Court File No.: CV-16-11389-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

**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**

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# BOOK OF AUTHORITIES OF THE MONITOR

(Motion Returnable May 1, 2018 – Speedy Electrical Claim Dispute)

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April 17, 2018

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# IN THE MATTER OF THE BANKRUPTCY OF NATIONAL TELECOMMUNICATIONS INC. OF THE TOWN OF VAUGHAN, IN THE PROVINCE OF ONTARIO

F.L. Myers J.

Heard: February 21, 2017
Judgment: March 3, 2017
Docket: 31-2014067

Counsel: James Clark, for Deloitte Restructuring Inc., trustee in bankruptcy of the estate of National Telecommunications Inc., a bankrupt
Bryan C. McPhadden, for 1219172 Ontario Inc. and Brian Coones

Subject: Civil Practice and Procedure; Evidence; Insolvency; Property

**Related Abridgment Classifications**

Bankruptcy and insolvency
XI Avoidance of transactions prior to bankruptcy
XI.6 Recovery of proceeds or property

**Headnote**

Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy — Recovery of proceeds or property
Bankrupt re-sold telephone equipment — In May 2012, bankrupt began paying consultant, C, and C's company $10,000 per month — In November 2013, bankrupt began receiving loans from new lender it reported as revenue — In March 2015, bankrupt's old lender brought application for bankrupt's receivership — In April 2015, receiver and manager were appointed — In July 2015, bankrupt was assigned into bankruptcy — At October 2015 examination under s. 163 of BIA, C testified he had no contact with and could not name any of bankrupt's customers or suppliers — Trustee in bankruptcy brought motion for order requiring C and C's company to repay $159,330 transferred during year prior to March 2014 (relevant period) to estate of bankrupt under s. 96 of Bankruptcy and Insolvency Act (BIA) — Motion granted; C and C's company ordered to pay estate $159,330 — Payments to numbered company during relevant period fell within s. 96(1)(b)(i) of BIA — Although applications were generally to be brought as motions, judge had discretion to order trial or use summary process if it would yield fair result — No trial was necessary as issue was narrow, parties' complete evidence was before court, protagonists had been cross-examined, and there was relatively small amount of money in issue — Section 96 did not require trustee to prove bankrupt was engaged in scheme to defeat its creditors generally or as group — C's affidavit evidence from his knowledge of bankrupt's customers to how he brought bankrupt millions of dollars in sales was contradictory — Value of consideration C and C's company gave to bankrupt were presumptively what trustee opined, which was zero — There was no legal or persuasive burden on C or C's company but, in absence of credible evidence to contrary, trustee proved on balance of probabilities that C and C's company provided no services of any value to bankrupt during relevant period and that all payments bankrupt made to C or C's company from that date were "payments at undervalue" — It was clear and undisputed that during relevant period, bankrupt was engaged in effort to defraud and delay bank from learning it was insolvent and borrowing from different lender — Three badges of fraud were found and gave rise to presumption that bankrupt intended to defraud, defeat, or delay old lender — There was no evidence of bona fide value flowing from C or C's company to bankrupt even before relevant period — While

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solvent company was entitled to make payments for non-commercial or uneconomic motivations, insolvent company making such payments for no consideration while actively defrauding its principal lender could not be said to be acting in ordinary course of business.

**Table of Authorities**

**Cases considered by *F.L. Myers J.*:**

*Hryniak v. Mauldin* (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, (sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7 (S.C.C.) — followed

*Juhasz (Trustee of) v. Cordeiro* (2015), 2015 ONSC 1781, 2015 CarswellOnt 4744, 24 C.B.R. (6th) 69 (Ont. S.C.J.) — considered

*Lee, Re* (2017), 2017 ONSC 388, 2017 CarswellOnt 463, 44 C.B.R. (6th) 68 (Ont. S.C.J.) — considered

*McLarty v. R.* (2008), 2008 SCC 26, 2008 CarswellNat 1380, 2008 CarswellNat 1381, (sub nom. *R. v. McLarty)* 2008 D.T.C. 6354 (Eng.), (sub nom. *R. v. McLarty)* 2008 D.T.C. 6366 (Fr.), [2008] 4 C.T.C. 221, (sub nom. *McLarty v. Minister of National Revenue)* 374 N.R. 311, (sub nom. *McLarty v. Canada)* 293 D.L.R. (4th) 659, 46 B.L.R. (4th) 1, (sub nom. *Canada v. McLarty)* [2008] 2 S.C.R. 79 (S.C.C.) — followed

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**Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

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s. 2 "date of the initial bankruptcy event" — considered

s. 2 "transfer at undervalue" — considered

s. 4(4) — considered

s. 96 — considered

s. 96(1) — considered

s. 96(1)(b)(i) — considered

s. 96(2) — considered

s. 96(3) — considered

s. 163 — considered

**Rules considered:**

*Bankruptcy and Insolvency General Rules*, C.R.C. 1978, c. 368

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R. 11 — considered

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

R. 20.04(2.1) [en. O. Reg. 438/08] — considered

R. 39.02(2) — considered

MOTION by trustee in bankruptcy for order requiring repayment of funds bankrupt paid to consultant prior to bankruptcy.

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*F.L. Myers J.:*

**The Motion**

1 The trustee in bankruptcy of the estate of National Telecommunications Inc. moves for an order requiring Brian Coones and his company, 1219172 Ontario Inc., to pay $159,330 to the estate under s. 96 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3. The trustee alleges that while insolvent, the bankrupt paid this amount to Mr. Coones' company and received no value in return.

2 For the reasons set out below, the order sought is granted.

**Transfer at Undervalue**

3 The phrase "transfer at undervalue" is defined in s. 2 of the *BIA* as follows:

> *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;

4 It is apparent from this definition that the topic concerns transactions prior to bankruptcy in which a bankrupt depleted its assets to the prejudice of its creditors. Parliament has determined that in such cases, the trustee, on behalf of the creditors, may move to declare the transfers void so as to make the transferred assets and/or the value differential between the assets transferred and consideration received exigible by the trustee. There is a very broad range of pre-bankruptcy transfers of assets that may later be said to have depleted an estate. Some definitional meat is required to narrow the range so as to determine which transactions will be actionable by a trustee on behalf of an estate. Section 96 of the *BIA* provides the required definitions.

> **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

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(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.

(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.

5 Section 96 identifies three different sets of transactions for which a trustee can seek a remedy. First, if the bankrupt and the recipient of its assets were dealing at arm's length, then the trustee can seek a remedy if the transfer at undervalue occurred up to one year prior to the initial bankruptcy event, the bankrupt was insolvent or rendered insolvent at the time, and in making the transfer at undervalue, the bankrupt intended to defraud, defeat, or delay a creditor.

6 Where the bankrupt and the recipient of its assets were not dealing at arm's length then the rules differ depending on when the transaction occurred. The second set of transactions that a trustee can attack under s. 96 involves cases where the parties to the transfer at undervalue were not dealing at arm's length and the transfer occurred within one year of the initial bankruptcy event. In that case, the transfer can be impugned without any further proof. In my view, it is Parliament's intention that relief should be available nearly automatically on proof of those facts. *Lee, Re*, 2017 ONSC 388 (Ont. S.C.J.) (CanLII) at para. 16.

7 The third situation that a trustee can be attack under s. 96 involves cases where the parties to the transfer at undervalue were not dealing at arm's length but the transfer at undervalue occurred more than one year before the initial bankruptcy event but no more than five years before that event. In this third situation, Parliament has re-asserted the same requirements that apply to a transfer at undervalue to an arm's length party. That is, to obtain relief in the third case, a trustee needs to prove that the bankrupt was insolvent or rendered insolvent at the time of the transfer at undervalue and that in making the transfer at undervalue, the bankrupt intended to defraud, defeat, or delay a creditor.

8 The court is asked to determine therefore, first, whether the bankrupt transferred property to Mr. Coones and his company for no consideration or for conspicuously less consideration than the fair market value of the transferred property. If a transfer at undervalue occurred, then the next issue is whether the bankrupt and Mr. Coones and his company were dealing at arm's length. If they were not at arm's length, then the timing of the transaction(s) will dictate whether any further proof is required by the trustee in order to succeed. If the parties were operating at arm's length or, if they were not at arm's length and the transaction occurred more than one year but less than five years prior to the initial bankruptcy event, then the trustee must prove two further facts (insolvency and intention) in order to be entitled to relief under s. 96.

**Mr. Coones was Privy to the Transfers to his Corporation**

9 It is not disputed that Mr. Coones is the sole owner of 1219172 Ontario Inc. It is his corporate vehicle through which he ran a consulting business. Mr. Coones and his corporation fall squarely within the definition of privity in s. 96 (3) set out above. That is, they do not deal with each other at arm's length and Mr. Coones conceded on his s. 163 examination that he received personally the benefit of the funds paid by the bankrupt to his corporation. While this may be quite ordinary tax planning and, without more, would not likely invite piercing of the corporate veil at common law, s. 96 (1) provides that those who are privy to a transfer at undervalue are as liable as the recipient. Subsection. 96 (3)

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provides a statutory piercing of the corporate veil to recover transfers at undervalue from the real party in interest who received the value that ought to be available to the bankrupt's estate and creditors.

**The Facts**

10 On April 9, 2015, the court appointed Deloitte Restructuring Inc. to be the receiver and manager of the bankrupt. The receivership application was brought by HSBC Bank Canada as the principal lender and secured creditor of the bankrupt. The Receiver assigned the bankrupt into bankruptcy on July 10, 2015. Under s. 2 of the *BIA*, the date of the initial bankruptcy event is the date on which the application for the receivership was brought by HSBC. [1] Counsel for the trustee advises that the date of issuance of the notice of application in the receivership proceeding was March 26, 2015.

11 The bankrupt was a re-seller of telephone equipment. The owner of the bankrupt is Nelson Guyatt. He too is now bankrupt.

12 Mr. Coones and Mr. Guyatt became friends while working together for a different company around the turn of the century. They socialized with their families about once a year. Mr. Coones became employed by the bankrupt in 2008. He was paid a salary plus bonus. By 2011 Mr. Coones' total remuneration from the bankrupt was over $100,000. In 2012, Mr. Coones and Mr. Guyatt agreed to switch Mr. Coones from an employee to a consultant through his corporation. Thereafter, the bankrupt paid Mr. Coones' corporation $10,000 per month. There is nothing remarkable in the change of Mr. Coones' employment status from a bankruptcy perspective.

13 Mr. Coones had background in telephone system architecture and sales engineering. He testified that during his time with the bankrupt, he performed technical design, installation, and programming services before and after becoming a consultant. He conceded that his services decreased after he became a consultant as he wanted to branch out into other business ventures.

14 Mr. Coones was not represented by counsel when he was first examined under s. 163 of the *BIA* in October, 2015. His counsel submits that Mr. Coones' initial testimony should be discounted because he did not have the opportunity to prepare with counsel. I decline to find that fundamental changes in Mr. Coones' testimony can be attributed to counsel becoming available to him.

15 In his s. 163 examination, Mr. Coones testified that in his position with the bankrupt, he had no contact with its customers. He could not name any of the major customers or suppliers of the bankrupt. In fact, he could not name any customers for whom he performed design, installation, or programming. He undertook to provide copies of his emails to substantiate his activities for the bankrupt. However he failed to produce any emails. If he was programming and installing telephone systems for fees of $120,000 per year, it is not credible that he does not recall which supplier's telephones he was programming and installing. It is not credible that he never went to see clients. It is not credible that he could not remember any of the major clients whose systems he programmed.

16 Mr. Guyatt was equally elusive in describing Mr. Coones' services. He said that Mr. Coones helped him start and grow the business. When pressed he said (at q. 531 of his examination):

> Q. You mentioned that when you started the business —
>
> A. Yeah. So, it is only fair, if the company is making money and doing well, it is only fair to cut him in. Whenever I needed him to come in and do some networking stuff, he did. He was on call for me. And the customers were making money, so I was taking care of him, right?

17 Mr. Guyatt could give no greater specificity as to what Mr. Coones did for the business. Mr. Coones came in to the bankrupt's office as needed which was once a month or so. Yet at $10,000 per month, Mr. Guyatt confirmed that Mr. Coones was making more than Mr. Guyatt was making from his own business.

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18 Mr. Coones and the bankrupt formalized Mr. Coones' consulting relationship with a written agreement dated April 1, 2012. It is apparent on the face of the document that it was a pre-printed form agreement that was obtained by the parties in 2013. The back-dating itself is not of particular relevancy as it was explained by Mr. Coones in a later cross-examination. However, in his initial testimony under s. 163 of the *BIA*, he was expressly asked and swore that he signed the agreement on the date of the agreement at a meeting with Mr. Guyatt at the bankrupt's office. That testimony was plainly untrue.

19 Late in his s. 163 examination, Mr. Coones testified that he was being paid commissions on clients for whom he had provided leads to the bankrupt. He said that he gave the bankrupt lists of leads. In response to an undertaking he produced a meaningless list of more than 225 businesses including American Express, Rogers Cable, The Bank of Nova Scotia, and Coca Cola that he had apparently provided to the bankrupt. Mr. Coones testified that his commissions were not based on sales made to his leads. Instead, he says that the bankrupt paid him $10,000 a month for a list of leads like those.

20 After cross-examining the trustee's representative on his affidavit, Mr. Coones delivered several further affidavits without seeking or obtaining leave of the court under Rule 39.02 (2) of the *Rules of Civil Procedure*, RRO 1990, Reg. 194 and Rule 3 of the *Bankruptcy and Insolvency General Rules*, CRC, c 368. In his further testimony, Mr. Coones swore that he provided web development for customers of the bankrupt. Moreover, he named several customers whom he said he introduced to the bankrupt and whose sales he helped increase substantially.

21 Mr. Coone's evidence changed substantially with each new affidavit. At first, he could not remember any customers. This evidence evolved to remembering that he brought in millions of dollars in sales from several customers whom he introduced to the bankrupt due to his personal connections. In the case of each customer whom Mr. Coone's swore he introduced to the bankrupt, the trustee was able to show from the bankrupt's records that it made sales to the customers *before* Mr. Coones was employed by the bankrupt. In response, Mr. Coones' story evolved again as he swore that he informally helped the bankrupt before even becoming employed by it and he grew the bankrupt's business with those customers. In doing so, he implicitly accepted that his initial affidavit of September 7, 2016, stating that he "rarely had direct contact with customers or potential customers" must have been untrue. Comparing Mr. Coones' inability to name any customers in his s. 163 examination, to the sentence just quoted from his September 7, 2016 affidavit, to his testimony in his affidavit sworn November 10, 2016 that, "I played a decidedly direct role in attracting Telquest and Norstar as customers to [the bankrupt]," to his having just helped increase the sales to existing customers rather than actually introducing the customers as previously sworn (see paras. 12 and 13 of his January 5, 2017 affidavit) leaves no room to treat Mr. Coones' testimony as credible.

22 It is true that the bankrupt's sales revenues greatly increased after Mr. Coones became employed in 2008. However, there is no tangible evidence that Mr. Coones did anything at all to contribute to those results.

23 The trustee was able to locate one email from Mr. Coones to Mr. Guyatt dated April 20, 2015. In it, Mr. Coones wrote:

> Let me know when I can see Anthony this week for 10. Would like to do one this week and the first week of May if possible. I can talk to him to see if he can do more ongoing but that would give me some time to prepare.

24 On its plain words, Mr. Coones was asking Mr. Guyatt to arrange an appointment with someone named Anthony to arrange to "do one" this week and another in ten days. This sounds like Mr. Coones was moving some goods for Anthony to whom Mr. Guyatt controlled access. On cross-examination, Mr. Coones could not explain the email. He denied selling any goods and claimed that his desire to "see Anthony this week for 10" had to do with his $10,000 salary from the bankrupt rather than having a 10 minute appointment with Anthony or obtaining a quantity of 10 items from him.

25 Just prior to the hearing of the motion, Mr. Coones delivered an affidavit of Bruno Bressi sworn February 16, 2017. Mr. Bressi says that he is the principal of a customer of the bankrupt. Mr. Bressi says that Mr. Coones introduced

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him to Mr. Guyatt in 2001 or 2002 and coordinated efforts directed at developing business between the customer and the bankrupt. Once again the evidence as to what Mr. Coones actually did is conclusory and entirely bald. There is no explanation as to how this arrangement worked from 2001 to 2008 before Mr. Coones was even an employee of the bankrupt. Mr. Bressi simply recites information from Mr. Coones that he was paid for "supplier advice and technical assistance in addition to his sales knowledge."

26 When asked specifically about Mr. Bressi in his s. 163 examination (after already being unable to remember the names of any customers of the bankrupt), Mr. Coones testified that he knew Mr. Bressi's because he worked at the same location as the bankrupt. He made no mention of introducing him to the bankrupt or knowing him prior to his employment with the bankrupt. Moreover, when the trustee's counsel asked Mr. Coones if he knew what Mr. Bressi's job was, Mr. Coones said he was not sure. When asked if it had something to do with the bankrupt, Mr. Coones said he thought so. I would have expected different answers if Mr. Coones had introduced Mr. Bressi to the bankrupt and had been singularly responsible for a massive growth in multi-million dollar sales by the bankrupt to Mr. Bressi's business. He might have remembered that Mr. Bressi was a customer and had some idea what he did for a living for example.

27 The trustee's unchallenged evidence is that the bankrupt was insolvent by November 18, 2013. At that time it started receiving loans from a new lender that it booked falsely as revenue. It appears that the bankrupt embarked on a scheme of hiding its insolvency from its lender HSBC by reporting fictitious sales and revenues. There is no suggestion that Mr. Coones was party to any of this. The trustee simply marked the date of the bankrupt's insolvency in case it is required to prove that fact under s. 96 of the *BIA* as discussed above.

28 At para. 30 of his affidavit, the trustee's representative swears:

> In the Trustee's opinion, [the bankrupt] received no value for payments made to [Mr. Coone's corporation]. Both Coones and Guyatt have been examined and no concrete evidence of [the corporation] or Coones providing any services to [the bankrupt] has been shown, and nothing that can be quantified. Additionally, Coones left the employment of [the bankrupt] as he wanted to pursue other things. Guyatt felt "So it is only fair, if the company is making money and doing well, it is only fair to cut him in." The reason provided by Guyatt for why Coones via [his corporation] was receiving payments is because Guyatt felt it was only fair to pay Coones for helping [the bankrupt] get started. The value of the services provided to [the bankrupt], in respect of the payments since May 2012 [when Coones became a consultant through his corporation], in the opinion of the Trustee, is nil.

29 The bankrupt paid Mr. Coones' corporation $338,830 after May, 2012. It paid $159,330 from the date of its insolvency November 18, 2013.

**Analysis**

***(a) Transfer at Undervalue***

30 As set out at the outset, the first question for resolution is whether the bankrupt disposed of property for no consideration or for conspicuously less than the fair market value of the property. This process for assessing this question is guided by s. 96 (2). It requires the trustee to provide its opinion of the fair market value of the property transferred by the bankrupt and as to the actual consideration given to or received by the bankrupt. Here, the value of the property that the bankrupt gave to Mr. Coones' corporation is simply the amount of money paid over the time period that is determined to be relevant. The trustee has opined that the value of the services provided by Mr. Coones over that same time period is zero.

31 Subsection 96 (2) provides further that "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."

32 I am dubious that the evidence provided by Mr. Coones, as bald, contradictory, and incredible as it was, amounts to any evidence to the contrary. As such, the statutory presumption could apply. However, without deciding the degree to

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which evidence must be believed to amount to some evidence to the contrary, I am prepared to view Mr. Coones' and Mr. Bressi's evidence as meeting that standard. As such, the statutory presumption falls away. In that case, in my view, the burden is on the trustee to prove the values that it propounds under s. 96 (1). The trustee's counsel accepted this burden as he noted that it is open to the court to find a value for Mr. Coone's services that differs from the trustee's opinion.

33 In light of the credibility issues in this application, I raised with counsel the question of whether a trial of an issue is required. While the trustee's counsel was prepared to go to trial if necessary, neither counsel argued that a trial is required. Rule 11 of the *Bankruptcy and Insolvency General Rules* provides, "[s]ubject to these Rules, every application to the court must be made by motion unless the court orders otherwise". It is trite law that the *BIA* is a businessperson's statute. Its aim is particularly focused on efficiency and affordability.

34 Were this a motion for summary judgment in a civil case, I likely would find that I could not decide the case on the written record alone. However, I would feel very comfortable weighing the evidence and drawing inferences under Rule 20.04 (2.1) of the *Rules of Civil Procedure*.

35 In para 66 of *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.), the Supreme Court of Canada discussed when a judge should make use of the powers to weigh evidence and draw inferences on a summary judgment motion as follows:

> If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

36 At para. 59 of the *Hryniak* decision, the Court gave further guidance as to the nature of the inquiry to be undertaken by a judge to decide if she or he might resolve a matter summarily as follows:

> It is logical that, when the use of the new powers would enable a judge to fairly and justly adjudicate a claim, it will generally not be against the interest of justice to do so. What is fair and just turns on the nature of the issues, the nature and strength of the evidence and what is the proportional procedure.

37 I am not to be taken as finding that *Hryniak* applies to a decision by the court under s. 96 of the *BIA*. Rather, I am cognizant that Rule 11 of the *Bankruptcy and Insolvency General Rules* provides that while the general rule is that applications are to be brought as motions, the judge has discretion to order a trial where appropriate. In my view, *Hryniak* provides an analogous circumstance where the court is directed to consider whether the use of a summary process will yield a fair result that serves the goals of timeliness, affordability, and proportionality and is therefore in the interest of justice. The goals identified in *Hryniak* are equally the goals of the bankruptcy process.

38 In my view a trial is not required to determine the issues in this application. The parties' complete evidence is before the court. There is no indication that there is any further evidence to be presented by any of the parties were a trial to be held. I have not excluded any evidence despite the procedural issues raised by the timing of the delivery of affidavits by both sides. There have been thorough cross-examinations of the protagonists. The credibility issues for Mr. Coones are patent on the faces of his own affidavits and the transcripts in light of the clear changes in his testimony and the inability of any witness to provide evidence of what Mr. Coones actually did for the bankrupt.

39 In my view, in light of the narrow definition of the issue, the breadth and clarity of the evidence on credibility, and especially, proportionality given the relatively small amount of money in issue, I should decline to exercise the jurisdiction under Rule 11 to order a trial of an issue. A trial is not needed to illuminate the issues or to assess the credibility and reliability of Mr. Coones' testimony.

40 Mr. Coones argues that his services were worth enough to the bankrupt for it to agree to pay him and to continue to pay him until it ran out of money in January, 2015. However, the subjective view of the debtor is not the issue. Once

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a debtor is insolvent, in particular, the issue requires an objective comparison of value given for value received. It is significant that s. 96 (2) directs the court to consider the "actual consideration" given or received. The question is not hypothetical or theoretical. The test is what was paid and what was actually given or done in return. In my view, through the testimony of Mr. Guyatt and Mr. Coones, the trustee proved its case on the balance of probabilities. Mr. Coones' had every opportunity in his multiple affidavits and cross-examinations to put forward a coherent set of facts to show what he actually did to provide value to the bankrupt, supported by documentation (as he undertook). It is clear that he did nothing of value for the bankrupt after becoming a consultant in May, 2012. If the consulting fees were intended as ongoing payments for prior services rendered, once again, apart from providing a meaningless list of business names, there is no credible basis to find that Mr. Coones provided services of enduring value to the bankrupt. Instead, Mr. Coones put forward a mass of conflicting evidence that changed each time the trustee answered his last version and yet always remained conclusory and essentially bald. There was no legal or persuasive burden on Mr. Coones or his corporation. However, in the absence of any credible evidence to the contrary, I find that the trustee has proven that Mr. Coones and his corporation provided no services of any actual value to the bankrupt from May, 2012. As such all payments to him from that date satisfy the definition of payments at an undervalue.

***(b) Were the Bankrupt and Mr. Coones (and his Corporation) Dealing at Arm's Length***

41 Mr. Coones looks to income tax law to define an "arm's length" relationship. He points out that under s. 4 (4) of the BIA, the question of whether persons who are not related to each other were operating at arm's length is a question of fact for the court. It is agreed that Messrs. Guyatt and Coones are not relatives.

42 In *McLarty v. R.*, 2008 SCC 26 (S.C.C.) (CanLII) the Supreme Court of Canada determined that all relevant factors must be considered to determine if parties operate at arm's length. While there is no one factor that predominates, the Court accepted that one should consider whether the parties were operating with a common mind. Did one control the other for example? Were they propounding or representing separate legal or economic interests? Again, the answers to these questions should take into account the entirety of the relationship.

43 In *Juhasz (Trustee of) v. Cordeiro*, 2015 ONSC 1781 (Ont. S.C.J.) (CanLII) Wilton-Siegel J. refined the issue for s. 96 of the *BIA* in particular. At para. 41 of the decision, Wilton-Siegel J. encapsulated the analysis as follows:

> Section 96 is directed at transfers by insolvent persons for a consideration that is materially or significantly less than the fair market value of the property. In this context, the concept of a non-arm's length relationship is one in which there is no incentive for the transferor to maximize the consideration for the property being transferred in negotiations with the transferee. It addresses situations in which the economic self-interest of the transferor is, or is likely to be, displaced by other non-economic considerations that result in the consideration for the transfer failing to reflect the fair market value of the transferred property.

44 I wholly agree with and adopt Mr. Justice Wilton-Siegel's approach.

45 I cannot find that the bankrupt controlled Mr. Coones or *vice versa*. Neither can I find that they operated with a common mind. Mr. Guyatt's explanation of the reason for paying Mr. Coones confirmed that the bankrupt did not approach the relationship with Mr. Coones to advance the bankrupt's self-interest in maximizing its value. The best he was willing to say was that he was operating on some notion of fairness that led him to pay Mr. Coones more than he was making himself. Mr. Coones' counsel submitted that this is not uncommon when a business is failing. Employees get paid before equity holders. That is generally true but only if the employees are necessary to generate revenue. If a business is failing, one expects it to cut costs that do not contribute to its ability to produce new revenue to survive. This is all hypothetical as there was no evidence on this point.

46 I do not know if Mr. Guyatt or Mr. Coones did a deal because they were friends or if something else was afoot. I do not believe that either Mr. Guyatt or Mr. Coones chose to favour the court with the details of their actual relationship. Apart from reliance on their friendship, the trustee's arguments to support the finding of a non-arm's length relationship

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essentially turn on the same facts that underlie the finding that the agreement between the parties was a transfer at undervalue. Among other things, the trustee relies on the lack of evidence that Mr. Coones actually did anything of value; that he was paid more than Mr. Guyatt; and that payments continued while the bankrupt was already insolvent, to support a finding that they dealt on a non-arm's length basis.

47 The *BIA* allows for the possibility that transfers at undervalue can occur between parties who deal at arm's length. If a finding that parties are not at arm's length is be made based upon the same facts that supported the finding of a transfer at undervalue, there is a risk of depriving the concept of arm's length dealings of any independent content. The finding of a transfer at undervalue would answer both questions.

48 However, in this case, the finding of a transfer at undervalue is essentially an inference drawn from the surrounding facts. There was no valuation exercise as one might normally expect. Many of the same facts that led me to infer that there was no value provided by Mr. Coones or his corporation prevent me from concluding that the bankrupt entered into its agreement with the corporation while acting under normal commercial incentives. I do not think that I am creating a circularity by finding that some of the same facts can lead to two different inferences. Nor am I depriving the arm's length relationship issue of content. I am not finding that there was a non-arm's length relationship because the parties entered into a transfer at undervalue. Rather, with full focus on each question independently, looking at the totality of the evidence concerning the relationship, I cannot find that a company that agrees to pay someone more than it pays its owner, for doing nothing, and keeps paying that person until it is in the very last throes of a fatal insolvency was dealing with that person at arm's length. While the court does not know the full facts of the relationship between the bankrupt and Mr. Coones and never will, it is clear that there were other incentives at play that deprived their relationship of normal commercial imperatives like maximizing one's own value and even preserving one's own going concern. As such, I find that they were not dealing at arm's length.

49 On these findings alone, all payments made by the bankrupt to Mr. Coones' company for the one year prior to the date of the initial bankruptcy event, that is, from and after March 27, 2014, fall within s. 96 (1)(b)(i) of the *BIA*.

***(c) Payments Made from November 18, 2013 to March 26, 2014.***

50 As discussed at the outset, the trustee can look back for up to five years prior to the date of the initial bankruptcy event if it proves that the bankrupt was or became insolvent at the time that the transfers at undervalue were made and that the transfers were made with the intention to defraud, defeat, or delay a creditor.

51 The trustee does not seek to go back beyond November 18, 2013 as the earliest date that it asserts the bankrupt was insolvent as I have accepted above. That leaves the issue of the bankrupt's intention. In *Juhasz*, at para. 54 of his decision, Wilton-Siegel J. found that the section requires the trustee to prove that the prohibited intention was among the bankrupt's intentions. Section 96 does not require the trustee to prove that the bankrupt's only or even that its primary intention was to defraud, defeat, or delay its creditors. To that I would add that the section speaks to the intent to defraud, defeat, or delay "a creditor." It is not necessary for the trustee to prove that the bankrupt was engaged in a scheme to defeat its creditors generally or as a group.

52 Here it is clear and undisputed that after November 18, 2013, the bankrupt was engaged in an effort to defraud and delay HSBC from learning that the bankrupt was insolvent and borrowing from a different lender. The question then is whether the payments to Mr. Coones' corporation that were made while the bankrupt was actively trying to defraud and delay HSBC, can be said to have been made with the same intention.

53 The law recognizes that it is nearly impossible to prove another person's actual subjective intention. The trustee therefore relies on an analysis of the traditional "badges of fraud" that, at common law, can be accessed to establish a presumption of intention.

54 In *Purcaru v. Seliverstova*, 2016 ONCA 610 (Ont. C.A.) (CanLII), at para. 5, Miller J.A. wrote for the Court of Appeal:

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> If a challenger raises evidence of one or more 'badges of fraud' that can give rise to an inference of an intent to defraud, the evidential burden then falls on those defending the transaction to adduce evidence showing the absence of fraudulent intent.

55 In *Montor Business Corp. (Trustee of) v. Goldfinger*, 2013 ONSC 6635 (Ont. S.C.J. [Commercial List]), Brown J.A. listed the following as among the badges of fraud that can be accessed for these purposes:

> i. The transfer was made to a non-arm's length person;
>
> ii. The transferor was insolvent at the time of the transfer; and
>
> iii. The consideration for the transfer was grossly inadequate.

56 The trustee relies on additional facts whose adequacy as badges of fraud are challenged by Mr. Coones. However, it does not need to go beyond the foregoing three badges of fraud which I have already found as facts above.

57 Upon the trustee proving that the payments made to Mr. Coones' corporation were accompanied by badges of fraud, the court will presume that the bankrupt intended to defraud, defeat, or delay a creditor unless the responding party proves that the bankrupt did not have such intent. Mr. Coones submitted that the payments were made in the ordinary course as part of his consulting agreement to which the bankrupt had agreed in April, 2012, some 18 months before it became insolvent. Would that there was evidence of *bona fide* value flowing from Mr. Coones or his company to the bankrupt even at April, 2012, this argument might have had more weight. Having already found that the bankrupt was not operating with a commercial mind in dealing with Mr. Coones, continuing such operations when insolvent cannot be said to be payments in the ordinary course that might in other circumstances be sufficient to rebut a presumption of fraudulent intent. While a solvent company may be entitled to make payments for non-commercial or uneconomic motivations, making those payments when insolvent, for no consideration, and while actively defrauding one's principal lender, cannot be seen to be acts in the ordinary course of business. The responding parties have not rebutted the presumption of fraudulent intent.

**Outcome**

58 As a result of the foregoing, the court orders 1219172 Ontario Inc. and its privy Brian Coones to pay to the estate of the bankrupt $159,330 under s. 96 (1) of the BIA.

59 The trustee may deliver up to five pages of costs submissions by March 17, 2017. The respondents may deliver up to five pages in response by March 31, 2017. Both shall include costs outlines no matter what position they take. Both may also include any relevant offers to settle. All documents shall be delivered in searchable PDF attachments to an email to my Assistant. No cases or statutory materials are to be provided. References to cases and statutory material, if any, shall be by hyperlink to CanLII or another online service embedded in the submissions.

*Motion granted.*

Footnotes

1 Under clause (e) of the definition of *Initial Bankruptcy Event* in s. 2 of the BIA, the receivership was "the application in respect of which a bankruptcy order is made" and a receivership is not an application of the type to which clause (d) of the definition apples.

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# TAB 2

2011 ONSC 6471
Ontario Superior Court of Justice

Cameron Estate, Re

2011 CarswellOnt 12323, 2011 ONSC 6471, [2012] W.D.F.L. 463, 108 O.R. (3d) 117, 10 R.P.R. (5th) 326, 210 A.C.W.S. (3d) 303, 343 D.L.R. (4th) 370, 83 C.B.R. (5th) 272

# In the Matter of the Bankruptcy of the Estate of Christopher Stephen Cameron of the Town of Caledon, in the Province of Ontario (Physician)

And In the Matter of the Bankruptcy of the Estate of Sheldon Shaul of the City of Toronto (Physician)

Mesbur J.

Heard: October 13, 2011
Judgment: October 31, 2011
Docket: 31-OR-207808-T, 31-OR-207811-T

Counsel: Sean N. Zeitz, for Bank of Nova Scotia, moving party in both estates
James D. Lockyer, for Jane Cameron, responding party in 31-OR-207808-T
Brandon Jaffe, for Barbara Kosky, responding party in 31-OR-207811-T

Subject: Insolvency; Property; Public; Family; Estates and Trusts; Restitution

**Related Abridgment Classifications**

Bankruptcy and insolvency
VIII Property of bankrupt
  VIII.7 Joint tenancies and joint accounts
Bankruptcy and insolvency
XI Avoidance of transactions prior to bankruptcy
  XI.3 Settlements of property
    XI.3.d Transfer of matrimonial home
Estates and trusts
II Trusts
  II.3 Constructive trust
    II.3.h Miscellaneous
Restitution and unjust enrichment
I General principles
  I.2 Requirements for unjust enrichment
    I.2.d Miscellaneous

**Headnote**

Bankruptcy and insolvency --- Property of bankrupt — Joint tenancies and joint accounts

Debtors held their respective matrimonial homes as joint tenants with their respective wives — Debtors owed secured debts to bank — Debtors died and their estates were adjudged bankrupt within one year of death — Wives acquired sole ownership of matrimonial homes by right of survivorship — Bank sought to pursue claims against wives to recover debtors' former joint interest in their matrimonial homes and have half of value of matrimonial homes declared asset of debtors' estates — Bank brought motions to set aside automatic vesting of matrimonial homes in wives on basis that they were transfers at undervalue under s. 96 of Bankruptcy and Insolvency Act — Motions dismissed — Automatic vesting by right of survivorship does not constitute transfer as contemplated by s. 96 — On death of joint tenant, deceased does not dispose of or part with asset — Its interest is extinguished, leaving nothing to transfer or part with — Passing of

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rights, duties or powers on succession does not include survivorship — Assets that vest in survivor of joint tenancy do not form part of deceased's estate and do not devolve on succession.
Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy — Settlements of property — Transfer of matrimonial home
Transfer at undervalue — Debtors held their respective matrimonial homes as joint tenants with their respective wives — Debtors owed secured debts to bank — Debtors died and their estates were adjudged bankrupt within one year of death — Wives acquired sole ownership of matrimonial homes by right of survivorship — Bank sought to pursue claims against wives to recover debtors' former joint interest in their matrimonial homes and have half of value of matrimonial homes declared asset of debtors' estates — Bank brought motions to set aside automatic vesting of matrimonial homes in wives on basis that they were transfers at undervalue under s. 96 of Bankruptcy and Insolvency Act — Motions dismissed — Automatic vesting by right of survivorship does not constitute transfer as contemplated by s. 96 — That finding was sufficient to dispose of bank's motions — In any event, wives' acquisition of whole of their properties was not at undervalue, as contemplated by s. 96 — Law presumes that each wife contributed as much as her husband to acquisition of matrimonial home, whether by way of money, or money's worth — Part of what each acquired was hope of surviving and becoming sole owner of whole — Each acquired inchoate right to sole ownership at time property was acquired with their equal, joint efforts — That inchoate right crystallized at moment of other joint tenant's death.
Estates and trusts --- Trusts — Constructive trust — Miscellaneous issues
Debtors held their respective matrimonial homes as joint tenants with their respective wives — Debtors owed secured debts to bank — Debtors died and their estates were adjudged bankrupt within one year of death — Wives acquired sole ownership of matrimonial homes by right of survivorship — Bank sought to pursue claims against wives to recover debtors' former joint interest in matrimonial homes — Bank brought motions to set aside automatic vesting of matrimonial homes in wives on basis that they were transfers at undervalue under s. 96 of Bankruptcy and Insolvency Act — In alternative, bank alleged that court should impose constructive trust on half interest in each home — Motions dismissed on other grounds — In obiter, request for constructive trust was refused — Before constructive trust can be imposed, court must find enrichment, corresponding deprivation, and absence of juristic reason for enrichment — In this case there was no enrichment, no deprivation, and in any event, no lack of juristic reason — Parties each acquired inchoate rights of survivorship at time property was acquired — There was mutual consideration passing between spouses in that each acquired chance to acquire whole by way of survivorship, and each risked fact that he or she might predecease other, and thus lose right to whole — Estate was not deprived — Wives owned entire properties prior to date of bankruptcy — There was nothing to vest in Trustee, therefore no deprivation — Even if there were enrichment and deprivation, it could not be said that there was no juristic reason for it — Law itself provides for right of survivorship.
Restitution and unjust enrichment --- General principles — Requirements for unjust enrichment — Miscellaneous
Debtors held their respective matrimonial homes as joint tenants with their respective wives — Debtors owed secured debts to bank — Debtors died and their estates were adjudged bankrupt within one year of death — Wives acquired sole ownership of matrimonial homes by right of survivorship — Bank sought to pursue claims against wives to recover debtors' former joint interest in their matrimonial homes and have half of value of matrimonial homes declared asset of debtors' estates — Bank brought motions to set aside automatic vesting of matrimonial homes in wives on basis that they were transfers at undervalue under s. 96 of Act — Motions dismissed on other grounds — In obiter, it was found that equities did not favour bank — There was nothing inequitable in depriving creditors of property which never vested in Trustee, was not owned by bankrupts' estates at date of death, and to which s. 96 did not apply — Long before bank lent any money to debtors, wives had acquired right of survivorship in their matrimonial homes — They had done so for consideration passing between them at time of acquisition — To deprive them of their property because outcome would have been different had their husbands been insolvent, adjudged bankrupt and then died seemed completely inequitable.

**Table of Authorities**

**Cases considered by *Mesbur J.*:**

*Becker v. Pettkus* (1980), 1980 CarswellOnt 299, 1980 CarswellOnt 644, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 34 N.R. 384, 8 E.T.R. 143, 19 R.F.L. (2d) 165 (S.C.C.) — referred to

*Bukvic v. Bukvic* (2007), 2007 CarswellOnt 2656, 86 O.R. (3d) 297, 46 R.F.L. (6th) 122 (Ont. S.C.J.) — referred to

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*Fuller v. Fuller Estate* (2010), 2010 CarswellBC 2555, 2010 BCCA 421, 493 W.A.C. 182, 292 B.C.A.C. 182, 62 E.T.R. (3d) 212, 92 R.F.L. (6th) 34, 9 B.C.L.R. (5th) 236 (B.C. C.A.) — referred to

*Harrison Estate v. Harrison* (2003), 2003 CarswellOnt 6342 (Ont. S.C.J.) — considered

*Simcoff v. Simcoff* (2009), 466 W.A.C. 7, 245 Man. R. (2d) 7, 2009 MBCA 80, 2009 CarswellMan 357, 49 E.T.R. (3d) 302, 82 R.P.R. (4th) 22, [2009] 9 W.W.R. 248 (Man. C.A.) — referred to

*Sorochan v. Sorochan* (1986), 1986 CarswellAlta 714, [1986] 2 S.C.R. 38, [1986] 5 W.W.R. 289, 29 D.L.R. (4th) 1, 69 N.R. 81, 46 Alta. L.R. (2d) 97, 74 A.R. 67, 23 E.T.R. 143, 2 R.F.L. (3d) 225, [1986] R.D.I. 448, [1986] R.D.F. 501, 1986 CarswellAlta 143 (S.C.C.) — referred to

*White, Re* (1928), 1928 CarswellOnt 29, 8 C.B.R. 544, 33 O.W.N. 255, [1928] 1 D.L.R. 846 (Ont. S.C.) — considered

**Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

Generally — referred to

s. 38 — considered

s. 70(1) — considered

s. 96 — considered

s. 96(1)(b) — considered

s. 100 — considered

*Family Law Act*, R.S.O. 1990, c. F.3

Generally — referred to

Preamble — referred to

Pt. I — referred to

*Personal Property Security Act*, R.S.O. 1990, c. P.10

Generally — referred to

MOTIONS by bank to set aside alleged transfers of matrimonial home at undervalue, contrary to *Bankruptcy and Insolvency Act*.

***Mesbur J.*:**

**The motions:**

1 These motions raise the issue of whether a wife's acquisition of her late husband's interest in their jointly owned matrimonial home by way of survivorship is a "transfer at undervalue" that can be set aside under section 96 of the *Bankruptcy and Insolvency Act* when her late husband's estate is adjudged Bankrupt within a year of his death.

2 The facts on these motions are not in dispute. The parties have agreed to a statement of facts in relation to each of these Bankrupt estates. Essentially, the facts are as set out below.

***Dr. Cameron***

3 The late Dr. Cameron acquired a matrimonial home in joint tenancy with his wife, Jane, in 2000. In 2002, he arranged a $70,000 operating line of credit from the Bank of Nova Scotia to run his medical practice. He gave the Bank a General Security Agreement over his assets. The Bank registered and perfected its security under the *Personal Property Security Act*. It took no other security. It did not require Mrs. Cameron to guarantee the loan.

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4 Dr. Cameron died suddenly on June 9, 2010. At the time of his death, all his payments to the Bank were current. He was not insolvent. He owed the Bank $56,306.92. His other unsecured debts, of which there were seven, totalled just over $2,700.

5 Because Dr. Cameron and his wife had owned their matrimonial home as joint tenants, on Dr. Cameron's death Mrs. Cameron became the sole owner of the home by right of survivorship.

6 Dr. Cameron's assets after his death were insufficient to meet his obligations. His primary obligation was to the Bank. Within two months of his death, the Bank moved for a Bankruptcy order against his estate. His estate was adjudged Bankrupt. The Trustee was unable or unwilling to pursue an action to try to "claw back" Dr. Cameron's former interest in his matrimonial home under s. 96 of the *Bankruptcy and Insolvency Act*. The Bank then obtained an order under s.38 of the *BIA* to pursue a claim against Mrs. Cameron for recovery of Dr. Cameron's former joint interest in the matrimonial home into his Bankruptcy estate.

***Dr. Shaul***

7 The situation with Dr. Shaul is very similar to that of Dr. Cameron. Dr. Shaul was a psychiatrist. In 1991, Dr. Shaul and his wife, Barbara Kosky, purchased their matrimonial home as joint tenants. Some years later, in 1995, Dr. Shaul arranged a demand overdraft facility with the Bank of Nova Scotia to run his practice. The facility had a limit of $75,000. Dr. Shaul gave the Bank a General Assignment of Book Debts to secure the debt. The Bank registered and perfected its security under the *PPSA*. It did not request or obtain any other security from Dr. Shaul, nor did it ask his wife, Barbara Kosky, to guarantee the loan.

8 Dr. Shaul died on August 16, 2010. Before he died, Dr. Shaul was not in default in his obligations to the Bank. He was not insolvent. He owed the Bank about $70,000. On his death, Mr. Kosky became the sole owner of their matrimonial home by way of survivorship. She registered a Survivorship Application on title to the matrimonial home on September 14, 2010. Title is now registered in her name alone.

9 After Dr. Shaul's death, the assets in his estate were insufficient to pay his debts. Other than what he owed the Bank, Dr. Shaul owed his unsecured creditors a total of about $1,000.

10 As was the case with Dr. Cameron, the Bank moved for a Bankruptcy order against Dr. Shaul. Registrar Nettie granted the order on March 28, 2011. Since the Trustee would not take proceedings against Ms. Kosky to have the vesting of her matrimonial home in her name declared a transfer at undervalue under s. 96 of the *BIA*, the Bank obtained a section 38 order to do so.

***The Bank's position***

11 On these motions, the Bank seeks to set aside the automatic vesting of the Cameron and Shaul matrimonial homes in Mrs. Cameron and Ms. Kosky on the basis they are "transfers at undervalue" under s. 96 of the *BIA*. It seeks to have one half of the value of these matrimonial homes declared an asset of the respective estates.

12 In the alternative, the Bank takes the position that even if s. 96 does not apply, the court should find the widows hold their late husbands' former interests in their matrimonial home in trust for their Bankrupt estates. The Bank suggests the court should impose a constructive trust on a half interest in each home in favour of the Bankrupts' estates.

13 For the reasons that follow, I would dismiss both motions.

**The law and analysis:**

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14 In a series of omnibus amendments to the *Bankruptcy and Insolvency Act* in 2009, Section 96 the *BIA* replaced section 100 of the earlier statute. Both sections are designed to claw back into a Bankrupt estate property that has been conveyed out of the Bankrupt's hands by transactions at less than the proper value of the property transferred.

15 Section 100 required the transfer of property to have been made with the intent of defeating the interests of creditors, or preferring one creditor over others. By contrast, section 96 removes the requirement of intent, and instead looks at the result of the transfer. Section 96 reads:

**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.

**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.

16 For the purposes of this motion, the provisions of section 96(1)(b) are relevant, since there is no question that both widows were not dealing at arm's length with their late husbands, the debtors. Unlike the situation under the old section

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100, the Bank need not show the transaction was a "reviewable" transaction. The Bank need not show any intention on the bankrupts' part to prefer their wives over other creditors.

17 In its most basic terms, therefore, the Bank must show that there was a transfer at undervalue and it occurred within one year of the date of the Bankruptcy. If it can do so, section 96 of the *BIA* will apply.

***Transfer***

18 The first question is whether the widows' becoming sole owners of their matrimonial homes by way of survivorship constitutes a "transfer" of property within the meaning of the *BIA*. Answering this question requires an analysis of the concepts of joint tenancy and right of survivorship.

19 A fundamental feature of joint tenancy is the right of survivorship. As long as a joint tenancy has not been severed, then on the death of one of the joint tenants, the surviving joint tenant automatically become the owner of the whole. Each joint tenant hopes to become the owner of the whole by surviving the other, but each risks predeceasing the other, and losing the entire estate. In a joint tenancy, a joint tenant's hope of surviving becomes the right of survivorship to the entire estate upon the death of the other joint tenant. [1]

20 To create and maintain a joint tenancy there must be, and continue to be, what are described as the "four unities".

21 First, there must be unity of title. This means all the joint tenants must take under the same instrument.

22 Second, there must be unity of interest. This means each joint tenant's interest in the property must be identical in nature, extent and duration to that of the other joint tenant or tenants.

23 Third, there must be unity of possession. This means each joint tenant is entitled to undivided possession of the whole of the property. None holds any part separately to the exclusion of the others.

24 Last, there must be unity of time. This means the interest of each joint tenant must vest at the same time. [2]

25 When one joint tenant dies, its interest in the property is extinguished, and the rights of the remaining joint tenant or tenants are correspondingly enlarged. The enlarged interest immediately vests in the remaining joint tenant or tenants. [3] As the court put it in *White, Re*, at paragraph 8, "The characteristic of an estate in joint tenancy is that the joint tenants have the same interests ... and upon the death of one of the joint tenants the entire estate *remains in* the survivor in whom the whole estate immediately vests." [emphasis added]

26 The Bank suggests that the automatic vesting is a "transfer" as contemplated by the *BIA*. It points to the definition of "transfer" in *Black's Law Dictionary* [4] to support its view. *Black's* provides three definitions of the term "transfer":

> a) Any mode of disposing of or parting with an asset or an interest in an asset, including the payment of money, release, lease or creation of a lien or other encumbrance. The term embraces every method — direct or indirect, absolute or conditional, voluntary or involuntary — of disposing of or parting with property or with an interest in property;
>
> b) Negotiation of an instrument according to the forms of law. The four methods of transfer are by endorsement, by delivery, by assignment, and by operation of law;
>
> c) A conveyance of property or title from one person to another.

27 The Bank suggests that the *Black's* definition of "devolution" as "the act of an instance of transferring one's rights, duties or powers to another" or "the passing of such rights, duties or powers by transfer or succession", taken together

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with the definition of "transfer" suggest that the automatic vesting in these circumstances constitutes a "transfer" as contemplated by section 96.

28 I disagree with the Bank's analysis. On the death of a joint tenant, the deceased does not "dispose" or "part with" an asset. Its interest is extinguished, leaving nothing to transfer, or part with.

29 Automatic vesting of title in a surviving joint tenant is not a "negotiation of an instrument according to the forms of law". The methods of transfer in those circumstances, articulated in the second part of the *Black's* definition, have no application here, and thus the method of "by operation of law" does not assist the Bank in these circumstances.

30 Last, the passing of rights, duties or powers on succession does not, in my view, include survivorship. Assets that vest in a survivor of a joint tenancy do not form part of the deceased's estate. They do not devolve on succession. They lie outside the estate. That is often a major reason parties take title in joint tenancy — to avoid property devolving into an estate on the death of one of them. That is precisely the legal result the parties seek. Joint tenancy is the way to achieve it. Thus, I conclude the term "devolution" does not assist the Bank.

31 The Bank also relies on the concept of *expression unius est exclusion alterius* (implied exclusion). It suggests that had Parliament intended to exempt the common law right of survivorship from being subject to the *BIA's* remedial provisions, it would have done so specifically. In this respect, the Bank points to section 70(1) which, it suggests, codifies a separate mechanism for exempting transactions from the *BIA's* remedial provisions.

