to perform functions at home and was the primary spouse responsible for their stock portfolio. When the Defendant started to "transition" the Plaintiff away from her role in managing the Campground (without her knowledge), she correspondingly performed more functions at home and in managing their joint trading account. This was an interdependent relationship in many respects, and the Plaintiff contributed to the relationship in a way that economically benefited both parties.

97 A consideration of the Plaintiff's condition, means and needs also demonstrates her need for spousal support, particularly the economic hardship she has suffered. This economic hardship has been as a result of both her health problems and career disadvantages, and the fact that the only work she has really been trained to do was at the Campground. See *Bracklow* at para 41. Her circumstances following separation have been challenging: she has lived a frugal and fairly meagre subsistence, with little financial support from the Defendant and very limited financial resources. She has suffered considerable health problems, many of which still beset her. The Plaintiff testified, and I accept, that she suffers difficulties with her eyes, as she has abnormalities in her optic nerves that have to be closely monitored because it resembles glaucoma. She has suffered permanent damage in her right knee. She has had surgery on it, and still experiences pain and instability in her knee. She has a torn left biceps tendon and problems with her right wrist, which she fractured at the Campground the first year she worked there. She has had reconstructive surgery on the wrist and currently experiences a limited range of motion, which also limits the jobs available to her. Furthermore, the Plaintiff currently has limited financial means to support herself other than her current job where she does not draw a significant salary, having earned $17.00 per hour working as a part-time receptionist since January 2013. At this time, she does not have the skills, training or experience to do another job than the one she presently is in, as her experience working at the Campground was highly specialized. The Plaintiff's present condition, needs and means are such that she requires spousal support.

98 I do not accept the Defendant's assertion that the Plaintiff has not suffered any economic disadvantages arising from the marriage or its breakdown; the evidence before me establishes she most certainly has suffered economic disadvantages and hardship arising from the breakdown of the marriage while the Defendant at separation was clearly better economically advantaged than was the Plaintiff at separation. The Plaintiff states, which I accept, that the Defendant controlled 90 percent of their assets at separation, and since separation he has enjoyed for the most part all of the income of the assets as well as encroached on and dissipated the parties' assets as evidenced by his own Statutory Declarations and the testimony he gave at trial. The Plaintiff claims that she left the marriage controlling $65,000.00 in assets, which I also accept. The Plaintiff is currently left with slightly over $30,000.00 in assets and states that she owes money to the Canada Revenue Agency. In comparison, the Defendant left the marriage controlling $750,000.00 in assets and a business which provided him with over $200,000.00 in income each year.

99 Neither do I accept the Defendant's alternate argument that the spousal support (in the amount of $116,800.00 for a total of 23 months between 2009-2012) already paid by the Defendant is a reasonable period of time for the Plaintiff to have secured employment and is an amount sufficient to promote the economic self-sufficiency of the Plaintiff. First, the Defendant claims in his closing brief that he has paid two and a half years of spousal support when in fact, he has paid only 23 months of support to the Plaintiff, which is less than two years' worth of spousal support. Second, the courts have repeatedly stated that economic self-sufficiency, while one of the objectives, does not have priority over the other objectives in section 15.2(6). Third, I find that the amount of $116,800.00 the Defendant has paid for a total of 23 months between 2009-2012 is insufficient, taking into account all of the evidence before me, as well as the amounts of spousal support recommended by the Spousal Support Advisory Guidelines.

100 I accept the Plaintiff's evidence and am satisfied that she has made more than reasonable efforts to better her economic position by undertaking a thorough job search and applying for any job that she felt qualified for, even going so far as volunteering when she could not find a paid position. That her job search efforts have been *bona fide* are supported by the documentation she provided at trial where she was congratulated in meeting certain criteria and passing tests including polygraph tests; although to date she has unfortunately not secured her desired employment position. This is in the face of the Plaintiff's numerous health concerns already discussed, including a time in May 2011 when her health was in such a bad state that she had to go to the emergency room for an infected salivary stone. She testified, and I accept, that during the period of 2011 she was not even physically capable of working due to her poor health, yet she was still applying for jobs and attending at interviews. I also accept the Plaintiff's evidence that her past work experience from working at the Campground is highly specialized to that business, that no comparable opportunities exist, and that she is finding it difficult to apply skills gained from working at the Campground to secure employment elsewhere.

101 Neither do I accept the Defendant's claim that the spousal support payments that he has made to date sufficiently satisfy the objectives of section 15.2(6) of the *Divorce Act* such that no further payments are warranted. While the Court takes into account the spousal support payments already made by the Defendant, a careful consideration of all of the facts of this case with a view to meeting the objectives of section 15.2(6) of the *Divorce Act*, necessitates that further payments of spousal support are required, including retroactive payment for support payments not made.

102 Furthermore, a review of the condition, means and needs of the Defendant leads me to find that he was and is in a position to pay spousal support, notwithstanding his claims to the contrary. I will deal further with the Defendant's "means" in my analysis below of his income and financial resources, which I have imputed to be significantly more than he has represented to this Court. Per Southin J.A. in *Muirhead v. Muirhead* (1995), 6 B.C.L.R. (3d) 229 (B.C. C.A.) at para 14:

> In my opinion, "means" in subs. (5) includes not only what the parties are earning but what they can reasonably be expected to earn. [...] A husband who is capable of earning a decent income cannot say "I am not going to" and, therefore, "no order may be made against me".
>
> [emphasis added]

103 I therefore find that the Defendant has and did have the means to pay spousal support. The Defendant has been the author of his own misfortune for as he indicated at trial the reason he is in this predicament is that he "personally spent more money than what should have been spent during that period. So it ended up the expenses caught up to me." I also find that he has not been disadvantaged economically by the breakdown of the marriage, but has been advantaged economically by it. I accept the Plaintiff's assertion, and the evidence before me supports the fact that, the Defendant's credit card statements demonstrate that since the parties' separation, the Defendant has been living a comfortable life in comparison to the Plaintiff, staying in hotels and motels, making frequent purchases from liquor stores, attending adult entertainment shops, restaurants, and travelling in Canada. As earlier noted, he testified that he was at one point spending $500.00 a day on cocaine, for a period of approximately six months during 2012. He also acknowledged that despite the fact he claimed the Campground lost $30,000.00 in bookings in November and December 2012, the Campground would gross $1,000,000.00 during a a period of six months, which typically in the past netted profits, being his income of at least $225,000.00 in the first year the Defendant operated it as an owner. In contrast, the Plaintiff has lived a meagre existence, having received periodic amounts of spousal support at unreliable frequencies and not having found employment until January of 2013.

ii. Calculating the Quantum of Spousal Support to be Paid

104 In order for me to determine the appropriate amount of spousal support to award to the Plaintiff, I need to calculate the parties' respective incomes. Calculating the Plaintiff's income is a straightforward exercise, but it is with no small measure of difficulty that I turn to calculating the Defendant's income. As I have already stated, I view the Defendant's assignment of the Campground lease and its business and his lack of meaningful disclosure regarding the transfer of his assets as calculated

attempts to undermine his legal obligations. In the result, I have drawn an adverse inference from his lack of cooperation and disclosure with this Court.

105 In calculating the Defendant's income for the purposes of determining an award of spousal support, including the imputation of his income for the years 2011 to present and on a go-forward basis, I look to the recent judgment of *Kostin v. Eaket*, 2012 ABQB 756 (Alta. Q.B.) ("*Kostin*"). As Justice Jones of this Court discussed in *Kostin* at paras 140-142:

> [...] Kostin's counsel [...] notes in her submission that the determination of guideline income for child support purposes, in a situation where a payor is a shareholder, director or officer of a corporation, is specifically addressed in section 18 of the Federal Child Support Guidelines (the "Guidelines"). In that situation, where, in the Court's opinion, that spouse's annual T1 line 150 income does not fairly reflect all of the income available to the spouse for the payment of child support, the Court may invoke section 18(1)(a) of those guidelines and include in the spouse's income all or part of the pre-tax income of the corporation for the most recent taxation year. Kostin's counsel suggests that I should, for purposes of partner support, rely on the provisions of section 18(1)(a) of the Guidelines to add the pre-tax income of 1396775 to Eaket's line 150 income to establish his income for purposes of applying the Spousal Support Advisory Guidelines. She further argues that I should apply section 19 of the Guidelines to impute income to Eaket on the basis that he is intentionally underemployed. His income thus re-determined would form the basis for application of the Spousal Support Advisory Guidelines.
>
> Though it may be common practice to incorporate provisions of the Guidelines, such as sections 18 and 19, in arriving at income for spousal or partner support purposes, there is no legislative basis for doing so. Nevertheless, I consider it entirely appropriate to approach the determination of Eaket's income utilizing these presumptive "tools". I can think of no policy reason why they would be appropriate for purposes of determining income for child support purposes but not for spousal or partner support purposes. Other courts seem to have taken this approach. For example, in *Rapoport v Rapoport*, 2011 ONSC 4456, the Court said at para. 512:
>
> > SSAG [the Spousal Support Advisory Guidelines] is not mandatory. It is only a guide, yet a good one and a good place to start in normal circumstances. It requires the determination of the payor's annual income as calculated in the Federal Child Support Guidelines, and once this is calculated, the application of a formula to the amount will produce a recommended range of spousal support which the court must then settle upon. It is therefore necessary to revisit the annual income calculations determined above in connection with child support.
>
> Similarly, the Court in *Laurain v Clarke*, 2011 ONSC 7195, 16 RFL (7th) 316 held as follows at paras. 27-28:
>
> > Like the Child Support Guidelines, the Spousal Support Guidelines refer to imputing income to a payor spouse. They do not, however, expressly provide for how this should be done. Instead, they adopt the methodology prescribed by the Child Support Guidelines. The Spousal Support Guidelines provide in this regard:
> >
> > > The starting point for the determination of income under both formulas is the definition of income under the Federal Child Support Guidelines, including the Schedule III adjustments...
> > >
> > > The Advisory Guidelines do not solve the complex issues of income determination that arise in cases involving self-employment income and other forms of non-employment income. In determining income it may be necessary, as under the Federal Child Support Guidelines, to impute income in situations where a spouse's actual income does not appropriately reflect his or her earning capacity.
> >
> > The courts, in applying the Spousal Support Guidelines, have applied the methodology set out in the Child Support Guidelines for determining a payor spouse's income.
> >
> > [emphasis added]

106 I therefore find authority in *Kostin* for the exercise by this Court of imputing income to the Defendant using sections 18 and 19 of the *Federal Child Support Guidelines*, SOR/97-175 (the "*Child Support Guidelines*"). As Justice Jones rightly stated

in *Kostin*, I consider it entirely appropriate to approach the determination of the Defendant's income utilizing these presumptive "tools".

107 Sections 18 and 19 of the *Child Support Guidelines* provide as follows:

> **Shareholder, director or officer**
>
> **18.** (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include
>
> (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
>
> (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.
>
> **Adjustment to corporation's pre-tax income**
>
> (2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.
>
> **Imputing income**
>
> **19**. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
>
> (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
>
> (b) the spouse is exempt from paying federal or provincial income tax;
>
> (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
>
> (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
>
> (e) the spouse's property is not reasonably utilized to generate income;
>
> (f) the spouse has failed to provide income information when under a legal obligation to do so;
>
> (g) the spouse unreasonably deducts expenses from income;
>
> (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
>
> (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.
>
> [...]

iii. Ms. Richards' Income

108 The evidence before me is that the Plaintiff's income is as follows (which amounts include the quantum of spousal support paid by the Defendant where applicable):

1. 2008 line 150 income was $29,370.81;

2. 2009 line 150 income was $38,212.00;

3. 2010 line 150 income was $124,065.00 (much of this represents the Plaintiff's capital gains, upon which she owed $31,000.00 in taxes);

4. 2011 line 150 income was $26,163.78; and

5. 2012 line 150 income was $4,000. 00.

109 In addition, the Plaintiff testified that her projected gross income in 2013 should be approximately $17,000.00. This is based on her testimony that her paycheques are between $600.00 and $1000.00 every two weeks, being paid $17.00 an hour for 28 hours of work per week. I accept $17,000.00 as the Plaintiff's projected gross annual income for 2013, on a without prejudice basis for the time being.

iv. Mr. Richards' Income

110 A calculation of the Plaintiff's entitlement to spousal support requires the Court to undertake a calculation of the Defendant's income. The evidence before me is that the Defendant's income is as follows:

1. 2008 line 150 income was $46,870.81;

2. 2009 line 150 income was $225,000.00;

3. 2010 line 150 income was $653,531.00;

4. 2011 combined income at least $290,000.00 (T5 and T4 combined however, no income tax return was provided for 2011 for the Defendant, so we do not know the extent of his entire income, and it could be higher);

5. No personal financial information such as an income tax return or Notice of Assessment was provided for 2012; and

6. No personal financial information such as a paystub or a letter from his alleged employer, Stardust Ranching Ltd. confirming his income was provided for 2013.

111 The Defendant claims that he expects his income for 2013 to be $26,000.00, and for 2014, if employed as a campground manager, his expected income will be $60,000.00 per year with a possible performance bonus of $30,000.00 for a total income of $90,000.00. Given my serious issues with the Defendant's credibility, and the fact that he assigned the major source of his income — the Campground lease and its business — in order to avoid his support obligations, I attach little or no weight to these figures.

112 The evidence before me regarding the income of 333582 Alberta Inc. is similarly incomplete. The Plaintiff in her Affidavit evidence and testimony, states that the Campground typically grossed on average between $1.1 and $1.2 million dollars annually, with a net income of approximately $300,000.00 to $400,000.00, which would appear to be before taxes. I accept the Plaintiff's evidence on this point, given my preliminary calculations below and the limited financial evidence disclosed by the Defendant to this Court. The Defendant's testimony that the net income before taxes of the Campground at the time of trial was approximately $350,000.00 also lends support to this. Using these figures, I find the Campground had a net income before taxes of $350,000.00 annually.

113 There is little to no financial disclosure for 333582 Alberta Inc. Per a GST/HST Return Report filed for July through September 2012, the Campground's sales and other revenue is indicated for July through September 2012 as $737,089.56. This is so in the face of the Campground having lost about 65 stalls in total through a road allowance dedication in favor of the City of Calgary. To extrapolate that number for 2012 (and assuming no additional revenues were made for the months of January through end of June), the amount of gross sales and other revenue would be $81,898.84 per month, being the July through September 2012 Campground revenue of $737,089.56 divided by nine months for the months of January to and including September. Using that calculation, on an annual basis (and again, not calculating any additional sales and other revenue for the months of January through June, which is unlikely as the Campground historically received rental payments for storage of rental trailers and RVs during these months), the gross annual sales and other revenue for 333582 Alberta Inc. from the Campground for 2012 would in my view conservatively be about $983,000.00. (i.e. $81,898.84 × 12 = $982,786.08)

114 For the years 2010 and 2011, the unaudited notice to reader financial statements for 333582 Alberta Inc. provided by the Defendant also support the Plaintiff's calculations — showing gross revenue for the 2011 and 2010 financial years, respectively, to be $1,180,156.00 and $1,234,178.00. However, the Plaintiff also noted that the "wages and benefits" reported for 2011 and 2010 of $250,481.00 and $195,722.00, respectively, seemed higher than ordinary, given that she and the Defendant had been earning about $30,000.00 each per year when employees of the Campground. I accept her evidence on this point, and specifically note that a breakdown of these wages and benefits paid was not provided, so there is no explanation on record as to the wages and benefits paid to various persons who may have worked and been employed at the Campground for the years 2010 and 2011.

115 I also note dividends in the amount of $210,000.00 and $400,000.00 were paid for the years 2011 and 2010, respectively, to the Defendant. As well, the cash listed as assets decreased significantly from $98,484.00 in 2010 to $56,755.00 in 2011, which is consistent with the Plaintiff's assertion that the Defendant likely siphoned off cash from the Campground for his own personal funds.

116 It is difficult to draw a complete financial picture for 333582 Alberta Inc. due to the limited disclosure. For the purposes of these proceedings, I have pieced together such a picture and draw the conclusion that the Campground was a valuable asset for the Defendant. It is still a valuable asset and a thriving business, despite having financial liabilities. The Campground is the largest RV campground within Calgary city limits: it now has 300 sites for camping and in excess of 500 sites for storage and RV. The Plaintiff testified that every year business increased for the Campground, there was never a downturn, and average revenues for the Campground during its busy season were in the amount of $13,326.00 per day, which I accept.

117 As alluded to earlier, the Defendant testified that the Campground was recently reduced by 70 sites, and Fred Richards testified that it was reduced by 65 sites. I accept that the Campground has been reduced by 65 sites, which is a reduction of approximately 13% of the total sites using 500 sites as its previous total capacity. Calculating a corresponding 13% reduction in net income before taxes, being 13% of the $350,000.00 net income figure accepted by this Court, which amount is $45,500.00; gives a net income amount of $304,500.00 (i.e. $350,000.00 less $45,500.00) before taxes for the Campground. Therefore, I find the Campground's annual net income before taxes to be at a minimum of approximately $300,000.00.

118 As I have previously stated, I find the Defendant lacking in credibility and do not give much weight, if any, to his testimony regarding his expected income for 2013 and 2014, or the reasons for his assignment of the Campground lease and its business. He has consciously underemployed himself at best, and has dissipated and disposed of assets in contravention of previous Court Orders; thereby diverting income which would have been available to pay the appropriate amount of spousal support to the Plaintiff. Neither has he provided me with his complete and accurate financial information; therefore, it is within my discretion to impute an appropriate income to him.

119 To reiterate, I draw an adverse inference from the fact that the Defendant has failed to provide a complete and accurate record of financial disclosure to this Court, and has instead pursued a deliberate course of conduct for the purpose of undermining or avoiding his spousal support obligations. As Justices Berger and Wittmann stated in *Hunt v. Smolis-Hunt*, 2001 ABCA 229 (Alta. C.A.) at para 42, (2001), 286 A.R. 248 (Alta. C.A.):

[Section 19(1)] should be interpreted to impute income where the obligor has pursued a deliberate course of conduct for the purpose of evading child support obligations. We read the section as requiring either proof of a specific intention to undermine or avoid support obligations, or circumstances which permit the court to infer that the intention of the obligor is to undermine or avoid his or her support obligations.

[emphasis added]

120 The Plaintiff argues this Court should impute an income to the Defendant of $275,000.00 for the years 2011 and 2012, and an income of $100,000.00 for the year 2013, with a total claim to date of trial for retroactive support of $167,779.00, which I have calculated as set out below. Initially, the Plaintiff's claim was for retroactive support of $306,858.00 from the date of separation in 2009 until the date of trial. However, the Plaintiff herself at trial and her counsel later acknowledged the relevant period for a claim for retroactive spousal support was from January 1, 2011 for the reasons I will elaborate on in the following paragraph 130. The Plaintiff submits this determination of retroactive and ongoing spousal support from January 1, 2011, should be without prejudice to the Plaintiff only, and subject to review at the instance of the Plaintiff pending the outcome of the Defendant's bankruptcy proceedings and the investigation of the Trustee, should such an investigation by the Trustee be undertaken.

121 For all of the foregoing reasons, including the Plaintiff's arguments with respect to the Defendant's imputed income, which I accept, I have imputed and attributed income to the Defendant, to be $275,000.00 for the years 2011 and 2012 and $100,000.00 for the year 2013 on the without prejudice basis as proposed by the Plaintiff.

v. Spousal Support Calculators

122 The Plaintiff requests the following amounts of retroactive spousal support using the Spousal Support Calculators for the years 2011-2013 based on the imputation of income to the Defendant of $275,000.00 for the years 2011 and 2012, and an income of $100,000.00 for the year 2013. She arrives at the following amounts by applying the Spousal Support Advisory Guidelines, taking the midrange amounts for 2011 and 2012 and the high end of the range for 2013 and utilizing her annual income as disclosed and the imputed incomes for the Defendant noted herein and taking into account what the Defendant has paid to date as set out in paragraph 126 below:

1. 2011: Midpoint at $7,258.00 per month (Range of $6,221.00 to $8,295.00) × 12 months = $87,096.00 less $24,000.00 paid in 2011 = $63,096.00;

2. 2012: Midpoint at $7,904.00 per month (Range of $6,775.00 to $9,033.00) × 12 months = $94,848.00 less $4,000.00 paid in 2012 = $90,848.00;

3. 2013: High end at $2,767.00 per month (Range of $2,075.00 to $2,767.00) × 5 months = $13,835.00.

123 Using the mid-point amounts for 2011 and 2012 and the high end amount for 2013 of the Spousal Support Calculators, and accounting for what the Defendant has paid to date, I have calculated the total amount of retroactive support claimed by the Plaintiff from January 1, 2011 through to and including May 2013 to be $167,779.00 (i.e. $63,096.00 + $90,848.00 + $13,835.00).

124 The Plaintiff also requests spousal support in the amount of $2,767.00 per month on an ongoing basis, which amount is the high end range of the Spousal Support Calculators, commencing as of June 1, 2013.

125 The Plaintiff at trial submitted requested amounts to the Court for both retroactive and ongoing spousal support utilizing the Spousal Support Calculators. However, these calculations were done in error, as they relied upon an incorrect marriage date of October 8, 1987, when the marriage date should have been October 8, 1988. Consequently, the Plaintiff thereafter provided to the Court, with a copy to the Defendant, revised Spousal Support Calculator sheets for her requested amounts of retroactive and ongoing spousal support utilizing the correct marriage date of the parties. The revised calculations are what I have relied on in making my determinations above.

vi. Mr. Richards' Previous Spousal Support Payments to Ms. Richards

126 I am satisfied the Defendant has made the following spousal support payments to the Plaintiff:

1. $30,000.00 total in 2009;

2. $58,800.00 total in 2010;

3. $24,000.00 total in 2011 (only six months was paid); and

4. $4,000.00 total in 2012 (made as one late payment after Justice Bensler's Order).

for a total of $116,800.00.

127 The Defendant has not made any further support payments to the Plaintiff for 22 months covering the years 2011, 2012 and to date of the trial in 2013.

128 It is left to me to determine the amount and duration of spousal support to be paid by the Defendant both retroactively and on a go-forward basis, commencing as of June 1, 2013.

vii. Amount of Spousal Support Awarded

129 I have concluded that it would be appropriate to award the Plaintiff retroactive spousal support in the total amount of $167,779.00, as calculated in paragraphs 122 and 123 above. I also award the Plaintiff the amount of $2,767.00 per month on an ongoing basis, commencing June 1, 2013 and thereafter payable on the 1 st day of each and every month. This is all done on a without prejudice basis to the Plaintiff only and is subject to review at the instance of the Plaintiff, pending the outcome of the bankruptcy proceedings and any investigation by the Trustee. In addition, the usual maintenance clause together with an annual exchange of financial and tax information by June 1 of each and every year will be included in the Order drafted by Plaintiff's counsel for this spousal support award.

130 I have not awarded the Plaintiff any additional spousal support payments for the years 2009 and 2010 because the parties entered into two Interim Spousal Support Agreements for those periods; with the Interim Spousal Support Agreement of June 6, 2010, specifically stating that "... after January 1, 2011, the Plaintiff reserves her right to further spousal support." There was no mention in that Agreement of the Plaintiff's right to revisit the quantum of her 2009 and 2010 spousal support. In that regard, the Defendant paid spousal support to the Plaintiff during 2009 and 2010 in accordance with those two Agreements, and therefore he is not in default of his spousal support obligations for the years 2009 and 2010.

131 I have reached these conclusions in respect of the amounts awarded to the Plaintiff for retroactive and ongoing spousal support, taking into account the following:

1. the condition, means, needs and other circumstances of each of the Plaintiff and Defendant;

2. the need to recognize any economic advantages to the Defendant and disadvantages to the Plaintiff arising from the marriage and its breakdown, which marriage prior to separation was 21 years in length;

3. the importance of relieving economic hardship which I find the Plaintiff has suffered as a result of the breakdown of the relationship;

4. the guidance provided by the cases referred to above relating to the imputation of income and the calculation of spousal support;

5. my imputation of the Defendant's income in the amount of $275,000.00 for the years 2011 and 2012, and $100,000.00 for the year 2013;

6. the Spousal Support Calculator guidelines and the Plaintiff's proposed Budget of $5,000.00 - $8,000.00 per month in expenditures (which range reflects the budget she went through in her testimony and in her written budget expenses filed at Tab X, Exhibit 3 and which includes an obligation to pay her outstanding income taxes of $6,000.00 in total by monthly payments of $1,335.00 per month);

7. recognizing that the Plaintiff has resumed employment as of January 2013 and expects an annual salary of $17,000.00 after making serious efforts to find employment and recover from illness;

8. recognizing that the amount of $100,000.00 to be imputed and attributed to the Defendant as an annual income for the year 2013 is a conservative number, and represents less than half his annual income (not including dividends) from the most recent 2011 financial disclosure provided to this Court;

9. accepting the Plaintiff's testimony and evidence regarding the financial documentation provided by the Defendant and 333582 Alberta Inc., which present the picture of the Campground as historically being a successful and thriving business, which brought in gross revenue of over $1,200,000.00 and $1,100,000.00 in 2010 and 2011, respectively, and which lease and business was assigned by the Defendant to a non-arm's length party for less than fair market value clearly in an attempt to undermine his legal obligation to pay spousal support to the Plaintiff;

10. the Defendant's lack of credibility in particular with respect to any meaningful financial disclosure and his failure to fully cooperate and comply with orders of this Court, and his dissipation of assets as earlier noted;

11. the Plaintiff lost her income from the Campground when the parties separated in 2009 and has not yet returned to her level of remuneration prior to separation and may never do so, while the Defendant has not and is still working at the Campground, performing Manager's duties as he did prior to separation; and

12. recognizing that the Defendant has paid a total of $116,800.00 in spousal support to date, which is clearly inadequate given the length of their marriage and all other factors noted above.

132 I have come to these conclusions based on my review of the relevant statutory factors, and in exercising my discretion based on a consideration of the evidence before me. In exercising this discretion, I rely on the authority set out in *Bracklow* where Justice McLachlin (as she then was), stated at para 61:

> I leave the determination of the quantum of support to the trial judge, who is in a better position to address the facts of this case than our appellate tribunal. My only comment on the issue is to reiterate that all the relevant statutory factors, including the length of the marital relationship and the relative independence of the parties throughout that marital relationship, must be considered, together with the amount of support Mr. Bracklow has already paid to Mrs. Bracklow.
>
> [emphasis added]

133 This principle is also stated at p 866 of *Moge* :

> At the end of the day however, courts have an overriding discretion and the exercise of such discretion will depend on the particular facts of each case, having regard to the factors and objectives designated in the Act.

C. The Defendant's Contempt of Court

134 The Plaintiff requests that the Defendant be held in contempt of the Order made by Justice Bensler on December 6, 2011 and that he also be held in contempt of the direction by the case conference judge, Justice Jeffrey, that the Defendant provide a sworn statement respecting the Campground lease and for making false and misleading representations to this Court at a domestic special hearing February 20, 2013 held before Justice Gates and at the March 25, 2013 case conference before Justice Jeffrey, in respect of disposing of property and assets.

135 On this, the Plaintiff requests the Defendant pay solicitor-client costs, following the authority of Justice Jones' award in *Kostin*.

136 The Defendant contests the Plaintiff's request for solicitor-client costs, on the basis that the Plaintiff is financially capable of paying her own costs and the Plaintiff's claim for solicitor-client costs is not justified.

i. Civil Contempt of Court

137 The Rules on civil contempt are found at Rule 10.52 of the Alberta *Rules of Court*, Alta Reg 124/2010 (the "*Rules of Court*"). Specifically, Rule 10.52(3) deals with a judge's power to declare a person to be in civil contempt of Court:

> 10.52(3) A judge may declare a person to be in civil contempt of Court if
>
> (a) the person, without reasonable excuse,
>
> (i) does not comply with an order, other than an order to pay money, that has been served in accordance with the rules for service of commencement documents or of which the person has actual knowledge,
>
> (ii) is before the Court and engages in conduct that warrants a declaration of civil contempt of Court,
>
> (iii) does not comply with an order served on the person, or an order of which the person has actual knowledge, to appear before the Court to show cause why the person should not be declared to be in civil contempt of Court,
>
> (iv) does not comply with an order served on the person, or an order of which the person has actual knowledge, to attend for questioning under these rules or to answer questions the person is ordered by the Court to answer,
>
> (v) is a witness in an application or at trial and refuses to be sworn or refuses to answer proper questions, or
>
> (vi) does not perform or observe the terms of an undertaking given to the Court, or
>
> (b) an enactment so provides.

138 This Rule was considered in *Koerner v. Capital Health Authority*, 2011 ABQB 191, 506 A.R. 113 (Alta. Q.B.), aff'd 2011 ABCA 289, 515 A.R. 392 (Alta. C.A.), leave to appeal to SCC refused [2012 CarswellAlta 724 (S.C.C.)]. In this case, Justice Shelley reviewed the test for civil contempt in light of the new *Rules of Court*. In considering Rule 10.52(3)(a)(i), Justice Shelley stated at paras 41-45:

> In my view, there is no appreciable difference between the new and old **Rules** dealing with civil contempt, at least as it relates to the failure to obey a Court Order.
>
> At para. 30 of 2010 ABQB 557, I noted that the purpose of a court's civil contempt power is to achieve compliance with court orders and to uphold the court's authority (**Dreco Services Ltd. et al. v. Wenzel et al.** (2004), 365 A.R. 344; 2004 ABQB 517 at para. 66; **S.W. et al. v. K.T. et al.**, [2005] A.J. No. 479; 379 A.R. 320 (Q.B.), at para. 17; **McInroy v. Burnstad et al.**, [2010] A.R. Uned. 483; 2010 ABQB 375, at para. 11). I noted:
>
> > The central idea is that courts have a right to protect the dignity of their own proceedings, and they are entitled to discipline any conduct that they feel tarnishes, undermines, or impedes the court's role in society as administrator of justice. The Court of Queen's Bench has an inherent power to find a person in contempt of court if they feel the proceedings are being disrespected.
>
> The requirements for finding civil contempt were outlined in **Point on Bow Development Ltd. v. Kelly (William) & Sons Plumbing Contractors Ltd. et al.** (2006), 405 A.R. 1; 2006 ABQB 775, where Rooke, J. (as he then was), noted (at para. 19) that there must be:

1. An existing requirement of the court;

2. Notice of the requirement to the person alleged to be in contempt; and

3. An intentional act (or failure to act) that constitutes a breach of the requirement. This should be without adequate excuse, in accordance with Rule 703(1)(a).

A judge must be satisfied beyond a reasonable doubt that each of these elements have been met in order to make a finding of contempt. Moreover, the decision to find a party in contempt is within the court's discretion **(Metropolitan Life Insurance Co. v. Hover** (1999), 237 A.R. 30, 197 W.A.C. 30; 1999 ABCA 123, at para. 10**)**.

I noted in 2010 ABQB 557 (at para. 35) that lack of compliance is often coupled with a lack of respect for the proceedings, but intention to disrespect the court is not required for a court to find contempt.

139 Consequently, the elements required to support a finding of civil contempt have not been materially affected by the new *Rules of Court* regarding a party's failure to obey a court order.

ii. Penalties or Sanctions for Contempt of Court

140 When a party is found by the Court to be in civil contempt, the penalties or sanctions that may be imposed are described in the *Rules of Court* at Rule 10.53:

10.53(1) Every person declared to be in civil contempt of Court is liable to any one or more of the following penalties or sanctions in the discretion of a judge:

(a) imprisonment until the person has purged the person's contempt;

(b) imprisonment for not more than 2 years;

(c) a fine and, in default of paying the fine, imprisonment for not more than 6 months;

(d) if the person is a party to an action, application or proceeding, an order that

(i) all or part of a commencement document, affidavit or pleading be struck out,

(ii) an action or an application be stayed,

(iii) a claim, action, defence, application or proceeding be dismissed, or judgment be entered or an order be made, or

(iv) a record or evidence be prohibited from being used or entered in an application, proceeding or at trial.

(2) The Court may also make a costs award against a person declared to be in civil contempt of Court.

(3) If a person declared to be in civil contempt of Court purges the person's contempt, the Court may waive or suspend any penalty or sanction.

(4) The judge who imposed a penalty or sanction for civil contempt may, on notice to the person concerned, increase, vary or remit the penalty or sanction.

141 Rule 10.53 lists the penalties or sanctions that may be imposed. The nature and severity of the penalty or sanction imposed is subject to the discretion of the judge. Factors to consider include whether an act of contempt was deliberate or negligent. As well, any actions taken after the act of contempt should be considered. These factors are discussed in *Michel v. Lafrentz*, 1998 ABCA 231 (Alta. C.A.) at paras 31-32, (1998), 219 A.R. 192 (Alta. C.A.):

> However, any kind of negligence (advertent or inadvertent, by omission or commission) is less blameworthy than deliberate defiance of a court order.
>
> [...]
>
> And any kind of attempt to purge the contempt, or to apologize, is relevant.

142 *Dreco Energy Services Ltd. v. Wenzel*, 2005 ABCA 185 (Alta. C.A.) at paras 11-12, (2005), 371 A.R. 11 (Alta. C.A.), includes a list of enumerated factors to consider when imposing a penalty or sanction for contempt:

> In terms of the sanction for contempt, we are of the view that the amount ordered is not adequate for its purpose. Requiring those in contempt to pay a part only of thrown-away costs related directly to the contempt does not bring home to the contemnors the seriousness of their actions and their responsibilities for the consequences attributable to that contempt. There is a public policy aspect to this entire issue. Generally, in principle, those who are found in civil contempt ought, at a minimum, to be required to accept responsibility for a substantial portion of the costs directly related to that contempt. It may be that a judge would also consider it appropriate to impose further monetary penalties or other sanctions, whether including striking of pleadings, drawing of adverse inferences, etc.
>
> In the context of this case, it is open to the case management judge in assessing the sanctions which should be imposed to take into account a number of considerations including: (1) the role of counsel, including the extent to which the actions of the respondents' counsel might have contributed to the respondents' contempt; (2) the motivation for the destruction/ erasure of the computer records while the undertakings to produce them remained extant; (3) the consequences flowing from the destruction of those records and what redress should flow from that, including consideration of whether any adverse inferences should be drawn as a result thereof; (4) the entire context and history of the litigation; (5) the amount of reasonable thrown-away costs properly incurred; (6) the nature of the contempt; and (7) the degree of culpability of the contemnors.
>
> [emphasis added]

iii. The Defendant's Actions Amount to Civil Contempt

143 Although the Defendant, when given the opportunity to respond, admitted in his own testimony to be in civil contempt, because he says he "had to choose between saving the Campground or actually letting it go", it is left to my discretion, and upon a review of all of the facts on record, to determine: (i) whether to find him in contempt of court under Rule 10.52(3); and (ii) if so, what the appropriate penalty or sanction to impose on him is under Rule 10.53.

144 In the case at bar on the totality of the evidence, I am satisfied beyond a reasonable doubt that the elements for civil contempt have been met. I do not accept the Defendant's explanation for his contempt as it is not credible. I find the Defendant to be in civil contempt under Rule 10.52(3)(i) for not complying with the Order made by this Court on December 6, 2011 "not to further dissipate any assets or matrimonial assets", and for not complying with the direction by the case conference Justice Jeffrey that the Defendant provide a sworn statement respecting the Campground lease. Adoption by the Defendant of the Fred Richards Affidavit, (which the Defendant admitted he didn't actually review the final Affidavit with its exhibits) was clearly insufficient and not the direct evidence from him that Justice Jeffrey had ordered be provided. Also, I find the Defendant to be in civil contempt under Rule 10.52(3)(ii) for making false and misleading representations to this Court at a domestic special hearing on February 20, 2013 and at a case conference on March 25, 2013, with regards to the disposing of assets and property and in particular the Campground lease and its business. Clearly, at both hearings the Defendant misled the Court by leading it to believe that the transfer and assignment of the Campground lease had not yet taken place, when in fact the Assignment of Lease and Business for the Campground had been entered into on January 17, 2013, with an effective date of January 1, 2013 — well before both hearing dates.

145 In each instance above, I find there was an existing requirement of the Court; the Defendant had notice of these requirements; and the Defendant intentionally acted in a manner that constituted a breach of these requirements. The Defendant's actions did not constitute an inadvertent negligence but rather amount to the deliberate defiance of Court Orders. Moreover, he has not made any attempt to purge the instances of contempt, and has instead been unapologetic as to his actions, seeking to justify them in his testimony as necessary and representing that he had no other choice of action.

VI. Costs

146 In finding the Defendant to be in civil contempt under Rule 10.52(3), the nature and severity of the penalty to be imposed under Rule 10.53 is also subject to the discretion of the Court. In the case at bar, given the egregious behaviour of the Defendant, I find it is most appropriate to award the Plaintiff solicitor and own client costs under Rule 10.53(2). I will set a specific amount for these solicitor and own client costs, once I have received and reviewed the Plaintiff's Bill of Costs for this matter. In that regard, Plaintiff's counsel may on notice to the Defendant set this down for approval of the Plaintiff's Bill of Costs, at a time mutually convenient to all parties and myself.

147 As in *Kostin*, I consider it entirely appropriate to exercise my discretion in this manner given the Defendant's lack of cooperation, his contempt of court, and the fact that this matter could not have proceeded to trial for a determination without the commendable efforts of both the Plaintiff and her counsel. I note the Plaintiff's own testimony that in order to reduce her considerable legal fees, she has expended hundreds of hours to undertake and compile nearly all of the documentary evidence before this Court, as well as the analysis upon which I have relied on in part, in arriving at my decision regarding the Defendant's imputed income. See *Kostin* at paras 164-165.

VII. Conclusion

148 For all of the foregoing reasons, I award the Plaintiff retroactive spousal support of $167,779.00 for the years 2011 and 2012, and from January 1, 2013 to and including May 31, 2013, calculated as earlier noted and based on an imputed and attributed income to the Defendant of $275,000.00 per year for the years 2011 and 2012 and $100,000.00 for the year 2013 and an income to the Plaintiff of $26,163.78 for 2011, $4,000.00 for 2012, and $17,000.00 for 2013.

149 I also award the Plaintiff ongoing spousal support in the amount of $2,767.00 per month to commence as of June 1, 2013 and payable on the 1 st day of each and every month thereafter and based on an imputed and attributed income to the Defendant of $100,000.00 and an income to the Plaintiff of $17,000.00.

150 All of the foregoing is done on a without prejudice basis to the Plaintiff only and is subject to review at the instance of the Plaintiff, pending the outcome of the bankruptcy proceedings and any investigation by the Trustee.

151 I also award the Plaintiff costs on a solicitor and own client basis. Counsel for the Plaintiff is directed to submit a Bill of Costs to me, with a copy to the Defendant, within 30 days of the date hereof, and thereafter contact my assistant to set up an appropriate time to hear submissions on the Plaintiff's application for approval of the Plaintiff's Bill of Costs.

152 Plaintiff's counsel will prepare the Order for the award of retroactive and ongoing spousal support and costs that I have granted herein, so that payment for retroactive and ongoing spousal support and costs by the Defendant to the Plaintiff can be made to and enforced by the Director of Maintenance Enforcement. Rule 9.4(2)(c) is hereby invoked, such that the Defendant's consent to the said Order is hereby dispensed with.

153 Plaintiff's counsel may proceed to apply for a desk divorce for his client and provide me with the Divorce Judgment and supporting documentation for my review and signature. Any consents for the desk divorce that may be required of the Defendant are hereby dispensed with, as I am satisfied all the requirements for a divorce have been met.

Action allowed as to spousal support and contempt.

TAB 10

2013 ABQB 273
Alberta Court of Queen's Bench

Scott & Associates Engineering Ltd. v. Finavera Renewables Inc.

2013 CarswellAlta 873, 2013 ABQB 273, [2013] 10 W.W.R. 551, [2013] A.W.L.D. 2930, [2013] A.W.L.D. 2932, [2013] A.W.L.D. 2956, [2013] A.W.L.D. 3004, [2013] A.W.L.D. 3005, 229 A.C.W.S. (3d) 121, 79 Alta. L.R. (5th) 172

Scott & Associates Engineering Ltd. Plaintiff and Finavera Renewables Inc. Defendant

S.L. Martin J.

Heard: February 4-14, 2013
Judgment: May 14, 2013
Docket: Calgary 0701-08472

Counsel: J.E. Fletcher for Plaintiff
P. Edwards, L. Mensch for Defendant

***S.L. Martin J.*:**

1. Introduction

1 The Plaintiff, Scott & Associates Engineering Ltd. ("Scott"), is an Alberta engineering firm and Mr. Bryan Scott is its principal. The Defendant, Finavera Renewables Inc. ("Finavera"), is a publicly-traded British Columbia company with experience in wind energy. In December 2006, Scott became interested in purchasing an Alberta wind generating project offered for sale by Penn West Petroleum Ltd. ("Penn West"). The project was to be built in two parts - Phase I (Ghost Pine) and Phase II (Lone Pine). The Phase I Ghost Pine project was subject to a joint venture agreement with Spirit Pine Energy Corp. ("Spirit Pine").

2 Scott conducted research on the project, was accepted as a qualified bidder, submitted four offers in its own name and eventually became the only entity with which Penn West was still negotiating. Penn West acknowledged that Scott had become the preferred potential purchaser of the project. However, Scott did not have the required funds or necessary financing and Scott actively sought monies from numerous sources. Eventually, Scott and Finavera were brought together by The Howard Group Inc. ("The Howard Group"). Scott and Finavera did not know each other before this introduction but they moved quickly to acquire the project, with Finavera providing the money. Finavera signed a form of Mutual Confidentiality Agreement ("MCA") in favour of Scott but Scott and Finavera did not have a formal agreement outlining their respective roles, rights, responsibilities or remuneration.

3 Nevertheless, Scott brought Finavera into the acquisition of the project: they shared information, worked together, and submitted a bid in the name of Finavera, in the same amount as in the prior Scott offers. This final bid was eventually accepted by Penn West. Differences of opinion arose between Scott and Finavera about certain matters. The tensions were such that when the purchase and sale transaction closed with Penn West, Finavera purported to have acquired the wind project on its own account. Finavera subsequently developed the project alone, hired another engineering firm to work on the project, and eventually sold the project to a third party, all without any further involvement of Scott. Scott argued that Finavera misused its confidential information, misappropriated its business opportunity and was unjustly enriched by its efforts. Scott seeks a constructive trust in the project.

4 For the reasons that follow I find that while there is no recovery for breach of contract or breach of confidence and no business opportunity taken, Finavera has been unjustly enriched by Scott's status and efforts. In all circumstances the preferable

remedy is a monetary one and Scott has not established that it merits the discretionary and exceptional remedy of a constructive trust in the project or its profits.

2. Facts: Timeline and Overview

5 The events that give rise to litigation arose over a four month period, between December 2006 and March 2007. The following is an overview to provide some context. Further relevant facts will be discussed in relation to the issues arising in this case.

6 A wind generating project or wind farm was offered for sale by Penn West. Penn West hired Phoenix Engineering Inc. ("Phoenix") to organize and supervise the bid process, manage the sale, put together the materials and protocols for the data room, and answer questions from prospective purchasers about the project.

7 Penn West provided preliminary information concerning the project in its Information Memorandum and set out the following time lines: during the week of December 2006 the Information Memorandum would be available and access to both the virtual and the physical data rooms would commence. Proposals and bids were due on January 12, 2007, with a closing date for the acquisition on January 31, 2007.

8 The Information Memorandum provided an executive summary of the project, including a list of the project's key features. It also provided a one page overview of the global, Canadian, and Alberta wind energy perspectives, a somewhat promotional discussion on the value of wind energy generally and its growth in those jurisdictions.

9 The Information Memorandum set out the bid process. In broad terms it contemplated a progression: qualified bidders would be identified by Penn West; Penn West would review any bids received; work with the best bids and eventually select the preferred potential purchaser; and try to negotiate the terms of a purchase and sale agreement.

10 Interested parties were instructed under the terms of the Information Memorandum to submit a proposal indicating: (i) a purchase price; (ii) comments, if any, on Penn West's proposed Purchase and Sale Agreement (which was available in the data room); and (iii) a review of the expected financing sources to fund the proposal.

11 In the first week of December 2006, Mr. Scott began his inquiries into the acquisition of the wind farm. From his testimony it was clear that he had limited experience in the wind industry and could not finance either the acquisition of the Penn West assets or the subsequent development of the wind farm on his own. Scott intended to put together a team, with another party putting up the funds.

12 On December 14, 2006, Phoenix provided Mr. Scott with the Alberta Wind Projects Information Memorandum dated December 13, 2006, which also attached the form of Penn West Confidentiality Agreement Scott was required to sign.

13 On December 14, 2006, Scott executed the Penn West Confidentiality Agreement. This agreement does not appear to have been executed by Penn West.

14 On December 15, 2006, Mr. Scott was granted access to the project data room operated by Phoenix.

15 On December 18, 2006, Mr. Scott sent Phoenix multiple email inquiries pertaining to the project. During the course of this correspondence, Phoenix confirmed to Mr. Scott that all of his inquiries and the information provided by Phoenix in response to such inquiries were confidential and would not be shared with any of Scott's competitors, unless they asked similar questions.

16 While looking for investors for his bid, Mr. Scott sent a draft summary of the project bid to several potential investors. For example, on December 22, 2006, Mr. Scott sent Mr. Arno Neumann his summary. On January 3, 2007, Mr. Scott sent Ms. Ellen Alston his summary, together with a preliminary financial analysis summary of the project.

17 On January 12, 2007, Scott sent Phoenix its first formal offer to purchase at a price of 3.35 million dollars. Scott listed its "expected financing sources" of equity funding as: (i) a consortium group of Mitsubishi companies; (ii) Nordbank; (iii) John Deere; and (iv) TD Investments. It listed a source of debt financing as "Bank(s)".

18 On January 18, 2007, Scott sent Phoenix a revised second offer to purchase at the same price, with the same expected financing sources as the first offer.

19 Following Scott's second offer, it negotiated the details of its bid with Phoenix while concurrently pursuing multiple investors. Although Scott's representations to both Phoenix and to its potential investors indicated that Scott had multiple investors locked in for the bid, none of Scott's potential investors had formally committed to the project. Notably, although Scott had not secured a commitment of financing by any of its investors, it did forward a summary of the project to them.

20 In telephone conversations, Phoenix indicated to Scott that Scott was one of three potential purchasers that Penn West was considering for the acquisition.

21 On January 20, 2007, Scott sent Phoenix an informal offer via email that stated Scott and its investors would consider reducing their bid to $2.7 million.

22 On January 23, 2007, following a significant amount of correspondence between Scott and Phoenix regarding Scott and what was presented as its potential investors' concerns over the joint venture agreement with Spirit Pine, Scott provided Phoenix with its comments and proposals on the joint venture agreement.

23 On January 31, 2007, Penn West sent Scott a letter of intent for execution, which provided for exclusivity between Scott and Penn West as vendor and purchaser during negotiations of the purchase and sale agreement by February 23, 2007.

24 On January 31, 2007, Scott executed a Mutual Confidentiality Agreement ("MCA") with The Howard Group, another potential investor, and the party which ultimately introduced Scott to Finavera.

25 On February 5, 2007, Scott communicated an informal third offer to Phoenix by way of email. Penn West countered with a request for Scott to sign a revised letter of intent and to move up the closing of the acquisition of the project to February 16, 2007.

26 On February 6, 2007, Phoenix provided Scott with a revised third offer to execute which incorporated the changes agreed to by the parties the day before.

27 The Howard Group introduced Scott to potential investor Finavera on February 6, 2007; Scott forwarded its summary of the project, as well as other documents relating to the proposed acquisition of the project to Finavera on the same day.

28 A February 7, 2007 email from Finavera to Scott stated: "Thank you once again for opening up your opportunity to us".

29 On February 7, 2007, Finavera signed the form of MCA provided by Scott, and Scott sent Finavera its summary of the project.

30 On February 7, 2007, Scott provided Penn West with its revised fourth offer and a formal letter of intent.

31 Following its fourth offer, Scott, The Howard Group and Finavera attempted to negotiate and settle amongst themselves the terms of their relationship for the acquisition, including who would lead negotiations with Penn West, and what their respective interests as purchasers in the project would be.

32 After heated phone calls and back and forth correspondence concerning the terms of Scott's compensation and interest in the project, on February 9, 2007, Finavera sent Mr. Scott an email offering to pay Scott $600,000.00 for its entire interest in the project, which sum would be payable at close of the acquisition. In a February 11, 2007 letter, Scott rejected Finavera's first offer and set out a counter-offer.

33 As a result, a February 12, 2007 email from Finavera to Scott amended their offer to include the $600,000.00 payment to Scott as well as a commitment to retain Scott as the owner's engineer on the project following close of the acquisition. This revised proposal was accepted by Scott in an email to Finavera on February 12, 2007, and was formalized in a February 12, 2007 letter of cooperation from Finavera to Scott. This letter was also provided as evidence to Penn West of Finavera's participation in the acquisition. Scott wanted the owner's engineer contract concluded before the acquisition closed. Finavera wanted to close the sale first and then discuss the terms of the owner's engineer contract. No contract appointing Scott as the owner's engineer was ever signed, either before or after the closing.

34 The introduction of Finavera as a party to the acquisition was subsequently approved by Penn West on February 13, 2007, and confirmed in an email from Penn West to both Finavera and Scott. This email also attached a formal final offer to purchase dated February 13, 2007 for Finavera to execute, which it did with Scott's knowledge and consent. The final offer was in Finavera's name alone. Scott was not a signatory to this final offer or to the final Agreement of Purchase and Sale between Finavera and Penn West.

35 Initially Mr. Scott wanted Finavera to direct its inquiries through him to Phoenix, telling them on February 7 that he had a month of questions and communications with Phoenix already and wanted to discourage a cold call from Finavera because it could lead Phoenix "to believe that we are shopping this project around, which is not the case". However, the full record discloses that Scott was offering the project to many different groups through Scott. At some point Scott agreed that it would be easier and acceptable for Finavera and Penn West to deal directly with each other and they did so.

36 Finavera and Penn West executed the Agreement of Purchase and Sale for the acquisition of the project on February 20, 2007.

37 On February 25, 2007, Scott requested a formal offer from Finavera on its interest in the acquisition of the project. An email response from Finavera confirmed that Finavera "made an offer to you... and I am sure you have no reason to believe that we would not honor it". Finavera's Investment Proposal to its board of directors dated February 23, 2007 for example, sets out the payment of a $600,000 "development fee" to Scott at close of the acquisition.

38 A subsequent email of March 14, 2007 from Scott to Finavera again requested that Finavera and Scott sign a formal agreement, before Finavera closed the purchase with Penn West. Finavera's email response of March 15, 2007 to Scott reiterated that Finavera made Scott an offer, which offer was accepted, and Finavera would not be in a position to negotiate an agreement with Scott until close of the acquisition with Penn West.

39 During this time, Finavera continued to speak to and negotiate with Penn West and other parties, including Spirit Pine and Phoenix, without the involvement of Scott.

40 The relationship between Scott and Finavera started to deteriorate with a chain of email correspondence between the parties on March 15 and 16, 2007. This resulted in Mr. Scott sending a formal letter to the TSX Venture Exchange on March 16, 2007, alleging that Finavera was misleading the public with the information disclosed in its March 6, 2007 press release to the market. Mr. Scott also sent a formal letter of complaint against Mr. Bertan Atalay, Finavera's Chief Operations officer on March 19, 2007 to the Association of Professional Engineers and Geoscientists of BC and a letter to Finavera's Chairman on March 27, 2007 alleging the unprofessional conduct of Finavera.

41 The closing of the acquisition between Finavera and Penn West occurred on March 30, 2007, with a final purchase price for the project of $3,350,000.00.

42 Press releases from Finavera to the market announced the completion of the acquisition of the project on April 3, 2007, and the selection of Canadian engineering firm Genivar as the owner's engineer for the project. An estimated fee summary in Genivar's contract for the project dated July 23, 2007 indicates estimated total fees as owner's engineer for the project of $684.700.00.

43 A December 15, 2008 press release from Finavera announced that it had sold a portion of the wind farm project (the Ghost Pine wind project) to Ghost Pine Wind Farm LP for $4,500,000.00.

44 Scott filed its Statement of Claim with this Court on August 20, 2007. Finavera filed its Amended Statement of Defence and Amended Counterclaim on April 2, 2012, and Scott filed its Statement of Defence to Counterclaim on January 8, 2008.

3. Procedural History and Evidence at Trial

45 Finavera took a summary judgment application, which was dismissed by the chambers judge and by the Court of Appeal: *Scott & Associates Engineering Ltd. v. Finavera Renewables Inc.*, 2012 ABQB 116, [2012] A.W.L.D. 3682 (Alta. Q.B.); 2012 ABCA 181, [2012] A.W.L.D. 3565 (Alta. C.A.).

46 The trial lasted just over two weeks. Mr. Scott testified on behalf of the Plaintiff and the Defendant called Mr. Bak, its chief operating officer; Mr. Kristan Tange and Mr. James Bell from Penn West; and Mr. Philpott from Phoenix, the main person in charge of the bid process, data room and sale. It is noteworthy that the Defendant did not call Mr. Bertan Atalay, the chief operations officer for Finavera, who acted during the acquisition of the project as Finavera's main contact and the person who was most involved in negotiating with Scott. Finavera also did not call two other former employees, who had a role in Finavera's relationship with Scott.

47 There were seven binders of exhibits with documents that spanned the approximately four month time frame in which these events took place. There was much correspondence, most of which involved Mr. Scott. Mr. Scott kept his own notes of meetings as well. He testified that he made his notes after or during the various meetings. Such notes were clearly taken from his perspective but they were often the only record of various conversations or meetings.

48 While there is much material, there are relatively few facts in dispute. What divides the parties most is the legal meaning to be attributed to what happened. Any facts in dispute will be discussed in relation to the issue to which they relate.

49 It is, however, appropriate to make some general observations about the credibility and reliability of those who testified.

50 Mr. Scott felt that he had been badly treated by the Defendant and his animosity towards those involved was apparent. He was prone to long answers which simultaneously contained self-serving statements and veiled and not so veiled attacks on others. Mr. Scott was highly critical of statements made by Penn West in its Memorandum of Information, claiming they made omissions and exaggerations. A review of Mr. Scott's correspondence and testimony demonstrate a similar brand of salesmanship.

51 Mr. Scott also spent a great deal of time during his testimony outlining his various complaints about the process employed by Penn West. It is unclear what Mr. Scott thought was to be gained by criticizing the Penn West/Phoenix bid process or how it was relevant to the issues at bar. For example, Mr. Scott complained that he was exceptionally pressed for time in arranging his team and he sought ways in which to create additional time to both conduct due diligence and to attempt to secure financing. The Penn West representatives acknowledged that its proposed time lines were tight and included the Christmas period. However, they explained that they had anticipated that bidders would have had experience in the wind industry and be major players with their own financial resources for a project of this magnitude. Mr. Tange testified, and the Court accepts, that no-one was obliged to enter into this process or to continue with it if it found the time lines too onerous.

52 Mr. Scott was clearly trying to put a positive, even hopeful spin on what was occurring. In certain instances, the presentation of his evidence through the lens of his preferred or desired result worked against his credibility. For example, while he discussed that he was trying to build a team to finance the acquisition of this expensive project, he appears to have relied upon very big name players without having actually secured their firm financial commitment. At other times, his testimony was internally inconsistent. He describes the Penn West project as "a bag of garbage" and refused to answer pertinent questions on the "project" in cross examination on the basis that there was no project. This is, however, difficult to reconcile with the fact that Scott pursued

such a project with fervour and tenacity at every stage, to the conclusion of the trial. Mr. Scott relied heavily on the documents, sometimes reading directly from them in chief and then again in cross-examination.

53 Mr. Bak was also principally interested in explaining Finavera's actions and perspective. He was very knowledgeable about his industry but lacked specific recollections about how the relationship with Scott evolved. He was also required to rely upon the documentary evidence.