32 Section 70(1) of the *BIA* reads:

> Every bankruptcy order and every assignment made under this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, legal hypothecs of judgment creditors, executions or other process against the property of a bankrupt, except those that have been completely executed by payment to the creditor or the creditor's representative, and except the rights of a secured creditor.

33 I fail to see how section 70(1) applies here. Section 70(1) deals with creditors' rights against the property of the bankrupt that have been completely executed prior to the bankruptcy. These are not subject to the bankruptcy order. If they have not been fully executed, however, they are subject to the bankruptcy order.

34 First, the widows are not creditors of their late husbands, and their right to survivorship cannot be described as a "judicial or other attachment." Second, and more importantly, their late husbands' interests in their former matrimonial homes vested in them prior to bankruptcy, and are not property of the bankrupt. Section 70(1) does not apply.

35 I therefore cannot see that the automatic vesting by right of survivorship is a "transfer" as contemplated by section 96 of the *BIA*. That finding is sufficient to dispose of the Bank's motions. However, since this is apparently the first time a court has been asked to address section 96, for the sake of completeness, I will discuss the rest of the Bank's arguments.

***Undervalue***

36 If I had found the automatic vesting is a "transfer", the Bank would still have to show it was a transfer made at "undervalue". In my view, the Bank has not established undervalue.

37 The right of survivorship is something the couples acquired when they bought their matrimonial homes. In both cases, this occurred long before the Bank lent any money to either doctor, and long before either of them died.

38 When they acquired their matrimonial homes as joint tenants, each joint tenant acquired his or her right of survivorship. Each provided equal consideration: the right of survivorship offset against each party's risk of predeceasing the other and having nothing. Simply put, the parties bargained that either they would take the whole, or would die first, and get nothing.

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39 Also, as I pointed out to counsel, quite apart from what money each might have contributed to the actual purchase of the properties, [5] I would have concluded each had made an equal contribution, whether by way of money or money's worth. I base this on the premise of our *Family Law Act*, namely that marriage is an economic partnership. The roles of the partners in that partnership are to acquire assets, earn income, raise children and run the household. All those roles are deemed to be of equal value, entitling each partner to an equal share of the net value of assets acquired during the marital partnership. [6]

40 As I see it, regardless of what each of the spouses contributed in money to acquire their matrimonial homes, the law presumes that each widow contributed as much as her husband to that acquisition, whether by way of money, or money's worth. Part of what each acquired was the hope of surviving and becoming the sole owner of the whole. Each acquired an inchoate right to sole ownership at the time the property was acquired with their equal, joint efforts. That inchoate right crystallized at the moment of the other joint tenant's death.

41 Although neither widow paid anything to acquire the whole of their matrimonial homes on their husbands' deaths, it seems to me each had already provided ample and adequate consideration for their right to acquire the whole property by way of survivorship.

42 I therefore conclude the widows' acquisition of the whole of their properties was not at "undervalue" as contemplated by s. 96. The Bank's motions would fail on this basis as well. This leaves the Bank's final argument that alternatively the court should impose a remedial constructive trust in these circumstances.

***Constructive trusts?***

43 The Bank asserts an alternative argument to relief under section 96 of the BIA. It says if its section 96 application fails, the court should find the widows hold their deceased husbands' former interests in their matrimonial homes in trust for the bankrupt estates.

44 Constructive trusts are imposed to prevent unjust enrichment. Before a court can impose a constructive trust, it must find there has been an enrichment, a corresponding deprivation, and the absence of any juristic reason for the enrichment. [7]

45 First, the Bank suggests the right of survivorship itself creates an enrichment in the hands of the widows. Second, it says the right of survivorship deprives the creditors of what would have fallen into the bankrupt estates. Third, the Bank alleges there is no juristic reason for it. The Bank argues that if a constructive trust is not imposed, *bona fide* third party rights will have been thwarted.

46 The Bank points out that an execution creditor can execute against a joint tenant's interest in jointly held property. It reasons this is inconsistent with the position the widows take that each of the joint tenants held an undivided interest in the whole. If their interests were undivided, then how, the Bank asks, can the other's interest be subject to the rights of its creditors? As a result, the Bank argues imposing a constructive trust is consistent with this treatment of a joint tenant's interest in a property vis a vis his or her creditors.

47 First, I am not persuaded the automatic vesting of title in a survivor enriches the survivor and deprives the estate. I say this because the parties each acquired their inchoate rights of survivorship at the time the property was acquired, not at the date of death. It was part of what each had from the beginning. There was mutual consideration passing between the spouses in the sense that each acquired the chance of acquiring the whole by way of survivorship, and each risked the fact that he or she might predecease the other, and thus lose his or her right to the whole. Also, as I have pointed out above, the widows and their late husbands provided equal consideration for their actual acquisition and maintenance of their respective matrimonial homes. I cannot find "enrichment" in the sense used by the courts in other cases dealing with constructive trusts.

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48 Second, I do not see the estate as "deprived". The estate is entitled to the bankrupt's property, which vests in the Trustee at the date of the bankruptcy. Here, the widows owned the whole of the properties prior to the date of bankruptcy. There was nothing to vest in the Trustee, and therefore no deprivation. It is true s. 96 permits some property to be clawed back into a bankrupt's estate. Here, however, I have found s. 96 does not apply. Therefore, since no property vested in the estate, I cannot see the estate was deprived in any way.

49 Third, even if there were enrichment and deprivation, I echo the words of Herold J. in *Harrison Estate v. Harrison* [8] in which he said that even if the automatic vesting of title by operation of law "enriches the survivor and deprives the estate, it surely cannot be said that there is no juristic reason for it." He identified the juristic reason as what the law dealing with joint tenancy requires. I agree with his statement that "[i]t would lead to a preposterous and unfortunate result if every transfer by operation of law which occurs on the death of a joint tenant could set up a claim for a remedial constructive trust." If the law itself provides for the right of survivorship, then surely that is the juristic reason for it.

50 For these reasons, I decline to impose a constructive trust.

***The equities favour the Bank?***

51 Last, the Bank argues the equities favour the creditors. It points out that a bankruptcy severs a joint tenancy, transforming it into a tenancy in common. [9] This means if either of Dr. Cameron or Dr. Shaul had become bankrupt prior to their deaths, their equity in their matrimonial homes would have vested in their Trustees, even though title had been held jointly. [10] The Bank argues that if this would have been the case if the bankruptcies occurred prior to death, why should bankruptcy occurring after death preclude clawing back the vesting of title in the survivor when that vesting occurs within the one-year reviewable period. The Bank suggests it would not be just and equitable to permit this result. As a result, the Bank takes the position the equities favour the Bank.

52 I disagree with the Bank's analysis. The flaw in the argument rests in the timing itself. When a joint tenant becomes bankrupt and the joint tenancy is severed, the bankrupt's half interest in the property *as a tenant in common* then vests in the Trustee, and is available for the creditors. In a case such as this, the joint tenancy is never severed, there is nothing to vest in the Trustee, and nothing is available from the property for the creditors.

53 The Bank, on behalf of the bankrupts' creditors, is entitled to the bankrupts' property to satisfy their claims. There is nothing inequitable in depriving the creditors of property which never vested in the Trustee, was not owned by the bankrupts' estates at the date of death, and to which s. 96 of the *BIA* does not apply.

54 In fact, the equities, in these cases, favour the widows. Long before the Bank lent any money to their husbands, they had acquired their right of survivorship in their matrimonial homes. They had done so for consideration passing between them at the time of the acquisition. To deprive them of their property because the outcome would have been different had their husbands been insolvent, adjudged bankrupt and then died strikes me as completely inequitable — a "preposterous and unfortunate result", as Herold J described it.

55 I cannot conclude the equities here favour the Bank.

**The result:**

56 For these reasons, the Bank's motions are dismissed with costs. I acknowledge that the Bank took the position at the end of the argument before me that this was a novel point of law, and therefore there should be no order as to costs. I disagree. The Bank stood to gain significantly if it had succeeded, both in these two cases, and in subsequent similar cases. The widows faced significant losses if the Bank's position prevailed. They have been put to significant expense to defend the Bank's claims. I see no reason why they should not be compensated for some of their expense with costs.

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57 Accordingly, if the parties are unable to agree on the quantum of costs the Bank should pay to each of the responding parties, the parties will make brief written submissions of no more than two pages, together with their costs outlines. They are to include particulars of each lawyer's year of call and actual billing rate to his client. They are also to include copies of any offers that might bear on the scale of costs. Their submissions should be delivered within two weeks of the release of these reasons.

*Motions dismissed.*

Footnotes

1 *Anger and Honsberger Law of Real Property*, 2nd Ed., Vol. 1, (A.H. Oosterhoff, W.B. Rayner, Canada Law Book Inc., 1985) at page 788

2 *Ibid.*

3 *Ibid.* at page 793. See also *White, Re*, 1928 CarswellOnt 29 (Ont. S.C.); *Simcoff v. Simcoff*, 2009 CarswellMan 357 (Man. C.A.) and *Fuller v. Fuller Estate*, 2010 CarswellBC 2555 (B.C. C.A.)

4 7th edition

5 None of that evidence was before me

6 Preamble to the *Family Law Act* R.S.O.1990, c. F-3 and Part I to the *Act*

7 *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 (S.C.C.); *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.); *Bukvic v. Bukvic*, [2007] O.J. No. 1637 (Ont. S.C.J.)

8 2003 CarswellOnt 6342 (Ont. S.C.J.) at paragraph 25

9 Since the bankrupt's property vests in the Trustee upon bankruptcy, the four unities are broken, thus creating a tenancy in common

10 *White, Re, supra*

**End of Document**

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# TAB 3

2017 ABQB 181
Alberta Court of Queen's Bench

Royal Bank of Canada v. Racher

2017 CarswellAlta 446, 2017 ABQB 181, [2017] A.W.L.D. 2003, 278 A.C.W.S. (3d) 17, 52 Alta. L.R. (6th) 161

# Royal Bank of Canada (Applicant) and James Stanley Racher and Audrey Anne Racher (Respondents)

J.T. Eamon J.

Heard: January 30, 2017
Judgment: March 16, 2017
Docket: Calgary 1401-11641

Counsel: Matti Lemmens, for Applicant
D. Grant Watson, for Respondents

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Insolvency; Property; Torts

**Related Abridgment Classifications**

Bankruptcy and insolvency
XI Avoidance of transactions prior to bankruptcy
XI.10 Miscellaneous

**Headnote**

Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy — Miscellaneous

Farm lands in Alberta were conveyed from husband and wife jointly to wife — Husband assigned himself into bankruptcy, filing for bankruptcy in Ontario — Creditor of husband was authorized to bring proceedings and held assignment of interests of husband's bankruptcy trustee in subject matter of proceeding, pursuant to order made under s. 38 of Bankruptcy and Insolvency Act — Creditor brought application seeking to set aside conveyance — Transaction was at undervalue and was void as against trustee in bankruptcy and creditor, standing in trustee's position under s. 38 of Act — Issues whether husband was entitled to exemption on basis that on date of bankruptcy he was Alberta resident and residence on farm lands was his principal residence, or husband's primary occupation was farming, his principal residence was located on land and that land was part of farm that he was farming, were directed to hearing with oral evidence — Creditor's position that court should consider exemption claims independent of effect of s. 96 of Act was not agreed with — If husband was found to have exempt property in Alberta and husband resided in Alberta, then s. 67(1)(b) of Act applied — Creditor's position that husband was out of time regarding exemption claims was rejected — Husband and wife were not dealing at arm's length — Creditor established case that transfer was undervalue, and onus shifted to husband and wife to show consideration was not undervalue — Lack of evidence of value was fatal to position of husband and wife.

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s. 4(2)(a) — considered

s. 4(5) — considered

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s. 49 — considered

s. 49(3) — considered

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s. 67(1)(b) — considered

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*Civil Enforcement Regulation*, Alta. Reg. 276/95

s. 37(1)(e) — considered

APPLICATION by creditor seeking to set aside conveyance of farm lands.

***J.T. Eamon J.*:**

**I Introduction**

1 Royal Bank of Canada ("*RBC*"), a creditor of James Racher, seeks to set aside a conveyance of farm lands in Alberta from James Racher and Audrey Racher jointly to Audrey Racher. It alleges that the transaction was a transfer at undervalue under section 96 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 as amended ("*BIA*"), or a fraudulent transfer or conveyance under *Fraudulent Preferences Act*, RSA 2000, c F-24 or the *Statute of Fraudulent Conveyances*, 1571, 13 Eliz 1, c 5 (the so-called *Statute of Elizabeth*).

2 The Rachers contest the allegations on several grounds including that the transaction was not at undervalue; Mr. Racher was not insolvent or on the eve of insolvency; there was a legitimate reason for the transaction; there was appropriate value supporting the transaction; and, there is no fraud or dishonesty to be imputed to Mr. Racher.

3 The Rachers further say that no creditor was prejudiced by the transaction because exemptions under section 88 of the *Civil Enforcement Act*, RSA 2000, c C-15 ("*CEA*") would have applied to Mr. Racher's joint interest. He claims an exemption up to the value prescribed under the *Civil Enforcement Regulation*, Alta Reg 276/1995, section 37(1)(e). The quantum of the exemption applied to his joint interest is $20,000. He further claims his primary occupation was farming on the farm lands, and therefore seeks exemption over the parcel of land not exceeding 160 acres that includes the debtor's principal residence and is part of the debtor's farm.

4 RBC disputes the exemptions on several grounds. It says Mr. Racher was not an Alberta resident or a farmer; he did not own the farm lands at the date of his bankruptcy and therefore is not eligible for any exemption; Ontario law governs Mr. Racher's exemptions, and Ontario has no farm land exemption; and, Mr. Racher is too late to claim any exemption.

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5 All of the foregoing must be considered within the limitations of the parties' procedural choice to bring the matter in chambers. There was no oral evidence and not all the witnesses who were involved in the transaction have provided affidavit evidence.

**II Procedural limitations — conflicting evidence on chambers application**

6 The written evidence conflicted on the most important issues: the consideration paid for the farm lands transfer, and the facts underlying the exemptions claimed by Mr. Racher — mainly his occupation, and perhaps his principal residence on the date of bankruptcy.

7 A court that decides matters in chambers on the basis of conflicting affidavits or documents that would support either party's position risks falling into procedural error. It is impossible in a chambers setting to resolve a material credibility dispute based simply on inconsistent affidavits, and documents that would support either competing interpretation: *Nafie v. Badawy*, 2015 ABCA 36 (Alta. C.A.) at para 106; *Charles v. Young*, 2014 ABCA 200 (Alta. C.A.) at paras 3 - 5, and authorities cited therein; *Rensonnet v. Uttl*, 2014 ABCA 304 (Alta. C.A.) at para 10; *Nieuwesteeg v. Barron*, 2009 ABCA 235 (Alta. C.A.) at paras 9 - 11.

8 RBC submitted that I ought to apply summary judgment principles, which it submits include (1) the court is to presume that the best evidence from both sides is before the court, and (2) self-serving evidence does not give rise to a triable issue.

9 RBC's Originating Application does not request summary judgment nor state that RBC relies on the summary judgment rule 7.3 of the *Alberta Rules of Court*, Alta Reg 124/2010 ("*ARC*"). The Respondents' counsel indicated that they had not viewed this as a summary judgment application when they selected their evidence for submission. This understanding might be material to the extent the Respondents did not provide an affidavit from Mrs. Racher, if I were to strictly apply the requirement espoused in some summary judgment cases that the Respondents put their "best foot forward".

10 I do not apply the summary judgment rules because RBC did not ask for summary judgment and this might cause unfairness to the Respondents.

11 Nevertheless, the court is obliged to resolve legal disputes in the most cost-effective and timely method available, provided the process ensures fairness between the parties. It is appropriate to pursue a cost-effective, timely final resolution to litigation which is fair and just to the parties, rather than permit continuation of protracted and costly litigation when it can be properly disposed of summarily and entirely: *Pyrrha Design Inc. v. Plum and Posey Inc.*, 2016 ABCA 12 (Alta. C.A.) at paras 8-11.

12 A court therefore ought to consider whether it could make sufficient findings on the record to arrive at a fair and just disposition. This is not to say that the standard is low or that credibility contests can be tried in chambers. Like summary judgment, neither is true: *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABQB 120 (Alta. Q.B.) at para 51; appeal dismissed 2015 ABCA 406 (Alta. C.A.).

13 This approach, and considerations which may permit a court sitting in chambers to resolve contested factual issues, are described by Beilby JA in *Sandhu v. Siri Guru Nanak Sikh Gurdwara of Alberta*, 2015 ABCA 101 (Alta. C.A.), leave to appeal refused [2015] S.C.C.A. No. 184 (S.C.C.):

> 78 In ***Nieuwesteeg v Barron***, 2009 ABCA 235, 460 AR 329, this Court concluded that a chambers judge should direct that a matter be tried, or at least that oral evidence be heard where he or she is unable to resolve conflicting affidavit evidence. Credibility cannot be tried "merely by reading affidavits which conflict on primary facts"***: Charles v Young***, 2014 ABCA 200 at para 4.

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> 79 However, last year the Supreme Court of Canada in ***Hryniak v Mauldin***, 2014 SCC 7, [2014] 1 SCR 87 determined that the fact that some conflict exists in the affidavit evidence of opposing parties in an application for summary judgment does not mandate setting the matter for trial in every situation. Where the judge finds that he or she can make a fair and just determination on the merits of the application, it should proceed without oral evidence. This arises where the judge can make the necessary findings of fact and apply the law to those facts. This is often a proportionate, more expeditious and less expensive way to achieve a just result than a trial.
>
> 80 This approach to litigation economy may also be applied to this application which, like a summary judgment application, addressed issues which resolved the litigation in its entirety.
>
> 81 Therefore, conflict on certain points in the parties' affidavits does not alone mean it should have been adjourned for oral testimony or a full trial. It may be that the conflicts do not arise on essential facts. It may be that analysis shows no factual conflict exists, but only a conflict of the litigants' separate opinions. It may be, as here, that one party relies on several affidavits, which contain internally conflicting evidence, including some evidence which agrees with or supports the evidence lead by the opposite party, and thus amount to admissions against interest. It may be that issues can be resolved on the basis of those portions of the affidavits which are not in dispute, as in ***Seymour Resources Ltd. v Hofer***, 2004 ABQB 303 at para 20, [2004] A.J. No. 1087.

14 In applying this cautious approach, a court may also consider whether the matter can be resolved by applying correct onuses of proof: *Wildeman v. Wildeman*, 2014 ABQB 732 (Alta. Q.B.) at paras 16 - 17.

15 Also, in applying this approach, like summary judgment cases, "[i]n some circumstances the nonmoving party may be at risk of losing the summary judgment application if it fails to present a version of the facts which is inconsistent with that relied on by the moving party". A self-serving affidavit alone is not sufficient to create a triable issue in the absence of detailed facts and supporting evidence: *Attila* at paras 51 - 52 of 2015 ABQB 120 (Alta. Q.B.); see also para 15 of 2015 ABCA 406 (Alta. C.A.). A similar standard was applied in an Originating Application in *Floden*: statements in affidavits that are merely conclusory, argumentative, or have no detailed evidence supporting them may not be sufficient to require a trial of an issue. *R. Floden Services Ltd. v. Solomon*, 2015 ABQB 450 (Alta. Q.B.) at para 23.

16 In determining whether there is a proportional means short of trial that should be used in a bankruptcy or related application, where final relief is sought, a self-serving affidavit alone may not be sufficient to create a meritorious issue in the absence of detailed facts and supporting evidence. The respondents in such proceedings should provide more. Otherwise, respondents could force trials merely by swearing to a set of general conclusions. The tolerance for that has long passed given the concerns for facilitating access to justice through proportionate procedures.

17 I must determine whether the claim to transfer at undervalue, the fraud claims, and the exemption claims are suitable for determination in chambers. The court may determine some of the claims summarily and refer others that are not suitable for summary determination to a trial of an issue. *ARC*, Rules 3.2(6), 3.12, and 7.1(1)(a). The *BIA* also authorizes trials of issues (*BIA*, section 187(8)) and this Court may exercise jurisdiction under the *BIA* in this case (*BIA*, section 183).

**III The transaction under review**

18 The transaction is a transfer of Alberta farm lands by the Rachers as joint tenants to Mrs. Racher. The transfer was made February 10, 2014 and registered February 14, 2014.

19 The farm lands are near the town of Wildwood, Alberta in a rural area. The farm lands consist of two adjacent quarter sections of land. They physically appear as a single property, but they are on separate land titles. One parcel (the NE 1/4, consisting of 158.97 acres) has road access and includes the residence, a substantial number of accessory buildings (including shop, double car garage, hay shed, machine shed, sheds and shelters for livestock, and waterers), and a mixture of open farm land and pasture. The other parcel (the SE 1/4, consisting of 160 acres) consists of farm land and pasture. There is a small area, approximately 15 acres, of bush on the south end of the SE 1/4. This parcel would

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be physically landlocked from existing developed roads if sold separately. There is no evidence of what legal or physical access would otherwise be available for a purchaser of the SE 1/4 who did not also own the NE 1/4.

20 The use of the residence at the date of a professional appraisal (October 29, 2014) was agricultural. The pictures of the property provided by the appraiser depict a sign at the entrance inscribed "Racher Farms", and a typical Alberta owner occupied farm with residence, accessory buildings, and a mixture of farmland and pasture.

21 The farm lands were clear of any financial encumbrances.

22 The transfer of the interest in the farm lands was prepared by an Alberta lawyer. The consideration identified in the transfer is $1 and "transfer from husband to wife". Mrs. Racher deposes in her sworn affidavit regarding the value of land appended to the transfer:

> "I know the circumstances of the transfer and the true consideration paid by me is as follows:
>
> ONE DOLLAR ($1.00) AND TRANSFER FROM HUSBAND AND WIFE TO WIFE"

23 The Rachers were (and are) husband and wife. There is no evidence that Mr. and Mrs. Racher were in any way adverse in interest or that the transfer was to settle any claims between them.

24 RBC claims that the transfer was for $1, and was both a transaction at undervalue under the *BIA* and a fraudulent transaction under the *Fraudulent Preferences Act* or a fraudulent conveyance under the *Statute of Elizabeth*.

25 The Rachers claim that the transfer was not merely for the consideration described in the transfer, and was for a legitimate purpose. They rely on affidavit evidence from Mr. Racher, who says:

- the transfer was part of a swap arrangement where Mrs. Racher would become the owner of the farm lands and Mr. Racher would become the owner of a parcel of land in Petrolia, Ontario which they also jointly owned (the "*Ontario land*").

- the purpose of the swap was to obtain financing on the Ontario land for use by Big Iron Transport (1997) Inc., an Ontario corporation ("*Big Iron*"). Mr. Racher was the sole director, officer and shareholder of Big Iron. The Ontario land was used by and in conjunction with Big Iron's trucking business. Mr. Racher described himself as an "absentee owner", living in Alberta, whose duties for Big Iron were to buy and sell equipment.

- Mr. Racher was in the process of selling the shares of Big Iron to Earl Paddock Transportation ("*Paddock*"). In connection with the sale, Big Iron required a cash injection in December 2013 to pay for certain repairs and maintenance on its fleet of trucks. He arranged for financing from Olympia Trust Company, with the Ontario land to be used as security.

- a lawyer practicing in Ontario who was representing him in the financing transaction advised him that it would not be fair for Mrs. Racher to mortgage her interest in the Ontario land because she did not have an interest in Big Iron and would not be compensated for mortgaging her interest. At that lawyer's suggestion, the Rachers decided to transfer Mrs. Racher's interest in the Ontario land to Mr. Racher and Mr. Racher's interest in the farm lands to Mrs. Racher.

- the Ontario land was transferred on December 19, 2013. The consideration in the instrument was $1. The Ontario lawyer certified the transfer was conducted in accordance with his professional standards.

- the subsequent transfer of the farm lands was pursuant to the swap arrangement.

- both the Ontario and Alberta lawyer were apprised of the real consideration, which Mr. Racher described as the exchange of value or the swap described above.

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• the Rachers did not turn their minds to the value of the interests being transferred in the swap. Mr. Racher said his thinking was to protect the business of Big Iron without prejudicing Mrs. Racher by having her mortgage her interest without compensation.

26 Mrs. Racher did not provide any evidence in this proceeding. There is no explanation why she swore to the consideration expressed in the transfer if, in fact, Mr. Racher's explanation of the swap is true. As to Mr. Racher's evidence that they did not turn their minds to values of the interests being transferred, Mrs. Racher swore to the values of the farm lands in the affidavit of transferee. No explanation was provided for this inconsistency.

27 Neither lawyer who prepared transfer documentation reflected Mr. Racher's version of the consideration in the transfer. The Rachers did not provide any evidence from either lawyer.

**IV Mr. Racher's bankruptcy**

28 RBC was at all material times a creditor of Mr. Racher, as the holder of a personal guarantee from him for the debts due by Big Iron to RBC. The Rachers did not dispute RBC's status. RBC was authorized to bring the proceedings and holds an assignment of the interests of Mr. Racher's bankruptcy trustee in the subject matter of the proceeding, pursuant to an Order of the Ontario Superior Court of Justice made June 25, 2014 under section 38 of the *BIA*.

29 Mr. Racher assigned himself into bankruptcy on March 6, 2014 pursuant to a Notice of Assignment and Statement of Affairs. The copy provided to the court is not sworn. Mr. Michie, of RBC, deposes that the statement was sworn. Section 49 of the *BIA* requires the document to be sworn. The Rachers have not provided contrary evidence. I find Mr. Racher swore his Statement of Affairs in the form appended as Exhibit "G" to Mr. Michie's affidavit.

30 Mr. Racher filed for bankruptcy in Ontario notwithstanding that he claims to be an Alberta resident. The RBC debt was incurred in Ontario, Big Iron operated in Ontario, and Mr. Racher's guarantee was made in Ontario.

31 In supplemental submissions after the oral hearing of this matter, RBC raised for the first time that Mr. Racher was too late to claim his exemptions, citing among other things that Mr. Racher had been discharged from bankruptcy. In support RBC referred to the Notice of Automatic Discharge. Throughout its amended Originating Application filed well after the automatic discharge date, RBC referred to Mr. Racher as the bankrupt.

32 RBC's argument that Mr. Racher was discharged from bankruptcy falls into the category of bare assertion. An automatic discharge is subject to any objection a creditor might make. I was provided no evidence whether Mr. Racher was or was not automatically discharged. The section 38 Order under the *BIA* obtained by RBC requires it to account to the bankruptcy trustee in the event of a surplus. I received no submissions as to whether the Trustee has yet been discharged.

33 Mr. Racher attributes the cause of his bankruptcy to the failure of Paddock to close its purchase of Big Iron's business. He says Paddock appropriated all the assets of Big Iron, leaving him no option but to make an assignment into bankruptcy. (The court was advised by Mr. Racher's counsel that an action has been commenced against Paddock arising from these events. The court was not provided with a copy, but RBC does not appear to dispute this and the Court accepts it as factual).

34 Mr. Racher had guaranteed Big Iron's debts to RBC pursuant to a guarantee. RBC's witness deposed that at the time of the transfer of the farm lands Big Iron was in serious financial difficulty and did not have sufficient assets to pay RBC. Although lay witness opinions on such matters are not admissible, there is some support for RBC's position in the evidence:

• Big Iron had to obtain financing in December 2013 to effect repairs and certifications of its trucking fleet, and used land belonging to the Rachers to facilitate that.

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• Big Iron's credit facility with RBC was fully drawn by mid-January 2014.

• Mr. Racher indicates in his Statement of Affairs in the bankruptcy that Big Iron "ceased" January 31, 2014 and the estimated net realizable value of its shares was zero.

35 Not much else is known about Big Iron's financial condition in January or February 2014 or Mr. Racher's exposure on his guarantee.

36 The only other evidence on the point is that Mr. Racher says there was a deal to sell Big Iron to Paddock. In support he produced an unsigned and undated two page document titled Letter of Intent. That document relates to an asset sale, whereas he said in his cross-examination on affidavit that he was approached by Paddock to sell the shares. The record is unclear about the terms of any sale actually agreed to, including price, the net value of any retained assets and liabilities (as mentioned in the purported letter of intent), or the value of any shares of Big Iron in late 2013 or early 2014.

37 The evidence is also vague about Mr. Racher's financial condition in late 2013 and early 2014. Mr. Racher deposes that his financial condition could not be described as "good" in December 2013 but he had no reason to believe he would need to assign himself into bankruptcy within 3 months.

**V The grounds for review of the transaction**

38 RBC makes 3 challenges to the transaction: it is undervalue pursuant to section 96 of the *BIA*; it is a fraudulent transfer under *Fraudulent Preferences Act*; and, it is a fraudulent conveyance under the *Statute of Elizabeth.*

39 Mr. Racher's exemption claim is part of the Rachers' response to each challenge: that the transaction did not prejudice creditors and should not be set aside. It is convenient to keep in mind at the outset that Mr. Racher relies on the following exemptions from execution under subsections 88(f) and 88(g) of the *CEA*:

(f) in the case of an enforcement debtor whose primary occupation is farming, up to 160 acres of land if the enforcement debtor's principal residence is located on that land and that land is part of that enforcement debtor's farm;

(g) the principal residence of an enforcement debtor, including a residence that is a mobile home, up to the value prescribed by the regulations for that residence but if the enforcement debtor is a co-owner of the residence, the amount of the exemption allowed under this provision is reduced to an amount that is proportionate to the enforcement debtor's ownership interest in the residence;

***(a) Section 96 of the BIA***

40 Section 96 of the *BIA* 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

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(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.

41 A transfer at undervalue is defined in section 2 of the *BIA*:

"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.

42 Persons are related to each other in several instances including where they are connected by marriage: *BIA*, section 4(2)(a).

43 For the purposes of section 96(1)(b), persons related to each other are deemed not to be dealing at arm's length in the absence of evidence to the contrary: *BIA*, section 4(5).

44 Section 67(1)(b) of the *BIA* incorporates the exemptions from execution under provincial law. It provides:

[t]he property of a bankrupt divisible among his creditors shall not comprise . . . any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides.

45 RBC argues that exemptions should be assessed on the facts existing as of the date of bankruptcy. It submits the bankrupt did not own the farm lands on that date, and therefore cannot claim an exemption. RBC further argued that the exemptions are also not available because the law of Ontario applies to exemptions, not the law of Alberta, and the exemption claims cannot be considered because the bankrupt has been discharged.

46 The legal principles respecting RBC's arguments are set out in the following paragraphs.

*(i) Whether a bankrupt who transfers potentially exempt property is deprived of an exemption claim if the transfer is later declared void*

47 It is well settled that exemptions are assessed at the date of bankruptcy. However, I do not agree with RBC's position that the court should consider the exemption claims independent of the effect of section 96.

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48 *Ramgotra (Trustee of) v. North American Life Assurance Co.*, [1996] 1 S.C.R. 325 (S.C.C.) at paras 44-51 observes that the general scheme through which a bankrupt's estate is divided by the trustee among creditors involves two distinct stages. First, at the time of the assignment or receiving order, the trustee in bankruptcy is obligated to take possession of the assets forming the estate of the bankrupt. Once the bankrupt's property has passed into the possession of the trustee, the *BIA* provides the trustee with the power to administer the estate. If a settlement is declared void against the trustee under section 91 of the *BIA* (since repealed), the settled property reverts back to the bankrupt's estate, and falls into the possession of the trustee in bankruptcy. Section 67(1) does not concern the property-passing stage of bankruptcy. It relates to the estate-administration stage by defining which property in the estate is available to satisfy the claims of creditors. Thus, exempt assets pass to the trustee, however they cannot be distributed. This is described in *Ramgotra* at para 49:

> Thus, it can be seen that ss. 91 and 67 relate to two different stages of bankruptcy. Section 91 dictates that certain settled property will fall back into the estate of the bankrupt in the possession of the trustee, while s. 67 is directed at the exercise of administrative powers over the estate by the trustee. Where a settlement is void against the trustee under s. 91, then in normal circumstances, the trustee is empowered to administer the settled asset, and use it to satisfy the claims of creditors. However, in the special case where the asset is exempt under s. 67(1)(b), then the trustee is prohibited from exercising his or her distribution powers because the asset is not subject to division among creditors . . .
>
> . . . while an asset which is exempt under provincial law passes into the possession of the trustee at the time of bankruptcy, the exemption itself bars the trustee from dividing the asset among creditors where s. 67(1)(b) is operative.
>
> [underlining added]

49 In *Holthuysen*, the Alberta Court of Appeal held that property conveyed by a bankrupt to defeat their creditors, the conveyance of which can be voided by the trustee, never ceases to be "property of an execution debtor" within the meaning of the exemptions legislation: *Holthuysen (Trustee of) v. Holthuysen* (1986), 49 Alta. L.R. (2d) 25 (Alta. C.A.) at para 8.

50 It follows that the debtor could claim their exemption once the property is returned to the bankrupt's estate. Consistent with *Ramgotra* and *Holthuysen*, Alberta courts have accepted on many occasions that where an impeachable transaction is set aside, a debtor or bankrupt may claim any exemption for which they otherwise qualified on the date of bankruptcy: *Weiss, Re*, 2002 ABQB 783 (Alta. Q.B.) (Registrar in bankruptcy); *Melnychuk, Re* (1997), 197 A.R. 62 (Alta. Q.B.) (Registrar in Bankruptcy); *Abba, Re* (1998), 66 Alta. L.R. (3d) 277 (Alta. Q.B.).

51 In *Weiss*, the Registrar summarized the principle as follows, at para 13:

> These principles make sense. It has already been established that a debtor can gift away exempt property and that where a settlement is void the settled property, including exempt property, reverts to the bankrupt in possession of the trustee. If it were held that when a settlement of partially exempt property is void the exempt portion loses its exempt status, then a debtor would be prevented from gifting away exempt property if the gift constituted a settlement. In effect, s. 91 would be given priority over s. 67 because s. 91 would be used to determine not only what property is properly property of the debtor but also which property is exempt. The Supreme Court clearly rejected such an approach in *Ramgotra*. Therefore, if a debtor gifts away partially exempt property prior to bankruptcy and after bankruptcy the gift is set aside as a settlement under s. 91, then the property reverts to the bankrupt in possession of the trustee and either the bankrupt or the third party transferee is entitled to the exemption that would have otherwise existed on the date of bankruptcy . . .

52 These cases were decided before the repeal of section 91 of the *BIA*. The same principles should be applied to section 96, in order to facilitate the twin objectives of the *BIA* described in *Husky Oil Operations Ltd. v. Minister of*

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*National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.): to ensure the equitable distribution of a bankrupt debtor's assets among the estate's creditors, and to provide for the financial rehabilitation of insolvent persons. The comprehensive exemption scheme provided for in the *CEA* balances the interests of debtors and creditors, implementing social policy to protect debtors from the severest of consequences: *Direct Rental Centre (West) Ltd. v. Norkus Estates (Trustee of)*, 2001 ABCA 233 (Alta. C.A.) at paras 35, 42. Depriving a bankrupt of their exemptions would frustrate the rehabilitative purpose of the *BIA*.

*(ii) What law governs the exemptions*

53 RBC cites *Duncan, Re*, 2002 ABQB 505 (Alta. Q.B.) at para 19 to say that the *BIA* referentially incorporates the law of the locality where the bankrupt goes into bankruptcy for the purpose of exemptions.

54 RBC further submits that Mr. Racher's locality is Ontario because he assigned himself into bankruptcy in Ontario. Therefore, Alberta exemptions law cannot apply.

55 RBC's interpretation of *Duncan* is not supported by the plain words of section 67(1)(b) of the *BIA*:

> [t]he property of a bankrupt divisible among his creditors shall not comprise . . . any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides.

56 The "locality of the debtor" is defined in section 2 of the *BIA*. If Parliament had intended that law to apply to exemption claims under section 67(1)(b), it would have said so. It did not say so.

57 *Duncan* is not inconsistent with section 67(1)(b) when read in its factual context. Registrar Funduk found that the bankrupts, who previously lived in the Northwest Territories and were in bankruptcy in Alberta, had become Alberta residents before assigning themselves into bankruptcy and acquired a principal residence in Alberta. Registrar Funduk applied Alberta exemptions law to that property. Registrar Funduk's reference to the locality of the debtor was in fact to the principal residence of the bankrupts.

58 Consequently, if Mr. Racher is found to have exempt property in Alberta and Mr. Racher resides in Alberta, then section 67(1)(b) of the *BIA* applies.

*(iii) Whether it is too late to claim the exemptions*

59 RBC submits that Mr. Racher's potential exemption claims should be refused because they were asserted only in response to RBC's application, so Mr. Racher did not claim them in a timely way. RBC further asserted that Mr. Racher is a discharged bankrupt and therefore cannot claim the exemptions.

60 There are two reasons why Mr. Racher should be permitted to assert exemption claims in response to RBC's assertion of the Trustee's claims.

61 First, RBC stands in the shoes of the Trustee under section 38. The trustee is under a duty not to distribute exempt property: *Direct Rental* at paras 35, 42. RBC should be in no better position.

62 Second, the exemptions under the *CEA* are rights, not privileges, founded in important social policy that protects debtors from the severest consequences: *Direct Rental* at paras 35, 42.

63 In *Direct Rental*, the Alberta Court of Appeal stated that the exemption is a right and exists although the bankrupts did not claim it (at para 66). It was sufficient that another creditor claimed the exemption.

64 Imposing a requirement that a debtor must have previously claimed an exemption where the Trustee or a creditor brings a section 96 of the *BIA* claim is inconsistent with the case law, referenced in para 50 above, holding that a bankrupt

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may assert exemptions if the transaction is declared void and thereby defeat the weighty social policy underlying the debtor exemptions. It would also result in the nonsensical situation where a debtor would be required to assert an exemption hypothetically before a claim is advanced, when the debtor may be of the view that the transfer was effective.

65 As to RBC's further submission that Mr. Racher has been discharged from bankruptcy, I refused to find as a fact that he was discharged (para 32). Whether or not he was discharged, I see no reason why an exemption claim cannot be advanced in response to a claim under the *BIA* which is advanced by a creditor under section 38 of the *BIA*. There is nothing in the *CEA* that provides a time limit on such a claim that would apply in a case like this and again, applying a limit would have the negative consequences identified in the immediately preceding paragraph.

66 I reject RBC's position that Mr. Racher is out of time.

*(iv) Whether an exemption claim precludes a remedy under section 96 of the BIA where a transaction at undervalue has occurred*

67 Are the Rachers correct that if the property is exempt, no remedy should be granted to RBC even if the transfer was at undervalue?

68 A disposition by a debtor of exempt property does not prejudice creditors and therefore cannot create a fraudulent conveyance or a fraudulent preference: *Royal Bank v. Laughlin*, 2001 ABCA 78 (Alta. C.A.) at para 33.

69 The same rationale ought to apply to proceedings to set aside property transfers under section 96 of the *BIA*. There are two potential routes to doing so.

70 First, "property" under the *BIA* does not include exempt property. Second, the Court should not exercise its discretion to grant a remedy under section 96 of the *BIA* when no creditor has been prejudiced.

71 The first route is not open to the court. At least one old case decided before *Ramgotra* and cited by the Rachers says that "property" under the *BIA* does not include exempt property: *Canadian Credit Men's Trust Assn. v. Umbel*, [1931] 3 W.W.R. 145 (Alta. S.C.). That law was effectively over-ruled by *Ramgotra*, as the Registrar found in *Gordon, Re*, 2000 ABQB 92 (Alta. Q.B.) at para 31.

72 The second route is open to the court. A section 96 Order under the *BIA* is discretionary. If the entirety of the property were exempt, there would be no purpose in making a section 96 Order under the *BIA*.

73 The rule does not apply where only a portion of the property is exempt. In *Heinz, Re*, 2003 ABQB 400 (Alta. Q.B.) at para 10, Justice Burrows observes that Alberta law clearly is that the settlement is only void if there is non-exempt equity. Similarly, the Alberta Court of Appeal in *Laughlin* stated:

> The short answer to the Bank's argument is that a disposition by a debtor of property, the full value of which is exempt, is not unlawful or fraudulent notwithstanding that its effect may be to deprive a creditor of its expectation that the exempt property would eventually mature into an interest to which its security would attach.

74 In many cases, the property cannot be carved up into exempt pieces to be left with the bankrupt and non-exempt pieces to go to the trustee. It would be unworkable to do anything other than to return the property to the bankrupt estate to administer it in accordance with the *BIA* (including application of any exemptions allowed by section 67(1)(b) of the *BIA*) as contemplated in *Ramgotra*.

75 If there were a dispute over exemptions, then also, the property should be brought into the estate to be dealt with as a matter of administration as described in *Ramgotra*. Exemptions can be determined, and those portions found exempt are not divisible.

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76 In *Heinz*, the Court placed the onus on the Trustee in the circumstances of that case to show non-exempt equity before making an order under section 91(1) of the *BIA*. *Heinz* was decided under a different statutory provision, and does not apply in this case. Under section 96 of the *BIA*, the Trustee must show a transfer at undervalue. Once that is proved the onus shifts to the bankrupt to show any reason not to make an order, for example, on the ground that the property is fully exempt.

***(b) Fraudulent transfer***

77 RBC's second challenge to the transaction relies on Section 1 of the *Fraudulent Preferences Act*, RSA 2000, c F-24. It provides:

> 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.

78 The Rachers do not explicitly argue that any of the exceptions in sections 6 through 9 of the Act apply, though they argue that the transfer was for good consideration, that there are no circumstances that would support an inference of dishonest or fraudulent purpose, and that a transfer of exempt property cannot be attacked as a fraudulent preference or conveyance.

***(c) Fraudulent conveyance***

79 RBC's third challenge to the transaction relies on the *Statute of Fraudulent Conveyances*, 1571, 13 Eliz. 1, c. 5 (the so-called *Statute of Elizabeth*). It is described by Justice Clackson, in *Proulx v. Proulx*, 2002 ABQB 151 (Alta. Q.B.) at para 14 as follows:

> 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;
>
> 8. The conveyance must have had the intended effect.

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80 The Rachers make the same arguments as are described earlier, in response to this claim.

**VI The alleged transfer at undervalue**

***(a) Nature of the transfer***

81 The Rachers are married and therefore are related: *BIA*, section 4(2)(a). For the purposes of section 96(1)(b), they are deemed not to be dealing at arm's length in the absence of evidence to the contrary: *BIA*, section 4(5).

82 There is no evidence to the contrary and no suggestion that there might be such evidence at a trial. I therefore find that the Rachers were not dealing at arms length.

***(b) Proof of intention not necessary***

83 Where the transfer is to a person who is not at arm's length within the year preceding bankruptcy, it is not necessary to show that the debtor intended to defeat, hinder or delay creditors or that that the debtor was insolvent or rendered insolvent by the transaction: *BIA*, section 96(1)(b)(i).

***(c) Whether transfer at undervalue***

*(i) Whether claim can be determined on the summary record*

84 In this case the court must decide whether it can determine on the present record, in accordance with the procedural limitations described in Part II of this decision, whether the transfer was at undervalue. There are two issues.

85 First, can the elements of the section 96 claim under the *BIA* be fairly and justly determined on the present record? They can if:

(a) the values of Mr. Racher's interest in the farm lands, the consideration for the transfer, and (if applicable) the value of Mrs. Racher's interest in the Ontario land can be appropriately determined on the present record, or

(b) the range of potential values are such that notwithstanding any inability to determine the values with precision, it is unassailable that the transaction was at undervalue.

86 Second, if the exemption claims are based on factual issues that cannot be resolved on the present record, can RBC's section 96 claims nevertheless be summarily resolved?

87 Mr. Racher's exemption claims are possibly relevant in two senses. First, as a defence to the section 96 claim under the *BIA*. The bankrupt says that because his exemptions apply, the creditors cannot have been prejudiced and any application to set the transaction aside should fail. If exemptions were clearly established over all the farm lands, that probably would be an answer to the section 96 claim under the *BIA*. See paras 67 - 75 above.

88 Second, potential exemptions might not be a defence to the section 96 claim but nevertheless could save some of the property for the bankrupt. A claim to exemption over a part only of the lands is not a defence to a section 96 claim under the *BIA* If that is the case, the farm lands should be returned to the bankrupt estate and the exemptions determined. See paras 73 - 76 above.

89 There was one consideration for both parcels (whether $1 as RBC asserts, or in exchange for the Ontario land as Mr. Racher asserts). The conveyance is not divisible. If the elements of section 96 of the *BIA* are proved, then the assets should be returned to the estate for administration unless Mr. Racher can clearly show either that his joint interest in the farm lands is $20,000 or less, or the farm lands are 160 acres or less.

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90 As discussed below, the evidence of value on the application is somewhat unsatisfactory. However, it is highly unlikely that if the matter went to trial there would be any evidence that the unencumbered farm lands had a value less than $40,000. The range of values suggested by RBC all indicate Mr. Racher's equity share to far exceed $20,000. More decisively, Mr. Racher has provided no evidence to suggest his equity is less than $20,000. Mr. Racher's second potential exemption is limited to 160 acres of a farm. The farm lands consist of two quarter sections totalling 318.97 acres. Mr. Racher cannot possibly have an exemption claim over the entirety of the farm lands.

91 In these circumstances the section 96 claim under the *BIA* must be considered first, and distinct from, the exemption claims. Following that determination, the court must consider whether the exemption claims are suitable for summary determination.

*(ii) RBC's opinion of value*

92 Subsection 96(2) of the *BIA* provides that the bankruptcy trustee's opinions of the values of the property and the actual consideration are the values to be used by the court in the absence of evidence to the contrary.

93 RBC provided the values of $650,000 and $1 as the values for the farm land and the consideration: paras 14(d) and 14(f) of Mr. Michie's affidavit.

94 RBC has not provided an opinion of the value of Mr. Racher's fractional interest as one of two joint owners of the farm lands.

95 The Rachers dispute that RBC's opinion should have evidentiary weight, noting the trustee is an independent party and an officer of the court whose opinion can be relied on, while RBC is an interested creditor whose opinion should not be relied on.

96 No authority was cited to me on whether a creditor standing in place of the trustee pursuant to a section 38 Order under the *BIA* may provide presumptive evidence of value as if the action were brought by the bankruptcy trustee.

97 I agree with the Rachers. The trustee is an officer of the Court, and in a fraudulent preference application is to present all the relevant facts in a dispassionate, non-adversarial manner: *Norris, Re* (1996), 45 Alta. L.R. (3d) 1 (Alta. C.A.) at paras 23 - 24. In contrast, the creditor is adverse in interest to the bankrupt. It is unlikely that Parliament intended an interested creditor's opinion of value to have presumptive weight over the bankrupt's position. It is more plausible that subsection 96(2) of the *BIA* did not contemplate what should occur if a proceeding were authorized to be brought by a creditor under section 38 of the *BIA*.

*(iii) Other evidence of value of the farm lands and the Ontario land*

98 The relevant valuation date for the farm lands is the date of the transfer, or the date of the alleged swap agreement. There is no expert appraisal opinion as of either date.

99 The lack of a valuation as at the date of transfer presents a hurdle for RBC.

100 Equally, the Rachers suggest that the land swap was the value of the consideration but they have not provided an appraisal of the Ontario land at any date. That presents a hurdle for them if the onus has shifted.

101 The possible evidence and values for the Alberta and Ontario parcels are described in the following paragraphs.

102 The Rachers purchased the farm lands in September 2011 for $640,000.

103 In his November 12, 2012 Personal Statement of Affairs, Mr. Racher told RBC that the estimated value of the farm lands was $640,000.

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104 Mrs. Racher's Affidavit of Transferee sworn February 10, 2014 states her opinion that the present value (defined in the transfer as what the land might be expected to realize if it were sold on the open market by a willing seller to a willing buyer) of the farm lands is $650,000. The affidavit attributes value of $525,000 to the NE and $125,000 to the SE .

105 The farm lands were appraised by a certified residential appraiser as of October 29, 2014 in the amount of $615,000. The appraiser did not provide individual values for the NE and the SE . The opinion was qualified because no site or interior inspection was conducted. The appraiser therefore made assumptions about interior conditions based on a recent sale listing. There is no evidence that the assumptions were inaccurate, but RBC did not prove the assumptions to be accurate.

106 The appraisal identified 3 comparable sales in close proximity with similar land characteristics. These parcels were vacant land. The sales spanned the period May 2013 through June 2014, and ranged from $1000 - $1257 per acre. This led the appraisers to assign a land value of $400,000. The appraisers then estimated the total value of improvements using the cost approach at $214,505.

107 The property assessment summary report provided by the Yellowhead County for property taxation purposes as of October 31, 2014 reports an assessment total of $358,500, consisting of $335,220 for the NE and $23,280 for the SE . The large difference between the 2 parcels arises from the fact that the SE was assessed as farmland, whereas the NE includes a farm/residence site, farm buildings, and farmland. The values in the assessment are an aggregate of market land valuation, farmland valuation, improvement valuation, and "Marshall & Swift".

108 During argument, the Rachers submitted the record discloses values of the Ontario land ranging from $90,000 to $250,000, as described in the following paragraphs.

109 Mr. Racher's Notice of Assignment and Statement of Affairs estimated the Ontario land to have a value of $90,000, stated it was encumbered by an $80,000 security, and provided an estimated net realizable value of zero.

110 The only other potential evidence of value is in the personal financial statement prepared by Mr. Racher for RBC dated November 12, 2012. This document states the Ontario land had a value of $250,000.

111 That statement contains misrepresentations that cause concern over its reliability. Mr. Racher incorrectly stated in the document that the title to the farm lands and the Ontario land was in his name. In fact, title was in the names of James Racher and his wife Mrs. Racher. The statement also represents that his % ownership was 100%. That is misleading given the failure to disclose the existence of Mrs. Racher as a joint owner. Whether or not the statements were intentionally false (and I make no finding in that regard), these misrepresentations cause me to conclude the document cannot be relied on in summary proceedings for statements concerning the properties.

112 Moreover, the value of the land in November 2012, even if it was reliable, is not evidence of value on December 19, 2013 or February 10, 2014.

113 The fact a trust company was willing to loan $80,000 on the security of the Ontario land might suggest a value well in excess of $90,000, but the Rachers have provided no information about what valuations were undertaken by the trust company or what other lending information it had, such as cash flows, business value, or the like.

*(iv) Assessment whether transaction at undervalue*

114 In considering whether the transaction was at undervalue can be fairly and justly determined on the present record, the court should consider whether the process allows the Court to make the essential findings of fact, allows the court to apply the law to these facts, and is a proportionate, more expeditious and less expensive means to achieve a just result, to borrow from the language of *Hryniak v. Mauldin* [2014 CarswellOnt 640 (S.C.C.)] quoted by the Alberta Court of Appeal in *Attila* at para 15.

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115 There is no factual contest over the relationship between Mr. and Mrs. Racher, and the section 96 test applied to related parties does not require any element of intention. Rather, the potentially contentious issue is relative value. Much of RBC's evidence of value is weak, or as of immaterial dates. Nevertheless, as discussed below, it is unassailable that whatever value presented by RBC is considered, the transaction is at undervalue. There is enough evidence to shift the onus to the Rachers. They did not present evidence to suggest that any values other than the potential values suggested in RBC's case should be considered. In these circumstances, the Court concludes the matter can be summarily resolved within the spirt of *Sandhu*.

116 The only authority cited to me on the definition of an undervalue transaction says that whether the transfer is at undervalue depends on whether the consideration received by the debtor is conspicuously less than the consideration given by the debtor. There is no exact range, but the cases appear to suggest that 17% below fair market value is conspicuously less, while 6% might not be: *Indarsingh, Re*, 2015 ABQB 158 (Alta. Q.B.), at para 15.

117 The only potential evidence as of the valuation date asserted by RBC is Mrs. Racher's affidavit of transferee. There is no evidence that Mrs. Racher is qualified to provide an opinion of the value of the farm lands. It is difficult to see how Mrs. Racher's opinion is admissible, unless it is taken as an admission against her interest and the interest of Mr. Racher who was working with her in the transaction. The other evidence is not particularly material to the value of the lands at February 10, 2014. The market can fluctuate over time. Also, in relation to the tax assessed value, there is no evidence explaining how the county arrived at its values, the basis on which they were made, or the effective date of the assessment.

118 Section 96 of the *BIA* does not explicitly require appraisal evidence, though such evidence would normally be expected and provided. The Registrar, in *Heinz, Re*, 2003 ABQB 166 (Alta. Q.B.), refused to accept the affidavit of transferee as evidence of value against the transferee because it was not an admissible expert opinion and was prepared for fee collection purposes under the *Land Titles Act*, RSA 2000, c L-4. The Registrar dismissed the Trustee's application under section 91 of the *BIA*, holding that although the transfer was a settlement under section 91 of the *BIA* in force at the time, the Trustee bore the onus of showing that there was no exempt equity. On appeal, 2003 ABQB 400 (Alta. Q.B.), Justice Burrows characterized the evidence as low quality but enough that it was not appropriate to dismiss the application. The Trustee (on whom he placed the burden in that case) was permitted to file additional evidence to show there was non-exempt equity.

119 Notwithstanding the lack of appraisal evidence, I conclude that RBC has established a case that the transfer was undervalue:

• RBC proved the existence of an operating farm consisting of almost 320 acres, including habitable residence and accessory buildings, all of which was free of financial encumbrances.

• Comparable bare land sold in a range of $1000 - $1257 per acre in the period May 2013 till June 2014. The farm lands had substantial improvements in addition to the bare land.

• RBC established that this farm, on the admission of the Rachers in the formal land transfer, was transferred for $1.

120 Regardless of the range of values that might be applied to the farm lands, if the consideration was the nominal amount of $1 then it is unassailable that the transaction was conspicuously undervalue.

121 The Rachers do not appear to strongly dispute that conclusion. They accepted in argument that "if the transfer of the Alberta lands was viewed in isolation and outside the factual matrix in which it occurred it would be very difficult for the Respondents to argue that it was anything but a transfer at undervalue".

122 Given RBC's evidence, the onus shifts to the Rachers to show the consideration was not undervalue. To do so, they must show merit to their case that there was a swap arrangement, and that the value difference between the Alberta lands and the Ontario land is enough to take the transfer outside the realm of undervalue.

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123 Applying the *Sandhu* decision, Mr. Racher's sworn evidence of the swap arrangement should not be disregarded. There are many unanswered questions about the swap arrangement. Those include the fact that the arrangement is inconsistent with Mrs. Racher's sworn affidavit of transferee that the consideration was $1, the absence of an affidavit of Mrs. Racher in the present proceedings to contradict her previous sworn statement, and the absence of affidavits or even letters from the lawyers who prepared the transfer documentation to support Mr. Racher's version of events. These raise credibility issues and conflicts in the evidence that cannot fairly be resolved in chambers.

124 However, whether or not the swap arrangement is true, the Rachers have not presented any appraisal evidence to support their case on value. If the Rachers would have the court accept that Mr. Racher's estimates are a proxy for proper appraisal evidence of the Ontario land, then the court would logically need to accept that the same is true of the RBC's evidence of the farm lands. Whichever range of values is employed, it is unassailable that the transaction was conspicuously undervalue:

**Percentage of Consideration in Relation to Market Value**

| | Farm lands— $650,000 (affidavit of transferee) | Farm lands— $615,000 (appraisal) | Farm lands— $358,500— (tax assessment) |
|---|---|---|---|
| ON land, $90,000 | 86.15% | 85.37% | 74.90% |
| ON land, $250,000 | 61.54% | 59.35% | 30.26% |

125 Realistically, the Rachers have not provided evidence to suggest any reasonable prospect of their establishing that the value of the Ontario land on December 19, 2013 or February 10, 2014 was enough to avoid the conclusion from RBC's evidence that the transfer was at undervalue. A self-serving affidavit alone may not be sufficient to create a triable issue in the absence of detailed facts and supporting evidence: *Attila* at para 52. In my judgment, this is a case where the lack of evidence of value is fatal to the Rachers' position.

126 It may be that the values of the joint interests need to be discounted to allow for the cost and delay associated with partition and sale or other proceedings. However, there is nothing to suggest (and neither party suggests) that the proportionate difference between the values of the joint interests would be different than that of the entire interests.

127 No trial of an issue is necessary. I have no hesitation in declaring the transfer void against RBC.

**VII Mr. Racher's exemption claim**

128 Mr. Racher must show that his exemption claim can be fairly and justly determined in a summary manner.

***(a) The evidence of Mr. Racher's occupation and residency***

129 There is substantial evidence that Mr. Racher was historically a farmer:

- He deposes that his income since 1990 has been predominantly from farming.

- His personal statement provided to RBC in November 2012 indicates he is the owner of the farm lands, and that he receives annual salary and wages, and farm income.

- His 2011 through 2013 tax returns clearly demonstrate he conducted the business of farming in Alberta.

130 In contrast, Mr. Racher swore in his Statement of Affairs effective March 6, 2014 that he was retired. The statement does not disclose anything about the farm business. Mr. Racher's 2014 tax return, unlike his previous 3 years returns, is ambiguous whether it reports farm income. Mr. Racher produced receipts for grain sales and straw sales from the

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farm in late 2014, causing me some concern given the content of his 2014 tax return. The ambiguity might arise because someone else prepared his return for 2014, or because there is some factual issue over the underlying farming activities.

131 On the present record, I cannot discern whether Mr. Racher was actually conducting or intending to conduct the business of farming on the farm lands at the date of his bankruptcy. There is no evidence of what supplies he required, when he required them, whether he acquired them, whether he was planting or planned to plant, when he planted, or whether he or Mrs. Racher contemplated a crop share arrangement with a third party. There is no explanation of the income in his 2014 tax return, or whether it reflects farming activity. These questions can only be answered in a further hearing.

132 Mr. Racher's sworn evidence should be treated with caution. To the extent his sworn evidence suggests he was farming in February or March 2014, it is inconsistent with his sworn statement in March 2014 that he was retired. There are many other indicators of the potential lack of reliability in his sworn evidence on this application. His evidence is inconsistent with the transfer that he signed contemporaneous with the events. It is inconsistent with Mrs. Racher's affidavit of transferee purporting to disclose the true consideration paid, yet Mrs. Racher has not provided any evidence explaining whether the swap did or did not exist. It suggests two lawyers prepared transfers containing a false statement of consideration. The potential lack of reliability in Mr. Racher's evidence is also reflected in his sworn Statement of Affairs, which disclosed a disposition of lands in Ontario in the preceding 5 year period, but did not disclose that the farm lands were transferred within the same period.

133 In light of these considerations, I cannot accept Mr. Racher's sworn evidence on a chambers application as a fair and just resolution of the issue short of trial. His evidence is not sufficiently reliable or specific in light of the inconsistencies and missing information. RBC should have the opportunity to challenge it in a viva voce hearing.

134 Mr. Racher claims he was an Alberta resident at the date of bankruptcy. That claim is corroborated by several documents:

- His personal statement provided to RBC in November 2012 indicates his home address is a post box in Wildwood Alberta. The farm is located near Wildwood, so the obvious inference is that he was living on the farm at that time.

- His tax returns for the years 2011 through 2014 identify his province of residence as Alberta.

135 In contrast, Mr. Racher's bankruptcy filing stated that his address was in Petrolia, Ontario (according to his counsel at an address of his brother — though there is no evidence on the record about that). The bankruptcy filing does not explicitly state that Mr. Racher's residency is Ontario or that he has only one residence.

136 RBC points out that section 49(3) of the *BIA* required Mr. Racher to file in the locality of the debtor as defined in section 2 of the *BIA*, and having filed in Ontario I should infer his locality is Ontario.

137 In response, Mr. Racher's counsel argues that Mr. Racher has a grade 10 education and relied on professionals to prepare the bankruptcy forms. Any errors should not be attributed to Mr. Racher.

138 I did not have the benefit of case law about whether the locality of the debtor must be a single place where a debtor carries on business or resides in more than one place. If a single place were required and Mr. Racher resided in Alberta, it might be plausible that any lack of awareness of the technicalities of the *BIA* led to the filing in Ontario.

139 I reject RBC's position that the mere filing of the bankruptcy in Ontario defines Mr. Racher's residence as Ontario for the purpose of assessing his exemptions. Rather, his place is residency is a question of fact. That is an evidentiary matter that would need to be explored in a viva voce hearing.

140 Mr. Racher's residence is closely related to his occupation. As stated above, his evidence must be treated with caution. I decline to make a finding of his residence as of the date of bankruptcy based on the present record.

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141 Either party could have applied for permission to adduce oral evidence or to have any necessary limited pre-trial disclosure: ARC, Rule 3.14(1). Neither asked, and it appears that there are credibility issues associated with the exemption claims.

142 The Court is mindful of the expense and delay associated with a trial of an issue following a special application, and that Mr. and Mrs. Racher have had a fair opportunity to put evidence forward of the farming business, if any, in March 2014. However, the Court should not dismiss the exemption claims. There is some evidence supporting them. It should not be a lengthy process to get to the bottom of who was farming or intending to farm the lands in March 2014 and where Mr. Racher was residing. As in *Heinz*, I conclude the fairest option is to permit the claimant an opportunity to prove the claim through a trial of an issue.

***(b) Whether Mr. Racher's exemption claims are extinguished by his transfer of the farm lands***

143 RBC argues that it is not necessary to be concerned with conflicts in the evidence over Mr. Racher's claimed status as a farmer or his residence because he disposed of his interest in the farm lands before the date of bankruptcy.

144 For the reasons in paras 47 - 52 above, I do not accept RBC's position. If Mr. Racher can show his principal occupation on the date of bankruptcy was farming the farm lands, that his principal residence was on the farm lands and that he is an Alberta resident, then he is entitled to an exemption up to the maximum number of acres under section 88 of the *CEA*. Similarly, by proving residency and his principal residence exemption, he can claim the $20,000 exemption.

**VIII Other challenges to the transaction**

145 RBC requested both a declaration that the farm land transfer is void and a compensation order under section 96 of the *BIA*.

146 I do not see a reason to make a compensation order. There is no evidence that the farm lands have been further transferred or encumbered. RBC's desire for partition and sale can be dealt with after the exemption claims are determined. If Mr. Racher succeeds in his exemption claim and becomes entitled to an exemption on any portion of the SE in addition to the NE , that can be adjusted in any partition and sale proceedings.

147 It is not necessary to deal with RBC's claims that there was a fraudulent transfer or fraudulent conveyance under either the *Fraudulent Preferences Act* or the *Statute of Elizabeth*. If it had been, I would not have been prepared to infer the necessary elements of insolvency (or similar) and intent on the summary record before me. I would have directed them to a trial of an issue.

**IX Disposition**

148 The court declares that the transaction was at undervalue and is void as against the trustee in bankruptcy and RBC, standing in the trustee's position under section 38 of the *BIA*.

149 The issues whether Mr. Racher is entitled to an exemption on the basis that on the date of bankruptcy he was an Alberta resident and (a) the residence on the farm lands was his principal residence, or (b) Mr. Racher's primary occupation was farming, his principal residence was located on the land and that land is part of the farm that he was farming, are directed to a hearing with oral evidence as soon as reasonably possible. If required by RBC, the records disclosure provisions of Part 5 of the ARC are directed to apply to these specific factual issues. Whether to permit oral discovery is reserved and any party may apply for directions regarding same.

150 I am not seized with the matter.

151 The parties may make arrangements within 30 days to speak to costs.

*Order accordingly.*

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# TAB 4

**Most Negative Treatment:** Check subsequent history and related treatments.

2002 CarswellOnt 4535
Ontario Superior Court of Justice

XDG Ltd. v. 1099606 Ontario Ltd.

2002 CarswellOnt 4535, [2002] O.J. No. 5307, 121 A.C.W.S. (3d) 18, 23 C.L.R. (3d) 67, 41 C.B.R. (4th) 294

# XDG Limited, Plaintiffs and 1099606 Ontario Limited and General Electric Caoutak Canada Inc., Defendants

Gordon J.

Heard: July 9-12, 2002

Judgment: December 23, 2002 *
Docket: 1424/99

Counsel: I. Duncan, M. Van Bodegom for Plaintiff, XDG Limited
A. Speciale for Plaintiff, William Green Roofing Ltd.
L. Ricchetti for Defendant, General Electric Capital Canada Inc.
No one for 1099606 Ontario Limited

Subject: Corporate and Commercial; Property; Contracts; Torts; Insolvency

**Related Abridgment Classifications**
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Bankruptcy and insolvency**

XVII Practice and procedure in courts
XVII.8 Costs
XVII.8.h Miscellaneous

**Construction law**

IV Construction and builders' liens
IV.9 Priorities
IV.9.a General principles

**Construction law**

IV Construction and builders' liens
IV.10 Practice on enforcement of lien
IV.10.l Costs
IV.10.l.xiii Miscellaneous

**Debtors and creditors**

XI Fraudulent preferences
XI.4 Intention to prefer

**Debtors and creditors**

XII Fraudulent conveyances
XII.10 Fraudulent intent

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XII.10.c Presumption of fraudulent intent
XII.10.c.i General principles

**Real property**

VII Mortgages
VII.2 Nature and form of mortgage
VII.2.d Mortgage as security for other debts

**Headnote**

**Mortgages --- Nature and form of mortgage — Mortgage as security for other debts**

Defendant numbered company ("109") purchased property and leased it to E Corp. — R was sole director, officer and shareholder of 109 and president of E Corp. — In 1998 and 1999, lien claimants provided services and materials to leased property — When contractors were not paid for work, claims for lien were registered in October 1999 — E Corp. was financed under credit agreement by GECC, which was large lending institution well known in commercial finance business — In March 1999, GECC determined E Corp. was in default position under credit agreement and amended agreement resulting in 109 providing guarantee and mortgage on leased property in favour of GECC regarding indebtedness of E Corp. — Both 109 and E Corp. were declared bankrupt in 2000 and leased property was sold resulting in insufficient funds to pay lien claimants and mortgage holder — In proceedings by lien claimants to determine priority between lien claimants and mortgage, issue arose as to whether mortgage was void as result of contravening s. 20 of Business Corporations Act — Mortgage was void — Purpose of s. 20(1) is to prevent dissipation of corporate assets that might otherwise prejudice financial position of creditors and shareholders — GECC, inconsistent with its usual practice, failed to perform due diligence investigation of 109 — E Corp. and 109 were affiliated corporations and guarantee and mortgage provided by 109 constituted financial assistance within meaning of s. 20(1) — Evidence indicated that when mortgage was granted, 109 failed both solvency and balance sheet tests under ss. 20(1)(c) and (d) of Act — GECC's failure to conduct due diligence test was wilful blindness by GECC and therefore GECC was not lender for value within meaning of safe harbour provision in s. 20(3) of Act — Business Corporations Act, R.S.O. 1990, c. B.16, ss. 20, 20(1), 20(1)(c), 20(1)(d), 20(3).

**Fraud and misrepresentation --- Fraudulent conveyances — Fraudulent intent — Presumption of fraudulent intent — General**

Defendant numbered company ("109") purchased property and leased it to E Corp. — R was sole director, officer and shareholder of 109 and president and controlling shareholder of E Corp. — In 1998 and 1999, lien claimants provided services and materials to leased property — When contractors were not paid for work, claims for lien were registered in October 1999 — E Corp. was financed under credit agreement by GECC, which was large lending institution well known in commercial finance business — In March 1999, GECC determined E Corp. was in default position under credit agreement and amended agreement resulting in 109 providing guarantee and mortgage on leased property in favour of GECC regarding indebtedness of E Corp. — Both 109 and E Corp. were declared bankrupt in 2000 and leased property was sold, resulting in insufficient funds to pay lien claimants and mortgage holder — In proceedings by lien claimants to determine priority between lien claimants and mortgage, issue arose as to whether mortgage was void as being fraudulent conveyance under Fraudulent Conveyances Act — Mortgage was void — GECC, inconsistent with its usual practice, failed to perform due diligence investigation of 109 — Evidence indicated that when mortgage was granted 109 failed both solvency and balance sheet tests under ss. 20(1)(c) and (d) of Business Corporations Act — R, knowing poor financial situation, caused 109 to guarantee indebtedness of E Corp., company of which he was president and controlling shareholder, to provide collateral mortgage security on leased property which was 109's only real asset — R's actions were facilitated by wilful blindness of GECC in not performing due diligence investigation — In circumstances, there was prima facie presumption of intent on part of GECC to defeat current and future creditors which GECC was unable to rebut — GECC could not save situation

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by claiming it acted in good faith since wilful blindness was not good faith — Fraudulent Conveyances Act, R.S.O. 1990, c. F.29 — Business Corporations Act, R.S.O. 1990, c. B.16, ss. 20(1)(c), (d).

**Fraud and misrepresentation --- Fraudulent preferences — Intention to prefer**

Defendant numbered company ("109") purchased property and leased it to E Corp. — R was sole director, officer and shareholder of 109 and president and controlling shareholder of E Corp. — In 1998 and 1999, lien claimants provided services and materials to leased property — When contractors were not paid for work, claims for lien were registered in October 1999 — E Corp. was financed under credit agreement by GECC, which was large lending institution well known in commercial finance business — In March 1999, GECC determined E Corp. was in default position under credit agreement and amended agreement resulting in 109 providing guarantee and mortgage on leased property in favour of GECC regarding indebtedness of E Corp. — Both 109 and E Corp. were declared bankrupt in 2000 and leased property was sold, resulting in insufficient funds to pay lien claimants and mortgage holder — In proceedings by lien claimants to determine priority between lien claimants and mortgage, issue arose as to whether mortgage was void as being unlawful assignment or preference under s. 4 of Assignments and Preferences Act — Mortgage was void — GECC, inconsistent with its usual practice, failed to perform due diligence investigation of 109 — Evidence indicated that when mortgage was granted, 109 failed both solvency and balance sheet tests under ss. 20(1)(c) and (d) of Business Corporations Act — R, knowing poor financial situation, caused 109 to guarantee indebtedness of E Corp., company of which he was president and controlling shareholder, to provide collateral mortgage security on leased property which was 109's only real asset — R's actions were facilitated by wilful blindness of GECC in not performing due diligence investigation — In circumstances, there was prima facie presumption of intent on part of GECC to defeat current and future creditors which GECC was unable to rebut — Assignments and Preferences Act, R.S.O. 1990, c. A.33, s. 4 — Business Corporations Act, R.S.O. 1990, c. B.16, ss. 20(1)(c), (d).

**Construction law --- Construction and builders' liens — Priorities — General principles**

Defendant numbered company ("109") purchased property and leased it to E Corp. — R was sole director, officer and shareholder of 109 and president and controlling shareholder of E Corp. — In 1998 and 1999, lien claimants provided services and materials to leased property — When contractors were not paid for work, claims for lien were registered in October 1999 — E Corp. was financed under credit agreement by GECC, which was large lending institution well known in commercial finance business — In March 1999, GECC determined E Corp. was in default position under credit agreement and amended agreement resulting in 109 providing guarantee and mortgage on leased property in favour of GECC regarding indebtedness of E Corp. — Both 109 and E Corp. were declared bankrupt in 2000 and leased property was sold, resulting in insufficient funds to pay lien claimants and mortgage holder — Plaintiff claimants brought action for declaration that they were entitled to priority over mortgage — Action allowed — GECC, inconsistent with its usual practice, failed to perform due diligence investigation of 109 — Failure to conduct due diligence test was wilful blindness by GECC — GECC gave no satisfactory answer to explain this neglect — In circumstances it would be unconscionable and inequitable to allow mortgagee to obtain priority based on its wilful blindness or negligence — Due diligence investigation would have led GECC to decide against mortgage security on leased property — Assignments and Preferences Act, R.S.O. 1990, c. A.33, s. 4 — Business Corporations Act, R.S.O. 1990, c. B.16, ss. 20(1)(c), (d).

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s. 2 — considered

s. 3 — considered

ACTION by lien claimants for declaration that they had priority over mortgage with respect to leased lands.

***Gordon J.*:**

1 A trial of this consolidated construction lien action was directed to determine the priority as between the lien claimants and the mortgagee with respect to certain lands in the City of Kitchener described as the "Dielcraft property".

**Background**

2 109606 Ontario Limited ("109") was incorporated on 30 November 1994. In December 1994 it purchased the Dielcraft property for $1,515,000. The property was leased to Euro United Corporation ("Euro United"), commencing 1 April 1995 for the purposes of storing raw material and finished product.

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3 Mr. Sam Rehani was the sole director, officer and shareholder of 109. He was also the controlling shareholder and president of Euro United.

4 In 1998 and 1999 the lien claimants provided services and material to the Dielcraft property. Various contractors were involved, commencing with certain demolition work to the ultimate renovation, being the raising of the building roof. In the fall of 1999 the contractors left the job site as they were not being paid by 109. Claims for lien were registered on title commencing in October 1999.

5 Euro United, and related companies operating under a similar name in different jurisdictions, was financed by General Electric Capital Canada Inc. ("GECC") pursuant to a credit agreement dated 13 November 1998. By the end of March 1999 GECC determined Euro United was in a default position regarding certain covenants in the credit agreement. In April 1999 an amendment to this agreement resulted in 109 providing a guarantee and mortgage on the Dielcraft property in favour of GECC regarding the indebtedness of Euro United.

6 Euro United temporarily corrected its default position, but by August 1999 GECC determined there were significant problems. On 24 November 1999 GECC demanded payment from Euro United and 109. In December 1999 KPMC Inc. was appointed interim receiver of Euro United and 109. In June 2000, both companies were declared bankrupt and KMPG Inc. was appointed trustee of their estates. Sale of the property by the trustees was authorized in January 2002.

7 The sale proceeds are held by KPMG Inc. pending the outcome of this litigation. There are insufficient funds to pay the lien claimants and the mortgage holder.

**Issues**

8 Pursuant to the order of Sills J., granted 17 December 2001, the statement of issues identified the following:

1. Section 20 of the Ontario *Corporations Act*. Is the mortgage invalid or void as against the plaintiffs as a result of contravening section 20 of the Ontario *Business Corporations Act*?

2. Section 4 of the *Assignments and Preferences Act* and section 2 of the *Fraudulent Conveyances Act*.

Is the mortgage invalid or void as against the plaintiffs as an unlawful assignment or preference or as a fraudulent conveyance?

3. Section 78 of the *Construction Lien Act*.

(a) Was the mortgage registered prior to the time when the first lien arose in respect of the subject improvement, and, if so, to what extent does the mortgage have priority under section 78 of the Construction Lien Act?

(b) Was the mortgage registered as a subsequent mortgage, and, if so, to what extent does the mortgage have priority under section 78 of the *Construction Lien Act*?

**Analysis**

***(i) Section 20 Business Corporation Act***

*(a) 109 and GECC*

9 Euro United was involved in the manufacture and sale of plastic injection mould products, such as patio furniture. Some of their product was supplied to large retail stores in Canada and the United States. According to Mr. Paul Feehan, Senior Vice President of GE Capital Commercial Finance, Inc., a related company to GECC, Euro United was growing rapidly. Mr. Feehan, who was involved in the underwriting of Euro United's financing by GECC, reported the growth in sales went from $10,000,000 in 1996 to $102,000,000 in 1998.

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10 The Canadian Imperial Bank of Commerce was the lending institution providing financing to Euro United. GECC, acting as agent for a syndicate of lenders, including itself, provided new replacement financing in November 1998 consisting of a revolving line of credit in the notional amount of $127,000,000 and a term loan of $50,000,000. The line of credit authorized from time to time was based on a formula pertaining to receivables and inventory.

11 Mr. Feehan, and others at GECC, conducted a due diligence investigation of Euro United from July to November 1998. The new financing terms were set out in the credit agreement dated 13 November 1998. GECC acquired security on the assets of Euro United.

12 GECC was aware of Euro United leased the Dielcraft property from the outset. A Landlord's Waiver and Consent, signed by Mr. Rehani on behalf of 109 and Euro United, dated 16 November 1998, was one of the documents in the security package. A copy of the lease was attached to this document indicating an annual rent to be paid by Euro United in the sum of $700,000 on a net net basis commencing 1 April 1996 and ending 31 March 2002. GECC was also aware Mr. Rehani controlled both companies.

13 By the end of March 1999, less than five months after the advance on the credit agreement, GECC became aware Euro United was in a default position. Amongst other items, Euro United had overstated its receivables, resulting in an overadvance on the line of credit of $15,300,000. In addition, Euro United had paid Mr. Rehani $525,000, apparently with respect to his shareholder loan, and purchased and mortgaged their head office property in Oakville, both items lacking the required consent of GECC. At this point in time, GECC's exposure was $89,900,000 on the line of credit and $50,000,000 on the term loan.

14 Mr. Feehan, and others involved in the financing, met with Mr. Rehani on 5 April 1999. Mr. Rehani offered to add his real estate, the Dielcraft property, as collateral and indicated its value to be $7,000,000 to $8,000,000. There was an indication equity investors might become involved in Euro United. Mr. Feehan said GECC wanted to resolve the existing financing problems and move forward in their relationship with Euro United. He also acknowledged GECC wanted to buttress its existing security to cover Euro United's indebtedness.

15 On 6 April 1999 Mr. Feehan reported to his superior, setting out the issues and possible solutions. In addition to taking security on the Dielcraft property, he recommended a two percent bonus on the indebtedness and a $200,000 fee to charged to Euro United as well as acquiring an option to purchase equity on favourable terms. Mr. Feehan testified GECC had not yet concluded to retract its financing, that Euro United was thriving and although it had significant management and administrative problems, he felt GECC should "take the risk" and provide bridge financing.

16 Nevertheless, in his written report dated 5 April 1999, he told his superior:

> Therefore we recommend that GECC choose the least disruptive solution because it allows Advent to work towards our quickest and easiest exit (i.e. Lehman). In addition, GECC is receiving additional boot collateral and is getting paid for its risk with an equity opportunity in the future.

17 Upon receipt of approval from his superior, Mr. Feehan submitted a written proposal to Mr. Rehani on 9 April 1999. It was accepted the same date.

18 The security documentation was prepared and signed by 14 April 1999, within five days of the accepted proposal. The mortgage was registered on 15 April 1999. The documentation appears to have been prepared by the solicitors for GECC, McMillan, Binch, although it is noted Euro United and 109 were represented by Bennett Jones. Mr. Rehani signed all documentation for 109, including the guarantee for $11,5000,000 and the mortgage for $300,000,000. Numerous declarations and other documents were also executed by Mr. Rehani, including an insolvency certificate.

19 Mr. Feehan stated the amounts described in the guarantee and mortgage were determined by GECC's solicitors. The $11,500,000 stated in the guarantee resulted from Mr. Rehani's representation the value of 109's assets was $12,000,000

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with only $100,000 in liabilities. The $300,000,000 referred to in the mortgage was to cover loans of the syndicated loan agreement although Mr. Feehan was not clear on this explanation.

20 The GECC proposal dated 9 April 1999 permitted it to conduct a due diligence investigation. For some unexplained reason, GECC chose not to make any inquiry with respect to 109. According to Mr. Feehan, GECC relied exclusively on the representations of Mr. Rehani.

21 In due course, GECC receive the executed security documents from its solicitors. There was no reporting letter regarding certification of title with respect to the Dielcraft property. Mr. Feehan indicated a certification was required and mistakenly assumed it was provided by the solicitors for 109.

22 GECC did not request financial statements from 109, nor did they conduct a credit check. They were unaware 109 had never filed income tax returns. GECC did not inspect the Dielcraft property nor did they obtain an appraisal.

23 The proposal contained a provision whereby GECC would release its mortgage if 109 obtained another mortgage, so long as the proceeds therefrom of at least $4,000,000 were contributed to Euro United as equity and applied to reduce the line of credit with GECC. This item was not included in the amending agreement.

24 Mr. Feehan said his only concern was the Dielcraft property be worth at least $4,000,000. He was not concerned with Mr. Rehani's representations as to the property value, nevertheless, no inquiry was made to appraise the property.

25 City Management & Appraisals Ltd. provided an appraisal report dated 3 April 2000 to KPMG Inc., in which they estimated the market value, as of 1 June 1999, at $3,190,000. This valuation appears to be accepted by the parties as the market value on 15 April 1999. The stated value, however, may be high as the appraiser also estimated market value as of 1 April 2000 to be $5,000,000, yet the property only sold for $2,896,000 in January 2002. There may have been intervening market conditions affecting the sale price although no evidence was presented.

26 Mr. Feehan also said GECC had no reason to question the representations made by Mr. Rehani although he offered to explanation. Without due diligence, it is equally reasonable to say GECC had no reason to believe those representations.

27 The declarations and certificates signed by Mr. Rehani, on or before 14 April 1999, as part of the security documents required by GECC contained numerous errors or, perhaps, deliberate false statements, examples of which are as follows:

(a) there was no change in the financial condition 109 which would have a material adverse effect on its ability to pay GECC and all rental payments where current when, in fact, Euro United had not paid its rent for at least four months and, therefore, 109 had no income;

(b) no material or services had been provided to the property, nor contracts signed, nor estimates given or, alternatively, all amounts have been paid in full and no liens have arisen within the meaning of the *Construction Lien Act* when, in fact, 109 had entered into substantial contracts in excess of $3,000,000 to renovate the building, work had started in August or September 1998, there were monies owing to one contractor, and, accordingly, liens had arisen;

(c) there were no encumbrances against the assets of 109 when, in fact, Engel Canada had an outstanding debenture or general security agreement;

(d) the value of assets was inflated and liabilities were not disclosed;

(e) 109 was up-to-date in filing income tax returns when, in fact, 109 had never filed a return since incorporation in 1994 and, further, there was significant, income tax owing.

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28 All of these errors or misrepresentations would have been discovered on a due diligence investigation. GECC and its related companies are well known in the commercial finance business. They specialize in large commercial loans starting at $5,000,000. They are a sophisticated lending institution. Failure to perform a due diligence investigation of 109 is inconsistent with GECC's normal practice.

29 On 27 April 1999 Mr. Feehan was informed 109 and Euro United had increased the rental payment required from $700,000 to $1,400,000 per annum. No explanation was requested. Mr. Feehan was still unaware rent was not being paid.

30 Equity investors contributed $70,000,000 to Euro United over the two months following 15 April 1999 and the overadvance was paid off by 25 May 1999. GECC, however, did not release its mortgage on the Dielcraft property.

31 In August 1999 Euro United requested an overadvance of $300,000. GECC refused. Mr. Feehan said Euro United was growing rapidly without the proper financing to support the growth. In fact, this was similar to the comment he made in April 1999.

32 Mr. Feehan stated GECC discovered the construction project on the Dielcraft property in November 1994 when Mr. Rehani made mention of it, he says, for the first time.

33 On 24 November 1999 GECC demanded payment from Euro United and 109. The end result was the bankruptcy of these companies and the ultimate sale of assets by the trustee.

*(b) Subsection 20(1). Business Corporations Act*

34 Subsection 20(1) of the Ontario *Business Corporations Act*, as at the relevant time of the events, said:

> 20(1) Financial assistance by corporation —
>
> Except as permitted under subsection (2), a corporation with which it is affiliated, shall not, directly or indirectly, give financial assistance by means of a loan, guarantee or otherwise,
>
> > (a) to any shareholder, director, officer or employee of the corporation or affiliated corporation or to an associate of any such person for any purpose; or,
> >
> > (b) to any person for the purpose of or in connection with a purchase of a share, or a security convertible into or exchangeable for a share, issued or to be issued by the corporation or affiliated corporations.
>
> where there are reasonable grounds for believing that,
>
> > (c) the corporation is or, after giving the financial assistance, would be unable to pay its liabilities as they become due; or
> >
> > (d) the realizable value of the corporation's assets, excluding the amount of any financial assistance in the form of a loan and in the form of any secured guarantee, after giving the financial assistance, would be less than the aggregate of the corporation's liabilities and stated capital of all classes.

35 The parties acknowledge 109 and Euro United were affiliated corporations and the guarantee and mortgage provided by 109 constituted financial assistance within the meaning of subsection 20(1).

36 The purpose of subsection 20(1), in part, is to prevent the dissipation of corporate assets that might otherwise prejudice the financial position of creditors and shareholders: see: Wayne D. Gray, *Corporate Guarantees*, 1999, Law Society of Upper Canada, Continuing Legal Education Lectures.

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37 The initial determination is the amount of the financial assistance. The guarantee says $11,500,000, the mortgage says $300,000,000. There is some merit in relying on the amount stated in the mortgage, insofar as the mortgage is central to the issue in this litigation; however, I am of the view such is misleading. The explanation provided for this sum bears little, if any relationship to the actual credit agreement amendment. Further, 109's liability is from the guarantee, the mortgage only providing collateral security.

38 GECC suggests the financial assistance is limited to $4,000,000, relying on its 9 April 1999 proposal which allowed for such payment, but on strict conditions. This provision was not inserted in the amendment to the credit agreement, the guarantee or any of the security documents delivered on 14 April 1999. Further, GECC has always claimed entitlement to the full amount of the guarantee, namely $11,500,000, as confirmed by its demand letter on 24 November 1999 and, as well, Mr. Feehan's testimony at trial.

39 Accordingly, I find the amount of financial assistance was $11,500,000.

40 The test in subsection 20(1)(c) and (d) is an objective one, that is, were there reasonable grounds on 15 April 1999.

41 The practical difficulty regarding a review of the financial problems of Euro United and 109 is that much of the evidence relates to subsequent events. Their ultimate bankruptcy, however, cannot be relied upon as the basis for finding a breach of this statutory provision. There are, however, a number of matters that existed on 15 April 1999 and are relevant to this issue. The evidence established the following facts:

(i) 109 had no income as Euro United had not paid its rent for at least four months;

(ii) the only prior source of income for 109 had been rental payments from Euro United which it relied on to meet its obligations;

(iii) 109 had an outstanding debt to Engel Canada, subsequently calculated by KPMG to be $279,913, as at 30 June 1999;

(iv) 109 had never filed income tax returns and there was income tax owing, subsequently calculated by KPMG to be $1,441,200 as at 30 June 1999;

(v) similarly, there was goods and services tax owing by 109, subsequently calculated by KPMG to be $26,618 as at 30 June 1999;

(vi) it is reasonable to assume 109 had other ongoing expense in the normal course of business, particularly if Euro United was also not paying the property related expense;

(vii) 109 had $102,275 on deposit in its bank account;

(viii) the property was valued at $3,190,000;

(ix) other assets of 109 were described as rent owing from Euro United and monies owing from its shareholder, Mr. Rehani, but there was no evidence these were tangible assets;

(x) 109 had entered into construction contracts in excess of $3,000,000, much of it for future work, and, although contractors had been substantially paid to date, there were holdback monies owing to one contractor;

(xi) the GECC mortgage prevented the property being used by 109 as security to fund the construction project.

42 On 15 April 1999, 109 was not paying, nor was able to pay, its outstanding liabilities. It had no income and significant debt had accumulated. Even if Euro United had been paying rent, there would be insufficient income to pay liabilities. The construction project, commenced some months prior, would require substantial funding which could not

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come from income. The guarantee and mortgage to GECC compounded the situation by preventing use of the property as security for funding to pay liabilities.

43 In addition, the value of 109's assets on 15 April 1999, excluding the amount of the financial assistance, was less than its outstanding liabilities. The construction expense alone was equal to or exceeded the property value. The outstanding income tax liability suggests it was only a matter of time before failure would occur.

44 In my review of the evidence, it appears 109 failed the solvency and the balance sheet tests without having to take into account the financial assistance provided in the guarantee and mortgage, although it is possible 109 might have been able to meet most of its liabilities if Euro United was paying its rent and it could mortgage the property to fund the construction. Neither event occurred, nor was there evidence to suggest it would occur.

45 Nevertheless, consideration must given to whether there were reasonable prospects of GECC calling on the guarantee as of 15 April 1999. In this regard, the comments by Farley J. in *Clarke v. Technical Marketing Associates Ltd. (Trustee of)* (1992), 8 O.R. (3d) 734 (Ont. Gen. Div.) at p. 750:

> It does not seem to me that the words 'after giving the financial assistance' under either s. 44(1)(c) or (d) mean that the tests have to be applied on the assumption that the corporation giving the guarantee has had to make payment. The guarantee has been given as financial assistance when it was entered into and not when it might actually be called upon (or as if it had been called upon). Thus a guarantee would no appear to impinge upon the 'cash flow' requirement contemplated by s. 44(1)(c) if given on a naked basis.
>
> However, one has to go back to the lead-in words 'where there are reasonable grounds for believing that'. This implies that one must form a reasonable opinion based on the facts of each case to see what the likelihood would be of the guarantee being called upon in the future so as to constitute it a 'liability' which must be paid as part of the 'liabilities as they become due' (s.44(1)(c).

46 The guarantee had only just been signed and, therefore, it might be said 109, Euro United and GECC were optimistic the financial problems at Euro United had been resolved, however, a more detailed analysis is required. GECC was buttressing its security, as acknowledged by Mr. Feehan. Within two months, equity investors inject $70,000,000 into Euro United and the overadvance is paid in full. The basis for the extra security appears resolved yet GECC does not release 109.

47 Despite Mr. Feehan's expressed optimism on 15 April 1999, it is clear GECC wanted more security as they were contemplating further default by Euro United. This is the only conclusion that can be drawn from Mr. Feehan's report on 5 April 1999 "our quickest and easiest exit". There was no acceptable evidence to the contrary and, therefore, I conclude the guarantee must be considered a liability in the solvency test under subsection 20(1)(c). It is also included on the basis it prevented 109 mortgaging the Dielcraft property to fund the construction project.

*(c) Subsection 20(3), Business Corporations Act*

48 Subsection 20(3) of the Ontario *Business Corporations Act*, as at the relevant time of the events, said:

> (3) Validity of Contract — A contract made by a corporation in contravention of this section may be enforced by the corporation or by a lender for value in good faith without notice of the contravention.

49 GECC seeks to rely on this safe harbour provision.

50 It is apparent, on the evidence, GECC did not have actual "notice of contravention." The question is whether it can rely on the representations of Mr. Rehani and its failure to perform a due diligence investigation on as stated in the subsection, was GECC "a lender for value in good faith."

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51 109 received no benefit from the guarantee and mortgage. The sole purpose of these documents, as said by Mr. Feehan, was so secure past indebtedness of Euro United. Monies may have been advanced by GECC to Euro United after 15 April 1999 but such was merely a continuation under the revolving letter of credit. Given the subsequent injection of funds by equity investors and the payment of the overadvance, GECC's failure to release 109 clearly demonstrates the purpose of this additional security to cover past indebtedness of Euro United. Therefore, in my view, GECC was not "a lender for value" within the meaning of subsection 20(3) as it relates to the financial assistance.

52 Further, failure to conduct a due diligence investigation cannot be used to establish "good faith" in the circumstances of this case. GECC made no attempt to investigate 109 which was inconsistent with their corporate practice as demonstrated in their inquiry in 1998 with respect to the Euro United application for financing. Here, a property inspection would, in a matter of minutes, reveal the construction project on the Dielcraft property and caused further inquiry. The normal request for financial statements would have led to finding the income tax liability. GECC also knew Mr. Rehani was responsible for several covenant breaches which ought to have raised concerns about his honesty.

53 In this regard, I adopt the comment by Huband J.A. in *Petro-Canada v. Cojef Ltd.*, [1992] M.J. No. 575 (Man. C.A.) where, at p. 2, he said:

> There is merit in the argument that Petro-Canada cannot turn a blind eye toward the obvious. Moreover, Petro-Canada must be judged, not on the basis of an unsophisticated lender, but as one whose business it is to extend credit on the basis of guarantees. Petro-Canada is aware of the hazards of relying on a guarantee which proves unenforceable by virtue of sec. 42(1). It cannot claim the benefit of sec. 42(3) by ignoring the obvious and neglecting to ask questions.

54 *Upper Mapleview Inc. v. Stolp Homes (Veterans Drive) Inc.* (1997), 36 B.L.R. (2d) 31 (Ont. Gen. Div.), is comparable in many respects to the case at bar. In discussing this issue, Swinton J. also indicated the defendant "should not be held to the same standard of sophistication as Petro-Canada".

55 GECC is a sophisticated financial institution that well knows the necessity of a due diligence investigation. As such, it cannot rely on the suggestion a solvency certificate satisfies the test. GECC knew enough about the relationship between 109, Euro United and Mr. Rehani that necessitated further inquiry. The evidence clearly indicated GECC made no inquiry, not even a property inspection or search of title, and, further, there was an urgency in completing the transaction.

56 In this regard, the statement by Carthy J.A. in *Assaad v. Economical Insurance Group*, [2002] O.J. No. 2356 (Ont. C.A.), at p. 4, is appropriate:

> Suspicions combined with blindness adds up to an absence of good faith.

57 Mr. Wayne Gray, in his paper *Corporate Guarantees*, supra, offered this conclusion, at p. 3-39:

> Thus a prudent lender should not expect to rely on the safe harbour provision. Instead, it will take all steps available to it to ensure that it not only has on notice of the contravention but that it can also, if necessary, produce compelling evidence to a court that the lender addressed its mind to the statutory requirements and reasonably satisfied itself that the corporation providing the financial assistance was not contravening the provisions of its incorporation statute. Unless the lender takes appropriate steps so that it can adduce such evidence should the issue arise in litigation, it will risk encountering significant enforcement difficulties if its primary security from the borrower should become insufficient to meet the borrower's obligations.

58 GECC took no steps and, therefore, has no evidence to demonstrate its good faith. Reliance on Mr. Rehani's representations and failure to conduct a due diligence investigation was, in my view, willful blindness by GECC.

*(d) Summary*

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59 In summary, I find 109 failed both the solvency and balance sheet test under subsections 20(1)(c) and (d) and, further, GECC cannot rely on the sale harbour provision of subsection 20(3). Accordingly, I find the mortgage from 109 to GECC is void as against the plaintiffs, as a result of contravention of section 20, *Business Corporations Act*.

***(ii) Section 2, Fraudulent Conveyances Act Section 4, Assignment and Preferences Act***

60 Although Mr. Rehani did not testify, it is likely he was optimistic, on 15 April 1999, Euro United and 109 would be successful business ventures. Optimism, however, is not evidence of good intentions. The mortgage to GECC, if it stands up, has the actual effect of defeating creditors. An objective analysis of the circumstances is necessary to determine if either, or both, of these statutory provisions apply.

*(a) Section 2 Fraudulent Conveyances Act*

61 Section 2 of the *Fraudulent Conveyances Act* says:

> 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.

62 The financial circumstances of 109 were identified previously. In April 1999 Mr. Rehani, sole director, officer and shareholder of 109, knowing the financial situation, caused 109 to guarantee the indebtedness of Euro United, a company of which he was the president and controlling shareholder, and to provide collateral mortgage security on its only real asset. Mr. Rehani's actions were facilitated by the willful blindness of GECC. Mr. Rehani was not truthful. He deliberately misrepresented the situation to GECC. GECC failed to make any inquiry.

63 At issue, therefore, is whether there was an intent to defeat or delay creditors, such as the lien claimants, some of whom had already commenced work on the Dielcraft property by 15 April 1999. There was no direct evidence of intent, however, as West J. said in *Home Savings & Loan Corp. v. Mathews* (1995), 49 R.P.R. (2d) 79 (Ont. Gen. Div.), at p. 87, "Intent can be inferred from the surrounding circumstances."

64 Over the years, the case law has referred to suspicious circumstances demonstrating "badges of fraud": see, for example *Solomon v. Solomon* (1977), 16 O.R. (2d) 769 (Ont. S.C.); and *Prodigy Graphics Group Inc. v. Fitz-Andrews*, [2000] O.J. No. 1203 (Ont. S.C.J.).

65 The evidence established the following, which may be appropriately considered in this analysis:

(i) the conveyance by 109 was in support of a related party, Euro United;

(ii) Mr. Rehani controlled both corporations;

(iii) 109 received no consideration;

(iv) the property conveyed was all of 109's real assets;

(v) 109 had existing and substantial debt such as for income tax, for creditors and was incurring future and substantial liability for creditors regarding the construction project;

(vi) the conveyance was completed with considerable haste, within five days;

(vii) disclosure to GECC was incomplete and in error which could have been discovered upon investigation;

(viii) Mr. Rehani had already committed acts of dishonesty regarding payment on his shareholders loan and acquisition and mortgaging of other property without the consent of GECC;

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(ix) The conveyances exceeded the property value;

(x) Euro United was in financial difficulties, having defaulted on the credit agreement within five months of the advance; and,

(xi) There was good reason for GECC and Mr. Rehani to consider Euro United and 109 were insolvent, or about to be.

66 As Cameron J. said in *Prodigy Graphics*, supra, at p. 22:

The badges of fraud are of evidentiary value in determining the issue of intent but are not conclusive evidence of fraud. Fraudulent intent is a matter of fact to be determined in the circumstances of each case or the basis of the evidence as a whole: *Meeker v. Cedar Products v. Edge* (1968), 12 C.B.R. (N.S.) 49 (B.C.C.A.).

Once the suspicious circumstances raise a prima facie presumption of intent to hinder, defeat or defraud a creditor, the court may find the intent unless the presumption is displaced by corroborative evidence of the bona fides of the debtor in the suspect transaction: *Kingsbridge Grand Ltd. v. Vacca*, [1999] O.J. No. 4914 citing *Koop v. Smith* (1915), 51 S.C.R. 554; *Applecrest Investments Ltd. v. Toronto Masonry (1986) Ltd.*, [1997] O.J. No. 436; *Rinaldo v. Rosenfeld*, [1999] O.J. No. 4665.

67 In *Petrone v. Jones* (1995), 33 C.B.R. (3d) 17 (Ont. Gen. Div.), Wright J. at p. 20 provided this comment:

In the absence of any direct proof of intention, if a person owing a debt makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid then, since it is the necessary consequence of the settlement that some creditors must remain unpaid, it is the duty of the judge to direct a jury that they must infer the intent of the settler to have been to defect or delay his creditors. (*Sun Life Assurance Co. v. Elliott* (1900), 31 S.C.R. 91). ...

Further: even if the plaintiff did not intent to defeat, hinder or delay their creditor but effected the transfer with a view to defeating, hindering or delaying potential future creditors his defence would still fail.

68 There are strong suspicious circumstances, or badges of fraud, as noted previously. Mr. Rehani knew of the construction project and the cost of same. He knew Euro United was not paying rent to 109. He knew 109 required the property to be mortgaged for the construction project expense as rent, if paid, was insufficient. He knew 109 already had significant liabilities, particularly for unpaid income tax. In spite of this knowledge, he caused 109 to pledge its only asset to GECC to secure Euro United's existing indebtedness. The only logical inference is that Mr. Rehani used 109 to support the financial difficulties of Euro United and, in so doing, used the property from which the contractors would look for payment.

69 Therefore, there is, in my view, a prima facie presumption of intent to defeat current and future creditors. GECC is unable to rebut this presumption as they failed to conduct a due diligence investigation and, therefore, had no knowledge, but should have, of the true circumstances on 15 April 1999.

70 Section 7 of the *Act* says:

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 the intent set forth in that section.

71 109 received no consideration for the conveyance. In *Courtesy Chevrolet Oldsmobile Ltd. v. Dhaliwal* (1987), 67 C.B.R. (N.S.) 72 (Ont. H.C.), Austin J. at p. 79 indicated:

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The jurisprudence makes it clear that where there is no 'good consideration', then the intent of the transferor alone is relevant.

72 Further, GECC cannot rely on section 3 for the same reasons as with respect to subsection 20(3) of the *Business Corporations Act*. Willful blindness is not good faith.

73 The plaintiffs argue a conveyance from 109 to Euro United for no consideration would be void under section 2 and, as the conveyance from 109 to GECC has the same effect, it should also be void. I agree. Substance, not form, is the determining factor.

*(e) Section 4, Assignments and Preferences Act*

74 Subsection 4(1) of the *Assignments and Preferences Act* says:

> 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.