54 Mr. Tange, Mr. Bell and Mr. Philpott had no direct interest in the litigation. They provided their own independent recollections and showed no sign of favouring either party. Each answered questions directly and with candour and professionalism. Each also was prepared to admit if and when they did not know something. None of these three were in any way shaken in cross examination.

4. The Position of the Parties

A. Overview of Scott's Claims

55 The Plaintiff claims a constructive trust over ten percent of the entire project, including its eventual development. First, it argues on the basis of a breach of confidentiality, alleging the Defendant misused the Plaintiff's confidential information to misappropriate the Plaintiff's business opportunity. The Plaintiff alleges the Defendant breached the confidentiality and non-competition provisions of the MCA. The Plaintiff further claims that the parties mutually modified the elements of an action for breach of confidence by the terms of a private contract, being the MCA, and that the elements of that action have been satisfied in the case at bar.

56 Second, the Plaintiff claims for unjust enrichment, and alleges the Defendant was enriched by not sharing with the Plaintiff the mutual benefit of the development of the project it received. The Plaintiff claims for the equitable remedy of a constructive trust, alleging an award of damages would not be adequate compensation, in part because of the Defendant's uncertain financial position.

57 The Defendant responds that the evidence does not support a claim for either a breach of confidentiality or unjust enrichment, as the elements of those causes of action are not met. The Defendant also counterclaims for misrepresentation and the economic torts of interference with economic relations and abuse of process, alleging the Plaintiff misrepresented the source of the confidential information, as well as the ownership of the project, and caused economic damage to the Defendant.

58 The Plaintiff responds to the Defendant's counterclaim that the Plaintiff acted in good faith, the Defendant has suffered no economic damage and that there is therefore no action for economic interference in economic relations, and no abuse of process.

B. Both Parties Agree there was no Contract between Scott and Finavera in Relation to How they would Approach this Project

59 The abundant email correspondence shows that Scott and Finavera were trying to establish the terms of their working relationship and how they would move forward to acquire the Penn West project.

60 Mr. Scott first tried to negotiate for a proprietary interest in the entire project: that being a 10% interest for Scott, a 15% interest for Finavera, and the remainder for the entity that would eventually provide the bulk of the financing for the actual development of the project, rather than its acquisition. Finavera rejected this arrangement and offered Scott: (i) a $600,000 payment, being 10% of the six million dollar overall acquisition cost; and (ii) the role of owner's engineer in the project after closing. Mr. Bak, the president of Finavera, testified that there was an agreement between the parties on this point in the sense that there was an offer and an acceptance with Scott that Scott would receive $600,000 and become the owner's engineer. He testified that at the time Finavera thought Scott had acquired development rights to the project and that the $600,000 payment was the purchase price for those rights.

61 Scott also wanted a formalized owner's engineer contract before the closing of the Purchase and Sale Agreement between Finavera and Penn West on March 31, 2007. Finavera disagreed, wanting to negotiate the terms of that work after they had

acquired the project. Finavera thought that if they did not acquire the asset first that any such contract would not be necessary and any such negotiation would be a waste of time when they were pressed for it. There was no agreement between the parties about when the owner's engineer contract was to be completed.

62 Finavera's commitment to make Scott the owner's engineer on the project reduced over time. Initially, Finavera appeared to confer the status of owner's engineer on Scott, then it began speaking of using reasonable steps to employ Scott, and finally sent a lawyer's letter dated March 29, 2007 expressly rejecting Scott as the owner's engineer. Finavera eventually awarded the owner's engineer contract to another entity. Mr. Bak testified that Finavera looked more closely into Scott in the second week of March and found it did not have the requisite experience in the wind industry to be an owner's engineer on a project of this type. There is no evidence as to what steps were taken by Finavera to evaluate Scott's abilities to act or not act in that capacity.

63 Both parties have taken the position before this Court that no binding contractual arrangements were concluded regarding the $600,000 payment or the owner's engineer contract, despite the appearance of agreement on both points. Scott takes the position that the parties' understanding of February 12, 2007 in respect of the $600,000 payment and the owner's engineer contract was not a contract as it was void for uncertainty. Finavera argues, despite the testimony of Mr. Bak, that there was only an agreement to agree.

64 Scott appears to have made a conscious decision not to pursue a contractual remedy, even in the alternative, seeking instead a constructive trust over the entire amount of the project. Since Scott has not sued for the $600,000 payment and/or any foregone profits from the loss of the owner's engineer contract, Finavera argues it did not lead or solicit certain evidence pertinent to any such claim. Finavera argues it would be unfair for the Court to grant a contract-based remedy with respect to these discussions. I agree. A court should not impose a cause of action a plaintiff has expressly decided not to pursue.

5. Issues

65 Four general issues arise:

> A. Did Finavera breach a duty of confidence owed to Scott by misusing Scott's confidential information or misappropriating Scott's business opportunity?
>
> B. Did Finavera breach any agreement it had with Scott?
>
> C. Was Finavera unjustly enriched by Scott's actions?
>
> D. Did Scott breach any duties it owed to Finavera?

6. Did Finavera Breach a Duty of Confidence Owed to Scott by Misusing Scott's Confidential Information or Misappropriating Scott's Business Opportunity?

A. General Principles

66 The law concerning the protection of confidential information in Canada is found in several parallel legal doctrines, which include theories of equity, contract, and property, as well as a "sui generis" theory that breach of confidential information is an action unto itself. The jurisprudence is not consistent in establishing the legal basis for the protection of confidential information, or in establishing which remedies are to be attached to each individual cause of action for a breach of confidence.

67 Generally, however, Canadian courts have rejected the view that confidential information is to be treated as property, and have "been at pains to emphasize that the action is rooted in the relationship of confidence rather than the legal characteristics of the information confided." *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, 167 D.L.R. (4th) 577 (S.C.C.) at para 41.

68 Similarly, the suggestion by Sopinka J., dissenting in *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 (S.C.C.), that the foundation for an action of breach of confidence is a *sui generis* hybrid

of contract, equity and property theories has not been widely followed by Canadian courts. Thus, the prevalent modern view in Anglo-Canadian jurisprudence is that a claim for breach of confidential business information is based in either contract or equity. See Justice Julie A. Thorburn & Keith G. Fairbairn, *Law of Confidential Business Information* (Toronto: Canada Law Book, 2012) at 2-2.

B. Scott's Claims

69 Scott says it told Finavera everything it knew about the project, including: that the wind farm was for sale; the documents Scott accessed from the Penn West data room; Scott's discoveries from its due diligence; Scott's conversations with Spirit Pine and Golder; Scott's summary and financial models; and Scott's bid price and negotiated contract terms.

70 From my understanding Scott argues that this transfer of information gives rise to four different types of claims. First, that Finavera breached the MCA. Second, that all of its own information, as well as all of the third party information owned by Penn West, became Scott's confidential information under the MCA. In essence, Scott claims the parties expanded by contract the definition of confidential information to give Scott greater rights. Third, Finavera took Scott's confidential information and fourth, that Finavera took Scott's business opportunity.

71 Finavera argues that there is no breach of confidentiality, that the information provided by Scott was not confidential, that such information did not give rise to an obligation of confidence to Scott on the part of Finavera, and that there was no unauthorized use of the information by Finavera. Finavera also claims for misrepresentation on Scott's part.

i. Did Finavera Breach the Mutual Confidentiality Agreement?

72 Finavera is bound by the terms of the MCA put forward by Scott, even though it was signed in an unconventional manner. Mr. Atalay signed the MCA Scott had previously entered into with The Howard Group with the notation, "As per our agreement, we honour the above terms". Mr. Bak testified that Finavera never terminated the MCA with Scott and had not advised that it was terminating this agreement.

73 The MCA includes as "Confidential Information":

> the Proprietary Data and all information, documents, data, studies, or other material which either party may disclose to the other in the course of their discussions, negotiations and communications of any sort arising from or related to the Project [...].

74 "Proprietary Data" in the MCA is defined as:

> As part of its ongoing business development efforts, SAEL and its agents and consultants have developed various financial models and entered into relationships with third parties involving contract negotiations, data and other confidential information. (SAEL is Scott)

75 Scott could include Penn West's confidential information in the MCA. Scott was essentially required by the Penn West Confidentiality Agreement to include Penn West's confidential information under the protection of his MCA with Representatives such as Finavera, The Howard Group and other potential investors. Under the Penn West Confidentiality Agreement signed on December 14, 2006, Penn West's confidential information is defined as:

> all information, whether written, electronic or oral, relating to the Wind Development Project, including without limitation all data, reports, interpretations, analysis, printouts and documents relating to the Wind Development Project, which are provided to the Recipient under this Agreement by the Vendor or its representatives and all analysis, compilations, forecasts, studies or other documents prepared by the Recipient or the Representatives in connection with its or their review of the Wind Development Project".
>
> (emphasis added)

76 Penn West is not alleging a breach of confidence in regard to Scott's use of Penn West's confidential information with Finavera and other third parties. However, Finavera argues that Scott was in breach of its confidentiality obligations to Penn West when it provided Penn West's information to prospective financiers and therefore does not have clean hands and does not merit equitable relief. Scott's obligations under another contract to another party, with whom Finavera lacks privity, are of no direct relevance to Scott's breach of contract claim with Finavera, but provide the larger commercial context. The focus should not be on the agreement between Scott and Penn West but the one between Scott and Finavera.

77 The starting point is, of course, that parties enjoy freedom of contract. Between themselves, Scott and Finavera are free to agree to any contractual definition of these important terms, outline what they consider to be a breach, and to stipulate available remedies.

78 *Cadbury Schweppes* at para 36 sets out that parties may choose to limit or negative general legal duties by contract:

> Just as a contractual term can limit or negative a more general duty implied by the law of tort, so too can a contractual term that deals expressly or by necessary implication with confidentiality negate the general obligation otherwise imposed by equity: *337965 B.C. Ltd. v. Tackama Forest Products Ltd.* (1992), 91 D.L.R. (4th) 129 (B.C. C.A.), per Southin J.A., at p. 176, leave to appeal to this Court refused, [1993] 1 S.C.R. v (S.C.C.). The ability of parties to contract out of, or limit, general duties otherwise imposed by law has been labelled "private ordering", and the general principles applicable here would be analogous to the principles considered by this Court in the context of concurrent remedies in tort and contract in *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12 (S.C.C.) at p. 27:
>
> > ...the tort duty, a general duty imputed by the law in all the relevant circumstances, must yield to the parties' superior right to arrange their rights and duties in a different way. In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon.

79 As part of private ordering the parties are also free to augment obligations otherwise imposed by law or equity. However, in such a case their rights and remedies flow from the contract itself.

80 On a plain reading of the MCA the parties have agreed to broaden the definition of confidential information otherwise arising in the breach of confidence cases. Under the MCA, everything Scott supplied to Finavera is either its "Proprietary Data" or "Confidential Information."

81 Given this contractually expanded definition, the real issue is whether Finavera breached any contractually assumed obligation. The MCA states that the parties:

> each agree not to use any of the Confidential Information for any purpose other than the discussion, negotiation or evaluation of the Project and related investments, and further agree not to disclose to any person, the fact that they are discussing the Project or similar investments [...]
>
> and to
>
> neither use nor disclose the Confidential Information for any business, commercial, or competitive purposes or for any purpose other than the purpose of negotiation and evaluation of the Project and related investments [...].

82 Scott alleges that Finavera breached both provisions, calling them the confidentiality and the non-competition provision of the MCA respectively. Finavera argues that there is no breach, due to the lack of confidential information and the fact that Finavera only used Scott's confidential information with Mr. Scott's authorization, without any detriment to Scott.

83 In the present instance, I find that Finavera did not breach the non-competition or confidentiality provisions of the MCA: it did not use or disclose the confidential information for any purpose other than the discussion, negotiation and evaluation of the project with Scott. In fact, in most respects the information provided by Scott to Finavera was used for exactly the purpose intended, namely to facilitate Finavera's evaluation and negotiation of the acquisition of the wind farm. As in *United*

Technologies Corp. v. Platform Computing Corp. (1998), 83 C.P.R. (3d) 350, 58 O.T.C. 81 (Ont. Gen. Div.), the relationship between the parties here was such that the information was intended to be used in circumstances of mutual benefit.

84 Scott argues that Finavera should not have made an independent offer to Penn West due to the non-competition provision in the MCA. Previous offers had been in the name of Scott and the final offer, which led to the eventual purchase and sale agreement, was submitted in the name of Finavera.

85 The evidence is unclear as to exactly what conversations precipitated the substitution of Finavera as the named purchaser in the final offer to acquire the project, but the evidence is very clear that this substitution was with Scott's full knowledge and consent. Until the middle of March, the parties were working co-operatively to place the final offer before Penn West. Scott agreed to Finavera bidding in its own name, albeit on the assumption that Scott would receive a payment of $600,000 and the owner's engineer contract. Therefore, Scott cannot argue that Finavera should not have submitted its own offer because Scott agreed the final offer would be in Finavera's name alone and in fact worked with Penn West to open the door and permit this substitution.

86 Did Finavera subsequently use the confidential information in a competitive fashion after it had made the offer and by the time it signed the purchase and sale agreement with Penn West? I do not think Finavera can be described as acting in competition with Scott, or of misusing the information provided by Scott, following the offer made by Finavera to Penn West.

87 Finavera's motives and actions did not change from the time the final offer was made to the closing of the acquisition; Finavera was always working towards the goal of acquiring the project and its actions demonstrate that. What did change, however, was the relationship between the parties following the final offer made to Penn West. After closing of the purchase and sale transaction the project became Finavera's alone. Due to increasing hostility and animosity between the parties, Scott was not given a $600,000 payment or chosen as the owner's engineer on the project.

88 I therefore find that despite the breadth of the contractual definition of "Confidential Information" in the MCA there has been no breach of its specific terms, including the non-competition and confidentiality provisions. The MCA addressed only a portion of the parties' overall relationship. Scott appears to be trying to use the MCA to regulate matters that were not the subject of a contract: their overall working relationship. Given that the parties say they had no agreement for the remuneration to be supplied the MCA cannot be read to fill in any gap created by that joint admission.

ii. "Confidential Information" and the Mutual Confidentiality Agreement

89 Scott also argues that it has a claim for breach of confidence apart from the MCA. However, Scott makes the novel argument that instead of this Court asking what information is confidential under that avenue of recovery, this Court should use and incorporate the broader definition in the MCA into the otherwise existing principles to grant a constructive trust. Scott argues that the MCA operates to expand the idea of what qualifies as Scott's confidential information for the purposes of a breach of confidence action. By doing so Scott therefore essentially asserts rights and equities over the Penn West confidential information by virtue of the fact that the MCA included both Scott's confidential information and Penn West's confidential information. In essence, Scott claims the parties expanded by contract the definition of confidential information to give Scott greater rights. The effect is that the parties' agreed upon definitions become incorporated by reference into the breach of confidence action. Scott argues that the MCA definitions prevail such that everything Scott gave to Finavera is protected as either Scott's "Confidential Information" or "Proprietary Data" in a breach of confidence claim.

90 At the base of this argument is an assertion that the parties are free to stipulate what will be confidential to them in a breach of confidence action. Scott argues that the passage quoted in *Cadbury Schweppes* at para 36 stands for the proposition that parties can modify the elements of a breach of confidence by private contract. I agree that parties may create the law between them in a breach of contract action. However, any such breach will sound in contract. In contrast, there is no authority for the proposition that the parties may impose their own criteria when the action is one of breach of confidence, which has its roots in equity. While this specific point is not addressed in the case law cited, all authorities suggest that Scott's argument is not sound.

Outside a binding contract, it is not open to the parties to modify what the courts have set as the test for information having the quality of confidence for a breach of confidence action.

91 What Scott may claim under a breach of confidence action are only those things that the law, not the parties, recognize as confidential. In a breach of confidence action Scott cannot modify by contract the confidential information he has ownership over or equity in simply by including an expansive definition of such confidential information in the MCA. As in *Drake International Ltd. v. Miller* (1975), 9 O.R. (2d) 652, 61 D.L.R. (3d) 420 (Ont. H.C.): "matters do not become confidential merely because the contract states them to be so".

92 Although I accept the legal principle that a contract can limit or negate a general duty implied by tort law or by equity, it does not therefore follow that a private contract can also expand the law of tort or equity to make confidential information that which does not bear the hallmarks of confidentiality when the action is one of breach of confidence and not breach of contract. More specifically, para 36 of *Cadbury Schweppes* cited above, does not support the proposition that a party can expand the definition of confidential information in a breach of confidence action.

93 Further, given that I found there is no breach of contract, Scott is trying to combine contract, tort and equity principles to secure for itself something it did not bargain for. Scott's claims in relation to the misuse of its confidential information therefore needs to be determined under the principles established under a breach of confidence claim.

iii. Does Scott Have a Claim for Breach of Confidence?

94 The parties agree that the three elements that must be established to make out a claim for breach of confidence, established in *LAC Minerals Ltd.* at 608, are the following:

> 1. the information conveyed must be confidential;
>
> 2. the information must have been communicated in confidence; and
>
> 3. the information must have been misused by the party to whom it was communicated to the detriment of the party who confided it.

95 Counsel submitted numerous other authorities. Many deal with confidential information in the context of patents, manufactured goods or innovative processes. See *Cadbury Schweppes*; *Stenada Marketing Ltd. v. Nazareno* (1990), 33 C.P.R. (3d) 367, 23 A.C.W.S. (3d) 203 (B.C. S.C. [In Chambers]); *Aram Systems Ltd. v. NovAtel Inc.*, 2008 ABQB 441, 449 A.R. 288 (Alta. Q.B.).

96 In some instances a party had created a business opportunity not known to or not available to others. See *Visagie v. TVX Gold Inc.* (2000), 49 O.R. (3d) 198, 187 D.L.R. (4th) 193 (Ont. C.A.); *LAC Minerals*; *Novawest Resources Inc. v. Anglo American Exploration (Canada) Ltd.*, 2006 BCSC 769, 151 A.C.W.S. (3d) 219 (B.C. S.C.); *Pharand Ski Corp. v. Alberta* (1991), 116 A.R. 326, 80 Alta. L.R. (2d) 216 (Alta. Q.B.).

97 By contrast, the case at bar deals with a very different factual matrix. In this case a property was offered for sale in a bid system where many were invited to participate. People who came to this existing opportunity were provided with extensive materials compiled and owned by Penn West. Potential purchasers were expected to make their own evaluations and/or further enquires and satisfy themselves in the manner of their choice about the attractiveness, economics and viability of the project.

a. Most of the Information Scott Conveyed was Not its Own Confidential Information

98 Confidentiality has a contextual dimension and depends in part on processes commonly used in an industry and what data may already be in the public domain. Factors considered by the courts in determining whether certain information is classified as confidential also vary, but include whether the information: (a) is generally known or unknown to others; (b) is known to others within the specific industry or trade, *i.e.* outside the actual business entity; (c) is known to others within or connected to the business entity; (d) is capable of acquisition elsewhere by those outside the business entity; (e) is the subject of measures

to ensure that the relative secrecy of the information remains intact; and (f) in some minimum or basic way is unique, original or novel. *Law of Confidential Business Information* at 3-5-3-6.

99 In considering whether information is confidential, the case law has primarily focused on the nature of the information, and whether such information possesses the necessary quality of confidence. The issue regarding whether a plaintiff may claim a breach of confidence over information which is not its own confidential information is one which has not been judicially considered at length, and for good reason.

100 It seems to me a logical starting point that a plaintiff alleging a breach of confidence only has a right over information which he or she has created, in a very general sense, with some measure of his or her own time, skill and effort. There is no obligation of confidence, for example, where the party asserting the right had no part in creating the information but merely summarized the information made public by a third party. See *Ridgewood Resources Ltd. v. Henuset*, 1982 ABCA 79 (Alta. C.A.) at para 27, (1982), 35 A.R. 493 (Alta. C.A.), leave to appeal to SCC refused, [1982] 1 S.C.R. xii (note) (S.C.C.).

101 I turn now to particular types of information that Scott has asserted as its own confidential information.

102 The fact that the wind farm was for sale was not confidential. I accept Mr. Philpott's assertion that people in the industry knew that this wind farm was being offered for purchase. The Plaintiff read in Mr. Bak's testimony that Finavera was first told that the Penn West assets were for sale by The Howard Group. Like *Ridgewood Resources Ltd.* this information lacks the necessary quality of confidence about it. In that case, the opportunity to purchase a property was known only to a small group, but the community in which the information would have any significance was itself a small group. The Court held that among prospective purchasers of oil lands, the information was in the public domain. It did not matter that it was not known to the particular plaintiff.

103 Finavera admitted that they received confidential information from Penn West and from Scott. While a great deal of information was forwarded by Scott to Finavera, very little of that information qualifies as Scott's confidential information or work product under the above stated principles.

104 The great majority of the information Scott provided to Finavera was the confidential information of Penn West. In cross-examination, Mr. Scott recognized that the over forty documents Scott sent to Finavera outlined in Appendix A came from the Penn West data room and were not created by Scott. This is very significant. Actions for breach of confidential information are fact-specific, and a plaintiff must establish the following three elements in order to bring an action: (1) he or she has the sole right to benefit from the use of the information; (2) the defendant has wrongly appropriated the information; and (3) the plaintiff has suffered damages as a result of the breach. *Law of Confidential Business Information* at 5-1.

105 Scott claims a breach of confidence over information which is primarily Penn West's. The person suing must be someone to whom a duty of confidence is owed; as with *Ridgewood Resources Ltd.*, Scott had no part in creating most of the information in the case at bar but merely passed it along or summarized it. Therefore, there is no obligation of confidence owed by Finavera to Scott for Penn West's information. Neither can Scott establish that it had the sole right to benefit from the use of the Penn West information.

106 Scott also claimed that it created confidential information by its discovery of what it said were discrepancies between the information contained in the Memorandum of Information and the data in the Penn West data room. This claim is to be assessed in light of the testimony of the Penn West employees concerning the commercial context of a purchase and sale transaction of this type. I accept the evidence of Mr. James Bell and Mr. Kristan Tange that the purpose of the Offer of Memorandum was to interest people in the project. The Memorandum was essentially a first introduction to this opportunity and was a promotional document. Anyone seeking further information would be required to sign a Confidentiality Agreement, on the terms provided by Penn West. At that point, more detailed information would be provided to potential purchasers. This two-step process is a familiar one when dealing with the purchase and sale of assets. All potential purchasers would be expected to review the available materials and conduct their own due diligence based on the information provided in the data room, and any other

sources they may elect to consult. As is common industry practice, interested bidders were expected to review the information in the data room and to conduct their own assessment, including deciding whether they required any further information.

107 Scott signed Penn West's Confidentiality Agreement and was given access to Penn West's confidential information in the data room. After reviewing what was there for all to see Scott claims its "discoveries" as its own confidential information. For example, first, Scott says it created confidential information by finding out that Penn West had a joint venture partner (Spirit Pine). Scott thought the presence of a joint venture partner was contrary to the statement in the Information Memorandum that the project "provided an opportunity to obtain 100% interest in a wind farm". As explained by the representatives from Penn West, the Penn West/Spirit Pine joint venture agreement was in the data room for all to see. Anyone reading it would immediately understand that Penn West and Spirit Pine had a joint venture and that under it Penn West had the opportunity to hold 100% of the Ghost Pine project by paying Spirit Pine a stipulated sum and transferring Spirit Pine's interest into the agreed upon overriding royalty.

108 Second, the Information Memorandum stated that this project was "ready to go". Mr. Scott outlined the many ways in which he thought this project was not ready to go, including incomplete and unsigned resource studies and various other factors. He alleged that his understanding of what else needed to be done became Scott's confidential information; it was not. I accept the evidence of Mr. James Bell and Mr. Kristan Tange from Penn West on this point. Both testified that within industry standards the project was ready to go, with Mr. Bell articulating that the term "ready to go" does not mean turnkey. Rather, it would have been understood by individuals familiar with the wind industry that at this stage of the project, any reports would be preliminary and therefore unsigned, and that it would be the obligation of the ultimate purchaser to finalize the studies at an appropriate time in the future.

109 Third, Mr. Scott said that he discovered that certain of the turbines placed by Penn West in their model were outside the areas of land that Penn West had already acquired. Mr. Philpott testified that Phoenix was well aware that certain of the turbines were marked as being on lands not then owned by Penn West. The process used by Phoenix was to put forward a model for consideration, in essence what one example of a prospective wind farm may look like. It was to be understood that this was a suggestion only. In the evidence, it was clear that Phoenix marked seven of the turbines outside the line indicating where Penn West held property; it was not a hidden part of the Phoenix model. Mr. Philpott explained that this was a way to show a prospective purchaser what a possible turbine placement might look like and that if they chose to follow that placement, what lands or rights they would need to acquire outside the existing holdings of Penn West.

110 I have mentioned but three examples of information Scott claims are confidential on the basis of asserted discoveries of discrepancies. The other information in this category also fails to qualify as Scott's confidential information. Simply stated, just because Scott knew what it learned from the Penn West data room, and Finavera did not have access to that information, does not mean that such information became Scott's confidential information.

111 Some of the limited information which was Scott's work product lacks a quality of confidence. For example, Mr. Scott prepared two preliminary financial models on the project in addition to the one provided by Penn West. Finavera claims that these figures were of no use to it as the approach taken was very basic and of little utility. The information provided by Scott was based on a generally available Government of Canada model into which Scott placed its economic assumptions. Scott did not create or modify the financial model; it merely used one that was in the public domain. The choice of the two numbers Scott placed into that model is not confidential absent proof, which is not present in the case at bar, that there was something confidential about the assumptions themselves. The evidence was that Scott's assumptions were put forward for illustrative purposes and did not contain any hidden confidential information.

112 Further, Scott claims that its efforts to optimize the economics of the project are Scott's confidential information. With respect, potential purchasers of any project would seek to improve its economics, especially one acknowledged by Penn West and Phoenix to be sub par and marginal. Whether an idea has the requisite quality of confidence depends on its nature. For example, I do not find that Scott's exploration about what type of turbines should be used is confidential because the cost, life span and output of the turbines are obvious considerations when assessing the economics of a wind farm. Similarly, even though Scott raised the possible availability of greenhouse gas credits, such involve readily available information and do not cross the

threshold into confidential information. Finavera further submits that many of the ideas claimed to be Mr. Scott's were originally Mr. Philpott's and the evidence supports that assertion in part.

113 Mr. Scott also prepared a summary of the acquisition of the project entitled "Alberta Wind Farm/ An Exclusive Opportunity". This document was essentially an overview of information gathered from Penn West sources and operates more as a digest than an innovation.

114 Thus for the most part Finavera is correct that under the common law principles there is little information having the quality of confidence about it generated by Scott and most information Scott provided to Finavera was Penn West's confidential information.

115 There is also merit to Finavera's claim that Scott gave information to so many potential investors that it did not retain the necessary quality of confidence, if it ever had it. The facts reveal that Finavera was not the only entity to receive materials from Scott. Scott sent various information, including Penn West information to Mitsubishi, Nordbank, John Deere, and TD Investments, The Howard Group and at least three individuals. The evidence is not clear what went to whom or under what conditions of confidentiality. Such distribution dilutes the claim of confidentiality and despite the number of people to whom Scott sent these documents, they always were and continued to remain the confidential information of Penn West.

116 There is therefore only a small amount of Scott's information that has any quality of confidence about it that can be enforced by Scott. This includes the amount Scott bid in its offers; the few terms Scott had negotiated with Penn West outside its proposed Purchase and Sale Agreement; and information Scott requested and received from Golder Associates Ltd. ("Golder") on wildlife and other issues.

b. The Information was Communicated in Confidence

117 Scott claims that the information it provided to Finavera was communicated in confidence. Finavera responds that the information forwarded by Scott did not give rise to an obligation of confidence owed by Finavera to Scott (as opposed to Penn West), and that by forwarding Penn West's confidential information, Scott was in breach of its own Confidentiality Agreement with Penn West. Finavera also alleges that Scott misrepresented the source of its confidential information, as well as ownership of the project and that Scott represented to Finavera that it had rights in relation to the project which it was necessary for Finavera to "buy out" in order to acquire the project. Scott denies this allegation, stating that it did not misrepresent the source of its confidential information or ownership of the project, and that it had a right to assign its position as the "preferred Potential Purchaser" under clause 9 of the Confidentiality Agreement.

118 I am prepared to accept that Scott conveyed what it did in confidence. The mere act of having something like the MCA between Scott and Finavera demonstrates that both parties intended to make and accept communications in confidence.

c. The Information Must have been Misused by the Party to Whom it was Communicated to the Detriment of the Party who Confided it

119 The plaintiff has a general onus to prove the three elements of an action for breach of confidence, but on this third requirement the burden of proof is on Finavera to show that its use of the confidential information was not a prohibited use. The relevant question is what was Finavera entitled to do with any confidential information, and not what it was prohibited from using such information for: *LAC Minerals* at 642.

120 Scott claims that Finavera misused Scott's confidential information to its detriment by breaching the non-competition and confidentiality provisions in the MCA and misusing the confidential information to springboard itself into Scott's position as "Preferred Potential Purchaser" with Penn West.

121 Finavera responds that it did not misuse Scott's confidential information and goes further to state that it did not use much, or any, of the information provided by Scott.

122 I accept that Finavera has established that it eventually made project management decisions that were contrary to what Scott had researched or suggested. For example, Scott explored a certain type of larger turbine and Finavera opted for smaller ones. Scott wanted to buy out the joint venturer Spirit Pine and Finavera chose to keep them as a joint partner but converted its interest into a royalty position. In many respects, however, this argument misses the mark. The question is not only whether Finavera was entitled to use Scott's information and suggestions in the development of the project, but includes whether it was entitled to use Scott's information in its dealings with Penn West in the final offer and to eventually negotiate and close the purchase transaction.

123 For the following reasons I find that Finavera used the information provided by Scott, except Scott's basic financial models, in the negotiation and close of the acquisition of the project. First, there is evidence that Scott provided Finavera with all of Penn West's information and some of its own and the time lines were exceptionally tight and did not seem to provide Finavera with the opportunity to conduct much, if any, of its own research.

124 Second, Finavera had no independent access to Penn West's data room until much later in the process and there is no evidence that Finavera actually accessed the data room after it signed a Confidentiality Agreement directly with Penn West. Third, with very limited exceptions, Finavera produced almost no internal or independent assessments of this project. It had its own economic assessment of the project but aside from that document no other reports, assessments or opinions generated by Finavera before the Purchase and Sale Agreement was signed were in evidence. The Plaintiff read in Mr. Bak's testimony saying they did an internal engineering review of the project. However, Mr. Bak acknowledged in cross examination that the report was oral and not written, that he could not recall its contents, and that he would have simply relied on Mr. Atalay's analysis of the situation and then acted accordingly. There was no evidence of Mr. Atalay's analysis.

125 Fourth, Mr. Bertan Atalay was not called as a witness. Finavera argued that Mr. Atalay is no longer an employee, that he works outside Canada, that when asked questions he failed to answer and he is not under their control. There were extensive pertinent undertakings asking for information that would have been known to Mr. Atalay. Mr. Bak said that Mr. Atalay would have known what steps Finavera took in respect of collecting its own information and doing its own due diligence. However, Mr. Atalay did not answer any inquiries through the undertaking process and was not a witness at trial.

126 The case of *Kamitomo v. Pasula* (1983), 50 A.R. 280 (Alta. Q.B.) at paras 67-77, (1983), 29 Alta. L.R. (2d) 375 (Alta. Q.B.), provides a detailed discussion of the principles of law on adverse inference (see also *Levesque v. Comeau*, [1970] S.C.R. 1010, 16 D.L.R. (3d) 425 (S.C.C.)). In *Kamitomo*, Kryczka J stated at para 69:

> The principles of law on adverse inference are well known. The leading statement is to be found in Wigmore, *Evidence in Trials at Common Law*, 1979 (Chadbourn Rev.) at vol. 2, 285, p. 192:
>
> > The failure to bring before the tribunal some circumstances, documents, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so; and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.

127 I draw a negative inference from Mr. Atalay's failure to appear as a witness in respect of Finavera's use of all the materials provided by Scott. Mr. Bak, as chief executive officer of Finavera, could only testify that he relied on Mr. Atalay to conduct the engineering analysis. Since Mr. Atalay did not himself testify, Finavera cannot establish that it did not in fact rely upon the information provided by Scott. Even if not entitled to draw a negative inference the combination of the burden of proof on Finavera and the absence of evidence on this point leads to the same result.

128 Mr. Bak testified, and I accept, that Finavera did their own complex financial modelling before they would agree to the acquisition of the project. Such modelling was in evidence. While Finavera may have read the information provided by Mr.

Scott, it went far beyond that basic information and I find Finavera conducted its own assessment of the finances of the project quite apart from whatever limited modelling Scott supplied.

129 The totality of the evidence leads me to the conclusion that Finavera had very little information that did not come through Scott; its assertion that it did not use the information is simply untenable. Most of the information provided by Scott to Finavera was Penn West's confidential information. Scott's claim for a breach of confidence is not satisfied with respect to Penn West's confidential information. However, Scott did provide Finavera with some of its own confidential information.

130 Scott claims the main misuse of the confidential information consisted of Finavera finalizing the Purchase and Sale Agreement on April 3, 2007 without its participation. With respect to Scott's confidential information, Finavera responds that there was no misuse of the information; that assuming Scott's "authorization" was required, Scott authorized Finavera to acquire the assets.

131 I find that Finavera did not misuse Scott's confidential information in putting forward the final offer in its name alone, or in negotiating the terms and closing of the Purchase and Sale Agreement. These were not prohibited uses of the confidential information because I find they were done with Scott's knowledge and consent at the time the final offer was made to Penn West. The use of confidential information can not become a misuse of information retroactively; that is, at the time Finavera used the confidential information, it was done with Scott's consent and cooperation. That Scott did not receive its payment or owner's engineer contract does not support a finding of misuse of the confidential information it gave to Finavera for the express intended purposes that Finavera could make an offer to acquire the project in its name alone.

132 Scott also asserts that Finavera's acting to close the acquisition of the project without the "next step agreement" in place was an act of bad faith, and that bad faith is also a misuse of the information. I will discuss the obligation of good faith below, but I do not find that Finavera taking steps to close the purchase and sale transaction was an act of bad faith or a misuse of the information.

133 Finavera argues there has been no detriment to Scott. Scott claims as its detriment that Finavera misappropriated its unique business opportunity to participate in the development of the wind farm to Scott's exclusion. This was not a detriment to Scott at the time the final offer was made, nor at the time the purchase and sale agreement was finalized between Finavera and Penn West. Again, Scott cannot claim a detriment retroactively by alleging a breach of confidence.

134 Based on the totality of the evidence, Scott cannot establish that it is entitled to an accounting for profit or constructive trust in the project based on a breach of confidence. This is not a case that falls neatly within the case law on breaches of confidence based on the misuse of confidential information. While I am prepared to assume that Finavera used the information Scott supplied, I have concluded that only a very few pieces of information supplied by Scott were Scott's, as opposed to Penn West's, confidential information and such was used as the parties intended: that is to allow Finavera to purchase the project.

iv. Did Finavera Misappropriate Scott's Business Opportunity?

135 Scott claimed that it had the sole right to go forward in the bid process and that by closing the transaction in its own name and cutting Scott out of any remuneration that Finavera has taken a business opportunity that was rightfully Scott's.

136 There was much debate over whether Scott had "development rights" to acquire the project. This term was only loosely defined in correspondence and in Mr. Bak's testimony. Scott did not have a "right" to acquire this project resembling anything in the nature of an option or a right of first refusal. Nevertheless it enjoyed a status or position which allowed it, and by extension those working with it, to negotiate with Penn West in the process they both established and subsequently respected.

137 I find that Scott had obtained a preferential position in the bidding process and Finavera benefited from stepping into that spot. I say this understanding that under the terms of the Information Memorandum, Penn West could deal with anyone it chose. I accept the evidence of Mr. Tange that even though Penn West did not classify this as a closed bid system, and had the legal right to negotiate outside the process it established, nevertheless it wished to retain its commercial reputation and was not

prepared to operate outside its bid process. Penn West rejected offers and overtures from Crestreet and Spirit Pine, its own joint venture partner on the very wind farms being sold, because they submitted their bids outside the established process.

138 Mr. Tange testified that Penn West recognized that Scott had become the "preferred potential purchaser" within its process. The fact that Scott did so by attrition, by being the only bidder remaining, does not change its status. This status had some commercial and practical value. In an email of February 7, 2007, Mr. Guedes from Finavera thanked Scott for "opening up your opportunity to us".

139 It is also clear that Finavera knew that Scott did not have any form of proprietary rights before it closed the transaction with Penn West. In an email letter dated March 15, 2007 Finavera stated that:

> Penn West also informed us that the document you executed with them gives rights to Penn West to discuss and negotiate the sale of the Three Hills assets with any party they choose.

Finavera did not complain that it had been misled and appeared perfectly willing to take whatever Scott had and to move forward and close the Purchase and Sale Agreement with Penn West. It provided specific notice to Scott later in the letter that:

> As per the attached e-mail to you, we made an offer and you accepted the offer. As part of the conditions of our offer, we will not be in a position to negotiate an agreement with Scott Engineering until we close the sale agreement with Penn West.

140 Thus Finavera knew that Penn West could deal with anyone but confirmed its arrangement with Scott to pay $600,000. and award Scott the owner's engineer contract.

141 I have already found above that Scott allowed Finavera to bid and proceed in its name alone with full knowledge and consent. However, Scott assumed that it would receive $600,000. and become owner's engineer and neither happened. The failure to come to contractually binding terms on their respective remuneration does not mean that Finavera misappropriated Scott's opportunity.

142 Further, I reject the idea that Scott lost the opportunity to acquire this project. The evidence is clear that Scott did not lose a real opportunity to buy this wind farm, either on its own or with another investor party. Scott never had the money to acquire this opportunity on its own. Scott acknowledged it did not have the financial wherewithal to complete the acquisition of a project of this size. Mr. Scott said, in his own words, that he was trying to put together a team because he could not do it alone, technically or financially.

143 Despite testimony from Mr. Scott that he was having ongoing discussions with others, I find that the circumstances were such that Finavera was Scott's last and only avenue into this acquisition. For months Scott tried to secure multiple sources of funding. Mr. Scott made many overtures to many different potential investors including various corporations and three individuals. Scott had simply not been successful in securing funding for either the acquisition or development costs. Indeed notes sent by Scott to various potential investors such as Crestreet, shows Scott did not have funding in place when it submitted its January 12, 2007 offer. Even after potential investor Mitsubishi said that it was not prepared to proceed with this project it remained listed as a funding source. By the end of January, Scott had not secured financing for this project. In its various letters of intent and in speaking with Mr. Philpott, Scott stated that it had funding from major players such as Mitsubishi, Creststreet and John Deere. As time progressed it was evident that these named sources of funding, and others not known to Penn West (the "investor groups" referred to in Mr. Scott's emails), would not be supplying the necessary funds to purchase the project; confirming Penn West's ongoing concerns that Scott did not in fact have the requisite or professed financing in place. With deadlines looming, when Finavera was introduced to Scott on February 6, 2007 Mr. Tange from Penn West captured the situation perfectly when he testified that Mr. Scott had pulled Finavera "out of a hat".

144 I find that Scott could not do the deal alone and had no alternative potential investors to Finavera and that Scott did not lose the opportunity to work with others by choosing to work with Finavera. Given the tight timelines, and the absence of any real ability to close the transaction, Finavera did not take a business opportunity from Scott.

7. Did Finavera Breach any other Agreement it had with Scott?

145 Scott also argues that Finavera breached the terms of it calls the "Exclusivity Agreement".

146 Scott argues that there was an Exclusivity Agreement appointing Scott as the lead negotiator with Penn West and with Finavera promising to negotiate in good faith. They allege that such a contract arose from an email exchange in which Scott agreed to extend for a further 24 hour period the time Finavera had to consider whether they would go ahead with the project. I find that there was no such contract between the parties and I find against the existence of the alleged exclusivity agreement between Scott and Finavera. This extension was more of a favour or indulgence, than an agreement supported by consideration. Scott simply extended the time it had given Finavera; there was no acceptance that Scott should become the lead negotiator in the process.

147 The extension was to Scott's benefit as well because Finavera was the only investor available. Scott and Finavera, who were previously unknown to each other, were simply feeling their way through the negotiation process. It was not clear who would lead the negotiations and both parties seemed to operate as if they were in charge. Things came to a head when Finavera disapproved of how Mr. Scott was dealing with the joint venture party, Spirit Pine. Mr. Scott wanted to buy out Spirit Pine before the purchase of the project. Finavera accepted that Spirit Pine was a joint venture participant in the project and eventually converted its interest into an overriding royalty. The twenty-four hour extension was just part of the give and take of negotiation and cannot be elevated into a commercial undertaking or a separate legal obligation.

148 The issue of good faith obligations in a commercial context exists quite apart from an email exchange where one party asserts that the parties are "dealing in good faith". I do not think it necessary to do an extensive review on whether there was a good faith obligation between the parties in the case at bar. First, the Plaintiff has not included a breach of the duty of good faith as a cause of action.

149 Topolniski J. made the following comments at paras 26, 27 and 32 of *National Courier Services Ltd. v. RHK Hydraulic Cylinder Services Inc.*, 2005 ABQB 856, 390 A.R. 158 (Alta. Q.B.):

> The law in Alberta does not recognize a general duty of good faith between contracting parties.
>
> Such a duty can arise in contracts where the relationship mandates good faith dealings; for example, in insurance matters (*Kantolic v. Peace Hills General Insurance Company* (2000), 259 A.R. 319, 2000 ABQB 59) and in employment dismissals (*Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). Neither is the case here.
>
> . . .
>
> In my view, the law in Alberta does not yet recognize a general duty of good faith in the performance of a contract and this case does not fit within the category of special relationship cases where such a duty is acknowledged. (emphasis added)

See also: *Petrobank Energy & Resources Ltd. v. Safety Boss Ltd.*, 2012 ABQB 161, 534 A.R. 265 (Alta. Q.B.).

150 In addition, I am mindful of the fact that no actual contract was entered into between the parties, and I do not accept that there was an Exclusivity Agreement in existence. Further, the law seems clear on this point: a general duty of good faith cannot be said to exist in Alberta in a commercial context, even where there is a contract. By extension, I do not think it appropriate to infer an independently enforceable duty of good faith between parties in these circumstances.

8. Was Finavera Unjustly Enriched by Scott's Actions?

151 Scott's second cause of action is that Finavera has been unjustly enriched by these events, by not sharing with Scott the mutual benefit of the development of the wind farms, and by not paying Scott the $600,000 payment or for the owner's engineer contract. Scott seeks a constructive trust and/or equitable damages.

152 Unjust enrichment is a cause of action distinct from contract and tort: *Becker v. Pettkus*, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257 (S.C.C.), and *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.) at paras 16-25, (1997), 146 D.L.R. (4th) 214 (S.C.C.).

153 Unjust enrichment may be advanced when three elements are proved:

1. That there has been an enrichment in favour of the respondent;

2. That there has been a corresponding deprivation on the part of the claimant; and

3. That there is an absence of juristic reason for the enrichment and deprivation.

154 Finavera argues it has received no enrichment, claiming a financial loss on the project. Finavera further argues that Scott had no interest in the project of which it could have been deprived. Finavera claims a juristic reason for any benefit, alleging that it did not breach any confidence owed by it to Scott and based on its allegation that Scott lacks clean hands.

A. Was Finavera Enriched by Scott's Actions?

155 I find that Finavera was enriched by many of Scott's actions. Finavera benefited from Scott's position as preferred purchaser; Scott's bid price; Scott's gathering; forwarding, and preliminary analysis of relevant information, including asking Golder to make certain site inspections and to come forward with a proposal to finish same on the preliminary reports, and Scott's negotiation of certain terms of the acquisition of the project. Simply put, Finavera could not have acquired this project when it did without Scott and Scott's efforts.

i. Finavera Benefited from Scott's Position in the Bid Process

156 While Finavera did not misappropriate Scott's business opportunity it did take full advantage of Scott's preferential position in the Penn West bidding process. Finavera benefited from Scott's status as preferred potential purchaser and from Scott helping Finavera step into that spot. This was a position of practical and commercial value.

ii. Finavera Benefited from Scott's Offer Price and Scott's Other Confidential Information

157 The final offer in Finavera's name was for $3.35 million dollars, the same amount that Scott had determined was an appropriate purchase price for the project. The amount offered by Scott was Scott's confidential information and knowing what Scott offered to Penn West improved Finavera's position. Mr. Bak said in questioning that they tested the $3.35 million to see if it was reasonable and conducted their own evaluation. Nevertheless he admitted "we certainly accept that it came from Scott".

iii. Finavera Benefited from Scott Gathering, Forwarding and Conducting a Preliminary Analysis of Relevant Materials

158 Finavera benefited from the many things Scott did as its preliminary due diligence on the project. Scott gathered and reviewed the available information in the data room, conducted a preliminary assessment of the materials, wrote a summary and forwarded relevant information to Finavera. While I have found that this did not make the information into Scott's confidential information, Scott nevertheless expended time and effort in these activities: time and effort which directly and unquestionably benefited Finavera. Scott had multiple discussions and copious correspondence with Phoenix and others that was shared with Finavera and which meant they did not have to do this work themselves. Scott also spoke with Golder about various studies and Spirit Pine about the future of the joint venture agreement. Scott also had some information about the grid system in Alberta and how to complete a project in this province. These services played a part in allowing Finavera to step into the process and become the ultimate purchaser of the project within a very restricted time frame.

iv. Finavera Benefited from the Terms of the Letter of Intent to the Purchase and Sale Agreement

159 Finavera benefited from Scott's position as a prior offeree on the project, and from Scott's negotiations with Penn West on certain terms of the letter of intent and the Purchase and Sale Agreement. After initially reviewing the Information

Memorandum, Scott requested further information to support preliminary reports in the data room. Essentially, Scott had a place in the process, the price, and certain negotiated terms of the deal. I accept that Scott negotiated the terms of the final letter of intent despite the fact that it was in the name of Finavera alone. Although the offer was only in the name of Finavera, I find that the offer was made by Finavera with Scott's assistance, effort and services.

v. Finavera Made a Profit

160 Finavera sold the project in December 2008 for total proceeds of $4,500,000. Mr. Bak testified that Finavera did not make a profit despite their public statement to the market that they held one million dollars in reserve and earned $230,000 in profit. He explained that this was not an accurate full picture as there were uncapitalized costs that ought to have been booked against the project and that Finavera in fact lost funds, especially with this lawsuit.

161 I do not accept Finavera's argument that despite the fact that it booked a small gain on its sale of the project, it in fact suffered a major financial loss. I find Finavera made a profit of $1,230,000 on the project.

162 In summary, Scott's actions, services, expertise and experience conferred multiple benefits upon Finavera and Finavera profited from them.

B. Has Scott Suffered a Corresponding Deprivation?

163 Scott has suffered a deprivation to the extent that it allowed Finavera to step into its status in the bid process and it expended time and labour performing services to the benefit of Finavera. As a result it could not work for others and did not receive any form of compensation from Finavera. Indeed, Mr. Bak acknowledged that it ended up with the Penn West assets and Scott ended up with a law suit.

164 I have rejected Scott's claim that what it really lost was the opportunity to acquire this project. I found that Scott could not afford to buy this project alone and that Finavera was the only remaining investor available to it. There is, however, a deprivation of time and effort as it dedicated itself to a project that solely benefited another company that it assisted in multiple ways.

C. Is there a Juristic Reason?

165 Determining whether there is an "absence of juristic reason" is the opportunity for the Court to consider what is fair. In the case at bar, Finavera freely accepted the benefits conferred by Scott's status and labours while Scott prejudiced itself with some expectation that it would eventually receive a benefit. These kind of circumstances make it unfair or unjust for Finavera to retain the benefit provided by Scott.

166 The Court in *Garland v. Consumers' Gas Co.*, 2004 SCC 25 (S.C.C.) at paras 44-46, [2004] 1 S.C.R. 629 (S.C.C.), set out a two-step analysis to determine the absence of juristic reason: the plaintiff must first show that no juristic reason from an established category exists to deny recovery, with established categories including a contract, a disposition of law, a donative intent, or other valid common law, equitable or statutory obligations. Second, in the absence of the established categories, the Court may consider the reasonable expectation of the parties and public policy considerations to assess whether recovery should be denied.

167 I find there is no juristic reason that exists in the case at bar to deny recovery, either based on the established categories of juristic reasons set out in *Garland* or based upon a review of the parties' reasonable expectations and public policy considerations.

168 I also do not accept Finavera's argument that Scott's lack of clean hands precludes his entitlement to an equitable remedy. The doctrine of clean hands is discussed in *Halsbury's Laws of Canada*, Equitable Remedies, 1st ed (Markham, ON: LexisNexis, 2012) at para HER-6 where it states that a party's right to seek equitable relief is subject to the equitable maxim that "he who comes into equity must come with clean hands". *Gerrow v. Dorais*, [2010] A.J. No. 999 (Alta. Q.B.) at para. 18, (2010), 324 D.L.R. (4th) 332 (Alta. Q.B.), revd [2011] A.J. No. 1290, 2011 ABCA 348 (Alta. C.A.). This has been endorsed by the Supreme Court of Canada in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] S.C.J. No. 91, [1991] 3 S.C.R. 534 (S.C.C.) at para. 82. and applied in several cases. See *Maximum Ventures Inc. v. de Graaf*, [2008] B.C.J. No. 263, 2008 BCSC 199 (B.C. S.C. [In

Chambers]); *Davie v. Davie Estate*, [2002] B.C.J. No. 511, 2002 BCSC 364 (B.C. S.C.); and *Werner v. Werner*, [1987] B.C.J. No. 2546 (B.C. S.C.). The principle of "unclean hands" and a plaintiff's entitlement to an equitable remedy are also discussed in *1297835 Alberta Ltd. v. Xtreme Coil Drilling Corp.*, 2010 ABQB 539, 503 A.R. 56 (Alta. Q.B.), where the Court cited Spry, *The Principles of Equitable Remedies*, 6th ed (Toronto: Carswell, 2001) at 245-246, at para 25: "...[N]onetheless, the undesirable behaviour in question must involve more than merely a "general depravity"; it must have "an immediate and necessary relation to the equity sued for; it must be a depravity in a legal as well as in a moral sense".

169 While neither Finavera nor Scott has acted with perfect dignity in this matter, there is no evidence that Scott comes to this Court without clean hands in the moral or legal sense. As in *Moody v. Cox*, [1917] 2 Ch. 71, [1916-17] All E.R. Rep. 548 (Eng. Ch. Div.), Finavera has not established that "the depravity, the dirt in question on the hand, has an immediate and necessary relation to the equity sued for". Scott's actions are not enough to disqualify him from an equitable remedy.

170 Neither do I accept Finavera's argument that there is a juristic reason for Finavera's enrichment. Finavera has not advanced any juristic reason to satisfy me that the enrichment Finavera benefited from was just.

D. The Appropriate Remedy

171 Scott seeks an equitable remedy in the form of a constructive trust in the project, being a ten percent ownership interest in net profits of property now owned by a third party purchaser with notice of its claims. Alternatively Scott claims equitable damages in the amount of $600,000 and a further approximately 30-34 million dollars for what Scott says it would have received under the owner's engineer contract: being 10% of the capital cost of the development of both wind farms. This is the sum Scott submits would put it in as good a position as it would have been in had there not been an improper act on the part of Finavera.

172 Finavera responds that Scott has suffered no damages: that Scott did not have the requisite financing and therefore had no chance of ever acquiring the project. Finavera responds that Scott never had any interest, or real opportunity to acquire, the project and therefore its request for proprietary remedies should be rejected. Finavera also submits that it sold the assets of the project in 2008 and Scott is pursuing a separate claim against the third party purchaser in a separate action: *Scott & Associates Engineering Ltd. v. Ghost Pine Windfarm LP* [2011 CarswellAlta 862 (Alta. Q.B.)], Docket Number 1001 01977.

173 Once an unjust enrichment has been established, as it has in the case at bar, the court has the discretion to grant an appropriate remedy. A court may order a monetary remedy consisting of an accounting for *quantum meruit*; or a proprietary remedy consisting of the imposition of a construction trust.

174 In my view the appropriate remedy is a monetary one designed to compensate Scott for the benefits conferred.

i. Monetary Remedy

175 As previously stated, I do not see that the gravamen of this case is about a breach of the duty of loyalty or a breach of the duty of confidence, but rather an unjust enrichment in the amount of Scott's efforts and the "springboard" effect that he provided for Finavera to acquire the project.

176 Both parties have expressly rejected that there was any sort of contractual or quasi-contractual obligation or relationship between them. Scott claims a constructive trust or equitable damages. It is therefore left to this Court to determine what the value of Scott's services were, absent a contract between the parties and without the introduction of any evidence concerning the value of those services.

177 Ultimately, Scott's role in this acquisition was akin to that of a broker or a "finder". He did a preliminary assessment of the project, undertook preliminary reviews of all of the documents in the data room, "shopped the deal around" to prospective investors, came up with an appropriate purchase price for the project, and introduced Penn West and Finavera to each other.

178 Even Scott's correspondence with Phoenix during the bid process presents him as a sort of broker on behalf of investors: he consistently referred to potential investors as dictating the terms of the offer: "the investor group also wishes to continue its negotiations with the JV partner" (February 5, 2007 email of Mr. Scott); "my Calgary investment group...would offer 10%

down at signing" (February 5, 2007 email of Mr. Scott); "It's their money - I obviously have to listen. Remember, I'm just the messenger" (January 24, 2007 email of Mr. Scott).

179 Little to no evidence was introduced regarding the value of the compensation paid to The Howard Group for its services in introducing Scott and Finavera, so I must determine an appropriate amount for Scott based on what I find in fact to be the role Scott played. There is some attraction to the sum of $600,000, being the amount agreed to by both parties as the "one time Development Payment" to be paid to Scott in respect of the acquisition. Finavera argues that this amount was the purchase price for "development rights" which it now argues Scott did not have. With respect Finavera knew before closing, and without complaint, that Penn West had the legal right to deal with others outside the bid process it established. Nevertheless, Penn West said, and I accept, that it would not have operated outside its bid process. Finavera's only way into the purchase at that time was through Scott, who was the preferred purchaser and the only entity Penn West was willing to negotiate with. As previously stated there was no real definition of the development rights Finavera thought it was purchasing and they got the essence of what they needed to become the purchaser.

180 I find that the appropriate award is for Finavera to pay Scott $600,000. It is the amount already agreed to by both parties in relation to Scott's compensation in this deal, and reflects how the parties themselves valued Scott's role and participation.

ii. Proprietary Remedy

181 In my view and in the totality of the circumstances this amount is an adequate remedy and Scott has not established why a court should exercise its discretion to impose a constructive trust.

182 A constructive trust may be available in cases of wrongful conduct on the part of a fiduciary (the "good conscience" cases), or in cases of unjust enrichment. However, the good conscience" line of reasoning does not apply to the facts at bar as I find that the Finavera did not owe fiduciary obligations to Scott.

183 There is an absence of the three general characteristics of a fiduciary required under *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.), at 136, (1987), 42 D.L.R. (4th) 81 (S.C.C.) being that: (1) the fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

184 Finavera did not have scope for the exercise of some discretion or power on behalf of Scott. Finavera was not acting as Scott's agent in acquiring the project for Scott; Scott was never in a real position to purchase the project, absent a serious investor to step in as its partner. The final offer to Penn West was in Finavera's name alone, and Scott agreed to that development. Rather, Finavera was able to step into Scott's place in a very short amount of time in order to close the deal, and Scott received no compensation for its part in that. Following the final offer in the name of Finavera alone, Finavera was negotiating with Penn West on its own behalf, not on Scott's behalf. Not having the scope of discretion or power on behalf of Scott, therefore, neither is the second element of the test met. Third, the requisite "vulnerability" or "dependency" does not exist in the relationship between the parties to support the finding of a fiduciary obligation. As Binnie J. stated in *Cadbury Schweppes* at para 30, fiduciary obligations are seldom present in a commercial context between parties acting at arm's length.