75 Subsection 4(1) includes a solvency test. As previously noted, under section 20, *Business Corporation Act*, 109 was, in my view, insolvent on 15 April 1999. 109 was also insolvent as defined in subsection 2(1) of the *Bankruptcy and Insolvency Act*: see also *Robinson v. Countrywide Factors Ltd.* (1977), 23 C.B.R. (N.S.) 97 (S.C.C.), at p. 136.

76 On 15 April 1999, 109 had no income and had existing liability for income tax and other debts. Construction work had commenced and there was an outstanding debt to one contractor. 109's liabilities exceeded its assets. The conveyance to GECC compounded 109's insolvency.

77 The evidence supports a prima facie case for insolvency of 109 and there is, therefore, a presumption of intent to defeat creditors, as noted in the analysis under the *Fraudulent Conveyances Act*. No evidence was presented to rebut the presumption.

78 Subsection 5(5)(d) of the Act says:

> Nothing in this Act,
>
> ellipsis;
>
> > (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 of 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.

79 No advance was made to 109. The pre-existing debt was Euro United's. There was no evidence to suggest any advance to Euro United would enable 109 to continue its business and pay its debts in full. Indeed, the evidence showed otherwise as confirmed by subsequent events. GECC, therefore, cannot rely on subsection 5(5)(d).

*(f) Summary*

80 In summary, I find the mortgage from 109 to GECC is void as against the plaintiffs, as a result of contravention of section 2 of the *Fraudulent Conveyances Act* and section 4 of the *Assignments and Preferences Act.*

***(iii) Section 78, Construction Lien Act***

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81 Subsection 78(1) of the *Construction Lien Act* says:

> (1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the matters.

Other subsections provide exceptions to this general priority in favour of construction liens. It is, therefore, necessary to determine if the mortgage to GECC is prior or subsequent to the construction liens.

82 In *Boehmers v. 794561 Ontario Inc.* (1993), 14 O.R. (3d) 781 (Ont. Gen. Div.); affirmed (1995), 21 O.R. (3d) 771 (Ont. C.A.), Killeen J. said:

> Section 78(1) is the overarching principle of the regime of the Act for the determination of priorities. It is, if you will, the central interpretative principle for the adjudication of conflicts of this type before the court in this case. Surely, it necessarily implies that, in cases of conflicts, as here, the burden must be on the mortgagee to persuade the court that it somehow falls clearly within a specified exception to the generalized priority of the liens.

83 The comment by Rosenberg J. in *697470 Ontario Ltd. v. Presidential Developments Ltd.* (1989), 69 O.R. (2d) 334 (Ont. Div. Ct.) is also of assistance where, at p. 337, he said:

> Accordingly, while the Act may merit a liberal interpretation with respect to the rights it confers upon those to whom it applies it must be given a strict interpretation in determining whether it does in fact apply: *Clarkson Co. Ltd. v. Ace Lumber Ltd.* (1963), 36 D.L.R. (2d) 554 (S.C.C.)

84 Before proceeding to consider whether the mortgage was prior or subsequent, a preliminary finding is necessary as to whether there was one improvement or several improvements. "Improvement" is defined in the *Act* as:

> (a) any alteration, addition or repair to, or
>
> (e) any construction, erection or installation on any land and includes the demolition or removal of any building, structure or works or part thereof, and 'improved' has a corresponding meaning.

85 Various contractors provided services and materials for 109 at the Dielcraft property at different times. 109 entered into specific contracts with Jannick Electric Limited ("Jannick"), Aim Waste Management Limited ("Aim") and XDG Limited ("XDG"). Numerous subcontractors were also involved.

86 In the summer of 1998 Mr. Raymond El Jarnal, vice-president of Euro United and general manager of 109, began inquiring of contractors and consulting engineers as to renovations of the building located on the Dielcraft property. Several contractors expressed an interest and provided quotations for various components of the intended project. Contracts were then negotiated with the successful firms.

87 Jannick was on site in early September or perhaps August 1998 to disconnect electrical services. Aim commenced demolition work on 15 September 1998. Negotiations with XDG continued to January 1999 at which point Mr. El Jamal presented XDG with a draft contract. Giffel's Associates Limited ("Giffels"), 109's consulting engineers, prepared the contract in final form based on the terms as already negotiated. Although the written contract is dated 15 April 1999, it is on the same terms as negotiated and agreed to and, therefore, I find the contract between 109 and XDG was orally entered into in early January 1999.

88 XDG employees and others were on site on 7 June 1999, however, actual work was commenced on 3 March 1999 when Mr. Wayne Nosal of Design Plus started to prepare the architectural drawings. XDG employees also commenced work on its metal fabrication drawings on the same day.

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89 The ultimate goal of the project was to raise the roof on the building, a large undertaking. XDG was to perform the actual work, however, demolition and electrical disconnection was required before they could commence work on site. In my view, therefore, this appears to be one project, or improvement, not several, as suggested by GECC.

90 Additional evidence confirms this observation. Aim was initially approached by another contractor in July 1998 to provide a quote for part of the project. 109 eventually contracted directly with Aim on 10 September 1998. Jannick's proposal to 109, dated 28 August 1998, stated it was "...to assist you in raising of your roof...". Also, the minutes of meeting on 19 November 1998, prepared by Giffels, refers to one project with numerous components.

91 Accordingly, I find there was one improvement. A comparison can be found in the situation in *Moffatt & Powell Ltd. v. 682901 Ontario Ltd.* (1992), Kirsch's C.L.C.F., 61.3 [49 C.L.R. 205 (Ont. Gen. Div.)] where Misener J. said:

> The 'construction' (and therefore the 'improvement') that Kuco undertook on the lands in question here was the erection of a three-storey residence for the elderly that contained 66 separate suites. All 16 lien claimants contracted with Kuco to perform work or services or to supply materials of that 'construction' (and therefore for that 'improvement'). Therefore, all performed work or services in respect of the same 'construction' — and therefore the 'same improvement.'

Section 15 of the *Act* says:

> 15. A persons' lien arises and takes effect when the person first supplies services or materials to the improvement.

92 Jannick was on site to disconnect electrical services, likely in August 1998, however, the evidence was not clear. Aim was on site to commence demolition on 15 September 1999. Therefore, the first lien arose at least by 15 September 1998 and, accordingly, the mortgage from 109 to GECC was a subsequent mortgage, and I so find.

93 Subsections 78(5) and (6) of that *Act* say:

> **78(5) Special priority against subsequent mortgages —**
>
> Where a mortgage affecting the owner's interest in the premises is registered after the time when the first lien arose in respect of an improvement, the lien arising from the improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV.
>
> **(6) General priority against subsequent mortgages —**
>
> Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect of the improvement, has priority over the liens arising from the improvement to the extent of any advances made in respect of that conveyance, mortgage or other agreement, unless,
>
> (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
>
> (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

94 As previously stated, the mortgage was provided as collateral security with respect to the prior indebtedness of Euro United. No advance was made to 109 nor did 109 benefit in any manner whatsoever. The statutory provisions refer to amounts advanced, not amounts secured: See *561861 Ontario Ltd. v. 1085043 Ontario Inc.* (1998), Kirsh's C.L.C.F. 78.50 [1998 CarswellOnt 2935 (Ont. Bktcy.)]

95 In *Marsil Mechanical v. A Reissing-Reissing Enterprise Ltd.* (1996), Kirsh's C.L.C.F. 78.40 [1996 CarswellOnt 301 (Ont. Gen. Div.)], Klowak J. said:

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In considering the definition of 'advance' it seems to me that, for purposes of the *Construction Lien Act*...it must mean when the owner, or the owner's delegate, acquires actual control of the money.

96 Accordingly, I find there was no advance under the mortgage from 109 to GECC and, therefore, the lien claimants have priority pursuant to section 78 of the *Construction Lien Act*.

**Conclusion**

97 KPMG Inc., trustee in bankruptcy of 109, filed a statement of defence in this action but did not participate in the trial for obvious reasons. Representatives of 109 and Euro United were not called as witnesses by the participating parties. The issues dealt with the relationship between those corporations and GECC and, as well, the lien claimants. The plaintiffs were able to establish their case based upon the documents and oral testimony.

98 In many respects, GECC required testimony of representatives of 109 and Euro United. Although there was sufficient evidence for the findings made, there is a strong argument to also rely on findings of adverse inference as against GECC for failure to call these witnesses.

99 One theme was central to all issues in this litigation; that is, GECC's failure to perform its usual and customary due diligence investigation with respect to 109. There was no satisfactory answer for this neglect. GECC is a sophisticated lending institution. It normally performs due diligence. Was its failure to do so an oversight or was GECC scrambling to gain additional security for a customer they knew was on the edge of failure?

100 It would be unconscionable and inequitable to allow a mortgagee to obtain priority based upon its willful blindness or negligence. Even the simplest of investigations would have revealed the construction project and led GECC to make further inquiry. They would easily have determined Mr. Rehani was not being truthful.

101 A due diligence investigation would, in my view, have led GECC to decide against mortgage security on the Dielcraft property.

102 A trial of issues was directed to determine the priority as between the lien claimants and the mortgagee. There were secondary issues that arose during the trial pertaining to the validity and quantum of some liens. Those issues were beyond the scope of the trial.

103 In result, the plaintiffs are entitled to a declaration the lien claimants have priority over the mortgage from 109 to GECC, subject to proof as to validity and quantum of the liens for which a further trial, if necessary, is directed.

104 If the parties cannot agree on the issue of costs, written submissions are required. The party seeking costs shall serve such submissions within 28 days of the release of this decision. The responding party shall have 14 days to serve submissions and a further 7 days is allowed for reply. All written submissions are to be filed by the last day for reply.

*Action allowed.*

Footnotes

* Additional reasons at (2003), 2003 CarswellOnt 1316, 41 C.B.R. (4th) 315 (Ont. S.C.J.) .

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# TAB 5

**Most Negative Treatment:** Recently added (treatment not yet designated)
**Most Recent Recently added (treatment not yet designated):** National Telecommunications v. Stalt | 2018 ONSC 1101, 2018 CarswellOnt 5360 | (Ont. S.C.J., Apr 6, 2018)

2015 ONSC 1781
Ontario Superior Court of Justice

Juhasz (Trustee of) v. Cordeiro

2015 CarswellOnt 4744, 2015 ONSC 1781, [2015] O.J. No. 1654, 24 C.B.R. (6th) 69, 252 A.C.W.S. (3d) 400

# Pollard and Associates Inc., Trustee in Bankruptcy for the Estate of Agnes Juhasz, Applicant and Rui Cordeiro and Agnes Juhasz, Respondents

H. Wilton-Siegel J.

Heard: November 25, 2014
Judgment: March 18, 2015
Docket: CV-14-10692-00CL

Counsel: Michael Hackl for Applicant
Sean N. Zeitz for Respondent, Rui Cordeiro

Subject: Civil Practice and Procedure; Insolvency; Property
**Related Abridgment Classifications**
Bankruptcy and insolvency
XI Avoidance of transactions prior to bankruptcy
XI.7 Fraudulent and illegal transactions
XI.7.a Reviewable transactions under Act
Civil practice and procedure
XVIII Summary judgment
XVIII.1 General principles
Civil practice and procedure
XVIII Summary judgment
XVIII.10 Evidence on application
XVIII.10.a General principles
**Headnote**
Civil practice and procedure --- Summary judgment — General principles
Bankrupt and C purchased property and adjacent property as equal tenants in common with plans to renovate and resell them — In summer 2012, Canada Revenue Agency assessed bankrupt for $2.7 million in unpaid income taxes — Bankrupt and C elected to concentrate on renovating adjacent property, which they sold in January 2013 for $2 million — In March 2013, bankrupt transferred 50 per cent interest in property to C — Consideration reflected in deed of transfer was $368,942, which represented one-half of amount outstanding under two mortgages on property — In 2014, bankrupt was adjudged bankrupt, and trustee was appointed executor of her estate — Trustee brought application for summary judgment seeking declaration that transfer of bankrupt's interest in property was transaction at undervalue, and therefore void — Reports submitted by parties concerning value of property at time of transfer were either outdated or flawed — Summary trial was ordered, limited to determination of value of property at date of transfer — Summary judgment application was appropriate apart from issue of value of property — While court was required to make certain findings of fact that were central to issues on application, parties sought determination rather than expense of trial,

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and had already made full disclosure and conducted extensive discoveries — That said, evidence from each party was insufficient to establish fair market value of property at date of transfer.

Civil practice and procedure --- Summary judgment — Evidence on application — General principles

Bankrupt and C purchased property and adjacent property as equal tenants in common with plans to renovate and resell them — In summer 2012, Canada Revenue Agency assessed bankrupt for $2.7 million in unpaid income taxes — Bankrupt and C elected to concentrate on renovating adjacent property, which they sold in January 2013 for $2 million — In March 2013, bankrupt transferred 50 per cent interest in property to C — Consideration reflected in deed of transfer was $368,942, which represented one-half of amount outstanding under two mortgages on property — In 2014, bankrupt was adjudged bankrupt, and trustee was appointed executor of her estate — Trustee brought application for summary judgment seeking declaration that transfer of bankrupt's interest in property was transaction at undervalue, and therefore void — Reports submitted by parties concerning value of property at time of transfer were either outdated or flawed — Summary trial was ordered, limited to determination of value of property at date of transfer — Summary judgment application was appropriate apart from issue of value of property — While court was required to make certain findings of fact that were central to issues on application, parties sought determination rather than expense of trial, and had already made full disclosure and conducted extensive discoveries — That said, evidence from each party was insufficient to establish fair market value of property at date of transfer.

Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy — Fraudulent and illegal transactions — Reviewable transactions under Act

Bankrupt and C purchased property and adjacent property as equal tenants in common with plans to renovate and resell them — In summer 2012, Canada Revenue Agency assessed bankrupt for $2.7 million in unpaid income taxes — Bankrupt and C elected to concentrate on renovating adjacent property, which they sold in January 2013 for $2 million — In March 2013, bankrupt transferred 50 per cent interest in property to C — Consideration reflected in deed of transfer was $368,942, which represented one-half of amount outstanding under two mortgages on property — This consideration implied property value of $737,885 — In 2014, bankrupt was adjudged bankrupt, and trustee was appointed executor of her estate — Trustee brought application for summary judgment seeking declaration that transfer of bankrupt's interest in property was void under s. 96 of Bankruptcy and Insolvency Act — Summary trial was ordered, limited to determination of value of property at date of transfer — Bankrupt and C were experienced business people who either believed or were wilfully blind to possibility that property had value in excess of amount reflected in transfer — Bankrupt and C were not acting at arm's length in respect of transfer given nature of their business relationship, absence of any economic interest of bankrupt, and evidence that bankrupt had accommodated C's wish not to have to deal with third party creditors through trustee — However, evidence from each party was insufficient to establish fair market value of property at time of transfer in order to determine whether transfer constituted transaction at undervalue.

**Table of Authorities**

**Cases considered by *H. Wilton-Siegel J.*:**

*Hryniak v. Mauldin* (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 2014 SCC 7, 95 E.T.R. (3d) 1, (sub nom. *Hryniak v. Mauldin)* [2014] 1 S.C.R. 87, 27 C.L.R. (4th) 1, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 2014 CSC 7, (sub nom. *Hryniak v. Mauldin)* 314 O.A.C. 1, (sub nom. *Hryniak v. Mauldin)* 453 N.R. 51, 12 C.C.E.L. (4th) 1, (sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641, 21 B.L.R. (5th) 248 (S.C.C.) — followed

*McLarty v. R.* (2008), [2008] 4 C.T.C. 221, (sub nom. *McLarty v. Minister of National Revenue)* 374 N.R. 311, (sub nom. *Canada v. McLarty)* [2008] 2 S.C.R. 79, 46 B.L.R. (4th) 1, (sub nom. *McLarty v. Canada)* 293 D.L.R. (4th) 659, 2008 CarswellNat 1380, 2008 CarswellNat 1381, 2008 SCC 26, (sub nom. *R. v. McLarty)* 2008 D.T.C. 6366 (Fr.), (sub nom. *R. v. McLarty)* 2008 D.T.C. 6354 (Eng.) (S.C.C.) — followed

**Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

Generally — referred to

s. 2 "transfer at undervalue" — considered

s. 4(2)(a) — considered

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s. 4(4) — considered

s. 4(5) — considered

s. 96 — considered

s. 96(1) — considered

s. 96(1)(a) — considered

s. 96(1)(a)(i) — considered

s. 96(1)(b) — considered

s. 96(1)(b)(i) — considered

s. 96(2) — considered

**Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

R. 20 — considered

APPLICATION by trustee for summary judgment seeking declaration that transfer of bankrupt's interest in property was void under s. 96 of *Bankruptcy and Insolvency Act*.

***H. Wilton-Siegel J.*:**

1 On this application, Pollard & Associates Inc. (the "Trustee"), the trustee in bankruptcy of Agnes Juhasz ("Juhasz"), seeks a declaration that a transfer of her interest in a property known municipally as 131 Ulster Street in the City of Toronto (the "Property") is void under s. 96 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). In the alternative, the Trustee seeks an order that Rui Cordeiro ("Cordeiro"), the transferee, pay the difference between the value of Juhasz's interest in the Property and the value of the consideration received by Juhasz on the transfer.

**Procedural Matter**

2 This proceeding was commenced as an application by the Trustee. The Trustee initially argued that the application should be converted into an action for purposes of a trial. However, after further consideration, the Trustee took the position that the facts were not in dispute, as did Cordeiro, with the result that the application proceeded.

3 While the factual background to this proceeding is largely not in dispute, the Court is, however, required to make certain findings of fact that are central to the issues on this application based on inferences from the factual context. The Court has considered the possibility of requiring a trial of these issues in a manner analogous to the limited trial envisaged by the current Rule 20 of the *Rules of Civil Procedure* and as contemplated by the principles in *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.).

4 Apart from one issue addressed below, however, I have rejected this approach for two reasons. First, the parties seek a determination on tins application rather than the additional expense of a trial. Second, the parties have already made full disclosure and conducted extensive discoveries of Juhasz and Cordeiro. There is, therefore, no suggestion that there is material evidence that would be available to the court if a trial were ordered.

5 Accordingly, the Court has proceeded to address this application on the basis of the principles applicable to a summary judgment, as informed by the principles articulated by Karakatsanis J. in *Hryniak*.

**Background**

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6 Cordeiro and Juhasz were business partners who acquired two properties for renovation, development and resale in 2010 and 2011, having had a business relationship for several years. Juhasz was a real estate agent who sourced the properties and attended to the financial administration of the properties. Cordeiro was a contractor who was responsible for the work done on the properties.

***The Property and the Adjacent Property***

7 On November 5, 2010, Cordeiro and Juhasz purchased the Property as equal tenants in common for a purchase price of $670,000. They intended to renovate and re-sell the Property, with each of them contributing one-half of the capital costs and expenses of the Property. In July 2011, Cordeiro and Juhasz acquired the adjacent property at 129 Ulster Street (the "Adjacent Property") on the same basis and for the same purpose, although in this case Juhasz acquired her interest together with her two sons. The Property and the Adjacent Property were semi-detached rental apartment buildings. The Property had four units and one illegal unit in the basement; the Adjacent Property had five apartments.

8 For a number of years, however, Juhasz had failed to report substantial business income for income tax purposes, which was derived from buying and selling real estate with Cordeiro. The Canada Revenue Agency ("CRA") advised Juhasz in the spring of 2011 that it was conducting an audit of her income. Subsequently, in 2012, the CRA assessed Juhasz for over $2.7 million in unpaid income tax, interest and penalties.

9 In the summer of 2012, Juhasz advised Cordeiro that she was having financial difficulties. At that time, she proposed to transfer her interest in the Property to her two sons. For this purpose, Juhasz engaged an appraiser, Ian G. McLean ("McLean"), to conduct appraisals of the Property and the Adjacent Property. McLean provided a report dated August 10, 2012 (the "McLean Report"), which is described below.

10 While the McLean Report was being prepared, Cordeiro advised Juhasz that he was not agreeable to the transfer of Juhasz's interest in the Property to her sons as they were no more able to bear Juhasz's share of the renovation and financing expenses than Juhasz. He proposed that she could take over the project failing which he would do so. However, they took no further action with respect to the Property at that time. Instead, they concentrated on completing the renovations of the Adjacent Property.

11 In November 2012, Juhasz and Cordeiro listed the Adjacent Property for sale at $2.3 million. In January 2013, they entered into an agreement to sell the Adjacent Property for $2,025,000, which transaction closed on May 5, 2013.

12 On or about March 6, 2013, Juhasz and Cordeiro attended at the office of a lawyer and executed separate documentation authorizing and directing the lawyer to register a transfer of Juhasz's 50% interest in the Property to Cordeiro.

13 A deed of transfer transferring Juhasz's undivided 50% interest in the Property to Cordeiro was registered by the lawyer on March 6, 2014 (the "Transfer"). The consideration reflected in the deed of transfer was $368,942.74, which it is agreed represents one-half of the amount outstanding at that time under two mortgages on the Property for which both Juhasz and Cordeiro were jointly and severally liable. Cordeiro and Juhasz say that Cordeiro assumed Juhasz's obligations in respect of these mortgages effective as of the Transfer. This alleged consideration implies a value of the Property of $737,885.48

14 Cordeiro explains the six-month delay in effecting the Transfer after obtaining the McLean Report as reflecting their joint concentration on the completion of the renovations of the Adjacent Property and its re-sale, together with a lack of appreciation of the significance of delaying the Transfer.

15 Subsequently, Cordeiro renovated the Property after obtaining possession of the occupied units and a minor variance to legalize the basement unit. The renovations were commenced in April 2013. It is not clear whether the renovations have now been completed.

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16 Cordeiro produced an unaudited statement reflecting renovation costs totalling $508,261.71 plus related professional fees of $7,784.58. However, he can only produce invoices for $212,561.71 of the construction work, of which approximately one-half represents his own invoice, without any supporting documentation, for the value that he estimates for his own work on the Property. He also says $295,000 was paid to sub-contractors and trades in cash and there are therefore no invoices available to evidence these payments.

17 During his cross-examination in July 2014, Cordeiro testified that he had entered into an agreement for the sale of the Property for $1.8 million. However, it appears this transaction did not close. While Cordeiro suggests that the transaction failed to complete as a result of the commencement of these proceedings, this explanation cannot be verified on the record before the Court.

***The Bankruptcy Proceedings of Juhasz***

18 Earlier, on January 23, 2013, the National Bank of Canada ("NBC") issued a statement of claim seeking payment of approximately $49,000, being the amount owing under a line of credit that it had extended to Juhasz which went into default in August 2012. Juhasz was aware of the NBC action from mid-February 2013. The statement of claim was served on Juhasz during March 2013, apparently shortly after the Transfer. Juhasz filed a statement of defence in the NBC action in April 2013. NBC subsequently obtained summary judgment against Juhasz on October 1, 2013.

19 On February 27, 2014, NBC commenced an application for bankruptcy order against Juhasz. On April 1, 2014, Juhasz was adjudged bankrupt and the Trustee was appointed the executor of her estate.

***Evidence Regarding the Value of the Property***

20 The McLean Report appraised the Property and the Adjacent Property as of July 27, 2012. The McLean Report appraised the Adjacent Property on an "as is" basis at $950,000, based primarily on a capitalization of income approach. The Adjacent Property was undergoing a total renovation and was unoccupied at the time of the appraisal. In reaching that conclusion, the McLean Report concluded that the value of the Adjacent Property on a completed basis was $1,183,000, based on a capitalization of income approach.

21 The McLean Report appraised the Property at $720,000, based on a direct comparison approach, for which McLean considered the Adjacent Property to be the best comparator. No renovations had been commenced on the Property, which was described as being in a state of disrepair, and was appraised as a shell. At that time, three units of the Property had been gutted by the previous owner and Juhasz and Cordeiro were seeking to evict a tenant from one of the two remaining units. To obtain a value for the Property, the McLean Report adjusted the value of the Adjacent Property downward to reflect vacant possession and a superior location of the Adjacent Property. The McLean Report also looked at the previous arm's length sale price of the Property, as increased by the average price increase of 10.67% in the greater Toronto area since the date of such sale.

22 In support of its position, the Trustee obtained a "consulting report" of Lebow Hicks Appraisal Inc. dated September 26, 2014 (the "Consulting Report"). The Consulting Report is expressly stated not to be an appraisal of the Property. The Consulting Report addressed only the estimated change in the value of the Property between November 5, 2010, when Juhasz and Cordeiro purchased the Property, and March 6, 2013, the date of the Transfer. The Consulting Report estimated the change in value based on two factors: (1) changes to typical rental income levels and expected capitalization rates during the relevant period; and (2) changes to the risk profile of the Property. The Consulting Report concluded that these factors yielded an increase in the value of the Property from $670,000 to $900,000 as of the date of the Transfer.

23 In a review report dated October 30, 2014 (the "Review Report"), McLean criticized the Consulting Report for its assumptions that the Property was an investment property and that the estimated change should therefore be derived based on a rental income model. The Review Report instead proceeded on the basis of the average increase in the price

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of single family dwellings over the relevant period as calculated according to two separate indices. When averaged, this price change yielded an increase in the value of the Property to $790,935.

**Applicable Law**

24 This application seeks a declaration under s, 96 of the BIA which reads 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.

25 For this purpose, the following provisions of s. 4 of the BIA address the requirements for establishing an ami's length relationship:

> (2) For the purposes of this Act, persons are related to each other and are "related persons" if they are
>
> (a) individuals connected by blood relationship, marriage, common-law partnership or adoption; ...
>
> (4) 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.

26 In addition, the following definition of "transfer at undervalue" in s. 2 of the BIA is relevant for present purposes:

> "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;

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**Issues on the Application**

27 It is not disputed that the initial bankruptcy event occurred on February 27, 2014, when NBC filed its application to petition Juhasz into bankruptcy, and that she was adjudged bankrupt on April 1, 2014. Accordingly, the Transfer, which occurred on March 6, 2013, falls within the period contemplated by paragraphs 96(1)(a)(i) and 96(1)(b)(i), which runs from February 27, 2013 to April 1, 2014.

28 Cordeiro acknowledges, and in any event, it is clear that Juhasz was insolvent on March 6, 2013. Juhasz acknowledges that her liabilities to CRA alone amounted to over $2.7 million at that date and that her liabilities exceeded her assets.

29 I propose therefore to consider the following remaining issues pertaining to the application of s. 96 to the Transfer in the following manner. First, I will address a preliminary issue — whether Juhasz and Cordeiro believed, or were willfully blind to the possibility, that the Property had a value in excess of the amount reflected in the Transfer. I will then address the following requirements of a claim under s. 96 of the BIA in order:

1. Were Juhasz and Cordeiro dealing at arm's length at the time of the Transfer?

2. Did Juhasz intend to defraud, defeat or delay a creditor in effecting the Transfer? and

3. Was the Transfer a "transfer at undervalue"?

***Preliminary Determination***

30 A central issue in this proceeding is whether Juhasz and Cordeiro considered that there was any equity in the Property i.e. any value over and above the outstanding amount under the mortgages against the Property totalling $737,885.48 at the time of the Transfer. I find that they knew that there was a reasonable likelihood, or were willfully blind to the likelihood that, there was such value for the following reasons.

31 Juhasz and Cordeiro were experienced business people. As such, they would have been keenly aware of the value of the Property as renovated. In particular, they would have been aware that the implied value of the Property had increased substantially over the appraised value in the McLean Report as a result of the sale of the Adjacent Property. I note that McLean expressed the same opinion on his cross-examination.

32 The McLean Report appraised the Adjacent Property, which was in the course of renovation, at $950,000 on an "as is" basis and at $1,183,000 on a completed basis. It sold six months later for $2,025,000. Even taking into consideration the remaining costs of the renovation, this sale transaction necessarily implied a substantially higher value for the Property both as a renovation property and in a completed state than would have been assumed in July 2012. Juhasz and Cordeiro would also have been aware that this increase in the value of the Adjacent Property over its appraised value was due to their ability to rent the renovated units at rates that exceeded the rental rates provided by Juhasz to McLean and assumed in the McLean Report.

33 In addition, as Juhasz was insolvent and therefore incapable of satisfying her one-half of the mortgage obligations, Cordeiro would have known that he would be fully liable for any deficiency in the value of the Property. He would not have assumed this additional risk unless he was satisfied that renovation of the Property was financeable and would result in a value that exceeded the aggregate of the mortgage financing and the renovation financing required to renovate the Property. Such a scenario implies that the value of the Property at the date of the Transfer at least equalled the outstanding amount under the mortgages.

34 However, Cordeiro would not have taken sole ownership of the Property by the Transfer if he did not also believe that there was a reasonable profit to be made from renovation of the Property. By definition, there must therefore have been sufficient value in the development potential, i.e. the right to renovate the Property, that Cordeiro was prepared

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to take an assignment of Juhasz's interest and spend his time renovating it. If he had believed there was no such value, or even negligible value, the opportunity would not have justified his time and the risk associated with any renovation in a potentially volatile market. His best course of action would have been to cut his losses by selling the Property with Juhasz, which he chose not to do.

35 While Juhasz did not take advantage of Cordeiro's offer to let her purchase his half-interest, the evidence indicates this was because she lacked the funds, not that she believed there was no development potential in the Property. Given her financial position, there would have been no reason to contemplate assigning the Property to her sons if she did not believe that she had any equity in the Property. In other words, the evidence suggests that Juhasz shared the same view of the value of the Property as Cordeiro.

36 Lastly, I am not persuaded that Cordeiro and Juhasz failed to obtain a new appraisal because they believed that the appraisal in the McLean Report remained valid. For the reasons stated above, they would have known that there was a real likelihood that the Property was worth more that McLean's appraisal of $720,000. They could have updated the McLean Report. However, that would have delayed the Transfer at a time when the parties appear to have wanted to move quickly in response to NBC's actions in attempting to serve its statement of claim in its action against Juhasz, Critically, they did ask McLean to do an update but he wasn't able to do it "because of time restriction". Given the sale price of the Adjacent Property, I think they also knew that an updated appraisal would have increased the valuation and, therefore, among other tilings, the land transfer tax payable on the Transfer, which Cordeiro was to bear. Because these considerations are at least as likely explanations for their failure to obtain a new valuation, I do not think that the failure of Juhasz and Cordeiro to obtain an updated appraisal in March 2013 is evidence of an honest belief on their part that the value of the Property had not risen since July 2012.

37 In short, I conclude on the evidence that Juhasz and Cordeiro knew that there was a reasonable likelihood that, or were wilfully blind to the likelihood that, the value of the Property exceeded the amount of the consideration for the Transfer expressed in the deed of transfer. They chose not to obtain an updated appraisal from McLean because they considered that it was a higher priority to effect the Transfer. Accordingly, they were prepared to take the risk that the Transfer might be challenged at some time in the future in order to complete the Transfer as quickly as possible in view of the likelihood of bankruptcy proceedings involving Juhasz given the NBC action as well as the CRA reassessment.

***Were the Parties at Arm's Length?***

38 The Trustee concedes that Juhasz and Cordeiro are not "related" for purposes of the presumption of a non-arm's length relationship in s. 4(5) of the BIA. In particular, there is no evidence that Juhasz and Cordeiro were in a common-law partnership. Accordingly, s. 4(4) of the BIA governs the issue of whether the parties dealt at arm's length on the date of the Transfer. It is therefore a question of fact whether or not these parties were at ami's length at the time of the Transfer.

39 The Trustee submits that Juhasz and Cordeiro were not acting at arm's length based on a number of factors, including that they were effectively partners dealing with partnership property and that they used the same lawyer for the Transfer. The Trustee also says that the parties intended that Juhasz would continue to provide the financial administration for the Property while under renovation, although there is no evidence that she actually did so. Cordeiro submits that the mere existence of a business relationship is not sufficient to establish a non-aim's length relationship.

40 There is little guidance in the BIA regarding the factors to be considered in addressing whether, as a matter of fact, parties were or were not at arm's length at the date of a transfer of property. The Trustee suggests that the Court should have regard to certain criteria identified by Rothstein J. in *McLarty v. R.*, [2008] 2 S.C.R. 79 (S.C.C.) at para. 62 in the context of income tax legislation, as well as to statements in Income Tax Folio S1-F5-C1 (the "IT Folio"). The latter refers, in particular, to the "common mind" principle, in which parties act in concert in respect of a transaction of material interest, and the absence of separate economic interests in respect of parties acting in their separate interests.

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It also refers to a key factor being "whether there are separate economic interests which reflect ordinary commercial dealing between parties acting in their separate interests".

41 Section 96 is directed at transfers by insolvent persons for a consideration that is materially or significantly less than the fair market value of the property. In this context, the concept of a non-arm's length relationship is one in which there is no incentive for the transferor to maximize the consideration for the property being transferred in negotiations with the transferee. It addresses situations in winch the economic self-interest of the transferor is, or is likely to be, displaced by other non-economic considerations that result in the consideration for the transfer failing to reflect the fair market value of the transferred property.

42 While I do not think that the existence of a partnership or joint venture relationship is sufficient on its own to establish a non-arm's length status, I consider that the absence of any economic interest of a transferor at the point of termination of a business relationship, together with evidence of accommodation of the wishes of the transferee, can support a finding that there was a non-arm's length relationship.

43 In the present circumstances, Juhasz accommodated Cordeiro's wish not to have to deal with third party creditors through a trustee in bankruptcy, i.e. to have a trustee in bankruptcy become his "partner" with respect to the Property. For her part, given the extent of her liabilities, any economic interest in the Property resided, in substance, with Juhasz's creditors. These circumstances appear to fall squarely within the circumstances envisaged in the IT Folio. Juhasz was in a position to accommodate Cordeiro's wishes with respect to the Property because she did not have a sufficient separate economic interest in the Transfer to engage in ordinary commercial dealings in the form of a negotiation with Cordeiro in which each party acted in his or her separate economic interest. Rather, the parties appear to have acted in concert to ensure control in Cordeiro's hands without separate economic interests coming into play.

44 I think the presence of these factors is sufficient, on a balance of probabilities, to establish that parties were not acting at arm's length in respect of the Transfer.

***Did Juhasz Intend to Defraud, Defeat or Delay a Creditor?***

45 Given the foregoing determination, it is not necessary to address whether Juhasz intended to defraud, defeat or delay a creditor as the circumstances in this proceeding are described by the provisions of paragraph (b) of s. 96(1) of the BIA. I have addressed this issue, however, in case I have erred in reaching the conclusion that Juhasz and Cordeiro were not dealing at arm's length.

46 The effect of the Transfer was to put any equity in Juhasz's interest in the Property beyond the reach of her creditors who, according to the record before the Court were primarily NBC and the CRA (disregarding a third creditor whose debt is secured against Juhasz's former residence but may not be fully secured). As such, the effect of the Transfer was clearly to defeat her creditors. The issue is whether Juhasz intended this effect.

47 The Trustee points to the following "badges of fraud" in the present circumstances: (1) Juhasz had few remaining assets after the Transfer; (2) Juhasz and Cordeiro were business partners; (3) Juhasz had significant liabilities and was being pursued by NBC which was trying to serve its statement of claim on her; (4) Juhasz knew she was insolvent at the time of the Transfer; (5) Juhasz and Cordeiro relied on an appraised value in the McLean Report, which they knew was outdated; (6) Juhasz received no consideration for the Transfer beyond Cordeiro's assumption of her share of the mortgage liabilities; and (7) Juhasz admitted subsequently transferring her residence into the name of her son in order to try to defeat her creditors.

48 The Trustee says that these considerations establish an intent to defeat Juhasz's creditors. Alternatively, the Trustee argues that such evidence raises a presumption of such intent that places the onus on Cordeiro to explain away the circumstantial evidence of fraudulent intent, which the Trustee argues Cordeiro has failed to do.

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49 Cordeiro says that the evidence indicates that he and Juhasz intended to effect the Transfer properly rather than defeat Juhasz's creditors. He points to the use of the McLean Report appraisal of the Property, the declaration and payment of land transfer tax on the Transfer, the use of a lawyer, the presence of consideration for the Transfer, and the absence of any concealment. Cordeiro's explanation for the delay in effecting the Transfer from July 2012 to March 2013 has been set out above.

50 Juhasz denies any intention to defeat her creditors in effecting the Transfer. However there are a number of difficulties with Juhasz's credibility. First, Juhasz appears to have had an initial intention of "bankruptcy-proofing" her interest in the Property by transferring her interest to her sons. Second, Juhasz subsequently transferred her interest in her Clarksburg farm residence to her son for the same purpose. Third, Juhasz concealed substantial business income from the CRA, which ultimately resulted in a very large reassessment against her. In these circumstances, I do not think the Court can give any credence to Juhasz's expression of her intention in transferring the Property.

51 Juhasz originally intended to transfer her interest in the Property to her sons with a view to retaining her equity in the Property beyond the reach of her creditors. However, ultimately, Juhasz transferred her interest in the Property to Cordeiro who was not one of her creditors. In this regard, I acknowledge that Cordeiro could be regarded as a contingent creditor by virtue of their joint and several liability on the mortgages. However, it follows from their own position — that the consideration for the Transfer was the assumption of that liability — that the Property had a value at least equal to the amount secured by the mortgages and, therefore, that there was no significant possibility of a deficiency claim by Cordeiro against Juhasz in respect of such liability. While it is possible that there was an understanding between Juhasz and Cordeiro regarding an entitlement of Juhasz to a portion of any profits realized, there is no evidence of any such agreement before the Court. Accordingly, Juhasz's intention must be analyzed in the context of an absolute transfer of her interest to a third party. In this context, the following considerations are relevant.

52 First, Cordeiro testified that his reason for requiring a transfer was that he was concerned that a trustee in bankruptcy would not be prepared to finance Juhasz's share of the financing and renovation expenses of the Property. While his concern may have been well-founded, Cordeiro would have been able to acquire the Trustee's interest in the Property at fair market value. In any event, the issue for the Court is not Cordeiro's intention but Juhasz's intention.

53 Second, Juhasz's original intention was clearly to defeat her creditors by transferring her interest in the Property to her sons. For the reasons set out above, I have concluded that Juhasz believed there was a reasonable likelihood that, or was wilfully blind to the likelihood that, there was equity in the Property even taking into account the amount outstanding under the mortgages securing the Property. As mentioned, her intention to transfer her interest in the Property to her sons makes no sense unless she believed that there was equity in her interest in the Property. The issue becomes, therefore, whether her intention changed in agreeing to transfer her interest to Cordeiro.

54 Third, the 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.

55 Fourth, it is probable that the timing of the Transfer was prompted by Juhasz's impending bankruptcy proceedings, given NBC's concurrent actions in issuing and attempting to serve the statement of claim in its action on top of the on-going audit of the CRA. In addition to the timing of the Transfer relative to these events, the perception of an urgent need to address the Transfer is also evidenced by the decision of Juhasz and Cordeiro to effect the Transfer without obtaining an updated appraisal from McLean, who apparently required more time than was acceptable to Juhasz and Cordeiro.

56 Fifth, Juhasz was well aware at the time of her Transfer that she was insolvent and that bankruptcy proceedings were likely, as she had very substantial liabilities and no assets. She had two principal creditors — NBC and the CRA,

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setting aside a third creditor who was at least partially secured against her residence. There is no evidence that she ever sought to reach an accommodation with these creditors by making available the assets that she had at her disposal or to make a proposal to her creditors generally using her remaining assets including the proceeds of sale of her interest in the Property. Instead, the proceeds of the sale of her interest in the Adjacent Property were applied to repay loans to family members. Subsequently, she also attempted to transfer her Clarksburg residence to her son. These factors suggest a consistent course of action directed toward preventing her assets from being used to satisfy her obligations to the CRA and NBC, to the extent possible, in a bankruptcy proceeding or otherwise.

57 Sixth, it is important to note that there was no formal agreement between Cordeiro and Juhasz regarding the Property and, in particular, no obligation on the part of Juhasz to transfer her interest in the Property to Cordeiro if she became financially unable to bear her share of the renovation expenses. She was free to retain her interest in the Property for the benefit of her creditors.

58 Lastly, given the determination that Juhasz had knowledge that there was a reasonable likelihood that there was equity in her interest in the Property, she would also have been aware that any such value would be assigned to her trustee in bankruptcy in the eventual bankruptcy proceedings. She therefore had a choice between giving such equity to Cordeiro or retaining it for the benefit of all of her creditors in the bankruptcy. Alternatively, if she had intended to ensure that her creditors received the value of her interest in the Property, she could have ensured that result by basing the consideration for the Transfer on an updated appraisal from McLean. As mentioned, the reason for not doing so — a need for haste in view of NBC's actions — suggests that her priority was to complete the Transfer as quickly as possible rather than to effect a Transfer that preserved value for her creditors.

59 Given the foregoing, I think the Court can infer that one of Juhasz's intentions in agreeing to the Transfer was to defeat her principal creditors. She chose to transfer the equity in the Property to Cordeiro rather than retain it for the benefit of all creditors in the bankruptcy proceedings that she knew were inevitable. She also chose not to establish a current fair market value for the Property, and therefore for her interest in the Property, in order to have proceeds to pay her principal creditors. In short, the evidence indicates that Juhasz decided that, to the extent there was any equity in the Property, she preferred to have Cordeiro take the benefit of that equity by virtue of their business partnership rather than to have that equity remain available for her creditors.

***Was the Transfer a "transfer at undervalue"?***

60 Based on the foregoing determinations, the Trustee has satisfied the requirements of both paragraphs 96(1)(a) and 96(1)(b). Accordingly, the issue arises as to whether the Transfer was a "transfer at undervalue"? For this purpose, it is necessary to address both: (1) the difference between the value of the consideration received by Juhasz and the value of the consideration given by her on the Transfer; and (2) whether the difference in (1) qualifies the Transfer as a "transaction at undervalue". I will address each issue in turn.

*The Difference Between the Value of the Consideration Received by Juhasz and the Value of the Consideration Given by Juhasz on the Transfer*

61 Section 96 requires a determination by the Court of the difference between the value of the consideration received by Juhasz and the value of the consideration given by her. In this case, the two are intimately related.

62 The Trustee submits that the value of the consideration given by Cordeiro was nil, given Juhasz's insolvency and the amount of her liabilities. The Trustee also bases his submission on the fact that the parties were jointly and severally liable on the mortgages secured against the Property, that the mortgagees did not release Juhasz from her liability, and that Cordeiro did not execute an assumption agreement in favour of Juhasz.

63 Cordeiro argues that the Property remained charged in favour of the mortgagees who were entitled to be satisfied out of the proceeds of sale of the Property. He also says that, notwithstanding the absence of an executed assumption

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agreement, he agreed to exchange his right of contribution and indemnity against Juhasz for a transfer to him of her interest in the Property.

64 The evidence demonstrates that, even if there was no formal assumption agreement executed by Cordeiro in favour of Juhasz, both of these parties proceeded on the basis that Cordeiro assumed Juhasz's obligation regarding the mortgages on the Transfer. Cordeiro serviced the mortgages after the Transfer until the date of discharge and has paid all other Property-related expenses since the date of the Transfer. In particular, he has paid all of the renovation expenses. He has also discharged the two mortgages on the Property at the time of the Transfer in favour of alternate financing for which he is solely liable.

65 In analyzing this issue, I accept that, as an unsecured claim, the value of Cordeiro's right of contribution and indemnity was effectively nil, given Juhasz's insolvency and the amount of her liabilities. As such, it is arguable that Cordeiro gave nil consideration for Juhasz's interest in the Property. On the other hand, the determination of the Court regarding the value of the Property weighs in favour of Cordeiro's position that he provided consideration in an amount equal to one-half of the outstanding mortgage obligations at the date of the Transfer.

66 In this case, the issues of the value received by Juhasz and the value given by Juhasz cannot be separated in the manner suggested by the Trustee. Put another way, there must be consistent treatment of Juhasz's share of the mortgage liabilities. Accordingly, the issues of value can be addressed in one of two ways with equal merit: (1) on the basis that Cordeiro gave no consideration and Juhasz assigned her equity in the Property; or (2) on the basis that Cordeiro gave consideration equal to the share of Juhasz's mortgage obligations assumed on the Transfer and Juhasz assigned her gross interest in the Property without taking into consideration her share of the mortgage liabilities.

67 Although the result is the same in either case, I think the second approach is the analytically correct approach, given the determination that the value of the Property exceeded the outstanding mortgage liabilities on the date of the Transfer. On that basis, Juhasz and Cordeiro were each effectively severally liable in respect of 50% of the mortgage liabilities, as each would be entitled to recover any amount paid in excess of such amount by way of a subrogation claim against the other's interest in the Property. Accordingly, the Transfer should be analyzed as a two-part transaction: (1) the assumption by Cordeiro of Juhasz's mortgage liabilities totaling $368,942.74; and (2) immediately thereafter, a transfer by Juhasz of her interest in the Property at its gross value, that is without any related mortgage liabilities, on the basis that such liabilities were effectively discharged by Cordiero's agreement to assume them.

*Was the Transfer a "Transaction At Undervalue"?*

68 As set out above, as applied to the present circumstances, a "transfer at undervalue" means a disposition of property for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor. In the present circumstances, based on the analysis in the preceding section, the consideration received by Juhasz has been established to be $368,942.74. The consideration given by Juhasz is the value of her 50% undivided interest in the Property. Accordingly, the critical question for determining whether the Transfer was a "transaction at undervalue" is the value of the Property at the date of the Transfer.

69 Pursuant to s. 96(2), in making this application, the Trustee is required to state the Trustee's opinion of the fair market value of the Property at the date of the Transfer. The Trustee originally valued the Property at $1.8 million based on Cordeiro's testimony on cross-examination that he had entered into an agreement for the sale of the Property at that price and his failure to produce evidence of renovation expenses. Clearly, however, extensive renovation of the Property had to have occurred to achieve a sale price of $1.8 million. As a result of the materials provided by Cordeiro in his responding motion record described above, the Trustee took the position at the hearing that the value of the Property was $1.4-$1.5 million. This would imply a value for Juhasz's 50% interest in the Property of $700 - $750,000.

70 Cordeiro argues that the Trustee had the onus of proving its estimate of the value of the Property at the date of the Transfer. He says that the Trustee has failed to satisfy this onus and, on this basis, the Court should find the value

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of the Property to be the amount of the outstanding mortgages. I do not agree that s. 96(2) imposes an onus of proof on the Trustee. Instead, the purpose of s.96(2) is, absent evidence to the contrary, to make a trustee's opinion of value available to a court for purposes of a proceeding under that provision. However, in the present circumstances, I think the evidence from each party is insufficient to establish the value of the Property at the time of the Transfer.

71 Cordeiro relies on the McLean Report. However, it is clearly outdated given the sale price of the Adjacent Property in January 2013. McLean testified in his cross-examination that the sale price of the Adjacent Property would have had a significant impact on the value of the Property even as a shell building.

72 On the other hand, the Trustee's current proposed fair market value of $1.4-1.5 million is derived by the deduction of estimated renovation costs from a contract selling price of $1.8 million. This is not a viable method of determining the fair market value of an unrenovated rental property insofar as it totally excludes any consideration of development risks and corresponding profit.

73 Further, the Consulting Report does not provide a basis for a determination of value by the Court. The Trustee did not rely on the Consulting Report in making its submissions at the hearing of this application. In any event, the Consulting Report was not an appraisal of the fair market value of the Property at the date of the Transfer. The Review Report similarly does not address the fair market value of the Property. It is also suspect insofar as it proposes a methodology based on the average increase in single-family residential dwellings, which the Property is not.

74 Although it appears likely that the value of the Property at the date of the Transfer exceeded the value of the outstanding mortgages secured against the Property, the Court is not in a position to make a determination as to the fair market value of the Property at such date based on the evidence before it. It therefore cannot determine by how much the consideration that Juhasz gave on the Transfer exceeded the consideration received by her. It is therefore also not possible on the evidence before it for the Court to determine whether the Transfer constituted a "transaction at undervalue". These are also not issues which the Court can resolve on the basis of an onus of proof.

75 In these circumstances, I think that the philosophy in *Hryniak* requires that the Court order a trial of the issue of the value of the Property at the date of the Transfer.

76 Accordingly, it is ordered that a summary trial be conducted limited to a determination of the value of the Property at the date of the Transfer. After the Court has made such determination, the Court would be in a position to address the issue of whether the Transfer constituted a "transfer at undervalue" and the appropriate remedy, if any, in favour of the Trustee.

*Summary trial ordered, limited to determination of value of property at date of transfer.*

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# TAB 6

2004 CarswellOnt 1211
Ontario Superior Court of Justice [Commercial List]

Stelco Inc., Re

2004 CarswellOnt 1211, [2004] O.J. No. 1257, [2004] O.T.C. 284, 129 A.C.W.S. (3d) 1065, 48 C.B.R. (4th) 299

# IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Farley J.

Heard: March 5, 2004
Judgment: March 22, 2004
Docket: 04-CL-5306

Counsel: Michael E. Barrack, James D. Gage, Geoff R. Hall for Applicants
David Jacobs, Michael McCreary for Locals, 1005, 5328, 8782 of the United Steel Workers of America
Ken Rosenberg, Lily Harmer, Rob Centa for United Steelworkers of America
Bob Thornton, Kyla Mahar for Ernst & Young Inc., Monitor of the Applicants
Kevin J. Zych for Informal Committee of Stelco Bondholders
David R. Byers for CIT
Kevin McElcheran for GE
Murray Gold, Andrew Hatnay for Retired Salaried Beneficiaries
Lewis Gottheil for CAW Canada and its Local 523
Virginie Gauthier for Fleet
H. Whiteley for CIBC
Gail Rubenstein for FSCO
Kenneth D. Kraft for EDS Canada Inc.

Subject: Insolvency
**Related Abridgment Classifications**
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.b Qualifying company
**Headnote**
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Application of Act
Steel company S Inc. applied for protection under Companies' Creditors Arrangement Act ("CCAA") on January 29, 2004 — Union locals moved to rescind initial order and dismiss initial application of S Inc. and its subsidiaries on ground S Inc. was not "debtor company" as defined in s. 2 of CCAA because S Inc. was not insolvent — Motion dismissed — Given time and steps involved in reorganization, condition of insolvency perforce required expanded meaning under CCAA — Union affiant stated that S Inc. will run out of funding by November 2004 — Given that November was ten months away from date of filing, S Inc. had liquidity problem — S Inc. realistically cannot expect any increase in

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its credit line with its lenders or access to further outside funding — S Inc. had negative equity of $647 million — On balance of probabilities, S Inc. was insolvent and therefore was "debtor company" as at date of filing and entitled to apply for CCAA protection.

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*Anvil Range Mining Corp., Re* (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — considered

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*Bell ExpressVu Ltd. Partnership v. Rex* (2002), 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, [2002] 5 W.W.R. 1, 212 D.L.R. (4th) 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered

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*King Petroleum Ltd., Re* (1978), 29 C.B.R. (N.S.) 76, 1978 CarswellOnt 197 (Ont. S.C.) — considered

*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — considered

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Generally — referred to

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

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s. 2(1) "insolvent person" — referred to

s. 2(1) "insolvent person" (a) — considered

s. 2(1) "insolvent person" (b) — considered

s. 2(1) "insolvent person" (c) — considered

s. 43(7) — referred to

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s. 121(2) — referred to

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Generally — referred to

s. 2 "debtor company" — referred to

s. 2 "debtor company" (a) — considered

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s. 2 "debtor company" (c) — considered

s. 2 "debtor company" (d) — considered

s. 12 — referred to

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s. 12(1) "claim" — referred to
*Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11
Generally — referred to
**Words and phrases considered:**

**debtor company**

It seems to me that the [*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36] test of insolvency . . . which I have determined is a proper interpretation is that the [*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3] definition of [s. 2(1)] (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring.

MOTION by union that steel company was not "debtor company" as defined in *Companies' Creditors Arrangement Act*.

***Farley J.*:**

1 As argued this motion by Locals 1005, 5328 and 8782 United Steel Workers of America (collectively "Union") to rescind the initial order and dismiss the application of Stelco Inc. ("Stelco") and various of its subsidiaries (collectively "Sub Applicants") for access to the protection and process of the *Companies' Creditors Arrangement Act* ("CCAA") was that this access should be denied on the basis that Stelco was not a "debtor company" as defined in s. 2 of the CCAA because it was not insolvent.

2 Allow me to observe that there was a great deal of debate in the materials and submissions as to the reason(s) that Stelco found itself in with respect to what Michael Locker (indicating he was "an expert in the area of corporate restructuring and a leading steel industry analyst") swore to at paragraph 12 of his affidavit was the "current crisis":

> 12. Contending with weak operating results and resulting tight cash flow, management has deliberately chosen not to fund its employee benefits. By contrast, Dofasco and certain other steel companies have consistently funded both their employee benefit obligations as well as debt service. If Stelco's management had chosen to fund pension obligations, presumably with borrowed money, *the current crisis* and related restructuring plans would focus on debt restructuring as opposed to the reduction of employee benefits and related liabilities. [Emphasis added.]

3 For the purpose of determining whether Stelco is insolvent and therefore could be considered to be a debtor company, it matters not what the cause or who caused the financial difficulty that Stelco is in as admitted by Locker on behalf of the Union. The management of a corporation could be completely incompetent, inadvertently or advertently; the corporation could be in the grip of ruthless, hard hearted and hard nosed outside financiers; the corporation could be the innocent victim of uncaring policy of a level of government; the employees (unionized or non-unionized) could be completely incompetent, inadvertently or advertently; the relationship of labour and management could be absolutely poisonous; the corporation could be the victim of unforeseen events affecting its viability such a as a fire destroying an essential area of its plant and equipment or of rampaging dumping. One or more or all of these factors (without being exhaustive), whether or not of varying degree and whether or not in combination of some may well have been the cause of a corporation's difficulty. The point here is that Stelco's difficulty exists; the only question is whether Stelco is insolvent within the meaning of that in the "debtor company" definition of the CCAA. However, I would point out, as I did in closing, that no matter how this motion turns out, Stelco does have a problem which has to be addressed - addressed within the CCAA process if Stelco is insolvent or addressed outside that process if Stelco is determined not to be insolvent. The status quo will lead to ruination of Stelco (and its Sub Applicants) and as a result will very badly affect its stakeholder, including pensioners, employees (unionized and non-unionized), management, creditors, suppliers, customers, local and other governments and the local communities. In such situations, time is a precious commodity; it cannot be wasted; no matter how much some would like to take time outs, the clock cannot be stopped. The watchwords of the Commercial List are equally applicable in such circumstances. They are communication, cooperation and common

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sense. I appreciate that these cases frequently invoke emotions running high and wild; that is understandable on a human basis but it is the considered, rational approach which will solve the problem.

4 The time to determine whether a corporation is insolvent for the purpose of it being a "debtor company" and thus able to make an application to proceed under the CCAA is the date of filing, in this case January 29, 2004.

5 The Monitor did not file a report as to this question of insolvency as it properly advised that it wished to take a neutral role. I understand however, that it did provide some assistance in the preparation of Exhibit C to Hap Steven's affidavit.

6 If I determine in this motion that Stelco is not insolvent, then the initial order would be set aside. See *Montreal Trust Co. of Canada v. Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 14 (P.E.I. C.A.). The onus is on Stelco as I indicated in my January 29, 2004 endorsement.

7 S. 2 of the CCAA defines "debtor company" as:

> "debtor company" means any company that:
>
> > (a) is bankrupt or insolvent;
> >
> > (b) has committed an act of bankruptcy within the meaning of *Bankruptcy and Insolvency Act* ["BIA"] or deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;
> >
> > (c) has made an authorized assignment against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or
> >
> > (d) is in the course of being wound-up under the *Winding-Up and Restructuring Act* because the company is insolvent.

8 Counsel for the Existing Stelco Lenders and the DIP Lenders posited that Stelco would be able to qualify under (b) in light of the fact that as of January 29, 2004 whether or not it was entitled to receive the CCAA protection under (a) as being insolvent, it had ceased to pay its pre-filing debts. I would merely observe as I did at the time of the hearing that I do not find this argument attractive in the least. The most that could be said for that is that such game playing would be ill advised and in my view would not be rewarded by the exercise of judicial discretion to allow such an applicant the benefit of a CCAA stay and other advantages of the procedure for if it were capriciously done where there is not reasonable need, then such ought not to be granted. However, I would point out that if a corporation did capriciously do so, then one might well expect a creditor-initiated application so as to take control of the process (including likely the ouster of management including directors who authorized such unnecessary stoppage); in such a case, while the corporation would not likely be successful in a corporation application, it is likely that a creditor application would find favour of judicial discretion.

9 This judicial discretion would be exercised in the same way generally as is the case where s. 43(7) of the BIA comes into play whereby a bankruptcy receiving order which otherwise meets the test may be refused. See *Kenwood Hills Development Inc., Re* (1995), 30 C.B.R. (3d) 44 (Ont. Bktcy.) where at p. 45 I observed:

> The discretion must be exercised judicially based on credible evidence; it should be used according to common sense and justice and in a manner which does not result in an injustice: See *Re Churchill Forest Industries (Manitoba) Ltd.* (1971), 16 C.B.R. (NS) 158 (Man. Q.B.).

10 Anderson J. in *MTM Electric Co., Re* (1982), 42 C.B.R. (N.S.) 29 (Ont. Bktcy.) at p. 30 declined to grant a bankruptcy receiving order for the eminently good sense reason that it would be counterproductive: "Having regard for the value of the enterprise and having regard to the evidence before me, I think it far from clear that a receiving order

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would confer a benefit on anyone." This common sense approach to the judicial exercise of discretion may be contrasted by the rather more puzzling approach in *TDM Software Systems Inc., Re* (1986), 60 C.B.R. (N.S.) 92 (Ont. S.C.).

11 The Union, supported by the International United Steel Workers of America ("International"), indicated that if certain of the obligations of Stelco were taken into account in the determination of insolvency, then a very good number of large Canadian corporations would be able to make an application under the CCAA. I am of the view that this concern can be addressed as follows. The test of insolvency is to be determined on its own merits, not on the basis that an otherwise technically insolvent corporation should not be allowed to apply. However, if a technically insolvent corporation were to apply and there was no material advantage to the corporation and its stakeholders (in other words, a pressing need to restructure), then one would expect that the court's discretion would be judicially exercised against granting CCAA protection and ancillary relief. In the case of Stelco, it is recognized, as discussed above, that it is in crisis and in need of restructuring - which restructuring, if it is insolvent, would be best accomplished within a CCAA proceeding. Further, I am of the view that the track record of CCAA proceedings in this country demonstrates a healthy respect for the fundamental concerns of interested parties and stakeholders. I have consistently observed that much more can be achieved by negotiations outside the courtroom where there is a reasonable exchange of information, views and the exploration of possible solutions and negotiations held on a without prejudice basis than likely can be achieved by resorting to the legal combative atmosphere of the courtroom. A mutual problem requires a mutual solution. The basic interest of the CCAA is to rehabilitate insolvent corporations for the benefit of all stakeholders. To do this, the cause(s) of the insolvency must be fixed on a long term viable basis so that the corporation may be turned around. It is not achieved by positional bargaining in a tug of war between two parties, each trying for a larger slice of a defined size pie; it may be achieved by taking steps involving shorter term equitable sacrifices and implementing sensible approaches to improve productivity to ensure that the pie grows sufficiently for the long term to accommodate the reasonable needs of the parties.

12 It appears that it is a given that the Sub Applicants are in fact insolvent. The question then is whether Stelco is insolvent.

13 There was a question as to whether Stelco should be restricted to the material in its application as presented to the Court on January 29, 2004. I would observe that CCAA proceedings are not in the nature of the traditional adversarial lawsuit usually found in our courtrooms. It seems to me that it would be doing a disservice to the interest of the CCAA to artificially keep the Court in the dark on such a question. Presumably an otherwise deserving "debtor company" would not be allowed access to a continuing CCAA proceeding that it would be entitled to merely because some potential evidence were excluded for traditional adversarial technical reasons. I would point out that in such a case, there would be no prohibition against such a corporation reapplying (with the additional material) subsequently. In such a case, what would be the advantage for anyone of a "pause" before being able to proceed under the rehabilitative process under the CCAA. On a practical basis, I would note that all too often corporations will wait too long before applying, at least this was a significant problem in the early 1990s. In *Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), I observed:

> Secondly, CCAA is designed to be remedial; it is not, however, designed to be preventative. CCAA should not be the *last* gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throe.

14 It seems to me that the phrase "death throe" could be reasonably replaced with "death spiral". In *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]), I went on to expand on this at p. 228:

> I would also observe that all too frequently debtors wait until virtually the last moment, the last moment, or in some cases, beyond the last moment before even beginning to think about reorganizational (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if "success" may have been available with earlier spade work.

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15 I have not been able to find in the CCAA reported cases any instance where there has been an objection to a corporation availing itself of the facilities of the CCAA on the basis of whether the corporation was insolvent. Indeed, as indicated above, the major concern here has been that an applicant leaves it so late that the timetable of necessary steps may get impossibly compressed. That is not to say that there have not been objections by parties opposing the application on various other grounds. Prior to the 1992 amendments, there had to be debentures (plural) issued pursuant to a trust deed; I recall that in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, 1 O.R. (3d) 289 (Ont. C.A.), the initial application was rejected in the morning because there had only been one debenture issued but another one was issued prior to the return to court that afternoon. This case stands for the general proposition that the CCAA should be given a large and liberal interpretation. I should note that there was in *Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 10 C.B.R. (4th) 133 (Ont. S.C.J. [Commercial List]) a determination that in a creditor application, the corporation was found not to be insolvent, but see below as to BIA test (c) my views as to the correctness of this decision.

16 In *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) I observed at p. 32:

> One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.

17 In *Anvil Range Mining Corp., Re* (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), the court stated to the same effect:

> The second submission is that the plan is contrary to the purposes of the CCAA. Courts have recognized that the purpose of the CCAA is to enable compromises to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators.

18 Encompassed in this is the concept of saving employment if a restructuring will result in a viable enterprise. See *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.). This concept has been a continuing thread in CCAA cases in this jurisdiction stretching back for at least the past 15 years, if not before.

19 I would also note that the jurisprudence and practical application of the bankruptcy and insolvency regime in place in Canada has been constantly evolving. The early jails of what became Canada were populated to the extent of almost half their capacity by bankrupts. Rehabilitation and a fresh start for the honest but unfortunate debtor came afterwards. Most recently, the *Bankruptcy Act* was revised to the BIA in 1992 to better facilitate the rehabilitative aspect of making a proposal to creditors. At the same time, the CCAA was amended to eliminate the threshold criterion of there having to be debentures issued under a trust deed (this concept was embodied in the CCAA upon its enactment in 1933 with a view that it would only be large companies with public issues of debt securities which could apply). The size restriction was continued as there was now a threshold criterion of at least $5 million of claims against the applicant. While this restriction may appear discriminatory, it does have the practical advantage of taking into account that the costs (administrative costs including professional fees to the applicant, and indeed to the other parties who retain professionals) is a significant amount, even when viewed from the perspective of $5 million. These costs would be prohibitive in a smaller situation. Parliament was mindful of the time horizons involved in proposals under BIA where the maximum length of a proceeding including a stay is six months (including all possible extensions) whereas under CCAA, the length is in the discretion of the court judicially exercised in accordance with the facts and the circumstances of the case. Certainly sooner is better than later. However, it is fair to observe that virtually all CCAA cases which proceed go on for over six months and those with complexity frequently exceed a year.

20 Restructurings are not now limited in practical terms to corporations merely compromising their debts with their creditors in a balance sheet exercise. Rather there has been quite an emphasis recently on operational restructuring as well

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so that the emerging company will have the benefit of a long term viable fix, all for the benefit of stakeholders. See *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at p. 314 where Borins J. states:

> The proposed plan exemplifies the policy and objectives of the Act as it proposes a regime for the court-supervised re-organization for the Applicant company intended to avoid the devastating social and economic effects of a creditor-initiated termination of its ongoing business operations and enabling the company to carry on its business in a manner in which it is intended to cause the least possible harm to the company, its creditors, its employees and former employees and the communities in which its carries on and carried on its business operations.

21 The CCAA does not define "insolvent" or "insolvency". Houlden & Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act* (Toronto, Carswell; 2003) at p. 1107 (N5) states:

> In interpreting "debtor company", reference must be had to the definition of "insolvent person" in s. 2(1) of the *Bankruptcy and Insolvency Act* . . .
>
> To be able to use the Act, a company must be bankrupt or insolvent: *Reference re Companies' Creditors Arrangement Act (Canada)*, 16 C.B.R. 1, [1934] S.C.R. 659, [1934] 4 D.L.R. 75. The company must, in its application, admit its insolvency.

22 It appears to have become fairly common practice for applicants and others when reference is made to insolvency in the context of the CCAA to refer to the definition of "insolvent person" in the BIA. That definition is as follows:

> s. 2(1) . . .
>
> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability 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.

23 Stelco acknowledges that it does not meet the test of (b); however, it does assert that it meets the test of both (a) and (c). In addition, however, Stelco also indicates that since the CCAA does not have a reference over to the BIA in relation to the (a) definition of "debtor company" as being a company that is "(a) bankrupt or insolvent", then this term of "insolvent" should be given the meaning that the overall context of the CCAA requires. See the modern rule of statutory interpretation which directs the court to take a contextual and purposive approach to the language of the provision at issue as illustrated by *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at p. 580:

> Today there is only one principle or approach, namely 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.

24 I note in particular that the (b), (c) and (d) aspects of the definition of "debtor company" all refer to other statutes, including the BIA; (a) does not. S. 12 of the CCAA defines "claims" with reference over to the BIA (and otherwise refers to the BIA and the *Winding-Up and Restructuring Act*). It seems to me that there is merit in considering that the test for insolvency under the CCAA may differ somewhat from that under the BIA, so as to meet the special circumstances of the CCAA and those corporations which would apply under it. In that respect, I am mindful of the above discussion regarding the time that is usually and necessarily (in the circumstances) taken in a CCAA reorganization restructuring

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which is engaged in coming up with a plan of compromise and arrangement. The BIA definition would appear to have been historically focussed on the question of bankruptcy - and not reorganization of a corporation under a proposal since before 1992, secured creditors could not be forced to compromise their claims, so that in practice there were no reorganizations under the former *Bankruptcy Act* unless all secured creditors voluntarily agreed to have their secured claims compromised. The BIA definition then was essentially useful for being a pre-condition to the "end" situation of a bankruptcy petition or voluntary receiving order where the upshot would be a realization on the bankrupt's assets (not likely involving the business carried on - and certainly not by the bankrupt). Insolvency under the BIA is also important as to the Paulian action events (eg., fraudulent preferences, settlements) as to the conduct of the debtor *prior* to the bankruptcy; similarly as to the question of provincial preference legislation. Reorganization under a plan or proposal, on the contrary, is with a general objective of the applicant continuing to exist, albeit that the CCAA may also be used to have an orderly disposition of the assets and undertaking in whole or in part.

25 It seems to me that given the time and steps involved in a reorganization, and the condition of insolvency perforce requires an expanded meaning under the CCAA. Query whether the definition under the BIA is now sufficient in that light for the allowance of sufficient time to carry through with a realistically viable proposal within the maximum of six months allowed under the BIA? I think it sufficient to note that there would not be much sense in providing for a rehabilitation program of restructuring/reorganization under either statute if the entry test was that the applicant could not apply until a rather late stage of its financial difficulties with the rather automatic result that in situations of complexity of any material degree, the applicant would not have the financial resources sufficient to carry through to hopefully a successful end. This would indeed be contrary to the renewed emphasis of Parliament on "rescues" as exhibited by the 1992 and 1997 amendments to the CCAA and the BIA.

26 Allow me now to examine whether Stelco has been successful in meeting the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in regard to the interpretation of "debtor company" in the context and within the purpose of that legislation. To a similar effect, see *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 103 D.L.R. (4th) 609 (Ont. C.A.), leave to appeal to S.C.C. dismissed [(1993), 49 C.P.R. (3d) ix (S.C.C.)] wherein it was determined that the trial judge was correct in holding that a party was not insolvent and that the statutory definition of insolvency pursuant to the BIA definition was irrelevant to determine that issue, since the agreement in question effectively provided its own definition by implication. It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. That is, there should be a reasonable cushion, which cushion may be adjusted and indeed become in effect an encroachment depending upon reasonable access to DIP between financing. In the present case, Stelco accepts the view of the Union's affiant, Michael Mackey of Deloitte and Touche that it will otherwise run out of funding by November 2004.

27 On that basis, allow me to determine whether Stelco is insolvent on the basis of (i) what I would refer to as the CCAA test as described immediately above, (ii) BIA test (a) or (iii) BIA test (c). In doing so, I will have to take into account the fact that Stephen, albeit a very experienced and skilled person in the field of restructurings under the CCAA, unfortunately did not appreciate that the material which was given to him in Exhibit E to his affidavit was modified by the caveats in the source material that in effect indicated that based on appraisals, the fair value of the real assets acquired was in excess of the purchase price for two of the U.S. comparators. Therefore the evidence as to these comparators is significantly weakened. In addition at Q. 175-177 in his cross examination, Stephen acknowledged that it was reasonable to assume that a purchaser would "take over some liabilities, some pension liabilities and OPEB liabilities, for workers who remain with the plant." The extent of that assumption was not explored; however, I do note that there was acknowledgement on the part of the Union that such an assumption would also have a reciprocal negative effect on the purchase price.

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28 The BIA tests are disjunctive so that anyone meeting any of these tests is determined to be insolvent: see *Optical Recording Laboratories Inc., Re* (1990), 75 D.L.R. (4th) 747 (Ont. C.A.) at p. 756; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at p. 161. Thus, if I determine that Stelco is insolvent on *any one* of these tests, then it would be a "debtor company" entitled to apply for protection under the CCAA.

29 In my view, the Union's position that Stelco is not insolvent under BIA (a) because it has not entirely used up its cash and cash facilities (including its credit line), that is, it is not yet as of January 29, 2004 run out of liquidity conflates inappropriately the (a) test with the (b) test. The Union's view would render the (a) test necessarily as being redundant. See *R. v. Proulx*, [2000] 1 S.C.R. 61 (S.C.C.) at p. 85 for the principle that no legislative provision ought to be interpreted in a manner which would "render it mere surplusage." Indeed the plain meaning of the phrase "unable to meet his obligations as they generally become due" requires a construction of test (a) which permits the court to take a purposive assessment of a debtor's ability to meet his future obligations. See *King Petroleum Ltd., Re* (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C.) where Steele J. stated at p. 80:

> With respect to cl. (a), it was argued that at the time the disputed payments were made the company was able to meet its obligations as they generally became due because no major debts were in fact due at that time. This was premised on the fact that the moneys owed to Imperial Oil were not due until 10 days after the receipt of the statements and that the statements had not then been received. I am of the opinion that this is not a proper interpretation of cl. (a). *Clause (a) speaks in the present and future tenses and not in the past.* I am of the opinion that the company was an "insolvent person" within the meaning of cl. (a) because by the very payment-out of the money in question it placed itself in a position that it was unable to meet its obligations as they would generally become due. In other words, it had placed itself in a position that it would not be able to pay the obligations that it knew it had incurred and which it knew would become due in the immediate future. [Emphasis added.]

30 *King Petroleum Ltd.* was a case involving the question in a bankruptcy scenario of whether there was a fraudulent preference during a period when the corporation was insolvent. Under those circumstances, the "immediate future" does not have the same expansive meaning that one would attribute to a time period in a restructuring forward looking situation.

31 Stephen at paragraphs 40-49 addressed the restructuring question in general and its applicability to the Stelco situation. At paragraph 41, he outlined the significant stages as follows:

> The process of restructuring under the CCAA entails a number of different stages, the most significant of which are as follows:
>
> (a) identification of the debtor's stakeholders and their interests;
>
> (b) arranging for a process of meaningful communication;
>
> (c) dealing with immediate relationship issues arising from a CCAA filing;
>
> (d) sharing information about the issues giving rise to the debtor's need to restructure;
>
> (e) developing restructuring alternatives; and
>
> (f) building a consensus around a plan of restructuring.

32 I note that January 29, 2004 is just 9-10 months away from November 2004. I accept as correct his conclusion based on his experience (and this is in accord with my own objective experience in large and complicated CCAA proceedings) that Stelco would have the liquidity problem within the time horizon indicated. In that regard, I also think it fair to observe that Stelco realistically cannot expect any increase in its credit line with its lenders or access further outside funding. To bridge the gap it must rely upon the stay to give it the uplift as to prefiling liabilities (which the Union

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misinterpreted as a general turnaround in its cash position without taking into account this uplift). As well, the Union was of the view that recent price increases would relieve Stelco's liquidity problems; however, the answers to undertaking in this respect indicated:

> With respect to the Business Plan, the average spot market sales price per ton was $514, and the average contract business sales price per ton was $599. The Forecast reflects an average spot market sales price per ton of $575, and average contract business sales price per ton of $611. The average spot price used in the forecast considers further announced price increases, recognizing, among other things, the timing and the extent such increases are expected to become effective. The benefit of the increase in sales prices from the Business Plan is essentially offset by the substantial increase in production costs, and in particular in raw material costs, primarily scrap and coke, as well as higher working capital levels and a higher loan balance outstanding on the CIT credit facility as of January 2004.

I accept that this is generally a cancel out or wash in all material respects.

33 I note that $145 million of cash resources had been used from January 1, 2003 to the date of filing. Use of the credit facility of $350 million had increased from $241 million on November 30, 2003 to $293 million on the date of filing. There must be a reasonable reserve of liquidity to take into account day to day, week to week or month to month variances and also provide for unforeseen circumstances such as the breakdown of a piece of vital equipment which would significantly affect production until remedied. Trade credit had been contracting as a result of appreciation by suppliers of Stelco's financial difficulties. The DIP financing of $75 million is only available if Stelco is under CCAA protection. I also note that a shut down as a result of running out of liquidity would be complicated in the case of Stelco and that even if conditions turned around more than reasonably expected, start-up costs would be heavy and quite importantly, there would be a significant erosion of the customer base (reference should be had to the Slater Hamilton plant in this regard). One does not liquidate assets which one would not sell in the ordinary course of business to thereby artificially salvage some liquidity for the purpose of the test: see *Pacific Mobile Corp., Re* (1979), 32 C.B.R. (N.S.) 209 (C.S. Que.) at p. 220. As a rough test, I note that Stelco (albeit on a consolidated basis with all subsidiaries) running significantly behind plan in 2003 from its budget of a profit of $80 million now to a projected loss of $192 million and cash has gone from a positive $209 million to a negative $114 million.

34 Locker made the observation at paragraph 8 of his affidavit that:

> 8. Stelco has performed poorly for the past few years primarily due to an inadequate business strategy, poor utilization of assets, inefficient operations and generally weak management leadership and decision-making. This point is best supported by the fact that Stelco's local competitor, Dofasco, has generated outstanding results in the same period.

Table 1 to his affidavit would demonstrate that Dofasco has had superior profitability and cashflow performance than its "neighbour" Stelco. He went on to observe at paragraphs 36-37:

> 36. Stelco can achieve significant cost reductions through means other than cutting wages, pensions and benefits for employees and retirees. Stelco could bring its cost levels down to those of restructured U.S. mills, with the potential for lowering them below those of many U.S. mills.
>
> 37. Stelco could achieve substantial savings through productivity improvements within the mechanisms of the current collective agreements. More importantly, a major portion of this cost reduction could be achieved through constructive negotiations with the USWA in an out-of-court restructuring that does not require intervention of the courts through the vehicle of CCAA protection.

I accept his constructive comments that there is room for cost reductions and that there are substantial savings to be achieved through productivity improvements. However, I do not see anything detrimental to these discussions and negotiations by having them conducted within the umbrella of a CCAA proceeding. See my comments above regarding the CCAA in practice.

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35 But I would observe and I am mystified by Locker's observations at paragraph 12 (quoted above), that Stelco should have borrowed to fund pension obligations to avoid its current financial crisis. This presumes that the borrowed funds would not constitute an obligation to be paid back as to principal and interest, but rather that it would assume the character of a cost-free "gift".

36 I note that Mackey, without the "laundry list" he indicates at paragraph 17 of his second affidavit, is unable to determine at paragraph 19 (for himself) whether Stelco was insolvent. Mackey was unable to avail himself of all available information in light of the Union's refusal to enter into a confidentiality agreement. He does not closely adhere to the BIA tests as they are defined. In the face of positive evidence about an applicant's financial position by an experienced person with expertise, it is not sufficient to displace this evidence by filing evidence which goes no further than raising questions: see *Anvil Range Mining Corp.*, *supra* at p. 162.

37 The Union referred me to one of my decisions *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1993), 13 O.R. (3d) 7 (Ont. Gen. Div.) where I stated as to the MacGirr affidavit:

> The Trustee's cause of action is premised on MacGirr's opinion that STC was insolvent as at August 3, 1990 and therefore the STC common shares and promissory note received by Trustco in return for the Injection had no value at the time the Injection was made. Further, MacGirr ascribed no value to the opportunity which the Injection gave to Trustco to restore STC and salvage its thought to be existing $74 million investment. In stating his opinion MacGirr defined solvency as:
>
> (a) the ability to meet liabilities as they fall due; and
>
> (b) that assets exceed liabilities.
>
> On cross-examination MacGirr testified that in his opinion on either test STC was insolvent as at August 3, 1990 since as to (a) STC was experiencing then a negative cash flow and as to (b) the STC financial statements incorrectly reflected values. As far as (a) is concerned, I would comment that while I concur with MacGirr that at some time in the long run a company that is experiencing a negative cash flow will eventually not be able to meet liabilities as they fall due but that is not the test (which is a "present exercise"). On that current basis STC was meeting its liabilities on a timely basis.

38 As will be seen from that expanded quote, MacGirr gave his own definitions of insolvency which are not the same as the s. 2 BIA tests (a), (b) and (c) but only a very loose paraphrase of (a) and (c) and an omission of (b). Nor was I referred to the *King Petroleum Ltd.* or *Proulx* cases *supra*. Further, it is obvious from the context that "*sometime in the long run . . . eventually*" is not a finite time in the foreseeable future.

39 I have not given any benefit to the $313 - $363 million of improvements referred to in the affidavit of William Vaughan at paragraph 115 as those appear to be capital expenditures which will have to be accommodated within a plan of arrangement or after emergence.

40 It seems to me that if the BIA (a) test is restrictively dealt with (as per my question to Union counsel as to how far in the future should one look on a prospective basis being answered "24 hours") then Stelco would not be insolvent under that test. However, I am of the view that that would be unduly restrictive and a proper contextual and purposive interpretation to be given when it is being used for a restructuring purpose even under BIA would be to see whether there is a reasonably foreseeable (at the time of filing) expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the say and ancillary protection and procedure by court authorization pursuant to an order. I think this is the more appropriate interpretation of BIA (a) test in the context of a reorganization or "rescue" as opposed to a threshold to bankruptcy consideration or a fraudulent preferences proceeding. On that basis, I would find Stelco insolvent from the date of filing. Even if one were not to give the latter interpretation to the BIA (a) test, clearly for the above reasons

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and analysis, if one looks at the meaning of "insolvent" within the context of a CCAA reorganization or rescue solely, then of necessity, the time horizon must be such that the liquidity crisis would occur in the sense of running out of "cash" but for the grant of the CCAA order. On that basis Stelco is certainly insolvent given its limited cash resources unused, its need for a cushion, its rate of cash burn recently experienced and anticipated.

41 What about the BIA (c) test which may be roughly referred to as an assets compared with obligations test. See *New Quebec Raglan Mines Ltd. v. Blok-Andersen*, [1993] O.J. No. 727 (Ont. Gen. Div. [Commercial List]) as to fair value and fair market valuation. The Union observed that there was no intention by Stelco to wind itself up or proceed with a sale of some or all of its assets and undertaking and therefore some of the liabilities which Stelco and Stephen took into account would not crystallize. However, as I discussed at the time of the hearing, the (c) test is what one might reasonably call or describe as an "artificial" or notional/hypothetical test. It presumes certain things which are in fact not necessarily contemplated to take place or to be involved. In that respect, I appreciate that it may be difficult to get one's mind around that concept and down the right avenue of that (c) test. See my views at trial in *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2001] O.J. No. 3394 (Ont. S.C.J. [Commercial List]) at paragraphs 13, 21 and 33; affirmed [2003] O.J. No. 5242 (Ont. C.A.). At paragraph 33, I observed in closing:

> 33 . . . They (and their expert witnesses) all had to contend with dealing with rambling and complicated facts and, in Section 100 BIA, a section which is difficult to administer when fmv [fair market value] in a notational or hypothetical market involves ignoring what would often be regarded as self evidence truths but at the same time appreciating that this notational or hypothetical market requires that the objects being sold have to have realistic true to life attributes recognized.

42 The Court of Appeal stated at paragraphs 24-25 as follows:

> 24. Nor are the appellants correct to argue that the trial judge also assumed an imprudent vendor in arriving at his conclusion about the fair market value of the OYSF note would have to know that in order to realize value from the note any purchaser would immediately put OYSF and thus OYDL itself into bankruptcy to pre-empt a subsequent triggering event in favour of EIB. While this was so, and the trial judge clearly understood it, the error in this submission is that it seeks to inject into the analysis factors subjected to the circumstances of OYDL as vendor and not intrinsic to the value of the OYSF note. The calculation of fair market value does not permit this but rather must assume an unconstrained vendor.
>
> 25. The Applicants further argue that the trial judge eroded in determining the fair market value of the OYSF note by reference to a transaction which was entirely speculative because it was never considered by OYDL nor would have it been since it would have resulted in OYDL's own bankruptcy. I disagree. The transaction hypothesized by the trial judge was one between a notational, willing, prudent and informed vendor and purchaser based on factors relevant to the OYSF note itself rather than the particular circumstances of OYDL as the seller of the note. This is an entirely appropriate way to determine the fair market value of the OYSF note.

43 Test (c) deems a person to be insolvent if "the aggregate of [its] property is not, at a fair valuation, sufficient, or of disposed at a fairly conducted sale under legal process would not be sufficient to enable payment of all [its] obligations, due and accruing due." The origins of this legislative test appear to be the decision of Spragge V-C in *Davidson v. Douglas* (1868), 15 Gr. 347 (Ont. Ch.) at p. 351 where he stated with respect to the solvency or insolvency of a debtor, the proper course is:

> to see and examine whether all his property, real and personal, be sufficient if presently realized for the payment of his debts, and in this view we must estimate his land, as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it would bring in the market at a forced sale, or a sale where the seller cannot await his opportunities, but must sell.

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44 In *Clarkson v. Sterling* (1887), 14 O.R. 460 (Ont. C.P.) at p. 463, Rose J. indicted that the sale must be fair and reasonable, but that the determination of fairness and reasonableness would depend on the facts of each case.

45 The Union essentially relied on garnishment cases. Because of the provisions relating as to which debts may or may not be garnished, these authorities are of somewhat limited value when dealing with the test (c) question. However I would refer to one of the Union's cases *Bank of Montreal v. I.M. Krisp Foods Ltd.*, [1996] S.J. No. 655 (Sask. C.A.) where it is stated at paragraph 11:

> 11. Few phrases have been as problematic to define as "debt due or accruing due". The Shorter Oxford English Dictionary, 3rd ed. defines "accruing" as "arising in due course", but an examination of English and Canadian authority reveals that not all debts "arising in due course" are permitted to be garnisheed. (See Professor Dunlop's extensive research for his British Columbia Law Reform Commission's Report on Attachment of Debts Act, 1978 at 17 to 29 and is text Creditor-Debtor Law in Canada, 2nd ed. at 374 to 385.)

46 In *Barsi v. Farcas* (1923), [1924] 1 D.L.R. 1154 (Sask. C.A.), Lamont J.A. was cited for his statement at p. 522 of *Webb v. Stenton* (1883), 11 Q.B.D. 518 (Eng. C.A.) that: "an accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation."

47 Saunders J. noted in *633746 Ontario Inc. (Trustee of) v. Salvati* (1990), 79 C.B.R. (N.S.) 72 (Ont. S.C.) at p. 81 that a sale out of the ordinary course of business would have an adverse effect on that actually realized.

48 There was no suggestion by any of the parties that any of the assets and undertaking would have any enhanced value from that shown on the financial statements prepared according to GAAP.

49 In *King Petroleum Ltd.*, *supra* at p. 81 Steele J. observed:

> To consider the question of insolvency under cl. (c) I must look to the aggregate property of the company and come to a conclusion as to whether or not it would be sufficient to enable payment of all obligations due and accruing due. There are two tests to be applied: First, its fair value and, secondly, its value if disposed of at a fairly conducted sale under legal process. The balance sheet is a starting point, but the evidence relating to the fair value of the assets and what they might realize if disposed of at a fairly conducted sale under legal process must be reviewed in interpreting it. In this case, I find no difficulty in accepting the obligations shown as liabilities because they are known. I have more difficulty with respect to the assets.

50 To my view the preferable interpretation to be given to "sufficient to enable payment of all his obligations, due and accruing due" is to be determined in the context of this test as a whole. What is being put up to satisfy those obligations is the debtor's assets and undertaking *in total*; in other words, the debtor in essence is taken as having sold everything. There would be no residual assets and undertaking to pay off any obligations which would not be encompassed by the phrase "all of his obligations, due and accruing due". Surely, there cannot be "orphan" obligations which are left hanging unsatisfied. It seems to me that the intention of "due and accruing due" was to cover off all obligations of whatever nature or kind and leave nothing in limbo.

51 S. 121(1) and (2) of the BIA, which are incorporated by reference in s. 12 of the CCAA, provide in respect to provable claims:

> S. 121(1) 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 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.

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> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such claim shall be made in accordance with s. 135.

52 *Houlden and Morawetz 2004 Annotated supra* at p. 537 (G28(3)) indicates:

> The word "liability" is a very broad one. It includes all obligations to which the bankrupt is subject on the day on which he becomes bankrupt except for contingent and unliquidated claims which are dealt with in s. 121(2).

However contingent and unliquidated claims would be encompassed by the term "obligations".

53 In *Gardner v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.), Mathers C.J.K.B. observed at p. 281 that "contingent claim, that is, a claim which may or may not ripen into a debt, according as some future event does or does not happen." See *A Debtor (No. 64 of 1992), Re*, [1993] 1 W.L.R. 264 (Eng. Ch. Div.) at p. 268 for the definition of a "liquidated sum" which is an amount which can be readily ascertained and hence by corollary an "unliquidated claim" would be one which is not easily ascertained, but will have to be valued. In *Gagnier, Re* (1950), 30 C.B.R. 74 (Ont. S.C.), there appears to be a conflation of not only the (a) test with the (c) test, but also the invocation of the judicial discretion not to grant the receiving order pursuant to a bankruptcy petition, notwithstanding that "[the judge was] unable to find the debtor is bankrupt". The debtor was able to survive the (a) test as he had the practice (accepted by all his suppliers) of providing them with post dated cheques. The (c) test was not a problem since the judge found that his assets should be valued at considerably more than his obligations. However, this case does illustrate that the application of the tests present some difficulties. These difficulties are magnified when one is dealing with something more significantly complex and a great deal larger than a haberdashery store - in the case before us, a giant corporation in which, amongst other things, is engaged in a very competitive history including competition from foreign sources which have recently restructured into more cost efficient structures, having shed certain of their obligations. As well, that is without taking into account that a sale would entail significant transaction costs. Even of greater significance would be the severance and termination payments to employees not continued by the new purchaser. Lastly, it was recognized by everyone at the hearing that Stelco's plants, especially the Hamilton-Hilton works, have extremely high environmental liabilities lurking in the woodwork. Stephen observed that these obligations would be substantial, although not quantified.

54 It is true that there are no appraisals of the plant and equipment nor of the assets and undertaking of Stelco. Given the circumstances of this case and the complexities of the market, one may realistically question whether or not the appraisals would be all that helpful or accurate.

55 I would further observe that in the notional or hypothetical exercise of a sale, then all the obligations which would be triggered by such sale would have to be taken into account.

56 All liabilities, contingent or unliquidated would have to be taken into account. See *King Petroleum Ltd.*, *supra* p. 81; *Salvati*, *supra* pp. 80-1; *Maybank Foods Inc. (Trustee of) v. Provisioners Maritimes Ltd.* (1989), 45 B.L.R. 14 (N.S. T.D.) at p. 29; *Challmie, Re* (1976), 22 C.B.R. (N.S.) 78 (B.C. S.C.), at pp. 81-2. In *Challmie* the debtor ought to have known that his guarantee was very much exposed given the perilous state of his company whose liabilities he had guaranteed. It is interesting to note what was stated in *Maybank Foods Inc. (Trustee of)*, even if it is rather patently obvious. Tidman J. said in respect of the branch of the company at p. 29:

> Mr. MacAdam argues also that the $4.8 million employees' severance obligation was not a liability on January 20, 1986. The *Bankruptcy Act* includes as obligations both those due and accruing due. Although the employees' severance obligation was not due and payable on January 20, 1986 it was an obligation "accruing due". The Toronto facility had experienced severe financial difficulties for some time; in fact, it was the major, if not the sole cause, of Maybank's financial difficulties. I believe it is reasonable to conclude that a reasonably astute perspective buyer of the company has a going concern would have considered that obligation on January 20, 1986 and that it would have substantially reduced the price offered by that perspective buyer. Therefore that obligation must be considered as an obligation of the company on January 20, 1986.

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57 With the greatest of respect for my colleague, I disagree with the conclusion of Ground J. in *Enterprise Capital Management Inc.*, *supra* as to the approach to be taken to "due and accruing due" when he observed at pp. 139-140:

> It therefore becomes necessary to determine whether the principle amount of the Notes constitutes an obligation "due or accruing due" as of the date of this application.
>
> There is a paucity of helpful authority on the meaning of "accruing due" for purposes of a definition of insolvency. Historically, in 1933, in *P. Lyall & Sons Construction Co. v. Baker*, [1933] O.R. 286 (Ont. C.A.), the Ontario Court of Appeal, in determining a question of set-off under the *Dominion Winding-Up Act* had to determine whether the amount claimed as set-off was a debt due or accruing due to the company in liquidation for purposes of that Act. Marsten J. at pp. 292-293 quoted from Moss J.A. in *Mail Printing Co. v. Clarkson* (1898), 25 O.R. 1 (Ont. C.A.) at p. 8:
>
>> A debt is defined to be a sum of money which is certainly, and at all event, payable without regard to the fact whether it be payable now or at a future time. And an accruing debt is a debt not yet actually payable, but a debt which is represented by an existing obligation: Per Lindley L.J. in *Webb v. Stenton* (1883), 11 Q.D.D. at p. 529.
>
> Whatever relevance such definition may have had for purposes of dealing with claims by and against companies in liquidation under the old winding-up legislation, it is apparent to me that it should not be applied to definitions of insolvency. To include every debt payable at some future date in "accruing due" for the purposes of insolvency tests would render numerous corporations, with long term debt due over a period of years in the future and anticipated to be paid out of future income, "insolvent" for the purposes of the BIA and therefore the CCAA. For the same reason, I do not accept the statement quoted in the Enterprise factum from the decision of the Bankruptcy Court for the Southern District of New York in *Centennial Textiles Inc., Re*, 220 B.R. 165 (U.S.N.Y.D.C. 1998) that "if the present saleable value of assets are less than the amount required to pay existing debt as they mature, the debtor is insolvent". In my view, the obligations, which are to be measured against the fair valuation of a company's property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied as, for example, a sinking fund payment due within the current year. Black's Law Dictionary defines "accrued liability" as "an obligation or debt which is properly chargeable in a given accounting period, but which is not yet paid or payable". The principal amount of the Notes is neither due nor accruing due in this sense.

58 There appears to be some confusion in this analysis as to "debts" and "obligations", the latter being much broader than debts. Please see above as to my views concerning the floodgates argument under the BIA and CCAA being addressed by judicially exercised discretion even if "otherwise warranted" applications were made. I pause to note that an insolvency test under general corporate litigation need not be and likely is not identical, or indeed similar to that under these insolvency statutes. As well, it is curious to note that the cut off date is the end of the current fiscal period which could have radically different results if there were a calendar fiscal year and the application was variously made in the first week of January, mid-summer or the last day of December. Lastly, see above and below as to my views concerning the proper interpretation of this question of "accruing due".

59 It seems to me that the phrase "accruing due" has been interpreted by the courts as broadly identifying obligations that will "become due". See *Viteway Natural Foods Ltd.* below at pp. 163-4 - at least at some point in the future. Again, I would refer to my conclusion above that *every obligation* of the corporation in the hypothetical or notional sale must be treated as "accruing due" to avoid orphan obligations. In that context, it matters not that a wind-up pension liability may be discharged over 15 years; in a test (c) situation, it is crystallized on the date of the test. See *Optical Recording Laboratories Inc. supra* at pp. 756-7; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at pp. 164-63-4; *Consolidated Seed Exports Ltd., Re* (1986), 62 C.B.R. (N.S.) 156 (B.C. S.C.) at p. 163. In *Consolidated Seed Exports Ltd.*, Spencer J. at pp. 162-3 stated:

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> In my opinion, a futures broker is not in that special position. The third definition of "insolvency" may apply to a futures trader at any time even though he has open long positions in the market. Even though Consolidated's long positions were not required to be closed on 10 th December, the chance that they might show a profit by March 1981 or even on the following day and thus wipe out Consolidated's cash deficit cannot save it from a condition of insolvency on that day. The circumstances fit precisely within the third definition; if all Consolidated's assets had been sold on that day at a fair value, the proceeds would not have covered its obligations due and accruing due, including its obligations to pay in March 1981 for its long positions in rapeseed. The market prices from day to day establish a fair valuation. . . .
>
> The contract to buy grain at a fixed price at a future time imposes a present obligation upon a trader taking a long position in the futures market to take delivery in exchange for payment at that future time. It is true that in the practice of the market, that obligation is nearly always washed out by buying an offsetting short contract, but until that is done the obligation stands. The trader does not know who will eventually be on the opposite side of his transaction if it is not offset but all transactions are treated as if the clearing house is on the other side. It is a present obligation due at a future time. It is therefore an obligation accruing due within the meaning of the third definition of "insolvency".

60 The possibility of an expectancy of future profits or a change in the market is not sufficient; *Consolidated Seed Exports Ltd.* at p. 162 emphasizes that the test is to be done on that day, the day of filing in the case of an application for reorganization.

61 I see no objection to using Exhibit C to Stephen's affidavit as an aid to review the balance sheet approach to test (c). While Stephen may not have known who prepared Exhibit C, he addressed each of its components in the text of his affidavit and as such he could have mechanically prepared the exhibit himself. He was comfortable with and agreed with each of its components. Stelco's factum at paragraphs 70-1 submits as follows:

> 70. In Exhibit C to his Affidavit, Mr. Stephen addresses a variety of adjustments to the Shareholder's Equity of Stelco necessary to reflect the values of assets and liabilities as would be required to determine whether Stelco met the test of insolvency under Clause C. In cross examination of both Mr. Vaughan and Mr. Stephen only one of these adjustments was challenged - the "Possible Reductions in Capital Assets."
>
> 71. The basis of the challenge was that the comparative sales analysis was flawed. In the submission of Stelco, none of these challenges has any merit. Even if the entire adjustment relating to the value in capital assets is ignored, the remaining adjustments leave Stelco with assets worth over $600 million less than the value of its obligations due and accruing due. This fundamental fact is not challenged.

62 Stelco went on at paragraphs 74-5 of its factum to submit:

> 74. The values relied upon by Mr. Stephen if anything, understate the extent of Stelco's insolvency. As Mr. Stephen has stated, and no one has challenged by affidavit evidence or on cross examination, in a fairly conducted sale under legal process, the value of Stelco's working capital and other assets would be further impaired by: (i) increased environmental liabilities not reflected on the financial statements, (ii) increased pension deficiencies that would be generated on a wind up of the pension plans, (iii) severance and termination claims and (iv) substantial liquidation costs that would be incurred in connection with such a sale.
>
> 75. No one on behalf of the USWA has presented any evidence that the capital assets of Stelco are in excess of book value on a stand alone basis. Certainly no one has suggested that these assets would be in excess of book value if the related environmental legacy costs and collective agreements could not be separated from the assets.

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63 Before turning to that exercise, I would also observe that test (c) is also disjunctive. There is an insolvency condition if the total obligation of the debtor exceed either (i) a fair valuation of its assets or (ii) the proceeds of a sale fairly conducted under legal process of its assets.

64 As discussed above and confirmed by Stephen, if there were a sale under legal process, then it would be unlikely, especially in this circumstance that values would be enhanced; in all probability they would be depressed from book value. Stephen took the balance sheet GAAP calculated figure of equity at November 30, 2003 as $804.2 million. From that, he deducted the loss for December 2003 - January 2004 of $17 million to arrive at an equity position of $787.2 million as at the date of filing.

65 From that, he deducted, reasonably in my view, those "booked" assets that would have no value in a test (c) sale namely: (a) $294 million of future income tax recourse which would need taxable income in the future to realize; (b) $57 million for a write-off of the Platemill which is presently hot idled (while Locker observed that it would not be prohibitive in cost to restart production, I note that neither Stephen nor Vaughn were cross examined as to the decision not to do so); and (c) the captialized deferred debt issue expense of $3.2 million which is being written off over time and therefore, truly is a "nothing". This totals $354.2 million so that the excess of value over liabilities before reflecting obligations not included in the financials directly, but which are, substantiated as to category in the notes would be $433 million.

66 On a windup basis, there would be a pension deficiency of $1252 million; however, Stephen conservatively in my view looked at the Mercer actuary calculations on the basis of a going concern finding deficiency of $656 million. If the $1252 million windup figure had been taken, then the picture would have been even bleaker than it is as Stephen has calculated it for test (c) purposes. In addition, there are deferred pension costs of $198.7 million which under GAAP accounting calculations is allowed so as to defer recognition of past bad investment experience, but this has no realizable value. Then there is the question of Employee Future Benefits. These have been calculated as at December 31, 2003 by the Mercer actuary as $909.3 million but only $684 million has been accrued and booked on the financial statements so that there has to be an increased provision of $225.3 million. These off balance sheet adjustments total $1080 million.

67 Taking that last adjustment into account would result in a *negative* equity of ($433 million minus $1080 million) or *negative* $647 million. On that basis without taking into account possible reductions in capital assets as dealt with in the somewhat flawed Exhibit E nor environmental and other costs discussed above, Stelco is insolvent according to the test (c). With respect to Exhibit E, I have not relied on it in any way, but it is entirely likely that a properly calculated Exhibit E would provide comparators (also being sold in the U.S. under legal process in a fairly conducted process) which tend to require a further downward adjustment. Based on test (c), Stelco is significantly, not marginally, under water.

68 In reaching my conclusion as to the negative equity (and I find that Stephen approached that exercise fairly and constructively), please note my comments above regarding the possible assumption of pension obligations by the purchaser being offset by a reduction of the purchase price. The 35% adjustment advocated as to pension and employee benefits in this regard is speculation by the Union. Secondly, the Union emphasized cash flow as being important in evaluation, but it must be remembered that Stelco has been negative cash flow for some time which would make that analysis unreliable and to the detriment of the Union's position. The Union treated the $773 million estimated contribution to the shortfall in the pension deficiency by the Pension Benefits Guarantee Fund as eliminating that as a Stelco obligation. That is not the case however as that Fund would be subrogated to the claims of the employees in that respect with a result that Stelco would remain liable for that $773 million. Lastly, the Union indicated that there should be a $155 million adjustment as to the negative equity in Sub Applicants when calculating Stelco's equity. While Stephen at Q. 181-2 acknowledged that there was no adjustment for that, I agree with him that there ought not to be since Stelco was being examined (and the calculations were based) on an unconsolidated basis, not on a consolidated basis.