185 A proprietary remedy is a powerful "extraordinary" remedy that is awarded at the discretion of the court. In the vast majority of cases, even when unjust enrichment has been established a constructive trust will not be the appropriate remedy: *LAC Minerals* at 678. For this and the following reasons, I decline to award a proprietary remedy.

186 Similarly, the unjust enrichment cases provided by Scott to this Court where a constructive trust was awarded to the plaintiffs, such as *Visagie* and *Walter Stewart Realty Ltd.*, do not lend themselves to the current facts and are distinguishable. In those cases, the parties had already agreed to the plaintiff having a proprietary interest in the respective project. In the case of *Visagie*, a formal joint venture agreement was in place. The plaintiff, who was awarded a constructive trust, had already secured a 12% carried interest and an option for a further 12% participating interest in the project by a finalized contract with the defendant. In contrast, Scott and Finavera had no written formal agreement in place setting out their respective rights and

responsibilities. Further, the verbal arrangement that was acceptable to both parties was for Scott to receive a monetary payment, not a proprietary interest in the project.

187 In *Walter Stewart Realty Ltd. v. Traber*, 1995 ABCA 307, 174 A.R. 45 (Alta. C.A.), the parties had a verbal agreement between them to give the plaintiff an interest in the property: the plaintiff was to receive a percentage of profits in the project. Although there was no formal joint venture agreement between the parties, the Court found there was an informal handshake agreement and the parties had agreed between them to a figure of 30%. Again, there is no such agreement between Scott and Finavera in the case at bar.

188 *Soulos* included facts wherein the Court found the defendant owed the plaintiff a fiduciary obligation, and the Court held that a constructive trust was "required in cases such as this to ensure that agents and others in positions of trust remain faithful to their duty of loyalty": at para 50. The Court in *Soulos* relied primarily on the constructive trust as a remedy for wrongful conduct. The Plaintiff has also cited *Tracy (Guardian ad litem of) v. Instaloans Financial Solution Centres (B.C.) Ltd.*, 2010 BCCA 357, 320 D.L.R. (4th) 577 (B.C. C.A.), a wrongful conduct case which included a lengthy discussion regarding the availability of a constructive trust as a remedy for both unjust enrichment and wrongful conduct.

189 Scott maintains that a constructive trust over 10% of the profits would put Scott in as good a position as it would have been in but for Finavera's actions. Although I accept the Plaintiff's submission that funds or accounts are a proper subject for a constructive trust (*Tracy (Guardian ad litem of) v. Instaloans Financial Solution Centres (B.C.) Ltd.* at para 31), it does not therefore automatically follow that the funds in question here are an appropriate subject for a constructive trust. Similarly, while I accept the well-established legal principle submitted by the Plaintiff that trust property can be traced into the hands of third parties and recovered if the third party was not a *bona fide* purchaser for value, I do not find that principle applicable to the facts of the case at bar.

190 Scott did not have a proprietary interest in the lands of the project, and would not have formed a consortium with another seed capital investor but for Finavera's actions. Similarly, Scott's argument that an important reason to grant a proprietary remedy is to assure that the plaintiff will receive the property accorded to the holder of a right of property in a bankruptcy (*LAC Minerals* at 678) is not applicable because I find that Scott did not hold a property right in the project.

191 Scott also argued that a monetary remedy is not an appropriate remedy due to Finavera's uncertain financial situation and its potential inability to pay a damage award. However, counsel for the Plaintiff has not provided any authority for the argument that the potential insolvency of a defendant is sufficient cause for awarding the extraordinary proprietary remedy of a constructive trust.

192 In the MCA the parties agree:

> that there is not an adequate remedy at law for any breach of this Agreement; and, therefore, either party shall be entitled to specific performance and injunctive relief restraining any breach of this Agreement in addition to any other rights and remedies which it may have.

193 I accept that this language is laying the groundwork for the equitable remedies of an injunction or specific performance in relation to any breach of the MCA. However, I did not find a breach of that agreement. Further, this provision does not establish that the equities are in favour of an extraordinary remedy such as a constructive trust.

194 The cases provided by Scott do not advance the argument for a constructive trust as I find Scott has no proprietary interest in the project, and in fact it agreed with Finavera to not have a proprietary interest in the project during negotiations when it accepted a monetary payment for its part in the acquisition. For the reasons given, I find the Plaintiff is not entitled to a constructive trust over the property or profits from the wind farm. In this case, I find that a monetary award is an appropriate remedy. "Where a monetary award is sufficient, there is no need for a constructive trust": *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), at 997, (1993), 101 D.L.R. (4th) 621 (S.C.C.). A monetary remedy is sufficient.

10. Did Scott Breach any Duties it Owed to Finavera?

195 Finavera counterclaims against Scott alleging misrepresentation, as well as the torts of interference with economic relations and abuse of process.

A. Misrepresentation of Scott to Finavera

196 Finavera alleges misrepresentation on the part of Scott regarding the source of the confidential information and ownership of the project. Scott responds that there was no misrepresentation on its part, that it has clean hands and Finavera does not.

197 The test for negligent misrepresentation was stated in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.), at 110, (1993), 99 D.L.R. (4th) 626 (S.C.C.):

> The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

198 I do not find a misrepresentation on the part of Scott, and Finavera has not introduced evidence to this Court to establish a case for negligent misrepresentation.

199 Finavera became a party to this transaction as a prospective investor introduced to Scott by The Howard Group. Mr. Bak was not asked whether anyone from Finavera ever asked for proof of the development rights they thought Mr. Scott possessed. One would suppose that if Finavera was prepared to purchase development rights for $600,000, their due diligence would involve requesting some written confirmation from Penn West that these development rights had been granted to Scott. Despite its assertions of misrepresentation on the part of Scott, Finavera did not break off its discussion with Scott when it discovered that these development rights did not in fact exist. Instead, Finavera continued down the path to acquiring the project and continued its communication with Scott. For example, March 15, 2007 email from Mr. Atalay to Mr. Scott reiterated that Finavera had made Scott and offer and they would not be in a position to negotiate an agreement until close.

200 Finavera did not establish that Mr. Scott misrepresented his position with Penn West. He was the preferred purchaser and the term "development rights" has no prescribed content. There was no evidence that Mr. Scott said that he held anything in the nature of development rights on the project.

201 Scott represented itself as having been invited to participate in an offer to purchase the wind farm, that twelve of over sixty developer firms were short-listed to participate in the offer to purchase, and that in January 2007 proposals were received and evaluated and Scott was ultimately short-listed along with two other bidders.

202 Finavera alleges that Scott misrepresented to Finavera the source of the confidential information, as well as the ownership of the project. I find there were no actionable misrepresentations against Scott regarding the source of the confidential information and the ownership of the project. No misrepresentations arose from Scott's self description either.

203 Neither has Finavera established that it suffered any loss or damage as a result of Scott's alleged misrepresentation.

B. Interference with Economic Relations

204 Finavera alleges that Scott committed the tort of interference with economic relations. The test for interference with economic relations is set out in *Conway v. Zinkhofer*, 2008 ABCA 392 (Alta. C.A.) at para 41 and consists of: (i) an intention to injure; (ii) interference with the other party's business by illegal or unlawful means; and (iii) resultant economic loss: *Reach M.D. Inc. v. Pharmaceutical Manufacturers Assn. of Canada* (2003), 65 O.R. (3d) 30, 227 D.L.R. (4th) 458 (Ont. C.A.) at para. 44.

205 I find there was no interference by Scott of Finavera's economic relations. Finavera did not establish Scott's intention, Scott's interference with Finavera's business by illegal or unlawful means, or that Finavera had suffered any prejudice due to

Scott's actions. The Defendant has not even introduced evidence regarding which of its economic relationships were interfered with, beyond a vague assertion from Mr. Bak that Scott's actions were a factor in its difficulties raising capital in the markets. I find this counterclaim without merit and dismiss it accordingly.

C. Abuse of Process

206 Finavera alleges that Scott committed the tort of abuse of process.

207 According to *3058354 Nova Scotia Co. v. On*Site Equipment Ltd.*, 2011 ABCA 168, 505 A.R. 289 (Alta. C.A.), at para 57 the following elements must be established:

> In *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 the Supreme Court of Canada indicated in obiter that punitive damages can be awarded on the basis of conduct undertaken throughout the litigation and trial. The Ontario Court of Appeal found that a tort of "abuse of process" existed and defined its constituent elements in *Harris v. GlaxoSmithKline Inc.* (2010), 78 C.C.L.T. (3d) 52, stating at para. 27:
>
> > The case law authorities establish that there are four constituent elements to the tort of abuse of process: (1) the plaintiff is a party to a legal process initiated by the defendant; (2) the legal process was initiated for the predominant purpose of furthering some indirect, collateral and improper objective; (3) the defendant took or made a definite act or threat in furtherance of the improper purpose; and (4) some measure of special damage has resulted: *Hawley v. Bapoo* (2005), 76 O.R. (3d) 649 (Ont. S.C.J.) at para. 86, var'd (2007), 156 C.R.R. (2d) 351 (Ont. C.A.); *Metrick v. Deeb (2002)*, 14 C.C. L.T. (3d) 297 (Ont. S.C.J.) at para. 9, aff'd (2003, 172 O.A.C. 229 (C.A.), leave to appeal ref'd, [2003] S.C.C.A. No. 378, (2004) 195 O.A.C. 398n (S.C.C.); *Scintilore Explorations Ltd. v. Larache*, [1999] O.J. No. 2847 (S.C.J.); P. M. Perell, "*Tort Claims for Abuse of Process*" (2007) 33 Adv. Q. 193 at p. 193; J. Irvine, "*The Resurrection of Tortious Abuse of Process*" 47 C.C.L.T. 217.

208 I find there was no abuse of process by Scott that Finavera suffered. Although I do not accept that Mr. Scott was reporting Mr. Atalay to the professional bodies for engineers out of a sense of duty, Finavera has not introduced any evidence to support a claim for abuse of process. I find this counterclaim without merit and dismiss it accordingly.

11. Conclusion

209 Scott has proven only that it is entitled to be reimbursed for the value of the services it has provided and the status it made available to Finavera. There has been no breach of contract, no breach of confidence and no misappropriation of a business opportunity. The Plaintiff succeeds on the basis of unjust enrichment in the amount of $600,000.00. (six hundred thousand dollars).

210 The Defendant's counterclaim is dismissed.

211 If the parties can not agree on costs they may return before me within thirty days.

Action allowed in part; counterclaim dismissed.

AppendixA

While a great deal of information was forwarded by Mr. Scott to Finavera, a large amount was not the work product of Mr. Scott. In cross-examination he recognized that the following documents sent by him to Finavera came from the Penn West data room and were not created by him. Documents in this category include:

A. Files sent by Mr. Scott in multiple emails to Mr. Paul Guedes of Finavera on February 6, 2007:

Ex.Sum. - Ghost Pine Wind Resource Executive Summary

g_philpott-bus-resume-Jan-03-2007 - Mr. Gerard Philpott's resume

PAEL to AESO Dec 10, 2006

Ex. Sum.- Lone Pine Wind Resourse

Customer Proposal Signed

Ghost Pine Interconnection Proposal

Draft Interconnection Proposal Ghost Pine

AESo Stage 1 System Access Application

AESO Transmission Modelling Data Requirements - 12 April

AESO Transmission Modelling Data Requirements - 12 April

AESO Response letter Dec 10 2006

Commercial Bid Analysis

Construction Commitment Agreement (Phase I)

Customer Contribution Application of Proceeds Agreement

Draft Interconnection Proposal Ghost Pine

Ghost Pine Economics

Ghost Pine Land Schedule A - Nov 22 2006

Ghost Pine Project Schedule

Ghost Pine Project Timelines

GhostPine LeaseOptionLands

Joint Venture Agreement

JV Agmt amendment Dec 7 2006

JV Agmt Dec 10 2006

Lone Pine Land Schedule A - Nov 22 2006

LonePine LeaseOptionLands

Petrofund Amalgamation Certificate

Phase 1 Evaluation

ResourceReport GhostPine rev3 reduced

ResourceReport LonePine rev3 reduced

RP-05-518 ATCO Estimate NID Estvfinal

RP-05-518 Customer Proposal signed

RP-05-518 ghost Pine CCD Sept 19 signed

RP-05-518%20Ghost%20Pine%20CCD%20Sept%2019%20signed

Spirit Pine Preliminary Estimate DataBook

SpiritPine EIA June06

B. Files sent by Mr. Scott to Mr. Atalay at Finavera on February 8, 2007:

Ghost Pine Economics 6.2

J Agmt Dec 10 2006

Joint Venture Agreement

JV Agmt amendment Dec 7 2006

C. Files sent by Mr. Scott to Mr. Atalay at Finavera on February 12, 2007:

Phase 1 Evaluation

ResourceReport GhostPine rev3 reduced

ResourceReport LonePine rev3 reduced

PSA Jan 8 2007

Wind option Marz template Aug 2 06

Wind lease final oct 26

Wind option final Oct26

ResourceReport Ghost Pine rev3 reduced

ResoureReport LonePine rev3 reduced

TAB 11

1999 CarswellBC 335
British Columbia Supreme Court [In Chambers]

A.E.M. Video Only Inc. (Trustee of) v. Video Only Inc.

1999 CarswellBC 335, 10 C.B.R. (4th) 49

Manning Jamison, Trustee of the Estate of A.E.M. Video Only, Inc., a Bankrupt, Plaintiff and Video Only, Inc., Defendant

Holmes J.

Heard: December 15 and 16, 1998
Judgment: February 22, 1999
Docket: Vancouver C982274

Counsel: *Peter Lee*, for the Plaintiff.
Douglas Knowles, for the Defendant.

***Holmes J.*:**

1 The plaintiff, Manning Jamison, Trustee of the Estate of A.E.M. Video Only, Inc., a Bankrupt (the "Trustee") seeks summary judgment for $1,397,634.84 against the defendant Video Only, Inc. pursuant to Rule 18A regarding two impugned transactions in respect of the bankruptcy of A.E.M. Video Only, Inc. (the "Bankrupt").

2 The Bankrupt operated retail outlets for the sale of electronic goods from June 1991 through December 1997 in Alberta and British Columbia.

3 Prior to December 10, 1997 the Bankrupt had maintained bank accounts at the Canadian Western Bank, the Bank of Montreal and the Royal Bank. On or about December 12, 1997, the Bankrupt opened a Canadian dollar account at the U.S. Bank of Washington in Seattle, Washington, U.S.A. and transferred the balances of its prior accounts totalling approximately $565,000 to the new account.

4 On December 17, 1997 the Bankrupt directed the issuance of a draft for $297,634.84 to Video Only. It is alleged Video Only is a "related person" to the Bankrupt. This payment is the first of the two impugned transactions in issue.

5 January 2, 1998 TransAmerica, a creditor of the Bankrupt, demanded payment of $768,446. It was not paid, and on January 5, 1998 TransAmerica seized the inventory of the Bankrupt and padlocked its premises.

6 On January 7, 1998 Video Only received $1,100,000 from the Bankrupt. Five cheques dated December 30, 1997 were drawn upon the Bankrupt's Seattle bank account in varying amounts which totalled $1,100,000. These cheques constitute the second of the impugned transactions.

7 January 13, 1998 a Petition was filed for the bankruptcy of the Bankrupt, and a Receiving Order in bankruptcy was made January 23, 1998.

Bankruptcy and Insolvency Act Provisions:

8 The Trustee seeks return of the monies involved in the two impugned transactions on the basis they were fraudulent preferences, and also reviewable transactions. Sections 95 and 96 of the *Bankruptcy and Insolvency Act*, 1985 (the "*Act*") establish a fraudulent preference when:

(a) the payments were made within 12 months of the date of bankruptcy;

(b) the Bankrupt was insolvent at the time; and

(c) the payments had the effect of preferring the recipient over the creditors of the Bankrupt.

9 It is alleged that the Bankrupt and Video Only are "related persons" within the meaning of Section 4(2) (c) of the *Act*:

... persons are related to each other and are "related persons" if they are

(c) two corporations

i) controlled by the same person or group of persons,

ii) each of which is controlled by one person and the person who controls one of the corporations is related to the person who controls the other corporation,

iii) one of which is controlled by one person and that person is related to any member of a related group that controls the other corporation,

iv) one of which is controlled by one person and that person is related to each member of an unrelated group that controls the other corporation,

v) one of which is controlled by a related group a member of which is related to each member of an unrelated group that controls the other corporation, or

vi) one of which is controlled by an unrelated group each member of which is related to at least one member of an unrelated group that controls the other corporation.

10 James Peter Edwards owns 87% of the voting shares of the Bankrupt, and is both an officer and a director of the Bankrupt and Video Only.

11 The relevant provisions of the *Act* in respect of reviewable transactions involving "related persons" defines a reviewable transaction as one between parties who did not deal at arms length. [Section 3(1)].

12 Section 3(3) makes conclusive the presumption that related persons do not deal at arm's length.

13 Section 100(3) permits the Trustee to state an opinion as to the fair market value of property or services received by the Bankrupt, and the value of the consideration given by the Bankrupt for the property or services. The stated opinion is definitive unless shown to be wrong by the related person.

14 Section 100(2) provides a Trustee may have judgment for the difference between the amount paid by the Bankrupt and the actual value he determines was received.

15 Mr. Rowan for the Trustee in respect of the impugned transaction deposed the fair market value of the property or services concerned was nil; and the value of the consideration given was $297,634.83 in the first impugned transaction and $1,100,000 in the second, for a total of $1,397,634.83.

16 Counsel for the Trustee advised on the hearing of this application that Video Only had, since the swearing of his affidavit, demonstrated it gave value in respect of the first impugned transaction. The Trustee concedes the value of $297,634.83 was in fact given.

17 On examination for discovery Mr. Rowan conceded the Trustee in fact had no opinion as to the value of services in respect of the Second impugned transaction. He could not deny the detailed evidence of value relied upon by Video Only.

18 The Trustee relies upon the principle that in rebutting any inference of fraud involving a related party, the related parties evidence should be treated as incredible unless independently verified. [*Bank of Montreal v. Jory* (1981), 39 C.B.R. (N.S.) 30 (B.C. S.C.), 35].

19 The Trustee considers there were several suspicious circumstances concerning the impugned payments to the Bankrupt, including:

- why the Bankrupt on the eve of its bankruptcy, transferred its bank account to the U.S.A.;
- why it operated a Canadian dollar account as opposed to a U.S dollar account;
- why the funds were transferred to the U.S. account before the impugned payment transaction were made;
- why the impugned $1,100,000 payment was made with five cheques in odd amounts, rather than combined in one cheque.

The Impugned Payments:

20 The Trustee now accepts the first impugned payment of December 17, 1997 for $297,634.83 was for outstanding invoices owed by the Bankrupt to Video Only for the supply of goods from Video Only to the Bankrupt. The defendant has filed copies of customs documents and invoices in proof. The Trustee however maintains the payment constitutes a fraudulent preference.

21 The payment was clearly made within 12 months of the filing of the Bankruptcy petition. The Bankrupt however denies it was insolvent at the time the payment was made.

22 An insolvent person by definition in Section 2 of the *Act* includes both someone who has "ceased paying" his current liabilities" and someone "unable to meet his obligations as they generally become due".

23 In proof of the claim of insolvency the Trustee uses claims made against the Bankrupt's estate following bankruptcy, to interpolate that as of December 17, 1997 the Bankrupt had $768,980.32 in secured debt; $4,540.92 in preferred debt; and $762,941.86 of unsecured debt. With allowance of $2,865.62 for "buyers liens" the total outstanding debt was $1,420,633.65.

24 It is noteworthy that nearly the entire $768,980.32 secured amount was owed to TransAmerica. TransAmerica apparently seized the Bankrupt's inventory and assets which put it out of business. There is no evidence as to the value of the property seized, what TransAmerica realized upon it or in what manner. The Trustee apparently has received approximately $100,000 on assets of the Bankrupt not subject to TransAmerica's secured claim.

25 In addition to the above debts Video Only now alleges that there was an accruing debt owed to it by the Bankrupt since 1993 and which by December 1997 totalled $1,100,000. It is the subject of the second impugned transaction. Video Only claims this debt was secured by a written Agreement in 1995. If this debt is combined with that listed by the Trustee the total outstanding debt of the Bankrupt in December 1997 exceeded $2,500,000.

26 *Metropolitan Trust Co. of Canada v. Novastar Development Corp.* (1993), 79 B.C.L.R. (2d) 100 (B.C. S.C.) supports the view that events subsequent to the date of payment can be relied upon to show that at an earlier date the debtor was insolvent.

27 I disallowed as inadmissible on a Rule 18A application the hearsay based opinion evidence of Mr. Rowan, an accountant employed by the Trustee, that according to subsequent claims filed by the collections administrator of Social Services Tax, taxes totalling $135,999.30 were owed by the Bankrupt, and that no remittances had been made for the three months preceding the date of bankruptcy, and hence the Bankrupt was insolvent by reason of failure to meet its debts as they generally fell due.

28 I also disallowed as admissible on a Rule 18A application transcript evidence that the Trustee sought to rely upon from an examination in the Bankruptcy of Mr. Pietrobon, a chartered accountant, whose firm was the external accountant of the Bankrupt.

29 Ms. Chew, employed as manager in the Vancouver office of the Bankrupt, deposed "That during the last six months or so during which the Bankrupt was carrying on business I received inquiries from the Bankrupt's trade creditors concerning their overdue accounts". I agree with counsel for Video Only, that the Trustee if being impartial could have obtained Ms. Chew's knowledge of other matters in issue but chose not to. Her comment is thin evidence of failure to meet obligations.

30 Another method to test a Bankrupt's solvency status is to consider whether as of December 17, 1997 its property could have been disposed of at a fair valuation to enable it to pay all its obligations, due or accruing due. There is however no evidence as to what the assets seized by TransAmerica realized, or what fairly they should have realized. Distress sale of merchandise and assets can adversely impact value.

31 Counsel for Video Only argues that the payment of December 17, 1997 was made in the ordinary course of business, and did not prefer the defendant over other creditors as the payment covered invoices for goods supplied over a period of 18 months.

32 Mr. Lothian, the Real Estate and Operations Manager of Video Only, deposed he was unaware that any Social Services Tax payments were overdue and in fact he believed they were paid quarterly. The Bankrupt's bank accounts were controlled by Video Only and all the Bankrupt's accounts payable were processed in Seattle. It took 15 to 30 days to process payment. With that time-lag certain invoices were being paid after the due date, but none seriously overdue.

33 Mr. Rowan acknowledged the Trustee, leaving aside the issue of overdue Social Services Tax being in arrears, did not know whether the Bankrupt as of December 17, was failing to meet its payments. The total amount of the Social Services Tax payments which were due November 15, and December 15, 1997 only totalled approximately $65,000.

34 Mr. Edwards, President of Video Only, deposed the Bankrupt was operating in the ordinary course of business as at December 17, 1997, making payments to both secured and unsecured creditors, and continued to do so until January 2, 1998 when TransAmerica seized the Bankrupt's inventory and padlocked its doors. The evidence supports his evidence; certainly there is none to the contrary.

35 Video Only had no expectation that TransAmerica intended to "pull the plug" on the Bankrupt and close it down. There is no evidence from the Trustee or TransAmerica which suggests otherwise.

36 There is no evidence from the Trustee as to the value of the Bankrupt's assets and no attempt was made to recreate a balance sheet for the Bankrupt as of December 17th, or December 30, 1997. No explanation is given for the lack of this usual form of evidence.

37 The onus of proving the insolvency alleged is upon the Trustee. [*Blenkarn Planer Ltd., Re* (1958), 26 W.W.R. 168 (B.C. S.C.)]. The proof must be clear and convincing. [*Thorne Riddell v. Fleishman* (1983), 47 C.B.R. (N.S.) 233 (Ont. S.C.)].

38 In this case no direct evidence has been placed before the court from any creditor complaining its account was overdue, or substantially so; taking into account past course of dealings between the parties and the payment of accounts, with some delay, was made from Seattle.

39 The Trustee does not appear to have considered it necessary to do any in depth study of the Bankrupt's business, interview creditors, or do an analysis of its business records and accounts.

40 The second impugned payment was made by five cheques drawn December 30, 1997. They apparently did not clear the account until January 2, 1998, attributable perhaps to the Christmas holiday season. The uncontradicted evidence of Mr. Edwards is they represent the accrued balance of deferred management fees for the years 1993 to 1997 which had been secured by a Loan and Promissory Note Agreement.

41 It must be recognized this accrued liability and attendant security documentation was not shown on the defendant's financial statements although those statements did purport to show inter-company debt between the Bankrupt and Video Only. Absent explanation, the Trustee was justifiably suspicious.

42 The affidavits of Mr. Edwards provide a lengthy history in regard to the second impugned transaction which I find plausible. The explanation shows the accumulated amounts owing for the management fees are reasonable charges in the circumstances.

43 The defendant Video Only provided extensive management services to the Bankrupt's retail chain of stores. It is clear the Bankrupt could not have operated without the services Video Only provided to it. The amount charged was approximately 2.5% of gross sales. I accept that an industry standard for the nature and extent of the services the Bankrupt received from Video Only would be approximately double what it was charged.

44 Starting in 1993 Video Only allowed the Bankrupt to defer part of the management fees and later the whole of the fees, in order to assist the Bankrupt in its business.

45 In 1995 on the basis of accounting advice Video Only accounted for the these management fees on a cash basis and documented the deferred payments it allowed by way of a security interest comprised of a Promissory Note and a Loan Agreement. These documents have been produced in these proceedings. The fact these Agreements were years prior to the bankruptcy was not challenged.

46 The documents were not registered as to do so would have involved creating subordination agreements in respect of Bank security. It was considered the expense was not warranted.

47 The Loan Agreement allows a "Right of Set-Off" and grants to Video Only a contractual possessory security interest. It assigns, conveys, delivers, pledges and transfers to Video Only the Bankrupt's right, title, and interest in the Bankrupt's accounts and permits Video Only to withdraw all sums owing on the indebtedness to it from any account.

48 The Loan Agreement provides that it is an event of default if the Bankrupt fails to comply with or perform any other term, obligation, covenant or condition, contained either in the Loan Agreement or in any of the defined "Related Documents" or if it fails to comply with or to perform any other term, obligation, covenant, or condition contained in any other agreement between the defendant and the Bankrupt.

49 An event of default includes commencement of foreclosure or forfeiture proceedings, whether by judicial proceedings, self-help, repossession or any other method by a creditor of the Bankrupt. In event of default all indebtedness of the Bankrupt will immediately become due and payable without notice of any kind.

50 The Note provides the Bankrupt is in default if, *inter alia*, it fails to make any payment or any creditor tries to take any of the Bankrupt's property on or in which the defendant has a lien or security interest.

51 The Note provides a security interest to the defendant in chequing, savings, or other accounts of the Bankrupt.

52 The security interest in the Loan Agreement and in the Note is security for all indebtedness of the Bankrupt to the defendant.

53 On December 12, 1997 the Canadian Western Bank withheld $155,349 from the Bankrupt's account to cover a performance bond that had been issued years earlier. At the time the Bankrupt was not indebted to the bank and had on deposit approximately $600,000. This action was viewed by the management of Video Only as an event of default pursuant to the terms of the Note.

54 It was as a result of the default that Video Only determined it would demand payment of all outstanding debt to it. On December 17, 1997 it therefore paid for the unpaid goods it had supplied over the course of the past 18 months, and on December 30, 1997 the defendant demanded and was paid the accrued management fees for services it had provided. They totalled $1,100,000.

55 I am satisfied the payment of $297,634.84 was the balance owing for goods Video Only had supplied to the Bankrupt over the past 18 months. I am also satisfied that the $1,100,000 impugned payment represented a properly incurred, but deferred debt, for management fees supplied by Video Only from 1993 to 1997. The Security Agreement made it a secured debt.

56 The debts represented by both impugned transactions were secured debts by virtue of the Loan and Note Agreements created in 1995.

57 Payments received by a secured creditor are not subject to attack as a fraudulent preference. [*Houlden & Morawetz, Bankruptcy and Insolvency Law of Canada* (3 ed) F90 p.4-51; *Imperial Lumber Ltd. v. Coast Mill Works Ltd.* (1956), 5 D.L.R. (2d) 334 (B.C. S.C.); *Christensen, Re* (1977), 25 C.B.R. (N.S.) 52 (B.C. S.C.)].

58 I accept that the Bankrupt and Video Only are "related persons (companies)" within that defined meaning in Section 4(2) of the *Act*.

59 The provisions of the *Act* allowing the Trustee to state an opinion of fair value do not apply in present circumstances. The Trustee has no opinion on the value of the services. The only evidence is that the amounts charged for the management services of Video Only were very reasonable in context of the commercial reality of the industry. The value of the goods supplied are acknowledged to have been as charged.

60 I find no support for the argument advanced by counsel for the Trustee that the Loan and Note Agreements are really two separate Agreements; the first occurring in 1995 when the Bankrupt agreed to accept liability for management fees and the defendant agreed to provide them; the second in 1997 when the Bankrupt was asked to pay for the services, and accepted the request. The Agreement was always to pay the debt on demand. There was no new agreement to be negotiated before Video Only was entitled to payment.

61 I have considered the cases to which I was referred by counsel in respect of the issue of determining whether the Bankrupt was insolvent at the time impugned payments were made. I reviewed the authorities in the context of argument presented by counsel. Authorities included:

- *Norris, Re* (1996), [1997] 2 W.W.R. 281 (Alta. C.A.);
- *Blenkarn Planner Ltd., Re*, *supra*;
- *Thorne Riddell v. Fleishman* (1983), 47 C.B.R. (N.S.) 233 (Ont.S.C.);
- *Fischer v. Moffatt & Powell, Perth Ltd.* (1984), 53 C.B.R. (N.S.) 28 (Ont. S.C.);
- *Debentis Investments Ltd., Re* (1981), 39 C.B.R. (N.S.) 39 (Ont. S.C.);
- *Christensen, Re*, *supra*.

62 I was invited by counsel for the applicant Trustee to remit the matter for trial if I considered under Rule 18A (11) (a) "(i) the court is unable, on the whole of the evidence ... to find the facts necessary to decide the issues of fact or law, or (ii) the court is of the opinion that it would be unjust to decide the issues on the application".

63 In the present circumstances I do not believe it unjust to decide the issue the Bankrupt's insolvency. There is an onus upon the Trustee to show a *prima facie* case of insolvency. I am sure that was understood at inception. I disallowed certain evidence in regard to the issue of insolvency but the fact it was to be challenged was again understood before the hearing of the application.

64 I have no reason to believe the Trustee was constrained either by time or cost in presenting evidence in admissible form. I was not able to discern any reason that direct and cogent evidence in relation to the solvency or insolvency of the Bankrupt would be difficult to obtain.

65 There was no application to adjourn the hearing to permit further or other evidence to be presented. The issue is one usually capable of determination on a summary basis, as credibility is unlikely to be an issue.

66 I am satisfied that the $78,750 U.S. which counsel for the Trustee argued represented pre-payment of management fees for the year 1998, and hence not recoverable as a debt, results from a misunderstanding on his part. The management fees were charged on a fiscal year basis and not on the calender year. The portion of management fees commencing in the fiscal year commencing in 1997 and ending in 1998, but incurred prior to December 30, 1997 were properly charged.

67 Counsel is also mistaken that in any event $397,634.83 is beyond the maximum secured under the Loan and Note Agreements. Those Agreements were expressed in United States dollars. The total claim is within the Canadian equivalent of $1,000,000 (U.S.).

68 In the result the Trustee's application for summary judgment pursuant to Rule 18A is dismissed, and as the application encompassed all issues in the Statement of Claim, the action is dismissed.

69 The defendant Video Only is entitled to costs on Scale 3.

Application dismissed.

TAB 12

Bankruptcy and Insolvency Law of Canada, 4th Edition § 5:501

Bankruptcy and Insolvency Law of Canada, 4th Edition
The Honourable Mr. Justice Lloyd W. Houlden, Mr. Justice Geoffrey B. Morawetz, Dr. Janis P. Sarra

Part I. The Bankruptcy and Insolvency Act

Chapter 5. Part IV Property of the Bankrupt

VIII. Sections 95, 96

§ 5:501. Insolvency of Debtor—Relevant Date for Insolvency

The insolvency of the debtor must be proved on the date on which the alleged preference was given: Re Hart Brothers Construction Ltd. (1954), 34 C.B.R. 116 (B.C. S.C.); Re Van der Liek (1970), 14 C.B.R. (N.S.) 229 (Ont. H.C.); Re Audio Records Ltd. (1962), 4 C.B.R. (N.S.) 99 (Que. S.C.); Re Consumers Furniture Mart of Man. Ltd. (1985), 8 C.B.R. (N.S.) 139, 52 D.L.R. (2d) 184 (Man. Q.B.). If a number of payments are involved, insolvency must be established on the date of each payment. The question of insolvency is thus to be judged from day to day: Re Consol. Seed Exports Ltd. (1986), 62 C.B.R. (N.S.) 156 (B.C. S.C.). However, if it can be shown that the debtor was hopelessly insolvent at the date of bankruptcy, it may be a reasonable assumption that little change has occurred in the financial position of the debtor from the date that the preference was given: Re Holt Motors Ltd. (1966), 9 C.B.R. (N.S.) 92, 56 W.W.R. 182, 57 D.L.R. (2d) 180 (Man. Q.B.).

Events subsequent to the date of the alleged preferential transaction can be relied upon to show that at the date of the transaction, the debtor was insolvent: A.E.M. Video Only Inc. (Trustee of) v. Video Only Inc. (1999), 10 C.B.R. (4th) 49, 1999 CarswellBC 335 (B.C. S.C. [In Chambers]).

The Ontario Superior Court of Justice held that the operative date for the review period for a transfer undervalue was the date of execution of the transfer document as opposed to the date of registration in the land titles system. Justice Pattillo noted that s. 96 of the *BIA* is concerned with a "transfer at undervalue", which is defined in s. 2 of the *BIA* as "a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor." He further noted that s. 96 speaks of "transfer"; it does not contain the words "register" or "registration". Justice Pattillo held that based on the plain wording of s. 96 and the *BIA* as a whole, the word "transfer" in that section does not mean registration under land titles or the registry system. As a result, the trustee's s. 96(1) application was outside the five-year time period within which it must be brought, and the application was dismissed. Pattillo J. also dismissed the trustee's fraudulent conveyance claim: Essery Estate (Trustee of) v. Essery, 2016 CarswellOnt 1443, 2016 ONSC 321 (Ont. S.C.J.).

The Court of Appeal for Ontario dismissed an appeal from the application judge who had exercised his discretion not to grant judgment in a proceeding brought under s. 96 of the *BIA*. The Court of Appeal determined that the transaction was more than one year before the initial bankruptcy event and there was no evidence that the transferor was insolvent more than one year before the initial insolvency event. Justice Feldman concluded that the former spouse acquired her beneficial interest in the property on the signing of the agreement, making that date the effective date of the impugned disposition of property, not the date of registration. Feldman J.A. held that while the balance of the funds for the purchase of the property were paid on the date of registration, deposits for the purchase of the home were made more than one year before the date of the initial bankruptcy event. An issue was whether the appellant creditor had proved that the bankrupt was insolvent or intended to defraud, defeat, or delay a creditor on the date of the disposition to the respondent, since the beneficial ownership passed more than one year before the initial bankruptcy event, but within five years of that event. The creditor, authorized by the court to bring this proceeding in the trustee's stead, bore the burden of establishing all of the factors in s. 96(1)(b)(ii) in order to impugn the transfer. Feldman J.A. concluded that there was no evidence on the record that proved insolvency on a balance of probabilities. Accordingly, there

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was no basis for the court to void the purchase of the home in joint names and in particular to void the impugned disposition: Mercado Capital Corporation v. Qureshi, 2018 CarswellOnt 14187, 63 C.B.R. (6th) 205, 2018 ONCA 711 (Ont. C.A.).

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TAB 13

2020 ABQB 249
Alberta Court of Queen's Bench

Servus Credit Union v. JRD Investments Inc

2020 CarswellAlta 673, 2020 ABQB 249, [2020] A.W.L.D. 1655,
13 R.P.R. (6th) 188, 317 A.C.W.S. (3d) 322, 9 Alta. L.R. (7th) 140

Servus Credit Union (Plaintiff) and JRD Investments Inc., Lurch Holdings Ltd., Donald James Clarke and Mark Gerald Lindskog (Defendants / Respondents)

J.H. Goss J.

Heard: February 14, 2020
Judgment: April 9, 2020
Docket: Edmonton 1603-12361

Proceedings: affirming *Servus Credit Union Ltd v. JRD Investments Inc* (2019), 2019 ABQB 158, 2019 CarswellAlta 396, W.S. Schlosser Master (Alta. Q.B.)

Counsel: David Hawreluk, Alison Archer, for JRD Investments Inc.
Brent Mielke, for Leeville Construction Ltd. operating as Craftex Builders

***J.H. Goss J.*:**

Introduction

1 This is an appeal of the March 5, 2019 decision of Master W.S. Schlosser granting an order directing that JRD Investments Inc. ("JRD") is entitled to be paid the principal amount of a mortgage ($105,000.00) entered into between JRD and Lurch Holdings Ltd. ("Lurch"), plus interest and costs, out of the net proceeds of sale being held in court, arising from foreclosure proceedings on mortgaged lands (the "subject lands"), in priority to the Leeville Construction Ltd. ("Leeville"), operating as Craftex Builders ("Craftex").

2 Craftex challenges the validity of the mortgage granted by Lurch to JRD, based on the *Fraudulent Preferences Act*, RSA 2000, c F-24 (the "*FPA*"). In the alternative, Craftex applies to set aside the mortgage and asserted priority arising from it pursuant to s 242 of *Alberta's Business Corporations Act*, RSA 2000, c B-9 (the "*ABCA*").

3 Briefly, following foreclosure proceedings commenced by Servus Credit Union Ltd. ("Servus"), net proceeds of sale totalling $409,273.30 (the "net proceeds") were paid into court. JRD's claim to one half of the net proceeds ($204,636.65), based on its ownership of an undivided one-half interest in the subject lands, is not at issue in this appeal. This amount, plus accumulated interest, was paid out to JRD in December 2018 pursuant to an Order granted by Master W.S. Schlosser.

4 What is at issue in this appeal is who has the right to receive the other half of the net proceeds ($204,636.65) which continue to be held in court (the "remaining proceeds"), plus accumulated interest. Craftex seeks an order directing payment to it of the full amount of the remaining proceeds.

The Parties

5 Donald James Clarke ("Mr. Clarke") is a director and shareholder of JRD. Mark Lindskog ("Mr. Lindskog") is the sole director and shareholder of Lurch. Mr. Lindskog is also the sole director of Bridge City Production Alberta Inc. ("Bridge City"). The sole shareholder of Bridge City is Lurch.

Facts

6 JRD and Lurch had entered into a Joint Venture and Co-Ownership Agreement (the "JV Agreement") to form the Border 5 Joint Venture ("Border 5") for the purpose of acquiring and developing certain lands. As of July 2010, each of JRD and Lurch owned an undivided 50 percent interest in the assets of Border 5. The principal asset of Border 5 was a commercial building located on the subject lands in Lloydminster, Alberta (the "Building"). JRD and Lurch each owned an undivided 50 percent interest in the Building as tenants in common. The Building was subject to two mortgages: one with Common Wealth Credit Union Limited (the "Common Wealth Mortgage") and a second with Servus in the original principal amount of $335,000.00 (the "Servus Mortgage"). Mr. Clarke and Mr. Lindskog each personally guaranteed the Servus Mortgage up to $150,000.00 each.

7 Pursuant to a Lease Agreement between Border 5 and Bridge City (the "Lease"), Border 5 leased the Building to Bridge City, from which Bridge City operated a night club called the Kooler Night Club (the "Kooler"). In or around November 2015, Craftex was retained to renovate Kooler (the "Project"). It is unclear which entity retained Craftex for the Project. A November 3, 2015 Work Authorization to renovate the Kooler for the sum of $349,498.52 was addressed to Mr. Lindskog and signed by Mr. Lindskog as the Authorized Representative with the title of President/CEO. A Letter of Consent was also signed by Mr. Lindskog on the same date.

8 In late 2015, Bridge City fell behind in its rent payments to Border 5. Mr. Clarke deposes that at or around this time Mr. Lindskog made representations to Mr. Clarke that he had sold, or was about to sell, the assets of Bridge City (including the Kooler) and/or that he was going to receive proceeds from an insurance claim, and that he would use the sale and/or insurance proceeds to pay Bridge City's debts, including the rent owed to Border 5.

9 In early 2016, Lurch and JRD fell behind on their payments on the Common Wealth Mortgage and the Servus Mortgage (collectively referred to herein as the "Mortgages"). Mr. Lindskog suggested to Craftex that he didn't have the funds available to fully pay for the work on the Project. On February 3, 2016, Craftex registered a Builder's Lien in the amount of $434,304.88 (the "Lien") against title to the Building. The Statement of Lien completed by Craftex states that the person or corporation for which the work was provided was the Kooler.

10 A Forbearance Agreement was entered into on March 24, 2016 (the "Forbearance Agreement"). It was executed by Leeville, Lurch and Mr. Lindskog. In the executed Forbearance Agreement, all references to JRD were crossed out. JRD did not execute the Agreement. Craftex continued on with the renovation work. Some payments ($24,440.00) were received after the Forbearance Agreement was entered into, but the principal amount of $434,304.88 ultimately remained owing.

11 Craftex did not file a Statement of Claim to enforce the Lien; the Lien expired and was discharged on August 25, 2016.

12 On June 23, 2016, Servus issued demand letters for repayment of the outstanding balance on the Mortgages in the total amount of $566,061.11, plus interest and costs. On July 14, 2016, Servus commenced an action (the "Servus Action") against JRD and Lurch as mortgagors and against both Mr. Clarke and Mr. Lindskog on the associated personal guarantees they had provided. On August 2, 2016, a Statement of Defence was filed in the Servus Action on behalf of JRD and Mr. Clarke. Lurch and Mr. Lindskog filed a Demand for Notice in that action.

13 On August 26, 2016, Craftex commenced QB Action No. 1603 15084 against, *inter alia*, JRD and Lurch (the "Craftex Action") for the indebtedness connected to the Project and for breach of the Forbearance Agreement.

14 On October 11, 2016, Servus obtained a Redemption Order which directed a four-month redemption period for the Building until February 11, 2017, following which the Building would be listed for sale at the appraised value of $1,375,000.00. A partial summary judgment was awarded against JRD in favor of Servus with respect to the *in rem* relief sought by it in the Servus Action.

15 Mr. Clarke deposes that in January 2017, to avoid the subject lands being foreclosed, and to try and maximize the value of the subject lands, JRD and Lurch agreed that each company would refinance their half of the Mortgages; however, Lurch did not obtain financing.

16 On January 31, 2017, Craftex filed a motion and supporting affidavit for judgment against Lurch in the Craftex Action, returnable February 22, 2017 (the "Craftex Motion"). The Craftex Motion materials were also served upon counsel for JRD on February 8, 2017, although no relief was sought against JRD. Discussions between Craftex and Mr. Lindskog ensued resulting in a further agreement between them to allow time to repay the monies due. As part of that agreement, Mr. Lindskog and Lurch provided a Consent Judgment in the Craftex Action, which could be entered on default. In addition, a mortgage collateral to the Consent Judgment, in the amount of $520,000, against Lurch's 50 percent interest in the Building was entered into on March 29, 2017 (the "Craftex Mortgage").

17 On February 17, 2017, JRD paid Servus the sum of $120,997.94 to redeem the Servus Mortgage, comprised of arrears ($95,917.25) and an amount for Servus' legal costs ($25,080.69), as outlined in a letter from Dentons Canada LLP dated February 14, 2017. Mr. Clarke deposes that:

> Given the downturn in the economy in Lloydminster at the time, JRD was concerned that a judicial sale of the lands would result in a much lower price. As a result, JRD agreed that it would use a portion of the financing it had previously lined up to pay, in the first instance, all outstanding arrears and legal fees owed in relation to Loan One [the Common Wealth Mortgage] and Loan Two [the Servus Mortgage]. As consideration for the payments made by JRD, and in recognition that the legal fees payable to Dentons Canada LLP and Bennett Jones LLP were a direct result of Lurch and Mr. Lindskog causing the mortgage default and delaying the resolution of the foreclosure proceedings, Lurch and Mr. Lindskog agreed that:
>
> > (a) Lurch would reimburse JRD for the arrears paid by JRD on behalf of Lurch, together with all legal fees paid to Servus and to Bennett Jones LLP to deal with Servus, Lurch and Mr. Lindskog; and
> >
> > (b) Lurch would provide security to JRD in the form of a mortgage for the above amounts and that Mr. Lindskog would personally guarantee the repayment of all amounts owed to JRD by Lurch.

18 Mr. Clarke deposes that Lurch's share of the arrears paid on the Mortgages was $47,958.63. Dentons Canada LLP's legal expenses with respect to the foreclosure proceedings paid by JRD amounted to $25,080.69. Bennett Jones LLP's legal expenses with respect to the foreclosure proceedings amounted to $31,960.68. Lurch agreed to pay and was indebted to JRD in the total sum of $105,000.00.

19 On or about February 16, 2017, Lurch, as mortgagor, executed a mortgage with JRD, as mortgagee, in the amount of $105,000.00 (the "JRD Mortgage"), as collateral security for a Promissory Note from Lurch in favor of JRD in the principal sum of $105,000. It stated the consideration was "the sum of One Hundred and Five Thousand and xx/100 ($105,000) DOLLARS (the "Loan") lent to the Mortgagor by JRD . . . " Attached to the JRD Mortgage, as Schedule "B," was the Promissory Note, which was "Effective this 17th day of February, 2017." The amount specified in the Promissory Note was required to be paid by February 28, 2018. Mr. Lindskog also provided JRD with a Guarantee dated February 16, 2017.

20 The JRD Mortgage was registered on title to the Building on March 1, 2017. Mr. Clarke deposes that JRD did not ever receive any payment or other consideration for the indebtedness claimed under the JRD Mortgage.

21 On March 31, 2017, Craftex registered the Craftex Mortgage in the amount of $525,000.00 against Lurch's 50 percent interest in the Building.

22 In the summer of 2017, the Mortgages matured. Lurch and JRD were unable to sell or refinance the Building. As a result, Servus filed a new foreclosure application and the Building was sold on February 8, 2018 for $925,000.00. The net proceeds of $409,273.30 were paid into court on May 14, 2018.

23 On February 8, 2018, Craftex obtained the aforementioned Consent Judgment against Mr. Lindskog and Lurch.

Master's Decision

24 The Master concluded that there was no fraudulent preference. There was no evidence that Lurch was insolvent when it granted the JRD Mortgage and it was not clear that the principal intent of the JRD Mortgage was to prefer, even though this was the effect. There was a valid commercial purpose for granting the JRD Mortgage. The JRD Mortgage was first in time and had priority to Craftex's *in rem* claim on the Craftex Mortgage.

25 The Master concluded JRD was entitled to the principal amount of the JRD Mortgage, plus interest, plus costs to be assessed on notice and paid out of the remaining proceeds, in priority to Craftex. Craftex was entitled to the balance of the remaining proceeds, if any.

26 Craftex now appeals this decision.

Issues

1. Does the JRD Mortgage constitute a fraudulent preference?

2. Are the Lurch transactions oppressive under s 242 of Alberta's *Business Corporations Act*?

Standard of Review

27 The standard of review on an appeal from a Master to a Judge, on all issues, is correctness: *Bahcheli v. Yorkton Securities Inc.*, 2012 ABCA 166 (Alta. C.A.) at para 30 and *McDonald v. Sproule Management GP Limited*, 2018 ABCA 295 (Alta. C.A.) at para 1. The appeal is *de novo* and therefore no deference is owed; a Judge can make a fresh assessment of the facts: *Poff v. Great Northern Data Supplies (AB) Ltd.*, 2015 ABQB 173 (Alta. Q.B.) at para 6 and *Rudichuk v. Genesis Land Development Corp*, 2019 ABQB 132 (Alta. Q.B.) at para 7.

Argument

Craftex

28 Craftex argues it was a creditor of Lurch at the time of the impugned transactions and that Lurch was insolvent at the time it granted the JRD mortgage as it continued to be in default of its obligations to Servus, in addition to its indebtedness to Craftex. Craftex also argues that there are a number of "badges of fraud" present, alone or in combination, giving rise to a rebuttable presumption of an intent to prefer on the part of Lurch, which has not been rebutted by JRD.

29 Craftex argues in the alternative that the JRD Mortgage and the asserted priority arising from it should be set aside on the basis that the transaction is oppressive under s 242 of the *ABCA* because the agreement to assume responsibility for amounts Lurch was not otherwise liable for and to grant priority to JRD, at the point it did, and arguably for inadequate consideration, was oppressive and unfairly prejudicial to Craftex.

JRD

30 JRD argues that there is no evidence to suggest Lurch was insolvent or on the eve of insolvency at the time of granting the JRD Mortgage, and there is no evidence to establish that Lurch had a fraudulent intent or that JRD was privy to a fraud. The JRD Mortgage was bona fide, bringing it within s 6(b) of *FPA*. Regarding oppression, JRD argues that reasonable consideration was provided in exchange for the JRD Mortgage.

Legislation

31 The following statutory provisions are relevant to the issues in dispute:

Fraudulent Preferences Act, RSA 2000, c F-24

Fraudulent transfers

1 Subject to sections 6 to 9, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made

(a) by a person at a time when the person is in insolvent circumstances or is unable to pay the person's debts in full or knows that the person is on the eve of insolvency, and

(b) with intent to defeat, hinder, delay or prejudice the person's creditors or any one or more of them,

is void as against any creditor or creditors injured, delayed or prejudiced.

Intent to prefer

2 Subject to sections 6 to 9, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made

(a) by a person at a time when the person is in insolvent circumstances or is unable to pay the person's debts in full or knows that the person is on the eve of insolvency, and

(b) to or for a creditor with intent to give that creditor preference over the other creditors of the debtor or over any one or more of them,

is void as against the creditor or creditors injured, delayed, prejudiced or postponed.

Bona Fide Transactions

6 Nothing in section 1 to 5 applies to

. . .

(b) a payment of money to a creditor, or a bona fide conveyance, assignment, transfer or delivery of any goods, securities or property, of any kind as above mentioned, that is made in consideration of a present actual bona fide sale or delivery of goods or other property or of a present actual bona fide payment in money, or by way of security for a present actual bona fide advance of money, if the money paid or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration for it.

Business Corporations Act, RSA 2000, c B-9

239 In this Part,

(a) "action" means an action under this Act or any other law;

(b) "complainant" means

. . .

(iii) a creditor

. . .

(B) in respect of an application under section 242, if the Court exercises its discretion under subclause (iv),

. . .

Relief by Court on the ground of oppression or unfairness

242(1) A complainant may apply to the Court for an order under this section.

(2) If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates

. . .

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the Court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

. . .

(j) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

. . .

Analysis

1. Does the JRD Mortgage constitute a fraudulent preference?

32 JRD holds a priority mortgage interest. The JRD Mortgage was registered against title to the Building before the Craftex Mortgage was. The issue is whether the JRD Mortgage was a fraudulent preference and is therefore void as against Craftex, pursuant to the *FPA*.

33 The *FPA* has the effect of "unwinding" or "reversing" transactions which fall into certain categories: *Taylor & Associates Ltd. v. Louis Bull Tribe No. 439*, 2011 ABQB 213 (Alta. Q.B.) at para 11. A general authority is provided by ss 1-2 of the *FPA* to unwind any transaction that was intended to defeat creditor debt recovery, if the person making a transfer of property knows that person is insolvent or is about to become insolvent (*FPA*, ss 1(a) and 2(a)), and the transfer is intended to prevent the person's creditors from recovering their debts (*FPA*, s 1(b)), or to prefer one creditor over another (*FPA*, s 2(b)).

34 To qualify under the *FPA*, an applicant must show that the respondent is indebted to it, although it is not necessary for an applicant to have been a judgment creditor at the time the impugned transaction was entered into: *Krumm v. McKay*, 2003 ABQB 437 (Alta. Q.B.) at para 37 [*Krumm*], citing *Rusnak v. Canadian Imperial Bank of Commerce* (1982), 38 A.R. 514 (Alta. Q.B.) at 516, 14 A.C.W.S. (2d) 165 (Master). A "creditor" is a person to whom a debt is payable: *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 60 Alta. L.R. (2d) 122, 40 B.L.R. 28, 1988 CarswellAlta 103 (Alta. Q.B.), at para 79, var'd 1989 ABCA 274 (Alta. C.A.) [*First Edmonton Place Ltd.*].

35 The *FPA* is more restrictive than the *Fraudulent Conveyances Act*, 1571 (13 Eliz 1), c 5 (the "*Statute of Elizabeth*"), which refers to "creditors and others": *Builders' Floor Centre Ltd. v. Thiessen*, 2013 ABQB 23 (Alta. Q.B.) at para 76 [*Builders' Floor Centre Ltd.*] and *Krumm* at para 35.

36 Craftex was a creditor of Lurch at the time the JRD Mortgage was entered into. The Forbearance Agreement would appear to confirm the indebtedness of Lurch to Craftex in relation to the Project. On January 31, 2017, Craftex filed a motion for summary judgment against Lurch in the Craftex Action, which resulted in a further agreement to allow Lurch time to repay the monies due to Craftex and ultimately to the Craftex Mortgage, which was registered on March 31, 2017.

37 In order for a transaction to be impeached under the *FPA*, the debtor must have been either insolvent, on the eve of insolvency, unable to pay its debts in full in the ordinary course as they become due or knew that it was on the eve of insolvency, at the time that the transfer was made. Each are alternatives and not conjunctives. The burden of proving this rests with the applicant, who need only prove facts that will warrant a reasonable inference of insolvency, at which point the defendant would need to adduce evidence to rebut that *prima facie* evidence: *Titan Investments Ltd. Partnership, Re*, 2005 ABQB 637 (Alta. Q.B.) at para 15 [*Titan*]; *Coopers & Lybrand Ltd. v. Alcan Canada Products Ltd.* (1982), 46 A.R. 32, 16 A.C.W.S. (2d) 4 (Alta. Q.B.) at paras 15-17, citing from *Robinson v. Countrywide Factors Ltd.* (1977), [1978] 1 S.C.R. 753 (S.C.C.).

38 Speaking generally, "insolvency" means an inability to pay one's liabilities. That condition therefore depends on both assets and liabilities. The fact that one does not pay one's debts is by no means proof that one cannot: *Clarke v. Sutherland* (1917), 37 D.L.R. 368 (Alta. S.C. (App. Div.)) 1917 CanLII 419 at page 369.

39 The *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("*BIA*") defines "insolvent person" in s 2 as follows:

> insolvent personmeans a person who is not bankrupt . . .
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

40 In order to determine the debtor's ability to pay, it is necessary to assess the assets available to the debtor to meet its obligations. It is not sufficient for a petitioning creditor to prove that an unpaid debt is owed to him alone. Some evidence is required that the debtor has ceased to meet his liabilities to others and the allegation must be strictly proven: *Holmes, Re* (1975), 9 O.R. (2d) 240 (Ont. Bktcy.). 1975 CanLII 667.