69 In the end result, I have concluded on the balance of probabilities that Stelco is insolvent and therefore it is a "debtor company" as at the date of filing and entitled to apply for the CCAA initial order. My conclusion is that (i) BIA test (c) strongly shows Stelco is insolvent; (ii) BIA test (a) demonstrates, to a less certain but sufficient basis, an insolvency

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and (iii) the "new" CCAA test again strongly supports the conclusion of insolvency. I am further of the opinion that I properly exercised my discretion in granting Stelco and the Sub Applicants the initial order on January 29, 2004 and I would confirm that as of the present date with effect on the date of filing. The Union's motion is therefore dismissed.

70 I appreciate that all the employees (union and non-union alike) and the Union and the International have a justifiable pride in their work and their workplace - and a human concern about what the future holds for them. The pensioners are in the same position. Their respective positions can only be improved by engaging in discussion, an exchange of views and information reasonably advanced and conscientiously listened to and digested, leading to mutual problem solving, ideas and negotiations. Negative attitudes can only lead to the detriment to all stakeholders. Unfortunately there has been some finger pointing on various sides; that should be put behind everyone so that participants in this process can concentrate on the future and not inappropriately dwell on the past. I understand that there have been some discussions and interchange over the past two weeks since the hearing and that is a positive start.

*Motion dismissed.*

**APPENDIX**

**End of Document**

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# TAB 7

**Most Negative Treatment:** Distinguished
**Most Recent Distinguished:** DBDC Spadina Ltd. v. Walton | 2014 ONSC 3052, 2014 CarswellOnt 6516, 240 A.C.W.S. (3d) 887 | (Ont. S.C.J. [Commercial List], May 20, 2014)

1992 CarswellOnt 136
Ontario Court of Justice (General Division)

Canadian Imperial Bank of Commerce v. Graat

1992 CarswellOnt 136, [1992] O.J. No. 1112, 33 A.C.W.S. (3d) 1075, 5 B.L.R. (2d) 271

# CANADIAN IMPERIAL BANK OF COMMERCE and CLARKSON GORDON INC. v. ANTHONY H. GRAAT, JR. and KEY PROPERTY MANAGEMENT INC.

CANADIAN IMPERIAL BANK OF COMMERCE v. CARFRAE ESTATES LIMITED, carrying on business as KEY PROPERTY MANAGEMENT and KEY PROPERTY MANAGEMENT INC. and ANTHONY H. GRAAT, JR.

CANADIAN IMPERIAL BANK OF COMMERCE v. ANTHONY H. GRAAT, JR., CARFRAE ESTATES LIMITED and GLENCAIRN PLAZA LIMITED

Granger J.

Heard: March 18-22, 25-28, April 2-3, 1991
Judgment: May 27, 1992
Docket: Docs. 9440/86, 9441/86, 10787/86

Counsel: *C. Paliare, P. Wardle* and *M. Milezynski*, for plaintiffs.
*T. Kerzner, Q.C.*, and *M.A. McKillop*, for defendants.

Subject: Corporate and Commercial; Contracts; Torts
**Related Abridgment Classifications**
Debtors and creditors
XII Fraudulent conveyances
XII.10 Fraudulent intent
XII.10.g No bona fide conveyance
Debtors and creditors
XII Fraudulent conveyances
XII.10 Fraudulent intent
XII.10.i Miscellaneous
**Headnote**
Fraud and Misrepresentation --- Fraudulent conveyances — Fraudulent intent
Fraudulent conveyances — Transfers of assets to corporations, not subject to creditor's charges, designed to delay or defeat creditors — Transfer being fraudulent.
Bulk sales — Disposal of all income-producing assets of company to another company being bulk sale — Transfer set aside for failure to comply with Bulk Sales Act, R.S.O. 1980, c.52.
Breach of fiduciary duty — Creditor entrusting company to collect rents on its behalf — Failure of company to deposit rents into account of receiver, appointed upon application of creditor, amounting to breach of contract and breach of fiduciary duty.
The defendant AHG owned a number of residential and commercial buildings through a number of corporations (the "group") owned or controlled by AHG. The group's main source of funding was the plaintiff bank. Internal banking for

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the group was conducted by CE Ltd. CE Ltd. also had separate management and laundry contracts with each member of the group that owned a building. CE Ltd. owned the laundry equipment placed in each building. The bank held mortgages and interlocking guarantees of group members including CE Ltd. The group owed the bank approximately $38 million. CE Ltd. owed about $2 million directly and guaranteed the balance. In 1984, the group's loans became non-performing. Negotiations between AHG and the bank were unsuccessful. Loans to a trucking corporation, KT Ltd., owned by AHG, were also non-performing. The bank applied for a receiver for KT Ltd. AHG opposed the application. A receiver was appointed and KT Ltd. was eventually sold. AHG made it clear that he would oppose the bank.

On November 15, 1984, the bank made demand on CE Ltd. for the amount of approximately $2 million owed by it directly. On November 16, 1984, AHG opened accounts with another bank in the name of KPM Inc., a corporation owned and controlled by AHG, but over which the bank held no security interests.

On December 14, 1984, the bank's manager advised AHG that the bank would cease to provide banking services to CE Ltd. as of December 31, 1984.

CE Ltd. alleged that it sold all of its assets to KPM Inc., including its laundry equipment, on November 1, 1984 and tendered an invoice and promissory note for $149,402 from KPM Inc. to CE Ltd. as evidence thereof. On December 1, 1984, CE Ltd. alleged that it sold its laundry contracts to KPM Inc. for $1 each. KPM Inc. took over all of CE Ltd.'s laundry, management and banking services for the group.

AHG and the bank negotiated a settlement between November 1984 and March 1985 whereby AHG was to assist the bank in realizing on its security and AHG was to be released from his personal guarantees.

CE Ltd. owned a tract of land which it transferred on April 19, 1985 to GP Ltd., a corporation owned by AHG over which the bank held no security interests. The land transfer tax affidavit sworn by AHG recited cash consideration of $268,000. AHG delivered a statutory declaration to the bank relating to his net worth and the bank appointed a receiver for CE Ltd. to realize on its security. During meetings on April 26 and 29, 1985, the receiver learned for the first time of the transfer of the management agreements to KPM Inc. To avoid alarming tenants, the bank agreed to allow KPM Inc. to continue to manage the buildings for the receiver. Rents collected by KPM Inc. were deposited in an account at the bank in the name of the receiver without dispute from AHG. The receiver also learned in late April of the transfers of the laundry contracts and the tract of land. The receiver and AHG negotiated over the commission to which KPM Inc. should be entitled to manage the buildings. Agreement was reached although AHG was not happy with it.

Relations between AHG and the receiver deteriorated over the summer of 1985. The receiver obtained AHG's agreement to have rental payments made directly to it. When KPM Inc. failed to do so, the receiver took over all management. When rent cheques were not deposited to the receiver's account, the receiver commenced an action for them. KPM Inc. had deposited the rent in an account of another bank. These funds were withdrawn and put in the account of NE Ltd., another AHG corporation, at a third bank. Further withdrawals were also made. Later, withdrawals were made from the NE Ltd. account to AHG's account at an investment dealer. Further amounts were withdrawn from the investment dealer account and deposited in one of KPM Inc.'s accounts. The court traced these funds from the rent cheque deposits to KPM Inc.'s account. The receiver obtained orders on October 15 and 18, 1985 requiring KPM Inc. to turn over books and records and to account. KPM Inc. initially refused to comply. An officer of KPM Inc. lied about having a legal opinion that it did not have to deliver up the records. This officer, on AHG's instructions, also lied about the deposits of the rent proceeds to mislead the receiver and to avoid compliance with the court orders.

The receiver brought three actions to set aside the transfers of the laundry assets and the tract of land and to force recovery of the October rents.

**Held:**

Judgment for the plaintiff.

The bank alleged that the laundry assets, management contracts and land tract transfers were all made with intent to defeat, hinder, delay or defraud it and were void and that the transfers by CE Ltd. to KPM Inc. contravened the *Bulk Sales Act* (Ont.) and were void.

In a fraudulent conveyance, there must be proof of fraudulent intent. If the conveyance is for nominal or no consideration, all that needs to be established is fraudulent intent on the part of the transferor; otherwise, fraudulent intent must be found by both the transferor and the transferee. The court examined the various "badges of fraud" including the closeness of relationships between transferor and transferee, especially between a corporation and

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individuals who control it. This should apply to transfers between corporations controlled by the same individual. In this case, AHG owned and actively controlled the transferors and transferees.

CE Ltd. was the internal banker and managed and held laundry contracts for AHG's corporations, including many not subject to security interests in favour of the bank. AHG argued that the transfers were to enable AHG to carry on business.

This argument had no merit as AHG could have limited the transfers to buildings over which the bank had no security. AHG and one of his officers testified that the purchase price for the transfer of assets from CE Ltd. to KPM Inc. was satisfied by setting off a pre-existing debt. There was no documentation to substantiate such satisfaction. The laundry contracts were transferred for nominal consideration. The fact that the asset transfers took place November 1, 1984 but KPM Inc. did not take over management of the properties or receive transfer of the laundry contracts until December 1, 1984 was difficult to accept. The invoice and promissory note with respect to the transfers were not prepared and executed until at least December 1, 1984. The earlier date was an attempt to mislead the bank and the evidence was an attempt to mislead the court. The transfers were secretly made after the bank's demand. The sole purpose of the transfers was to put the assets beyond the reach of the bank.

AHG's evidence was that the tract of land was worth $100,000, even though his land transfer tax affidavit placed the value at $268,000. AHG saw nothing wrong with swearing a false affidavit. AHG testified that this transfer was to satisfy pre-existing debts to GP Ltd. but later stated that he did not know what CE Ltd. had received as consideration. There was no consideration for this transfer and the sole purpose was to put the property beyond the reach of the bank. Evidence of other reasons for the transfer was rejected. The purpose of the transfers was to strip CE Ltd. of its assets. The transfers were to defeat, delay, hinder and prejudice the bank and were fraudulent. The fact that the land tract transfer may have been made to a creditor did not prevent it from being a fraudulent conveyance, even if there was consideration, if both transferor and transferee had fraudulent intent. Even if there had been consideration for the land tract transfer, AHG, as the directing mind of both corporations, had the necessary fraudulent intent. The transfers were for the benefit of AHG.

The bank also attacked the transfer of the laundry contracts by CE Ltd. as contravening the *Bulk Sales Act*. The sale of assets and the assignment of contracts, together with KPM Inc.'s taking over property management and banking for the group, was a sale in bulk and required compliance with the *Bulk Sales Act*. CE Ltd. disposed of all of its income-producing assets. The Act was not complied with and the transfers of the laundry equipment and contracts were set aside.

The bank sought damages for conversion of such assets based on lost profits to CE Ltd. The damages were assessed on the basis of KPM Inc.'s profits on the contracts with certain adjustments. KPM Inc. disposed of the laundry equipment in breach of a court order and its undertaking. AHG directed such breach and was personally liable for the value of the assets transferred. The transfer of the tract of land was also for the sole purpose of protecting it from the bank. There was no credible evidence of good value received. A mortgage placed on the tract of land to gain priority for a tax payment on the land was set aside as part of the fraudulent transfers. The court inferred that AHG, or a member of the group, was a beneficiary of the trust set up as mortgagee.

The bank also attacked the transfers of the assets and contracts under the *Assignments and Preferences Act* (Ont.). The sole purpose of the transfers was to defeat, hinder, delay or prejudice the bank. AHG was the directing mind of the group and all parties knew the purpose of the transfers. CE Ltd. was insolvent when the bank made demand on it. The transfers were made two weeks later to corporations over which the bank had no security. The transfers were void under the *Assignments and Preferences Act*.

The bank sought judgment for October 1985 rents not deposited into the account of the receiver of CE Ltd. AHG argued that some rents were from six buildings over which the bank had no security. With respect to the six buildings, the bank had not yet appointed a receiver. In the settlement agreement of March 1985, it was clear that the six buildings were to assist the bank in reducing the group's indebtedness. KPM Inc. had no beneficial interest in the rents. They belonged to the corporate owners who agreed to assist the bank. Therefore, the bank was entitled to such rents under the March 1985 agreement.

There was no entitlement to the various claims for set-off, credits and management fees.

The bank also claimed that KPM Inc. and AHG were personally liable for the October rents, as KPM Inc. agreed to collect the rents for the bank and breached its contract and its fiduciary duty. The receiver was entitled to expect that KPM Inc. would act in the bank's best interests in collecting the rents. The bank entrusted KPM Inc. with that collection,

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which gave rise to a fiduciary relationship. The bank also argued that a constructive trust arose as KPM Inc. did not have any beneficial interest in the October rents. A constructive trust should be imposed to avoid unjust enrichment to KPM Inc.

AHG, as the sole shareholder and directing mind of KPM Inc., was personally involved in KPM Inc.'s breach of trust. AHG directed KPM Inc. to convert trust funds to his use before returning the funds to KPM Inc. and, therefore, AHG was personally liable.

Punitive damages were not awarded based on the transfers of assets but were awarded against AHG for deliberately misleading the receiver and the bank.

**Table of Authorities**

**Cases considered:**

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*Burton v. R & M Insurance Ltd.* (1977), 5 Alta. L.R. (2d) 14, 26 C.B.R. (N.S.) 49, 81 D.L.R. (3d) 455, 9 A.R. 589 (T.D.) — *considered*

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*Freeman v. Pope* (1870), 5 Ch. App. 538, 18 W.R. 906 — *referred to*

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*Wise, Re; Ex parte Mercer* (1986), 17 Q.B.D. 290, [1886-90] All E.R. Rep. Ext. 1723 (C.A.) — *referred to*

**Statutes considered:**

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s. 4 [R.S.O. 1990, c. A.33, s. 4]

Bulk Sales Act, R.S.O. 1980, c. 52 [R.S.O. 1990, c. B.14] —

s. 1 [R.S.O. 1990, c. B.14, s. 1]

s. 4 [R.S.O. 1990, c. B.14, s. 4]

s. 11 [R.S.O. 1990, c. B.14, s. 11]

s. 16 [R.S.O. 1990, c. B.14, s. 16]

Fraudulent Conveyances Act, R.S.O. 1980, c. 176 [R.S.O. 1990, c. F.29] —

s. 2 [R.S.O. 1990, c. F.29, s. 2]

s. 3 [R.S.O. 1990, c. F.29, s. 3]

s. 4 [R.S.O. 1990, c. F.29, s. 4]

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Fraudulent Conveyances Act, 1571 (U.K.), 13 Eliz. 1, c. 5 —

s. 1

s. 2

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Municipal Tax Sales Act, 1984, S.O. 1984, c. 48 [R.S.O. 1990, c. M.60] —

s. 5(3) [R.S.O. 1990, c. M.60, s. 5(3)]

Actions to recover damages for fraudulent conveyances and breaches of the *Bulk Sales Act* (Ont.).

***Granger J.*:**

1 Anthony H. Graat, Jr. ("Graat"), in 1985 owned through his corporations ("Graat Group") a substantial number of residential and commercial apartment buildings in or about London, Ontario. For many years Graat and the Canadian Imperial Bank of Commerce ("CIBC" or "bank") had a strong commercial relationship, with the CIBC being the main source of funds for the day-to-day operations, and the capital financing of the Graat Group. Each residential or commercial building was owned by a separate corporation which was owned or controlled by Graat.

2 The internal banking for all of the corporations which owned the apartment or commercial buildings was carried on by Carfrae Estates Limited ("Carfrae"), which owned modest assets. In addition to being the internal banker, Carfrae had separate management and laundry contracts with each corporation that owned an apartment building. Carfrae owned the laundry equipment which was placed in each building for use by the tenants. The corporations including Carfrae had interlocking guarantees to the bank. The CIBC held mortgage security over the apartment buildings collateral to those guarantees.

3 In the summer of 1984, the CIBC loans to the Graat Group amounted to approximately $38,000,000, of which $2,022,879.81 was directly owed by Carfrae. Carfrae, through its guarantees, was also liable for the whole $38,000,000.

4 During the summer of 1984 the Graat Group loans were non-performing and the bank dispatched Roy Turcotte of its Special Loan Division to London to take the necessary steps to realize on its security.

5 During the latter part of July 1984, Turcotte and William Beavers of Clarkson Gordon Inc. met with Graat in an attempt to arrange a mutually satisfactory arrangement for retirement of the indebtedness. Graat asked the CIBC to extend the time for repayment but such request was not acceptable to the bank, as it felt the financial situation of the Graat Group was worsening. In addition the King Truck Ltd. loan was non-performing. King Truck Ltd. was a manufacturing company owned by Graat and heavily financed by the CIBC although such financing was separate from the residential and commercial apartment financing. At the conclusion of the meeting, when it became apparent that the CIBC would be forced to take action to realize on its security, Graat said to Turcotte, "I hope you find me a worthy opponent," indicating that Graat did not intend to assist the CIBC.

6 Shortly after this meeting the bank brought an application in court for the appointment of a receiver-manager of King Truck Ltd. The application was opposed by Graat. During September 1984, Clarkson Gordon Inc. was appointed receiver-manager in the Supreme Court of Ontario of King Truck Ltd. and eventually sold the company in February 1985.

7 On November 15, 1984, the bank made a written demand on Carfrae for repayment of its loan and the loans which it guaranteed:

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> We hereby make formal demand for immediate payment of the indebtedness of Carfrae Estates Limited to this Bank amounting to $2,022,879.81 as at November 1, 1984, particulars of which are set out in Schedule 'A' attached to this letter. Photocopies of the promissory notes and other evidence of the said indebtedness may be obtained upon request. The said indebtedness together with an additional indebtedness owed by you to this Bank as at the date hereof and interest thereon must be paid immediately.

8 On the following day, November 16, 1984, Graat opened three bank accounts at Citibank Canada ("Citibank") in Toronto in the name of Key Property Management Inc. ("K.P.M. Inc."), a company wholly owned and controlled by Graat. The bank held no security over the assets of K.P.M. Inc.

9 On December 14, 1984, G.M. Foster, the manager of the CIBC branch at Dundas and Richmond, London, Ontario, gave Carfrae notice that the bank would cease to offer banking services to Carfrae as of December 31, 1984. This was the first notice that the bank had given Carfrae or the Graat Group that it would no longer offer banking services to the Graat Group.

10 Carfrae alleges that on November 1, 1984, it sold all of its assets, including the laundry equipment, to K.P.M. Inc. for $149,402. It is alleged that the sale is evidenced by an invoice of the same date and the promissory note due November 1, 1989 that K.P.M. Inc. gave to Carfrae on the same date.

11 On December 1, 1984, Carfrae alleges that it assigned its laundry contracts to K.P.M. Inc. for $1 per contract. On the same date Carfrae claims that the management of the apartment buildings was taken over by K.P.M. Inc. According to Graat, Carfrae had ceased its banking, laundry and management services for the Graat Group as of December 1, 1984 and K.P.M. Inc., a company over which the CIBC had no security, had taken over all of these services.

12 Between November 1984 and March 1985, the bank started numerous actions against Graat and his corporations in an attempt to realize on its security. Graat and his corporations during the same period commenced numerous actions against the bank for damages and discharge of the bank's security. On March 23, 1985, the CIBC, Graat and his corporations reached a compromise whereby Graat and his corporations consented to monetary judgments in favour of the bank and the appointment of receiver-managers of certain companies, including Carfrae. The consents were to be held by the bank in escrow until Graat delivered a statutory declaration setting out his personal and corporate net worth. If the bank was satisfied that Graat's personal net worth was less than $2,000,000, the bank was entitled to implement option no. 2 in the settlement, which provided that the consents being held by the bank were released from escrow and the bank was entitled to obtain judgment and appoint receiver-managers as agreed in the consents. In return the bank personally released Graat from his guarantees.

13 The general intent of the agreement was that Graat and his corporations would assist the bank in realizing on its security and in return Graat would be personally released from any liability to the bank. The settlement agreement allowed Graat one month to prepare his statutory declaration.

14 The preamble of the settlement agreement stated inter alia:

> (a) Graat is the owner of all (other than qualifying shares) of the issued capital stock of the Debtors and has guaranteed in favour of the Bank the debts, liabilities and obligations of the Debtors to it;
>
> (b) The Debtors together with King Truck Engineering Canada Limited, King Truck Properties Limited and King Truck Engineering Limited are collectively indebted to the Bank at this date in an amount exceeding Thirty Eight Million Dollars ($38,000,000), particulars of which shall be given by the Bank to Graat and the Debtors on request, which said indebtedness and all interest, fees and charges relating thereto shall hereinafter be referred to as the 'Indebtedness';

15 Section 5.01(g)(i) of the settlement agreement stated:

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(i) co-operate from the date hereof until at least August 24, 1986 with the Bank, its advisors and any Receiver and Manager or Agent appointed pursuant to the Securities for the purpose of assisting in the recoveries under such Securities and for such purpose shall at the request of a person designated by the Bank, upon reasonable prior notice make his services available to the Bank, its advisors or any such Receiver and Manager or Agent, without compensation, for a period of not less than six (6) hours per week including travel time outside the City of London.

16 Prior to March 23, 1985, Carfrae owned a tract of land referred to as the "Urlindale lands." On April 19, 1985, Carfrae transferred the property to Glencairn Plaza Limited ("Glencairn"), a Graat-owned corporation over which the bank had no security. The land transfer tax on the transfer which was sworn by Graat indicated that $268,000 was paid in cash for the property by Glencairn.

17 On April 23, 1985, Graat delivered his statutory declaration to the bank and which declaration showed Glencairn as the owner of the Urlindale land. The bank, after reviewing the declaration, elected to proceed with the settlement and the appointment of a receiver-manager to realize on its security. As Carfrae, to the bank's knowledge, was the banker for the corporations which owned the buildings and was the manager of the buildings through Key Property Management ("K.P.M."), the bank felt it was sufficient to have a receiver-manager appointed for Carfrae and not for the other owner corporations.

18 On May 1, 1985, the bank wrote to Clarkson Gordon Inc. advising that Carfrae was in default on its loan and appointing it (Clarkson Gordon Inc.) receiver-manager of the assets of the corporation under the terms of a debenture granted to it by Lynhurst Estates Limited, which subsequently amalgamated with Sheldrake Developments Limited, Richmond Racquet Courts Inc. and Carfrae Estates Limited to form Carfrae.

19 On April 26 and 29, 1985, William Beavers and William Stuart of Clarkson Gordon Inc. met with Graat and Wes Suchard ("Suchard"), Graat's accountant, to obtain agreement on Clarkson Gordon Inc. taking over as receiver of Carfrae. During these meetings Stuart learned for the first time that K.P.M. Inc. had taken over the management of the buildings from Carfrae.

20 The bank was concerned that if the tenants became aware that a receiver had been appointed they would withhold their rent and accordingly the bank and Graat agreed that K.P.M. Inc. would manage the buildings for the receiver. It was agreed that two new bank accounts would be opened at the bank. The first account was in the name of Clarkson Gordon Inc. as the receiver of Carfrae. Graat agreed that K.P.M. Inc. would deposit all rents collected into this account.

21 The second account was opened in the name of K.P.M. Inc. and all expenses were to be paid from this account under the signatures of K.P.M. Inc. and Clarkson Gordon Inc. Between May and September 1985, inclusive, K.P.M. Inc. deposited into the receiver's account all the rents it collected including the rents collected from 752 Kipps Lane, 1570 Adelaide Street, 4 Avon Rd, 45 and 49 Cheyenne Court, 110 Highview and 746 Fanshaw Park Road. The bank had security over all of the buildings from which rents were collected by K.P.M. Inc. and deposited into the receiver's account. In addition, the owners of all the buildings from which rents were collected were parties to the settlement agreement. During the five-month period from May to September 1985, Graat did not suggest by his conduct or otherwise that the receiver was not entitled to the deposited rents. K.P.M. Inc. provided Clarkson Gordon Inc. with monthly summaries of the rents which were collected and deposited.

22 The property management agreements provided that K.P.M. Inc. would pay the current expenses including the mortgage and property taxes. On May 1, 1985, numerous mortgages were in arrears and there were substantial tax arrears. The receiver attempted to deal with such arrears.

23 During the April meetings the bank, through Clarkson Gordon Inc., became aware that the laundry contracts had been assigned to K.P.M. Inc. and that Carfrae had sold all its assets to K.P.M. Inc. for $149,402. At the same time the receiver became aware that the Urlindale land had been transferred to Glencairn.

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24 During May and June 1985, negotiations were carried on between the receiver and Graat concerning the commission that K.P.M. Inc. would be paid for managing the buildings. In addition to negotiating the amount of commission, the receiver and Graat discussed K.P.M. Inc.'s entitlement to a commission on rents which were attorned to other mortgage-holders.

25 On June 10, 1985, Stuart wrote to Graat indicating that the receiver was prepared to pay K.P.M. Inc. a commission of 4-1/2 per cent of anticipated rents excluding those properties where the rents were already attorned and the commercial properties where the rents were being withheld or the current rents were insufficient to pay the operating costs. Although Graat was not happy with this compensation package, K.P.M. Inc. continued to collect the rents and deposit same in the account of the receiver until the end of September 1985. I am satisfied that this letter set out the terms of the arrangement which were accepted by K.P.M. Inc.

26 During the summer of 1985 the relationship between the receiver and Graat began to deteriorate as a result of the receiver's refusal to pay a commission on the attorned rents and the failure of K.P.M. Inc. to return the laundry contracts and assets to Carfrae. In addition the receiver and Graat were unable to reach any accord on the payment of commissions on the sale of lots in the Highland subdivision or compensation for Graat or his companies in negotiating the road extension in the subdivision with the City of London.

27 During the early part of September 1985, the receiver decided to take over complete control of rent receipts from K.P.M. Inc., leaving it with only property management duties. On September 9, 1985, Stuart and Beaver, on behalf of the receiver, R.D.S. Hunter, on behalf of the bank, and Graat, Souchard, and Israel, a solicitor representing Graat, met in an attempt to resolve the outstanding issues. The receiver asked K.P.M. Inc. to deliver to it the postdated rent cheques, execute directions to the tenants to pay future rent to Carfrae and return the laundry contracts and assets to Carfrae. Graat agreed on behalf of K.P.M. Inc. to turn over the postdated rent cheques, and indicated that K.P.M. Inc. would execute the required directions to have the tenants pay the October rent to the receiver of Carfrae.

28 On September 27, 1985, as a result of K.P.M. Inc.'s failure to deliver the postdated cheques and execute the directions, the receiver gave written notice to K.P.M. Inc. to cease all management functions as of October 11, 1985. K.P.M. Inc. was instructed by the receiver to deposit the October rents in the receiver's bank account. The receiver indicated that K.P.M. Inc. would be paid for its services at the usual rate.

29 On September 30, 1985, Graat indicated to Beavers that he would not undertake that K.P.M. Inc. would deposit the October rents in the receiver's account. On the same day the receiver wrote to K.P.M. Inc. demanding that all rents being held by K.P.M. Inc. be delivered to Thomas Ayers ("Ayers") of the receiver's office. When Ayers attended at K.P.M. Inc.'s office, Graat and Trent Krauel ("Krauel") refused to talk to him. On the same date the receiver served notice on Citibank claiming an interest in any moneys on deposit in the name of K.P.M. Inc.

30 When the October rents were not deposited in the receiver's account at the bank, the receiver immediately instituted proceedings to recover the October rents. Subsequent evidence revealed that the rents were deposited in account no. 034 in the name of K.P.M. Inc. at Citibank. On October 3, 1985, a cheque was issued to Graat from account no. 034 in the amount of $550,000 and which cheque was deposited at the Mercantile Bank of Canada to the credit of Norfolk 1980 Exploration Ltd. ("Norfolk"), a Graat company. On October 8, 1985, a further cheque in the amount of $75,000 was issued to Graat from account no. 034 and which cheque was deposited to the same account as the cheque for $550,000. At the same time $31,952.18 was transferred into account no. 018 at Citibank in the name of K.P.M. Inc. Citibank charged a service charge on account no. 034 of $57.50. Accordingly $657,009.68, the total amount of the October rent deposits were removed from account no. 034. On October 4, 1985, the sum of $375,000 was withdrawn from the Norfolk account and deposited in Graat's account at Merrill Lynch. On October 11, 1985, a further withdrawal was made from Norfolk in the amount of $250,000 and deposited in Graat's Merrill Lynch account. On October 21, 1985, $230,000 was withdrawn from Graat's Merrill Lynch account and deposited in K.P.M. Inc.'s account no. 018 at Citibank which had

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a balance of $31,952.18 as a result of the transfer from no. 034. On October 23, 1985, $395,000 was withdrawn from Graat's Merrill Lynch account and deposited in account no. 018.

31 Accordingly, three weeks after the rent moneys left account no. 034 at Citibank the funds returned to account no. 018 at Citibank in the name of K.P.M. Inc. I have absolutely no doubt that the funds removed from account no. 034 were the funds returned to account no. 018 at Citibank.

32 On October 15, 1985, Clarkson Gordon Inc. obtained orders in the Supreme Court of Ontario appointing it receiver-manager without security of various apartment buildings and requiring K.P.M. Inc., its directors, officers, employees and agents to forthwith deliver to it all books and records, and moneys received from tenants. In addition K.P.M. Inc. was ordered to account to the receiver for all moneys received and disbursed.

33 On October 17, 1985, Ayers, on Stuart's instructions, personally delivered to Graat at the office of K.P.M. Inc. the orders, and by letter demanded that all of the documents, records and moneys be delivered to Clarkson Gordon on October 18, 1985. Graat was upset at being served with the orders and ordered Ayers from his office premises. A copy of such letter was also delivered to Israel and Krauel on the same date.

34 On October 18, 1985, the receiver obtained further orders in the Supreme Court of Ontario, which allowed the receiver to enter the premises of K.P.M. Inc. to recover the books, records and moneys which K.P.M. Inc. had failed to deliver. On October 18, 1985, Ayers again went to the head office of K.P.M. Inc. to serve the new orders on Graat and was advised that Graat was not in and Krauel would not see him. Ayers left the orders with the receptionist indicating that such orders should be delivered to Graat or Krauel. I have no doubt that shortly thereafter Graat and Krauel became aware of the October 18, 1985 orders.

35 On October 21, 1985, Ayers and four other members of Clarkson Gordon went to the office of K.P.M. Inc. and met with Krauel in order to take possession of the documents which still had not been produced. Ayers asked Krauel for details of the deposit records for the October rents. Krauel refused to provide such details or records claiming that he had a legal opinion from Brown, Beattie, a law firm, that the orders did not require production of such records. At trial the defendants did not call as a witness any member of the firm of Brown, Beattie to establish that such an opinion had been given to Krauel, Graat or K.P.M. Inc. Given the relative ease to call as a witness the author of such opinion, and in all of the surrounding circumstances, it is a reasonable inference that if a lawyer from Brown, Beattie had been called as a witness he or she would not have indicated that such an opinion was rendered. In my opinion this statement by Krauel was a total fabrication to justify the refusal to deliver up the records for the October rents. Later on the same day the receiver wrote to Krauel requesting an accounting of such moneys be provided by October 23, 1985. On October 23, 1985 Krauel, on Graat's instructions, wrote to the receiver stating:

> In reply to the above, we now provide copies of the deposit slips and advise youu that all related funds have been disbursed in full.

The enclosed deposit slips showed that the rents had been deposited to Citibank account no. 034 in the name of K.P.M. Inc. This letter was an attempt by Graat to mislead the receiver and to avoid compliance with the orders of the Chief Justice of the High Court. Graat knew that part of the rent deposits were in account no. 018 at Citibank in the name of K.P.M. Inc. and at least by the end of the day the remaining rent moneys had been transferred from Graat's Merrill Lynch account to no. 018 at Citibank. Eventually the funds in account no. 018 at the Citibank were frozen by court order until it could be determined to whom the funds belonged.

36 The CIBC and Clarkson Gordon Inc. have brought before this court three actions which they have initiated against Graat and certain of his corporations.

37 Action 9441/86 is brought by the bank against Carfrae Estates Limited carrying on business as Key Property Management and Key Property Management Inc. and Anthony H. Graat, Jr. This action relates to the alleged sale of assets and assignment of laundry contracts from Carfrae to K.P.M. Inc.

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38 Action 10787/86 is brought by the bank against Graat, Carfrae Estates Limited and Glencairn Plaza Limited and relates to the alleged transfer of the Urlindale land to Glencairn which was registered on April 25, 1985.

39 The third action is 9440/86 and is brought by both the bank and Clarkson Gordon Inc. against Graat and K.P.M. Inc. This action related to the October 1985 rents which K.P.M. Inc. refused to pay over to Clarkson Gordon Inc.

**The Carfrae Assets and Laundry Contracts Action 9441/86 and the Urlindale Land Transfer Action 10787/86**

40 The bank attacks these transfers on the grounds that such transfer were made with the intent to defeat, hinder, delay or defraud it and as such, the transfers are void. The bank also alleges that the sale of assets by Carfrae to K.P.M. Inc. contravenes the provisions of the *Bulk Sales Act*, R.S.O. 1980, c. 52 and as such, the transfer is void.

41 The *Fraudulent Conveyances Act*, R.S.O. 1980, c. 176, ss. 2, 3 and 4, states:

> *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. R.S.O. 1970, c. 182, s. 2.
>
> *3.* Section 2 does not apply to an estate or interest in real property or personal property conveyed upon good consideration and *bona fide* to a person not having at the time of the conveyance to him notice or knowledge of the intent set forth in that section. R.S.O. 1970, c. 182, s. 3.
>
> *4.* Section 2 applies to every conveyance executed with the intent set forth in that section notwithstanding 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 *bona fides* and want of notice or knowledge on the part of the purchaser. R.S.O. 1970, c. 182, s. 4

42 C.R.B. Dunlop, in his text *Creditor-Debtor Law in Canada* (Toronto: Carswell, 1981), describes the purpose of such legislation at p. 513:

> **3. Fraudulent Conveyances**
>
> ***(a) Generally***
>
> The purpose of the Statute of Elizabeth and of the Canadian Acts based on it, as interpreted by the courts, is to strike down all conveyances of property made with the intention of delaying, hindering or defrauding creditors and others except for conveyances made for good consideration and *bona fide* to persons not having notice of such fraud. The legislation is couched in very general terms and should be interpreted liberally. Lord Mansfield concluded that the common law had always been strongly against fraud in every shape and that the Statute of Elizabeth 'cannot receive too liberal a construction, or be too much extended in suppression of fraud'. Relying on this policy, the courts have interpreted the statute to include any kind of alienation of property made with the requisite intent, the form of the transaction being immaterial. Similarly the legislation has been held to invalidate a conveyance of any kind if exigible or attachable property of the debtor, so long as it is of some real value.

[Footnotes omitted.]

43 In a fraudulent conveyance action there must be proof of fraudulent intent. If the conveyance is made for nominal or no consideration the court need only consider if there is fraudulent intent on the part of the transferor whereas if there is consideration, the transaction can be found to be fraudulent if there is fraudulent intent on the part of both the transferor and transferee.

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44 Over the years the courts have loosely defined what are called badges of fraud, which have been interpreted as indicating a presence of fraud in the transaction.

45 In *Creditor-Debtor*, supra, Dunlop states at pp. 525-526:

> **(d) The Proof of Intent**
>
> We noted earlier that the crucial problem in any fraudulent conveyance action is to prove the fraudulent intent of the debtor and, in the case of transfers for value, the concurrence of the transferee. We discussed the presumptions developed by the courts to aid them in finding fraud in certain types of voluntary transactions (Kerr's class (1)). Even where fraud must be proved as a fact, the courts as early as *Twyne's Case* [(1601), 76 E.R. 809] developed evidentiary rules which would enable them to find fraud unless the supporters of the transaction could explain away the suspicious circumstances. These rules have come down to us today as the so-called badges of fraud.
>
> While the legal or persuasive burden to prove the case remains on the plaintiff throughout the trial, the plaintiff may raise an inference of fraud sufficient to shift the evidentiary burden to the defendant if he can establish that the transaction has characteristics which are typically associated with fraudulent intent. No doubt proof of one or several badges of fraud will not compel a finding for the plaintiff, but it does raise a *prima facie* case which it would be prudent for the defendant to attempt to rebut.
>
> Lists of the badges of fraud vary from writer to writer, and no comprehensive catalogue is likely to be agreed upon. The judges in *Twyne's Case* listed six 'signs and marks of fraud' present in the facts before them:
>
> > (1) The gift was general 'without exception of his apparel, or any thing off necessity'.
> >
> > (2) The donor continued in possession and used the goods as his own, including selling them.
> >
> > (3) The transaction was secret.
> >
> > (4) The transfer was made pending the writ.
> >
> > (5) The transfer amounted to a trust of the goods 'and fraud is always apparelled and clad with a trust, and a trust is the cover of fraud'.
> >
> > (6) The deed contained the self-serving and unusual provision 'that the gift was made honestly, truly, and bona fide'.
> >
> > Later judges and writers have added other fact situations which raise one's suspicions of fraud:
> >
> > (7) The deed gives the grantor a general power to revoke the conveyance.
> >
> > (8) The deed contains false statements as to the consideration.
> >
> > (9) The consideration is grossly inadequate.
> >
> > (10) There is unusual haste to make the transfer.
> >
> > (11) Some benefit is retained under the settlement by the settlor.
> >
> > (12) Cash is taken in payment instead of a cheque.
> >
> > (13) A close relationship exists between the parties to the conveyance.
>
> One can think of other candidates for the list.

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[Footnotes omitted.]

46 In considering a close relationship between the parties as a badge of fraud and the evidentiary effect of such relationship in a fraudulent conveyance action, Dunlop, in *Creditor-Debtor*, supra, stated at pp. 526-527:

> Perhaps the most common type of fraudulent conveyance, and one which is bound to attract suspicion, is the sale or gift of property to a close relative. The existence of this close relationship between the parties is itself a badge of fraud, but the courts have gone further and have developed a secondary evidentiary rule applicable to these kinds of conveyances.
>
> The leading Canadian case is *Koop v. Smith* in which it was sought to set aside a bill of sale executed in favour of the defendant by her brother at a time when the latter was financially embarrassed. Counsel for the plaintiff urged the Supreme Court to accept and apply a rule developed in the Ontario courts to the effect that where the transaction in question occurs between close relatives, the evidence of the relatives as to *bona fide* should be corroborated.
>
> The Supreme Court held that the bill of sale should be declared to be void but their comments on the Ontario corroboration rule do not go quite as far as plaintiff's counsel appears to have argued. Davies J. commented as follows:
>
>> I think the rule laid down by the Courts of Ontario with regard to assignments made between near relations and impeached by the creditors of the assignor as fraudulent is a salutory one, namely, that where it is accessible some corroborative evidence of the *bona fides* of the transaction should be given.
>
> Duff J. considered the proposed rule at greater length. He began by noting that the trial judge appeared to have held that a suspicious transaction between close relatives can only be supported by corroborative evidence. He submitted this proposition to a long but useful analysis:
>
>> I do not think the proposition put thus absolutely is part of the English law or of the law of British Columbia; but I think it is a maxim of prudence based upon experience that in such cases a tribunal of fact may properly act upon that when suspicion touching the reality or the *bona fides* of a transaction between near relatives arises from the circumstances in which the transaction took place then the fact of relationship itself is sufficient to put the burden of explanation upon the parties interested and that, in such a case, the testimony of the parties must be scrutinized with care and suspicion; and that it is very seldom that such evidence can safely be acted upon as in itself sufficient. ...
>>
>> I may add that I think it doubtful whether the Ontario decisions when properly read really do lay it down as a rule of law that the fact of relationship is sufficient in itself to shift the burden of establishing the burden of proof in the strict sense. It may be that the proper construction of these cases is that the burden of giving evidence and not the burden of the issue is shifted. (As to this distinction see the admirable chapter IX, in Professor Thayer's "Law of Evidence".) In my own view as indicated above, even this would be putting the matter just a little too high; I think the true rule is that suspicious circumstances coupled with 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.

47 The principle enumerated in *Koop v. Smith* (1915), 51 S.C.R. 554, 8 W.W.R. 1203, 25 D.L.R. 355, has been extended to transfers between individuals and companies which they control: see *Martineau v. Martineau* (1969), 5 D.L.R. (3d) 165 (B.C.S.C.); *Burton v. R & M Insurance Ltd.* (1977), 5 Alta. L.R. (2d) 14, 26 C.B.R. (N.S.) 49, 81 D.L.R. (3d) 455, 9 A.R. 589 (T.D.). I see no reason why such principle should not be applied to transfers between companies when such companies are owned and controlled by the same individual. Here Graat not only owned and controlled all of the corporations, but actively directed their activities including the transfers, as evidenced by his execution of the transfer documents.

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48 The intent necessary to void the transfer and the process of determining intent was reviewed by Dunlop in *Creditor-Debtor*, supra, in his discussion of *Freeman v. Pope* (1870), 5 Ch. App. 538, 18 W.R. 906, and *Re Wise; Ex parte Mercer* (1886), 17 Q.B.D. 290, [1886-90] All E.R. Rep. Ext. 1723 (C.A.) at pp. 515-518 of his text:

> The second important English case is *Re Wise; Ex parte Mercer*, decided 16 years later. The bankrupt Wise was a master mariner, who in 1881 was engaged to be married to Miss Vyse. However, while in Hong Kong in the course of a voyage, he married another lady. In August of 1881, the slighted Miss Vyse sued the bankrupt for breach of promise and he was served with the writ in Hong Kong. About the same time, Wise was informed that a legacy of £500 had vested in him. He promptly assigned the legacy to a trustee to invest the same and to pay the income during the joint lives of Wise and his wife to his wife and then to the survivor of the two. After the death of the survivor, the trustee was to hold the trust fund for the children of the marriage and in default of children for Wise absolutely. In 1882, Miss Vyse obtained what Lord Esher described as a 'vindictive' and 'startling' judgment for £500 damages. In 1884, Wise was adjudicated a bankrupt.
>
> Wise's trustee in bankruptcy challenged the settlement of the legacy as fraudulent and void and was successful in the County Court. The decision was reversed by the Divisional Court, whose judgment was upheld by the Court of Appeal. The reasoning of the judges is complicated and should be examined closely.
>
> Lord Esher M.R. described the argument of the trustee in bankruptcy as follows:
>
> > It is necessary to prove that the bankrupt, at the date of the voluntary settlement, intended to defeat and delay a creditor or his creditors generally; the necessary consequence of what he did was to defeat and delay his creditors; and, therefore, as a proposition of law, the tribunal which had to consider whether he did intend to defeat and delay his creditors was bound to find that he did.
>
> Lord Esher noted that 'dicta of great and eminent judges' were cited in support of the argument, but he rejected it firmly.
>
> > I will venture to say as strongly as I can that to my mind that proposition is monstrous. It is said that it is a necessary inference that a man intends the natural and necessary result of his acts. If you want to find out the intention in a man's mind, of course you cannot look into his mind, but, if circumstances are proved from which you believe that he had a particular intention, you infer as a matter of fact that he had that intention. No doubt, in coming to a particular conclusion as to the intention in a man's mind, you should take into account the necessary result of the acts which he has done. I do not use the words "necessary result" metaphysically, but in their ordinary business sense, and of course, if there was nothing to the contrary, you would come to the conclusion that the man did intend the necessary result of his acts. But, if other circumstances make you believe that the man did not intend to do that which you are asked to find that he did intend, to say that, because that was the necessary result of what he did, you must find, contrary to the other evidence, that he did actually intend to do it, is to ask one to find that to be a fact which one really believes to be untrue in fact.
>
> Lord Esher then added an ambiguous and controversial reser vation to the above conclusion.
>
> > Whether the fact that the necessary effect of a voluntary deed is to defeat or delay the creditors of the grantor will make the deed void under the statute of Elizabeth, although there was no such intent in his mind at the time when he executed it, is a question which we are not now called upon to decide. But that is a question wholly independent of the question of intention. That may be the law; the Courts may have put that construction on the statute. But that is a different proposition from that which was put forward in argument, and I will not undertake to decide it now.
>
> Lord Esher went on to hold that at the time of the settlement the bankrupt owed no one any money except Miss Vyse, and the amount of her recovery in the breach of promise action was highly speculative. Wise was not therefore

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insolvent, it was not the necessary consequent of his settlement to defeat his creditors and he had no intention to do so.

49 In *Burton v. R & M Insurance Ltd.*, supra, the defendant company agreed to purchase an insurance business owned by the plaintiff. Before all the instalments on the purchase price were paid, the defendant corporation disposed of all of its assets. Payments were made to the individual defendant to repay shareholder loans. Poole was the majority shareholder, and the chief executive officer of the corporation. The plaintiff alleged the payments to Poole were made fraudulently and with the intent to defeat, hinder, delay and prejudice the plaintiff, a creditor of the corporate defendant.

50 The plaintiff brought his action under the Statute of Elizabeth, 1571, c. 5, ss. 1, 2 (fraudulent conveyance) and *The Fraudulent Preferences Act*, R.S.A. 1970, c. 148.

51 Dechene J. stated at pp. 17-18 [Alta. L.R.]:

> The question before me, therefore, is whether the depletion of the company's assets by payments to the defendant Poole was in contravention of the Statute of Elizabeth, 1571, c. 5, described in its title as an Act against Fraudulent Deeds, Gifts, Alienations, etc. and of The Fraudulent Preferences Act, R.S.A. 1970, c. 148.
>
> Sections 1 and 2 of the Statute of Elizabeth are in force in Alberta: see *Goyan v. Kinash*, [1945] 1 W.W.R. 291, [1945] 2 D.L.R. 749 (Alta.); and *Bank of N.S. v. Zgurski* (1970), 72 W.W.R. 464, 14 C.B.R. (N.S.) 185 (Alta.).
>
> The distinction between the two statutes is that the Statute of Elizabeth does not require the plaintiff to prove that the debtor was insolvent. He need only show that the result of the impugned conveyance has the necessary consequence that there is nothing left for his creditor: *Bludoff v. Osachoff*, 22 Sask. L.R. 533, [1928] 2 W.W.R 150 at 153, [1928] 3 D.L.R. 179 (C.A.), and cases therein cited:
>
>> It is not necessary in such a case as this to show that the debtor was insolvent. By the transfers and bill of sale he deprived himself of all his property, with the necessary consequence that there was nothing left for his creditors. The inference to be drawn from that fact is that the transfers were fraudulent. *Kent v. Riley* (1872), L.R. 14 Eq. 190, 41 L.J. Ch. 569; *Smith v. Cherrill* (1867), L.R. 4 Eq. 390 at 395, 36 L.J. Ch. 738.
>>
>> In such a case it is not necessary to prove an intention to defeat, delay or defraud, as the conveyance is calculated to have that effect. Even if there were good consideration, the conveyance must be *bona fide* as well to take the transaction out of the *Statute of Elizabeth*, 13 Eliz., ch. 5.
>
> Another rule which applies to conveyances between close relatives which have the effect of defeating the claims of creditors is that the onus of establishing the validity of the transaction is upon the parties upholding it: *Koop v. Smith* (1915), 51 S.C.R. 554, 8 W.W.R. 1203, 25 D.L.R. 355.
>
> The provisions of The Fraudulent Preferences Act of Alberta, however, are limited to insolvent persons and to preferences of particular creditors or classes of creditors. There must be an intent to give, and by the creditor to receive, a preference over other creditors and the court must be satisfied that such preference was the predominant intent of the debtor.
>
> The problem arose more frequently in cases of conveyances between close relatives. The same principles apply, however, to conveyances between individuals and companies controlled by those individuals: *Re Martineau and Martineau* (1969), 5 D.L.R. (3d) 165 (B.C.); and *Faulhaber v. Ulseth*, [1976] 4 W.W.R. 48, 66 D.L.R. (3d) 488 (Alta.).
>
> In the latter case, my brother Steer J. held, in dealing with the question of intent to delay, hinder or defraud creditors, that the intent of the company and the intent of defendant who was the president and controlling force of the company were one and the same. He states [pp. 59-60]:

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> The fact that the company gave consideration cannot save the transaction if the company had an actual intent to defraud, delay or hinder Faulhaber in recovering his judgment: *Reutcke v. Reutcke* (1958), 24 W.W.R. 417 at 422-423 (Man.); *Bank of N.S. v. Zgurski* [supra].

Under both statutes, I conclude that the payments to the defendant Poole must be set aside.

Under the English Statute which is in force in this province, the intent to defraud the plaintiff must be presumed as the transaction divested the defendant company of all its assets thereby defeating the claim of the plaintiff. The circumstances surrounding the payments to the defendant Poole do not establish a bona fide claim by him and he has not satisfied the onus of proof upon him. Under The Fraudulent Preferences Act, I find that the defendant company was insolvent or on the eve of insolvency, and by stripping itself of its assets it defeated the plaintiff's claim. Because of the close relationship between the company and its major shareholder I find there was a common intent between them.

For the foregoing reasons there will be a judgment in favour of the plaintiff in the amount of $10,000 plus costs to be taxed on col. 4(c) (r), limiting rules not to apply.

52 In this case Carfrae, through Key Property Management, had been the property manager of Graat's apartment complexes for many years. Also, Carfrae owned the washing machines and dryers located in the buildings and had acquired contracts with the owners of each building to maintain the profitable laundry facilities.

53 On November 15, 1984, when the bank made its demand on Carfrae, Graat through his individual corporations owned, in addition to the 30 buildings over which the bank had security, 20 additional apartment buildings. Carfrae was the internal banker for these corporations. In addition, Carfrae managed these buildings and had laundry service contracts with each building owner. Graat submits that in order to continue the operation of the buildings which were not subject to CIBC security, it was necessary to transfer the assets of Carfrae to K.P.M. Inc. and to assign the laundry contracts to K.P.M. Inc. According to Graat the transfers and assignments were not for the purpose of defeating, hindering or delaying the claim of the bank but rather to allow him to carry on business. In my opinion this argument lacks any merit. If the transfers had been for the purpose of allowing Graat to operate through his corporations the other 20 buildings over which the bank had no security, he could have directed Carfrae to sell or assign only those contracts or assets relating to those buildings.

54 Graat in his evidence suggests that on November 1, 1984 Carfrae transferred all of its assets to K.P.M. Inc. for $149,402. Graat says that the sale is evidenced by an invoice and promissory note both dated November 1, 1984. Krauel suggests that the promissory note was satisfied by the setting-off of a pre-existing debt owed by Carfrae to K.P.M. Inc. Neither Krauel nor Graat were able to produce any documentation to substantiate such satisfaction. The laundry contracts were assigned by Carfrae to K.P.M. Inc. on December 1, 1984 for $1 per contract.

55 It is difficult to accept that K.P.M. Inc. would, on November 1, 1984, purchase all the assets of Carfrae which included all its washers and dryers but not take over management of the properties or purchase the laundry contracts until December 1, 1984. In my opinion the invoice which was signed by Graat on behalf of Carfrae as the vendor and on behalf of K.P.M. Inc. as the purchaser was not prepared and not executed until at least December 1, 1984 and the dating of the invoice and promissory note was an attempt by Graat to mislead the CIBC and his evidence at trial was an attempt to mislead the court. At the same time that the laundry contracts were assigned, K.P.M. Inc. took over as the internal banker of the Graat companies and also took over the management of all of the buildings.

56 In this case the transfers from Carfrae to K.P.M. Inc. were made after the bank made its demand and were made in secrecy. The transfers were from Carfrae to K.P.M. Inc., corporations wholly owned and solely directed by Graat and to a corporation over which the bank had no security. In my opinion, the sole purpose of such transfers was to put the assets beyond the reach of the bank as the bank had no security over K.P.M. Inc. or its assets.

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57 On April 19, 1985, Carfrae transferred the Urlindale lands to Glencairn. The transfer was executed by Graat on behalf of Carfrae and the land transfer which Graat swore to be true indicated that Glencairn paid $268,000 in cash for the property. Glencairn was a corporation wholly owned by Graat and over which the bank had no security.

58 During his evidence Graat said that the fair market value of the property at the time of transfer was $100,000 and when he was challenged on the accuracy of the land transfer tax affidavit which he swore to be true, he replied that he did not think the inaccuracy was that important.

59 This evidence provides an insight into the credibility and business morality of Graat. I gained the impression that he saw nothing wrong in swearing a false affidavit. This evidence leads me to believe that Graat has no respect for the taking of an oath to tell the truth. When Graat and his corporations entered into the settlement agreement, Graat was given 30 days to file his statutory declaration of his financial affairs. Graat declared his financial statement to be true on April 23, 1985, four days after the Urlindale property was transferred to Glencairn.

60 The statement of defence in Action 10787/86 (Urlindale land action) states in para. 6:

> 6. The Defendants including Glencairn Plaza Limited, further state that the aforementioned transfer was effected for the purpose of satisfying or securing a substantial pre-existing debt of approximately $268,000 owing to Glencairn Plaza Limited by Carfrae Estates Limited.

61 Krauel and Graat said that the transfer to Glencairn was effected to satisfy pre-existing debts owing by Carfrae to Glencairn in the amount of $268,000. After cross-examination Krauel was forced to admit that he did not know what Carfrae received by way of consideration for the transfer. When I consider that at the time of the transfer Graat had consented to a receiver-manager being appointed for Carfrae although such consent was being held in escrow and the transfer was to a company solely owned by Graat and over which the CIBC had no security, I am convinced beyond any doubt that there was no consideration for the transfer and the transfer was for the sole purpose of putting the property beyond the reach of the CIBC.

62 Graat suggested that he had given D.P. Casino, a lawyer in London, instructions to transfer the property many months before for tax purposes. The defence did not see fit to call Casino as a witness and considering all of the circumstances including Casino's account, I am satisfied Casino would not have corroborated the evidence of Graat.

63 The defence called as a witness Suchard, a chartered accountant and partner with Coopers & Lybrand, a prominent and large accounting firm. Suchard appeared with Graat when the settlement was reached in March 23, 1985, and at various meetings with Clarkson Gordon Inc. It was my impression that Suchard was Graat's chief chartered accountant and he (Suchard) was the designer of the Graat corporate empire.

64 According to Graat the bank was aware and consented to the transfer of assets and promissory notes between Graat corporations on a quarterly basis. In a report dated July 7, 1981, from the Dundas and Richmond St. branch to the regional general manager, U.P. Unrau, the assistant manager, stated:

> It is important to understand the function of Carfrae Estates Limited to the Graat Group of Companies. As we have described to you in the past, Carfrae is the management company for the Group and as such, it pays all of the expenses related to the various affiliated companies. Revenues and expenses are accounted for by notes on a quarterly basis between the Companies within the Group and Carfrae.

65 Suchard suggested that prior to the actual transfer, he and Graat discussed transferring the Urlindale lands from Carfrae to Glencairn in order to shelter the profits of Glencairn from taxation. Suchard was unable to say when he discussed this matter with Graat and did not produce any memorandum of when the transfer was discussed. I simply do not believe Suchard on this point and reject that the purpose of the transfer on April 19, 1985 was for tax purposes.

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66 Graat, Krauel and Suchard in differing ways suggested that the transfers were not unusual within the Graat Group where assets were transferred from corporation to corporation to minimize the income tax payable by profitable corporations. In my view the main purpose of transferring assets from company to company was to protect such assets from creditors who would suddenly find themselves attempting to collect from corporations which had been stripped of their assets. I am convinced beyond any doubt that Graat, Krauel and Suchard were aware of the purpose of such transfers and in these actions the assets were transferred for the purpose of stripping Carfrae of its assets.

67 In my opinion there can be no doubt that the transfers were fraudulent and carried out for the sole and only purpose of defeating, delaying, hindering and prejudicing the bank, the creditor of Carfrae and Graat.

68 It was suggested that at the time of the transfer of the Urlindale land that Carfrae was indebted to Glencairn and the lands were transferred to satisfy such indebtedness and as such the transfer is not fraudulent as it was made to a creditor.

69 In *Re Optical Recording Laboratories Inc.* (1990), 2 C.B.R (2d) 64, 75 D.L.R. (4th) 747, 42 O.A.C. 321, (sub nom. *Optical Recording Laboratories Inc. v. Digital Recording Corp.*) 1 O.R. (3d) 131 (C.A.), Griffiths J.A. stated at p. 139 (O.R.):

> The provisions of the *Fraudulent Conveyances Act* defining a fraudulent conveyance in no way limit such transactions to conveyances to third parties other than creditors. In my view, there is no rational reason to read into the legislative definition such a restrictive interpretation. The legislation, being remedial, should be given a liberal construction.

Accordingly, the fact that the transfer may have been made to a creditor of the transferor does not preclude a finding that the transfer was a fraudulent conveyance. Even if there was adequate consideration to support the transfers, such transfers may be fraudulent if there is fraudulent intent on the part of the transferor and transferee.

70 In *Profile United Industries Ltd. v. Coopers & Lybrand Ltd.* (1987), (sub nom. *Re Associated Fisheries of Canada Ltd.)* 64 C.B.R. (N.S.) 242, 79 N.B.R. (2d) 62, 201 A.P.R. 62, 38 D.L.R. (4th) 600 (C.A.), Stratton C.J.N.B. stated at p. 245 [C.B.R.]:

> This appeal raises two questions: whether a payment made by one related company to another was a 'settlement' within the meaning of s. 69 of the Bankruptcy Act, R.S.C. 1970, c. B-3; and whether the payment was made in contravention of the Statute of Elizabeth (Fraudulent Conveyances Act), 1570 (13 Eliz. 1, c. 5).
>
> In 1980 the appellant Profile United Industries Limited ('Profile'), Associated Freezers of Canada Limited ('Freezers') and Associated Fisheries of Canada Limited ('Fisheries') were associated companies, all controlled by one Joseph Yvon Robichaud.
>
> Fisheries operated a fish processing plant at Shippegan, New Brunswick. On 29th February 1980 Fisheries sold its fish processing business to Connors Bros. Ltd. for $3,650,000. After the payment of several encumbrances, Fisheries' solicitors paid the balance of the sale price in the amount of $578,308.06 to Profile. Profile then proceeded to liquidate Fisheries' remaining assets, collect its receivables and pay its outstanding accounts. Among Fisheries' outstanding accounts was one due Profile of $150,570.04, one due Metrocan Leasing Ltd. of $220,149.79 and one due Excel Packaging Ltd. of $220,071.23. Profile offset against the sums it received its own account with Fisheries while Freezers assumed payment of the Metrocan account.
>
> When the sale by Fisheries to Connors Bros. Ltd. took place, Excel Packaging Ltd. had commenced legal action in the courts of Quebec to collect its account with Fisheries. In that litigation Fisheries had counterclaimed against Excel for substantially the same amount as was claimed against it. But the counterclaim was unsuccessful and Excel was awarded judgment against
>
> Fisheries for the full amount of its account. On 23rd July 1981 Excel registered its judgments against Fisheries in New Brunswick. The registered judgment was for $238,638.92. On 11th December 1981 Excel petitioned for a

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receiving order against Fisheries. On 8th January 1982 a receiving order was made and Coopers & Lybrand Limited was appointed trustee of the estate of Fisheries.

The trustee commenced the present action against Profile claiming that the sum of $578,308.06 that was paid to it by Fisheries' solicitors was paid at a time when Fisheries was unable to pay its debts without these funds, that it was paid with intent to defraud the creditors of Fisheries, and in particular Excel, and that such payment contravened the Statute of Elizabeth and was therefore void and should be set aside.

71 Stratton C.J.N.B. continued at pp. 250-252:

**The Statute of Elizabeth**

Profile contends that the payment of $578,308.06 to it by Fisheries' solicitors did not contravene the Statute of Elizabeth because, it argues, the Statute does not prohibit a debtor from preferring one creditor to another. Indeed, Profile further submits that, even though a debtor may know that a judgment is pending against him or that what is at issue is a substantial portion of the proceeds of sale of the debtor's principal asset, yet the statute is not necessarily offended when all creditors save one are paid. There is support for this submission in 17 Halsbury (3rd ed.) at para. 1267, where it is stated:

> Unlike the bankruptcy laws, the statute does not prohibit a debtor preferring one creditor to another, and therefore a conveyance executed in favour of one or some only of the creditors of the grantor may be bona fide and valid, notwithstanding that the grantor knows at the time that execution is about to be issued against him, or that he is insolvent, and even though the conveyance comprises the whole of the grantor's property. Such an alienation will, however, be avoided if it is a mere cloak to secure a benefit to the grantor, and the fact that one creditor obtains an advantage will not of itself prevent a transaction from being avoided.

It has been said that the Statute of Elizabeth was merely declaratory of what was previously the common law of the land.

The purpose of its enactment is described in Kerr on Fraud and Mistake, 7th ed. (1952), at p. 298, as follows:

> The statute 13 Eliz. c. 5, was made for the protection of creditors. It provided, in effect, that all conveyances and dispositions of property real or personal, made with the intention of delaying, hindering, or defrauding creditors, should be null and void as against them, their heirs, etc., and assigns. It also provided that nothing therein contained should extend to any estate or interest made on good consideration and *bona fide* to any person not having, at the time, any notice of such fraud.

. . . . .

It is to be noted that the Statute of Elizabeth makes a distinction between voluntary conveyances and bona fide transfers for consideration. Section 6 of the Statute provides that the Statute does not extend to any conveyance made upon good consideration and 'bona fide lawfully conveyed' to any person not having notice or knowledge of the fraud or collusion against the creditors. The applicable rule is stated in 17 Halsbury (3rd ed.) at para. 1261, as follows:

> For creditors to be in a position to impeach an alienation of property by their debtor they must prove, in addition to fraudulent intent on the part of the grantor, either that the alienation was not made for valuable consideration or upon good consideration, or that the grantee was privy to the fraud. Otherwise the grantee will be entitled to the protection given by the provision, even where a creditor is in fact defeated by the grant.

The decision in *Bank of Montreal v. Vandine*, supra, involved a conveyance that was made for valuable consideration. In the judgment of Harrison J. in that case it was stated at p.373:

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> Two questions have to be determined under the Statute of Elizabeth — (1) Whether the conveyance in question was made by the debtor with intent "to delay, hinder or defraud" his creditors; and — (2) If there was such intent, whether the party buying such property participated in such fraudulent intent.
>
> . . . . .

In the instant case it was established that Fisheries sold its only substantial revenue producing asset, i.e., its fish processing plant, and diverted the net sale proceeds to Profile in an effort to avoid payment to Excel, which had sued it. While it is true that Profile undertook to collect Fisheries' receivables and to pay its outstanding accounts, it is also true that Profile, Fisheries and Freezers were associated companies, all controlled by Mr. Robichaud. And as the trial judge took pains to point out, although he was present at the trial Mr. Robichaud did not testify. In all of the circumstances, the trial judge categorized the diversion of Fisheries' funds to Profile as an unusual business transaction and one which prevented Fisheries from paying its debts in a fair and equitable manner at a time when it was insolvent. More importantly, he also found that Profile shared Fisheries' desire to exclude Excel from the payment of debts. As he put it:

> The balance of the purchase price was paid to a related company, Profile, so that it could choose which of [Fisheries'] debts to liquidate. It might be natural that the management of Profile would not want to pay the Excel account which was thought to have caused [Fisheries'] downfall.

The learned trial judge therefore concluded that the trustee was entitled to succeed on the basis of the Statute of Elizabeth because, he said, as a result of the impugned transaction there were no funds left for Excel, 'as Profile chose to pay other creditors instead'. In my opinion, the trial judge's conclusion is substantiated by the evidence. I would respectfully agree with him that there was present here a shared intention on the part of Fisheries and Profile to delay, hinder or defraud Excel, a potential judgment creditor. Adopting the language of Halsbury, the diversion of Fisheries' funds to Profile 'was a mere cloak to secure a benefit' to Fisheries and under the Statute of Elizabeth it was void.

72 Even if there was adequate consideration to support the transfers, which I have found there was not, the fraudulent intent on the part of Graat as the controlling mind of the transferor makes the transferee corporation, which was also controlled and directed by Graat, a willing and active participant in the fraud.

73 The transfer from Carfrae to K.P.M. Inc. was an attempt by Carfrae to put its only revenue-producing assets beyond the reach of the bank, and as stated in *Halsbury*, supra, was "a mere cloak to secure a benefit to the grantor." The transfers were for the sole purpose of securing a benefit on Graat by placing the assets beyond the reach of the bank. The transfers by Carfrae to K.P.M. Inc. were made shortly after the bank took control of King Truck Ltd. and after the bank had made a formal demand on Carfrae. Graat was aware that his companies' loans were in default and the bank was taking steps to realize on its security. It was not until May 1985 at the earliest that the bank became aware that Carfrae had been stripped of its assets and was no longer the Graat Group banker.

74 The bank also attacks the transfer by Carfrae of its assets and the assignment of its laundry contracts on the ground that such transfers contravene the provisions of the *Bulk Sales Act*, R.S.O. 1980, c.52, ss. 1, 4, 11, 16:

> *1.* In this Act,
>
> > (*a*) 'buyer' means a person who acquires stock in bulk;
> >
> > . . . . .
> >
> > (*c*) 'creditor' means any creditor, including an unsecured trade creditor and a secured trade creditor;
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> > . . . . .

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(*e*) 'proceeds of the sale' includes the purchase price and any security therefor or for any part thereof, and any other consideration payable to the seller or passing from the buyer to the seller on a sale in bulk, and the moneys realized by a trustee under a security or by the sale or other disposition of any property coming into his hands as the consideration or part of the consideration for the sale, less the proper and reasonable costs of the seller's solicitor for completing the sale;

(*f*) 'sale', whether used alone or in the expression 'sale in bulk', includes a transfer, conveyance, barter or exchange, but does not include a pledge, charge or mortgage;

(*g*) 'sale in bulk' means a sale of stock in bulk out of the usual course of business or trade of the seller;

(*h*) 'secured trade creditor' means a person to whom a seller is indebted, whether or not the debt is due,

(i) for stock, money or services furnished for the purpose of enabling the seller to carry on business, or

(ii) for rental of premises in or from which the seller carries on business,

and who holds security or is entitled to a preference in respect of his claim;

(*i*) 'seller' means a person who sells stock in bulk;

(*j*) 'stock' means,

(i) goods, wares, merchandise or chattels ordinarily the subject of trade and commerce,

(ii) the goods, wares, merchandise or chattels in which a person trades or that he produces or that are the output of a business, or

(iii) the fixtures, goods and chattels with which a person carries on a trade or business;

. . . . .

*4.* — (1) The buyer, before paying or delivering to the seller any part of the proceeds of the sale, other than the part mentioned in section 6, shall demand of and receive from the seller, and the seller shall deliver to the buyer, a statement verified by the affidavit of the seller in Form 1.

(2) The statement shall show the names and addresses of the unsecured trade creditors and the secured trade creditors of the seller and the amount of the indebtedness or liability due, owing, payable, or accruing due, or to become due and payable, by the seller to each of them, and, with respect to the claims of the secured trade creditors, the nature of their security and whether their claims are due or, in the event of sale, become due on the date fixed for the completion of the sale. R.S.O. 1970, c. 52, s.4.

. . . . .

*11.* — (1) Within five days after the completion of a sale in bulk, the buyer shall file in the office of the clerk of the court an affidavit setting out the particulars of the sale, including the subject-matter thereof and the name and address of the trustee, if any, and exhibiting duplicate originals of the statement mentioned in section 4, the statement, if any, mentioned in clause 8(1)(*b*), the waivers, if any, mentioned in clause 8(1)(*c*) and the consent and affidavit, if any, mentioned in subsection 8(2).

. . . . .

(3) If the buyer fails to comply with subsection (1), a judge may at any time,

(*a*) upon the application of the trustee or a creditor order the buyer to comply therewith; or

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(*b*) upon the application of the buyer, extend the time for compliance therewith; or

(*c*) upon the application of the buyer after the lapse of one year from the date of the completion of the sale in bulk and upon being satisfied that the claims of all unsecured trade creditors and secured trade creditors of the seller existing at the time of the completion of the sale have been paid in full and that no action or proceeding is pending to set aside the sale or to have the sale declared void and that the application is made in good faith and not for any improper purpose, make an order dispensing with compliance therewith. R.S.O. 1970, c.52, s.11.

*16.* — (1) A sale in bulk is voidable unless the buyer has complied with this Act.

(2) If a sale in bulk has been set aside or declared void and the buyer has received or taken possession of the stock in bulk, he is personally liable to account to the creditors of the seller for the value thereof, including all moneys, security and property realized or taken by him from, out of, or on account of, the sale or other disposition by him of the stock in bulk. R.S.O. 1970, c.52, s.16.

75 In my opinion the sale of assets and assignment of laundry contracts from Carfrae to K.P.M. Inc., when considered with K.P.M. Inc. taking over all property management services and banking responsibilities for the Graat Group, was a "sale in bulk" of all of the income producing assets and accordingly required compliance with the *Bulk Sales Act*.

76 In *Roynat Inc. v. Ron Clark Motors Ltd.* (1991), 1 P.P.S.A.C. (2d) 191 (Ont. Gen. Div.), released February 13, 1991, Herold J. in defining a sale in the ordinary course of business stated at p.4 [p.197 P.P.S.A.C.]:

The New South Wales Supreme Court defined the term, 'in the ordinary course of the company's business' as follows:

> The transaction must be one of the ordinary day to day business activities, having no unusual features, and being such as a manager of a business might reasonably be expected to be permitted to carry out on his own initiative without making prior reference back or subsequent report to his superior authorities such as, for example, to his board of directors.

— see *Re Bradford Roofing Industries Property Ltd.* [1966] 1 N.S.W.R. 674.

77 In this case the sale and assignment to K.P.M. Inc. was for more than a manager could authorize as Carfrae was disposing of all of its income-producing assets. As a result of the failure to comply with the provisions of the *Bulk Sales Act*, the sale of the laundry equipment and assignment of the laundry contracts from Carfrae to K.P.M. Inc. is set aside.

78 The bank, instead of seeking the return of the assets to Carfrae, except the Urlindale lands, and the reassignment of the laundry contracts, seeks damages for the wrongful conversion of such assets.

79 In *Roynat Inc. v. Ron Clark Motors Ltd.*, supra, Herold J. stated at p. 15 [p.198 P.P.S.A.C.]:

At the conclusion of trial the plaintiff abandoned its claim for the return of the goods and claimed damages based upon wrongful detention and conversion. The majority of the evidence and the argument dealt with the liability question and damages were dealt with rather briefly. The law of damages with respect to detinue and conversion is not without some difficulty although it has been dealt with quite well in Professor Waddams' text, *The Law of Damages*, Canada Law Book, 1983, especially at paragraphs 99 to 102 and 171 to 174.

Having reviewed the House of Lords and Canadian cases referred to by Professor Waddams and having considered the submissions of counsel, I am of the view that damages for conversion would be established by considering the value of the asset converted as of the date it was converted whereas damages for detinue, as in the case of damages in lieu of specific performance, involve a valuation of the unit as of the date of judgment. There is no evidence in this case as to the value of the unit as of the present time, and indeed no evidence as to whether it is still in use. The defendants did not testify and their representatives were examined for discovery several years ago. There

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was evidence that the defendants had added substantially to the value of the unit by expenditures of considerable time and money in order to render it operable. Again referring to Professor Waddams' text at paragraphs 39 to 55, inclusive, and assuming that the unit in question but for the improvements made by the defendant probably has depreciated in value, and bearing in mind that the plaintiff elected to take whichever measure of damages was most advantageous to it, I have concluded that the value of the unit at the time of its conversion is the appropriate measure of damages in this case.

80 The bank, having abandoned its claim to have the laundry contracts returned to Carfrae, seeks damages for the lost profits which the contracts would have produced had such contract not been fraudulently transferred to K.P.M. Inc. on December 1, 1984. According to Stuart, K.P.M. Inc. received laundry revenues of $154,716.85 for the period from December 1, 1984 to the end of September 1985 and during the same period paid commissions of $69,503.74, leaving a gross profit of $85,213.11. K.P.M. Inc. takes the position that during the same period of time it had additional laundry commission expenses of $41,864.18 which it claims it paid to Victor Graat, a brother of Graat. The payments to Victor Graat were not allocated to each building and represent his work for the 50 residential apartment buildings within the Graat Group. In my view it is a reasonable assumption that 60 per cent of such commission expense should be allocated to the laundry contracts which were assigned to K.P.M. Inc. on the apartment buildings over which the bank had security. Accordingly, the bank is entitled to lost profits on the laundry contracts from December 1, 1984 to the end of September 1985, which I assess at $60,213.11. The issue arises as to the period of time over which the damages should be awarded. The bank claims that the damages should cover the period from December 1, 1984 to September 30, 1985 whereas K.P.M. Inc. says the damages should only be awarded for the lost profits between May 1, 1985 and September 30, 1985, being the period that the bank appointed a receiver of Carfrae. K.P.M. Inc. argues that even if the laundry contracts had not been approved, Carfrae would have used the funds to pay other expenses. Surely the bank is entitled to say that such profits between December 1, 1984 and May 1, 1985 would or should have been used to reduce Carfrae's indebtedness to it and as such the bank is entitled to have the sum of $60,213 paid by K.P.M. Inc. to Carfrae.

81 The bank and the receiver also claim damages against K.P.M. Inc. and Graat in the amount of $149,402, being the value of the assets transferred from Carfrae to K.P.M. Inc. on December 1, 1984. On November 25, 1985, K.P.M. Inc. was, by order of the Chief Justice of the High Court, allowed to remove its laundry equipment upon its un dertaking to hold such equipment until further order of the High Court. Subsequently, K.P.M. Inc. removed the laundry equipment after providing Clarkson Gordon with its undertaking executed by Graat to retain the equipment. Notwithstanding the court order and its undertaking, K.P.M. Inc., at the direction of Graat, disposed of the laundry equipment.

82 Accordingly, the sale of assets by Carfrae to K.P.M. Inc. and the assignment of the laundry contracts to K.P.M. Inc. are void and the bank, through Clarkson Gordon Inc. as receiver of Carfrae, is entitled to damages. The bank, through Lynhurst Estates Limited, which amalgamated with other Graat corporations to form Carfrae, held a demand debenture dated September 12, 1979 over the property of Carfrae and is entitled to receive the damages. In addition, the bank held a general assignment dated October 15, 1980 of the accounts of Carfrae. K.P.M. Inc. disposed of the laundry equipment at the direction of Graat contrary to the order of the Chief Justice of Ontario and in breach of its undertaking to retain the equipment.

83 K.P.M. Inc. was under a duty to retain such equipment until the conclusion of this trial and when Graat directed K.P.M. Inc. to breach its duty, he became personally responsible for any damages arising from such breach: see *Air Canada v. M & L Travel Ltd.* (1991), 2 O.R. (3d) 184, 77 D.L.R. (4th) 536, 43 O.A.C. 215 (C.A.). Accordingly, the bank is entitled to judgment against K.P.M. Inc. and Graat in the amount of $149,402, which represents the value of the assets transferred to K.P.M. Inc.

84 The bank and the receiver attack the transfer of the Urlindale property as being fraudulent. Again I have absolutely no doubt that the sole purpose of the transfer was to protect the property from the receiver and the bank, by placing the property in the name of Glencairn, a Graat-owned corporation over which the bank had no security. Graat personally executed the transfer, between the time he executed the settlement agreement and when he provided the bank with his statutory declaration of his financial affairs.

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85 Graat and Krauel attempted at trial to establish that Carfrae received good and valuable consideration for the transfer. There was no satisfactory documentary evidence adduced to support the suggestion that Carfrae received valuable consideration through the cancellation of inter-company debts. I do not believe Graat and Krauel on this issue.

86 During 1980, when the realty taxes on the Urlindale land fell into arrears, Graat arranged for Glencairn to grant a mortgage to Anthony Franklin Steel in trust on the land. On February 23, 1990, Steel wrote to the Corporation of the Township of London stating:

> As you are aware there is a significant amount of tax arrears with respect to the parcel set out above which is currently owned by Glen Carin [sic] Plaza Limited. We have recently registered a mortgage against this property and we would like to bring the tax arrears into good standing. Before we do that, however, we would like to be in a position to obtain a lien pursuant to section 4 of the Municipal Tax Sales Act, 1984. Before we can obtain such a lien it is necessary for a Tax Arrears Certificate to be registered on title following which we will pay the arrears permitting us to obtain a lien after you file a Tax Arrears Cancellation Certificate.
>
> I also enclose herewith a copy of a Tax Arrears Cancellation Certificate we had registered in Woodstock after we had brought tax arrears into good standing after a mortgage was place [sic] on the property. We would ask you, therefore, to register the appropriate certificate respecting tax arrears under the Municipal Tax Sales Act following which we will be pleased to bring the taxes into good standing as per your tax statement.

87 Glencairn granted Steel a mortgage in order that Steel upon payment of the tax arrears would obtain a lien in priority on the lands for the tax payment pursuant to the *Municipal Tax Sales Act, 1984*, S.O. 1984, c. 48, s. 5(3).

88 Mr. Kerzner, Q.C., submits that as Steel is not a defendant in this action there is no jurisdiction to set aside the mortgage. He also suggests that since the beneficiary of the trust is unknown and accordingly not before the court, I should not set the mortgage aside as such order would not be binding on the mortgagee.

89 It would seem to me that Glencairn could only grant a mortgage on the property which it owned. Glencairn at all material times was wholly owned by Graat and he personally directed its operations. On April 13, 1986, almost four years before the mortgage was granted to Steel in trust, the bank commenced its action against Graat, Carfrae and Glencairn to set aside the transaction as being fraudulent. If Carfrae and Glencairn were parties to the fraudulent transaction then it would seem to me that Steel, acting on behalf of Graat or a Graat-owned corporation, would be deemed to have notice of the bank's claim. It is a reasonable inference that the beneficiary of the trust was Graat or one of his corporations and as such the beneficiary had notice of the bank's claim that the transfer was fraudulent. Accordingly the mortgage was taken and the taxes paid with full knowledge that the ownership of Glencairn might be declared void. Accordingly, the mortgage to Steel in trust is declared to be void.

90 The bank, in the alternative, attacks the validity of the transfer and assignment of the assets and contracts of Carfrae to Glencairn and K.P.M. Inc. pursuant to the provisions of the *Assignments and Preferences Act*, R.S.O. 1980, c. 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 at a time when he is in insolvent circumstances or is unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice his 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 debts in full, or knowing himself to be on the eve of insolvency, to or for a creditor with the intent to give such creditor an unjust preference over his other

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creditors or over any one or more of them is void as against the creditor or creditors injured, delayed, prejudiced or postponed.

91 As I have previously indicated I have no doubt that the sole and only purpose for the transfers and assignments was to defeat, hinder, delay or prejudice the claims of the bank. Graat owned and was the directing mind of Carfrae, K.P.M. Inc. and Glencairn and accordingly all of the parties to the assignments and transfers knew the purpose of the transfer and assignment. Notwithstanding the invoice and promissory note, both dated November 15, 1984, I am satisfied beyond any doubt that the assets of Carfrae, excepting the Urlindale lands, were transferred or assigned to K.P.M. Inc. on December 1, 1984.

92 On November 15, 1984, the bank made a demand on Carfrae for its direct indebtedness of $2,022,879.81. At the same time the bank demanded repayment from other Graat corporations. The total amount of the indebtedness of the Graat Group to the bank exceeded $38,000,000. Carfrae, as a result of its guarantees, was liable for the $38,000,000. Eventually the bank recovered approximately $20,000,000 leaving a shortfall of $18,000,000. There can be no doubt that Carfrae was insolvent when the bank made a demand on it. Graat was aware that Carfrae was insolvent and it was for this reason that he transferred all of the assets of Carfrae, excepting the Urlindale land, and assigned the laundry contracts to K.P.M. Inc., a corporation over which the bank had no security.

93 Prior to the Urlindale lands being transferred from Carfrae to Glencairn, Carfrae by executing the settlement agreement on March 23, 1985 acknowledged that it was indebted to the bank in the amount of $38,000,000. When the lands were transferred Carfrae was insolvent and the purpose of the transfer was to place the lands in the name of a corporation over which the bank had no security. Accordingly, the transfers and assignments to K.P.M. Inc. and Glencairn are void as against the bank pursuant to the *Assignments and Preferences Act*, supra.

**The October Rents**

94 The bank and Clarkson Gordon Inc. seek judgment against K.P.M. Inc. and Graat for the October 1985 rents which were not deposited into the account at the CIBC in the name of Clarkson Gordon Inc., as receiver of Carfrae. As previously stated, Clarkson Gordon Inc. had entered into an agreement with K.P.M. Inc. for the collection of rents from Graat Group buildings over which the bank had security. K.P.M. Inc. collected and deposited the rents for May 1985 through September 1985 inclusive into the receiver's account without complaint. The October rents collected by K.P.M. Inc. for the months of October 1985 totalled $657,009.68 and after adjustment for cheques which were not honoured the gross rents to which the bank and Clarkson Gordon Inc. claim entitlement was $647,916.18. Graat argues that included in the sum of $647,916.18 are rents from six residential buildings and five commercial buildings to which the bank was not entitled. The October rents from the six residential buildings amounted to $120,691.14 and from the commercial buildings: $11,579.44. On May 1, 1985, the bank, pursuant to its debenture security, privately appointed Clarkson Gordon Inc. as receiver-manager of Carfrae. On September 25, 1985, Clarkson Gordon Inc. was appointed by the bank pursuant to its mortgage security receiver-manager over a number of residential apartments owned by Graat-controlled corporations. The appointment did not cover the six residential apartment buildings and five commercial buildings owned by Graat corporations over which the bank held security by way of a mortgage. The six residential buildings were:

752 Kipps Lane

1570 Adelaide Street

4 Avon Road

45 and 49 Cheyenne Court

110 Highview

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746 Fanshawe Park Road

95 The mortgages which the bank held on the buildings had receivership clauses but the bank had not taken any steps up to October 1, 1985 to appoint a receiver-manager. On September 27, 1985, Clarkson Gordon wrote to K.P.M. Inc. advising it to "cease all property management activities including the collection of rents at 5:00 p.m. on October 11, 1985 or at such earlier time that we might advise." On September 30, 1985, Graat said he would make no commitment that the October 1985 rents would be deposited in the account of Clarkson Gordon Inc., as receiver-manager of Carfrae.

96 Mr. Kerzner, Q.C., in his able argument, correctly points out that the security which the bank held was over the land and not over the corporation which owned the land and, accordingly, the bank was only entitled to rents pursuant to its security if it took some positive action to seize the rents, which it did not do in this case. It does seem to me that the bank's entitlement to the rents from the six residential buildings and the five commercial buildings can be found in the settlement agreement dated March 23, 1985. All of the corporate owners of the buildings over which the bank had security were signatory parties to the agreement. The preamble to the agreement states:

> (d) The Bank has commenced or is about to commence certain actions and proceedings against the Debtors and Graat for payment of the indebtedness and enforcement of the securities;

97 There can be little doubt that the intent of the agreement was that the debtors, which included the corporate owners of the six apartment buildings and the commercial properties, would assist the bank in reducing the indebtedness of Graat and the Graat Group to the bank which totalled $38 million, including the mortgagees' security. K.P.M. Inc. had no beneficial interest in the rents which were collected from the tenants. These rents belonged to the corporate owners of the apartment building who had agreed that they would assist the bank in reducing the indebtedness. If the owners had not agreed to such terms, I am sure the bank would have proceeded with actions against such owners. The bank's entitlement to such rent is not being challenged by creditors who claim a priority over the bank's claim, but rather by Graat, who claims that the bank had not taken the proper steps to be entitled to such rents.

98 It should also be kept in mind that from the rents the receiver was attempting to pay the expenses of operating the buildings. Graat, who owned the corporations which owned the buildings, agreed that the rents would be paid to the receiver and accordingly, the bank is entitled to such rents pursuant to its security and the March 23, 1985 agreement.

99 K.P.M. Inc. claims that from the October rents which may be payable to Clarkson Gordon Inc., it is entitled to certain set-offs.

**Utilities and Miscellaneous Charges**

100 K.P.M. Inc. claims a set-off of $60,202.22 for utility and miscellaneous charges it claimed it paid during October 1985. Mr. Kerzner, Q.C., takes the position that to the extent that K.P.M. Inc. paid accounts that would otherwise have been paid by Clarkson Gordon Inc., it should be given credit for such payments.

101 On September 27, 1985, Clarkson Gordon Inc. wrote to K.P.M. Inc. terminating its management duties as of October 11, 1985. Until Clarkson Gordon Inc. was appointed receiver by the Supreme Court of Ontario on October 15, 1985, K.P.M. Inc. continued to manage the apartment buildings pursuant to the management contracts it had with the owners. According to Krauel, K.P.M. Inc. paid accounts during the month of October 1985 in the amount of $76,417.51 pertaining to apartment buildings from which Clarkson Gordon Inc. was receiving the rents. Included in the payment of $76,417.51 are payments of $16,215.29 representing duplicate payment for which either Clarkson Gordon Inc. or K.P.M. Inc. is entitled to a credit from the supplier of the service. In my view, K.P.M. Inc. is entitled to a set-off against any moneys owing to the bank or Clarkson Gordon Inc., in the amount of $60,202.22 and an assignment of any credits Clarkson Gordon Inc. may have with service suppliers. The set-off represents payments which the receiver would have paid in maintaining the building and to deny the set-off would unjustly enrich the receiver.

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**Payroll Reimbursement**

102 K.P.M. Inc. employed and paid the maintenance workers for the apartment buildings between May 1, 1985 and October 1985 and during such time it was reimbursed by Clarkson Gordon Inc. The evidence indicated that when Clarkson Gordon Inc. terminated its arrangement with K.P.M. Inc., it had not reimbursed K.P.M. Inc. for the maintenance payroll for the weeks ending September 28, 1985, and for the two-week period ending October 12, 1985, which amounted in total to $15,634.30. In my opinion, K.P.M. Inc. is entitled to set this amount off against any moneys owing to Clarkson Gordon Inc.

**Management Fees On Attorned Rents**

103 K.P.M. Inc. claims that it is entitled to a management fee on rents which were attorned by other creditors. On June 19, 1985, Clarkson Gordon Inc. advised K.P.M. Inc. in writing that it would not pay a management fee on attorned rents and although K.P.M. Inc. was not happy with this decision, it appears to have accepted this decision until after it was discharged by Clarkson Gordon Inc. as of October 11, 1985. As there was no agreement that Clarkson Gordon Inc. would pay a management fee on the attorned rents, K.P.M. Inc. is not entitled to a management fee on such rents.

**Commercial Properties**

104 K.P.M. Inc. claims a set-off for payments totalling $64,507.66, which it claims it made on behalf of Clarkson Gordon Inc. on 303 Richmond Street, London and the Bluevale property. On June 19, 1985, the bank in writing advised K.P.M. Inc. that it would not fund those properties where the cash flow was not sufficient to meet the debt servicing charges, and accordingly, K.P.M. Inc. is not entitled to any set-off for payments which it made to support 303 Richmond Street. As the bank did not take possession of the Bluevale property and subsequently advised K.P.M. Inc. of its decision, K.P.M. Inc. is not entitled to a set-off for any payments made to support the Bluevale property.

**Highland Subdivision**

105 K.P.M. Inc. claims a set-off for the work which Graat did to negotiate with the city of London the Homewood Road extension. In addition, it also claims a set-off for commissions which it claims it paid to agents on the sale of lots in the subdivision. The work done by Graat in negotiating an agreement with the city of London was done on behalf of Cranberry Lake Development Ltd., and the receiver of that corporation and not the receiver of Carfrae must decide if Graat is entitled to be reimbursed. Also, any claims for commissions must be made through the Cranberry Lake Development Ltd. receiver-manager. The receivership of Cranberry Lake Development Ltd. is not subject-matter of any of the actions before me.

**Liability Re October Rents**

106 The bank takes the position that K.P.M. Inc. is indebted to it for the October rents, which amount to $647,916.18 less the set-offs of $75,836.52. The bank also claims that Graat is personally liable for such rents. K.P.M. Inc. contracted with the bank and Clarkson Gordon Inc. to collect the rents and when it did not deposit the October rents in the receiver's bank account, it breached its contract and is liable to the bank in the amount of $647,916.18.

107 The bank submits that a fiduciary relationship was created between Clarkson Gordon Inc. and K.P.M. Inc. when K.P.M. Inc. agreed to collect the rents and deposit such rents in the receiver's bank account.

108 P.D. Finn, in an essay ["The Fiduciary Principle"] presented at the 1988 Conference on Equity Fiduciary and Trust (*Equity, Fiduciaries and Trusts*, T.G. Youdan, ed. (Toronto: Carswell, 1989) held at the University of Victoria law school, discussed how a fiduciary relationship might arise. Finn, at p. 4, describes three standards of conduct: the unconscionable standard, the good faith standard, and the fiduciary standard. The unconscionable standard allows a person to act in his own self-interest but excludes excessive self-interest or exploitive conduct. The good faith standard allows the person to act in his own self-interest but in decision and action, that person must have regard for the legitimate

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interest of others. The fiduciary standard requires a person to act in the interest of another, selflessly with undivided loyalty. Finn argues that in order to determine the standard of responsibility appropriate in a particularly situation it is necessary to pose three questions. He lists the three at p. 5:

> (1) What are the nature, purpose and progress of the actual relationship between the parties particularly as manifest in their dealings *inter se.*
>
> (2) What, given the circumstances of the relationship, is the one party entitled reasonably to expect (generally or in particular circumstances) of the other in or in virtue of the relationship; that he will act in his interests; that he will have regard to the former's interests; on that he will act in the former's interests?
>
> (3) Are there any independent reasons in public policy which, of themselves, call for the regulation of the conduct of the one party, or which would justify according a significant primacy to the expectations of the other?

109 At pp. 46-47, Finn describes what is necessary to establish whether the relationship in question is fiduciary. He writes:

> What must be shown, in the writer's view, is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out, but they will be important only to the extent that they evidence a relationship suggesting that entitlement. The critical matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship. It must so implicate that party in the other's affairs or so align him with the protection or advancement of that other's interest that foundation exists for the 'fiduciary expectation.' Such a role may generate an actual expectation that the other's interests are being served. This is commonly so with lawyers and investment advisers. But equally, the expectation may be a judicially prescribed one because the law itself ordains it to be that other's entitlement. This may be so either because that party should, given the actual circumstances of the relationship, be accorded that entitlement irrespective of whether he has adverted to the matter, or because the purpose of the relationship itself is perceived to be such that to allow disloyalty in it would be to jeopardise its perceived social utility. Illustrative of the former are relationships of unthinking dependency, a phenomenon which can be prevalent in family and close personal relationships.

110 In *Frame v. Smith*, [1987] 2 S.C.R. 99, 78 N.R. 40, 9 R.F.L. (3d) 225, 42 C.C.L.T. 1, 23 O.A.C. 84, 42 D.L.R. (4th) 81, [1988] 1 C.N.L.R. 152, Wilson J. at pp. 98-99 [D.L.R.] was considering the extension of fiduciary obligations to new categories of relationships. She stated:

> Yet there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the *imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.*
>
> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> > (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.
> >
> > (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

(Emphasis added.)

111 In my view, the relationship between Clarkson Gordon Inc. and K.P.M. Inc. was such that Clarkson Gordon Inc. was entitled to ex pect that K.P.M. Inc. would act in its best interests in collecting and depositing the rents. Clarkson

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Gordon Inc. was entrusting K.P.M. Inc. with money that the owners of the buildings had agreed would be paid to the bank. The relationship between K.P.M. Inc. and Clarkson Gordon Inc. would give rise to a fiduciary relationship.

112 The receiver also argues that as K.P.M. Inc. did not have any beneficial interest in the October rents, it is obliged to make restitution to Clarkson Gordon Inc. as it would be unjustly enriched if allowed to retain such rents. In these circumstances, the receiver suggests that a constructive trust may be employed as a remedy to avoid an unjust enrichment.

113 In *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, [1986] 5 W.W.R. 289, 46 Alta. L.R. (2d) 97, 2 R.F.L. (3d) 225, 29 D.L.R. (4th) 1, 69 N.R. 81, 23 E.T.R. 143, [1986] R.D.I. 448, [1986] R.D.F. 501, 74 A.R. 67, Dickson C.J.C., in discussing unjust enrichment and a constructive trust, stated at pp. 293-294 [W.W.R.]:

> **Unjust Enrichment**
>
> To ascertain whether a constructive trust should be imposed in this case, we must begin by examining the doctrine of unjust enrichment. As I had occasion to say in *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 at 444, [1978] 2 W.W.R. 101, 1 R.F.L. (2d) 1, 1 E.T.R. 307, 83 D.L.R. (3d) 289, 19 N.R. 91 [Sask.]:
>
>> On the legal front, acceptance of the notion of restitution and unjust enrichment in Canadian jurisprudence (*Deglman v. Guaranty Trust Company* [[1954] S.C.R. 725, [1954] 3 D.L.R. 785]) has opened the way to recognition of the constructive trust as an available and useful remedial tool in resolving matrimonial property disputes.
>
> In *Pettkus v. Becker*, the court stated at pp. 847-48:
>
>> The principle of unjust enrichment lies at the heart of the constructive trust. "Unjust enrichment" has played a role in Anglo-American legal writing for centuries. Lord Mansfield, in the case of *Moses v. Macferlan* [(1760), 2 Burr, 1005], put the matter in these words: "... the gist of this kind of action is, that the defendant, upon the circumstances of the case, *is obliged by the ties of natural justice and equality to refund* the money". It would be undesirable, and indeed impossible, to attempt to define all the circumstances in which an unjust enrichment might arise ... The great advantage of ancient principles of equality is their flexibility; the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice. The constructive trust has proven to be a useful tool in the judicial armoury.
>
> See also Waters, Law of Trusts in Canada, 2nd ed. (1984), pp. 378-85; Fridman and McLeod, Restitution (1982), pp. 20-22, 34-39; Palmer, Law of Restitution (1978), vol. 1, p.5.
>
> It is also interesting to note that the principle of unjust enrichment has been firmly acknowledged as part of the civil law of Quebec: see *Cie Immobilière Viger Ltée v. Lauréat Giguère Inc.*, [1977] 2 S.C.R. 67 at 75-77, 10 N.R. 277 [Que.], in which Beetz J. articulates the theoretical principles underlying the concept of unjust enrichment. In the family law context, see *Richard c. Beaudouin-Daigneault*, [1982] C.A. 66, where the Quebec Court of Appeal applied the principle of unjust enrichment, although it ultimately rejected the merits of the unjust enrichment claim on the facts of the case. On appeal to this court (see *Beaudouin-Daigneault v. Richard*, [1984] 1 S.C.R. 2, 37 R.F.L. (2d) 225, 51 N.R. 288), the Court of Appeal's judgment was reversed on another ground and the court expressly held it unnecessary to consider the merits of the unjust enrichment claim.
>
> Before a constructive trust can be imposed in this case, the court must find that there has been an unjust enrichment. In *Pettkus* and *Rathwell*, the court outlined three requirements that must be satisfied before it can be said that an unjust enrichment exists. These include:
>
> (a) an enrichment;
>
> (b) a corresponding deprivation; and

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(c) the absence of any juristic reason for the enrichment.

114 In these circumstances, a constructive trust should be imposed to avoid K.P.M. Inc. being unjustly enriched at the expense of Clarkson Gordon Inc. and the bank.

115 If there is a breach of a fiduciary duty or a breach of trust by K.P.M. Inc., can Graat as the sole shareholder and directing mind of K.P.M. Inc. be held personally responsible for such breach?

116 In *Air Canada v. M & L Travel Ltd.*, supra, the directors of the defendant corporation were found personally liable as they participated in a breach of trust by the corporation. Griffiths J.A. stated at pp. 193-194 [O.R.]:

> **The trust relationship**
>
> The corporation was clearly liable in this case to Air Canada for breach of contract in failing to remit the funds claimed. The trial judge found that there was a breach of trust by the corporation in failing to take steps to protect the interest of Air Canada. That finding of a trust relationship is significant in determining the potential liability of Martin and Valliant as directors because, as directors, they would bear no personal liability for breach of contract alone by the corporation.
>
> I conclude on the authority of *Canadian Pacific Airlines Ltd. v. Canadian Imperial Bank of Commerce* (1987), 61 O.R. (2d) 233, 42 D.L.R. (4th) 375, 27 E.T.R. 281 (H.C.J.), affd Ont. C.A., Robins, Krever and Carthy JJ.A., January 19, 1990 [now reported 71 O.R. (2d) 63 (note), 37 E.T.R. 1], that the agreement between Air Canada and the corporation clearly created a trust relationship between them with the result that any monies received by the corporation from the sale of Air Canada tickets were impressed with a trust.

and at p.196:

> **The personal liability of the respondents as directors**
>
> The personal liability of directors or officers of a corporation involved in a breach of trust, in the context of the failure of a travel agent to remit funds collected from ticket sales, has not been judicially considered in Canada or England in any of the reported authorities. Canadian decisions have, however, imposed personal liability on directors for breach of trust where the obligation to hold the monies in trust was imposed by statute.

Griffiths J.A. continued at pp. 202-203:

> **Conclusions**
>
> Canadian authorities such as *Wawanesa v. Chalmers, Henry Electric Ltd. v. Farwell* and *Andrea Schmidt Construction Ltd. v. Glatt*, all *supra*, which have imposed liability on directors for breach of trust of a corporation, were cited to the trial judge. He distinguished them on the basis that in each instance the trust was imposed by statute. The American authority of *Myrta Forastieri v. Eastern Air Lines, supra*, does not, however, appear to have been drawn to his attention.
>
> In my view, the fact that the trust was created by statute in the foregoing Canadian authorities should not affect the principle established that, where the breach of trust by the corporation is expressly induced by a director, that director should bear personal liability for the breach. In the underlying principle of those cases little emphasis is placed on the fact that the trust was imposed by statute. What is significant in those cases is that the shareholders and directors that were held responsible were the sole owners and directors and were the sole directing and operating minds of the corporations (see *Henry Electric Ltd. v. Farwell, supra*, and *Andrea Schmidt Construction Ltd. v. Glatt, supra*). For the purposes of this appeal, I adopt the reasoning of the United States District Court of Puerto Rico in *Myrta Forastieri v. Eastern Air Lines, supra*, that it is just and equitable to impose personal liability on directors

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> who participate in the breach of trust by the corporation because, in effect, they have participated in a conversion of trust funds.

117 Graat was the sole shareholder of K.P.M. Inc. and was the sole directing mind of the corporation. I have absolutely no doubt that it was Graat who directed K.P.M. Inc. to breach its duty of trust to place the rents collected in the account of Clarkson Gordon Inc. In these circumstances, the conduct of Graat is as blameworthy as the actions of K.P.M. Inc. Graat directed K.P.M. Inc. to convert the trust funds to his own use and then returned the money to K.P.M. Inc. In my opinion, based on the law and the facts of this case, Graat is personally liable along with K.P.M. Inc. for the October rents.

118 A substantial part of the October rents have been held at Citibank and such funds should be used to satisfy the judgments and any prejudgment interest which may be awarded. Any part of the judgment which remains unsatisfied shall be the joint and several responsibility of K.P.M. Inc. and Graat.