41 The fact that formal demands for payment have not been made by all the creditors does not prevent a court from finding that the debtor has ceased to meet its obligations generally. The petitioning creditor needs evidence of other creditors who are unpaid, not evidence of other creditors who have commenced bankruptcy proceedings against the debtor: *Cappe, Re*, 18 C.B.R. (3d) 229, 1993 CarswellOnt 198 (Ont. Gen. Div. [Commercial List]), at para 27, citing *Pro-Lam Industries (1986) Ltd., Re* (1989), 75 C.B.R. (N.S.) 239 (B.C. S.C.), and *Ko-Da Trading Co., Re* (1992), 9 C.B.R. (3d) 141 (B.C. S.C.). This matter is not proceeding under the *BIA*; however, the provisions thereunder can provide some further context for considering the question of insolvency.

42 I am not satisfied on the evidence before me that Craftex has proven facts that will warrant a reasonable inference that Lurch was insolvent, on the eve of insolvency, unable to pay its debts in full in the ordinary course as they become due or knew that it was on the eve of insolvency, at the time the JRD Mortgage was granted. The evidence establishes that by January 2017, Craftex had not been fully paid for the work completed on the Project and Lurch had defaulted on its payment obligations under the Forbearance Agreement with Craftex in relation to that debt. Lurch also continued to be in default of its obligations under the Servus Mortgage at that point. No other evidence is available. There is no evidence as to the assets of Lurch. Without a more complete picture, a reasonable inference cannot be made as to whether or not Lurch was insolvent or was on the eve of insolvency at the relevant time for the purpose of ss 1(a) and 2(a) of the *FPA*.

43 In the event that I am wrong in this conclusion, I will consider whether a rebuttable presumption of an intent to prefer one creditor over other creditors, on the part of Lurch, has been made out.

44 The *FPA* applies to any kind of transfers, conveyances or securities made with the requisite intent to defraud or hinder creditors, no matter what the form: *Builder's Floor Centre* at para 39, citing *Krumm* at para 13. The presence or absence of fraudulent intent is a question of fact, to be determined from all the circumstances. The granting of security can itself be a fraudulent preference: *Myers v. AlanRidge Homes Ltd*, 2017 ABQB 631 (Alta. Q.B.) at paras 61 and 62.

45 "Intent to defeat, hinder, delay or prejudice its creditors or any one or more of them," for the purpose of s 1(b) of the *FPA*, is difficult to prove on the basis of direct evidence. Consequently, the intent must be implied or inferred from suspicious facts or circumstances surrounding the imputed transaction, which could include elements which have been classed as badges of fraud in decisions relating to the *Statute of Elizabeth*: *Alberta (Attorney General) v. Samuel Doz Professional Corp.* (1993), 139 A.R. 198, 9 Alta. L.R. (3d) 201 (Alta. Q.B.) , cited in *Builder's Floor Centre* at para 42 and *Conte Estate v. Alessandro*, [2002] O.T.C. 1035 (Ont. S.C.J.) . 2002 CanLII 20177 at para 20 [*Conte Estate*].

46 The principal problem in establishing that a transfer for value falls within the statute is to prove that the transferor had the necessary fraudulent intent and that the grantee was privy to the fraud. When we turn to transfers for value, it appears that there is no presumption which can establish fraud: *Builder's Floor Centre* at para 72, quoting from C.R.B. Dunlop, *Creditor-Debtor Law in Canada* (2nd Edition) Carswell at 609 [Dunlop].

47 The intent of a debtor company is to be ascertained by determining the intent of its governing mind. Any allegation of fraudulent intent is a serious one and should not be found as a fact without the presence of substantial evidence on which to base such a finding: *Titan* at para 26, citing *Canadian Imperial Bank of Commerce v. Grande Cache Motor Inn Ltd.* (1977), 9 A.R. 208, 4 Alta. L.R. (2d) 319 (Alta. T.D.) , (sub nom *Hobbema Farms Ltd v. Fowlis*) at 329 and 330. Section 2 of the *FPA* does not require a consideration of the intention of the creditors: *Titan* at para 25, citing *Christensen (Trustee of) v. Christensen* (1994), 166 A.R. 161, 30 C.B.R. (3d) 271 (Alta. Q.B.) at para 18, rev'd on other grounds 1996 ABCA 174 (Alta. C.A.) [*Christensen (Trustee of) v. Christensen*], leave to appeal to SCC refused,(1997), [1996] S.C.C.A. No. 394 (S.C.C.) .

48 In addition to noting the effect of the JRD Mortgage to prefer JRD as a creditor over itself, Craftex points to a series of "badges of fraud" that, when viewed in combination, give rise to a rebuttable presumption of an intent to prefer on the part of Lurch, which presumption it argues has not been rebutted by JRD. Badges of fraud, first articulated in *Twyne's Case, Re* (1601), 76 E.R. 809 (Eng. K.B.), are evidentiary indicators of fraudulent intent. The presence of one or more of these badges of fraud raises a presumption of fraud. Once the persuasive burden of proof is met by the plaintiff, and a presumption is raised, the evidentiary burden of explaining the circumstantial evidence suggesting fraudulent intent shifts to the defendant: *Builder's Floor Centre* at para 44 and *Conte* at paras 21 and 22.

49 The following have been identified as badges of fraud:

1. The consideration was grossly inadequate;

2. The transfer was accomplished quickly or with unusual haste;

3. A close or non-arm's length relationship exists between the parties to the conveyance or transfer;

4. The transfer was very general in nature in that it included virtually all of the assets of the transferor;

5. The transfer was made pending the creditor's efforts to obtain judgment;

6. The transfer documents contain false statements as to consideration;

7. The transaction was secret;

8. The transfer was made pending the writ;

9. The deed contained self-serving provisions;

10. The transferor continued in possession or occupation of goods or property for his own use after the transfer;

11. The transfer occurs when there are actual or potential liabilities facing the transferor;

12. The effect of the transaction is to delay and defeat creditors;

13. The absence of a sound business or tax reason for the transaction; and

14. Payment to a person not a party to the disposition.

50 The list is not exhaustive: *Builder's Floor Centre* at para 43, referencing Dunlop; *Alberta (Attorney General) v. Samuel Doz Professional Corp.* (1993), 139 A.R. 198, 9 Alta. L.R. (3d) 201 (Alta. Q.B.) ; *Dwyer v. Fox* (1996), 43 Alta. L.R. (3d) 63 (Alta. Q.B.) . 1996 CanLII 10477; *Krumm*, *Mako Megbiz, K.F.T. v. Osprey Energy Ltd.*, 2006 ABQB 630 (Alta. Q.B.); *Gerrow v. Dorais*, 2010 ABQB 560 (Alta. Q.B.); and *Conte Estate* at para 43 and 46. I will assess each of the badges of fraud specifically alleged by Craftex.

51 It is argued that the consideration given by JRD for the JRD Mortgage was grossly inadequate as Lurch assumed obligations which were excessive and which it did not otherwise owe, in terms of the legal fees it agreed to pay in full. It is argued that the Respondents had no proper defence to the Servus foreclosure action and that JRD's contribution to Servus' increased legal fees or the increased interest, because it failed to pay the arrears sooner, were ignored or not shared. In paying Servus, JRD was doing no more than simply discharging its own existing legal obligations as JRD was a co-debtor and co-mortgagor. Again, I cannot conclude that the consideration given by JRD for the JRD Mortgage was grossly inadequate, based on the wisdom, or not, of commercial decisions made by Lurch.

52 In terms of the timing of the payment to Servus and of the JRD Mortgage, the evidence is that in January 2017, JRD and Lurch had agreed that each company would refinance their half of the Mortgages; however, Lurch did not obtain financing. The subsequent payment by JRD on behalf of both companies and the entering into of the JRD Mortgage coincided with the expiry of the redemption period on February 11, 2017.

53 As to the relationship between JRD and Lurch, they were joint venture partners in Border 5 and co-mortgagors, but they had separate ownership structures. There is no evidence that the two entities were acting other than in their own self-interest or that one entity was subject to pressure or undue influence from the other. The JRD Mortgage was restricted to a specific mortgage interest in the Building, equivalent to the funds advanced by JRD. Craftex had filed a motion for judgment against Lurch in the Craftex Action at the time, but an agreement was reached to allow time to repay the monies due. A year later Craftex obtained a Consent Judgment against Mr. Lindskog and Lurch in relation to that agreement. The JRD Mortgage was registered on title to the Building on March 1, 2017. Finally, I agree with the Master that while the effect of the JRD mortgage was ultimately to prefer, "it was not clear that this was the principal intent." The badges of fraud that Craftex points to do not collectively give rise to a rebuttable presumption of an intent to prefer one creditor over the other creditors on the part of Lurch.

54 Again, should I be wrong in reaching this conclusion, I am satisfied that the JRD Mortgage falls within s 6(b) of the *FPA*.

55 Section 6(b) of the *FPA* is to be interpreted such that a payment of money would be exempt from the application of the *FPA* if the payment bore a fair and reasonable value to the consideration which gave rise to the obligation to pay: *Christensen* at para 26. However, the *FPA* does not require a penny for penny match in value between what each party gives to the other. Rather, there must be a reasonable fit between the two:*Titan* at para 29 and 30, citing *Stihl Ltd. v. Motion Engine Services Ltd.* (1990), 106 A.R. 118 (Alta. Q.B.), 1990 CanLII 5932 at para 62.

56 In *Christensen*, payments made by a bankrupt to his two brothers to fully discharge loans they had made to him were found not to be fraudulent preferences under the *FPA*. While the debtor was insolvent at the time the payments were made, and the payments had a prejudicial effect on the ability of the other creditors to recover in the bankruptcy, the payments were exempt from the application of the *FPA* because they were substantially similar to the amounts the brothers had loaned the debtor, and therefore the Court found that the payments bore a fair and reasonable value relative to the consideration.

57 In this case, the basis upon which the value of the Promissory Note and JRD Mortgage were arrived at are laid out. A payment was clearly made by JRD, based on the payout statement from Dentons dated February 14, 2017, to address the original foreclosure action commenced by Servus. That payment included the agreed upon payment obligations of Lurch. The JRD Mortgage was granted as consideration for and equivalent to the payment made by JRD on behalf of Lurch. There is no

basis upon which I can conclude that it is not fair and reasonable. This Court is in no position to second guess the wisdom of the commercial decisions made by these corporate entities, particularly given the limited facts available. The basis of that decision, by the directing mind of Lurch, is not before me. It is certainly explained by Mr. Clarke from JRD's perspective and that explanation is sufficiently rationalized. As concluded by the Master, "there is a valid commercial explanation for the mortgage that gave JRD priority."

2. Are the Lurch transactions oppressive under s 242 of Alberta's Business Corporations Act?

58 Craftex argues in the alternative that the JRD Mortgage and the asserted priority arising from it should be set aside on the basis that the transaction is oppressive under s 242 of the *ABCA*.

59 There are two related inquiries in a claim for oppression: (1) does the evidence support the reasonable expectation asserted by the claimant; and (2) does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression," "unfair prejudice" or "unfair disregard" of a relevant interest: *BCE Inc., Re*, 2008 SCC 69 (S.C.C.) at para 68 [*BCE Inc.*].

60 The claimant bears the burden of establishing the asserted expectation, the reasonableness of the expectation, and the violation of the expectation by conduct that was oppressive or unfairly prejudicial or that unfairly disregarded a relevant interest: *BCE Inc.* at paras 119 and 137 and *1216808 Alberta Ltd. v. Crown Capital Corp.*, 2014 ABCA 386 (Alta. C.A.) at para 39.

61 Fair treatment is the central theme running through the oppression jurisprudence and is most fundamentally what stakeholders are entitled to reasonably expect. Factors that emerge from the case law that are useful in determining whether a reasonable expectation exists include: general commercial practice, the nature of the corporation, the relationship between the parties, past practice, steps the claimant could have taken to protect itself, representations and agreements, and the fair resolution of conflicting interests between corporate stakeholders. In determining whether a stakeholder expectation is reasonable, the court may consider whether the claimant could have taken steps to protect itself against the prejudice it claims to have suffered. Thus, it may be relevant to inquire whether a secured creditor claiming oppressive conduct could have negotiated protections against the prejudice suffered: *BCE Inc.* at paras 64, 72 and 78.

62 Not every unmet expectation, though reasonably held, constitutes oppression. Whether expectations are reasonable depends in part upon the context, viewed objectively. Courts assessing the fairness of directors' conduct must appreciate that directors must consider a variety of interests in determining action furthering the best interests of the corporation and should give appropriate deference to the business judgment of directors, so long as the business decision in question lies within a range of reasonable alternatives. A judge must take care not to substitute his or her own business judgment for that of managers and directors. Courts should consider not only isolated actions, but patterns of conduct to determine whether conduct was unfair: *Krulc v. Krulc*, 2015 ABQB 213 (Alta. Q.B.) at para 23 and 25 and *R. Floden Services Ltd. v. Solomon*, 2015 ABQB 450 (Alta. Q.B.) at paras 35 and 36 [*R. Floden Services Ltd.*].

63 In oppression actions, the applicant is bound to establish at least a *prima facie* case of having been subjected to oppressive or unfairly prejudicial actions or actions that unfairly disregarded its interests. The test of unfair prejudice or unfair disregard should encompass the following considerations: the protection of the underlying expectation of a creditor in its arrangement with the corporation, the extent to which the acts complained of were unforeseeable or the creditor could reasonably have protected itself from such acts, and the detriment to the interests of the creditor: *Builder's Floor Centre* at para 86, citing *First Edmonton Place*. Creditors have been given status as complainants against a corporation where those in control of the corporation have stripped the corporation of assets or dissipated assets rendering it immune from a judgment in favour of the creditor. The reasonable expectations of a creditor are that:

1. a corporation will not be used as a vehicle for fraud;

2. the debtor will not convey away, for no consideration, exigible assets which will leave the creditor unpaid and unable to realize upon assets to satisfy the debt;

3. the directors of a corporation will manage the company in accordance with their legal obligations, namely to act honestly and in good faith in the best interests of the corporation and to exercise the diligence expected of a reasonably prudent person; and

4. the debtor will honour the understandings and expectations which the debtor has created and encouraged.

(***Builder's Floor Centre*** at para 43, citing MA Springman et al, *Frauds on Creditors: Fraudulent Conveyances and Preferences* (Toronto: Thomson Reuters Canada Limited, 2009) at 24 -12.1, 24-13, 24-15, 24-16)

64 Where there is nothing in the evidence to suggest that steps to protect itself from oppressive or unfairly prejudicial actions or actions that unfairly disregarded its interests were necessary in the circumstances, the failure to protect itself alone may not disentitle the debtor from pursuing an oppression remedy: *Builder's Floor Centre* at para 92.

65 In this case, it was certainly reasonable for Craftex to expect Lurch to be operated in a manner that was not oppressive to Craftex's interests. However, I am not satisfied that the evidence establishes that the reasonable expectation was violated. The decision of Lurch to enter into the JRD Mortgage on the basis described by Mr. Clarke was a commercial business decision that is not for me to second guess. I am not satisfied that it lies outside of a range of reasonable alternatives given the circumstances, viewed objectively.

Conclusion

66 The Appeal is dismissed.

Costs

67 Schedule C costs to the Respondent, JRD. Costs shall be assessed on notice if not agreed upon.

Appeal dismissed.

TAB 14

2019 ONCA 757
Ontario Court of Appeal

Urbancorp Toronto Management Inc. (Re)

2019 CarswellOnt 15220, 2019 ONCA 757, 313 A.C.W.S. (3d) 240, 74 C.B.R. (6th) 23

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF a plan of compromise or arrangement of Urbancorp Toronto Management Inc., Urbancorp (St. Clair Village) Inc., Urbancorp (Patricia) Inc., Urbancorp (Mallow) Inc., Urbancorp (Lawrence) Inc., Urbancorp Downsview Park Development Inc., Urbancorp (952 Queen West) Inc., King Residential Inc., Urbancorp 60 St. Clair Inc., High Res. Inc., Bridge on King Inc. (Collectively the "Applicants") and the affiliated entities listed in Schedule "A" hereto

K. van Rensburg, C.W. Hourigan, Grant Huscroft JJ.A.

Heard: March 28, 2019
Judgment: September 27, 2019
Docket: CA C65891

Proceedings: affirming *Urbancorp Toronto Management Inc. (Re)* (2018), 60 C.B.R. (6th) 241, 2018 CarswellOnt 7672, 2018 ONSC 2965, F.L. Myers J. (Ont. S.C.J. [Commercial List])

Counsel: Matthew Milne-Smith, Chantelle Cseh, for Appellant, KSV Kofman Inc., in its capacity as Monitor
Kevin D. Sherkin, Jeremy Sacks, for Respondent, Speedy Electrical Contractors Ltd.
Neil Rabinovitch, for Israeli court-appointed Functionary and Foreign Representative of Urbancorp Inc.

***K. van Rensburg J.A.*:**

OVERVIEW

1 King Residential Inc. ("KRI") is part of the Urbancorp group of companies, which are presently involved in proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). Speedy Electrical Contractors Ltd. ("Speedy") filed a claim against KRI pursuant to a secured guarantee given by KRI to Speedy for debts owed by Edge on Triangle Park Inc. ("Edge") and Alan Saskin. KRI's monitor, KSV Kofman Inc. (the "Monitor") argued that Speedy's claim (which was in the amount of $2,323,638.54) should be disallowed, among other things, because the secured guarantee was a transfer at undervalue under s. 96 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") and a fraudulent conveyance under s. 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 (the "FCA"). The motion judge disagreed and dismissed the Monitor's motion for an order disallowing Speedy's claim. The Monitor appeals, with leave.

2 The Monitor challenges the motion judge's finding, in relation to s. 96(1)(b) of the BIA, that the secured guarantee was between arm's length parties. The Monitor says that the motion judge erred in law in focussing on the relationship between KRI and Speedy, rather than the relationships among KRI, Edge and Mr. Saskin. The Monitor also contends that there was reversible error in the motion judge's conclusion that the fraudulent intent necessary under s. 96(1)(a) of the BIA and s. 2 of the FCA was not proved.

3 For the following reasons I would dismiss the appeal.

4 Briefly, as I will explain, the motion judge properly considered the relationship between KRI and Speedy, rather than the relationship between KRI, Edge and Mr. Saskin, in determining whether the impugned transfer was to a non-arm's length party.

Although Edge and Mr. Saskin were parties to, and beneficiaries of, the *transaction* that provided for the secured guarantee, the *transfer* sought to be impugned by the Monitor was KRI's secured guarantee in favour of Speedy. The issue, under a proper construction of s. 96(1)(b) of the BIA, is whether the transferee, Speedy, was dealing at arm's length with KRI, the transferor, in relation to the impugned transfer, which is the secured guarantee.

5 The other main arguments on appeal challenge the motion judge's finding that the transfer was for the purpose of facilitating a financing for the Urbancorp group and not with the intention to defraud, defeat or delay KRI's creditors. This is a finding of fact, supported by the evidence, that is entitled to deference and reveals no reversible error. This finding is determinative of the appellant's claim for relief, whether under s. 96 of the BIA or s. 2 of the FCA.

6 Finally, the motion judge's costs award against the Monitor, on behalf of the debtor, and not in its personal capacity, was a proper exercise of his discretion, and reveals no reversible error.

FACTS

7 The Urbancorp group consists of a number of corporations and business entities all ultimately owned by Alan Saskin, and principally involved in the development of residential real estate projects in the Greater Toronto Area.

8 Speedy operates an electrical contracting business and performed electrical services for members of the Urbancorp group.

9 In September 2014, Speedy made a personal loan to Mr. Saskin for $1 million, with interest at the rate of 12.5%, evidenced by a promissory note due in one year dated September 23, 2014 (the "Promissory Note"). In addition, Speedy completed electrical work for Edge (an Urbancorp entity) on Lisgar Street in Toronto, ultimately registering a construction lien against the project for $1,038,911.44 on September 30, 2015.

10 On November 14, 2015, KRI, Speedy, Mr. Saskin and Edge executed a debt extension agreement (the "DEA") under which:

- Speedy agreed to extend the due date of the Promissory Note to January 30, 2016;
- Edge confirmed its debt to Speedy and Speedy agreed to discharge its lien against the Edge project;
- In consideration of the extension of the Promissory Note, the discharge of the lien, and payment by Speedy to KRI of $2.00, KRI agreed to guarantee the two outstanding debts, secured by a collateral mortgage in Speedy's favour over 13 KRI condominium units and 13 parking spaces; and
- KRI agreed to provide evidence showing that there were no common element arrears of the subject condominium units or to pay such arrears on closing, confirmed the taxes on the units were up to date, and agreed that it would obtain a discharge or postponement of a Travelers Guarantee Company of Canada mortgage registered on the subject units.

11 Pursuant to the DEA, on November 16, 2015, Speedy discharged its lien against the Edge property, and the collateral mortgage in favour of Speedy was registered on title to the KRI properties.

12 At the time of the DEA, the beneficial owners of the Urbancorp group's various development projects were three limited partnerships: TCC/Urbancorp (Bay) LP ("Bay LP"), Urbancorp (Bay/Stadium) LP ("Bay/Stadium LP"), and Urbancorp (Stadium Road) LP ("Stadium Road"). Typically, the Urbancorp group set up various single-purpose, project-specific corporations that acted as bare trustees or nominees for their beneficial owners. KRI was a wholly-owned subsidiary and nominee of Bay LP, while Edge was a wholly-owned subsidiary and nominee of Bay/Stadium LP. The Monitor emphasizes that each limited partnership had distinct ownership and different creditor groups.

13 Part of the impetus behind the DEA was to facilitate a financing of the Urbancorp group through a public bond issuance in Israel. In order to support the underwriting and to complete the financing, Mr. Saskin wanted to offer the unencumbered value of the Edge project property. And Speedy had threatened to bring legal proceedings against Mr. Saskin and was pressing forward with its lien.

14 The parties entered into the DEA shortly before the Urbancorp group initiated a corporate reorganization, which was completed on or around December 15, 2015. The reorganization was also required to facilitate the bond issuance.

15 According to the Monitor, as part of the reorganization, Urbancorp Inc. ("UCI") was incorporated in June 2015 and several wholly-owned subsidiaries were formed. KRI, previously owned by Bay LP, became part of a wholly-owned subsidiary called Urbancorp Cumberland 1 LP. Edge, previously owned by Bay/Stadium LP, became part of a wholly-owned subsidiary called Urbancorp Cumberland 2 LP.

16 In December 2015, the Israeli bond issuance closed. UCI raised approximately $65 million, most of which it used to repay certain secured debt owed by various Urbancorp group members and for general working capital purposes. Speedy was not repaid.

17 Approximately five months after the Israeli bond funding, the Urbancorp empire collapsed and substantially all the Urbancorp group entities commenced insolvency proceedings. On May 18, 2016, KRI and the other Urbancorp entities involved in these proceedings were granted protection under the CCAA. There are other insolvency proceedings involving other Urbancorp entities, including Edge.

18 On September 15, 2016, Newbould J. made an order establishing a procedure to identify and quantify claims against the CCAA-protected entities and their current and former directors and officers. Speedy filed a proof of claim, dated October 19, 2016, against KRI in the amount of $2,323,638.54 pursuant to its secured guarantee. On November 11, 2016, the Monitor disallowed the claim on the basis that the granting of the guarantee could be voidable as a transfer at undervalue or as a fraudulent conveyance or preference. On November 25, 2016, Speedy filed a notice disputing the disallowance.

19 After some delay, the Monitor brought a motion on March 7, 2018, for an order declaring that Speedy's claim be disallowed in full. Guy Gissin, in his capacity as the court-appointed functionary of UCI in proceedings in Israel (the "Israeli Functionary") participated in the court below, and was represented in court in this appeal. [1] The Israeli Functionary was appointed in 2016 pursuant to an application under Israel's insolvency regime. The Israeli Functionary supported the Monitor on its motions to disallow Speedy's claim. The Israeli Functionary also sued Mr. Saskin and others in Israel, alleging, among other things, fraud and securities law violations in connection with the bond underwriting.

20 On May 11, 2018, the motion judge dismissed the Monitor's motion for an order disallowing Speedy's claim.

21 By the time of the hearing of the appeal, there was evidence that, shortly after executing the DEA, Speedy had waived KRI's mortgage in relation to Mr. Saskin's personal debt, a fact that was not brought to the attention of anyone when the motion was heard, including the Monitor and the motion judge. After this information came to light, the motion judge varied his original order to exclude the loan from Speedy's claim. At issue, therefore, is only the claim against KRI under the secured guarantee of Edge's debt to Speedy. This does not affect the arguments made on appeal, except, according to the Monitor, in respect of the quantum of costs awarded by the motion judge.

RELEVANT STATUTORY PROVISIONS

22 Of relevance to this appeal, the Monitor challenged the secured guarantee under s. 96 of the BIA, and alternatively under s. 2 of the FCA.

23 Section 96 of the BIA provides for the challenge of pre-bankruptcy transfers at undervalue made by a debtor. Section 96 is applicable in CCAA proceedings pursuant to s. 36.1 of the CCAA. Subsections 96(1) to (3) of the BIA provide as follows:

> (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

(a) the party was dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

(ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

(iii) the debtor intended to defraud, defeat or delay a creditor; or

(b) the party was not dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

(2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

(3) In this section, a *person who is privy* means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

24 A "transfer at undervalue" is defined as a "disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor": BIA, s. 2. "Related persons" is defined, and includes entities that are controlled by the same person: BIA, s. 4(2). It is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length: BIA, s. 4(4). Persons who are related to each other are deemed, in the absence of evidence to the contrary, not to deal with each other at arm's length: BIA, s. 4(5).

25 The FCA is provincial legislation that is also available in insolvency proceedings for the declaration of fraudulent transfers as void. Sections 2 to 4 provide as follows:

2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

3. Section 2 does not apply to an estate or interest in real property or personal property conveyed upon good consideration and in good faith to a person not having at the time of the conveyance to the person notice or knowledge of the intent set forth in that section.

4. Section 2 applies to every conveyance executed with the intent set forth in that section despite the fact that it was executed upon a valuable consideration and with the intention, as between the parties to it, of actually transferring to and for the benefit of the transferee the interest expressed to be thereby transferred, unless it is protected under section 3 by reason of good faith and want of notice or knowledge on the part of the purchaser.

DECISION OF THE MOTION JUDGE

26 The motion judge considered the Monitor's motion for an order disallowing Speedy's claim as filed against KRI on three bases: as a transfer at undervalue under s. 96 of the BIA, as a fraudulent conveyance contrary to s. 2 of the FCA, and as oppression under the *Business Corporations Act*, R.S.O. 1990, c. B.16. Only the first two grounds are relevant to this appeal.

27 The motion judge noted that the motion resolved to two findings. The first was that Speedy and KRI were operating at arm's length when KRI gave its guarantee. As such, it would be necessary under s. 96 of the BIA for the Monitor to prove, among other things, that the guarantee was given by KRI to Speedy with the intent to defraud, defeat or delay a creditor.

28 On the arm's length question, the motion judge rejected the Monitor's argument that Speedy had leverage to subvert normal economic incentives because of Speedy's long-term relationship with Mr. Saskin and the personal loan it made to him. The motion judge explained that there was no evidence that Speedy and KRI were acting in concert, and that contemporaneous written communications indicated they were adverse in interest. He rejected the Monitor's argument that Mr. Saskin had acted in bad faith by offering the guarantee to remove what the Monitor argued was an untimely and therefore invalid lien. Speedy's witness had testified the lien was timely and, contrary to the rule in *Browne v. Dunn* (1893), 6 R. 67 (U.K. H.L.), he was not confronted with the document said to suggest the lien was registered late. As a result of all of these circumstances, the motion judge found that Speedy and KRI were operating at arm's length.

29 The second finding of the motion judge was that the Monitor had failed to prove that the guarantee was given by KRI with the intent to defraud, defeat or delay its creditors. He recognized that such intent could be inferred from "badges of fraud", including where "the consideration is grossly inadequate". Here he noted that the adequacy of consideration was disputed. He then stated that the only apparent badge of fraud was that the transaction "was made in [the] face of threatened legal proceedings". The fact that Speedy registered its mortgage on title — as one would expect any *bona fide* commercial creditor to do — further undermined the suggestion of fraudulent intent. The motion judge concluded at para. 24: "[t]here is nothing about the facts of this transaction that leads me to infer that it was made with a fraudulent intent rather than to obtain Speedy's cooperation to allow Urbancorp to refinance as intended at the time."

30 The motion judge contrasted the case of *XDG Ltd. v. 1099606 Ontario Ltd.* (2002), 41 C.B.R. (4th) 294 (Ont. S.C.J.), aff'd (2004), 1 C.B.R. (5th) 159 (Ont. Div. Ct.), which similarly involved a challenge to a guarantee by an insolvent affiliate for debts that did not relate to the specific business of the guarantor. In that case, the parties entered into the impugned transaction in great haste and the lender knew or ought to have known that the debtor was insolvent. The motion judge noted that here, by contrast, the solvency of the debtor depended on whether one looked at the debtor on its own or as part of the broader business of Bay LP, and that in any event, the Monitor accepted that the business was solvent on a balance sheet basis at the relevant time. He noted that he was "simply pointing out that the situation in *XDG* was quite different from this case in which the debtor was undertaking obligations to support the refinancing of the overall business within a few weeks' time and the refinancing occurred": at para. 25.

31 Having found that the necessary intention was not proved, the motion judge held that the remedies under s. 96 of the BIA and s. 2 of the FCA could not apply.

32 As for the oppression claim, the motion judge concluded that, assuming that such a claim could be raised in response to a debt in a CCAA claim process without an oppression claim being separately heard and an appropriate remedy granted, there was no basis on the evidence for an oppression remedy to lie.

33 Finally, the motion judge noted that he had decided the motion based solely on the arm's length relationship and lack of fraudulent intent, and that it was not necessary to deal with a number of other issues raised by the parties orally and in their factums: at para. 30.

34 In dismissing the motion, the motion judge ordered costs of $25,000 to be paid to Speedy by the Monitor on behalf of the debtor, and not in its personal capacity.

ISSUES

35 I would frame the issues on appeal as follows:

1. Did the motion judge err in focussing on the relationship between Speedy and KRI rather than between Edge and Mr. Saskin (as beneficiaries of the secured guarantee) and KRI?

2. Did the motion judge err by failing to consider the record as a whole, including all of the potential badges of fraud, when he refused to find fraudulent intent?

3. Did the motion judge err in misapplying the rule in *Browne v. Dunn*?

4. Did the motion judge err in his award of costs of the motion against the Monitor?

ANALYSIS

(1) Did the motion judge err in focussing on the relationship between Speedy and KRI rather than between Edge and Mr. Saskin (as beneficiaries of the guarantee) and KRI?

36 As noted, the motion judge concluded that KRI and Speedy were acting at arm's length when the secured guarantee was given. As such, s. 96(1)(b) did not apply and the secured guarantee, provided that it was made within one year of the CCAA proceedings, could only be impugned as a transfer at undervalue under s. 96(1)(a) if: (i) KRI was insolvent at the time of the transfer or was rendered insolvent by it, and (ii) KRI intended to defraud, defeat or delay a creditor.

37 The motion judge's conclusion that Speedy and KRI were acting at arm's length in respect of the transaction is a finding of fact under s. 4(4) of the BIA, which is subject to a palpable and overriding error standard of review: *Montor Business Corp. (Trustee of) v. Goldfinger*, 2016 ONCA 406, 58 B.L.R. (5th) 243 (Ont. C.A.), at para. 66, leave to appeal refused, [2016] S.C.C.A. No. 361 (S.C.C.); *Piikani Nation v. Piikani Energy Corp.*, 2013 ABCA 293, 86 Alta. L.R. (5th) 203 (Alta. C.A.), at para. 17. The Monitor does not challenge this finding. Rather, its main argument on appeal is that, in determining whether the parties were acting at arm's length, the motion judge considered only the relationship between Speedy and KRI, instead of the relationship between KRI and the other parties to the DEA, namely Edge and Mr. Saskin. The Monitor says that, because KRI, Edge and Mr. Saskin were related parties, and clearly non-arm's length, the entire DEA was void as against the Monitor, including the secured guarantee that was provided to Speedy as a term of the DEA. According to the Monitor, the motion judge failed to make any finding on this central issue. It is unclear whether any such argument was advanced before the motion judge.

38 The Monitor submits that, in contrast with s. 95 of the BIA, which deals with fraudulent preferences and requires a "transfer" from an insolvent debtor to a "creditor", s. 96 does not explicitly use the word "creditor" and is therefore intended to encompass a broader set of relationships and harm. Edge and Mr. Saskin, in addition to Speedy, benefited from the DEA, and since Edge and KRI are both controlled by Mr. Saskin, these parties are related and presumed not to be operating at arm's length pursuant to the BIA. As such, the "transfer" was between non-arm's length parties, and can be voided without any determination of the debtor's fraudulent intent or insolvency under s. 96(1)(b)(i) since it occurred less than one year before the date of the initial bankruptcy event. The Monitor argues that this interpretation is consistent with the objective of s. 96 which is to provide a remedy for asset-stripping by insolvent debtors.

39 Speedy asserts that the plain wording of s. 96(1)(b) does not support the Monitor's interpretation. For the purpose of this section, in determining whether a non-arm's length relationship existed, such that it is unnecessary to establish fraudulent intent for a transfer within one year of the initial bankruptcy event,[2] the court must consider the parties to the transfer, and not whether other parties to the overall transaction may have benefited.

40 I agree with Speedy. While s. 96 no doubt is a tool to address "asset stripping" by a debtor, as the Monitor contends, a bankruptcy trustee or CCAA monitor that seeks to impugn a transfer under that provision must nevertheless meet the

requirements of the section to establish that the transfer in question is void. The point of departure is to consider the specific words used in this section of the BIA.

41 Section 96 provides for a court order to declare void as against the trustee (in this case the Monitor) a "transfer at undervalue" or to require the "party to the transfer" or "any other person who is privy to the transfer" to pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor.

42 "Transfer at undervalue" is defined in s. 2 of the BIA to mean:

> A disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor. [Emphasis added.]

43 A "transfer" is defined in Black's Law Dictionary, 11th ed. (Saint Paul: Thomson Reuters, 2019) as "any mode of disposing of or parting with an asset or an interest in an asset, including a gift, the payment of money, release, lease, or creation of a lien or other encumbrance". A "transaction", by contrast, is defined as "something performed or carried out, a business agreement or exchange". While the DEA was a *transaction* between KRI, Speedy, Edge and Mr. Saskin, the transaction contemplated a *transfer*, which was the secured guarantee given by KRI to Speedy. The only parties to the transfer, as opposed to the transaction, were KRI and Speedy.

44 The DEA is not the "transfer" — the transfer sought to be impugned by the Monitor is the secured guarantee provided to Speedy. The overall agreement pursuant to which the guarantee and security were provided to Speedy does not make the entirety of the DEA the "transfer" for the purpose of s. 96.

45 I also disagree with the Monitor's argument that, because s. 96 uses the term "party" rather than "creditor", the court is not limited to considering the relationship between KRI and Speedy, but should also consider the relationship between KRI and other "parties" to the DEA (Edge and Mr. Saskin). The reason that s. 96 uses the term "party" rather than "creditor" is that it applies to a broader range of dealings than s. 95, including gratuitous transfers to persons who are not creditors of the debtor.

46 The distinction between a person who is a "party to the transfer" and a "person who is privy to the transfer" underscores that the focus in determining whether the dealing was non-arm's length is on the relationship between the parties to the particular transfer. If the transfer is between non-arm's length parties, then a person who is privy to the transfer (defined under s. 96(3) as "a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person") may be ordered, together with the transferee, to pay the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor. In this case, if the secured guarantee were impeachable (whether because KRI and Speedy as the parties to it were non-arm's length, or because fraudulent intent and insolvency were established), then Edge, as KRI's privy, and beneficiary of the transfer, could be subject to an order for a remedy in favour of KRI. Edge is a privy to KRI, but not a party to the transfer.

47 In argument, the Monitor asserted that the "transfer" here is in fact the transfer by Edge to KRI of Edge's indebtedness to Speedy. If this is the transfer sought to be impugned, then the remedy is properly sought against Edge itself. The non-arm's length relationship between Edge and KRI, as entities under common control, would be relevant if the relief sought by the Monitor were against Edge. To the extent that Edge received value from KRI for no consideration, Edge, as a non-arm's length party, would be liable to account for such value to KRI. The problem, of course, is that Edge is insolvent and also under CCAA protection. However, it would be an unwarranted interpretation of s. 96(1)(b) to void the guarantee KRI provided to Speedy on the basis that KRI and Edge (the beneficiary of the transaction) are related. Indeed, the Monitor has cited no case or commentary to support this interpretation of s. 96(1)(b), which ignores its plain meaning.

48 In conclusion, s. 96 is a remedy to reverse an improvident transfer that strips value from the debtor's estate, where its conditions are met. The interpretation of the section must be considered in relation to the remedy that is sought. The remedy in this case is to prevent Speedy from enforcing its secured guarantee against KRI. While the reason KRI provided the guarantee was to accommodate its related party Edge, this does not transform the transfer sought to be impugned — the secured guarantee

— into a transfer between non-arm's length parties. The focus of the motion judge was properly on the relationship between KRI and Speedy, not between KRI and the beneficiary of the transaction, its related party Edge. As such, I would dismiss this ground of appeal.

(2) Did the motion judge err by failing to consider the record as a whole, including all of the potential badges of fraud, when he refused to find fraudulent intent?

49 The motion judge concluded that the Monitor had failed to prove that KRI held a fraudulent intention when it granted the secured guarantee. He began his analysis by stating that it was the intent of the transferor (i.e., KRI), and not that of the transferee (i.e., Speedy) that was relevant. Noting the difficulty for an applicant to prove a debtor's subjective intention to defeat creditors, the motion judge referred to "badges of fraud" from which the court can infer the existence of the necessary intention. Relying on *Indcondo Building Corp. v. Sloan*, 2014 ONSC 4018, 121 O.R. (3d) 160 (Ont. S.C.J.), aff'd 2015 ONCA 752, 31 C.B.R. (6th) 110 (Ont. C.A.), he explained that, "[i]f the court draws the inference of fraudulent intent due to the existence of badges of fraud, then an evidentiary burden will fall to the respondent to explain its conduct to try to rebut the inference of fraudulent intent. The ultimate persuasive burden remains on the applicant throughout": at para. 22.

50 The Monitor does not take issue with the motion judge's statement of the law; rather it argues that the motion judge erred by failing to consider the record as a whole, including all of the potential badges of fraud, when he concluded that there was no fraudulent intent.

51 I would not give effect to this ground of appeal.

52 "Badges of fraud" can provide an evidentiary shortcut that may help to establish the subjective intention of a transferor both under s. 96 of the BIA and s. 2 of the FCA: see e.g., *Goldfinger*, at para. 72*; Purcaru v. Seliverstova*, 2016 ONCA 610, 39 C.B.R. (6th) 15 (Ont. C.A.), at para. 5. In *Fancy, Re* (1984), 46 O.R. (2d) 153 (Ont. Bktcy.), Anderson J. explained the role of "badges of fraud" in the determination of fraudulent intent under s. 2 of the FCA. He stated at p. 159:

> Whether the [fraudulent] intent exists is a question of fact to be determined from all of the circumstances as they existed at the time of the conveyance. Although the primary burden of proving his case on a reasonable balance of probabilities remains with the plaintiff, the existence of one or more of the traditional "badges of fraud" may give rise to an inference of intent to defraud in the absence of an explanation from the defendant. In such circumstances there is an onus on the defendant to adduce evidence showing an absence of fraudulent intent. Where the impugned transaction was, as here, between close relatives under suspicious circumstances, it is prudent for the court to require that the debtor's evidence on bona fides be corroborated by reliable independent evidence.

53 The burden of proving fraudulent intent is on the party seeking to avoid the transfer. While badges of fraud are indicia of fraudulent intent, their presence does not mandate an inference of fraud to be drawn. The alleged badges of fraud must be considered in the context of the entire record. "Whether the intent exists is a question of fact to be determined from all of the circumstances as they existed at the time of the conveyance": *Goldfinger*, at para. 72.

54 In *Goldfinger*, as in this case, the appellant argued that the trial judge had "failed to identify and to consider the badges of fraud that were present": at para. 50. The court found that the trial judge had assessed the evidence and made findings of fact that supported his reasons for finding an absence of intent. The findings were available on the record: at para. 75.

55 Badges of fraud are non-exhaustive and may or may not be applicable to a given fact situation: see e.g., *FL Receivables Trust 2002-A (Administrator of) v. Cobrand Foods Ltd.*, 2007 ONCA 425, 85 O.R. (3d) 561 (Ont. C.A.), at para. 39; *Indcondo*, at paras. 52-53. Since badges of fraud are an evidentiary shortcut, and the analysis requires taking into account "all of the circumstances as they existed at the time of the conveyance" (*Fancy*, at p. 159), it follows that the failure to identify any particular badge of fraud and to undergo a mechanical analysis does not justify appellate intervention.

56 The Monitor accepts that the failure to consider a particular badge of fraud is not, in itself, a legal error justifying review on a correctness standard. The real issue here is whether the trial judge failed to take into account the entirety of the

fact situation, and made conclusions of fact, or mixed fact and law, that were not supported by the record. In other words, was the motion judge's refusal to find that the transfer from KRI to Speedy was made with fraudulent intent adequately supported by the entirety of the record?

57 The motion judge set out a non-exhaustive list of badges of fraud referred to in the case law, including in *Indcondo*, at para. 52. He stated that "the adequacy of consideration is disputed" and that "[t]he only apparent badge of fraud is that the transaction was made in face of threatened legal proceedings". He noted that that particular "badge of fraud" was barely impactful as it was consistent with a *bona fide* transaction in circumstances such as those before the court. He went on to state:

> Of greater impact, in my view, is the fact that Speedy registered its mortgages on title. It gave notice to the world as one would expect any *bona fide* commercial creditor to do. There is nothing about the facts of this transaction that leads me to infer that it was made with a fraudulent intent rather than to obtain Speedy's cooperation to allow Urbancorp to refinance as intended at the time. [Emphasis added.]

58 The Monitor submits that the motion judge erred by failing to recognize various badges of fraud that were present in this case. It emphasizes that the consideration for the guarantee was nominal, so that the adequacy of the consideration was not in fact "disputed". It also submits that the motion judge ought to have accepted the uncontroverted evidence that KRI was insolvent on a cash flow basis, rather than refusing to make any determination of the issue of KRI's insolvency. Moreover, it argues that, when the motion judge concluded that the lien was registered and therefore not concealed, he overlooked the fact that the secured guarantee was not disclosed in the prospectus for the Israeli bondholders. According to the Monitor, all of these factors were important "badges of fraud" that were ignored by the motion judge.

59 I disagree. First, as already explained, the relevant intent is that of KRI in relation to the transfer with Speedy. While there is no question that the $2 Speedy paid to KRI is a nominal sum, Speedy also gave up its construction lien claim against Edge. Whether this abandonment of the construction lien constituted consideration of value to KRI is disputed. This is what prompted the motion judge's observation that the adequacy of consideration was disputed.

60 Second, with respect to the question of insolvency, the Monitor misinterprets para. 25 of the motion judge's reasons. At para. 25, the motion judge noted that "the solvency of the debtor depends upon whether one looks at the debtor on its own behalf (as Speedy submits) or considers the position of the beneficial owner [Bay LP] as a whole (as the Monitor submits)". He did not resolve that question. Rather, he stated that "even if one looks at the financial position of the broader business of [Bay LP], with all of its various nominees and buildings, the Monitor accepts that the business was solvent on a balance sheet basis at the relevant time". This was not a finding that KRI was, in fact, solvent, but was a factor that distinguished this case from the *XDG* case relied on by the Monitor, where the insolvency of the transferor was readily apparent to the lender. The motion judge stated, "I am simply pointing out that the situation in *XDG* was quite different from this case in which the debtor was undertaking obligations to support the refinancing of the overall business within a few weeks' time and the refinancing occurred": at para. 25.

61 The fact that the motion judge did not determine whether or not KRI was insolvent is confirmed by his later observation, at para. 30 of the reasons, that he decided the motion based solely on the arm's length relationship and lack of fraudulent intent, and that he did not have to deal with the other arguments raised. Since s. 96(1)(a) of the BIA requires both fraudulent intent and insolvency, it was open to the motion judge to decline to make a determination as to whether KRI was insolvent given that he was not satisfied that KRI provided the secured guarantee with the intent to defraud, defeat or delay its creditors.

62 While the Monitor concedes that the motion judge was not required to determine whether KRI was insolvent for the purpose of s. 96 of the BIA, it nonetheless argues that he erred in law in failing to make that determination for the purpose of s. 2 of the FCA. The Monitor submits that there was uncontradicted evidence that KRI was insolvent on a cash-flow basis at the time of the transfer. It relies on *Sun Life Assurance Co. of Canada v. Elliott* (1900), 31 S.C.R. 91 (S.C.C.), to argue that KRI's insolvency is a persuasive if not determinative consideration under the FCA.

63 In *Sunlife Assurance Co.*, a debtor made a gratuitous settlement of all of his property on his family before his death, thus rendering his estate insolvent. The Supreme Court set aside the settlement under the Statute of Elizabeth, 13 Eliz. I, c. 5,

legislation to which the FCA traces its roots: see *Perry, Farley & Onyschuk v. Outerbridge Management Ltd.* (2001), 54 O.R. (3d) 131 (Ont. C.A.), at para. 29. In setting aside the settlement, the Supreme Court stated the principle that "where at any time a person is solvent and then makes a voluntary settlement the effect of which is to make him insolvent, the settlement is void, and that too no matter what the intent of the settlor was": at pp. 94-95.

64 Despite this one broad statement, however, there is no special rule that makes evidence of a debtor's insolvency determinative as opposed to one factor that may be considered. The common issue under s. 2 of the FCA and s. 96 of the BIA is whether the debtor made the conveyance or transfer with the intent to defraud, delay or defeat creditors. A number of the authorities referred to earlier in these reasons relating to the role in the analysis of badges of fraud, including the debtor's insolvency, were in the context of the provincial legislation. Insolvency can be a factor, but is not sufficient or decisive. Instead, the crucial question remains whether the applicant has proved the fraudulent intent of the debtor.

65 Finally, the motion judge was well aware of the Monitor's argument that the secured guarantee was not disclosed to the Israeli bondholders. I agree that concealment of a transfer may be consistent with fraudulent intent. An alleged badge of fraud, however, must be considered in context, and in relation to how it relates to the question of the intention of the debtor at the time of the transfer. Here the motion judge noted that the discharge of the lien and the registration of the mortgages were public. The fact that the secured guarantee, while a matter of public record, was not disclosed in the prospectus in relation to the Israeli funding, may well have been a wrong against the Israeli investors. Indeed, the motion judge explained that the Israeli bondholders (who, with Speedy are the only creditors of KRI in the CCAA proceedings) have their own remedies, which they are pursuing.

66 Ultimately, the issue was whether the Monitor had established that, in giving the secured guarantee, KRI (or arguably Bay LP) intended to defraud, defeat or delay its creditors. The overall context was the impending Israeli bond financing. There was uncontroverted evidence that Speedy's lien had to be discharged in order to facilitate the financing, and that the lawyers for Speedy and the Urbancorp group were seeking alternative security for Speedy's debt. This was accommodated by the secured guarantee and mortgages on KRI's completed units and parking spaces. The bond funding was expected to be available to discharge debts of the Urbancorp group. Instead, the funding was used for other purposes, and ultimately the Urbancorp group defaulted on its obligations to the Israeli bondholders and others. In my view, the motion judge's finding that the Monitor had not established the debtor's fraudulent intent, or that it was anything other than "to obtain Speedy's cooperation to allow Urbancorp to refinance" and "to support the refinancing of the overall business", were available on the record and did not ignore any relevant evidence.

(3) Did the motion judge err in misapplying the rule in* Browne v. Dunn*?

67 This issue will be addressed only briefly, as in my view its determination has no effect on the outcome of the appeal.

68 At the hearing of the motion, the Monitor argued that the construction lien that Speedy agreed to discharge under the DEA was invalid because it was registered out of time. The Monitor relied on a copy of the statutory declaration filed by Speedy which indicated October 22, 2014 as the date of last supply of goods or services. Contrary to s. 31(3) of the *Construction Lien Act*, R.S.O. 1990, c. C.30, as it provided at the relevant time, the lien was registered on September 30, 2015, more than 45 days after the last supply. The lien itself stated that the contract price was $6,159,625, and that services and materials were supplied between August 1, 2012 and August 31, 2015.

69 The statutory declaration was contained in a report of the Israeli Functionary dated February 27, 2018. In its own reports, which were filed with the court as evidence, the Monitor had not questioned the validity of the lien. The Monitor also did not put the statutory declaration to Speedy's witness, Albert Passero, when it cross-examined him on his affidavits, which, among other things, attested to "ongoing work up to the end of August".

70 The motion judge noted that Speedy's witness had testified that the lien was timely, and that he was not confronted with the document on cross-examination to enable him to explain any apparent inconsistency. Absent compliance with the rule in *Browne v. Dunn*, the motion judge was not prepared to make a credibility finding against Speedy.

71 The Monitor says that the motion judge's reliance on *Browne v. Dunn* was in error, that the statutory declaration was conclusive, and that it was beyond question that the lien was out of time.

72 The problem with the Monitor's argument that the motion judge misapplied the rule in *Browne v. Dunn* is its apparent lack of relevance to any issue that continues to be in dispute in this appeal.

73 Before the motion judge, the Monitor argued that the invalidity of the lien called into question Mr. Saskin's *bona fides* which was relevant to whether Speedy and Mr. Saskin were acting at arm's length when the secured guarantee was given. The motion judge's finding that Speedy on the one hand and Mr. Saskin and Edge on the other were at arm's length is not in dispute in this appeal.

74 On appeal, the Monitor makes a different argument. At para. 70 of its factum, the Monitor states:

> But for his error in applying the rule in *Browne v. Dunn*, the Motion Judge should properly have concluded that the Lien was not registered on a timely basis and was accordingly invalid. If the Lien was invalid, then the Secured Guarantee did not provide any value to Edge (because there was no Lien that needed to be discharged and the underlying unsecured debt was not released). The Monitor's principal position, as argued above, is that it does not matter whether Edge received any consideration. KRI was the entity that granted the Secured Guarantee, it was not at arm's length with Mr. Saskin, and it did not receive consideration. However, even if one focusses, as the Motion Judge did on the relationship between Speedy and Edge, the Lien was invalid and therefore there was no consideration to Edge for the Secured Guarantee. This further supports the Monitor's submission, above, that there was no consideration for the Secured Guarantee and it is void as a transfer at undervalue.

75 According to the Monitor, the relevance of the lien being out of time is simply that it would support the Monitor's submission that there was no consideration for the secured guarantee and it is void as a transfer at undervalue. Whether the secured guarantee was or was not a "transfer at undervalue" as defined in s. 2 of the BIA was not the question on which the motion judge's disposition of the motion turned. At para. 30 of his reasons he noted that he decided the motion based solely on the arm's length relationship and lack of fraudulent intent and that it was not necessary to deal with a number of other issues raised by the parties orally and in their factums.

76 I have determined that the motion judge made no error in his factual conclusions that the transfer in question — the secured guarantee — was between arm's length parties, and was for the purpose of obtaining Speedy's cooperation to allow the Urbancorp group to refinance, and not with a fraudulent intent. Whether or not the secured guarantee was a transfer at undervalue is not a question that was definitively answered by the motion judge; nor does it fall to be determined in this appeal.

(4) Did the motion judge err in awarding costs of the motion against the Monitor?

77 The motion judge awarded Speedy $25,000 in costs payable by the Monitor on behalf of KRI, and not in its personal capacity.

78 An award of costs, as an exercise in discretion, is entitled to deference. This court will interfere where the costs award reveals an error in principle or where it is plainly wrong: see *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9, [2004] 1 S.C.R. 303 (S.C.C.), at para. 27. The Monitor says there were two such errors here.

79 First, the Monitor says that it had no alternative but to make an application to the court after Speedy objected to the disallowance of its claim. The Monitor asserts that the motion judge erred in awarding costs in circumstances where he had concluded that it was "reasonable and appropriate" for the matter to be brought to the court. The Monitor asserts that policy considerations should have militated against an award of costs in this case.

80 The motion judge considered the Monitor's request that, as in *XDG*, the court should award no costs. He noted that, while in some ways the facts of the case resembled those in *XDG*, there were important differences that he had already noted

in his reasons. The motion judge rejected the Monitor's argument that there should be no costs unless it was found to have been unreasonable, and he applied the "normative approach that costs follow the event": at para. 33.

81 The Monitor argues that there was an error in principle in this case because the motion judge departed from the general rule that costs should not be awarded against unsuccessful parties in the context of motions in CCAA proceedings. The Monitor relies on the observation of this court in *Indalex Ltd., Re*, 2011 ONCA 578, 81 C.B.R. (5th) 165 (Ont. C.A.), at para. 4, rev'd on other grounds 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), that the "conventional approach" or "usual practice" in CCAA proceedings is to "rarely make costs orders", with the result that "each party bears its own costs". The Monitor also asserts that, given the policy considerations animating CCAA proceedings, it would be unjust to award costs against the Monitor, which is obliged to bring a motion to court when a creditor disputes its disallowance of a claim.

82 We see no reversible error here. We agree with the observation of Newbould J. in *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.*, 2011 ONSC 7465, 88 C.B.R. (5th) 320 (Ont. S.C.J. [Commercial List]), at para. 5, that this court's decision in *Indalex* should not be read as laying down a "general principle that costs should rarely be awarded in CCAA proceedings". There is nothing in *Indalex* that would remove the motion judge's discretion to award costs in this case, and there is nothing unreasonable in his decision that costs of the Monitor's unsuccessful attempt to disallow Speedy's claim (which, if successful, would have benefited KRI's creditors) should follow the event and be borne by the debtor's estate.

83 Second, the Monitor asserts that the quantum of costs awarded by the motion judge, although agreed at the time of the motion, is clearly unreasonable. At the time of the motion, everyone, including the motion judge, believed that the amount in dispute exceeded $2 million. In fact, because Speedy had waived its rights under the secured guarantee in respect of Mr. Saskin's personal debt, the amount in dispute was substantially less. The Monitor submits that this reduction should be reflected in the amount of costs.

84 I disagree. The amount in dispute is only one of a variety of factors that are relevant to the determination of costs. In the circumstances of this case, the quantum of costs reflected the legal work required, which was the same, irrespective of the amount in dispute. There is nothing to suggest that the agreed quantum of $25,000 was other than proportional to the work and reasonable in all the circumstances.

CONCLUSION AND DISPOSITION

85 For these reasons, I would dismiss the appeal. I would award costs of the appeal to Speedy, including the motion for leave to appeal, fixed at the inclusive amount of $15,000, to be paid by the Monitor on behalf of the debtor and not in its personal capacity. No costs are awarded in favour of or against the Israeli Functionary.

***C.W. Hourigan J.A.*:**

I agree.

***Grant Huscroft J.A.*:**

I agree.

Appeal dismissed.

SCHEDULEA — LIST OF NON APPLICANT AFFILIATES

Urbancorp Power Holdings Inc.

Vestaco Homes Inc.

Vestaco Investments Inc.

228 Queen's Quay West Limited

Urbancorp Cumberland 1 LP

Urbancorp Cumberland 1 GP Inc.

Urbancorp Partner (King South) Inc.

Urbancorp (North Side) Inc.

Urbancorp Residential Inc.

Urbancorp Realtyco Inc.

Footnotes

1 The Israeli Functionary did not file a factum in this court, although counsel was present for the argument of the appeal.

2 If the transfer occurred within one year before the date of the initial bankruptcy event, fraudulent intent is not required: BIA, s. 96(1)(b)(i). If the transfer occurred more than one year but less than five years before the date of the initial bankruptcy event, fraudulent intent or insolvency is required: BIA, s. 96(1)(b)(ii).

TAB 15

2016 ONCA 406
Ontario Court of Appeal

Montor Business Corp. (Trustee of) v. Goldfinger

2016 CarswellOnt 8324, 2016 ONCA 406, [2016] W.D.F.L. 3770, 267
A.C.W.S. (3d) 274, 351 O.A.C. 241, 36 C.B.R. (6th) 169, 58 B.L.R. (5th) 243

In the Matter of the Bankruptcy of Summit Glen Waterloo/2000 Developments Inc., of the City of Toronto, in the Province of Ontario

A. Farber & Partners Inc., the Trustee of the Bankruptcy Estate of Montor Business Corporation, Annopol Holdings Limited and Summit Glen Brantford Holdings Inc., Applicant (Appellant/Respondent by way of cross-appeal) and Morris Goldfinger, Goldfinger Jazrawy Diagnostic Services Ltd., Summit Glen Bridge Street Inc., Mahvash Lechcier-Kimel, Annopol Holdings Limited and Summit Glen Brantford Inc., Respondents (Respondents/Appellants by way of cross-appeal)

E.A. Cronk, S.E. Pepall, P. Lauwers JJ.A.

Heard: October 14-15, 2015
Judgment: May 30, 2016 *
Docket: CA C57879

Proceedings: affirming *Montor Business Corp. (Trustee of) v. Goldfinger* (2013), [2013] O.J. No. 4871, 8 C.B.R. (6th) 200, 2013 CarswellOnt 14983, 2013 ONSC 6635, D.M. Brown J. (Ont. S.C.J. [Commercial List]); additional reasons at *Montor Business Corp. (Trustee of) v. Goldfinger* (2014), 2014 CarswellOnt 1169, 9 C.B.R. (6th) 86, 2014 ONSC 756, D.M. Brown J. (Ont. S.C.J. [Commercial List])

Counsel: Patrick Shea, Brent Arnold, for Appellant / Respondent by way of cross-appeal
Maurice J. Neirinck, Michael McQuade, for Respondents / Appellants by way of cross-appeal

***S.E. Pepall J.A.*:**

Introduction

1 A failed relationship between an investor, Dr. Morris Goldfinger, and a real estate developer, Jack Lechcier-Kimel ("Kimel"), and the subsequent bankruptcy of several of Kimel's companies has generated three appeals. The appeals involve claims to funds asserted by A. Farber & Partners Inc. ("Farber"), the Trustee in bankruptcy of five companies: Annopol Holdings Limited ("Annopol"), Summit Glen Brantford Holdings Inc. ("SG Brantford"), Summit Glen Waterloo/2000 Developments Inc. ("SG Waterloo"), Summit Glen Group of Companies Inc. ("SG Group") and Montor Business Corporation ("Montor"). All but Montor were companies owned and controlled by Kimel or his then-spouse, Mahvash Lechcier-Kimel ("Mahvash").

2 In the primary appeal, which is the subject matter of these reasons, Farber, in its capacity as Trustee of Annopol, challenges the trial judge's refusal to set aside transactions arising from a settlement between Goldfinger, Kimel and some of Kimel's companies. In particular, Farber seeks to set aside certain transactions arising from the settlement: (1) payments totalling $2.5 million to Goldfinger from Annopol (the "Payments"); and (2) mortgages granted to Goldfinger by SG Brantford and Summit Glen Bridge Street Inc. ("SG Bridge") over their respective properties, and Annopol's subordination of mortgage security in favour of Goldfinger (the "Brantford/Bridge 2008 Transactions").

3 The trial judge rejected Farber's assertions that the transactions were:

- transfers at undervalue under s. 96 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*");

- unjust preferences under s. 4 of the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33 (the "*APA*");
- fraudulent conveyances under s. 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 (the "*FCA*");
- oppressive under s. 248 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 (the "*OBCA*"); and
- an unjust enrichment.

4 Goldfinger cross-appeals on the basis that the trial judge erred in setting aside a $471,000 payment in his favour from SG Brantford. The trial judge found that the payment was contrary to s. 2 of the *FCA* and oppressive under s. 248 of the *OBCA*.

5 In the remaining two appeals, both Farber and Goldfinger or his company, 1830994 Ontario Ltd., take issue with the treatment of certain claims asserted in the various bankruptcy proceedings. These appeals are addressed in separate sets of reasons released contemporaneously with these reasons, bearing court file numbers C57898 and C58356.

6 For the reasons that follow, I would dismiss this appeal and Goldfinger's cross-appeal.

Background Facts

A. The Parties' Relationship

7 Kimel was a real estate developer. He incorporated numerous companies for that purpose. He attracted investors to lend to and invest in his companies. Those companies would then lend money to other Kimel companies that would in turn acquire real estate. The investor loans were to be repaid from the proceeds generated from selling the real estate. The investors would also receive a portion of the profit generated from the sales.

8 Goldfinger was not a real estate developer; he was a radiologist. He was also a good friend of Kimel. He decided to lend and invest money into some of Kimel's companies. From February 1999 to December 2005, Goldfinger lent approximately $6.5 million to Kimel's companies, $2,956,000 of which he claimed was advanced to Annopol. Annopol's affairs were directed by Kimel. Annopol then lent these funds to other Kimel companies for the purpose of acquiring properties in the Kitchener/Waterloo and Brantford areas.

9 The terms of the arrangements with Goldfinger were not reduced to writing. Goldfinger described the funds advanced as "interest-free loans" and claimed that he was engaged in a "joint venture" with Kimel.

10 In 2007, the relationship between Goldfinger and Kimel broke down. Goldfinger discovered that Kimel had misled him and that many of the properties that had been acquired were encumbered by mortgages of which he was unaware. He sought explanations and the return of his money, but Kimel stalled. Goldfinger retained counsel who, in letters dated November 12 and 13, 2007, threatened litigation. Goldfinger prepared a draft affidavit in support of a request for a court-appointed receiver over some of Kimel's companies, including Annopol. In that affidavit, he asserted that he had repeatedly requested an accounting from Kimel without success and had concluded that Kimel had not been dealing in good faith. Kimel also retained counsel.

B. The First Settlement

11 The parties commenced settlement negotiations and negotiated the dissolution of their business relationship (the "First Settlement"). Goldfinger and Kimel reached a resolution independently and arrived at an amount to be paid to Goldfinger, but the overall structure and details of the settlement were negotiated with the assistance of counsel. The parties agreed that Goldfinger would withdraw from the various projects and would be repaid his shareholder loans of $6.5 million, plus an additional $5 million in return for his shares in the various companies. At the time, this latter sum was thought to represent his equity in the properties.

12 As agreed, between December 2007 and January 2008, Annopol paid $2.5 million to Goldfinger. The Payments were broken down as follows. On December 5, 2007, Annopol transferred $1.5 million to Goldfinger. Annopol also issued four

cheques in his favour dated December 12 and 28, 2007 in the amount of $300,000 each and December 21, 2007 and January 10, 2008 in the amount of $200,000 each, for a total of $1 million. Each cheque bore the notation "re-purchase shares". Annopol relied on transfers of funds from other Summit Glen entities to cover the amounts paid to Goldfinger.

13 The settlement was memorialized in a Memorandum of Agreement (the "Memorandum") dated December 11, 2007 but signed on May 20, 2008 and amended on June 6, 2008. The terms of the Memorandum originated around the time that the aforesaid payments were made. Goldfinger testified that the Payments of $2.5 million were consideration in contemplation of the settlement. Kimel also stated that the Payments were made in anticipation of the settlement.

14 The parties to the Memorandum were: Goldfinger, Kimel, Mahvash, Annopol, and enumerated Summit Glen companies including SG Brantford and SG Bridge (collectively, the "Summit Glen Companies").

15 The Memorandum provided that:

- Notwithstanding that shares of the Summit Glen Companies had not been formally issued, Goldfinger was, and for all purposes deemed to be, the legal and beneficial owner of 50% of the share capital of each of the Summit Glen Companies.

- The Summit Glen Companies acknowledged the $6.5 million debt to Goldfinger which, in aggregate, was allocated to each of them in separate amounts. The advances were described as shareholder loans.

- The Memorandum accurately recorded the parties' understanding of the discussions that had taken place.

- Each of the Summit Glen Companies was to deliver an interest-free promissory note for its share of the $6.5 million to Goldfinger, one-half payable on December 11, 2008 and the other half payable on December 11, 2009.

- Kimel and each of the Summit Glen Companies were to guarantee the payment of $6.5 million.

- The Summit Glen Companies were to provide $6.5 million in collateral mortgages to Goldfinger. These included mortgages on 176 Henry St., Brantford, which was owned by SG Brantford, and on 70 Bridge St. W., Kitchener, which was owned by SG Bridge.

- Kimel would purchase Goldfinger's shares for $5 million. The parties agreed that the $2.5 million already paid represented a partial payment of the purchase price. The remainder was to be paid by a $1.5 million secured promissory note and a $1 million unsecured promissory note.

- Each of the Summit Glen Companies, including SG Brantford and SG Bridge, was to guarantee payment to Goldfinger of these secured and unsecured promissory notes and was to give collateral third mortgages as security for the guarantees. SG Brantford granted a third mortgage over 176 Henry St. in Brantford and SG Bridge granted a third mortgage over 70 Bridge St. W. in Kitchener to secure the sum of $1.5 million.

- Annopol, Kimel and Mahvash postponed all of their claims against the Summit Glen Companies, including SG Brantford and SG Bridge, in favour of Goldfinger.

- Annopol also postponed its mortgages, including those over 176 Henry St. and 70 Bridge St. W., in favour of Goldfinger (the "Annopol Subordinations").

- Kimel and the Summit Glen Companies provided Goldfinger with an indemnity and they, together with Mahvash and Annopol, also provided him with a release.

16 Lawyers acted for the parties on the settlement, but Goldfinger's lawyers testified that Kimel and Goldfinger had agreed on the $2.5 million figure prior to approaching them.

17 The settlement "was designed in such a way as to repay to Goldfinger the amounts already lent to the SG Companies and to enable Goldfinger to extract an amount representing his notional equity or profit in the various real estate developments": reasons, at para. 213.

18 The Memorandum transactions closed in June 2008 and Goldfinger received the promissory notes, guarantees, postponements and mortgages due to him pursuant to the terms of the Memorandum.

C. The Brantford/Bridge 2008 Transactions

19 Prior to the closing, the 176 Henry St. property owned by SG Brantford was subject to: a first mortgage of $2.85 million in favour of First National Financial Corporation ("First National"); a second mortgage of $450,000 in favour of Montor; and a third mortgage of $750,000 in favour of Annopol. Montor was owned by Jack Perelmuter, an accountant who had provided accounting services to Kimel's companies.

20 As a result of the settlement, SG Brantford provided Goldfinger with two mortgages over 176 Henry St. and Annopol agreed to postpone its third mortgage in favour of Goldfinger's two mortgages. As such, Goldfinger's mortgages were in third and fourth position on the property and Annopol's mortgage was in fifth place.

21 The 70 Bridge Street property owned by SG Bridge was subject to a mortgage in favour of Annopol. As a result of the settlement, SG Bridge provided Goldfinger with two mortgages over 70 Bridge Street and Annopol postponed its mortgage in favour of Goldfinger's two mortgages.

D. Events Surrounding the Bankruptcies

22 By July 2008, Goldfinger alleged that Kimel had breached the terms of the Memorandum and he proceeded to serve demand notices on some of Kimel's companies.

23 Meanwhile, the global credit market crisis was brewing, with matters coming to a head with Lehman Brothers' Chapter 11 filing in mid-September 2008.

24 In November 2008, the 176 Henry St. property had to be refinanced, as the first mortgage in favour of First National was due. It was renegotiated and the principal sum secured was increased. As part of the transaction, Kimel signed an agreement on behalf of Montor to subordinate its second mortgage so that the principal amount of the first mortgage could be increased. SG Brantford then paid $471,000 to Goldfinger, and his third and fourth mortgages were discharged. This payment to Goldfinger was made in the absence of any payment to Montor.

25 On December 1, 2008, Goldfinger obtained an order appointing Zeifman & Partners Inc. as receiver of a number of Kimel's companies to which Goldfinger had made loans, including SG Waterloo, but not including Annopol. Following this, some other Kimel companies defaulted on loans.

26 Perelmuter assigned his company, Montor, into bankruptcy on February 6, 2009. Farber was subsequently appointed Montor's Trustee in bankruptcy.

27 Annopol and SG Brantford were each adjudged bankrupt on May 27, 2010, the initial bankruptcy event having occurred on May 26, 2009, in the case of Annopol, and on April 30, 2009 in the case of SG Brantford. Farber was appointed Trustee in bankruptcy of both companies, as well as of SG Group and SG Waterloo. SG Waterloo was adjudged bankrupt on June 28, 2010, the date of its initial bankruptcy event being April 3, 2009.

E. The Litigation

28 As mentioned, Farber, in its capacity as Trustee in bankruptcy of Annopol, challenged the $2.5 million Payments from Annopol to Goldfinger. It argued that the Payments were: (1) transfers at undervalue contrary to s. 96 of the *BIA*; (2) unjust

preferences under s. 4 of the *APA*; (3) fraudulent conveyances under s. 2 of the *FCA*; (4) oppressive under s. 248 of the *OBCA*; and (5) an unjust enrichment.

29 The trial judge heard the proceedings in a hybrid trial conducted over the course of eight days. He heard *viva voce* evidence and also reviewed extensive documentary records, including several transcripts of out-of-court cross-examinations.

30 The trial judge dismissed all of Farber's challenges to the Payments. Farber now appeals from that judgment, arguing that the trial judge erred in upholding the Payments on each of the grounds set out above.

31 Also relying on the same statutory provisions, before the trial judge Farber challenged the Brantford/Bridge 2008 Transactions (the mortgages granted by SG Brantford and SG Bridge to Goldfinger and the Annopol Subordinations) and the $471,000 paid to Goldfinger. The trial judge dismissed Farber's claims with the exception of the $471,000 payment to Goldfinger, which he found to be contrary to s. 2 of the *FCA* and s. 248 of the *OBCA*. On appeal, Farber submits that the trial judge erred in failing to set aside the Brantford/Bridge 2008 Transactions under the *OBCA*.

32 Goldfinger cross-appeals from the trial judge's decision ordering him to repay Farber the $471,000.

Appeal Relating to the Payments

A. Are the Payments Transfers at Undervalue under the BIA?

(i) Introduction

33 Dealing first with the *BIA* claim, Farber challenged the Payments as transfers at undervalue contrary to s. 96 of the *BIA*. In order to succeed on this ground, Farber was required to establish that:

(a) the Payments were transfers at undervalue;

(b) the transfer occurred:

(i) within one year before the initial bankruptcy event (May 26, 2009), if Goldfinger was at arm's length with the debtor, Annopol; or

(ii) within five years before the initial bankruptcy event (May 26, 2009), if Goldfinger was not at arm's length with the debtor, Annopol; and

(c) the debtor, Annopol, was insolvent at the time of the Payments or was rendered insolvent by the Payments; and

(d) the debtor, Annopol, intended to defraud, defeat or delay a creditor.

34 As I will discuss, undervalue means either that no consideration has been received by the debtor or that the consideration received is conspicuously less than the fair market value of the consideration given by the debtor: *BIA* s. 2. Section 96 is reproduced in Schedule "A" attached to these reasons.

(ii) Trial Judge's Decision on s. 96 of the BIA

35 Before the trial judge, Farber argued that it had established all of the s. 96 requirements and therefore was entitled to an order that the Payments were transfers at undervalue.

36 The trial judge rejected this argument. He found that the transfers were not at undervalue because consideration was given to Annopol by Goldfinger.

37 The trial judge explained that forbearance from suit, either actual or promised, can constitute good consideration. He found that Goldfinger had lent $6.5 million to Kimel's companies and could bring proceedings for that amount. Moreover, formal

demand had been made on Kimel and in November 2007, Goldfinger had his counsel prepare an affidavit for him to swear in an action he was contemplating against Kimel, Annopol and the Summit Glen Companies, for the appointment of a receiver over a number of their properties. Instead, Goldfinger settled and did not proceed with his threatened litigation.

38 The trial judge held that the terms of the settlement reflected a compromise of Goldfinger's claims to recover his investment of $6.5 million. Goldfinger deposed that: (1) but for the prior payment of $2.5 million, he would not have entered into the settlement and would have proceeded with the litigation against Kimel and his various companies; and (2) over the course of his dealings, $2.956 million of his money had been deposited into Annopol. Goldfinger's forbearance from suit was not consideration that was conspicuously less than the fair market value of the Payments and there were no transfers at undervalue. This was the ratio of the trial judge's decision on s. 96 of the *BIA*.

39 Nonetheless, he proceeded to consider the other elements Farber was required to establish under s. 96 of the *BIA*.

40 The trial judge concluded that at the time of the Payments (December 2007 and January 2008), Annopol was insolvent using a balance sheet test.

41 The trial judge also addressed the nature of the relationship between Goldfinger and Annopol and considered whether they were at arm's length. Although the Memorandum deemed Goldfinger to be a shareholder, the trial judge found that Goldfinger was not a registered shareholder of Annopol. He found that this deal structure was simply a technical device that was probably tax-driven. Goldfinger never exercised any control over the affairs of Annopol, or any of Kimel's other companies. As a result, Goldfinger and Annopol were not related persons within the meaning of ss. 4(2) and (3) of the *BIA*.

42 In addition, he addressed s. 4(4) of the *BIA*, which provides that "[i]t is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length." He concluded that they were acting at arm's length.

43 Although the trial judge accepted that Goldfinger and Kimel had been close friends, he acknowledged that one had to examine the nature of their relationship at the time the Payments were made. Goldfinger had not been involved in the operation of Kimel's companies and had quite limited information about their affairs. In 2007, Goldfinger discovered that he had been misled. He sought explanations, but Kimel stalled. Although Goldfinger and Kimel arrived at the amount of $2.5 million together, the overall structure and details of the settlement were negotiated with the assistance of counsel. The trial judge determined that the facts did not disclose bonds of "dependence, control or influence", which are generally necessary in order to find that two parties are not acting at arm's length.

44 Given that the parties were found to be at arm's length, to succeed under s. 96 of the *BIA*, Farber had to show that the Payments were made within one year prior to the initial bankruptcy event. Annopol's initial bankruptcy event was May 26, 2009 and therefore, the one-year statutory review period commenced on May 26, 2008. The Payments, having occurred between December 5, 2007 to January 10, 2008, were outside the one-year statutory review period reflected in s. 96(1)(a) of the *BIA*. Accordingly, the trial judge concluded that the Payments were not reviewable under s. 96.

45 Lastly, the trial judge considered whether, by making the Payments, Annopol intended to defraud, defeat or delay a creditor. He accepted Farber's submission that Annopol's intention should be determined by reference to the intention of Kimel, who directed Annopol's affairs.

46 The trial judge recognized that an inference of intent may arise from suspicious facts or circumstances, sometimes referred to as "badges of fraud". He found that when making the Payments, Kimel and Goldfinger did not intend to defraud, defeat or delay any of Annopol's creditors. In making that finding, he relied on the following facts:

- the terms of the Memorandum, which originated around the time the Payments were made, indicated that the parties thought the Summit Glen Companies would continue as going concerns and that the properties would generate sufficient value to repay the remaining amount owing to Goldfinger by December 11, 2009;

• the parties to the Memorandum also believed that the properties owned by the Summit Glen Companies had significant future value;

• the Memorandum was not put together in a rush, but was negotiated over six months and both parties were represented by counsel;

• the parties were at arm's length;

• the two lawyers' evidence on the parties' thought processes at the time suggested a genuine belief in the sufficient value of the subject properties;

• consideration was given;

• the Payments and the Memorandum were not put in place in the face of claims by Annopol's judgment creditors; and

• this was all done prior to the collapse of the credit markets, which occurred months after the execution of the Memorandum.

(iii) Farber's s. 96 Submissions on Appeal

47 On appeal, Farber advances three arguments with respect to the trial judge's treatment of the s. 96 *BIA* claim.

48 First, in concluding that the Payments were not transfers at undervalue, Farber submits that the trial judge erred in deciding that Goldfinger provided valuable consideration. Compromising his potential legal claim did not amount to sufficient consideration, as s. 96 requires that the consideration be given at the same time as the transfer and the compromise only occurred at the time of the Memorandum. Furthermore, Annopol did not receive anything in exchange for the Payments; the Memorandum lists the $2.5 million as payment for a debt owing by Kimel. Farber also submits that the trial judge erred in failing to examine the sufficiency of the consideration provided — there was no documentary evidence of any forbearance or settlement with Annopol at the time of the Payments.

49 Second, Farber submits that the trial judge erred in finding that the parties were acting at arm's length. Although he identified the correct test, he failed to apply it. Specifically, he failed to consider the parties' relationship at the time of the Payments and that the Payments were the opposite of what one would expect from arm's-length parties. The trial judge also failed to consider that Goldfinger refused to produce his e-mail exchanges with Kimel from the time of the Payments and failed to consider Goldfinger's evidence that he used his relationship with Kimel to obtain the Payments.

50 Third, Farber argues that the trial judge erred in his analysis of Annopol's intention to defraud, defeat or delay a creditor. Again, Farber states that the trial judge focused on the evidence relating to the Memorandum rather than the Payments themselves and also failed to identify and consider the badges of fraud that were present. In addition, Annopol had a subjective intent to defraud its creditors, HSBC and a third-party investor, Srubiski, and its actions were deliberate. It had borrowed money from those creditors on the basis that the funds would be invested in real estate; instead, Annopol gave the money to Goldfinger. The effect of the Payments was to defraud and defeat its creditors.

(iv) Analysis

(1) Transfers at Undervalue

51 Section 2 of the *BIA* defines a "transfer at undervalue" as follows:

> [A] disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor.

52 In the absence of evidence to the contrary, Farber's opinion on both the fair market value of the property or services and the value of the actual consideration given or received by the debtor are to be accepted by the court: see s. 96(2) of the *BIA*.

53 Weighing the adequacy of consideration is not an exercise in precision but one of judgment. Nominal or grossly inadequate consideration is insufficient and may be an indication or badge of fraud: see *Feher v. Healey*, [2006] O.J. No. 3450 (Ont. S.C.J.) at para. 45, aff'd 2008 ONCA 191 (Ont. C.A.).

54 Forbearance from suit and a settlement agreement may constitute adequate consideration: see *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 (S.C.C.), at p. 743; *Stott v. Merit Investment Corp.* (1988), 63 O.R. (2d) 545 (Ont. C.A.), at pp. 558-60, leave to appeal dismissed, [1988] S.C.C.A. No. 185 (S.C.C.).

55 Here, formal demand had been made on Kimel and in November 2007 Goldfinger had his counsel prepare an affidavit for him to swear in an action he was contemplating against Kimel, several of the Summit Glen Companies and Annopol. Rather than proceeding with the litigation, Goldfinger negotiated a resolution to the parties' dispute. He abandoned his pursuit of the legal action against Kimel and his companies, including Annopol. But for the $2.5 million payment, he would have commenced and continued with his litigation.

56 The evidence supports the finding that Goldfinger was genuinely threatening legal action. In particular, the record contains Goldfinger's draft affidavit and, as well, his lawyer prepared a memorandum referring to the proposed settlement and that as a result, "Jack [Kimel] staves off receivership". In addition, Annopol was to be a beneficiary of a release under the settlement. The trial judge did not err in concluding that Goldfinger's forbearance constituted consideration.

57 One must then consider whether the consideration given by Goldfinger was adequate, or, to use the language of s. 2 of the *BIA*, was "conspicuously less than the fair market value" of the consideration given by Annopol.

58 Of the $6.5 million invested by Goldfinger, $2.956 million had been paid to Annopol. Based on the record before him, it was open to the trial judge to conclude that a payment of $2.5 million in return for a compromise of Goldfinger's remaining rights was adequate consideration. At a minimum, Goldfinger paid Annopol and Kimel $2.9 million. Given the potentially ruinous consequences of a lawsuit, the trial judge did not err in concluding that the Payments did not constitute a transfer at undervalue.

59 Farber also asserts that s. 96 requires that consideration be given at the same time as the transfer and, in this case, the compromise only occurred at the time of the Memorandum.

60 Section 96 does not address timing and Farber provided no authority for this proposition. However, assuming without deciding that Farber's proposition is correct, the trial judge found at para. 274 of his reasons that the terms of the settlement originated around the time the $2.5 million was paid. This finding of fact is also relevant to the trial judge's determination that the Payments were not motivated by a desire to defraud, defeat or delay a creditor.

61 This finding was also available on the record. Goldfinger testified that he and Kimel came up with the terms of the settlement themselves and only then approached the lawyers to structure and paper the agreement. In one of his affidavits, he stated that the parties had reached an agreement in November 2007, before the first payment was made. The evidence of Goldfinger's two lawyers lends credence to Goldfinger's version of events.

62 In addition, one of the lawyers, Carl Schwebel, prepared a memo dated November 28, 2007 that recorded discussions with Goldfinger, Kimel and members of Schwebel's firm at a meeting that same day. Although not identical to the terms of the Memorandum, the memo recorded the terms of the settlement negotiated by Goldfinger and Kimel, including the payment of $2.5 million.

63 In light of this evidence, I would not give effect to Farber's submission that the trial judge erred in his transfer at undervalue analysis.

(2) Acting at Arm's Length

64 Given my conclusion on the transfer at undervalue issue, it is not strictly necessary to address Farber's other arguments about s. 96 of the *BIA*. I will do so because my conclusions on the balance of the s. 96 factors inform my conclusions on Farber's other grounds of appeal attacking the validity of the Payments.

65 On the issue of whether the parties were at arm's length, Farber does not challenge the trial judge's description of the applicable test or his finding that Goldfinger and Annopol were unrelated. Rather, it challenges his application of the test and his conclusion that Goldfinger and Annopol were acting at arm's length.

66 Section 4(4) of the *BIA* states: "It is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length." As a result, absent a palpable and overriding error, the trial judge's finding on this issue is entitled to deference.

67 The trial judge considered the *dicta* in *Abou-Rached, Re*, 2002 BCSC 1022, 35 C.B.R. (4th) 165 (B.C. S.C.), at para. 46:

> [A] transaction at arm's length could be considered to be a transaction between persons between whom there are no bonds of dependence, control or influence, in the sense that neither of the two co-contracting parties has available any moral or psychological leverage sufficient to diminish or possibly influence the free decision-making of the other. Inversely, the transaction is not at arm's length where one of the co-contracting parties is in a situation where he may exercise a control, influence or moral pressure on the free will of the other. Where one of the co-contracting parties is, by reasons of his influence or superiority, in a position to pervert the ordinary rule of supply and demand and force the other to transact for a consideration which is substantially different than adequate, normal or fair market value, the transaction in question is not at arm's length.

68 He also considered *Piikani Nation v. Piikani Energy Corp.*, 2013 ABCA 293, 556 A.R. 200 (Alta. C.A.), which identified factors that provide guidance on non-arm's length analysis in the context of *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) jurisprudence. These factors, enumerated at para. 29 of *Piikani*, are: was there a common mind which directed the bargaining for both parties to a transaction; were the parties to the transaction acting in concert without separate interests; and was there *de facto* control?

69 There was no common mind directing Goldfinger and Annopol or indeed, Kimel. They were adverse in interest and on the verge of litigation. The evidence also fails to suggest that they were acting in concert. As discussed, the trial judge did not fail to consider the parties' relationship at the time of the Payments. Nor did Goldfinger or Annopol exercise *de facto* control over the other.

70 Goldfinger was never involved in the operation of the companies, had little information about their operation or finances, discovered Kimel had misled him and then threatened to sue. As mentioned, although Goldfinger and Kimel decided on the amount Goldfinger would be paid, the overall structure and details of the settlement were negotiated with the assistance of counsel.

71 Farber argues that the Payments were the opposite of what one would expect from arm's length parties and that the trial judge erred in declining to draw certain inferences from the evidence. However, the trial judge is the fact finder, not this court, and he was not required to recite every piece of evidence in his 372 paragraphs of reasons. Moreover, there was a dearth of evidence suggesting that the parties were not at arm's length and the trial judge did not err in finding to the contrary. I would reject this argument.

(3) Intention to Defraud, Defeat or Delay a Creditor

72 The burden was on Farber to establish the requisite intent under s. 96 of the *BIA*. An inference of intent may arise from the existence of one or more badges of fraud. However, the presence of such indicia does not mandate a finding of intent. Whether the intent exists is a question of fact to be determined from all of the circumstances as they existed at the time of the conveyance: see *Fancy, Re* (1984), 46 O.R. (2d) 153 (Ont. Bktcy.), at p. 159.

73 Case law has identified the following, non-exhaustive list of "badges of fraud" (see *DBDC Spadina Ltd. v. Walton*, 2014 ONSC 3052 (Ont. S.C.J. [Commercial List]), at para. 67; *Indcondo Building Corp. v. Sloan*, 2014 ONSC 4018, 121 O.R. (3d) 160 (Ont. S.C.J.), aff'd 2015 ONCA 752, 31 C.B.R. (6th) 110 (Ont. C.A.), at para. 52):

- the transferor has few remaining assets after the transfer;
- the transfer was made to a non-arm's length person;
- the transferor was facing actual or potential liabilities, was insolvent, or about to enter a risky undertaking;
- the consideration for the transaction was grossly inadequate;
- the transferor remained in possession of the property for his own use after the transfer;
- the deed of transfer contained a self-serving and unusual provision;
- the transfer was secret;
- the transfer was effected with unusual haste; or
- the transaction was made in the face of an outstanding judgment against the debtor.

74 As stated, Farber complains that the trial judge failed to consider the presence of badges of fraud, focused on the evidence relating to the Memorandum rather than the Payments themselves, and ignored Annopol's intent to defraud its creditors.

75 The trial judge found that the terms of the settlement originated around the time that the $2.5 million was paid. Furthermore, the evidence suggested that the parties expected the Summit Glen Companies and Annopol to continue as going concerns. As is evident from paras. 260 and following of his reasons, the trial judge did consider the issue of badges of fraud, but ultimately concluded that there was no intent. Indeed, his findings undermine Farber's assertions that badges of fraud were present. He assessed the evidence and made findings of fact that supported his reasons for finding an absence of intent. Those findings were available on the record. I see no basis to interfere with them.

76 As for Farber's submissions relating to Annopol's alleged subjective intent to defraud its creditors, HSBC and Srubiski, the evidence did not support such a finding of intent. Neither the Payments nor the settlement were effected in the face of claims by Annopol's judgment creditors. No evidence was tendered from any creditor and there was no evidence that established that Annopol paid creditor funds to Goldfinger.

77 In conclusion, I would reject Farber's submissions on s. 96 of the *BIA*.

B. Are the Payments Unjust Preferences under the APA?

(i) Introduction

78 At the trial, Farber also argued that the Payments were void as unjust preferences pursuant to s. 4 of the *APA*. To be successful, Farber needed to establish that:

(a) Annopol was insolvent at the time of the Payments;

(b) Annopol intended to defeat, hinder, delay or prejudice a creditor; and

(c) Goldfinger was not a creditor of Annopol within the meaning of s. 5(1) of the *APA*.

79 Sections 4 and 5 of the *APA* are reproduced in Schedule "A" attached to these reasons.

(ii) Trial Judge's Decision on the APA

80 The trial judge did not accept Farber's *APA* argument. He found that the first and third requirements under the *APA* were satisfied — Annopol was insolvent, and Goldfinger was not a creditor of Annopol within the meaning of s. 5(1) of the *APA*. However, the trial judge relied on his earlier analysis under s. 96 of the *BIA* to conclude that the second requirement was not met: Annopol did not have the requisite intent to defeat, hinder, delay or prejudice a creditor.

(iii) Parties' APA Submissions on Appeal

81 On appeal, Farber reiterates its position on intent. In response, Goldfinger takes issue with the trial judge's finding that he was not a creditor within the meaning of s. 5(1).

(iv) Analysis

82 I have already addressed the issue of intent under s. 96 of the *BIA* and that analysis is equally applicable to the requirement of intent under the *APA*. For these reasons, I would dismiss Farber's *APA* ground of appeal. Given that conclusion, there is no need to address Goldfinger's submission on his status.

C. Are the Payments void under the FCA?

(i) Introduction

83 Before the trial judge, Farber submitted that the Payments were also contrary to s. 2 of the *FCA*. To succeed, Farber had to demonstrate that:

> (a) Annopol made the Payments with an intent to defeat, hinder, delay or defraud creditors or others; and
>
> (b) Goldfinger did not provide good consideration in exchange for the Payments; or
>
> (c) if Goldfinger did provide good consideration, he had notice or knowledge of Annopol's intent to defeat, hinder, delay or defraud creditors or others.

84 Sections 2 and 3 of the *FCA* are reproduced in Schedule "A".

(ii) Trial Judge's Decision on the FCA

85 The trial judge confined his *FCA* analysis to an examination of intent. He concluded that the evidence concerning intent under the other statutes applied equally to Farber's claim under the *FCA*. Consequently, he dismissed the *FCA* claim.

(iii) Farber's Submissions on Appeal

86 On appeal, Farber submits that the trial judge erred in failing to consider the factual matrix surrounding the Payments; the evidence relating to Annopol's actual or imputed intent; and that Goldfinger was wilfully blind.

(iv) Analysis

87 I have already addressed the issue of intent, which is equally fatal to this ground of appeal. There is therefore no need to address the issue of Goldfinger's knowledge. The trial judge was correct in dismissing Farber's claim under the *FCA*.

D. Oppression Claim

(i) Introduction

88 Before the trial judge, Farber submitted that the Payments were oppressive within the meaning of s. 248 of the *OBCA*. To succeed, Farber had to establish that:

(a) it was a "complainant" within the meaning of s. 245 of the *OBCA*; and

(b) the Payments were oppressive, unfairly prejudicial or unfairly disregarded the interests of Annopol's creditors.

Section 248 of the *OBCA* is reproduced in Schedule "A".

(ii) Trial Judge's Decision on Oppression

89 The trial judge proceeded with his analysis of the oppression claim on the basis that Farber, as Trustee in bankruptcy of Annopol, had status as a complainant under s. 245 of the *OBCA*. In that regard, he noted that in *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2003), 68 O.R. (3d) 544 (Ont. C.A.), at para. 46, this court held that where it was likely the creditors of a bankrupt would have been recognized as complainants for the purpose of challenging a transaction under s. 248 of the *OBCA*, it was proper to recognize the Trustee of the bankrupt as a complainant "in effect on behalf of the creditors" of the bankrupt.

90 The trial judge accepted that creditors of a corporation have a reasonable expectation that the corporation will not engage in conduct that runs afoul of provincial preference legislation or the preference/transfer for undervalue provisions of the *BIA*. However, the trial judge had already found that the Payments by Annopol to Goldfinger did not run afoul of the *BIA*, the *APA* or the *FCA*, and he therefore relied on the same findings to conclude that the Payments did not violate the reasonable expectations of Annopol's creditors.

91 Farber also argued that Goldfinger was a shareholder of Annopol at the time of the Payments and the $2.5 million represented the repurchase of shares or the payment of a dividend. However, the trial judge rejected this contention. Rather, in substance, Goldfinger received the re-payment of $2.5 million of the funds he had loaned to Kimel and his companies, together with some additional security. He wrote, at para. 300 of his reasons: "The business substance of the December, 2007 and January, 2008 payments was that Goldfinger received back some of the principal he had invested; there was no profit or equity yet available for distribution." For these reasons, he rejected Farber's oppression claim.

(iii) Parties' Oppression Submissions on Appeal

92 Goldfinger submits that while the court has discretion to recognize a Trustee in bankruptcy as a complainant under the *OBCA*, the exercise of that discretion was unjustified in this case. Furthermore, Farber put forward no evidence on the reasonable expectations of the creditors on whose behalf it purported to act. Goldfinger submits that the trial judge erred in recognizing Farber as a complainant.

93 For its part, Farber asserts that Goldfinger is raising the issue of Farber's status as a complainant for the first time on this appeal. The decision was within the trial judge's discretion and there is no basis on which this court should interfere.

94 On the issue of oppression, Farber reiterates that the Payments were unlawful preferences. In addition, Farber submits that Annopol's creditors expected that its funds would be used for real estate development. The Payments to Goldfinger resulted in unfair prejudice, as Annopol's creditors will likely recover nothing from its bankrupt estate. Annopol and Kimel acted with unfair disregard for Annopol's creditors' interests. As a result, Farber submits that Goldfinger should be ordered to repay the $2.5 million to Annopol's bankrupt estate.

(iv) Analysis

95 Dealing first with the issue of Farber's status as a complainant, s. 245 of the *OBCA* defines "complainant" for the purposes of the oppression remedy as follows:

(a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(b) a director or an officer or a former director or officer of a corporation or of any of its affiliates,

(c) any other person who, in the discretion of the court, is a proper person to make an application under this Part.

96 Farber relied on subsection (c) in support of its position that it should be given standing as a complainant. In *Olympia & York Developments Ltd.*, at para. 45, this court held that Trustees in bankruptcy are neither automatically barred nor automatically entitled to standing, but it is a matter of discretion in each case whether to grant standing.

97 I do not read the trial judge's reasons as having conclusively held that Farber was a proper person to be a complainant under s. 245. Rather, given his other findings, the trial judge simply proceeded on the assumption that Farber, in its capacity as Trustee in bankruptcy of Annopol, was a complainant. In light of his conclusion on the merits of the oppression claim, and my concurrence with it, I see no need to interfere with his approach. I would also observe that Goldfinger objected to Farber's status to assert a claim for oppression for the first time on this appeal.

98 Turning to the merits of the oppression ground of appeal, this court has recognized that the oppression remedy contained in s. 248 of the *OBCA* is a "flexible, equitable remedy that affords the court broad powers to rectify corporate malfeasance": see *Unique Broadband Systems Inc., Re*, 2014 ONCA 538, 121 O.R. (3d) 81 (Ont. C.A.), at para. 107. The granting of an oppression remedy is a discretionary decision.

99 In *BCE Inc., Re*, 2008 SCC 69, [2008] 3 S.C.R. 560 (S.C.C.), the Supreme Court addressed the oppression provision found in the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, which is similar to the provision found in the *OBCA*. At para. 68, the Court outlined the following two-step test: (1) Does the evidence support the reasonable expectations asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

100 The Court addressed the concept of reasonable expectations under the first part of the test, at paras. 62 and 63:

> [T]he concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.
>
> Particular circumstances give rise to particular expectations. Stakeholders enter into relationships, with and within corporations, on the basis of understandings and expectations, upon which they are entitled to rely, provided they are reasonable in the context. These expectations are what the remedy of oppression seeks to uphold. [Citations omitted.]

101 The court addressed the second stage of the test, at para. 67:

> Even if reasonable, not every unmet expectation gives rise to a claim under [s. 248]. The section requires that the conduct complained of amount to "oppression", "unfair prejudice" or "unfair disregard" of relevant interests. "Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind, that nevertheless has unfair consequences. Finally, "unfair disregard" of interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations. The phrases describe, in adjectival terms, ways in which corporate actors may fail to meet the reasonable expectations of stakeholders. [Citations omitted.]

102 The trial judge's analysis under the *BIA*, the *APA* and the *FCA* effectively disposed of that part of Farber's submissions relating to unjust preferences. As for Farber's argument that there was unfair disregard for the interests of Annopol's creditors, this submission must be placed in context. While Kimel stated that he was not thinking of his creditors when he made the

Payments, Kimel and his companies were facing the prospect of potentially ruinous litigation. He believed that the Payments would permit the companies to continue as going concerns and that they would generate profit. The evidence did not suggest that this was a misguided proposition at that time. The cataclysmic, and unforeseen, economic meltdown that enveloped the global economy months after the Payments were made cannot be ignored. In this context, the trial judge did not err in exercising his discretion and dismissing Farber's claim of unfair disregard for the interests of Annopol's creditors.

103 As for the expectations of HSBC and Srubiski as creditors, Farber claims that Annopol paid Goldfinger with funds it had received from Srubiski. The trial judge found that it was not possible to trace the vast majority of funds to any particular source or creditor. As the trial judge noted, Kimel's evidence was that money *may* have come from Srubiski or Mahvash. There was also no conclusive evidence that the funds paid by Annopol to Goldfinger came from Srubiski. Moreover, the line of credit from HSBC was provided to SG Group and not to Annopol. Consequently, HSBC was not a creditor of Annopol. HSBC, a sophisticated party, would have known that it was not a creditor of Annopol. There could be no reasonable expectation to the contrary.

104 The trial judge's decision reflected an exercise in discretion and is entitled to deference. I would not accede to Farber's submissions on oppression.

E. Did the Payments Unjustly Enrich Goldfinger?

(i) Introduction

105 Before the trial judge, Farber submitted that the Payments unjustly enriched Goldfinger. To succeed, Farber had to establish that:

(a) the Payments enriched Goldfinger;

(b) there was a corresponding deprivation suffered by Annopol; and

(c) there was no juristic reason for that enrichment.

(ii) Trial Judge's Decision on Unjust Enrichment

106 The trial judge gave brief reasons for his dismissal of Farber's unjust enrichment claim. In essence, he relied on his reasons for dismissal of the oppression claim, stating at para. 304 of his reasons: "Farber also advanced a claim sounding in unjust enrichment on the basis that the $2.5 million payments were a re-purchase of shares or equity distribution. For similar reasons [*i.e.* similar to those for dismissing the oppression claim], I dismiss that claim."

(iii) Parties' Submissions on Appeal

107 Farber submits that the trial judge failed to consider the test for unjust enrichment, which it says was met based on the evidence. Farber says that the first two parts of the test were easily satisfied on the basis of the Payments from Annopol to Goldfinger. With respect to lack of a juristic reason, the Payments were contrary to the reasonable expectations of Annopol's creditors and it was contrary to public policy for Goldfinger to have received the Payments from an insolvent company.

108 Goldfinger responds that he merely received his money back and Annopol got what it bargained for. The Payments were a repayment of an obligation and in line with the parties' expectation of a settlement of their dispute. Settlement of disputes is supported by public policy and may constitute the rationale for a payment.

(iv) Analysis

109 As Iacobucci J. noted in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.), at para. 30, the test for unjust enrichment requires that a claimant establish the following three elements:

a) an enrichment of the defendant;

b) a corresponding deprivation of the plaintiff; and

c) an absence of juristic reason for the enrichment.

110 As noted in *Garland*, at para. 31, the first two elements are determined by applying a "straightforward economic approach". Iacobucci J. explained, at para. 36: "Where money is transferred from plaintiff to defendant, there is an enrichment."

111 The analysis in respect of the third element proceeds in two steps.

112 At the first stage, the claimant has the burden of demonstrating that "no juristic reason from an established category exists to deny recovery." The established categories include a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations: see *Garland*, at para. 44.

113 If the claimant can show that there is no established juristic reason, then, at the second stage, the defendant bears the burden of demonstrating that there is another reason to deny recovery. When determining if there is a reason to deny recovery at this stage, courts are required to consider the reasonable expectations of the parties and public policy considerations: see *Garland*, at paras. 45-46.

114 As this court noted in *Campbell v. Campbell* (1999), 43 O.R. (3d) 783 (Ont. C.A.), at pp. 794-95, and *Simonin v. Simonin*, 2010 ONCA 900, 329 D.L.R. (4th) 513 (Ont. C.A.), at para. 24:

> [W]hat is at the heart of the third requirement is the reasonable expectation of the parties, and whether it would be just and fair to the parties considering all of the relevant circumstances, to permit the recipient of the benefit to retain it without compensation to those who provided it.

115 Applying these principles to the issues on appeal, the first two requirements for unjust enrichment were clearly met. Goldfinger was enriched and there was a corresponding deprivation to Annopol. The real issue turns on the third element: was there a juristic reason for the enrichment?

116 Farber was unsuccessful in attacking the Memorandum and, in any event, it did not ask that the Memorandum be set aside. A contract is a recognized category on which to reject a claim for unjust enrichment. The settlement provided an established rationale for the Payments and hence amounted to a juristic reason. In addition, Goldfinger's advance of $2.9 million to Annopol amounted to a juristic reason.

117 Finally, a juristic reason may be made out based on an examination of the reasonable expectations of the parties. On the facts of this case, Goldfinger advanced funds to whichever company Kimel requested. He advanced a total of about $2.9 million to Annopol itself. Kimel treated all the companies as, effectively, a common pool. Therefore, it was in line with past practice and the reasonable expectations of the parties that Goldfinger received payment in respect of funds from Annopol.

118 This ground of appeal therefore fails.

Appeal Relating to the Brantford/Bridge 2008 Transactions

A. Are the Brantford/Bridge 2008 Transactions Oppressive under the OBCA?

(i) Introduction

119 As mentioned, Farber had originally advanced an oppression claim with respect to the Brantford/Bridge 2008 Transactions. Ultimately, the dispute devolved into a claim to approximately $280,000 in proceeds from the sale of the Bridge Street property that is held in trust pending resolution of the action. The payment of this sum turns on whether the Brantford/Bridge 2008 Transactions were oppressive within the meaning of s. 248 of the *OBCA* and therefore ought to have been set aside by the trial judge.

(ii) Trial Judge's Decision on the Brantford/Bridge 2008 Transactions and Oppression

120 The trial judge relied on his findings under the *BIA*, the *APA* and the *FCA* claims to conclude that Goldfinger's charges over the SG Brantford and SG Bridge properties, as well as the Annopol Subordinations, did not violate the reasonable expectations of creditors. There was no intent to defeat, hinder, delay or defraud creditors. He concluded that no s. 248 *OBCA* remedy was justified.

(iii) Farber's Submissions on Appeal

121 Farber submits that the trial judge did not consider whether the transactions should be set aside pursuant to s. 248 of the *OBCA*. Its primary submission is that the trial judge dismissed its claim on the basis of lack of intent; however, this is an irrelevant consideration in an oppression analysis. Goldfinger was at best an unsecured creditor, and Annopol held prior security over the Henry Street and Bridge Street properties. As a result of the Memorandum, Goldfinger became secured. But for the transactions, Annopol's creditors would be entitled to the $280,000 in sale proceeds.

122 Farber argues that the trial judge erred in failing to make a finding of oppression and in refusing to set aside the Brantford/Bridge 2008 Transactions.

(iv) Analysis

123 The trial judge clearly turned his mind to the oppression claim as is evident from paras. 317, 327, 328, 348, 349 and 351 of his reasons. It is a fair inference from his reasons and his conclusion on the Brantford/Bridge 2008 Transactions that he was of the view that his prior findings supported his conclusion that they did not violate the reasonable expectations of creditors.

124 The trial judge relied on his same reasons, found at paras. 274-280, for concluding that Annopol did not intend to defeat, hinder, delay or defraud its creditors by making the Payments to Goldfinger. In addition, the trial judge's reasons were that the Payments were part of a global settlement meant to avoid potentially ruinous litigation; the settlement in question was concluded at arm's length after fairly lengthy negotiations; and the parties' compromise was reasonable at the time they reached it.

125 The trial judge's decision that the Payments and the Brantford/Bridge 2008 Transactions were defensible for the same reasons was justified on the record. Both sets of transactions resulted from the same settlement. Therefore, the validity of the Brantford/Bridge 2008 Transactions falls to be decided on the same basis as that applicable to the Payments. For the reasons given, I would reject Farber's submissions with respect to the Brantford/Bridge 2008 Transactions.

Cross-Appeal

A. Is the $471,000 Payment to Goldfinger a Fraudulent Conveyance?

(i) Introduction

126 Farber, in its capacity as Trustee in bankruptcy of SG Brantford, asked the trial judge to order Goldfinger to return the sum of $471,000 to SG Brantford. Goldfinger objected.

(ii) Trial Judge's Decision

127 To recap, about five months after the Memorandum, the mortgage from the first mortgagee, First National, on 176 Henry St., a property owned by SG Brantford, came due. As part of the refinancing, the First National mortgage was to be increased. To complete the refinancing with First National, SG Brantford had to arrange for the postponement of the second mortgage in favour of Montor.

128 The trial judge was not prepared to find that Kimel forged Montor's signature on the postponement. He instead found that the Montor postponement was signed by Kimel purporting to act as the secretary-treasurer of Montor.

129 However, he did find that the postponement arose as a result of Kimel's and SG Brantford's deliberate misrepresentation of the true state of affairs to Montor. Moreover, Perelmuter, the sole shareholder of Montor, was unaware that part of the refinancing proceeds would be paid to a junior secured creditor, namely Goldfinger. The trial judge concluded that Kimel and SG Brantford made the misrepresentation in order to defeat, hinder, delay or defraud Montor.

130 He held that the evidence on intent as of November 26, 2008 was materially different from the evidence at the time of the Memorandum. By November 2008, Goldfinger knew that Kimel and his companies, including SG Brantford, had defaulted on their obligations. He and Kimel also knew that there were insufficient funds to pay Goldfinger's charges over the SG Brantford and SG Bridge properties if Montor were to be paid from the refinancing.

131 On the trial judge's findings, when Kimel and SG Brantford misrepresented the true state of affairs to Montor, they did so intending to defeat, hinder, delay or defraud Montor. Goldfinger had notice or knowledge of that intent within the meaning of s. 3 of the *FCA*.

132 The trial judge concluded that Goldfinger knew that the payment of $471,000 to him would prefer his interests over those of Montor. He based his conclusion on the *FCA*, but held that he would have reached a similar result under s. 248 of the *OBCA*. Therefore, the payment by SG Brantford to Goldfinger of $471,000 in preference to the payment of that amount to Montor violated s. 2 of the *FCA* and was not saved by s. 3 of the *FCA*.

133 Accordingly, Goldfinger was ordered to repay the sum of $471,000 to Farber, as Trustee in bankruptcy of SG Brantford.

(iii) Goldfinger's Submissions on Appeal

134 Goldfinger argues that he was not involved with, and did not know, the terms of the postponement. He asserts that the trial judge erred in finding that he had the intent to defeat Montor's interest. He had nothing to do with the postponement of the Montor mortgage. Goldfinger was unconditionally entitled to payment of the $471,000.

135 He asks that if his cross-appeal is denied, he should, in the alternative, be given judgment for the restoration of his position, including judgment for $183,000 representing the net proceeds from the sale of the Henry Street property on August 31, 2010 being held by the Trustee pending the outcome of the appeals.

(iv) Analysis

136 I would reject Goldfinger's cross-appeal. As Goldfinger notes in his factum, at para. 53, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, his findings should not be overturned absent palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at paras. 23-24.

137 The trial judge's conclusion on this issue rested on factual findings. In particular, he found that Goldfinger had notice or knowledge of Kimel's and SG Brantford's intent to defeat, hinder, delay or defraud Montor and that he knew the $471,000 payment would prefer his interests over those of Montor. Goldfinger has not identified any palpable and overriding error that would serve to displace these findings.

138 For these reasons, I would dismiss the cross-appeal.

139 Further, I see no basis on which to grant the alternative relief Goldfinger requests. Based on the evidence, even with the repayment of the $471,000, there will be a significant shortfall in recovery on account of Montor's mortgage. Moreover, no such request was made of the trial judge.

Disposition

140 For these reasons, I would dismiss both the appeal and the cross-appeal. As agreed by the parties, I would order Farber to pay Goldfinger $40,000 in costs of the appeal and Goldfinger to pay Farber $20,000 in costs of the cross-appeal, both sums inclusive of disbursements and applicable taxes.

***E.A. Cronk J.A.*:**

I agree

***P. Lauwers J.A.*:**

I agree

Appeal and cross-appeal dismissed.

Schedule"A"

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

96 (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

(a) the party was dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

(ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

(iii) the debtor intended to defraud, defeat or delay a creditor; or

(b) the party was not dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

(2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

(3) In this section, a person who is privy means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

Assignments and Preferences Act, R.S.O. 1990, c. A.33

4. (1) Subject to section 5, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person when insolvent or unable to pay the person's debts in full or when the person knows that he, she or it is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice creditors, or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced.

(2) Subject to section 5, every such gift, conveyance, assignment or transfer, delivery over or payment made by a person being at the time in insolvent circumstances, or unable to pay his, her or its debts in full, or knowing himself, herself or itself to be on the eve of insolvency, to or for a creditor with the intent to give such creditor an unjust preference over other creditors or over any one or more of them is void as against the creditor or creditors injured, delayed, prejudiced or postponed.

(3) Subject to section 5, if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall, in and with respect to any action or proceeding that, within sixty days thereafter, is brought, had or taken to impeach or set aside such transaction, be presumed, in the absence of evidence to the contrary, to have been made with the intent mentioned in subsection (2), and to be an unjust preference within the meaning of this Act whether it be made voluntarily or under pressure.

(4) Subject to section 5, if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall, if the debtor within sixty days after the transaction makes an assignment for the benefit of the creditors, be presumed, in the absence of evidence to the contrary, to have been made with the intent mentioned in subsection (2), and to be an unjust preference within the meaning of this Act whether it be made voluntarily or under pressure.

(5) The word "creditor" when used in the singular in subsections (2), (3) and (4) includes any surety and the endorser of any promissory note or bill of exchange who would upon paying the debt, promissory note or bill of exchange, in respect of which the suretyship was entered into or the endorsement was given, become a creditor of the person giving the preference within the meaning of those subsections.

5. (1) Nothing in section 4 applies to an assignment made to the sheriff for the area in which the debtor resides or carries on business or, with the consent of a majority of the creditors having claims of $100 and upwards computed according to section 24, to another assignee resident in Ontario, for the purpose of paying rateably and proportionately and without preference or priority all the creditors of the debtor their just debts, nor to any sale or payment made in good faith in the ordinary course of trade or calling to an innocent purchaser or person, nor to any payment of money to a creditor, nor to any conveyance, assignment, transfer or delivery over of any goods or property of any kind, that is made in good faith in consideration of a present actual payment in money, or by way of security for a present actual advance of money, or that is made in consideration of a present actual sale or delivery of goods or other property where the money paid or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration therefor.

(2) In case of a valid sale of goods or other property and payment or transfer of the consideration or part thereof by the purchaser to a creditor of the vendor under circumstances that would render void such a payment or transfer by the debtor personally and directly, the payment or transfer, even though valid as respects the purchaser, is void as respects the creditor to whom it is made.

(3) Every assignment for the general benefit of creditors that is not void under section 4, but is not made to the sheriff nor to any other person with the prescribed consent of creditors, is void as against a subsequent assignment that is in conformity with this Act, and is subject in other respects to the provisions thereof until and unless a subsequent assignment is executed in accordance therewith.

(4) Where a payment has been made that is void under this Act and any valuable security was given up in consideration of the payment, the creditor is entitled to have the security restored or its value made good to him before, or as a condition of, the return of the payment.

(5) Nothing in this Act,

(a) affects the *Wages Act* or prevents a debtor providing for payment of wages due by him or her in accordance with that Act;

(b) affects any payment of money to a creditor where the creditor, by reason or on account of the payment, has lost or been deprived of, or has in good faith given up, any valid security held for the payment of the debt so paid unless the security is restored or its value made good to the creditor;

(c) applies to the substitution in good faith of one security for another security for the same debt so far as the debtor's estate is not thereby lessened in value to the other creditors; or

(d) invalidates a security given to a creditor for a pre-existing debt where, by reason or on account of the giving of the security, an advance in money is made to the debtor by the creditor in the belief that the advance will enable the debtor to continue the debtor's trade or business and to pay the debts in full.

Fraudulent Conveyances Act, R.S.O. 1990, c. F.29

2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

3. Section 2 does not apply to an estate or interest in real property or personal property conveyed upon good consideration and in good faith to a person not having at the time of the conveyance to the person notice or knowledge of the intent set forth in that section.

Business Corporations Act, R.S.O. 1990, c. B.16

248. (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;

(d) an order directing an issue or exchange of securities;

(e) an order appointing directors in place of or in addition to all or any of the directors then in office;

(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;

(g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the money paid by the security holder for securities;

(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 154 or an accounting in such other form as the court may determine;

(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of a corporation under section 250;

(l) an order winding up the corporation under section 207;

(m) an order directing an investigation under Part XIII be made; and

(n) an order requiring the trial of any issue.

(4) Where an order made under this section directs amendment of the articles or by-laws of a corporation,

(a) the directors shall forthwith comply with subsection 186 (4); and

(b) no other amendment to the articles or by-laws shall be made without the consent of the court, until the court otherwise orders.

(5) A shareholder is not entitled to dissent under section 185 if an amendment to the articles is effected under this section.

(6) A corporation shall not make a payment to a shareholder under clause (3) (f) or (g) if there are reasonable grounds for believing that,

(a) the corporation is or, after the payment, would be unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

Footnotes

* Affirmed at *Montor Business Corp. (Trustee of) v. Goldfinger* (2013), 2013 ONSC 6635, 2013 CarswellOnt 14983, 8 C.B.R. (6th) 200 (Ont. S.C.J. [Commercial List]).

TAB 16

2013 ABQB 23
Alberta Court of Queen's Bench

Builders' Floor Centre Ltd. v. Thiessen

2013 CarswellAlta 269, 2013 ABQB 23, [2013] 7 W.W.R. 333, [2013] A.W.L.D. 1778, [2013] A.W.L.D. 1781, [2013] A.W.L.D. 1814, [2013] A.W.L.D. 1815, [2013] A.W.L.D. 1816, 11 B.L.R. (5th) 92, 19 C.L.R. (4th) 74, 226 A.C.W.S. (3d) 1036, 554 A.R. 152, 75 Alta. L.R. (5th) 62, 98 C.B.R. (5th) 116

Builders' Floor Centre Ltd. Respondent/Plaintiff and John Thiessen, John Thiessen Operating As Autumn Ridge Homes Inc. and Autumn Ridge Homes Inc. Appellants/Defendants

K.G. Nielsen J.

Heard: June 1, 2012; October 16, 2012
Judgment: January 14, 2013
Docket: Edmonton 1003-18830

Proceedings: affirming *Builders' Floor Centre Ltd. v. Thiessen* (2012), 2012 ABQB 86, 2012 CarswellAlta 119, 86 C.B.R. (5th) 16, 96 B.L.R. (4th) 335, 9 C.L.R. (4th) 10, 532 A.R. 271 (Alta. Master)

Counsel: Patrick D. Kirwin, Jennifer Liddle for Plaintiff / Respondent
Andrew R. Fraser for Defendants / Appellants

***K.G. Nielsen J.*:**

I. Introduction

1 The Appellants appeal the decision of the Master (2012 ABQB 86, 86 C.B.R. (5th) 16 (Alta. Master)) setting aside the transfer of certain lands by Autumn Ridge Homes Inc. (Autumn) to John Thiessen and Verna Thiessen.

II. Facts

2 Autumn is an Alberta corporation. John Thiessen and Kelly Kijewski are the Directors of Autumn. J & V Holdings (1999) Inc. and 1318795 Alberta Ltd. are the shareholders in Autumn. John Thiessen and his wife, Verna Thiessen, are the shareholders in J & V Holdings (1999) Inc. Kelly Kijewski and his wife, Donna Kijewski, are the shareholders in 1318795 Alberta Inc. John Thiessen is the President and Secretary Treasurer of Autumn.

3 On June 12, 2007, Autumn became the registered owner of property (the Land) legally described as:

> Plan 9322359
>
> Block 1
>
> Lot 2
>
> Excepting thereout all mines and minerals

4 Mr. and Mrs. Thiessen provided cheques totalling $100,388.77 to the solicitor acting in respect of the purchase of the Land. These funds represented the purchase price of the Land and legal fees. Mr. Thiessen deposed that Autumn then owed a shareholder loan to J & V Holdings (1999) Inc. in respect of the funds provided.

5 Autumn was incorporated for the purposes of constructing, *inter alia*, single family residences. Mr. Thiessen deposed that the Land was purchased for the purpose of constructing a house thereon that would be the residence for Mr. and Mrs. Thiessen (the Residence). As a result of advice received from a bank that Mr. and Mrs. Thiessen were dealing with and their accountant, the decision was made to register title to the Land in Autumn's name. This was, apparently, to promote Autumn, to establish corporate credit for Autumn and to allow Autumn to qualify for the Alberta New Home Warranty Program.

6 On November 6, 2007, Builders' Floor Centre Ltd. (Builders') prepared a flooring installation proposal for Autumn with respect to the Residence. The proposal was accepted and on April 4, 2008, and September 16, 2008 Mr. Thiessen, on his personal credit card, provided deposits to Builders' totalling $17,500.

7 On January 7, 2008, a mortgage between the Toronto Dominion Bank and Autumn in the sum of $457,465 was registered against title to the Land.

8 On September 11, 2008, a mortgage between the Toronto Dominion Bank and Autumn in the amount of $682,077 was registered against title to the Land (the Corporate Mortgage). The mortgage in the amount of $457,465 was eventually discharged.

9 In November and December 2008, Builders' supplied and installed flooring and window blinds in the Residence.

10 On December 18, 2008, title to the Land was transferred from Autumn to Mr. and Mrs. Thiessen as joint tenants (the Transfer). The consideration shown on the Transfer of Land was $1. Mr. Thiessen swore an Affidavit of Transferee that the current value of the Land was, in his opinion, $800,000. On December 18, 2008, a mortgage between the Toronto Dominion Bank and Mr. and Mrs. Thiessen in the amount $682,077 was registered against title to the Land (the Personal Mortgage) and the Corporate Mortgage was discharged at that time.

11 In January and February of 2009, Builders' provided an additional quote for work and materials to be provided in relation to the Residence.

12 Builders' provided invoices to Autumn in respect of the work and materials supplied. Autumn provided a cheque to Builders' dated June 22, 2009, in the sum of $10,000 in partial payment of the invoices submitted.

13 On November 3, 2010, Builders' commenced the within action to recover the balance of the monies outstanding in respect of the work and materials provided by Builders'.

14 On November 30, 2010, John Thiessen made an assignment into bankruptcy.

15 On April 4, 2011, Builders' obtained a Default Judgment against Autumn for the sum of $43,540.90 in respect of the outstanding amounts claimed, interest and costs (the Judgment). On October 26, 2011, an application by Mr. Thiessen to set aside the Judgment was denied.

16 Autumn has made no payment to Builders' in respect of the Judgment.

17 On September 12, 2011, Builders' received a Financial Statement of Corporate Debtor from Autumn which indicated that Autumn, at that time, had no assets beyond $10 in a Toronto Dominion Bank account.

18 On February 3, 2012, Master Wacowich released his Reasons for Decision and directed that the Transfer be set aside and that the Registrar of Land Titles return registration of title to the Land to the name and status as it existed prior to the Transfer.

19 An officer of Builders' has deposed that at the time Builders' began supplying work and materials to the Residence, and at all material times thereafter, Builders' believed that Autumn was the registered owner of the Land and had no knowledge of the Transfer.

20 Mr. Thiessen testified at questioning that Builders' had completed the supply of the work and materials at his request as an officer of Autumn. He also testified that at the time of the Transfer, the only asset owned by Autumn was the Land, and a line of credit which Autumn had with TD Canada Trust was overdrawn beyond its maximum limit of $50,000. Mr. Thiessen further testified that Autumn was never in a position to pay debts as they became due, outside of funds that were provided by Mr. and Mrs. Thiessen.

21 This matter was initially argued before me on June 1, 2012. Subsequent to argument, I learned that the Court of Appeal had rendered its decision in *Bahcheli v. Yorkton Securities Inc.*, 2012 ABCA 166, 524 A.R. 382 (Alta. C.A.). I was of the view that the decision of the Court of Appeal may have an impact on this appeal and at my invitation both counsel filed further written submissions, and further oral submissions were made on October 16, 2012.

22 As further submissions were to be made, counsel for the Appellants sought leave to file additional evidence with respect to the value of the Land as of the date of the Transfer. I granted leave to both the Appellants and the Respondent to file further evidence as to the value of the Land as of December 2008. In addition, I directed that the Appellants provide further documentation with respect to the two mortgages obtained by Autumn and the one mortgage obtained by Mr. and Mrs. Thiessen, all of which were registered against title to the Land. I also granted leave to counsel for the Respondent to conduct further questioning on the mortgage documents produced if counsel felt such questioning was required.

23 On June 29, 2012, the Appellants filed an Affidavit of Value and Valuator's Report attaching an appraisal of the Land as at December 16, 2008 (the Appraisal). The Land and the Residence were inspected by the appraiser on June 19, 2012 and the Appraisal was completed on June 22, 2012. The Appraisal valued the Land and improvements at $650,000 (qualified). The Appraisal was based on the inspection of the Land and on discussions between the appraiser and Mr. Thiessen. The appraiser commented as follows in the Appraisal:

> The subject is a detached bungalow, built in 2008. As of December 16, 2008, according to the owner, the subject were [sic] missing several interior and exterior elements including flooring on both floors, air conditioning system, a front door, landscaping/yard, deck and posts and interior painting. It was estimated that it would cost approximately $50,000 to complete the interior and there would be an additional $25,000 adjustment for negative market appeal. Since the subject property's incomplete condition and superior size/building quality were off-setting qualities, the subject property has average market appeal.

24 Counsel for Builders' conducted questioning of Mr. Thiessen with respect to the three mortgages registered against title to the Land at the material times, and with respect to the Appraisal.

25 Regarding the Appraisal, Mr. Thiessen testified that: at the time of the Transfer the residence had a deck constructed on it although it was incomplete; the front door of the residence was installed sometime in December 2008; and the residence was painted, although the painting was not complete.

26 With respect to the mortgages registered against title to the Land, Mr. Thiessen testified that: on October 23, 2008, he and Mrs. Thiessen had signed a Mortgage Application in respect of the Personal Mortgage in the sum of $682,077 and which estimated the value of the Land and the Residence at $1,065,000; the proceeds received on the Personal Mortgage were used to pay out the balance outstanding on the Corporate Mortgage in the sum of $558,768; and Mr. and Mrs. Thiessen received the sum of $138,352 (net of legal fees), being the net mortgage proceeds on the Personal Mortgage and the builders' lien holdbacks on the Corporate Mortgage.

III. Issues

> 1. Should the Court take into account the additional evidence regarding the mortgages and the value of the Land and Residence as at December 2008?

2. Did the Master err in setting aside the Transfer and directing the Registrar of Land Titles to return title to the Land to the name and status as it existed prior to the Transfer?

IV. Standard of Review

27 The standard of review on an appeal from a Master to a Judge, on all issues, is correctness and it is settled law that there cannot be deference to the Master's fact findings or discretion when the judge has heard new evidence: *Bahcheli v. Yorkton Securities Inc.*; *Gudzinski Estate v. Allianz Global Risks US Insurance Co.*, 2012 ABCA 5, 519 A.R. 215 (Alta. C.A.).

28 In *Gudzinski Estate v. Allianz Global Risks US Insurance Co.*, with respect to the matter of additional evidence on an appeal from a Master, the Court commented as follows:

> 24 ...where, as in this case, new evidence is put before the Queen's Bench Judge, it makes no sense to say that the Master's decision on the facts should be reviewed for palpable and overriding error. The Master did not have the same evidence as the Queen's Bench Judge had which compels a fresh assessment of the facts.

V. Analysis

1. Should the Court take into account the additional evidence regarding the mortgages and the value of the Land and Residence as at December 2008?

29 Rule 6.14(3) of the *Alberta Rules of Court* provides as follows:

> 6.14(3) An appeal from a master's judgment or order is an appeal on the record of proceedings before the master and may also be based on additional evidence that is, in the opinion of the judge hearing the appeal, relevant and material.

30 The Court of Appeal has considered Rule 6.14(3) in its decisions in both *Gudzinski Estate v. Allianz Global Risks US Insurance Co.* and *Bahcheli v. Yorkton Securities Inc.*

31 In *Gudzinski Estate v. Allianz Global Risks US Insurance Co.* the Court stated:

> 21 The appellant argues that the chambers judge should not have admitted the new evidence tendered by the respondent. At the time the chambers judge heard the appeal to her, the Rule provided that new evidence was admissible if it "is significant enough that it could have affected the Master's decision". The Rule (6.14(3)) has since been amended to clarify that the new evidence must be "relevant and material", which carries forward the previous practice under the former Rules. Rule 6.14 accordingly provides its own internal test for admitting new evidence on appeals from the Master: it must be "relevant and material". Since the Rule contains its own test for new evidence, there is no longer room for the operation of the common-law test in ***R. v. Palmer***, [1980] 1 S.C.R. 759, 30 N.R. 181. It is inapplicable to appeals from a Master to a judge.

32 In *Bahcheli v. Yorkton Securities Inc.* the Court stated:

> 16 Furthermore, the new Rules never said that an appeal from a Master was always on the record. Rule 6.14(3), quoted above, has always made an exception where the judge finds it proper to admit further evidence. That used to be a comparatively narrow exception; originally the evidence had to be arguably pivotal (to paraphrase). But since the Rule was amended in July 2011, the exception to the subrule is probably wider. In any event, it is now not ambiguous, and is not narrow. Now the proposed new evidence (referred to at the end) need only be "relevant and material" in the opinion of the judge hearing the appeal. The Rules on disclosure (discovery) have used that quoted phrase for a number of years now, and the phrase is interpreted quite broadly. Therefore, the exception to R 6.14(3) is quite wide, making the Rule that the appeal must be "on the record" rather narrow.

33 The Appellants argue that the Residence was always intended to be the personal residence of Mr. and Mrs. Thiessen, and that Mr. and Mrs. Thiessen had, in effect, initially paid for the purchase of the property and for the construction of the Residence and, therefore, the Transfer was for value.

34 The Respondent argues that title to the Land was registered in the name of Autumn and that the Transfer was not for value given the information set out in the Transfer of Land. The Transfer of Land indicates that the value of the Land at the date of transfer was $800,000 for which Mr. and Mrs. Thiessen paid $1 and obtained a mortgage in the sum of $682,077. There was, therefore, on the face of the Transfer of Land a shortfall of some $118,000 as a result of the Transfer.

35 Clearly, the value of the Land as of the date of the Transfer (December 18, 2008) is in issue. If the value of the Land at that date exceeded the amounts in respect of which, at law, Mr. and Mrs. Thiessen were entitled to receive credit (by virtue of either contributing personal funds or obtaining mortgage funds), then the Transfer would not have been for value. If, on the other hand, the credits which Mr. and Mrs. Thiessen were entitled to receive at law, equalled or exceeded the value of the Land as at the date of the Transfer, the Transfer would have been for value and Builders' would have to satisfy a more stringent test.

36 In light of the foregoing, in my view, the evidence with respect to the mortgages and the value of the Land as at December 2008 is relevant and material. It is, therefore, appropriate that I consider the Appraisal, the further documentation provided with respect to the three mortgages registered against title to the Land and the further questioning of Mr. Thiessen.

2. Did the Master err in setting aside the Transfer and directing the Registrar of Land Titles to return title to the Land to the name and status as it existed prior to the Transfer?

37 The Master determined on three separate bases that the Transfer should be set aside:

> 1. The Transfer was a fraudulent conveyance pursuant to the *Fraudulent Conveyances Act*, 1571 (13 Eliz 1), c 5 (the *Statute of Elizabeth*);
>
> 2. The Transfer was a fraudulent preference pursuant to the *Fraudulent Preferences Act*, RSA 2000, c F-24; and
>
> 3. The conduct of Autumn was oppressive within the terms of the *Business Corporations Act*, RSA 2000, c B-9.

The Statutes

38 I turn first to a consideration of the application of the *Statute of Elizabeth* and the *Fraudulent Preferences Act* on this appeal.

39 The leading case in Alberta which has considered these two statutes is *Krumm v. McKay*, 2003 ABQB 437, 342 A.R. 169 (Alta. Q.B.). Romaine J. in that case summarized the purpose of these two statutes as follows:

> 13 The purpose of the *Statute of Elizabeth* and the *Fraudulent Preferences Act* is to strike down all conveyances of property made with the intention of defrauding creditors, except for conveyances made for good consideration and *bona fide* to persons not having notice of fraud. The legislation is to be interpreted liberally, and includes any kind of transfers or conveyances made with the requisite intent to defraud or hinder creditors, no matter what the form: C.R.B. Dunlop, *Creditor-Debtor Law in Canada* (2nd Edition) Carswell, at page 598.

Statute of Elizabeth

40 Romaine J. in *Krumm v. McKay* made these findings as to the applicability of the *Statute of Elizabeth*:

> 14 Under the *Statute of Elizabeth*, where a transfer is made for nominal or no consideration, it is only necessary to consider whether the intent of the debtor is fraudulent in considering whether the transaction is voidable. Cases in which fraudulent transfers for nominal consideration have been held to be voidable can be divided into two categories: those in which

fraudulent intent is established as a presumption of law and those in which fraudulent intent is established as a fact in evidence: Dunlop (supra) at pages 600, 601.

15 The Respondents submit that the *Statute of Elizabeth* is inapplicable in this case as they submit that the transfers were made for consideration. While the *Statute of Elizabeth* includes an exception for *bona fide* transfers for consideration, it is restricted to transferees who do not have knowledge of fraud. With respect to a transfer for value, a creditor attempting to rely on the *Statute of Elizabeth* must establish that the transferor had the necessary fraudulent intention and that the transferee was privy to the fraud.

41 After referring to the two categories as summarized in *Krumm v. McKay* at para. 14, Dunlop in *Creditor-Debtor Law in Canada* at 601 stated:

> The first classic case obviously involves an attempt by the courts to apply the statute without engaging in the metaphysical excursion into the debtor's state of mind deplored by the writer in the Law Times [previously referred to in the text]. Even in the second type of case, the courts have been ready to rely on the surrounding circumstances as establishing *prima facie*, the intent to defraud or delay. The so called badges of fraud articulated in ***Twyne***'s case are nothing more than typical and suspicious fact situations which may be enough to enable the court to make a finding of fraud unless the debtor leads evidence to rebut the presumption. Again the courts are driven to the surrounding circumstances to assist them in making the necessary finding of fact under the statute.

42 Ritter J. (as he then was) in *Alberta (Attorney General) v. Samuel Doz Professional Corp.* (1993), 139 A.R. 198, 9 Alta. L.R. (3d) 201 (Alta. Q.B.) recognized that intent is difficult to prove on the basis of direct evidence and that it would be unlikely that a debtor would publicly admit such an intent. As a result, intent must be implied from the circumstances surrounding the transaction which could include elements which have been classed as badges of fraud in decisions relating to the *Statute of Elizabeth*.

43 Without intending to be an exhaustive list, the following have been identified as badges of fraud:

1. The consideration was grossly inadequate;
2. The transfer was accomplished quickly;
3. A close relationship exists between the parties to the conveyance;
4. The transfer was very general in nature in that it included virtually all of the assets of the transferor;
5. The transfer was made pending the creditor's efforts to obtain judgment;
6. The transfer documents contain false statements as to consideration;
7. The transaction was secret;
8. The transfer was made pending the writ;
9. The deed contained self serving provisions such as "the gift was made honestly, truthly and *bona fide*"; and
10. The transferor continued in possession and used the goods as his or her own.

(*Creditor-Debtor Law in Canada*; *Alberta (Attorney General) v. Samuel Doz Professional Corp.*; *Dwyer v. Fox* (1996), 43 Alta. L.R. (3d) 63, 190 A.R. 114 (Alta. Q.B.); *Krumm v. McKay*; *Mako Megbiz, K.F.T. v. Osprey Energy Ltd.*, 2006 ABQB 630, 405 A.R. 165 (Alta. Master); *Gerrow v. Dorais*, 2010 ABQB 560, 503 A.R. 65 (Alta. Q.B.)).

44 The Appellants submit that the Master incorrectly found that the Transfer was not for value. The Appellants argue that fraudulent intent cannot be presumed and Builders' must prove an actual intent to defraud.

45 In my view, based on the evidence before the Master and the additional evidence which was submitted to me, it cannot be said that the Transfer was for value.

46 On the face of the Transfer, the consideration is nominal, being $1. On the day of the Transfer, a mortgage in the sum of $682,077 was registered against title to the Land. The Affidavit of Transferee indicates that the value of the Land at the date of Transfer was $800,000. Therefore, on the evidence before the Master, there was a deficiency in consideration in the sum of $117,922. This deficiency was determined on the assumption that the Personal Mortgage in the sum of $682,077 was used in full to retire the Corporate Mortgage in the same amount.

47 Based on the information before me, it is now clear that the full amount of the Corporate Mortgage had not been advanced. The Trust Account Statement received from the lawyer acting in relation to the Transfer indicates that the Corporate Mortgage had been advanced to the sum of $558,768 and that this amount was repaid from funds advanced pursuant to the Personal Mortgage. The $558,768 advanced on the Corporate Mortgage included builders' lien holdbacks totalling $30,430. This amount plus the balance on the Personal Mortgage in the sum of $110,977 was advanced to Mr. and Mrs. Thiessen. Net of legal fees, Mr. and Mrs. Thiessen received cash arising from the Transfer in the sum of $138,332.

48 Using the $800,000 value for the Land as set out in the Affidavit of Transferee and recognizing $1 nominal consideration and that $558,768 from the Personal Mortgage was used to pay out the Corporate Mortgage, Mr. and Mrs. Thiessen received $241,231 in consideration in the form of cash or equity in the Land.

49 The Appellants argue that they did not in fact receive any additional value as they were entitled to repayment of the personal funds in the sum of $100,388 which they had contributed towards the initial purchase of the Land. Mr. Thiessen deposed that Autumn owed a shareholder loan to J & V Holdings (1999) Inc. in respect of the funds provided. However, he also deposed that the purchase monies were a shareholder loan from Mr. and Mrs. Thiessen. Counsel for Builders' notes that although copies of cheques drawn on Mr. and Mrs. Thiessen's bank accounts dated May 28, 2007 and allegedly used in the purchase of the Land were provided, there was no evidence as to the source of these funds. The initial mortgage to Autumn in the amount of $457,465 and personal guarantees were executed by both directors of Autumn. In June 2007, Mr. Kijewski (through 1318795 Alberta Inc.) paid $10,000 towards a letter of credit required by the New Home Warranty Program. Autumn's monthly bank statements for the line of credit reference payments being made on account of a "TD Mortgage".

50 The Appellants also argue that shortly after receipt of the net mortgage proceeds and builders' lien holdbacks in the sum of $138,332, Mr. and Mrs. Thiessen contributed $150,000 to Autumn for the purposes of Autumn's operations, particularly, completion of construction of the Residence.

51 I do not accept the Appellants' arguments.

52 Dealing firstly with the entitlement of Mr. and Mrs. Thiessen to be repaid the funds which they contributed to purchase the Land, in my view, they stood in no better position to recover those funds than any other creditor of Autumn. Mr. Thiessen gave evidence that this particular transaction was structured in the manner it was based on advice from Autumn's accountants and bankers. That may be. However, none of the individuals giving such advice provided evidence as to why the transaction was structured in the manner it was. In any event, it appears the funds contributed personally by Mr. and Mrs. Thiessen were ultimately treated as a shareholder loan from J & V Holdings (1999) Inc. to Autumn. The Appellants argue that this shareholder loan was retired upon the Transfer occurring. Once again, no evidence was forthcoming from the accountant for Autumn as to how this transaction was structured. The repayment of such a shareholder loan from J & V Holdings (1999) Inc. would not address any alleged entitlement of Mr. and Mrs. Thiessen to take title to the Land personally. Further, the other evidence referred to in para. 49 hereof points to Autumn's interest in the Land.

53 Dealing with the alleged contribution of the sum of $150,000 by Mr. and Mrs. Thiessen to Autumn shortly after receipt of the mortgage advance and release of the builders' lien holdback, the only evidence of such a contribution is a bank statement on Autumn's account indicating that on February 10, 2009 a deposit in the sum of $150,000 was made. No evidence was provided as to the source of that $150,000. Counsel for the Appellants urged me to conclude that the source had to be, in part, the mortgage

advance and the builders' lien holdback. The Respondent argues that there is no evidence as to the source of the $150,000, and notes that the Camrose property (referred to later in these Reasons for Judgment) was mortgaged in February 2009 for $280,000.

54 This application was initially filed on September 30, 2011. The matter was argued before the Master on January 19, 2012. As stated previously, this matter has now been argued twice before me and the Appellants were given leave to file further evidence with respect to this matter. Notwithstanding the significant length of time this matter has been outstanding, and the opportunity to provide further evidence, no evidence was tendered as to the source of the $150,000. Rather, the Appellants ask me to speculate as to the source of the funds deposited to the Autumn bank account on February 10, 2009. I am not prepared to do so.

55 Therefore, based on the evidence before me, in my view, Mr. and Mrs. Thiessen paid a maximum of only $558,769 (retirement of the Corporate Mortgage and $1 nominal consideration) for the Land.

56 The Appellants also argue that, in any event, based on the Appraisal, the Land and Residence were valued at only $650,000 as at the date of the Transfer. I do not accept that the value of the Land as at December 18, 2008 was only $650,000. I reach this conclusion for two reasons.

57 First, based on Mr. Thiessen's evidence on questioning, the qualifications which he gave to the appraiser were not accurate. Therefore, the value of the property would be in excess of $650,000.

58 Second, all of the documents executed contemporaneously with the Transfer and the obtaining of the Personal Mortgage suggest a value significantly in excess of $650,000. As previously stated, the Affidavit of Transferee sets out the value as being $800,000. The mortgage application executed by Mr. and Mrs. Thiessen on October 23, 2008 estimates the value of the Land and improvements to be $1,065,000. In my view, documents executed for the purposes of the Transfer and obtaining the Personal Mortgage are much more likely to be accurate as to the value of the Land and improvements than is an appraisal completed on partial information some three and one half years after the date of the Transfer.

59 In any event, given my findings with respect to the value effectively paid by Mr. and Mrs. Thiessen for the Land being the sum of $558,769, even if the value of the Land is $650,000, Mr. and Mrs. Thiessen received $91,231 in excess of the amount they paid for the Land.

60 Based on the foregoing, it cannot be said that the Transfer was for value. It is, therefore, appropriate to consider badges of fraud to determine if the Transfer was with the intent to defeat, hinder or delay Autumn's creditors.

61 The Appellants submit that even if the Master was entitled to consider badges of fraud to determine the debtor's intent, the Master erred in finding that there were sufficient badges of fraud present to infer fraudulent intent. The Master did not err in his analysis of the badges of fraud present in this case. There were numerous badges of fraud present.

62 First, there was a close relationship between Mr. and Mrs. Thiessen and Autumn. Mr. and Mrs. Thiessen were the shareholders in J & V Holdings (1999) Inc. which was a shareholder in Autumn. Mr. Thiessen was a director and officer of Autumn. Clearly, Mr. Thiessen knew the financial status of Autumn and knew the risk that the Land could be significantly encumbered, if not lost, if Autumn was unable to meet its financial obligations. As was the case in *Krumm v. McKay*, the close relationship between the transferor and the transferee is the most persuasive factor leading to a finding of fraud.

63 Second, the consideration paid by Mr. and Mrs. Thiessen was grossly inadequate. As set out previously herein on the best evidence for Mr. and Mrs. Thiessen, the consideration was $91,231 less than the value of the property ($650,000 appraised value less $558,768 Corporate Mortgage payout and $1 nominal consideration). On the worst evidence for Mr. and Mrs. Thiessen, the consideration paid was $506,231 less than the value of the property ($1,065,000 mortgage application value less $558,768 Corporate Mortgage payout and $1 nominal consideration). On either scenario, Mr. and Mrs. Thiessen received a significant windfall and, therefore, the consideration paid for the Land was grossly inadequate.

64 Third, the Transfer of the Land divested Autumn of virtually all of its assets. While Autumn claims to have had an interest in a lot and house being built thereon in Camrose, Alberta, the evidence with respect to this property is limited. Mr. Thiessen testified at questioning that this property was registered in his name personally, on the advice of professional advisors, although the intention was that this property would be Autumn's asset. The evidence is not clear as to when this property was disposed of, whether there were net proceeds from the disposal of this property and if so, what happened to those proceeds. Whatever the status of the Camrose Property, it seems clear that the Transfer of the Land to Mr. and Mrs. Thiessen was a disposal of virtually all of Autumn's assets.

65 The Appellants argue that this badge of fraud is intended to cover a situation in which the debtor has multiple assets and the transaction being challenged is essentially a "fire sale" or a liquidation of assets at below market value.

66 I do not find support for this submission in the authorities. In my view, a consideration of this badge of fraud is undertaken to determine if the impugned transaction will have the effect of depriving a creditor of an ability to recover the debt from the debtor's assets. Whether the debtor has one or multiple assets which would otherwise be available to the creditor to realize upon is irrelevant to this consideration where the transaction puts those assets beyond the reach of the creditor.

67 Fourth, the Transfer was done in relative secrecy. I say this as Mr. and Mrs. Thiessen did nothing in their dealings with Builders' to bring to Builders' attention the fact that the Transfer was being undertaken. It is true that Builder's could have learned of the Transfer by conducting a Land Titles Office search. In the circumstances of this matter, Builders' had no information that would have led it to do so.

68 I accept that there is some evidence to support Mr. Thiessen's contention that it was intended from the outset that ultimately Mr. and Mrs. Thiessen would reside in the Residence and, presumably, it would become their property. The additional evidence obtained with respect to the mortgages registered against title to the Land suggests that this was in fact discussed with the mortgagee from the outset. While it is true that the initial deposits totalling $17,500 were received from Mr. Thiessen personally, there is no evidence to suggest that Builders', in any way, believed it was dealing with anyone other than Autumn during the course of the supply of its work and materials. Indeed, Mr. Thiessen acknowledged in his testimony that Builders' completed the supply of work and materials at his request as an officer of Autumn. Further, some six months after the Transfer, Autumn made a partial payment to Builders' in the sum of $10,000.

69 Mr. and Mrs. Thiessen received a substantial benefit from the Transfer and I find that their dealings with representatives of Builders' did nothing to alert Builders' that its position may be impacted by a pending Transfer.

70 In my view, the foregoing are sufficient badges of fraud to presume fraudulent intent with respect to the Transfer. Mr. Thiessen has deposed that the steps were taken based on professional advice. However, from the evidence before me, the financial arrangements with respect to Autumn's operations were haphazard at best. Further, they were either poorly documented, or the Court has not been provided with some of the relevant documentation. Mr. Thiessen, as a principal of Autumn and Mr. and Mrs. Thiessen through their shareholdings in J & V Holdings (1999) Inc., appear to have treated Autumn's property as their own and, in my view, this is effectively what they did in having the Land transferred to their names personally. If there were legitimate business reasons for the Transaction and for the financial operations of Autumn, such evidence was not put before the Court.

71 In the circumstances, the onus was on Autumn and Mr. and Mrs. Thiessen to rebut the presumption of fraud. They have failed to do so. The Master was, in my view, correct in determining that the Transfer was a fraudulent conveyance within the terms of the *Statute of Elizabeth* and in granting the Order which he did.

72 If I am wrong, and the transfer was for valuable consideration, the test would be more stringent. Dunlop wrote at 609:

> The principal problem in establishing that a transfer for value falls within the statute is to prove that the transferor had the necessary fraudulent intent and that the grantee was privy to the fraud...
>
> ...When we turn to transfers for value, it appears that there is no presumption which can establish fraud...

Therefore, Builders' would have the onus in this case to establish as a fact that Autumn had the necessary fraudulent intention and that Mr. and Mrs. Thiessen were privy to the fraud.

73 In my view, for the reasons stated above, the badges of fraud in this case are sufficient to meet Builders' onus even under this more stringent test. Intent to defraud is reasonably inferred from all the circumstances surrounding the Transfer, and Mr. and Mrs. Thiessen were clearly privy to the fraud. There is no evidence of a *bona fide* attempt to sell the Land. Mr. and Mrs. Thiessen obtained a benefit through repayment of the shareholder loan from J & V Holdings (1999) Inc. and removal of the Residence which they personally resided in from Autumn's exigible asset base. I find, as did Romaine J. in *Krumm v. McKay*, that this constituted an indirect benefit to the transferor, Autumn.

Fraudulent Preferences Act

74 The *Fraudulent Preferences Act* renders void any conveyances of real or personal property with the intent to defeat, hinder, delay or prejudice the debtor's creditors at a time when the debtor is in insolvent circumstances.

75 Romaine J. in *Krumm v. McKay* stated:

> 35 The *Fraudulent Preferences Act* is more restrictive than the *Statute of Elizabeth* in its application, in that it requires that the debtor be insolvent. In addition, the Alberta Act does not use the term, "creditors and others" as in the *Statute of Elizabeth*, but is limited in its application to "creditors".

76 Thus, the analysis under the *Fraudulent Preferences Act* is similar to that under the *Statute of Elizabeth* except that the *Fraudulent Preferences Act* is more restrictive because the debtor must be insolvent and is limited to "creditors" as opposed to "creditors and others". The time for determination if the debtor was insolvent is the time of the impugned transaction: *Krumm v. McKay* para. 41. If the facts necessary to prove insolvency are not and could not be within the knowledge of the applicant, the evidentiary burden shifts to the respondent to disprove insolvency at the relevant times: *Alberta (Attorney General) v. Samuel Doz Professional Corp.*

77 As set out in my analysis in respect of the *Statute of Elizabeth*, the Transfer was a conveyance of the Land by Autumn with the intent to defeat, hinder, delay or prejudice Autumn's creditors. The issues pursuant to the *Fraudulent Preferences Act* in this case, are, therefore, whether Builders' was a creditor and whether Autumn was insolvent at the time.

78 Builders' was a creditor of Autumn as at the date of the Transfer. The general meaning of "creditor" is a person to whom a debt is payable: *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 60 Alta. L.R. (2d) 122 (Alta. Q.B.), at 163, (1988), 40 B.L.R. 28 (Alta. Q.B.), var'd (1989), 71 Alta. L.R. (2d) 61, [1989] A.J. No. 1021 (Alta. C.A.). As at the date of the Transfer, Builders' had commenced the supply of work and materials to Autumn in respect of the construction of the Residence. A debt was, therefore, owing by Autumn to Builders'. A party who is owed a debt which may not yet be payable, is nevertheless a creditor pursuant to the *Fraudulent Preferences Act*: *Krumm v. McKay* at para 40. Therefore, while Builders' may not yet have submitted invoices to Autumn at the date of the Transfer it was, nonetheless, a creditor pursuant to the *Fraudulent Preferences Act*.

79 Autumn was insolvent at the time of the Transfer. Mr. Thiessen testified that at the time of the Transfer, the only asset owned by Autumn was the Land, a line of credit which Autumn had with TD Canada Trust was overdrawn beyond its maximum limit of $50,000, and Autumn was never in a position to pay debts as they became due, outside of funds that were provided by Mr. and Mrs. Thiessen. While at the time of the Transfer there may have been some equity in the Land, the Appellants have failed to disprove the insolvency of Autumn at that time. To the contrary, Mr. Thiessen's evidence leads to the conclusion that Autumn was insolvent at the material time. I therefore find that Autumn was in insolvent circumstances as at the date of the Transfer.

80 The Transfer was, therefore, a fraudulent transfer within the terms of the *Fraudulent Preferences Act*. The Master, in my view, was correct in holding that the Transfer was void as against Autumn's creditors and properly gave the Order which he did.

Business Corporations Act

81 The *Business Corporations Act*, RSA 2000, c B-9 (*BCA*) permits a "complainant" to apply for an oppression remedy:

> 239(b) "complainant" means ...
>
> (iii) a creditor
>
> (B) in respect of an application under section 242, if the Court exercises its discretion under subclause (iv),
>
> or
>
> (iv) any other person who, in the discretion of the Court, is a proper person to make an application under this Part.
>
> . . .
>
> 242(1) A complainant may apply to the Court for an order under this section.
>
> (2) If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates
>
> (a) any act or omission of the corporation or any of its affiliates effects a result,
>
> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

82 In *People's Department Stores Ltd. (1992) Inc., Re*, [2004] 3 S.C.R. 461, 2004 SCC 68 (S.C.C.), the Court commented generally on the status of creditors in Canada:

> 48 The Canadian legal landscape with respect to stakeholders is unique. Creditors are only one set of stakeholders, but their interests are protected in a number of ways. Some are specific, as in the case of amalgamation: s. 185 of the CBCA. Others cover a broad range of situations. The oppression remedy of s. 241(2)(c) of the CBCA and the similar provisions of provincial legislation regarding corporations grant the broadest rights to creditors of any common law jurisdiction: see D. Thomson, "Directors, Creditors and Insolvency: A Fiduciary Duty or a Duty Not to Oppress?" (2000), 58 U.T. Fac. L. Rev. 31, at p. 48. One commentator describes the oppression remedy as "the broadest, most comprehensive and most open-ended shareholder remedy in the common law world": S. M. Beck, "Minority Shareholders' Rights in the 1980s", in *Corporate Law in the 80s* (1982), 311, at p. 312. While Beck was concerned with shareholder remedies, his observation applies equally to those of creditors.
>
> 49 The fact that creditors' interests increase in relevancy as a corporation's finances deteriorate is apt to be relevant to, *inter alia*, the exercise of discretion by a court in granting standing to a party as a "complainant" under s. 238(d) of the CBCA as a "proper person" to bring ... an oppression remedy claim under s. 241 of the CBCA.

83 It is interesting to note that although s. 241 of the *Canadian Business Corporations Act*, RSC 1985, c. C-44 (*CBCA)* is very similar to s. 242 of the *BCA*, the definition of "complainant" under the *CBCA* does not expressly include a creditor.

84 As noted by the Court in *Remo Valente Real Estate (1990) Ltd. v. Portofino Riverside Tower Inc.*, 2010 ONSC 280, 261 O.A.C. 326 (Ont. Div. Ct.) at paras. 19 and 20, while there is case law to the effect that debt actions should not be routinely turned into oppression actions (see for example *First Edmonton Place Ltd. v. 315888 Alberta Ltd.*, *R. v. Sands Motor Hotel Ltd.* (1984), 28 B.L.R. 122 (Sask. Q.B.)), creditors have been given status as complainants against a corporation where those

in control of the corporation have stripped the corporation of assets or dissipated assets rendering it immune from a judgment in favour of the creditor.

85 The Court in *A E Realisations (1985) Ltd. v. Time Air Inc.* (1994), [1995] 3 W.W.R. 527 (Sask. Q.B.); aff'd on other grounds [1995] 6 W.W.R. 423 (Sask. C.A.) held that "complainant" under s. 241 of the *CBCA* can include contingent claimants for an unliquidated demand in the category of a creditor. McDonald J. contemplated this result under the *BCA* at para. 53 in *First Edmonton Place Ltd. v. 315888 Alberta Ltd.*

86 McDonald J. also set out the general principles applicable to oppression actions under the *BCA* in *First Edmonton Place Ltd. v. 315888 Alberta Ltd.*. He held that the applicant was bound to establish at least a *prima facie* case of having been subjected to oppressive or unfairly prejudicial actions or actions that unfairly disregarded its interests. McDonald J. further held that the test of unfair prejudice or unfair disregard should encompass the following considerations: the protection of the underlying expectation of a creditor in its arrangement with the corporation, the extent to which the acts complained of were unforeseeable or the creditor could reasonably have protected itself from such acts, and the detriment to the interests of the creditor.

87 The Supreme Court in *BCE Inc., Re*, 2008 SCC 69, [2008] 3 S.C.R. 560 (S.C.C.) discussed the oppression remedy under s. 241 of the *CBCA*:

> 45 A third remedy, grounded in the common law and endorsed by the CBCA, is a s. 241 action for oppression...[which] focuses on harm to the legal and equitable interests of stakeholders affected by oppressive acts of a corporation or its directors. This remedy is available to a wide range of stakeholders — security holders, creditors, directors and officers.
>
> . . .
>
> 68 In summary, the foregoing discussion suggests conducting two related inquiries in a claim for oppression: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

88 The Court held that in assessing the first question, useful factors in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicts between corporate stakeholders.

89 The learned Master cited the reasonable expectations listed in MA Springman et al, *Frauds on Creditors: Fraudulent Conveyances and Preferences* (Toronto: Thompson Reuters Canada Limited, 2009) at 24 - 12.1, 24-13, 24-15, 24-16:

> 1. A creditor reasonably expects that a corporation will not be used as a vehicle for fraud;
>
> 2. A creditor reasonably expects that the debtor will not convey away, for no consideration, exigible assets which will leave the creditor unpaid and unable to realize upon assets to satisfy the debt;
>
> 3. A creditor reasonably expects that the directors of a corporation will manage the company in accordance with their legal obligations, namely to act honestly and in good faith in the best interests of the corporation and to exercise the diligence expected of a reasonably prudent person; and
>
> 4. A creditor reasonably expects that the debtor will honour the understandings and expectations which the debtor has created and encouraged.

90 These reasonable expectations relate to the fiduciary duties of directors. The Supreme Court in *BCE Inc., Re* stated:

> 82 The cases on oppression, taken as a whole, confirm that the duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. ...In

each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including — but not confined to — the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen.

91 I find that Builders' reasonably entertained an expectation that, assuming fair dealing, its chances of repayment would not be frustrated by the Transfer, and that it can establish a *prima facie* case of having been subjected to the type of conduct targeted by s. 242(2) of the *BCA*.

92 While it is true that Builders' could have filed a builders' lien in this case or taken some other form of security from Autumn so as to protect itself, in my view, this alone does not disentitle Builders' from pursuing an oppression remedy. There is nothing in the evidence to suggest that such steps were necessary and in the circumstances, it was reasonable for Builders' to expect that Autumn would be operated in an appropriate manner and in a way which was not oppressive to Builders' interests. Builders' had commenced provision of work and materials to the Residence prior to the Transfer. The construction of the Residence was a relatively simple and typical construction project. At that point in time, there was nothing to suggest that Builders' was at risk of not being paid and there was, therefore, no reason for Builders' to either file a builders' lien or seek some other form of security. Therefore, Builders' is a proper person to bring an oppression application.

93 Further, I find that Autumn unfairly disregarded Builders' reasonable expectations as a creditor. The Transfer of Land removed, for little or no consideration, Autumn's only asset. This was conduct that was oppressive, unfairly prejudicial and that unfairly disregarded the interests of Builders' as a creditor.

94 I conclude that the Master did not err in finding that Builders' had established entitlement to an oppression remedy.

VI. Conclusion

95 The Master correctly determined that the Transfer was a fraudulent conveyance pursuant to the *Statute of Elizabeth* and a fraudulent preference pursuant to the *Fraudulent Preferences Act*. Further, he correctly concluded that Builders' had established entitlement to an oppression remedy pursuant to the *BCA*.

96 Therefore, his Order stands, directing the return of the registration of title to the Land to the name and status of the registered owner as existed prior to the Transfer and directing that Builders' may seize and sell the Land and apply the proceeds to Builders' Writ of Enforcement after payment of any priority interest.

97 The parties may speak to me within 30 days of the release of these Reasons for Judgment if they are otherwise unable to agree on costs on this appeal.

Appeal dismissed.

TAB 17

2022 ABQB 553
Alberta Court of Queen's Bench

Grewal (Re)

2022 CarswellAlta 2210, 2022 ABQB 553

In the Matter of the Bankruptcy of Shaminder Singh Grewal Aka Shawn Grewal

R.A. Neufeld J.

Heard: June 7, 2022
Judgment: August 19, 2022
Docket: Calgary B201-127159

Counsel: Richard Harrison, Elizabeth Argento, for Applicants
Douglas Nishimura, for Respondent

***R.A. Neufeld J.*:**

I. Overview

1 In May 2016, Shaminder Singh Grewal made an assignment into bankruptcy.

2 Over three years later, a group of his creditors requested the Trustee in Bankruptcy to conduct questioning of one of Mr. Grewal's investors, and to bring an application to set aside payments made to that investor prior to the assignment as being fraudulent preferences or transfers for under value. The group consists of Jasper Gill, Navaz Cassam, Parveen Parmar, Karmjit Parmer, Gurcharan Malhi, Jasdeep Sandhu, Dylal Dandiwal, Gurdip Rakhra, and Timberwolf Technologies Inc.

3 The Trustee declined because there were insufficient funds available for that purpose.

4 The aggrieved creditors now apply for leave to take proceedings against Mr. Sidhu and his company Clumbus Transport (collectively referred to as "Mr. Sidhu"), under s. 38 of the Bankruptcy and Insolvency Act (“BIA”). at their own expense and for their own credit.

5 Mr. Sidhu opposes the application, arguing that the prerequisites for leave to proceed under s. 38 have not been met.

6 To decide this application, I must determine whether there has been a sufficiently clear request by the Applicants that the Trustee take proceedings against Mr. Sidhu and a corresponding refusal.

7 I must also determine whether the claim to be advanced against Mr. Sidhu has satisfied the low threshold for applications under s. 38 — whether the claim is obviously spurious.

8 I have decided that the exchange of correspondence between counsel for the Applicants and the Trustee constitutes a sufficient demand for the Trustee to initiate proceedings and a corresponding refusal, as it is clear what the Trustee was being asked to do by way of further proceeding and that the Trustee had no intention to embark on an such steps due to a lack of funds.

9 I have also decided that the low threshold merit test has been met. While one or more of the arguments advanced by Mr. Sidhu may ultimately succeed, none of them are sufficiently persuasive that the proposed proceeding can be characterized as being obviously spurious.

10 My reasons for reading these determinations follow. I will commence with a summary of the events leading to this application, and then return to whether the criteria for leave under s. 38 have been met.

II. Background and Chronology of Events

11 Shaminder Singh Grewal made an assignment into Bankruptcy on May 16, 2016. He was deeply indebted to a variety of investors, including the eight Applicants in this proceeding. Their aggregate unsecured debt was $4,866.494, out of a total unsecured debt of $10,596, 295.

12 Investor money was to be used to develop franchised restaurants. High rates of interest were promised. While certain franchises were obtained, the Applicants contend that the money was primarily used to pay previous investors and for lavish personal purposes — both of which are said to be indicators of a Ponzi scheme.

13 Among the investors were the Respondents in this application Narinderpal Sidhu and his company Clumbus Transport. Mr. Sidhu had loaned a substantial amount of money to Mr. Grewal between 2013 — 2015, secured from time to time by high interest promissory notes.

14 According to an Affidavit sworn by Mr. Sidhu on May 31, 2017, ("the Sidhu Affidavit"), Mr. Grewal requested a new loan of $2.6 million from him in the Fall of 2015. Mr. Sidhu agreed, but on the condition that $2 million owed on restated promissory notes (having a face value of $3,445,000) be paid, and that security be given for the new loan. He attested that Mr. Grewal agreed, subject to the proviso that only $1.3 million could be paid down against the restated promissory notes. The Sidhu Affidavit goes on to state that Mr. Grewal paid $1.3 million in three tranches (October 15, 22 and 30, 2015), with funds provided by Mr. Grewal's' relatives. These included his uncle, Mr. Gary Toor.

15 Mr. Sidhu attested that the new $2.6 million loan was never advanced, because the additional security was not provided. Mr. Grewal's relatives commenced an action seeking return of the $1.3 million on December 17, 2015 (the "Toor Litigation").

16 The first meeting of creditors was held on June 15, 2016. Two of the Applicants in this proceeding, Parveen Parmar and Gurcharan Malhi, were among the appointed inspectors.

17 On October 7, 2016 Mr. Grewal was examined by the official receiver ("OR"). He acknowledged paying debts to creditors (including Mr. Sidhu) within 12 months prior to the Bankruptcy. The ensuing OR Report mentioned this, as well as the Toor litigation; the payment of $1,300,000 to Mr. Sidhu; and that the $1,300,000 had been provided by Mr. Grewal's family. The O.R. Report and Examination were obtained by counsel for Mr. Sidhu on October 8, 2016.

18 Having been sued by Mr. Grewal's relatives, Mr. Sidhu wanted to add Mr. Grewal as a third party. He applied in the Bankruptcy action to have the stay of proceedings lifted for that purpose, relying on the Sidhu Affidavit. The Trustee took no position on the application. The action by Mr. Grewal's relatives was later settled.

19 It appears that over the course of the next three years, little progress was made toward recovering significant assets for Mr. Grewal's unsecured creditors. Eventually the Applicants retained counsel of their own although the record is unclear as to exactly when that retainer took place.

20 On March 29, 2019, the Trustee sent a copy of the OR Examination and OR Report to counsel for the Applicants.

21 As will be discussed later in these reasons, in September 2019 correspondence was exchanged between counsel and the Trustee in which the Trustee was asked to take steps to investigate a potential claim against Mr. Sidhu, and declined to do so because of a lack of funds.

22 On November 12, 2019, the Applicants filed an application in the bankruptcy, seeking to examine the bankrupt, Narinder (sic) Toor and Marinder Sidhu under s. 163 of the BIA. It also sought authorization to commence proceedings against the

bankrupt and any other related parties for fraudulent preference, fraudulent conveyance, or transfer at under value in the Applicants' own name and at their risk.

23 On December 10, 2019, Registrar Mason granted an Order requiring the Bankrupt to produce bank records. She adjourned the remainder of the application, and questioning of the Bankrupt took place on January 14, 2020 (and continued on May 14, 2020).

24 On February 4, 2020 the Applicants appeared before Registrar Prowse, seeking to question Mr. Sidhu under s. 163 of the BIA. Their counsel stated that he was not seeking a s. 38 Order at that time. Registrar Prowse referred counsel to the Sidhu Affidavit, which was on the Court file. It was the first that counsel knew of the affidavit, which provides a detailed description of the transactions that are in issue in this proceeding. The application was adjourned.

25 On June 2, 2021theApplicants filed an Amended Amended Application seeking permission under s. 38 to take proceedings under ss. 95, 96 and 98 of the BIA. One of the amendments made to the application was to specifically name Mr. Sidhu as a respondent.

III. Criteria for Determination of S. 38 Applications

26 Section 38 of the BIA allows creditors to pursue actions against third parties where the Trustee has refused or neglected to do so for the benefit of creditors as a whole. Leave to proceed is required. Four criteria must be met:

(1) the applicant must be a creditor of the bankrupt estate;

(2) the applicant must have requested that the trustee undertake the proceeding which the applicant now seeks permission to undertake itself;

(3) the trustee must have refused or neglected to undertake the requested proceeding; and

(4) there is threshold merit to the proposed proceedings, i.e. it is not obviously spurious.

27 The Respondents do not dispute that the Applicants are creditors of Mr. Grewal's estate.

28 They argue, however, that criteria 2 to 4 have not been met. I will deal first with criteria 2 and 3 (whether there has been a request of the Trustee to undertake fraudulent preference and transfer for under value proceedings). I will then turn to whether there is threshold merit to the proposed claim against the Respondents.

A. Request and Refusal

29 On September 24 2019 counsel for the Applicants wrote to the Trustee, stating as follows:

> . . . We are of the position that further information is required in order to ascertain whether a cause of action exists against the bankrupt, either under sections 95 or 96 of the act, or otherwise.
>
> Please advise if you are agreeable to further Questioning under section 163 of the Bankruptcy and Insolvency Act with respect to the disposition of the bankrupt's assets in the 12 months leading up to his bankruptcy. If you are not so inclined, please provide us with correspondence confirming same so that our clients may proceed with an Application to the Registrar pursuant to section 38 of the act.

30 On October 1, 2019, the Trustee replied:

> This is in response to your letter dated September 24, 2019 where you requested that the Trustee examine the bankrupt under Section 163 of the Bankruptcy and Insolvency Act ("BIA").

Although the Trustee agrees that more information is needed to ascertain whether a cause of action exists, the Trustee is currently unfunded and not willing to examine the bankrupt.

31 It is clear from this respondence that the request made of the Trustee was two-fold. First that it undertakes questioning of third parties under s.163 of the BIA and second, that it pursue relief under ss. 95, 96 and 98 of the BIA, for the benefit of the estate. It can be inferred that the second aspect would, to some extent at least, be dependent on or affected by the evidence obtained in questioning.

32 The Trustee did not dispute the possibility of a fraudulent preference having been made. However, it declined to even go so far as to pursue questioning under s.163, because it had no funds to do so.

33 In the circumstances, I find the exchange of correspondence between the Applicants and the Trustee satisfies s.38(1) of the BIA. The Trustee was being asked to undertake questioning with a view to pursuing relief under s.95, 96 and 98. It refused to take even the initial step in that process due to lack of funds.

34 There is no reason to believe that a specific, curative request (which the Respondents say could still be obtained) would engender any different response from the Trustee. It would only cause a delay, and a renewed application to this Court for leave to proceed.

35 In argument, I was referred to Re Points of Call Airlines Ltd [1990] CanLII 464 (BCSC) as authority for the proposition that there must be strict compliance with ss. 38(1)(b) and (c) for leave to be granted. In that case the creditor had not only made a request of the Trustee, but had simply proceeded to file an application for injunctive relief that was similar to (but broader in scope than) an application by the Trustee. The facts here are quite different.

36 In any event, I do not consider *Re Points of Call Airlines Ltd* to stand for the proposition that form must trump practicality.

B. Threshold Merit

37 In Smith v Price Waterhouse Coopers Inc v Service Credit Union Ltd, 2013 ABCA 288 the Court of Appeal discussed the threshold merit criterion as follows:

> [18] The threshold merit criterion emanates from the implicit gatekeeper function assigned to the court under section 38(1). Without the authority to make an inquiry into the merits of a proposed action, the court would become a rubber stamp and there would be no utility in requiring a creditor to seek the court's permission when the statutory criteria are met: *Re Jolub Construction Ltd*, 1993 CarswellOnt 235 at para 16, 21 CBR (3d) 313 (Ont Gen Div).
>
> [19] An applicant seeking leave under section 38(1) must demonstrate a *prima facie* case, which must be supported by evidence and not mere allegations: Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada* (looseleaf) at 1-236.1; *Polar Products Inc v Hongkong Bank of Canada* (1992) 1992 CanLII 1321 (BC SC), 14 CBR (3d) 225 (BCSC); *Re Jolub* at para 20. The threshold is not particularly high, and requires the applicant to show that the claim is not "obviously spurious": *NESI Energy Marketing Canada Inc (Re)*, 1998 ABQB 912 at para 22, 233 AR 347 (QB); *Alberta Treasury Branches v Chocolaterie Bernard Callebaut Partnership*, 2012 ABQB 245 at para 15).

38 The Applicants contend that the evidence before the Court satisfies the threshold merit criterion. They say that it shows that:

(1) Mr. Grewal was operating a Ponzi scheme, and as such was insolvent at all material times.

(2) Mr. Grewal paid Mr. Sidhu/Clumbus out in full, and indeed paid him approximately $1,400,000 more than he invested, with $1,300,000 paid in October 2015.

(3) By virtue of those payments, Mr. Sidhu received a preference over other creditors.

39 The Respondents argue that the proposed claims have no merit. They say that the facts underlying the impugned payments were discoverable by the creditors (two of whom are Inspectors in the Bankruptcy) years ago. They argue that the October 2015 payment of $1,300,000 was made by Mr. Grewal's relatives on his behalf and as such would never have been part of the bankrupt's estate. They argue that the payments were clearly not funded by Mr. Grewal's relatives order to prefer Mr. Sidhu over other creditors, but rather to facilitate refinancing (which was ultimately unsuccessful).

40 Lastly, they argue that even if the $1,300,000 was paid to prefer Mr. Sidhu over other creditors, it was paid more than three months before the initial bankruptcy event being May 16, 2016 (when the assignment into bankruptcy), and the transaction was therefore not reviewable under s. 95 of the BIA.

41 While not a "rubber stamp", the gatekeeping function triggered by s.38(1) of the BIA involves a very low standard of proof. That is, whether the claim is not "obviously spurious". This is far below the standard of proof that would be required at trial, and for that matter, is lower than the threshold to be met to survive an application for summary dismissal [i.e. a genuine issue for trial].

42 It bears emphasis that if leave to proceed under s. 38 is granted, the Applicants must take the case as they find it. They will run the risk of the claim being dismissed, either summarily or otherwise, on the basis of one or more of the defences advanced by Mr. Sidhu. They also may be required to post security for costs in order to proceed further should a successful application for such relief be made by the Respondents.

43 With that preface, I will turn to the primary defences advanced by Mr. Sidhu.

IV. Limitations

44 The respondents argue that the applicants are barred from proceeding with a fraudulent preference or fraudulent conveyance claim under the *BIA*. They say that these claims were first advanced on June 2, 2021 when the Amended Amended Notice of Application was filed. However, the facts upon which the claims were based are largely contained in the May 31, 2017 Sidhu Affidavit.

45 The Applicants respond that while the Sidhu Affidavit was filed with the Court on June 1, 2017, it was apparently not served on the Trustee by Mr. Sidhu, and that they had no knowledge of it until February 4, 2020 when Registrar Prowse advised their counsel of its existence. They also say that the application for relief under the *BIA* was filed on November 12, 2019 and that if the limitations defence is to be considered it should be when the application is heard on its merits.

46 I agree with the Applicants that it is premature to decide whether the proposed proceeding is barred by limitations. In fairness, both sides should be given the opportunity to put their best foot forward on this issue, including the marshalling of evidence regarding the steps that were, or could have been taken to discover the facts related to the impugned transactions by either the Trustee, the inspectors, or the remaining creditors forming the Applicant group.

47 At present, while it appears that the proposed proceeding may be barred by limitations, it cannot be said to be rendered obviously spurious by such a defence.

48 The Respondent also argues that the October 2015 payments are outside of the window for reviewability under s. 95 and 96. Payments made to a creditor are only reviewable as fraudulent preferences under s. 95 if made within three months of the initial bankruptcy event. For transfers at under value (s. 96), the time period for reviewability is 12 months prior to the initial bankruptcy event.

49 In the context of this matter, the operative "Initial Bankruptcy Event" was the assignment into bankruptcy (May 16, 2016). The impugned payments would therefore fall outside of the statutory window for reviewability as fraudulent preferences (s. 95) but within the window for reviewability as a transfer for under value (s. 96).

50 Ponzi schemes, by definition, involve extended periods of insolvency, and the preference of one creditor over another, as "Peter is robbed to pay Paul" in a continuing series of fraudulent transactions. The Applicants argue that in this case the payments made to Mr. Sidhu fell into that category and are therefore fraudulent preferences (and fraudulent conveyances). They also argue that certain replacement promissory notes issued by the Bankrupt to Mr. Sidhu constituted transfers for under value.

51 The application of these Ponzi scheme characteristics to the time windows for reviewability under s. 95 and 96 of the BIA is an issue that should be dealt with when the application is heard on its merits. No case authority was presented to me that is directly on point. More importantly even if the impugned transactions fall outside of the reviewability window under the *BIA* relief may still be available under the *Fraudulent Preferences Act* and/or the Statute of Elizabeth.

52 I am not satisfied that the proposed proceeding is obviously spurious due to the time windows for reviewability under ss. 95 and 96 of the BIA.

V. The Source of Funds Defence

53 The respondents argue that the proposed fraudulent preference/conveyance proceeding is doomed to fail because the money was paid to Mr. Sidhu by Mr. Grewal's relatives, not him. They were, consequently, never part of the bankrupt's assets, nor are they recoverable by the estate on behalf of other creditors.

54 The Applicants respond that the source of funds paid to Mr. Sidhu by or on behalf of Mr. Grewal is irrelevant, as is the motivation of such benefactors. If the payments constituted a fraudulent preference to Mr. Sidhu they are voidable and should be refunded to Mr. Grewal's estate in bankruptcy for pro rata distribution to participating s. 38 creditors.

55 The Applicants also respond that Mr. Sidhu's evidence on this point has not been consistent. In his August 13, 2021 Affidavit he states that the funds "were serviced" from family members whereas the original Sidhu Affidavit states that the funds came from Mr. Grewal or through his counsel, with the source of those funds being of no concern to Mr. Sidhu. The Applicant also allege that the real source of funds was other investors in the Ponzi scheme.

56 In any event, they argue, if the funds came from family and friends, those benefactors become creditors of Mr. Grewal and are now creditors of the estate under given the presumption of resulting trust.

57 It is unnecessary and premature to make a determination as to the relative merits of the parties' positions in respect of the source of finds issue based on the current record. This may, in the end result, be resolved in favour of Mr. Sidhu. At present, however, the arguments put forward by the Applicants have a certain degree of merit. This potential defence does not render the proposed proceeding obviously spurious.

VI. Intention to Prefer Mr. Sidhu

58 Section 95 of the BIA provides as follows:

> 95 (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person
>
> > (a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and
> >
> > (b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the

period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

59 The Applicants argue that they have met the threshold merit criterion in respect of the existence of a fraudulent preference under s. 95 of the BIA.

60 They say that Mr. Grewal was insolvent when the impugned payments were made; the payments constituted a preference in fact because Mr. Sidhu received $1,300,000 while other creditors received nothing; and that Mr. Sidhu has not shown that the dominant interest of the challenged transaction was not to prefer him (so as to rebut the presumption of an intent to prefer).

61 The Respondents reply that there is uncontradicted evidence before the Court that the intent of the $1,300,000 payment was not to prefer Mr. Sidhu over other creditors, but rather to obtain additional financing from Mr. Sidhu. This was done in an attempt to preserve Mr. Grewal's franchise restaurant operations.

62 Mr. Sidhu may have a meritorious defence to advance regarding the intentions of Mr. Grewal. The October 2015 payments were, it appears, made as part of an agreement to secure additional financing, which could have benefited all creditors and allowed the businesses to continue.

63 However, such an expectation must still have been objectively reasonable in the sense that there was a reasonable probability of survival and continuation of the business: ATB Financial v Devlin Construction Ltd, 2020 ABQB 574 at para 6. That is not clear on the evidence before me, and is further complicated by the source of these funds being from third parties. Their intentions may have been quite different than Mr. Grewal, especially if he was in fact operating a Ponzi scheme.

64 I find that this potential defence does not render the proposed proceeding to be obviously spurious.

VII. Conclusion

65 To summarize, I find that the prerequisites for proceeding under s. 38 of the BIA have been met. The Applicants requested that the Trustee undertake examinations of the Bankrupt and others under s. 163, and requested a response so that if the Trustee was not willing to do so they could proceed with such questioning and a s. 38 application. The Trustee refused based on a lack of funding.

66 On its face, the proposed proceeding has sufficient merit to satisfy the low threshold established in the jurisprudence. None of the arguments advanced by the Respondents is sufficiently persuasive to render the proposed application to be "obviously spurious". In due course the Respondents will have the opportunity to contest the application based on one or more of the defences presented. They may well succeed in doing so but that is for another day.

67 The application is therefore granted. If counsel cannot agree on costs within thirty days, that matter can be referred to me for a decision by way of submissions in writing, not to exceed three pages in length, exclusive of authorities.

TAB 18

2003 ABQB 437
Alberta Court of Queen's Bench

Krumm v. McKay

2003 CarswellAlta 961, 2003 ABQB 437, [2003] 9 W.W.R. 442, [2003] A.W.L.D. 380, [2003] A.J. No. 724, 127 A.C.W.S. (3d) 265, 17 Alta. L.R. (4th) 103, 342 A.R. 169, 47 C.B.R. (4th) 38

BARBARA D. KRUMM AND JAMES A KRUMM (Plaintiffs) and MARGARET MCKAY, MICHAEL R. MARSHALL, 715302 ALBERTA LTD., 893138 ALBERTA LTD. AND YANKEE VALLEY ESTATES LTD. (Defendants)

Romaine J.

Judgment: May 9, 2003
Docket: Calgary 0101-13404

Counsel: Thomas R. Benson for Applicants, James A. Krumm
Reginald J. Hashizume for Respondents, 715302 Alberta Ltd., Margaret McKay, Donald McKay
Michael J. Bondar for Royal Bank of Canada

***Romaine J.*:**

INTRODUCTION

1 This is an application by a creditor of the defendant 715302 Alberta Ltd pursuant to the *Fraudulent Conveyances Statute*, 13 Eliz. 1, Chapter 5 (U.K.), (the "*Statute of Elizabeth*"), the *Fraudulent Preferences Act*, R.S.A. 2000 c. F-24 and Rule 359 of the Alberta Rules of Court to set aside certain transfers of property as fraudulent conveyances or preferences, and for orders for the seizure and sale of such property for the benefit of creditors.

BACKGROUND

2 On August 8, 2000, James Krumm loaned $60,000 to 715302 as evidenced by a promissory note dated August 21, 2000. The note was to be repaid either upon the sale of certain properties that 715302 was developing (which never occurred) or as agreed between the parties. Although there was no agreement as to repayment of the loan, Mr. Krumm demanded repayment on May 8, 2001.

3 As at December 31, 2000, as shown in the notes to its financial statements, 715302 had three principal capital assets with a net book value of $213,467. One of these assets was a rental property on Bowness Road in Calgary, Alberta. On May 18, 2001, 715302 sold the home to Donald and Margaret McKay for $18,415.17 and the assumption of an existing mortgage of $87,584.43, a total of $106,000. At this, and all other relevant times, the McKays were the directors and sole shareholders of 715302. No cash was actually paid but the $18,415.17 was credited to 715302 as partial payment of a shareholders loan owing to the McKays, leaving a balance of $72,517.74 on the loan. On May 23, 2001, the property was transferred to 934030 Alberta Ltd., another corporation that the McKays control as directors and sole shareholders. The mortgage was assumed by 934030, but no cash to close was ever paid.

4 On June 22, 2001, the McKays transferred an acreage that they owned to unrelated parties. Included in what was transferred was a shop building owned by 715302. The notes to the 715302 financial statements indicate that the original cost of the shop building was $65,435, and the net book value as of December 31, 2000 was $48,981. No money from the disposition of the shop building was paid to 715302, but the shareholders' loan, at that point standing at $103,694.81, was reduced by $33,239.32 to $70,455.49.

5 The third major capital asset of 715302, tools and equipment valued by the McKays at $36,675, was transferred to the McKays on September 27, 2001. Nothing was paid to 715302 in respect of this disposition. All of the transferred assets were encumbered by a General Security Agreement to the Royal Bank of Canada. The balance owing to the Bank as at September 22, 2001 was $50,506.49. The McKays submit that they agreed to assume 715302's obligations with respect to this loan as payment for the assets. However, it appears the Bank was not aware of this transfer until July, 2002.

6 Mr. Krumm commenced this action on July 16, 2001. On September 7, 2001, a standstill agreement was entered into between Mr. Krumm and 715302. Under the agreement, the repayment terms of the loan were revised. Mr. Krumm was paid $13,324.25 on September 10, 2001, and further payments were to be made in December, 2001, March, 2002 and June, 2002. The agreement states that 715302's insolvency is an act of default that gives rise to remedies under the agreement. While it is submitted that 715302 was insolvent at the time the agreement was entered into, Mr. Krumm states that he was unaware of the insolvency. The December, 2001 payment was not made, and Mr. Krumm entered judgment on December 19, 2001.

7 On July 11, 2002, the McKays obtained a default judgment against 715302 for $147,378 plus interest and costs on the basis of alleged shareholders' loans. As at June 30, 2002, the financial records of 715302 and answers to undertakings indicate that the amount of the shareholders loans was $58,205. Ms. McKay on cross-examination on affidavit conceded that the amount of the judgment was based on the concern that if the action of Mr. Krumm under the *Fraudulent Preferences Act* and the *Statute of Elizabeth* was successful, the McKays' shareholders' loans credited to 715302 would be over-turned.

8 715302 began to wind-down its construction business in September, 2001. It no longer carries on business, and has no means to pay Mr. Krumm's judgment or any of its other creditors.

9 715302 executed a General Security Agreement in favour of the Bank on June 30, 1999. The Bank also obtained the guarantees of the McKays for amounts owing by 715302, together with postponements and assignments of claim. The General Security Agreement was registered in the Personal Property Security Registry on July 5, 1999. In August, 2002 after the Bank had become aware that 715302 had transferred tools and equipment to the McKays, the Bank added the McKays as debtors to the registration of its General Security Agreement.

10 The amount of $844.07 has been paid into court pursuant to the action between Mr. Krumm and 715302. The Clerk of the Court proposes to distribute this amount to the Bank. Mr. Krumm has filed a Notice of Objection to this disbursement of funds. The Bank declares that it is owed $64,460.85 as at August 13, 2002, with interest accruing.

THE APPLICATIONS

11 Mr. Krumm seeks the following relief:

1) a declaration that the transfer of the rental property is fraudulent and void against creditors of 715302;

2) an order that the rental property be sold and the normal 180 day waiting period be shortened to one day;

3) a declaration that the transfer of equipment is fraudulent and void against creditors of 715302;

4) an order that the equipment be seized and sold, and an existing injunction enjoining the McKays from disposing of the equipment be continued until the equipment has been seized;

5) a declaration that the transfer of the shop building is fraudulent, and that the Applicant is entitled to recover the proceeds of disposition from the McKays;

6) judgment against the McKays personally in respect of the transfer of the shop building in the amount of $65,435; and

7) judgment postponing the claims of the McKays against 715302 to the claims of other creditors.

12 The Bank seeks the following relief:

1) a declaration that it has priority to all present and after acquired personal property of the McKays over the Applicant;

2) an order directing the McKays to disclose the whereabouts of the equipment and deliver it to a private bailiff service;

3) an order directing the Clerk of the Court to pay the amount of $844.07 to the Bank; and

4) a declaration that it has priority over the McKays with respect to all money credited to their shareholders' loans with respect to the conveyance of assets of 715302 to them.

ANALYSIS

13 The purpose of the *Statute of Elizabeth* and the *Fraudulent Preferences Act* is to strike down all conveyances of property made with the intention of defrauding creditors, except for conveyances made for good consideration and *bona fide* to persons not having notice of fraud. The legislation is to be interpreted liberally, and includes any kind of transfers or conveyances made with the requisite intent to defraud or hinder creditors, no matter what the form: C.R.B. Dunlop, *Creditor-Debtor Law in Canada* (2nd Edition) Carswell, at page 598.

The Statute of Elizabeth

14 Under the *Statute of Elizabeth*, where a transfer is made for nominal or no consideration, it is only necessary to consider whether the intent of the debtor is fraudulent in considering whether the transaction is voidable. Cases in which fraudulent transfers for nominal consideration have been held to be voidable can be divided into two categories: those in which fraudulent intent is established as a presumption of law and those in which fraudulent intent is established as a fact in evidence: Dunlop (*supra*) at pages 600, 601.

15 The Respondents submit that the *Statute of Elizabeth* is inapplicable in this case, as they submit that the transfers were made for consideration. While the *Statute of Elizabeth* includes an exception for *bona fide* transfers for consideration, it is restricted to transferees who do not have knowledge of fraud. With respect to a transfer for value, a creditor attempting to rely on the *Statute of Elizabeth* must establish that the transferor had the necessary fraudulent intention and that the transferee was privy to the fraud.

16 The case law appears to establish that no presumption of law is available to establish fraud in situations of transfer for value, and a creditor must prove an actual intent to defraud. Many cases have provided that if the transferee knows that the intention of the transferor is to defraud creditors, the transfer will be invalidated. However, the Supreme Court of Canada in *Mulcahy v. Archibald* (1898), 28 S.C.R. 523 (S.C.C.) cast some doubt on this proposition as an absolute rule in Canada. This case involved a transfer by a debtor to his sister. Knowledge of the motive of the transfer by the sister was found not to be conclusive of bad faith. The court implied that the transfer to the sister was protected on the basis that her brother was indebted to her and she did not directly or indirectly make herself an instrument for the purpose of benefiting her brother. Since *Mulcahy* (*supra*), the law in Canada appears to be that, in cases of a transfer for consideration, there must be a "concurrence of intent" to invalidate a transfer under the *Statute of Elizabeth*: Dunlop (*supra*) at pages 607-612. The decision in *Mulcahy* has been criticized as being driven by particular facts and the commercial mores of the time.

17 I find that the transfers of the rental property and the shop building were made for consideration. Whether there was any real consideration for the transfer of equipment is doubtful, given that the Bank did not become aware of the transfer until informed by the Applicant, but I have assumed for the purpose of this decision that it was made for value. I must therefore determine whether the transfers were made by 715302 with an intention to defraud creditors and, if so, whether the McKays were privy to the fraud. With respect to the further transfer of the shop building, there is no suggestion that the transferees of the acreage and the shop building had knowledge of fraud, and therefore, the exception for *bona fide* transfers for consideration applies in the case of that transfer.

18 With respect to proof of the fraudulent intent of 715302, the Applicant relies on the following "badges of fraud" that he submits are present in this case to raise a *prima facie* case:

1) the transfers were made pending the Applicant's efforts to obtain judgment;

2) the transfer documents contain false statements as to the consideration;

3) the consideration was grossly inadequate;

4) there was unusual haste to make the transfers; and

5) a close relationship exists between the parties to the transfers.

19 The most persuasive factor leading to a finding of fraud in this case is the relationship between 715302 and the McKays. The evidenciary rule that governs cases of close relationship between a transferor and a transferee is set out by Davies J. in *Koop v. Smith* (1915), 8 W.W.R. 1203 (S.C.C.) (at page 1205) as follows:

> I think the true rule is that suspicious circumstances coupled with a relationship make a case of *res ipsa loquitur* which the tribunal of fact may and will generally treat as a sufficient *prima facie* case, but that it is not strictly in law bound to do so; and that the question of the necessity of corroboration is strictly a question of fact.

20 The type of close relationship covered by this evidenciary rule include transactions between individuals and corporations that they control: *Burton v. R & M Insurance Ltd.* (1977), 5 Alta. L.R. (2d) 14 (Alta. T.D.); *Cooper's & Lybrand Ltd. v. Niton Junction Holdings Ltd.* (1979), 32 C.B.R. (N.S.) 141 (Alta. Q.B.).

21 Some cases suggest that rebuttable presumptions only arise in situations where no consideration has been exchanged: *Mega Cranes Ltd. v. Toutant* [1999 CarswellBC 347 (B.C. S.C. [In Chambers])] (1999) B.C.C.S. 0212; *Gresham v. Gresham* (1993), 18 C.B.R. (3d) 201 (B.C. C.A.). Dunlop (*supra*, at page 613) suggests that badges of fraud, and the rebuttable presumptions that arise from them, are applicable in cases of transfers for value. This appears to be the better view. The "presumption" created by a transfer involving a close relationship is an evidenciary rule, not a presumption of law. It is a rare case where direct evidence of an intention to defraud is available, and given the difficulty of a court "engaging in [a] metaphysical excursion into the debtor's state of mind" (Dunlop, *supra* at page 601), it is not unreasonable to shift the burden of adducing evidence to rebut a *prima facie* case to the debtor in circumstances where strong suspicions of a relationship that may give rise to collusion are apparent.

22 Although the *prima facie* case created by the relationship between 715302 and the McKays is rebuttable, the Respondents do not choose to address it, relying on their submission that the transfers were made for consideration and that 715302 was solvent at the time. I will address the question of 715302's solvency later, under the discussion of the *Fraudulent Preferences Act*. It is not necessary to prove the insolvency of the debtor under the *Statute of Elizabeth*.

23 Intent to defraud may be inferred from all the circumstances surrounding a transaction; *Rogers Realty Ltd. v. Prysiazny* (1996), 182 A.R. 118 (Alta. Q.B.) at para 18.

24 Although the McKays submit that their close relationship with 715302 is the only "badge of fraud", it is noteworthy that the impugned transfers commenced shortly after Mr. Krumm demanded repayment of his loan. In addition, while the affidavit of transfer of the rental property refers to the payment of cash and the assumption of a mortgage, no cash was actually paid. The disposition of the shop building as part of the acreage was not disclosed in the Form 1.1 Statutory Declaration provided in respect of 715302's financial affairs.

25 Through the impugned transactions, the McKays stripped most of the valuable assets out of 715302 between May 18, 2001 and September 22, 2001. At the time, 715302's financial statements showed it to be in a deficit position, and there is evidence that it was having problems meeting the demands of its creditors. When a debtor makes a conveyance while insolvent, it may be presumed that it is with a fraudulent intention: N. J. Howcroft, "*Scope of Fraudulent Conveyances and Fraudulent Preferences Legislation in Alberta*" (1986), 3 Alta. L. Rev. 496 at p. 500.

26 In addition, I take into account as corroboration of intent the behaviour of the McKays with respect to obtaining their default judgment against 715302, and Ms. McKay's explanation of how the amount of the judgment was computed.

27 Given all of these factors, I find that the transfers were made with the intent to defraud and hinder creditors of 715302, and that the McKays, and in the case of the rental property, 934030 through the McKays, were privy to the fraud.

28 The Respondents submit that the Applicant was not a creditor of 715302 at the time of the transfers because the promissory note had not yet become due.

29 The *Statute of Elizabeth* applies to conveyances made against "creditors and others". Unless specifically defined in a particular statute, the term "creditor" bears the meaning ascribed to it in everyday usage. The general meaning of "creditor" is a person to whom a debt is payable: *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 60 Alta. L.R. (2d) 122 (Alta. Q.B.) at p. 163. In *Murdoch v. Murdoch* (1976), [1977] 1 W.W.R. 16 (Alta. T.D.) at p.20, Bowen J. defines the words "creditors and others" under the *Statute of Elizabeth* as "wide enough to include any person who has a legal or equitable right . . . by virtue of which he is, or may become, entitled to rank as a creditor." Relying on these cases, the Applicant submits that he became a creditor of 715302 on August 8, 2000 when he advanced funds to 715302, and the fact that the debt was not yet payable under the promissory note does not preclude him from that status.

30 I agree that the Applicant falls within the category of "creditors and others" under the statute. The debt existed at the time of the transfers, although it was not yet due. Even if the Applicant only became a creditor at the time of default under the settlement agreement, the case law relating to the *Statute of Elizabeth* has established a general exception to the effect that a subsequent creditor can challenge a transfer if it is able to establish an intention to defraud it specifically, or future creditors generally; Dunlop (*supra*) at p. 619.

31 The Respondents rely on *Canada Life Assurance Co. v. 494708 Alberta Ltd.* (1995), [1996] 1 W.W.R. 21 (Alta. Q.B.) for the proposition that the *Statute of Elizabeth* does not apply to the preference of one creditor over another. Part of the consideration for the impugned transfers of the rental property and the shop building was stated to be the repayment of shareholders' loans.

32 While Nash J. does comment in *Canada Life Assurance Co.* that the *Statute of Elizabeth* is not directed against the preference of one creditor over another, it will apply if, in the course of doing so, the debtor obtains some benefit for itself. As set out in *Halsbury* and quoted in *Anderson Lumber Co. v. Canadian Conifer Ltd.* (1977), 25 C.B.R. (N.S.) 35, [1977] 5 W.W.R. 41 (Alta. C.A.), at pp. 42, 43, such a transfer will be struck "if it is a mere cloak to secure a benefit to the grantor." In this case, the sole shareholders of 715302 obtained a benefit by partial repayment of their shareholders' loans in priority to other creditors. In this way, 715302 indirectly received a benefit. I also note that the Ontario Court of Appeal held in *Optical Recording Laboratories Inc., Re* (1990), 1 O.R. (3d) 131 (Ont. C.A.) that a conveyance to a creditor need not be challenged under provincial fraudulent preference legislation, but can be attacked under the *Statute of Elizabeth*. Given that the McKays were in sole control of 715302 at the time of the transfers, and, as shareholders, received the benefit of the transfers, it is reasonable to conclude that the transfers were merely a strategy to secure a benefit to the shareholders of the debtor, and remain subject to attack under the *Statute of Elizabeth*.

33 I, therefore, find that the transfer of the rental property to the McKays and thence to 934030 and the transfer of the equipment to the McKays are void under the *Statute of Elizabeth*. The transfer of the shop building to the McKays is void, but the further transfer of the shop building as part of the sale of the acreage is problematic, as the purchasers were not aware of the fraudulent intent of the vendors. There is no remedy therefore, for this further transfer under the *Statute of Elizabeth*.

The Fraudulent Preferences Act

34 Section 3 of the *Fraudulent Preference Act* renders void any conveyance of real or personal property made by a debtor to a creditor and having the effect of giving a preference to that creditor when the debtor is in insolvent circumstances or is unable to pay its debts in full if an action to impeach the transaction is brought within one year of the conveyance. The Applicant brought action with respect to the impugned transfers within the one year period.

35 The *Fraudulent Preferences Act* is more restrictive than the *Statute of Elizabeth* in its application, in that it requires that the debtor be insolvent. In addition, the Alberta Act does not use the term, "creditors and others" as in the *Statute of Elizabeth*, but is limited in its application to "creditors". However, the combined effect of Sections 2,3 and 4 of the *Fraudulent Preferences Act* means that a creditor who commences an action within a year and who is able to demonstrate that another creditor is preferred by the transfer to an extent greater than it otherwise would be will succeed despite any evidence of good consideration for the transfer or lack of knowledge or bad faith on the part of the preferred creditor.

36 The Respondents submit that the Applicant was not a "creditor" within the meaning of the Act at the time of the transfers, and that, at any rate, the transfers are protected by Section 6 of the *Fraudulent Preferences Act*, which protects bona fide transactions. They also submit that, when the transfers were effected, 715302 was solvent.

37 To qualify under the *Fraudulent Preferences Act*, an applicant must show that the respondent is indebted to it, although it is not necessary for an applicant to have been a judgment creditor at the time the impugned transaction was entered into: *Rusnak v. Canadian Imperial Bank of Commerce* (1982), 38 A.R. 514 (Alta. Q.B.), at 516. In *Rusnak*, however, there was no issue of whether the debt was payable at the time the transaction was effected.

38 In this case, while the debt existed in the sense that it was "an obligation to pay a sum certain or a sum readily reducible to certainty" (Dunlop, *supra* at p. 16), it was not yet payable. Given the time the loan had been outstanding, this is not a case where the non-occurrence of a contingent event had given rise to an implied obligation to pay the loan: *Berry v. Page* (1989), 38 B.C.L.R. (2d) 244 (B.C. C.A.). Before it did, the parties entered into the settlement agreement that set out terms of repayment. Under that agreement, the Respondents were not in default until December, 2001, leaving aside the issue of solvency. By that time, all of the impugned transfers had taken place.

39 The Respondents cite several cases where the holder of an unliquidated claim in tort was held not to be a creditor under the *Fraudulent Preferences Act*. These cases are distinguishable on their facts.

40 Although a few cases have suggested that contingent or subsequent creditors such as guarantors may have standing under the *Fraudulent Preferences Act*, (Howcroft, *supra* at page 507), the issue of whether a debtor whose debt has not yet become payable at the time of an impugned transaction has standing has not yet been determined. I find that such a debtor is a creditor under the *Act*, as this aligns the Alberta legislation with the fraudulent preferences legislation of other provinces, with the *Statute of Elizabeth*, and with the general commercial understanding of the term "creditor".

41 I also find that 715302 was insolvent at the time of the impugned transfers, on the basis of its financial statements for the years ending December 31, 2000 and 2001 and the evidence of Ms. McKay with respect to 715302's ability to pay its creditors in the ordinary course of business: *Clarke v. Sutherland*, [1917] 3 W.W.R. 624 (Alta. S.C. (App. Div.)); *Rae v. McDonald* (1886), 13 O.R. 352 (Ont. C.A.); *Stihl Ltd. v. Motion Engine Services Ltd.* (1990), 106 A.R. 118 (Alta. Master); *Niemyt v. Commertec Capital Corp.* (1999), 11 C.B.R. (4th) 66 (B.C. S.C.); (1999), 11 C.B.R. (4th) 75 (B.C. S.C.).

42 The Respondents submit that I should not find insolvency from the financial statements without expert evidence, and that there is no evidence of insolvency of 715302 on the specific dates of the impugned transfers. The financial statements, however, clearly show a net loss in 715302 for the years ending December 31, 2000 and 2001. Given that the facts necessary to prove insolvency between those time periods are not and could not be within the knowledge of the Applicant, the evidenciary burden shifts to the Respondents in these circumstances to disprove insolvency at the relevant times: Clarke, *supra* at page 625; *Alberta (Attorney General) v. Samuel Doz Professional Corp.* (1993), 9 Alta. L.R. (3d) 201 (Alta. Q.B.)

43 While I note that Ms. McKay has sworn that at the time the impugned transfers were made, 715302 was not insolvent, and that all financial obligations of 715302 were current at the time of the transfer of equipment, I am not satisfied that these simple allegations satisfy 715302's evidenciary burden of proving solvency of 715302 at the material times in 2001 in the face of the financial statements.

44 Section 6 of the *Fraudulent Preferences Act* protecting *bona fide* transfers does not aid the Respondents, given the findings I have made with respect to fraudulent intent and privity of the McKays. In addition, there are issues of the reasonableness of the consideration with respect to both the shop building and the equipment.

45 I therefore find that the transfers are fraudulent preferences under the *Fraudulent Preferences Act*, and that the transfers of the rental property and the equipment are void against the creditors of 715. I also find that the Applicant is entitled to recover the proceeds of the transfer of the shop building against the McKays by virtue of Section 11 of the *Fraudulent Preferences Act*. The McKays are trustees for the creditors of 715302 of the sum of $48,981 of the proceeds of the sale of the acreage, being the best evidence available to me of the value of the shop building, and there will be judgment against the McKays personally for that amount for the benefit of all creditors of 715302: *Allen v. Allen*, [1948] 1 W.W.R. 539 (B.C. S.C.); *Rogers Realty* (*supra* at para 36).

46 I decline to order that the claims of the McKays in respect of their shareholders' loans be postponed or subordinated to the claims of other creditors as the Notice of Motion filed by the Applicant does not specifically claim this remedy. This does not preclude a claim of equitable subordination being made by the creditors, or any of them, at a future time.

THE POSITION OF THE BANK

47 Although the Bank did not file a brief in the application, it claims priority over the property of the Respondents by virtue of the registration of its General Security Agreement on July 5, 1999. Counsel for the Bank submits that it is "piggy-backing" on the application of the Applicant. Given the priority of its registration and the terms of the General Security Agreement, the Bank has priority over the unsecured creditors of 715302 with respect to the proceeds received from the application to the extent of the Bank's indebtedness.

48 The Bank also applies for an order directing the Respondents to disclose the whereabouts of certain equipment, and deliver this equipment to a private bailiff. Given that I have found the transfer of equipment from 715302 to the McKays to be a fraudulent transfer and void, the equipment is the property of 715302. The equipment will be seized and sold and the existing injunction enjoining the McKays from disposing of the property will continued until the equipment has been seized. There is no evidence before me that the McKays, as directors of 715302, have, or intend to, hinder this process, and I decline to make the order requested by the Bank.

49 The Bank also asks for an order directing that the Clerk of the Court pay to it the amount of $844.07 received in the action between the Applicant and the Respondents. This amount was paid into Court prior to the end of June, 2002. Under Section 97(9) of the *Civil Enforcement Act*, RSA 2000 c-15, it became part of a distributable fund at the time it was paid in. The Applicant submits that, since the Bank did not issue a demand for payment to 715302 until July 5, 2002, it was not entitled to share in the distribution fund until that time. Section 99(3) of the *Civil Enforcement Act* gives priority in a distribution fund to eligible claims of enforcement creditors generally. The General Security Agreement provides that the Bank shall have, both before and after default, all the rights of a secured party under the PPSA. The Bank's claim under its security agreement ranks as a claim with priority and the Bank is entitled to the $844.07 currently in the fund.

COSTS

50 The Applicant claims solicitor-client costs against the Respondents. Given that I have found the impugned transfers to be fraudulent preferences, I find that the Applicant is entitled to costs on a full indemnity basis against 715302. This entitlement to costs will rank prior to the Bank and other creditors of 715302 in accordance with subsection 99(3)(c) of the *Civil Enforcement Act*.

51 The Bank also claims indemnity costs against the Respondent on the basis of the provisions of the General Security Agreement. It is entitled to such costs, to rank equally with its claim pursuant to subsection 93(3)(e) of the *Civil Enforcement Act*.

CONCLUSION

1. The transfer of the rental property is fraudulent and void against creditors of 715302 both on the basis of the *Statute of Elizabeth* and the *Fraudulent Preferences Act*.

2. The rental property will be sold, and the normal 180 day waiting period will be shortened to one day.

3. The transfer of equipment is fraudulent and void against creditors of 715302 both on the basis of the *Statute of Elizabeth* and the *Fraudulent Preferences Act*.

4. The equipment will be seized and sold, and the existing injunction enjoining the McKays from disposing of the property will continue in force until the equipment has been seized.

5. The transfer of the shop building is fraudulent both under the *Statute of Elizabeth* and under the *Fraudulent Preferences Act*, and creditors of 715302 are entitled to recover the proceeds of disposition of the shop building from the McKays under the *Fraudulent Preferences Act*.

6. There will be judgment in the amount of $48,981 against the McKays for the benefit of creditors of 715302.

7. The Bank has priority over the unsecured creditors of 715302 with respect to the proceeds received from this application, other than the award of costs made to the Applicant, to the extent of the Bank's indebtedness.

8. The Clerk of the Court is directed to pay the sum of $844.07 held in a distribution fund to the Bank.

9. The Applicant is entitled to indemnity costs of this application in priority to the Bank and other creditors of 715302 pursuant to subsection 99(3)(c) of the *Civil Enforcement Act*.

10. The Bank is entitled to indemnity costs of this application to rank equally with its claim pursuant to subsection 99(3)(e) of the *Civil Enforcement Act*.

Application granted.

TAB 19

2015 ABCA 137
Alberta Court of Appeal

BDO Canada Ltd. v. Dorais

2015 CarswellAlta 625, 2015 ABCA 137, [2015] A.W.L.D. 1976, 252
A.C.W.S. (3d) 194, 25 C.B.R. (6th) 320, 600 A.R. 18, 645 W.A.C. 18

BDO Canada Limited, Appellant (Plaintiff/Applicant) and Shauna Lee Dorais, Respondent (Defendant/Respondent) and Grant Dewar, Respondent (Defendant/Respondent)

Peter Costigan, Frans Slatter, Myra Bielby JJ.A.

Heard: April 2, 2015
Judgment: April 14, 2015
Docket: Edmonton Appeal 1403-0277-AC

Proceedings: reversed in part *BDO Canada Ltd. v. Dorais* (2014), 2014 CarswellAlta 1988, 2014 ABQB 331, 247 A.C.W.S. (3d) 21, [2015] A.W.L.D. 1 ((Alta. Q.B.))

Counsel: G.J. Thorlakson for Appellant
K.W. Fitz, C. Ballesteros for Respondent, Shauna Lee Dorais
P.G. Asselin for Respondent, Grant Dewar

***The Court*:**

1 The issue on this appeal is whether a trustee in bankruptcy can take over the prosecution of actions started by individual creditors, and pursue them on behalf of the bankrupt estate.

Facts

2 At present the litigation has not proceeded beyond the pleadings stage, so many of the key alleged facts have not been proven. However, for the purposes of this appeal, the facts as pleaded can be presumed to be true.

3 The deceased Michel Dorais and a number of companies previously controlled by him (the Dorais companies) have been adjudged bankrupt. When they were still operating, they solicited funds from investors, which they represented would be invested in real estate and mortgages. A number of those investors allege that they made their investments based on negligent or fraudulent misrepresentations.

4 At one point the Dorais companies purchased a significant amount of life insurance on the life of Michel Dorais. It is alleged that the policies or their proceeds were improperly diverted to Shauna Dorais or one creditor, Grant Dewar. They then received the proceeds of the insurance when Michel Dorais died. It is also alleged that real estate was bought using funds of the Dorais companies, but was placed in the name of Shauna Dorais.

5 Two groups of creditors (the Havelock plaintiffs and the Metz plaintiffs) commenced actions seeking personal remedies including rescission of their investment contracts, and damages. They also alleged a fraudulent preference in the transfer of an insurance policy to Grant Dewar, and alleged that property (including the proceeds of insurance policies) in the name of Shauna Dorais is impressed with a constructive trust.

6 Michel Dorais died in June 2009, and a receiver was appointed for many of the Dorais companies in August, 2009. In May 2011, the receiver commenced an action alleging fraudulent preferences with respect to the dealings in the insurance policies.

The respondents take the position that this statement of claim was never served, and there are now perceived to be limitation problems with respect to any new action by the Trustee in bankruptcy. In December 2011, the Havelock, Metz, and receiver's actions were stayed during case management, and the receiver was directed to assign Michel Dorais' estate and the Dorais companies into bankruptcy. The Trustee was appointed in January, 2012.

7 In early 2014 the Havelock plaintiffs and the Metz plaintiffs assigned their actions to the Trustee, who proposed to prosecute them on behalf of the bankrupt estates. The Trustee applied to lift the stays that had been imposed during case management in December 2011. The case management judge agreed with the respondents Shauna Dorais and Grant Dewar that a trustee in bankruptcy has no capacity to prosecute claims of individual creditors: *BDO Canada Ltd. v. Dorais*, 2014 ABQB 331 (Alta. Q.B.). Since he concluded that the Havelock and the Metz claims were essentially personal, the case management judge was not prepared to lift the stays.

Capacity of the Trustee in Bankruptcy

8 Trustees in bankruptcy are creatures of statute, and they derive their powers from the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3. Of particular importance are sections 30 and 72:

> 30(1) The trustee may, with the permission of the inspectors, do all or any of the following things:
>
> (d) bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt;
>
> . . .
>
> 72(1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

The case law establishes that a trustee may pursue claims on behalf of the bankrupt estate, but may not pursue the claims of individual creditors: *Toyota Canada Inc. v. Imperial Richmond Holdings Ltd.* (1997), 202 A.R. 274 (Alta. Q.B.) at para. 20, (1997), 54 Alta. L.R. (3d) 183 (Alta. Q.B.); *Principal Group Ltd. (Trustee of) v. Principal Savings & Trust Co.* (1990), 111 A.R. 81 (Alta. Q.B.) at para. 14, (1990), 80 C.B.R. (N.S.) 313 (Alta. Q.B.) affm'd (1992), 3 Alta. L.R. (3d) 123, 12 C.B.R. (3d) 257 (Alta. C.A.); *Principal Group Ltd. (Trustee of) v. Alberta* (1993), 139 A.R. 26 (Alta. Q.B.) at para. 10, (1993), 8 Alta. L.R. (3d) 73 (Alta. Q.B.). Personal claims do not "relate to the property of the bankrupt" under s. 30(1)(d).

9 The appellant Trustee does not dispute that it cannot pursue the claims of individual creditors. It argues, however, that claims for fraudulent preferences are advanced on behalf of all the creditors, not just any individual plaintiff creditor. The respondents concede that a trustee in bankruptcy does have the capacity to prosecute fraudulent preference claims on behalf of the bankrupt estate.

10 The Havelock and Metz claims clearly have a strong personal component. Those plaintiffs allege misrepresentations to themselves personally, investments that they made in reliance on those misrepresentations, and resulting personal loss. They seek rescission of their individual investment contracts, and damages for their own personal losses. The Trustee in bankruptcy concedes that it cannot pursue those claims on their behalf.

11 The Havelock and Metz claims, however, also contain collective components:

> (a) They plead that one of the insurance policies was assigned to Dewar at a time when the assignor was insolvent, and specifically plead the *Fraudulent Preferences Act*, RSA 2000, c. F-24.
>
> (b) They plead that (i) funds of the bankrupt companies were used to purchase property for the respondent Shauna Dorais, (ii) funds of the bankrupt company were used to purchase life insurance that accrued to the benefit of Shauna Dorais, and (iii) there is a constructive trust over the insurance proceeds received by Shauna Dorais.

The Trustee in bankruptcy argues that these types of collective claims accrue to the benefit of all the creditors, and not just the individual named plaintiffs. It argues that the case management judge should have lifted the stay with respect to these collective components of the Havelock and Metz actions, even if he properly declined to lift the stay on the personal components of those actions.

12 Section 10(1) of the *Fraudulent Preferences Act* provides:

> 10(1) One or more creditors may, for the benefit of creditors generally or for the benefit of those creditors who have been injured, delayed, prejudiced or postponed by the impeached transaction, sue for the rescission of, or to have declared void, agreements, deeds, instruments or other transactions made or entered into in fraud of creditors or noncompliance with this Act or by this Act declared void.

Actions under the statute are brought on behalf of all creditors, not just the one prosecuting the action: *Convoy Supply Alberta Ltd. v. Apex Insulation 1996 Ltd.*, 2003 ABQB 1 (Alta. Q.B.) at paras. 30, 33-4. A declaration that one of the respondents holds property under a constructive trust would likewise accrue to the advantage of all the potential beneficiaries of that trust, which would be the general body of creditors: *Leard, Re* (1995), 30 C.B.R. (3d) 312 (Ont. Bktcy.) at para. 5.

13 One of the core duties of a trustee in bankruptcy is to gather in the assets of the bankrupt. The Havelock and Metz claims seek, in part, declarations that certain transfers of assets from the bankrupts to the respondents are void. If those claims are successful, those assets would revert back to the original owner, not to the individual plaintiffs seeking the declaration. Neither the Havelock nor the Metz plaintiffs would receive any preferential payment or treatment. If the respondents do in fact hold property in trust for one or more of the bankrupt companies, the Trustee has a duty to attempt to recover it. Prosecuting these types of claims on behalf of the general body of creditors is consistent with the Trustee's overall duties. In that respect he is pursuing legitimate claims of the estates, and is not impermissibly "stepping into the shoes" of individual plaintiffs.

14 Since it is conceded that the Trustee in bankruptcy can pursue fraudulent preference claims on behalf of the bankrupt estates, the essential issue is whether the collective components of the Havelock and Metz claims can be pursued independently. In other words, is it possible to lift the stay on the Havelock and Metz actions, but only with respect to these collective claims? There is no doubt that the Court can, in an appropriate case, stay an action in whole, or only in part: R. 1.4(2)(h) provides that the Court may stay all or any part of an action. There is therefore no procedural impediment to allowing the Trustee to pursue only the collective components of the actions.

15 The case management judge concluded that the Trustee did not have the legal capacity to pursue the Havelock and Metz actions because they were personal claims, and the Trustee would be "stepping into the shoes of the plaintiffs". That would only be true to the extent that the Trustee was authorized to pursue the personal components of those claims, as opposed to the collective fraudulent preference and constructive trust claims. If the order lifting the stay is properly crafted, the prohibition against the Trustee pursuing personal claims will not be violated.

16 The respondents argue, in the alternative, that a trustee in bankruptcy has no capacity to take an assignment of an existing cause of action. They argue that s. 30(1)(d) only allows a trustee to "bring, institute or defend any action", which does not include taking an assignment of an existing action. Section 30(1)(d) should, however, be read in light of the provisions of s. 72, which confirm that a trustee is entitled to avail itself of all rights and remedies provided by the general law. Those rights and remedies include the general right to take assignments, as well as the right to take advantage of any ordinary procedures allowed at law. There are sound public policy reasons for preventing a trustee from pursuing personal claims on behalf of individual creditors, but there are no equivalent policy reasons for artificially limiting the procedural options open to a trustee in fulfilling its core obligation of bringing in the assets of the bankrupt.

17 In summary, the Trustee has the legal capacity to take an assignment of the collective components of the Havelock and Metz actions, and the stay on those actions should have been partially lifted to allow the Trustee to pursue them against the two respondents.

Other Issues

18 The respondents advanced several reasons why the stay of the Havelock and Metz actions should not be lifted. The case management judge concluded that the Trustee did not have the capacity to take the assignments of those actions under s. 30(1)(d), and accordingly did not deal with the other issues. Counsel for the respondents argued that those remaining issues should be referred back to the case management judge. There has, however, already been considerable delay in the prosecution of these actions and the administration of the bankrupt estates. The respondents dealt with these other issues in their factums, and they are properly before this Court. In light of the partial lifting of the stay, some of the other issues are clear enough to enable disposition at this point.

19 The respondents argued that the Trustee could not pursue the Havelock and Metz actions because he would be in a conflict of interest. As the bankrupts are among the defendants in the actions, the Trustee would effectively be suing itself. Since the actions will be proceeding only against the two respondents, who are not bankrupts, there is no longer a concern about conflicts. For the same reason, the doctrine of merger is not engaged. Trustees in bankruptcy routinely challenge preferential payments made by their own bankrupts under s. 95, without any merger occurring.

20 The respondents allege that the assignments are champertous. As noted, one of the fundamental duties of a trustee in bankruptcy is to get in the assets of the bankrupt. Since the assignments permit the Trustee to pursue assets that allegedly belong to the bankrupts, the Trustee has a legitimate interest in the actions that allays any concerns about champerty: *Margetts (Next Friend of) v. Timmer Estate*, 1999 ABCA 268 (Alta. C.A.) at para. 12, (1999), 73 Alta. L.R. (3d) 110, 244 A.R. 114 (Alta. C.A.).

21 The respondents also argue that the Trustee has not met the test for lifting a stay found in s. 69.4 of the *Bankruptcy and Insolvency Act*. The stays in question were imposed during the case management process, in an attempt to bring order to the litigation. With respect to the two respondents, they were not the statutory stays that arise when a defendant is declared to be bankrupt, as neither of the respondents in this appeal is bankrupt. The lifting of the stays against the non-bankrupt respondents is accordingly governed by common law principles, not by the provisions of the *Act.* Since the stays are not to be lifted against any of the bankrupt defendants, s. 69.4 is not engaged.

22 Finally, the respondents argue that the Havelock and Metz actions are of insufficient merit to warrant lifting the stay. The merits of an action are undoubtedly relevant in deciding whether to lift a stay, and clearly hopeless actions should not be revived. An application to lift the stay is not, however, the place for detailed examination of the merits; if any party thinks that it is entitled to summary disposition of the claims, it can bring the appropriate application. There may well be valid defences to some of the claims made in the two actions, and the Trustee may well face procedural and evidentiary hurdles. On this record, however, the two actions are of sufficient merit to entitle the Trustee to an opportunity to pursue the claims on their merits.

Conclusion

23 In summary, while a trustee cannot pursue the claims of individual creditors, a trustee has a duty to pursue the assets of the bankrupt estate. The stay of the Havelock and Metz actions should be lifted to the extent of permitting the Trustee to pursue the fraudulent preference and constructive trust claims, but not the personal claims, against the two respondents. The appeal is allowed to that extent. Any procedural implications arising from the partial lifting of the stay are referred back to the case management judge.

Appeal allowed in part.

TAB 20

2011 ABQB 213
Alberta Court of Queen's Bench

Taylor & Associates Ltd. v. Louis Bull Tribe No. 439

2011 CarswellAlta 796, 2011 ABQB 213, [2011] A.W.L.D. 2845, 201
A.C.W.S. (3d) 710, 46 Alta. L.R. (5th) 182, 525 A.R. 141, 79 C.B.R. (5th) 65

Taylor & Associates Ltd. (Plaintiff) and Louis Bull Tribe No. 439, 677626 Alberta Ltd., 415992 Alberta Ltd., Bear Hills Service Centre Ltd., Pigeon Lake Golf Club (1991) Ltd., Bear Hills Land Developments Ltd., Pigeon Lake Golf Club (1991) Holdings Ltd., K.H. Restaurants Ltd. (Defendants)

Louis Bull Tribe No. 439, 677626 Alberta Ltd., 415992 Alberta Ltd., Bear Hills Service Centre Ltd., Pigeon Lake Golf Club (1991) Ltd., Bear Hills Land Developments Ltd., Pigeon Lake Golf Club (1991) Holdings Ltd., K.H. Restaurants Ltd. (Plaintiffs by Counterclaim) and Taylor & Associates Ltd., Dwayne Taylor, 835537 Alberta Ltd., carrying on business as Mearon Construction, Harold Mearon, Verlie Sison, Po Chan, Helen Bull, Solomon Bull, Virgil Deschamps, Elaine Roasting and John Does No. 1 through 10 (Defendants by Counterclaim

A.W. Germain J.

Heard: February 28, 2011
Judgment: March 29, 2011
Docket: Edmonton 0103-11021

Counsel: G. James Thorlakson, for Louis Bull Tribe No. 439, 677626 Alberta Ltd., 415992 Alberta Ltd., Bear Hills Service Centre Ltd., Pigeon Lake Golf Club (1991) Ltd., Bear Hills Land Developments Ltd., Pigeon Lake Golf Club (1991) Holdings Ltd., K.H. Restaurants Ltd.
Dwayne Taylor, for himself, Taylor & Associates Inc.

***A.W. Germain J.*:**

1. Procedural History and Supplemental Judgment Overview

1 In October of 2006, I released my Reasons for Judgment in *Taylor & Associates Ltd. v. Louis Bull Tribe No. 439*, 2006 ABQB 698, 423 A.R. 164 (Alta. Q.B.) ["Taylor v. Louis Bull #1"]. In that judgment I dismissed the claim of Taylor & Associates Ltd. [Taylor Inc.] and allowed the counterclaim of Louis Bull Tribe No. 439 and various corporations owned by the Band [Louis Bull]. Taylor Inc. was at all relevant times directed by Dwayne Taylor, its majority shareholder, director, and namesake.

2 In *Taylor v. Louis Bull #1* I concluded a number of parties, including Mr. Taylor and Taylor Inc., were liable (jointly and severally) to Louis Bull and a Louis Bull owned corporation for a number of judgment amounts. These awards are summarized at paras. 130-131. I also concluded that the misconduct of Dwayne Taylor, Taylor Inc., and Mr. Po Chan (an accountant) warranted punitive damages (paras. 124-128). $91,126.38 of the Louis Bull judgment against Dwayne Taylor remains unpaid.

3 On May 14, 2007, I released supplemental reasons that flowed from the request of certain of the Defendants by counterclaim for reconsideration of some elements of *Taylor v. Louis Bull #1*. Those supplemental reasons were reported as *Taylor & Associates Ltd. v. Louis Bull Tribe No. 439*, 2007 ABQB 350, 423 A.R. 257 (Alta. Q.B.) ["Taylor v. Louis Bull #2"].

4 This supplemental judgment relates to a further application by Louis Bull for a declaration regarding certain funds taken from Louis Bull and deposited into the account of Taylor Inc. Louis Bull alleges these funds were removed from Taylor Inc. by defendant Dwayne Taylor under circumstances which constitute a fraudulent preference.

5 This is not the only allegedly fraudulent preference which has emerged in this matter. Louis Bull originally also applied for a declaration that Mr. Po Chan had engaged in a fraudulent preference when he transferred his home entirely into the name of his wife. That aspect of this application has been settled, and Mr. Chan in fact gave evidence for the Plaintiffs against Mr. Taylor. I understand that Mr. Chan has now paid off in full the judgment I granted in favor of Louis Bull against him in *Taylor v. Louis Bull #1*.

6 I will not in this supplemental judgment repeat the observations and findings that I made about how Louis Bull was taken advantage of by Mr. Dwayne Taylor and Taylor Inc. Nor will I repeat the observations I made about the minority shareholder in Taylor Inc., accountant Po Chan. These are detailed in *Taylor v. Louis Bull #1* .

7 This decision involves three issues:

1. were the transfers of money out of Taylor Inc. a fraudulent preference,

2. who was the recipient of the funds removed from Taylor Inc., and

3. if the transfers were fraudulent, what amount can Louis Bull recover from Taylor Inc.?

2. The Position of the Parties

8 The position of Louis Bull is that in my first judgment I granted Louis Bull judgment against Taylor Inc.; that made Louis Bull a judgment creditor against Taylor Inc. Further, before Louis Bull became a judgment creditor it was a direct creditor because Dwayne Taylor improperly placed band monies into a new bank account maintained by Taylor Inc., and immediately thereafter diverted the bulk of these funds by money order to someone else. Louis Bull asserts that on a balance of probabilities, Dwayne Taylor was the ultimate recipient of these funds.

9 However, Taylor Inc. allegedly has other debts. Louis Bull accepts that Dwayne Taylor might also have been a creditor to his own company, as he generated the work effort that caused the band to pay the monies to Taylor Inc. As such, Louis Bull asserts that when Dwayne Taylor took the monies out of his company he preferred himself (as an employee/director creditor) over other creditors, though the only identified alternative creditor is Louis Bull.

10 Dwayne Taylor's position was given partially under oath in his own defense. He argues that if he took the monies out of the company, and he is not prepared to state that one way or the other, then all the funds involved went to lawyers who provided poor professional legal services, or alternatively the money may have gone to Po Chan. In any case, Mr. Taylor says he did not get the money, and adding a fraudulent preference amount to his personal judgment would be unfair to him. He says he is attempting to pay off the damages ordered in *Taylor v. Louis Bull #1*.

3. The Law

11 There are two legislative bases on which this Court can declare Mr. Taylor engaged in a fraudulent preference. The first is the *Fraudulent Preferences Act*, R.S.A. 2000, c. F-24 [the "*FPA*"]. This legislation has the effect of 'unwinding' or 'reversing' transactions which fall into certain categories. A general authority is provided by *FPA*, ss. 1-2 to unwind any transaction that was *intended* to defeat creditor debt recovery, if:

1. the person making a transfer of property knows that person is insolvent or is about to become insolvent (*FPA*, ss. 1(a), 2(a)), and

2. the transfer is intended to prevent the person's creditors from recovering their debts (*FPA*, s. 1(b)), or to prefer one creditor over another (*FPA*, s. 2(b)).

12 *FPA*, s. 3 provides a parallel authority to unwind a transaction that has the *effect* of defeating creditor debt recovery, provided the application is made within one year of the transaction. *FPA*, s. 3 does not require the applicant demonstrate there was any *intention* to favour one creditor over another.

13 The Plaintiffs here say that a transfer of funds out of Taylor Inc. was intended to prevent Louis Bull from recovering the funds it was owed by preferring one creditor (Taylor) over another (Louis Bull), a *FPA*, s. 2 type scenario. That requires proof on a balance of probabilities of four factors (*Titan Investments Ltd. Partnership, Re*, 2005 ABQB 637 (Alta. Q.B.) at para. 13, (2005), 383 A.R. 323 (Alta. Q.B.); *Shengli Oilfield Freet Petroleum Equipment Co. v. Ascension Virtual Group Ltd.*, 2010 ABQB 597 (Alta. Master) at para. 8):

> ... under s. 2 of the FPA, the applicant must show (1) that there was a transfer of property, (2) by an insolvent person or a person who is on the eve of insolvency, (3) to a creditor, (4) with the intent of giving that creditor a preference.

14 If a fraudulent preference is identified and falls within the *FPA*, ss. 1-3 criteria, then the a creditor may seize and recover of the 'preferred' property or the proceeds of its sale (*FPA*, s. 11(1)). Alternatively, 'preferred' property may be the subject of a court application for an order to recover the 'preferred' property (*FPA*, s. 11(4)). Property or proceeds of property recovered under the *FPA* belong to all creditors, and not merely the party or parties who initiated the *FPA* procedure (*FPA*, s. 11(2)).

15 The second basis for the Plaintiffs' claim is the *Fraudulent Conveyances Statute*, 13 Eliz. 1, Chapter 5 (U.K.) [the "*Statute of Elizabeth*"]. This is a 16 th century English act that has been 'inherited' by certain Canadian jurisdictions: *Ramgotra (Trustee of) v. North American Life Assurance Co.*, [1996] 1 S.C.R. 325 (S.C.C.) at paras. 61-63, (1996), 132 D.L.R. (4th) 193 (S.C.C.). Gonthier J. explains at para. 62 that the *Statute of Elizabeth* operates in manner parallel to that of the *FPA*, but allows a transfer to be unwound even where insolvency is not a risk.

> Several of the provincial fraudulent conveyance statutes impose an insolvency requirement, like that contained in Alberta's Act: Nova Scotia, New Brunswick, Prince Edward Island, Saskatchewan and Yukon. Thus, ... it would allow creditors to challenge fraudulent conveyances without having to prove that, at the time of the conveyance, the debtor was insolvent, was unable to pay his or her debts in full, or knew that he or she was on the eve of insolvency.

16 In *Palechuk v. Fahrlander*, 2006 ABCA 242, 273 D.L.R. (4th) 332 (Alta. C.A.), leave denied (2007), [2006] S.C.C.A. No. 405 (S.C.C.), the court at para. 31 identified five elements required for application of the *Statute of Elizabeth*:

> 31 To obtain a remedy under the Statute of Elizabeth, the plaintiff must establish the following:
>
> (1) there must be a conveyance of real or personal property;
>
> (2) for no or nominal consideration;
>
> (3) with intent to defraud, delay, or hinder creditors;
>
> (4) the party challenging the conveyance must be someone who was a creditor at the time of the conveyance or someone with a legal or equitable right to claim against the transferor; and
>
> (5) the conveyance must have had the intended effect.

See also *Proulx v. Proulx*, 2002 ABQB 151 (Alta. Q.B.) at para. 14, (2002), 316 A.R. 150 (Alta. Q.B.), and *Don Forsey & Blackfalds Investments Ltd. v. Hydro Kleen Systems Inc.*, 2011 ABQB 14 (Alta. Q.B.) at para. 100.

17 A judgment creditor such as Louis Bull is authorized by the *Alberta Rules of Court* (*Alberta Rules Of Court*, Alta. Reg. 124/2010, s. 9.24(1); *Alberta Rules of Court*, Alta. Reg. 390/1968, s. 359) to apply under either the *FPA* or the *Statute of Elizabeth*; see also *834658 Alberta Ltd. v. 763319 Alberta Ltd.*, 2008 ABCA 371 (Alta. C.A.) at para. 6, (2008), 440 A.R. 290 (Alta. C.A.). The right to claim under the *FPA* or the *Statute of Elizabeth* arises on the date that a party to an action alleges a

debt in its pleadings: *Krumm v. McKay*, 2003 ABQB 437 (Alta. Q.B.) at paras. 29-30, 40, (2003), 342 A.R. 169 (Alta. Q.B.); *Proprietary Industries Inc. v. Workum*, 2005 ABQB 610 (Alta. Q.B.) at paras. 13-18, (2005), 142 A.C.W.S. (3d) 100 (Alta. Q.B.); *Don Forsey & Blackfalds Investments Ltd. v. Hydro Kleen Systems Inc.* at para. 95.

4. The Facts

18 In a few short months in 2000 Mr. Dwayne Taylor, Mr. Po Chan, and their company Taylor Inc. inflicted much harm on Louis Bull. These two men and their corporation aligned themselves with a sympathetic faction of the Louis Bull leadership and systematically transferred the assets from the tribe to their own corporate account. Details of this egregious conduct may be found in the two prior judgments recorded by me that describe this troubling period of time for Louis Bull: *Taylor v. Louis Bull #1*; *Taylor v. Louis Bull #2*.

19 The Louis Bull Band Counsel was badly split at the time. By way of short summary, in May of 2000 a group of band leaders wrestled financial control of the Band from the chief Helen Bull and her counsel supporters. The Chief's faction was aligned with Mr. Taylor; they had hired him and his company to manage a number of struggling Band-owned businesses.

20 However, the Band received significant sums of borrowed money immediately prior to this takeover. The part of the Louis Bull leadership that was aligned with Mr. Taylor created a new Band account at the Treasury Branch in Wetaskiwin Alberta. The chief and her followers deposited large sums of borrowed money into the Treasury Branch, and systematically wrote similar large cheques to Taylor Inc. on the deposited funds: Notionally, all of these checks were to pay bills due to Taylor Inc.

Cheque Date	***Cheque Amount***
May 16, 2000	$186,000.00
May 25, 2000	$170,000.00
May 26, 2000	$164,769.67
	Total = $520,769.67

Notionally, all of these checks were to pay bills due to Taylor Inc.

21 Taylor Inc. was owned 70% by Dwayne Taylor and 30% by Po Chan. Dwayne Taylor was the bank signing authority and the clearly the business mind who directed the company. Taylor Inc was, effectively, the alter-ego of Dwayne Taylor. The company had no business other than managing the affairs of Louis Bull.

22 The financial records of Taylor Inc. were released to Louis Bull by court order in 2009. Its Toronto Dominion Canada Trust corporate account was opened on January 24, 2000 with an initial deposit of $150,000.00 from Louis Bull. Thereafter, and consistent with normal business practices, numerous small dollar amount corporate cheques were written which seemed to distribute that money in the normal course of business. However all of this changed in May 2000.

23 In that month three large money orders were purchased. In each case, a money order was issued the same day a cheque was deposited. Their recipient is unknown; the financial institution is no longer able supply the information to indicate the payee of these money orders. There is a clear correlation between the money orders and the May payments to Taylor, Inc.:

Date	***Cheque Amount***	***Money Order Amount***
May 16, 2000	$186,000.00	$165,006.75
May 25, 2000	$170,000.00	$175,000.00
May 26, 2000	$164,769.67	$150,006.75
	Total = $520,769.67	Total = $490,013.50

24 I find that the money orders were unusual and not in the ordinary course of business. The money orders were clearly timed to withdraw money from Taylor Inc. as soon as the large amounts were received by that company. Dwayne Taylor knew about the monies coming in and was able to control their removal.

25 There were only two possible people who would have access to the Taylor Inc. account and who could authorize those type of transfers. One was Po Chan, the other was Dwayne Taylor. Po Chan gave evidence at this fraudulent preference hearing and denied that he had any cheque writing ability whatsoever on this company. He was only a minority shareholder. Generally his credibility is weak. I have previously concluded he fully and knowingly collaborated with Taylor's schemes to take money from the Band.

26 However, on this point he is believable because Dwayne Taylor was clearly the alter-ego of Taylor Inc. Dwayne Taylor was the major shareholder and director. Also, in the trial which I heard now some years ago there was no evidence whatsoever that Po Chan was able to write any cheques on the Taylor Inc. account. He would in some cases *prepare* cheques but Mr. Taylor would sign them.

27 At the hearing for this application Mr. Taylor testified as to what he remembered about the money orders. His evidence is vague and self-serving. Even so, he cannot bring himself to *completely* deny knowing anything about the money orders, so instead he blames members of the legal community and professionals who he said received this money. In short, while he remembers the money coming into and leaving Taylor Inc., Dwayne Taylor denies he was the ultimate recipient of these funds. He provides no particulars about who the payee was on these large money orders. I find that incredible and reject it.

28 The exclusive knowledge and factual possession by Mr. Taylor means he could easily show where this money went. The suspicious circumstances here lead me to conclude that Mr. Taylor purchased money orders, if not directly to himself, then instead to an entity or third-party over which he had full and complete control. Directly or indirectly, Mr. Taylor received this money.

29 He may later have spent some in an attempt to prove a $10 million mortgage penalty arising out of his claim in the main action, but that does not make the money any less attributable to him or to his order or benefit. Despite Mr. Chan's general lack of credibility I accept that he did not receive any of these monies.

5. Analysis and Conclusion

30 I find on a balance of probabilities that in May 2000 Dwayne Taylor removed $490,013.50 from his company Taylor Inc., at a time when Taylor Inc. was insolvent. I have concluded that one way or another Dwayne Taylor ended up with the $490,013.50.

31 That satisfies the criteria of *FPA*, s. 2; Dwayne Taylor paid himself in priority over another creditor, Louis Bull.

32 The next question is whether Mr. Taylor had any right at all to that money. Here Louis Bull takes a fair, reasonable and generous position. A strong argument can be made that Mr. Dwayne Taylor was not a creditor of the company; he received various monies by usual and ordinary cheque transfers throughout the history of Taylor Inc. If so, Louis Bull would be entitled to the entire monies.

33 Louis Bull however concedes that despite the strong inference that Mr. Taylor was fully paid by the cheque transfers, it accepts that Dwayne Taylor was a comparable creditor for the monies he took. In short, that means Louis Bull accepts that Mr. Taylor would have been attracting a compensation package of over $100,000.00 a month over and above the other payments by cheque in the ordinary course of business.

34 The forensic expert at the original trial felt the monies taken by Taylor Inc. from Louis Bull were ludicrous as compensation for Taylor Inc.'s work efforts. That same argument could be made for the diversion of funds from the company to Mr. Taylor. Dwayne Taylor is a businessman. He operated an A&W franchise at one point, was perhaps a partner in a lumberyard at another, and generally made a living as a retail merchant businessman. He exhibits no special training, professional status, or credentials. He caught the Louis Bull tribe at a particularly vulnerable time (see *Taylor v. Louis Bull #1*, Schedule 1) and rode their vulnerability to the point that he nearly bankrupted them.

35 There is therefore a strong inference that he was *not* entitled to any of that money, but I accept Louis Bull's analysis that it cannot, on a balance of probabilities, do anything more than proved that they were creditors of Taylor Inc. and give Mr. Taylor the benefit of the doubt and conclude that he too had that same status.

36 Recent cases of our court indicates the criteria for fraudulent preference: *Don Forsey & Blackfalds Investments Ltd. v. Hydro Kleen Systems Inc.*, *Titan Investments Ltd. Partnership, Re*, *Shengli Oilfield Freet Petroleum Equipment Co. v. Ascension Virtual Group Ltd.*. It is a common sense approach. One creditor who has an inroad into the debtor diverts to himself assets that should be shared by all creditors. That is a fraudulent preference when the transfer occurs during a time when the debtor is insolvent.

37 I find on a balance of probabilities that in May 2000 Dwayne Taylor removed $490,013.50 from his company Taylor Inc., at a time when Taylor Inc. was insolvent. That satisfies the criteria of *FPA*, s. 2; Dwayne Taylor paid himself in priority over another creditor, Louis Bull.

38 In coming to that conclusion I give Dwayne Taylor the benefit of the doubt (one which some may argue unreasonably generously) that he may have also been a creditor for the amount of money that he took for himself. He gets this benefit primarily because the trail has gone cold and it is difficult for Louis Bull to prove the contrary.

39 Given my conclusion I do not need to consider the *Statute of Elizabeth*. That said, I do not think that legislation applies here because Louis Bull has, in effect, admitted that Mr. Taylor has a claim for unpaid services worth nearly half a million dollars. That means the money orders were in exchange for substantial unpaid services, and not for "no or nominal consideration", the second requirement identified in *Palechuk v. Fahrlander*, at para. 31.

40 What remains is assessing the relative claims of Dwayne Taylor and the Louis Bull. As of February 28, 2010 Taylor Inc. is indebted to Louis Bull in an amount equal to $520,769.67. Mr. Taylor is presumptively owed $490,013.50, the amount he removed for his own benefit. Together, Taylor Inc.'s debt is $1,010,783.17; Louis Bull's share is 51.5%.

41 I have concluded that Dwayne Taylor improperly (based on the *FPA*) took $490,013.50 from Taylor Inc. That transaction is reversed under *FPA*, s. 2, Taylor Inc. is owed $490,013.50 by Dwayne Taylor.

42 As a creditor of Taylor Inc. Louis Bull is entitled to 51.5% of the amounts preferred to Dwayne Taylor or $252,356.96. Therefore Louis Bull has additional judgment against Dwayne Taylor, based on fraud, in the amount of $252,356.96, which they may add to their outstanding balance of $91,126.38.

6. The Costs of Louis Bull

43 Louis Bull was successful in this litigation. Louis Bull is entitled to their costs of these proceedings, on the basis of Schedule C, Column 5 of the *Alberta Rules of Court*, plus their litigation disbursements.

Application granted.

TAB 21

2017 ABQB 631
Alberta Court of Queen's Bench

Myers v. AlanRidge Homes Ltd

2017 CarswellAlta 2326, 2017 ABQB 631, [2017] A.W.L.D. 6322, [2017] A.W.L.D. 6323, 285 A.C.W.S. (3d) 543

Michael Myers, Jyoti Myers, Sam Ranieri, Carmen Raniere, Will Saskoley, Janice Saskoley, Amish Sabharwal and Christine Coutts (Plaintiffs) and AlanRidge Homes Ltd., Jager Homes Inc., 1181435 Alberta Ltd., Hon Enterprises Limited., Dominic Hon, Nicholas Hon, John Does(s) and ABC Limited (Defendants)

C.S. Anderson J.

Heard: February 13, 2017; February 14, 2017; February 15, 2017; April 28, 2017
Judgment: October 18, 2017
Docket: Calgary 0801-06032

Counsel: James G. Hanley, for Plaintiffs
Trevor A. Batty, J. Kelly Hannan, for Defendants

***C.S. Anderson J.*:**

Introduction

1 Together, the plaintiffs obtained four judgments against AlanRidge Homes Ltd. This trial arises out of their inability to realize on their judgements, as AlanRidge is now insolvent. The plaintiffs challenge a number of transactions that AlanRidge undertook in winding up its affairs. The plaintiffs ask this Court to void these transactions relying upon the *Fraudulent Preferences Act*, RSA 2000, c F-24 (*FPA*), and the *Fraudulent Conveyances Act, 1571* (UK), 13 Eliz I, c 5 (*Statue of Elizabeth*). They also ask that this court find the defendants conspired to defeat the plaintiffs' claims.

Background

2 In February 2005, Dominic Hon and Nicholas Hon (through a numbered company) purchased 60% of AlanRidge, a custom home builder, (which also owned another custom home builder, Jager Homes Inc.) for $7.5 million.

3 Less than a year later, in December 2005, the Hons learned that AlanRidge's CEO had been misappropriating funds. They terminated her employment and hired new management.

4 New management quickly determined that AlanRidge was not financially sustainable. They recommended that AlanRidge finish any custom homes on which construction had already commenced, but cease taking any new work. In addition, they recommended cancelling the contracts for thirty-eight custom homes that AlanRidge had not yet started. These contracts 'were below costs' and would not be profitable.

5 To that end, on February 27, 2006, AlanRidge sent letters to those thirty-eight custom home purchasers advising of its decision to cancel the contracts and offering to return their deposits.

6 AlanRidge then began laying off employees, securing additional financing and selling assets in order to complete its ongoing projects and wind down its affairs with a view, at least at the beginning, of paying off all of AlanRidge's creditors.

7 During this time, AlanRidge also faced a lawsuit from its former CEO. That lawsuit and AlanRidge's dire financial position resulted in AlanRidge's bank reducing its credit facility. The lawsuit was not settled until the summer of 2007. Until that time, the CEO retained a 40% interest in AlanRidge.

8 Of the thirty-eight custom home purchasers whose contracts were cancelled, six sought redress. Although I do not know when AlanRidge was first notified of these six claims, in July, 2006 there was a court order directing the plaintiffs' claim to proceed to arbitration. These claims were dealt with by AlanRidge's management. Nicolas Hon (Hon) did not become aware of them until the fall of 2006.

9 In November 2006, the arbitration commenced. On May 30, 2007, the arbitration decisions and awards were released. AlanRidge appealed four of the six awards and paid out the two that were not appealed. By November 2007, the four decisions under appeal were resolved resulting in judgements totalling $1.242 million. By that time, however, AlanRidge no longer had the funds to pay the four outstanding judgments.

10 As a result, the four sets of unpaid award holders commenced this action, challenging six of the transactions that occurred during the winding up of AlanRidge. They maintain that three of the transactions should be set aside because they are contrary to the *FPA* and the *Statute of Elizabeth.* They also maintain that these three transactions along with three others support a finding that the Hons conspired to strip AlanRidge of its assets so as to avoid paying the plaintiffs' claims.

11 I will address here one of the defendants' arguments that applies to all three transactions: that the *FPA* does not apply to unliquidated claims. They argue that the *FPA* applies only to liquidated claims and the plaintiffs' claims were not liquidated until their appeal was resolved in November 2007, or, alternatively, when the award was first delivered to the AlanRidge in July, 2006. The *FPA* cannot apply, it is argued, to any transactions that occurred before that earlier date. The plaintiffs, however, rely upon *1007374 Alberta Ltd. v. Ruggieri*, 2014 ABQB 641 (Alta. Q.B.), aff'd 2015 ABCA 205 (Alta. C.A.), where the court found that despite the uncertain outcome of a trial, an outstanding claim was sufficient to trigger the provisions of the *FPA*.

12 I note that few of the custom home purchasers whose contracts were cancelled pursued a claim against AlanRidge so such claims cannot be viewed as inevitable at the time the contracts were cancelled, in February 2006. However, by July 2006, AlanRidge knew or ought to have known of the plaintiffs' claims. Unlike the decision in *Ruggieri*, I heard no evidence regarding AlanRidge's assessment of the claims. In this decision, I have proceeded on the basis that the plaintiffs were creditors under the *FPA* as of July 2006, in accordance with *Ruggieri*.

Issues

13 The first issue before is me is whether the following three transactions, involving related or non-arm's-length parties, were fraudulent preferences, contrary to the *Statute of Elizabeth* and/or the *FPA*:

1. The Jager Homes Inc. (Jager) building sale to 1181435 Alberta Ltd. (118) for $2.85 million;

2. The sale of Jager shares to Hon Enterprises Limited (HEL) for $3.19 million;

3. A loan in the amount of $1.2 million from 118, the granting of security as a result, the substitution of security and its repayment.

14 As full and fair consideration was paid in each of these transactions, the issue before me is whether AlanRidge intended by these transactions to defraud, defeat, hinder, delay, or prejudice the plaintiffs (*Krumm v. McKay*, 2003 ABQB 437 (Alta. Q.B.)).

15 I can infer such intent, if the plaintiffs raise a *prima facie* inference of such intent by showing that certain badges of fraud existed at the time of transfer: *Ruggieri*. If so, the burden then shifts to the defendants to rebut the inference.

16 Next, if I find that the defendants have successfully rebutted this inference such that they (or any of them) are not contrary to either the *Statute of Elizabeth* or section 1 of the *FPA*, I am nonetheless asked to find that the second and third transaction are

contrary to sections 2 and 3 of the *FPA*. That is to say that, I am asked to find that by selling the Jager shares or paying the 118 loans, the defendants intended to give preference to another creditor over the plaintiffs (section 2 of the *FPA*) or that, regardless of intent, the transactions had the effect of doing so (section 3 of the *FPA*). If so, I then consider whether sections 6 and/or 9 of the *FPA* apply, thereby exempting the transactions, in any event.

17 Finally, I am asked to consider the elements of the tort of conspiracy and whether these three transactions, set out in paragraph thirteen herein, along with the following three, together, demonstrate that the defendants conspired to intentionally and unlawfully defeat the plaintiffs' claims:

4. A loan to Jager in August 2007 for $2.5 million;

5. General accounting expenses of $579,000; and

6. The payment of two of the arbitration awards (that were not appealed).

Transaction #1 — Jager Building sale

18 The plaintiffs are seeking to set aside the sale of the Jager building to a related company, 118 (wholly owned by 698828 Alberta Ltd., which is owned by the defendants, Dominic and Nicholas Hon and other members of their family).

19 The Jager building was sold to 118 on May 14, 2007, shortly before the arbitration awards were released. The plaintiffs, therefore, allege that the timing of the sale to a related party, one of the Hon companies, is suspicious or *prima facie* fraudulent.

20 Assuming, as I have done in these reasons, that the close relationship between Jager and 118 (concurrent intent) and the timing of this transaction are sufficient to raise a *prima facie* inference of fraud, the burden to rebut this inference then shifts to the defendants.

21 The defendants have explained the reasons for and the circumstances in selling the Jager building. Although the sale did not close until May 2007, the transaction actually began in August 2006, when Jager needed funds to fulfill a contractual obligation to purchase lots from Qualico Communities Ltd. (Qualico). Jager had earlier given a deposit on some lots with the balance due to Qualico in August 2006. In August 2006, Jager was having cash flow issues similar to AlanRidge and could not get bank financing. Had Jager failed to make this payment, it would have lost its deposits and the lots. In response, Jager's management recommended selling Jager's non-core assets, one of which was the Jager building.

22 Weidman Reliance Group undertook an independent appraisal of the building and appraised it at $2.85 million. 118 agreed to purchase the Jager building.

23 118 then advanced Jager $1,135,520 in August 2006, the amount that Jager needed to pay Qualico. The advance was used as a deposit towards the purchase of the Jager building. It is noteworthy, that although 118 was a related party to the Hons, at the time of this loan to Jager, the former CEO, who is independent of 118, owned 40% of AlanRidge.

24 Approximately four months later, in December 2006, 118 made a formal offer to purchase the Jager building for its fair market value, $2.85 million, and the transaction closed on May 14, 2007. The accuracy of the appraisal is not disputed or in issue.

25 The directors of Jager received independent legal advice regarding the sale.

26 In his testimony, Hon explained that rather than listing the property for sale with an agent, Jager decided to sell the Jager building to 118 because it gave Jager certainty; certainty as to the timing of the sale and the amount realized. Jager knew that 118 would pay the fair market value for the building with no conditions. I accept this evidence. I found Hon to be forthright and candid in his evidence in both chief and cross examination. The decision to sell the Jager building to 118 made commercial sense. Jager needed cash and 118 provided it.

27 Jager has provided an accounting of where the funds were expended. In addition to purchasing the lots from Qualico ($1,135,520), it paid down its liabilities ($1,198,378 to an arm's-length mortgagee to discharge the first mortgage against the building) and the balance of approximately $505,000 was deposited into Jager's account to reduce its $3.6 million operating line of credit with HSBC.

28 The evidence does not support the plaintiffs' argument that in selling the Jager building, the defendants were systemically stripping the assets of AlanRidge (Jager being a wholly owned subsidiary of AlanRidge) so as to avoid plaintiffs' claims. I am satisfied that Jager sold its non-core asset for cash so that it could meet its immediate contractual and financial obligations.

29 Unlike the cases of *Krumm* and *Ruggieri*, 118 paid Jager much needed cash on a timely basis, cash that Jager could not access from its bank.

30 In the words of plaintiffs' counsel, I am satisfied that the defendants have 'disproved intent' to defraud, defeat, hinder, delay or prejudice the plaintiffs in the selling of the Jager building.

31 I therefore decline to void the transaction under the *Statute of Elizabeth* or section 1 of the *FPA*.

Transaction #2 - Sale of Jager Shares

32 The plaintiffs also seek to set aside AlanRidge's sale of Jager shares to HEL, a non-arm's-length company, owned by the Hon Family Trust and Dominic Hon.

33 AlanRidge sold the shares in Jager in August 2007, after the arbitration awards were released. These shares, it is argued, would have fully satisfied the plaintiffs' claims. Given the timing of the sale to a related party, the plaintiffs allege the transaction is *prima facie* fraudulent.

34 Assuming, as I have done in these reasons, that these circumstances are sufficient to raise a *prima facie* inference of fraud, the burden to rebut this inference then shifts to the defendants.

35 Hon has testified as to the reasons for and the circumstances in selling the Jager shares in the face of the plaintiffs' claims. Similar to the sale of the Jager building, the actual sale of the Jager shares was contemplated and set in motion much earlier than the closing date of August 2007.

36 From February 2006, when AlanRidge decided to wind down its operations, AlanRidge's financial situation deteriorated. By July 2006, it could not meet its payroll obligations, nor pay its debts as they came due.

37 In order to address its urgent financial needs and to proceed with winding up, AlanRidge borrowed money from 118. In exchange for cash, it pledged to 118, or its nominee, the shares of Jager.

38 AlanRidge retained Clark Valuation Services to appraise the shares. The shares were privately held, wholly owned by AlanRidge. Typically, shares in privately held companies are illiquid, in that there is no ready public market, and therefore not easily transferrable.

39 Clark opined that as of June 13, 2007, the value of the shares ranged between $2.74 million to $3.19 million. HEL agreed to buy the shares at the highest range set by Clark, $3.19 million. On August 9, 2007, HEL paid AlanRidge $3.19 million in cash, which AlanRidge deposited into its general account. The accuracy of the appraisal is not disputed or in issue.

40 AlanRidge used the cash to pay off its debts. The Agreed Statement of Facts sets out where these funds were spent.

41 Approximately $820,000 was paid to secured creditors, HSBC and Fisgard, an unrelated party. Approximately $186,000 was paid to preferred creditors (CRA and New Home Warranty Program) and approximately $609,000 was paid to trade creditors. Hon testified that the trades were paid because they could register liens against the custom homes, homes that AlanRidge needed to sell.

42 AlanRidge also used part of the proceeds or cash received from HEL ($2.5 million) to advance a loan to Jager on August 30, 2007. Of course, as AlanRidge no longer owned Jager by this date, the plaintiffs understandably question why AlanRidge would have loaned Jager these funds, when it was in such dire straits financially.

43 I accept that there was a history of loans between the two companies. I also accept Hon's evidence that he was not involved in this loan nor did he know the reason for the loan but that it was likely directed by AlanRidge's controller or staff, who were "probably not aware of the share transfer" and not aware that AlanRidge no longer wholly owned Jager.

44 More importantly, for this analysis, Jager repaid the loan in four installments within a five month period, from October 2007 to January 2008 ($250,000 on October 30, 2007; $300,000 on November 9, 2007; $700,000 on December 27, 2007; and $1,752,000 on January 21, 2008). The evidence demonstrates that, indeed, Jager overpaid the amounts owing to AlanRidge. At the time of its wind up, AlanRidge owed significant funds to Jager.

45 In August 2007, one of the two award holders whose awards were not appealed, StormHaven, was threatening to enforce its judgement, which would have resulted in additional costs for AlanRidge. As a result, in August, 2007 AlanRidge paid StormHaven's judgement, in the approximate amount of $422,000. I accept Hon's evidence as to why StormHaven was paid in August and the plaintiffs were not. The StormHaven award was due, the plaintiffs' awards were not.

46 The circumstances surrounding the sale of the Jager shares are distinguishable from the facts in *Krumm* and in *Ruggieri*. HEL paid and AlanRidge received $3.19 million cash for the shares, cash that AlanRidge could not access from its bank. In addition, AlanRidge has provided a commercially sound reason for selling the shares. I find the sale of the shares to be a *bona fide* transaction, with the amount, as set by an independent appraisal, fully paid.

47 I am satisfied that the defendants have 'disproved intent' to defraud, defeat, hinder, delay or prejudice the plaintiffs in the selling of the Jager shares. I therefore decline to void the transaction under the *Statue of Elizabeth* or section 1 of the *FPA*.

48 The plaintiffs also ask that I consider the sale of the Jager shares under sections 2 and 3 of the *FPA*. Sections 2 and 3 are subject to section 6 of the *FPA*. Section 6 exempts a *bona fide* transfer of securities or property, for a present actual *bona fide* advance of money, if the money paid bears a fair and reasonable relative value to the consideration for it.

49 The defendants have satisfied me that this sale was without intent to deceive or defraud and therefore *bona fide.* Further, they have satisfied me that full, fair and reasonable consideration of actual money was given in exchange. The transaction is therefore not voidable under sections 2 or 3 of the *FPA*.

50 Even in the absence of section 6, I am satisfied that the dominant intent of this transaction was not to give the Hons or their related companies any preference over the plaintiffs' claims, contrary to section 2 of the *FPA*. The purpose was to allow AlanRidge to meet its immediate financial obligations, dating back to July 2006 and onward, when AlanRidge could not meet its payroll obligations.

Transaction #3 — Granting Security and Loan Repayment to 118

51 The third and final transaction that the plaintiffs seek to set aside arises out of two loans from 118 to AlanRidge and the subsequent granting of security. The plaintiffs argue that this transaction is the most egregious of the three transactions.

52 In July 2007, when the plaintiffs' claims were outstanding (albeit under appeal), AlanRidge executed a General Security Agreement (GSA) in favour of 118. The GSA was executed by Rowena Chow, Hon's cousin, who was employed by the Hons' companies. The GSA related to two loans in 2006. The loans were repaid to 118 in August 2007 and a month later, the GSA was then registered.

53 The plaintiffs argue that each step of this transaction, the initial granting of security, the execution of the GSA and the repayment were a clear attempt to defraud or defeat the plaintiffs' claims and give priority to the Hons and their related

companies. I am satisfied that the circumstances here are sufficiently suspicious such that the burden shifts to the defendants to justify this transaction and to disprove any fraudulent intent.

54 *Ruggieri* sets out that if a person makes a settlement which subtracts from the property, an amount without which the debts cannot be paid, then the court can infer intent of the settlor to defeat or delay a creditor unless the debtor can put before the court cogent evidence that it did not intend to defeats its creditors.

55 The defendants have put the reasons for and the circumstances of the loan before me. 118 loaned AlanRidge funds twice in 2006. In June 2006, approximately 3 $^{1}/_{2}$ months after AlanRidge hired new management, 118, the same company that would advance Jager money in August 2006, loaned AlanRidge $900,000 so that it could continue its operations. In exchange, on June 30, 2006, AlanRidge executed a demand collateral mortgage against a number of lots in favour of 118. There is no issue that AlanRidge actually received these funds nor that a collateral mortgage was given as security for the loan (see Agreed Statement of Facts).

56 Approximately one month later, in July 2006, AlanRidge requested a further $150,000 from 118 so that AlanRidge could meet its month-end payroll obligations. HSBC had refused to advance these funds to AlanRidge. Understandably, 118 was reluctant to continue to loan monies to AlanRidge, which was insolvent at the time. However, it agreed to another loan on a number of conditions, including that the monies be repaid by December 31, 2006, that AlanRidge pledge its Jager shares as security and that AlanRidge grant to 118 or its nominee an exclusive and irrevocable option to purchase the Jager shares at the fair market value. There is no issue that AlanRidge actually received these funds nor that the Jager shares were pledged as security (see Agreed Statement of Facts).

57 AlanRidge did not repay 118 by December 31, 2006.

58 The security given for these loans was not registered until after it was repaid. The failure to register this securities may affect 118's priority as a secured creditor, but not its status as a secured creditor.

59 By 2007, AlanRidge intended to (and indeed did) sell the underlying properties (the lots and the Jager shares) over which 118 had security. In order to do so, AlanRidge exchanged or substituted one security for another.

60 On August 31, 2007, after the sale of the Jager shares, AlanRidge repaid $1,222,855 to 118, which included interest ($174,480) minus an earlier repayment of $1625.

61 The presence or absence of fraudulent intent is a question of fact, to be determined from all the circumstances (*Tracy Estate v. Wobick*, [1999] B.C.J. No. 2530 (B.C. S.C.)). The facts in *Tracey Estate* are distinguishable from the facts before me, where, among other things, the debtor registered a debt against a property three weeks before trial. The facts are also distinguishable from *Business Development Bank of Canada v. Sood*, 2016 ABQB 429 (Alta. Q.B.), upon which the plaintiffs rely. In *BDBC*, the guarantor transferred his assets to a numbered company without consideration one week before a payment to BDBC was due.

62 In considering the facts before me, I consider that the granting of security can itself be a fraudulent preference (*Canadian Imperial Bank of Commerce v. Grande Cache Motor Inn Ltd.*, [1977] A.J. No. 496 (Alta. T.D.)). *CIBC* is distinguishable however, because in that case the creditors had not taken security at the time of their investment in a company nor had they intended to do so, until it became clear that the company was insolvent. Here, the GSA at issue was not granted because of the Hons' earlier, initial investment, but because of a subsequent loan that AlanRidge desperately needed that would not otherwise been given without security. The GSA was then substituted, a year later, because AlanRidge wanted to sell the underlying security.

63 At the outset, in 2006, 118 would not loan AlanRidge funds without security. This only makes commercial sense. In addition to AlanRidge's financial troubles which made it impossible to obtain bank financing, the former CEO continued to own 40% of AlanRidge. She did not loan or contribute funds to AlanRidge's operations at this time. The Hons, through 118, found themselves having to fund 100% of AlanRidge's operations, despite only owning 60%. I find it was commercially reasonable for AlanRidge to grant security to 118 in order to obtain the loans it needed to continue its operations.

64 There is no issue before me regarding the terms of the loans. As a result of the lawsuit, AlanRidge was careful to borrow these funds from 118 at the same interest rate as another arm's-length lender of AlanRidge's. I also find that AlanRidge has also justified the reasons for substituting the security for these loans and for its repayment.

65 I accept Hon's evidence as to the circumstances surrounding this loan. I am satisfied that the defendants have rebutted any presumption of fraud. The defendants did not have any dishonest intent or intent to defraud, defeat, hinder, delay or prejudice the plaintiffs or have any intent to prefer the Hon-related companies over the plaintiffs in each step of this transaction.

66 I find the substitution of security was *bona fide* and made in good faith to allow AlanRidge to sell the lots over which 118 had an unregistered mortgage and the Jager shares which were pledged to 118 or its nominee at the time the loan was advanced.

67 I accept Hon's evidence that he was not considering the plaintiffs' claims when the loans were granted and security substituted.

68 It was not until the summer of 2007 that Hon realized that AlanRidge would be unable to pay off all of its creditors.

69 The fact that AlanRidge does not list the plaintiffs as creditors in their financial statements of October 8, 2007 is symptomatic of poor accounting or an overwhelmed management winding up a company and not evidence of fraud or intent to deceive.

70 The defendants have also disproved that these loans and the granting of the underlying security were intended to give preference of 118's claim over the plaintiffs (under section 2 of the *FPA*).

71 I now consider section 3 of the *FPA* and whether the repayment to 118 had the effect of giving 118 preference over the plaintiffs, regardless of intent. Section 3 of the *FPA* is subject to sections 6 and 9 of the *FPA*. Section 6 allows for the granting of the original security as AlanRidge received *bona fide* payment for same. Section 9 allows for the substitution in good faith of one security over another for the same debt so far as the debtor's estate is not lessened in value to the other creditors because of the substitution. I am satisfied that the substitution was in good faith, an exchange of one security for another for the same debt and that AlanRidge's estate was not lessened in value as a result, particularly *vis a vis* the plaintiffs, who are unsecured creditors.

72 I therefore decline to void this transaction under the *Statue of Elizabeth* or the *FPA*.

Tortious Conspiracy

73 The plaintiffs ask that I consider the above three transactions, along with the following three, transactions 4, 5 and 6, as evidence that the plaintiffs engaged in a tortious conspiracy to strip away the assets of AlanRidge in order to avoid paying the plaintiffs.

74 The necessary elements to establish the tort of conspiracy are that the allegedly-tortious action must be unlawful, and that the conspirators intended to cause damage to the plaintiffs or at least knew or ought to have known that their actions would injure the plaintiffs.

Transaction #4 - Loan to Jager $2.5 Million

75 I have already addressed this loan when I considered the sale of the Jager shares.

76 AlanRidge loaned Jager $2.5 million on August 30, 2007. These funds came from the proceeds of the share sale where AlanRidge sold its Jager shares. Therefore, at the time of this loan, AlanRidge did not own Jager.

77 Although the loan was not commercially reasonable, given AlanRidge's financial circumstances, there is a history of loans between AlanRidge and Jager. Hon was not involved in this loan nor did he know the reason for the loan. I accept his evidence that the loan was likely directed by AlanRidge's controller or staff, who were "probably not aware of the share transfer" or sale.

78 Importantly, Jager repaid the loan in four installments within a five month period. In fact, Jager overpaid AlanRidge for this loan.

79 I cannot find that this loan was unlawful or supports a finding that it was part of a conspiratorial scheme or conduct intended to strip away the assets of AlanRidge or defraud the plaintiffs.

Transaction #5 - AlanRidge's G&A Expenses

80 The plaintiffs ask that I find that AlanRidge's General and Administrative (G&A) expenses from September 2007 to January 2008, totaling $579,990, were excessive and further evidence of tortious conduct, particularly for a company that was winding up its operations, with only one employee at the time.

81 Hon testified that these amounts were decided by AlanRidge's controller, with advice from AlanRidge's external accountants. As well, these G&A expenses included significant legal fees incurred by AlanRidge during this time.

82 The plaintiffs have not put forward any expert evidence to contradict the evidence of the defendants' expert, Barry Milliner, although they did question Milliner's qualifications and the thoroughness of his investigation in this matter. As such, the plaintiffs ask that I give his evidence less weight.

83 Milliner opined that construction companies can charge G&A expenses of up to ten percent of their total cost of sales. Milliner concluded that AlanRidge's G&A throughout 2007 was eight percent of total cost of sales. He concluded that the charges were within the reasonable range. I accept his evidence.

84 The plaintiffs have failed to prove that that the G&A expenses were unreasonable, much less unlawful, nor do they support a finding that the setting of the G&A expenses were part of a scheme intended to strip away the assets of AlanRidge in order to defraud the plaintiffs.

Transaction #6 - Arbitration Settlement Payments

85 In August 2007, AlanRidge paid another award holder, StormHaven, $422,399 in settlement of its arbitration award. On October 10, 2007, a second arbitration award in the approximate amount of $206,000 was paid to Stemp/Psofimis. These were the two arbitration awards that AlanRidge did not appeal. Hon testified that he did not have a relationship with or know any of the award holders. Of the award holders, Hon had only met Michael Myers, because he was a former employee of AlanRidge. AlanRidge paid the award holders whose amounts were due and owing. They were also threatening to execute upon their judgments.

86 The unfortunate and seemingly unfair result is that two arbritation awards were fully paid while four, the plaintiffs', were not. By the time the four outstanding awards were finally settled on November 29, 2007, AlanRidge had insufficient funds to pay its secured creditors, much less unsecured creditors.

87 I accept Hon's evidence relating to AlanRidge's reasons for paying out these two award holders. The evidence does not support a finding that such payments were unlawful or part of a scheme intended to strip away the assets of AlanRidge in order to defraud the plaintiffs.

Conclusion

88 I am satisfied that the defendants did not undertake the first three transactions with the intent of defrauding, defeating, hindering, delaying or prejudicing the plaintiffs. As such, I decline to void these transactions under the *Statute of Elizabeth* or section 1 of the *FPA*.

89 Further, the transactions are not voidable under sections 2 or 3 of the *FPA*.

90 Finally, the plaintiffs have failed to satisfy me that the defendants engaged in a tortious conspiracy, that the six transactions, or any of them, were undertaken with the intent to systematically strip assets from AlanRidge in order to avoid paying the plaintiffs.

91 As a result of the forgoing, I dismiss the plaintiffs' claim in its entirety.

Action dismissed.

TAB 22

2021 ABCA 348
Alberta Court of Appeal

Fish Creek Finish Carpentry Ltd v. Lindner

2021 CarswellAlta 2580, 2021 ABCA 348, [2021] A.W.L.D. 4497, 336 A.C.W.S. (3d) 660, 463 D.L.R. (4th) 554

Fish Creek Finish Carpentry Ltd. (Respondent/ Applicant) and Andrew Lindner and Peter Lindner (Not Parties to the Appeal / Respondents) and Magdalena Lindner (Appellant / Non-Party Respondent)

Tracey Higashi (Respondent / Plaintiff) and Andrew Lindner, also known as Andreas Lindner, Peter Lindner, Lindner Enterprises Inc., Fish Creek Finish Carpentry Ltd., John Doe and ABC Corporation (Not parties to the Appeal / Defendants) and Magdalena Lindner (Appellant / Non-Party Respondent)

Jack Watson, L. Bernette Ho, Anne Kirker JJ.A.

Heard: October 12, 2021
Judgment: October 20, 2021
Docket: Calgary Appeal 2001-0052AC

Counsel: B.J. Findlater, for Fish Creek Finish Carpentry Ltd.
R.E. Harrison, for Tracey Higashi
L.V. Halyn, for Magdalena Lindner

***Per curiam*:**

Introduction

1 The appellant, Magdalena Lindner, appeals an order declaring a settlement agreement to be fraudulent in contravention of the *Fraudulent Preferences Act*, RSA 2000, c F–24 and the *Statute of Elizabeth, 1571* (UK), 13 Eliz 1, c 5 and thereby void as against her husband's creditors. A Master granted the order in morning chambers and the order was upheld on appeal to the Court of Queen's Bench.

2 We dismiss the appeal for the following reasons.

Background

3 The factual background of these applications is found at Fish Creek Finish Carpentry Ltd v Lindner, 2020 ABCA 129. We will set out the facts in brief.

4 Andrew Lindner, the appellant's husband, and his brother were the directors and shareholders of a corporation. In 2016, the respondents obtained judgments against the corporation for an amount in excess of $300,000. In 2018, the respondents obtained a further order permitting them to enforce the debts against Andrew and his brother personally on the basis that the brothers fraudulently transferred property belonging to the corporation to themselves.

5 It was in the course of enforcing this debt that the respondents came to learn that Magdalena and Andrew were plaintiffs in an action against a third-party, Deepa Ganatra, and were seeking damages for breach of contract related to the sale of their jointly owned property. In 2018, a Master granted the Lindners summary judgment on liability and declared that "the only real issue for trial is the amount to be awarded to the Lindners": Lindner v Ganatra, 2018 ABQB 635 at para 56. The Master noted that on the face of the claim the Lindners would be entitled to damages of $873,500, but there was a triable issue as to

whether the Lindners were reasonably diligent in marketing the house. The Master also dismissed Ms. Ganatra's application for summary dismissal. The Master's order was upheld on appeal to the Court of Queen's Bench. A further appeal to this court was discontinued on November 15, 2019.

6 In May of 2019, Andrew took an undertaking under advisement to, among other things, advise the respondents if the property action was settled or discontinued. On September 30, 2019, counsel for Andrew advised the respondents that the property action had been settled. Andrew was ultimately compelled to disclose the settlement agreement following a November 7, 2019 hearing and the settlement agreement was disclosed a week later on November 14, 2019.

7 The settlement agreement was executed by Magdalena Lindner, Andrew Lindner and Deepa Ganatra. It is dated September 17, 2019. The agreement provided that Ms. Ganatra pay Magdalena $215,000. Upon Magdalena's receipt of the full settlement amount, Magdalena and Andrew each agreed to discontinue and release their individual actions against Ms. Ganatra. All funds were to be paid in trust to the lawyers representing Magdalena and Andrew, with $100,000 payable on execution and three instalments of $38,333.33 payable on the last day of October, November and December 2019, respectively.

8 The settlement agreement also contained a "No Admission of Liability" provision that stated:

> It is understood and agreed that the settlement terms and release of all liability under this Agreement is the compromise of legal dispute and that payment of the Settlement Amount by Deepa to Magdalena, and the waiver of costs as between Andrew and Deepa, as required by this Agreement are not to be construed as an admission of liability on the part of Deepa.

9 The settlement agreement was disclosed to the respondents the morning of November 14, 2019. That afternoon, counsel for the respondents requested that Magdalena and Andrew's counsel not release any funds that may have been received for Magdalena. The following morning, November 15, 2019, counsel for Magdalena and Andrew advised that not only had the full $215,000 settlement amount been paid by Ms. Ganatra ahead of schedule, but that the entirety of those funds (less approximately $10,000 held in trust as a retainer) had been disbursed to Magdalena. That same day the respondents were granted an *ex parte* interim attachment order prohibiting Andrew and Magdalena from disbursing any of the funds received under the settlement agreement.

10 This brings us to the order now under appeal. The respondents applied to a Master for an order directing that half of the settlement amount ($107,500) be paid into court for distribution to Andrew's creditors. The respondents argued that the settlement agreement was a fraudulent transfer of Andrew's interest in the property action from Andrew to Magdalena.

Reasons of the Master

11 The application was heard by a Master in morning chambers. The Master had before him the settlement agreement and a legal assistant's affidavit setting out the history of the matter. The Master granted the order, and declared that the settlement agreement contravened both the *Fraudulent Preferences Act* and the *Statute of Elizabeth*. The Master's reasoning is reproduced in full:

> Mr. Halyn on behalf of Magdalena Lindner has portrayed this as her settling her claim against Ms. Ganatra. This would have made sense if Andrew Lindner had not signed and agreed to release his claim. That is the difference. If Ms. Ganatra was prepared to pay funds to Magdalen[a] Lindner and not have a release from Andrew Lindner and face whatever claim he or his creditors through him were prepared to make, that is one thing. But reading the settlement agreement and release clearly what is happening here is that Andrew Lindner has agreed to walk away from his claim to the benefit of his wife Magdalena. And so, essentially, Ms. Ganatra was willing to pay $215,000 to obtain a release from both Magdalena and Andrew Lindner and in my view it's clear that half of the settlement proceeds, $107,500, are attributable to the claim of Andrew Lindner and I'm declaring that Magdalena is to pay into court the $107,500 being one-half of the settlement allowed under the settlement agreement.

Reasons of the Chambers Judge

12 The appellant filed new evidence on appeal in the form of an affidavit from Magdalena and a transcript from questioning on that affidavit. The appellant argued that the settlement agreement was not a conveyance or transfer of property within the purview of either statute, relying on Sembaliuk Estate v Sembaliuk, 1984 ABCA 340, leave to appeal to SCC refused, 19198 (18 February 1985). In *Sembaliuk*, this court held that a disclaimer of an interest in an estate was not a conveyance under the *Statute of Elizabeth*. The appellant argued that Andrew's discontinuance of his claim via the settlement agreement was akin to a disclaimer of an interest in an estate.

13 The chambers judge admitted the new evidence on appeal, but held that it did not change her conclusion that the Master was correct. The chambers judge held that the settlement agreement was a fraudulent transfer within the meaning of section 1 of the Fraudulent Preferences Act and that the respondents were also entitled to relief under the *Statute of Elizabeth*. The chambers judge concluded that the fraudulent conveyance statutes are to be interpreted liberally and thus apply to "any kind of transfer or conveyance made with intent to defraud creditors no matter what the form", relying on Krumm v McKay, 2003 ABQB 437 at para 13. She also rejected the appellant's argument that *Sembaliuk* was determinative, finding that the settlement agreement was a transfer of property that was much more specific than the disclaimer of interest in *Sembaliuk*.

14 The chambers judge's conclusion that the settlement agreement was a transfer of property was based in part on Magdalena's affidavit evidence. Magdalena acknowledged that any monies from the property action were to be shared equally between her and Andrew:

> We were content to share equally in any damages awarded against Ganatra, and if we were successful in obtaining a judgment against Ganatra, we would equally share in any amounts collected from Ganatra in enforcing that judgment. [AKE2]

Magdalena also acknowledged that Andrew could drop his claim at any time:

> It was evident at that time that Andrew was financially unable to fund the Ganatra litigation going forward, and he did not want to pursue his claim for an equal portion of the damages alleged against Ganatra for her breach of the Contract only to have the benefit of that effort, if any, then seized by his judgment creditors. In short, Andrew indicated he would not pursue his claim against Ganatra alone, but as long as I was willing to pursue and fund the litigation, he would stay involved although he could have dropped his claim at any time. [AKE4 - AKE5]

15 The chambers judge noted that Andrew only discontinued his cause of action after the execution of the settlement agreement and after Magdalena received the settlement funds. She noted that Andrew could have dropped his case against Ms. Ganatra without executing the settlement agreement, but he did not do that. She found that Andrew's discontinuance of his cause of action was "directly related" to Magdalena receiving the settlement funds, of which half he was entitled to.

16 The chambers judge noted numerous indicators or "badges of fraud", relying on Moody v Ashton, 2004 SKQB 488, including: Andrew was insolvent and unable to pay his debts; a complete absence of evidence about any consideration flowing to Andrew in exchange for his signing the settlement agreement; Andrew and Magdalena were aware that Andrew was being forcibly pursued by creditors; Andrew and Magdalena are related parties such that Andrew retains some benefit from the fact that Magdalena received the settlement funds; and the settlement fund payments were accelerated and disbursed in "unusual haste". The chambers judge also found that the terms of the settlement agreement raised the "spectre of fraud" because the agreement, without reasonable explanation, referred to the outstanding judgment of over $300,000 against Andrew, and Andrew's discontinuance was contingent on Magdalena receiving the funds.

17 The chambers judge concluded:

> The settlement agreement effectively results in Andrew transferring his cause of action to his wife for no consideration but her benefit as she received the settlement funds in relation to their action to which Andrew's creditors would have been entitled to one-half. Therefore, by releasing his claim he reduces the value of his cause of action to nothing, thus defeating

and prejudicing his creditors. The only conclusion to be drawn is that he did so with the intent to defeat his creditors. There is no reliable evidence to suggest otherwise.

Grounds of Appeal

18 The appellant argues that the chambers judge erred in concluding that the settlement agreement was a transfer or conveyance of property within the meaning of section 1 of the Fraudulent Preferences Act and the *Statute of Elizabeth*.

Standard of Review

19 The question of whether there was a transfer of property or conveyance is a question of mixed law and fact reviewed for palpable and overriding error: Housen v Nikolaisen, 2002 SCC 33 at para 36.

Fraudulent Conveyance Statutes

20 The general legal principles flowing from the *Fraudulent Preferences Act* and the *Statute of Elizabeth* are not in dispute. The chambers judge correctly enunciated the legal principles previously endorsed by this court in Paragon Capital Corporation Ltd v Morgan, 2014 ABCA 363, leave to appeal to SCC refused, 36242 (23 April 2015).

21 Section 1 of the Fraudulent Preferences Act states the following:

> **Fraudulent transfers**
>
> Subject to sections 6 to 9, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made
>
> > (a) by a person at a time when the person is in insolvent circumstances or is unable to pay the person's debts in full or knows that the person is on the eve of insolvency, and
> >
> > (b) with intent to defeat, hinder, delay or prejudice the person's creditors or any one or more of them,
>
> is void as against any creditor or creditors injured, delayed or prejudiced.

22 The *Statute of Elizabeth* similarly provides a remedy to void a transfer, but unlike the *Fraudulent Preferences Act*, the insolvency of the transferor is not an essential element of the fraudulent conveyance. The principles defining the remedy in the *Statute of Elizabeth* are set out in Proulx v Proulx, 2002 ABQB 151 at para 14, and were endorsed by this court in *Paragon*:

> 1. There must be a conveyance of either real or personal property;
>
> 2. The transaction must have been for no or nominal consideration;
>
> 3. It must have been the intent of the settlor to defraud, hinder or delay his creditors;
>
> 4. The intent of the settlor may be inferred from his circumstances and the circumstances of the settlement or may be the result of direct evidence;
>
> 5. The fact that there was no consideration or voluntary consideration will in most cases justify the inference of the necessary intent absent evidence rebutting that inference;
>
> 6. Inference of intent will be strong if the settlor was insolvent at the time of settlement or the settlement effectively denuded him of assets sufficient to cover existing obligations;
>
> 7. The party challenging the conveyance must be a creditor or someone with a legal or equitable right to claim against the settlor; and

8. The conveyance must have had the intended effect.

See also Palechuk v Fahrlander, 2006 ABCA 242 at para 31, leave to appeal to SCC refused, 31672 (1 March 2007).

Analysis

23 The appellant's main contention on appeal is that the settlement agreement executed by Magdalena, Andrew and Ms. Ganatra, or the release signed by Andrew, was not a transfer or conveyance of property by Andrew to Magdalena. Therefore, there was no transfer or conveyance for the purposes of either the *Fraudulent Preferences Act* or the *Statute of Elizabeth*. This characterization is inaccurate. The relevance of the circumstances of, and the contents of, the settlement agreement and the release by Andrew exist in their being evidence of the transfer or conveyance, not in their being by themselves the transfer or conveyance. We outline the appellant's position as follows.

24 The appellant's position, as it was before the lower courts, is there was no transfer or conveyance from the judgment debtor (Andrew) to Magdalena, and any payment from a third party (Ms. Ganatra) to Magdalena cannot be in contravention of the statutes. The appellant advances the same argument made before the chambers judge: Andrew's decision to decline to pursue his claim against Ms. Ganatra is akin to the disclaimer of an interest in an estate in *Sembaliuk*. The appellant says that a discontinuance is an avoidance of a cause of action and not a transfer or conveyance of the property comprised in that cause of action.

25 The appellant further submits that Andrew was free to discontinue or pursue the property action as he saw fit. Even if something nefarious did occur, that is irrelevant since there was no transfer or conveyance of property. Indeed, the appellant does not argue that the chambers judge erred in her findings related to the numerous "badges of fraud".

26 The respondents argue that the chambers judge did not err in distinguishing *Sembaliuk* and did not err in giving a liberal interpretation to the fraudulent conveyance statutes. A conveyance came about when Andrew and Magdalena agreed to discontinue and release the entire property action between the parties, and further agreed that Magdalena would receive the entire settlement amount.

27 *Sembaliuk* was a matrimonial property action. Following the death of the husband's father, and before the will had been probated, the husband disclaimed his interest in his father's estate in order to prevent his wife from sharing in that interest. The husband knew that his share of the estate would go to his uncle, who he believed would see that the children be looked after. The wife sought to set aside the disclaimer on the basis that it was a fraudulent conveyance either within the meaning of section 1 of the Fraudulent Preferences Act or the *Statute of Elizabeth*. The trial judge declined to set aside the disclaimer under the *Fraudulent Preferences Act* on the basis that a disclaimer was not a "gift, conveyance, assignment, transfer, delivery over or payment", and further, the wife was not a "creditor". The trial judge did, however, find that the disclaimer was void under the *Statute of Elizabeth*. This court disagreed and held that the disclaimer did not fall within any usual definition of conveyance, concluding at paras 12-13:

> The gift to the husband was not a specific one. It was not ascertainable or identifiable. If we return to the meaning of the word "conveyance" in *the Statute of Elizabeth* it can only mean that the debtor has made over property, a situation which does not apply here. There is no donee of a disclaimed gift in a real sense. The bequest lapses. It may go to the creditors or other claimants, it may go to other beneficiaries, or it may go to a residuary beneficiary.
>
> I am satisfied that a disclaimer, being an avoidance of a gift, is not a conveyance of the property comprised in that gift.

28 In distinguishing *Sembaliuk*, the chambers judge reasoned:

> The appellant refers to the *Sembaliuk* decision as authority that the settlement agreement and release does not constitute a fraudulent preference nor conveyance as there is no transfer of property between Magdalena and Andrew. With all due respect, there is a transfer of property and it is much more specific than a disclaimer of interest as the Court in *Sembaliuk* was dealing with. Here [there] was a cause of action and liability had been determined. Andrew had an interest which was

quantifiable and ascertainable. It only required the damage assessment. He released this. In effect, he gave it to his wife, as I said, for her benefit. There's no other reasonable explanation for why he executed the settlement agreement and release.

29 In our view, the chambers judge did not err in distinguishing the *Sembaliuk* decision. We agree with the reasons enunciated by both the Master and the chambers judge highlighting the significance of Andrew's execution of the settlement agreement which included a release in favour of Ms. Ganatra. We note there was also an agreement regarding the waiver of costs as between Andrew and Ms. Ganatra.

30 In addition, the chambers judge did not commit a palpable and overriding error in applying the legal principles flowing from the *Fraudulent Preferences Act* and the *Statute of Elizabeth* to the evidence before her. The chambers judge thoroughly reviewed the evidentiary record, including Magdalena's affidavit and the transcript of questioning on affidavit, in finding that there were significant indicators of fraudulent intent or "badges of fraud", as described by Justice Baynton in *Moody*.

31 Although the chambers judge said that the "settlement agreement effectively results in Andrew transferring his cause of action to his wife for no consideration", we are satisfied that what the chambers judge meant was that the settlement agreement and release, when considered in their overall context, demonstrated that Andrew had effectively transferred his cause of action in the property action to Magdalena for no consideration, thus allowing Magdalena to reach a final settlement with Ms. Ganatra, and thus defeating and prejudicing Andrew's creditors by taking all settlement proceeds for herself. Having regard for the totality of the circumstances, the overall flow of events constituted a transfer or conveyance of property within the meaning of section 1 of the Fraudulent Preferences Act and the *Statute of Elizabeth*. We agree.

Conclusion

32 The appeal is dismissed.

33 The respondents seek costs on a solicitor and client scale. This court has previously indicated that solicitor and client costs are awarded in rare and exceptional cases, including where there is a finding of misconduct during the litigation: Weatherford Canada Partnership v Artemis Kautschuk und Kunstoff–Technik GmbH, 2019 ABCA 92 at para 14. We are not satisfied that an award of solicitor and client costs is warranted here where the appellant relied upon this court's decision in *Sembaliuk* on a principled basis, though the decision was ultimately found to be distinguishable.

34 The respondents are awarded party-party costs on the appeal and are entitled to share the entirety of the amount paid into this court as security for costs as satisfaction of the cost award, in whole or in part.

Appeal dismissed.