**Punitive Damages**

119 The bank claims punitive damages against the defendants in all of the actions. In *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, 25 C.C.E.L. 81, [1989] 4 W.W.R. 218, 36 B.C.L.R. (2d) 273, 94 N.R. 321, 58 D.L.R. (4th) 193, 90 C.L.L.C. 14,035, McIntyre J., in discussing punitive damages, stated at pp. 208-209 [D.L.R.]:

> Moreover, punitive damages may only be awarded in respect of conduct which is of such nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature. I do not suggest that I have exhausted the adjectives which could describe the conduct capable of characterizing a punitive award, but in any case where such an award is made the conduct must be extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment. This view has found expression in Canadian courts: see *Paragon Properties Ltd. v. Magna Envestments Ltd., supra*, where Clement J.A., dissenting on the issue of whether damages should have been awarded but not on the principle governing the award, said at p.167:
>
> > *Rookes v. Barnard* cannot be said to have been adopted by Canadian Provinces as the common law. It is upon the common law of England prior to 1964 that our Canadian jurisprudence in respect of exemplary damages has been developed, and in its decision the House of Lords has departed very materially from that common law. The case recognizes the principle of exemplary damages, but in restricting its application it, in my opinion, does injustice to the principle. The basis of such an award is actionable injury to the plaintiff done in such a manner that it offends the ordinary standards of morality or decent conduct in the community in such marked degree that censure by way of damages is, in the opinion of the Court, warranted. The object is variously described to include deterrence to other possible wrongdoers, or punishment for maliciousness, or supra-compensatory recognition of unnecessary humiliation or other harm to which the claimant has been subjected by the censurable act. It is the reprehensible conduct of the wrongdoer which attracts the principle, not the legal category of the wrong out of which compensatory damages arise and in relation to which the conduct occurred. To place arbitrary limitations upon its application is to evade the underlying principle and replace it with an uncertain and debatable jurisdiction.
>
> In other cases the same principles have been expressed: see *Warner v. Arsenault* (1982), 53 N.S.R. (2d) 146 (N.S.S.C.A.D.), where Pace J.A., speaking for the court, made the following statements in respect of the circumstances which will permit the awarding of punitive damages, at p.152:
>
> > Exemplary or punitive damages may be awarded where the defendant's conduct is such as to merit punishment. This may be exemplified by malice, fraud or cruelty as well as other abusive and insolvent acts towards the victim. The purpose of the award is to vindicate the strength of the law and to demonstrate to the offender that the law will not tolerate conduct which wilfully disregards the rights of others.

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And see as well *Meyer v. Gordon* (1981), 17 C.C.L.T. 1 (B.C.S.C.), where Legg J., in refusing an award of punitive damages, said at p.53:

> The lack of care, the inadequate charting, and the unsatisfactory evidence to which I have referred establish liability for negligence on the defendant Hospital. It is negligence that has caused a tragic outcome for the plaintiffs. To the extent that the law can compensate the plaintiffs for their loss, damages will be assessed and awarded. But I am unable to find in the defendants' conduct that character of high-handedness, maliciousness, contempt of the plaintiffs' rights or that disregard of every principle of decency which is the foundation for an award of exemplary and punitive damages.

120 The facts surrounding the transfer of assets and assignment of contracts from Carfrae to K.P.M. Inc. and Glencairn are not of such a nature to support an award of punitive damages. If the transfer is fraudulent the law provides that the transfer can be deemed void. It would be a rare case where the court would void the transfer as being fraudulent and also award punitive damages.

121 In the October rents action, the conduct of Graat in directing the deposits of the funds in Citibank and then moving the funds through various accounts in other financial institutions before returning the funds to Citibank was for the sole purpose of denying the bank the funds which Graat and K.P.M. Inc. had agreed would be paid to the receiver. After K.P.M. Inc. failed to deposit the rents in the receiver's account, Krauel advised the receiver in writing that the funds has been disbursed. I have absolutely no doubt that Graat directed Krauel to write the receiver and advise it that the funds had been disbursed. This action was a deliberate attempt to mislead the receiver and the bank. The actions of Graat are reflective of his lack of commercial morality and his actions are deserving of the full condemnation of this court. K.P.M. Inc. and Graat had no beneficial interest in the rents and Graat's actions were an attempt to retain the funds for the benefit of himself or K.P.M. Inc.

122 Mr. Kerzner, Q.C., suggests that the failure of the bank to pursue the contempt proceeding which it initiated against Graat and K.P.M. Inc. precludes it from seeking punitive damages against Graat and K.P.M. Inc. In my opinion, the bank is entitled to elect the relief it will pursue against Graat and K.P.M. Inc. and in this case it has elected to seek punitive damages. In my view, an award of punitive damages in favour of the bank in the amount of $25,000 against Graat personally will reflect this court's condemnation of Graat's conduct.

123 Counsel may make written submissions on prejudgment interest and costs within 30 days.

*Judgment for plaintiffs.*

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# TAB 8

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

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Insolvency; Property; Public; Restitution; Torts

**Related Abridgment Classifications**

Bankruptcy and insolvency
XI Avoidance of transactions prior to bankruptcy
  XI.2 Fraudulent preferences
    XI.2.e View to prefer
      XI.2.e.ii Relevance of creditor's intent or knowledge
Bankruptcy and insolvency
XI Avoidance of transactions prior to bankruptcy
  XI.2 Fraudulent preferences
    XI.2.j Miscellaneous
Business associations
III Specific matters of corporate organization
  III.3 Shareholders
    III.3.e Shareholders' remedies
      III.3.e.ii Relief from oppression
        III.3.e.ii.C Oppressive conduct
          III.3.e.ii.C.5 Miscellaneous

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Debtors and creditors
XII Fraudulent conveyances
XII.5 Conveyances for valuable consideration
XII.5.b Sufficiency of consideration
Debtors and creditors
XII Fraudulent conveyances
XII.10 Fraudulent intent
XII.10.i Miscellaneous

**Headnote**

Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy — Fraudulent preferences — View to prefer — Relevance of creditor's intent or knowledge

G invested in companies controlled by his friend, real estate developer K — Relationship between G and K soured — After G threatened litigation, G and K negotiated settlement involving various payments and transactions — Settlement included payment of $2.5 million to G from A Ltd., K's holding company — Several of K's companies went bankrupt in 2009 — Trial judge refused trustee in bankruptcy's request to set aside transactions arising from settlement, rejecting trustee's assertions that transactions were transfers at undervalue, unjust preferences, fraudulent conveyances, oppressive and unjust enrichment — Trial judge concluded that A Ltd. did not have requisite intent to defeat, hinder, delay or prejudice creditor — Trustee appealed — G cross-appealed — Appeal and cross-appeal dismissed — Trial judge did not err in concluding that payments did not constitute transfer at undervalue — Trustee did not show that A Ltd. intended to defeat, hinder, delay or prejudice creditor.

Debtors and creditors --- Fraudulent conveyances — Conveyances for valuable consideration — Sufficiency of consideration

G lent approximately $6.5 million to companies controlled by his friend, real estate developer K — Relationship between G and K soured and G threatened litigation — G and K negotiated settlement, involving payments of $2.5 million from A Ltd. to G, and other transactions — Several of K's companies went bankrupt in 2009 — Trial judge refused trustee in bankruptcy's request to set aside transactions arising from settlement — Trial judge rejected trustee's assertions that transactions were transfers at undervalue, unjust preferences, fraudulent conveyances, oppressive and unjust enrichment — Trustee appealed; G cross-appealed — Appeal and cross-appeal dismissed — Trial judge did not err in concluding that G's forbearance from suit constituted consideration — But for $2.5 million payment, G would have commenced and continued with litigation — It was open to trial judge to conclude that payment of $2.5 million in return for compromise of G's remaining rights was adequate consideration.

Debtors and creditors --- Fraudulent conveyances — Fraudulent intent — Miscellaneous

G lent $6.5 million to companies controlled by his friend, real estate developer K — Relationship between G and K soured — After G threatened litigation, G and K negotiated settlement involving various payments and transactions — One of K's companies, SG B, made $471,000 payment to G — Several of K's companies went bankrupt — Trial judge refused trustee in bankruptcy's request to set aside transactions arising from settlement, rejecting trustee's assertions that transactions were transfers at undervalue, unjust preferences, fraudulent conveyances, oppressive and unjust enrichment — Trial judge set aside $471,000 payment to G on basis that it was contrary to s. 2 of Fraudulent Conveyances Act (FCA) and oppressive under s. 248 of Ontario Business Corporation Act — Trial judge found G had notice or knowledge of K's and SG B's intent to defeat, hinder, delay or defraud another creditor, and he knew payment would prefer his interests over those of other creditor — Trial judge dismissed trustee's other claim under Fraudulent Conveyances Act (FCA) as no intent to defeat, hinder, delay or defraud was proven — Trustee appealed; G cross-appealed from setting aside of $471,000 payment — Appeal and cross-appeal dismissed — Trial judge was correct in dismissing trustee's claim under FCA — Issue of intent was fatal to trustee's ground of appeal — With respect to cross-appeal, G identified no palpable and overriding error that would displace trial judge's findings.

Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy — Fraudulent preferences — Miscellaneous

G lent approximately $6.5 million to companies controlled by his friend, real estate developer K — Relationship between G and K soured — After G threatened litigation, parties negotiated settlement including payments and transactions

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involving K's companies and G — Settlement included $2.5 million payment from K's holding company A Ltd. to G — Several of K's companies subsequently went bankrupt — Trial judge refused trustee in bankruptcy's request to set aside transactions arising from settlement, rejecting trustee's assertions that transactions were transfers at undervalue, unjust preferences, fraudulent conveyances, oppressive and unjust enrichment — Trial judge found A Ltd. was insolvent, and G was not creditor of A Ltd. within meaning of s. 5(1) of Assignments and Preferences Act, but concluded that A Ltd. did not have requisite intent to defeat, hinder, delay or prejudice creditor — Trustee appealed — G cross-appealed — Appeal and cross-appeal dismissed — Trial judge did not err in concluding that payments did not constitute transfer at undervalue — Trustee did not show that A Ltd. intended to defeat, hinder, delay or prejudice creditor — Trial judge did not err in concluding that G's forbearance from suit constituted consideration — But for $2.5 million payment, G would have commenced and continued with litigation.

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief from oppression — Oppressive conduct — Miscellaneous

G lent $6.5 million to companies including SG Group and A Ltd., which were controlled by G's friend, real estate developer K — Relationship between G and K soured — After G threatened litigation, parties reached settlement involving various payments and transactions — Several of K's companies went bankrupt — Trustee in bankruptcy sought to set aside transactions arising from settlement, and challenged transactions under oppression provisions in s. 248 of Ontario Business Corporations Act — Oppression claim was rejected — Trial judge found that there was no intent to defeat, hinder, delay or defraud creditors, and concluded that transactions did not violate reasonable expectations of its creditors — Trustee appealed; G cross-appealed — Appeal and cross-appeal dismissed — Trial judge's decision on oppression reflected exercise in discretion and was entitled to deference — K believed payments and transactions would permit companies to continue as going concerns and that they would generate profit — Cataclysmic, unforeseen global economic meltdown that occurred months after payments were made could not be ignored — In that context, trial judge did not err in exercising his discretion and dismissing trustee's claim of unfair disregard for interests of creditors.

Restitution and unjust enrichment --- General principles — Requirements for unjust enrichment — No juristic reason for enrichment

G lent $6.5 million to companies controlled by his friend, real estate developer K — Relationship between G and K soured — After G threatened litigation, G and K negotiated settlement — Settlement involved various payments and transactions, including total of $2.5 million payment from A Ltd. to G — Several of K's companies went bankrupt in 2009 — Trustee in bankruptcy sought to set aside transactions resulting from settlement on basis of unjust enrichment, alleging $2.5 million payments were re-purchase of shares or equity distribution — Trial judge refused trustee's request to set aside transactions arising from settlement, rejecting trustee's assertions that transactions were transfers at undervalue, unjust preferences, fraudulent conveyances, oppressive and unjust enrichment — Trustee appealed — G cross-appealed — Appeal and cross-appeal dismissed — Trusteee appealed, alleging trial judge failed to consider test for unjust enrichment — Appeal dismissed — First two requirements for unjust enrichment were met, as G was enriched and there was corresponding deprivation to A Ltd. — However, there was juristic reason for enrichment — Settlement provided established rationale for payments and hence amounted to juristic reason, as did G's advance of $2.9 million to A Ltd. — Juristic reason was also made out based on reasonable expectations of parties.

**Held:**

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*BCE Inc., Re* (2008), 2008 CarswellQue 12595, 2008 CarswellQue 12596, 71 C.P.R. (4th) 303, 52 B.L.R. (4th) 1, (sub nom. *Aegon Capital Management Inc. v. BCE Inc.)* 383 N.R. 119, (sub nom. *Aegon Capital Management Inc. v. BCE Inc.)* 301 D.L.R. (4th) 80, 2008 SCC 69, (sub nom. *BCE Inc. v. 1976 Debentureholders)* [2008] 3 S.C.R. 560 (S.C.C.) — considered

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*Piikani Nation v. Piikani Energy Corp.* (2013), 2013 ABCA 293, 2013 CarswellAlta 1567, 5 C.B.R. (6th) 185, [2013] 12 W.W.R. 436, 86 Alta. L.R. (5th) 203, (sub nom. *Piikani Energy Corp. (Bankrupt), Re)* 556 A.R. 200, (sub nom. *Piikani Energy Corp. (Bankrupt), Re)* 584 W.A.C. 200, 367 D.L.R. (4th) 173 (Alta. C.A.) — followed

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s. 4(3) — considered

s. 4(4) — considered

s. 96 — considered

s. 96(1)(a) — considered

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Generally — referred to

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*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to

APPEAL by trustee in bankruptcy from judgment reported at *Montor Business Corp. (Trustee of) v. Goldfinger* (2013), 2013 ONSC 6635, 2013 CarswellOnt 14983, 8 C.B.R. (6th) 200, [2013] O.J. No. 4871 (Ont. S.C.J. [Commercial List]), dismissing trustee's request to set aside payments and transactions arising from settlement; CROSS-APPEAL from setting aside of certain payment on basis that it was contrary to s. 2 of *Fraudulent Conveyances Act* and was oppressive under s. 248 of *Ontario Business Corporations Act*.

***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.

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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.

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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.

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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

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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;

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• 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.

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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.

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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**

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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;

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(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*

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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.

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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"

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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.

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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.

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**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?***

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*(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*

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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

**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

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(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

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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.

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**(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

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(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.

*Appeal and cross-appeal dismissed.*

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]).

**End of Document**

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# TAB 9

2015 ONSC 188
Ontario Superior Court of Justice [Commercial List]

# Rehman, Re

2015 CarswellOnt 5063, 2015 ONSC 188, [2015] W.D.F.L. 2320,
[2015] O.J. No. 1748, 252 A.C.W.S. (3d) 401, 25 C.B.R. (6th) 103

## In Bankruptcy and Insolvency

In the Matter of the Bankruptcy of Hafiz Rehman of the City of Mississauga,
in the Regional Municipality of Peel, in the Province of Ontario

L.A. Pattillo J.

Heard: December 10, 2014
Judgment: April 10, 2015
Docket: 32-1774657

Counsel: Philip J. Gertler, Allan Fogel for Brief & Associates Limited, trustee of the estate of Hafiz Rehman, a bankrupt
Syed Abid Hussain for Zohaib Rehman, Haseeb Rehman and Rakhshanda Rehman
Ziba Heydarian (Agent) for Jay Chauhan, for Khalida Rehman
Matthew Harris, Monica Goyal for Bankrupt

Subject: Family; Insolvency; Property
**Related Abridgment Classifications**
Bankruptcy and insolvency
XI Avoidance of transactions prior to bankruptcy
XI.3 Settlements of property
XI.3.b Settlement within five years of bankruptcy
**Headnote**
Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy — Settlements of property — Settlement within five years of bankruptcy
In March 2010, Canadian Revenue Agency (CRA) advised bankrupt that one of his companies was under review, which review ultimately led to CRA filing proof of claim in bankruptcy for $326,102 — In July 2010, bank counterclaimed against bankrupt in relation to fraudulent cheque scheme, which ultimately led to bank filing proof of claim in bankruptcy for $981,301.20 — In August 2010, bankrupt transferred 99 percent ownership of residential property (property) to two his children for stated consideration of two dollars (2010 transfer) — In April 2012, bankrupt transferred his remaining one percent ownership of property to his children for no consideration (2012 transfer) — In August 2013, bankrupt made assignment in bankruptcy, and trustee was appointed — Trustee brought motion for declaration that 2010 and 2012 transfers (collectively, subject transfers) were void pursuant to s. 96(1)(b) of Bankruptcy and Insolvency Act (BIA) — Motion granted — Section 4(5) of BIA deems persons related to each other not to be at arm's length in absence of evidence to contrary, and neither bankrupt nor children attempted to assert otherwise — Subject transfers occurred more than one year but less than five years prior to date of bankruptcy, bringing s. 96(1)(b)(ii) of BIA into play — Evidence did not support finding that children contributed any money for 2010 transfer, but even if it was accepted that they contributed $67,000, that amount was still less than value of property — Further, there was no evidence that children paid bankrupt any moneys for 2012 transfer — Bankrupt transferred subject property with intent to defeat his creditors, either bank or CRA or both — Bankrupt told trustee at time of his assignment that he made 2010 transfer in light of his ongoing litigation with bank, which indicated intention to protect property against possible judgment — There was also circumstantial evidence of intention to defeat creditors, including that subject transfers were

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to children, were for inadequate consideration, were done in face of significant legal proceedings, and that bankrupt retained one percent interest following 2010 transfer — Evidence did not support finding that property was purchased by bankrupt in trust for himself and his children.

**Table of Authorities**

**Cases considered by *L.A. Pattillo J.*:**

*Indcondo Building Corp. v. Sloan* (2014), 2014 CarswellOnt 10946, 16 C.B.R. (6th) 220, 121 O.R. (3d) 160, 2014 ONSC 4018 (Ont. S.C.J.) — followed

**Statutes considered:**

*Assignments and Preferences Act*, R.S.O. 1990, c. A.33

s. 4 — pursuant to

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

s. 4(5) — considered

s. 96 — pursuant to

s. 96(1)(b) — considered

s. 96(1)(b)(ii) — considered

*Family Law Act*, R.S.O. 1990, c. F.3

Generally — referred to

s. 18(1) — considered

*Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29

s. 2 — pursuant to

MOTION by trustee in bankruptcy for declaration that pre-bankruptcy transfers of residential property to bankrupt's children were void.

***L.A. Pattillo J.*:**

**Introduction**

1 On April 6, 2010, Hafiz Rehman (the "Bankrupt") purchased 771 Sombrero Way in Mississauga (the "Property"). Subsequently, on August 23, 2010, the Bankrupt transferred 99% of his interest in the Property to two of his children. On April 2, 2012, in a further transfer, the Bankrupt ceased to own any interest in the Property and title was in the name of three of his children.

2 On July 4, 2013, the Royal Bank of Canada ("RBC") obtained a judgment against the Bankrupt for $981,301.52 in total (the "RBC Claim").

3 On August 1, 2013, the Bankrupt made an assignment in bankruptcy. Brief & Associates was appointed as trustee of the Estate of the Bankrupt (the "Trustee").

4 The Trustee brings this motion for a declaration that the Bankrupt's transfers of the Property to his children for nominal or no consideration on August 23, 2010 and April 2, 2012 are void against the Trustee pursuant to s. 96 of the *Bankruptcy and Insolvency Act (Canada)*, R.S.C. 1985, C. B-3 as amended ("BIA"); s. 4 of the *Assignment and Preferences Act*, R.S.O. 1990, c. F.29 as amended ("APA"); and s. 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. B. 29 as amended ("FCA") and for an order delivering the Property to the Trustee or in the alternative, for a judgment against the Bankrupt's three children for $150,000 or for the value of the Trustee's interest in the Property.

**Background**

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5 The Bankrupt has four children. The eldest three are Rakshanda, Haseeb and Zohaib (collectively the "Children"). The youngest child is not involved in these proceedings. Their mother is Khalida Rehman ("Khalida"). Prior to 2010, the Bankrupt was in the currency exchange and cheque cashing business.

6 In the fall of 2009, two corporations controlled by the Bankrupt cashed cheques in three fraudulent schemes totaling almost $800,000 utilizing accounts at the RBC. On October 21, 2009, the Bankrupt and his two corporations commenced an action against RBC following RBC's freezing and debiting of the accounts of the two corporations as a result of cashing the fraudulent cheques. RBC subsequently counterclaimed against the corporations for the overdrafts in the two accounts and against the Bankrupt on a guarantee limited to $30,000. On July 16, 2010, RBC amended its counterclaim to claim, among other things, full repayment of the overdraft amounts against the Bankrupt personally.

7 On July 4, 2013, the Bankrupt's claim against RBC was dismissed and RBC was awarded judgment on the counterclaim against the Bankrupt and his two corporations in the amount of $706,487.20. RBC was subsequently awarded $274,814.32 in costs. RBC filed a proof of claim in the Estate of the Bankrupt for $981,301.20.

8 In March 2010, the Canadian Revenue Agency ("CRA") advised the Bankrupt that one of his companies was under review and the scope of the audit may extend to personal records. CRA filed a proof of claim in the bankruptcy for $326,102 which amount related to the taxation years 2006 through 2008.

9 The Property was purchased by the Bankrupt on April 6, 2010 for $615,000 and a mortgage in the amount of $492,000 was obtained from the Equitable Trust Company.

10 On August 23, 2010, the Bankrupt transferred 99% of his interest in the Property to Rakshanda and Haseeb and retained 1% himself. Rakshanda, who was 21 years old at the time and a full time student, received a 49.5% interest and Haseeb, who was 19 and also in school, received a 49.5% interest. There is no indication on the Transfer document that the Bankrupt holds the Property as a Trustee. The stated consideration was for $2.

11 The Bankrupt swore an affidavit in response to the Trustee's motion. He stated that in October 2009, he sold property listed as 12 Ellen Street which netted $86,431.91 to him and his wife Khalida. In January 2010, he agreed to purchase the Property and the sale closed April 6, 2010. He said that his daughter Rakshanda and son Haseeb gave him cheques towards the purchase of the home but because they did not qualify for a mortgage, he remained on title. He also said both he and Khalida contributed towards the purchase of the Property.

12 Attached to the Bankrupt's affidavit as an exhibit was a trust agreement purporting to be signed on August 23, 2010 but made as of April 6, 2010, between the Bankrupt as the trustee and Rakshanda and Haseeb as beneficial owners (the "Trust Agreement"). The Trust Agreement provides, among other things, that the Property is held by Bankrupt as bare trustee for and on behalf of Rakshanda, Haseeb and the Bankrupt as tenants in common and that Rakshanda and Haseeb each have a 49.5% in the Property and the Bankrupt has a 1% interest.

13 On April 2, 2012, the Property was transferred from Rakshanda, Haseeb and the Bankrupt to Rakshanda, Haseeb and Zohaib. Rakshanda, who was now 22 years of age, obtained a 1% interest, Haseeb who was 20 retained his 48.5% interest and Zohaib, who was 19, obtained a 48.5% interest. The Bankrupt said that he was empowered to do the transaction under the Trust Agreement with the permission of the beneficial owners. The Bankrupt explained the reason for the transaction in paragraph 12 of his affidavit:

> 12. The 1% which was then registered in [Rakshanda's] name on title was a change of title by [Zohaib, Rakshanda and Haseeb], as part of the funding for the purchase of the Property was given by [the Bankrupt] and his wife. However, this was done by [Rakshanda] and [Haseeb] as beneficial owners under the [Trust Agreement], not [the Bankrupt].

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14 There is no explanation of why Rakshanda's 49.5% interest was reduced to 1% or why Zahaib, in the absence of any evidence of consideration, received a 48.5% interest in the Property.

15 On May 1, 2013, a mortgage for $600,000 from Computershare Trust Company of Canada was registered against the Property.

16 On November 28, 2013, the Trustee obtained an opinion from a real estate agent that the current market value of the Property was between $725,000 and $750,000.

**Procedural Background**

17 The Trustee commenced this motion on December 26, 2013. The Bankrupt swore a reply affidavit on January 31, 2014, and the Trustee filed a reply affidavit sworn February 24, 2014. On April 15, 2014, the Bankrupt was cross-examined on his affidavit. On August 8, 2014 the motion was scheduled to be heard on October 7, 2014 for two hours. At all material times, the Bankrupt and the Children were represented by Mr. Matthew Harris.

***October 7, 2014***

18 On October 7, 2014, the motion came on before me. In addition to Mr. Harris, Mr. Hussain was present and gowned. Mr. Hussain advised that he had been retained by the Children and Khalida, the Bankrupt's wife. He requested an adjournment in order to file material. Counsel for the Trustee opposed the adjournment, on the basis of the matter had been set for sometime and costs had been incurred.

19 I was not pleased with Mr. Hussain's last minute request and told him so. The practice of the Commercial List requires counsel to not only abide by dates given but to also communicate with each other. According to him, he had been retained in August 2014 but did not get in touch with Mr. Harris, who was acting for the Children, until the end of September. And at the time of his appearance before me, he had still not filed a notice of change of solicitors. However, because the asset in question was in the Children's names, I was of the view they should be given an opportunity to respond, notwithstanding that they had been represented from the outset. As there was no urgency from the Trustee's perspective (a certificate of pending litigation was registered against the Property), I reluctantly granted an adjournment on the following terms:

1. Mr. Hussain shall file a notice of change forthwith;

2. Mr. Hussain shall serve and file any responding material on or before October 27, 2014;

3. The Trustee shall serve and file any reply material, if required, by November 27, 2014;

4. Cross-examinations, if required, by November 21, 2014;

5. Motion returnable before me on December 10, 2014 for 1.5 hours, peremptory to the Bankrupt and the Children; and

6. The Children shall pay the Trustee's costs thrown away fixed at $4,000 on or before October 31, 2014, failing which Counsel for the Trustee can attend before me, on notice, to discuss the remedy, including striking any responding material.

***December 10, 2014***

20 On December 10, 2014, when the motion came back on before me, I was advised by Mr. Harris that his retainer had been terminated by the Bankrupt the evening before and that Ms. Goyal was now acting for him. Ms. Goyal indicated that she had not yet been retained. In the circumstances, I excused Mr. Harris.

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21 Ms. Heydanan advised that she was acting as agent for Mr. Chauhan who had been retained by the Bankrupt's wife Khalid in respect of a Family Law Act Application ("FLA Application") that had been commenced by her in Brampton on November 28, 2014. Mr. Chauhan was not appearing for cost reasons. Khalida was present in the courtroom. Ms. Heydanan requested an adjournment of the motion to permit the FLA Application to be dealt with in the Brampton Family Court. No time estimate was provided as to when it would be heard.

22 Ms. Goyal submitted that the Bankrupt was concerned about his wife's family law issues and wanted to see them decided.

23 The Trustee opposed Khalid's request for an adjournment and moved to strike the responding record of the Children filed by Mr. Hussain on December 9, 2014 at 4 p.m. without any affidavit of service. In support, the Trustee filed the affidavit of Lee Gertler, sworn December 9, 2014. The Trustee's position was that both the adjournment request and the late filing were designed to further delay the motion.

24 For brief reasons given orally at the time, I refused Khalida's request for an adjournment and declined to consider the Children's Responding Record. I briefly restate my reasons.

25 The FLA Application was commenced by Khalida on November 28, 2014. It seeks, among other things, support for herself, joint custody of the children and child support. In respect of property, Khalida sought equalization of net family properties and exclusive possession of the matrimonial home.

26 The FLA Application has been started late in the process. There is no explanation of why that is so, given that she has been represented by Mr. Hussain in this proceeding since August, 2014. Further, based on the evidence, I agree with the Trustee that the Property is not a matrimonial home within the meaning of s. 18(1) of the *Family Law Act*, R.S.O. 1990, Chapter F.3, as amended ("FLA"). That section provides:

> 18(1) Every property in which a person has an interest and that is or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their matrimonial home.

27 Although Khalida has been represented by Mr. Hussain since August 2014 in connection with this proceeding, she has filed no material nor has she asserted any interest in the Property prior to the FLA Application.

28 In the FLA Application, Khalida states at two separate places that she and the Bankrupt separated and have lived separate and apart since January 1, 2010. Although the FLA Application also says at one point that the date of separation was January 1, 2011, the earlier 2010 date is confirmed by the Bankrupt who said in his cross-examination on more than one occasion that he and his wife were not living together at the time of the purchase of the Property. Because the Property was never occupied by the Bankrupt and his wife prior to their separation, it is not a matrimonial home within the definition of s. 18(1) of the FLA.

29 Accordingly, and based on the above, I was not satisfied that Khalida's request for possession of the matrimonial home in the FLA Application will entitle her to any interest in the Property. In my view, the FLA Application, commenced more than four years after the separation and after the children are past 18 years of age, was commenced to further delay the Trustee's motion. I therefore refused Khalida's request for an adjournment to await the outcome of her FLA Application.

30 Mr. Hussain said he deeply regretted the delay in filing the Children's Responding Record but it resulted from circumstances beyond his control. He indicated there was a delay in obtaining the documents. He strongly opposed striking out the Children's Responding Record.

31 The late delivery of the information was a clear breach of the timetable that had been put in place by the court. Mr. Hussain had more than sufficient time to file responding material on behalf of the Children. When he knew that

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he could not meet the timetable date, Mr. Hussain took no steps to advise Trustee's counsel or to obtain an extension from the court of the deadline. Nor has he, in my view, provided a sufficient explanation for the delay. To allow the material to be placed before the court on the eve of the motion, peremptory to the Respondents will inevitably result in further delay which, in my view, is precisely what the Respondents seek. Accordingly, I refused to consider the Children's Responding Record.

**Position of the Parties**

32 The Trustee relies on s.96 (1) (b) of the BIA and s. 2 of the FCA and submits that the conveyance by the Bankrupt to Rakshanda and Haseeb of 99% of the Property on August 23, 2010 and the subsequent conveyance of his 1% interest in the Property on April 22, 2012 should be set aside on the grounds that they were undervalue non-arms length transfers, done within three years of the bankruptcy and with the intent to defeat creditors or when the Bankrupt was insolvent.

33 Ms. Goyal, on behalf of the Bankrupt, submitted that the evidence establishes that a trust was created in April 2010 and that the 2010 transaction between the Bankrupt and the trust was a valid transaction. In the factum filed by Mr. Harris for the October 7, 2014 return date, the Bankrupt takes no issue with the fact that the conveyances were non-arms length. It is submitted, however, that the transactions were not at undervalue and were not done with the intention to defeat creditors or when the Bankrupt was insolvent.

34 Mr. Hussain, on behalf of the Children, submits that a valid trust was created in April, 2010 and the evidence establishes that Rakshanda and Haseeb provided value for the Property. Further, the Bankrupt was not insolvent at the time of the transfer.

**Discussion**

35 Section 96(1)(b) of the BIA provides as follows:

> 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
>
> (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 five years 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.

36 Section 2 of the FCA provides:

> 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 other persons and their assigns.

**Trust**

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37 The Bankrupt submits that he purchased the Property on April 6, 2010 in trust for Rakshanda, Haseeb and himself. In support of that position, he points to copies of cheques and money orders he says establishes that Rakshanda and Haseeb contributed money to the purchase and to the Trust Agreement.

38 In my view, the evidence does not support a finding that the Property was purchased by the Bankrupt in trust for himself and his children. The Transfer document does not indicate he was purchasing as a trustee. The Bankrupt admitted in his cross-examination that he arranged the Equitable Trust mortgage and he did not tell Equitable Trust that he was purchasing the Property as a trustee.

39 The evidence with respect to what Rakshanda and Haseeb actually paid for a 99% interest in the Property on August 23, 2010 is not clear. The two children were full time students at the time. The Bankrupt produced some checks and money drafts and purported to say that money came from his two children. That evidence is far from conclusive. The cheques were illegible and one did not have the payee inserted. Some were dated a week before the purchase and sale agreement was even entered into. The drafts were drawn on bank branches far apart and apart from a name thereon, had no connection to the Children or the Children's bank branch.

40 At the time of his assignment, when the Trustee raised the question of the Property transfer to his children, the Bankrupt told him that, in light of his ongoing litigation with RBC, his lawyer advised him to transfer the Property out of his name. It was his litigation lawyer at the time who allegedly drafted the Trust Agreement. When asked about his statement to the Trustee in cross-examination, the Bankrupt said he didn't remember it. Later he agreed it "might be" what he said. Nor did he say anything to the Trustee about the trust or the Trust Agreement. The first time the Trustee became aware of the Trust Agreement was when the Bankrupt filed his reply affidavit in January 2014.

41 On the evidence, I am not prepared to find that the Bankrupt purchased the Property on April 6, 2010 in trust for Rakshanda, Haseeb and himself as alleged. In my view he purchased it in his own name beneficially. It was only when his lawyer advised him later in April that he transferred the Property and entered into the Trust Agreement on April 23, 2010.

42 There is no question that the transfer of the Property from the Bankrupt to Rakshanda, Haseeb and himself on August 23, 2010 and the subsequent transfer to the Children on April 2, 2012 were not arm's length. Section 4(5) of the BIA deem persons related to each other not to be at arm's length in the absence of evidence to the contrary. Neither the Bankrupt nor the Children have attempted to assert otherwise.

43 Further, the transfers occurred more than one year but less than five years prior to the date of bankruptcy bringing s. 96(1)(b)(ii) of the BIA into play.

44 The remaining issues to be determined, therefore, are whether the transactions were undervalue and whether at the time, the Bankrupt was insolvent or intended to "defraud, defeat or delay" a creditor.

**Undervalue**

45 As noted, I have great difficulty accepting the Bankrupt's evidence that his two children contributed any money towards the purchase of the Property in 2010. In my view, the evidence does not support such a finding. They were both full time students at the time. The Bankrupt said that they got the money from their mother. But there is no independent evidence of that.

46 At his cross-examination, and based on the cheques the Bankrupt produced, he agreed that they demonstrate that he contributed $47,400 towards the purchase of the Property, Rakshanda contributed $33,200 and Haseeb $33,800. Even if I accept the Bankrupt's evidence in that regard, the amount contributed by Rakshanda and Haseeb was still less than the value of the Property after considering the Equitable Trust mortgage. In my view and I so find, the transfer of the Property to Rakshanda and Haseeb on August 23, 2010 was for undervalue.

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47 Further, there is no evidence that any of the Children paid the Bankrupt any moneys for his 1% interest in the Property which he conveyed in April 2012 transfer.

**Insolvent or Intent to Defeat Creditors**

48 The Trustee submits that given the assets the Bankrupt listed at the time of his Bankruptcy and the fact that by early 2010, the Bankrupt's business had ceased, that I should infer that the Bankrupt was insolvent at the time of the August 2010 transfer. The Bankrupt's assignment was on August 1, 2013, almost three years after the transfer. While he was facing significant claims by both the RBC and CRA in August 2010, they were not final. He was paying lawyers and had money from the sale of his house. While he was unemployed, I am unable to infer, in the absence of further evidence that in the spring/summer of 2010 the Bankrupt could not meet his debts as they fell due. I decline therefore to find that the Bankrupt was insolvent at the time of the August 2010 transfer.

49 In my view, however, the evidence which I accept establishes that the Bankrupt transferred the Property with the intent to defeat his creditors, in this case either the RBC or CRA or both. He denied that he was concerned by the RBC's counterclaim or CRA. But both were significant. RBC's claim, which the Bankrupt became aware of a month before the August 2010 transfer, was for in excess of $700,000 and involved indemnity for the cashing of fraudulent cheques. CRA's audit, while only in its initial stages, raised serious questions of the co-mingling of business funds in his personal bank accounts.

50 The Bankrupt's explanation to the Trustee at the time of his assignment that he transferred the Property to his two children in light of his ongoing litigation with RBC clearly indicates that he did the August 23, 2010 transfer with the intention of protecting the Property against a possible judgment by RBC.

51 Apart from the above evidence of the Bankrupt's direct intent behind the initial transfer, in my view there is ample circumstantial evidence concerning both transfers to give rise to the inference that they were done by the Bankrupt with the intent to defeat creditors.

52 In *Indcondo Building Corp. v. Sloan*, 2014 ONSC 4018 (Ont. S.C.J.) at paras. 43 to 56, Penny J. considered in some detail the legal principals arising in a fraudulent conveyance action. As the learned judge noted, a finding of intent is almost always based on circumstantial evidence. In that regard, at paragraph 52 of the decision, he lists nine "badges of fraud" or factual occurrences which, if present, enable a court to find, in the absence of a credible explanation, an intent to defeat creditors. Some of those "badges" are: a close relationship between the parties to the conveyance; the donor continued in possession and continued to use the property as his own; the transaction was secret; the transfer was made in the face of threatened legal proceedings; the consideration is grossly inadequate; there is unusual haste in making the transfer; and some benefit is retained by the settlor.

53 In this case, many of those "badges of fraud" exist. The transfers were to the Bankrupt's children. They were done in the face of significant legal proceedings and threatened proceedings. The consideration was inadequate. The Bankrupt retained a 1% interest in the Property following the August 23, 2010 transfer. The Bankrupt continued to pay the mortgage and carrying costs for the Property after the transfer. The fact of a trust was kept secret from the Trustee. Further, the Bankrupt has failed to provide a credible explanation of the above facts to dispel the inference that the transfers were done to defeat creditors.

54 For the above reasons, therefore, I conclude that the Bankrupt purchased the Property on April 6, 2010 beneficially and not in trust for Rakshanda and Haseeb. Further, his transfer of a 99% interest in the Property to Rakshanda and Haseeb on August 23, 2010 and the subsequent transfer of his remaining 1% interest on April 2, 2012 were for undervalue and done with the intent of defeating a creditor.

55 Accordingly, pursuant to s. 96 (1)(b) of the BIA, the transactions are void against the Trustee.

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56 The Trustee seeks in the alternative judgment against the Children in the amount of $150,000 or such other amount (greater or lesser) as determined by the Court to be the value of the Trustee's interest in the Property as at the date of judgment.

57 I am reluctant to make such an order against the Children based on the evidence before me. In my view, proper evidence of the value of the Trustee's interest in the Property at the time of the motion is necessary before such an order can be made.

58 The Trustee seeks its costs as against the Bankrupt and the Children. In that regard, the Trustee has filed a Cost Outline claiming substantial indemnity costs of $20,600.03 and partial indemnity costs of $24,607.01. The Cost Outline covers costs up to and including the October 7, 2014 motion date which was adjourned.

59 I have received no Cost Outline from either the Bankrupt or the Children.

60 The issue of awarding costs in this motion is problematic. The Bankrupt, who was the principal actor, is bankrupt and accordingly there is no benefit to a cost order against him. I view the Children, given their ages at the time, as pawns in the Bankrupt's purported attempt to insulate the Property. To saddle them with a significant cost award would be unfair in my view. There is no evidence they were involved in the planning of the transactions.

61 Accordingly, I decline to make any cost award.

*Motion granted.*

**End of Document**

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# TAB 10

2016 ONCA 128
Ontario Court of Appeal

Shoukralla v. Dumolong

2016 CarswellOnt 17387, 2016 ONCA 128, [2016] W.D.F.L. 6298, 272 A.C.W.S. (3d) 289, 41 C.B.R. (6th) 6

# Carmen Shoukralla (Respondent) and Michael Shoukralla (Respondent) and Margelyn Delfin Dumolong, Luzviminda Jardenil Bautista and Gina Tumulak Aung (Appellants)

K.M. Weiler, H.S. LaForme, Grant Huscroft JJ.A.

Heard: January 14, 2016
Judgment: February 11, 2016
Docket: CA C59196

Proceedings: affirming *Shoukralla v. Shoukralla* (2014), [2014] O.J. No. 3329, 2014 CarswellOnt 9518, 2014 ONSC 4205, 16 C.B.R. (6th) 95, Croll J. (Ont. S.C.J.)

Counsel: Victor Opara, for Appellants, Margelyn Delfin Dumolong, Luzviminda Jardenil Bautista and Gina Tumulak Aung
Michael Shoukralla, for himself
G. William McKechnie, Q.C., for Respondent, Carmen Shoukralla

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Family; Insolvency; Property; Torts
**Related Abridgment Classifications**
Civil practice and procedure
III Parties
III.6 Adding or substituting parties
III.6.b Adding defendant
Debtors and creditors
XII Fraudulent conveyances
XII.10 Fraudulent intent
XII.10.d "Badges of fraud"
Debtors and creditors
XII Fraudulent conveyances
XII.10 Fraudulent intent
XII.10.h Transferee's knowledge of intention to defraud
Family law
III Division of family property
III.7 Events after separation
III.7.b Sale or dissipation of assets
III.7.b.ii Transfers to third parties
III.7.b.ii.C Fraudulent conveyances legislation
**Headnote**
Civil practice and procedure --- Parties — Adding or substituting parties — Adding defendant
Wife brought application for determination of family law issues — Pursuant to court order, husband was prohibited from selling, encumbering or registering mortgages on any properties without further court order — Husband transferred property to three purchasers, who had been tenants of property, without seeking court order — Wife brought motion to

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add purchasers as parties — Motion judge granted motion, and was satisfied that substituted service requirements had been met and that purchasers had actual or deemed notice of motion — Purchasers appealed — Appeal dismissed — Order adding purchasers as parties was interlocutory and appeal from it was to Divisional Court with leave — Having never properly appealed order adding them as parties, purchasers' complaints about procedural fairness, including proper service of hearing of motion, were not properly before this court — This portion of appeal was quashed.
Debtors and creditors --- Fraudulent conveyances — Fraudulent intent — "Badges of fraud"
Wife brought application for determination of family law issues — Pursuant to court order, husband was prohibited from selling, encumbering or registering mortgages on any properties without further court order — Despite order, husband listed property for $850,000, and revealed at family law trial, that he had transferred property to three purchasers, who had been tenants, for $350,000 — Husband alleged that proceeds of sale were nil, after payment of debts and taxes — Wife brought motion for summary judgment to aside transfer of property and for injunction restraining respondent purchasers from selling or otherwise dealing with property — Motion judge granted motion and set aside transfer — Judge found numerous badges of fraud, including court order prohibiting sale, court order registered on title, conveyance occurring two weeks prior to start of trial, husband not filing fresh financial statement prior to trial, husband not disclosing conveyance until cross-examination and husband continuing to live at property with purchasers — Judge found that, where transferor was transferring only asset he had remaining with which to pay his debts, there was presumption of intent to defeat creditors — Purchasers appealed — Appeal dismissed — Judge's findings were well-supported by motion record — Judge did not err in finding that there was fraudulent conveyance, pursuant to ss. 2 and 3 of Fraudulent Conveyances Act — Purchasers failed to demonstrate any basis upon which this court may interfere with judge's findings or analysis.
Debtors and creditors --- Fraudulent conveyances — Fraudulent intent — Transferee's knowledge of intention to defraud
Wife brought application for determination of family law issues — Pursuant to court order, husband was prohibited from selling, encumbering or registering mortgages on any properties without further court order — Despite order, husband listed property for $850,000, and revealed at family law trial, that he had transferred property to three purchasers, who had been tenants, for $350,000 — Husband alleged that proceeds of sale were nil, after payment of debts and taxes — Wife brought motion for summary judgment to aside transfer of property and for injunction restraining respondent purchasers from selling or otherwise dealing with property — Motion judge granted motion and set aside transfer — Judge held that husband transferred property with intent to defeat wife's claims and that purchasers had knowledge of this intent — Judge found that purchasers did not rebut evidentiary presumption that they were privy to husband's fraudulent intention — Judge found that purchasers lived at same address as husband and there was personal relationship between husband and them — Purchasers appealed — Appeal dismissed — Judge's findings were well-supported by motion record — Judge did not err in finding that there was fraudulent conveyance, pursuant to ss. 2 and 3 of Fraudulent Conveyances Act — Purchasers failed to demonstrate any basis upon which this court may interfere with judge's findings or analysis.
Family law --- Division of family property — Events after separation — Sale or dissipation of assets — Transfers to third parties — Fraudulent conveyances legislation
Husband and wife separated after 15 years of marriage — Wife brought application for determination of family law issues — Pursuant to court order, husband was prohibited from selling, encumbering or registering mortgages on any properties without further court order — Despite order, husband listed property for $850,000, and revealed at family law trial, that he had transferred property to three purchasers, who had been tenants, for $350,000 — Husband alleged that proceeds of sale were nil, after payment of debts and taxes — Wife brought motion for summary judgment to aside transfer of property and for injunction restraining respondent purchasers from selling or otherwise dealing with property — Motion judge granted motion and set aside transfer — Judges found badges of fraud — Judge held that husband transferred property with intent to defeat wife's claims and that purchasers had knowledge of this intent — Purchasers appealed — Appeal dismissed — Judge's findings were well-supported by motion record — Judge did not err in finding that there was fraudulent conveyance, pursuant to ss. 2 and 3 of Fraudulent Conveyances Act — Purchasers failed to demonstrate any basis upon which this court may interfere with judge's findings or analysis.

**Table of Authorities**

**Cases considered:**

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*Clarke (Litigation Guardian of) v. Richardson* (2013), 2013 ONCA 731, 2013 CarswellOnt 17824 (Ont. C.A.) — referred to

*Conte Estate v. Alessandro* (2002), 2002 CarswellOnt 4507 (Ont. S.C.J.) — followed

*Conte Estate v. Alessandro* (2004), 2004 CarswellOnt 3218 (Ont. C.A.) — referred to

*R. v. Palmer* (1979), [1980] 1 S.C.R. 759, 30 N.R. 181, 14 C.R. (3d) 22, 17 C.R. (3d) 34 (Fr.), 50 C.C.C. (2d) 193, 106 D.L.R. (3d) 212, 1979 CarswellBC 533, 1979 CarswellBC 541 (S.C.C.) — referred to

*Shoukralla v. Shoukralla* (2014), 2014 ONSC 4209, 2014 CarswellOnt 9508, 49 R.F.L. (7th) 179 (Ont. S.C.J.) — referred to

**Statutes considered:**

*Courts of Justice Act*, R.S.O. 1990, c. C.43

s. 19(1)(b) — referred to

*Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29

s. 2 — considered

s. 3 — considered

APPEAL by purchasers from judgment granting wife's motion to add purchasers as parties, and from judgment reported at *Shoukralla v. Shoukralla* (2014), 2014 ONSC 4205, 2014 CarswellOnt 9518, 16 C.B.R. (6th) 95, [2014] O.J. No. 3329 (Ont. S.C.J.), granting wife's motion for summary judgment that transfer of property from husband to purchasers was fraudulent conveyance.

***Per curiam*:**

**BACKGROUND**

1 Carmen Shoukralla (the "Wife"), commenced an application against her husband, Michael Shoukralla (the "Husband"), seeking, among other things, an order that a property in Toronto (the "Property") be sold and that the proceeds be available to satisfy her equalization entitlement and child support arrears, and to secure future child support. In January 2011, a court order was granted prohibiting the Husband from selling, encumbering or registering mortgages on any properties without further court order.

2 A trial dealing with all of the family law issues, including issues relating to the Property, commenced in September 2013. Evidence came out at trial that the Husband sold the Property for $350,000 to the appellants, who were tenants at the Property, without seeking a court order.

3 After hearing this evidence, the Wife sought and was granted an adjournment of the trial to bring a motion to add the appellants — the purchasers of the Property — as parties. The court ordered that substituted service was appropriate and ordered the Wife to serve the appellants with the notice of motion and supporting materials by regular and registered mail at the Property.

4 The Wife's motion was heard on October 29, 2013. The appellants were not in attendance nor did they file any material. Nonetheless, the motion judge was satisfied that the service requirements were met and that each of the appellants had actual or deemed notice of the motion. She granted the motion and added the appellants as parties. Further, the Wife was granted leave to amend her pleadings to request that the transfer be set aside and an injunction be granted restraining the appellants from dealing with the Property.

5 At the conclusion of the trial, the Wife brought a motion for summary judgment, returnable April 8, 2013, seeking an order setting aside the Husband's transfer of the Property to the appellants.

6 The Wife did not serve the appellants with the notice of motion and supporting material for the summary judgment motion. Nevertheless, on the return date of April 8, 2014, counsel for the appellants attended the motion hearing and submitted — without evidence — that the appellants were never served with any prior documents and were unaware of

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the action between the Wife and Husband. Counsel said that his clients only became aware of the summary judgment proceeding after instructing him to search the court files to "see if there was anything ... relating to [the appellants]." Thus, he argued, the lack of valid service nullified the proceedings as against the appellants.

7 The motion judge rejected counsel's submissions and found that the appellants had been served with previous documents and orders — including the first motion to add them as parties — and arranged for all previous orders to be copied and provided to counsel. She accepted that the appellants had not been served with the summary judgment motion materials and adjourned the motion to June 6, 2014 to allow them to receive the Wife's materials and file their own.

8 The summary judgment motion was heard on June 6, 2014. The appellants were represented by counsel and one of the appellants filed affidavit evidence in response to the motion.

9 On July 14, 2014, the trial judge released separate reasons for the trial judgment, *Shoukralla v. Shoukralla*, 2014 ONSC 4209 (Ont. S.C.J.) and the summary judgment motion, *Shoukralla v. Shoukralla*, 2014 ONSC 4205 (Ont. S.C.J.). The Wife was successful in obtaining relief at trial. Regarding the summary judgment motion, the Wife was granted the relief she sought. The motion judge held that:

> 1. The transfer of the Property from the Husband to the purchasers was a fraudulent conveyance, as it was done with the intent to defeat the Wife's claims. There is no genuine issue requiring a trial. Accordingly, summary judgment should issue setting aside the transfer dated August 30, 2013.
>
> 2. There shall be an order vesting the registered interest of the Husband in the Property in the name of the Wife. The Wife may sign all documents required to give effect to the vesting order on behalf of both herself and the purchasers, without their consent.

10 The appellants appeal the order adding them as parties on the application and the order granting summary judgment. The Husband appeared on the appeal but did not file any material and made no submissions.

11 At the conclusion of oral argument, we dismissed the appeal and advised the parties that reasons would be forthcoming. What follows are those reasons.

**ANALYSIS**

***Fresh evidence***

12 The appellants first sought to introduce fresh evidence in the form of an affidavit by a legal assistant to counsel for the appellants with attachments containing correspondence and documents from the file of the solicitor who acted on the property transfer.

13 The appellants have failed to explain why this fresh evidence was not tendered on the summary judgment motion when it was available through due diligence: *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.). While we would therefore deny the admission of the proposed evidence on this appeal, we note that it is of no assistance to the appellants in any case.

***Merits of the appeal***

*(i) Adding the appellants as parties on an ex parte basis*

14 The appellants' first argument is that their rights to procedural fairness were violated when the trial judge added them as parties on an *ex parte* basis after the trial proceedings were already under way. They say that, because the order was made *ex parte* it was subject to *de novo* review. They further argue that they were never properly served with the notice of motion to add them as parties and therefore the motion judge should have held a *de novo* hearing to determine whether service was effective.

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15 The trial judge's order, made on October 29, 2013, adding the appellants as parties in the matrimonial proceedings between the Husband and Wife, is interlocutory. Consequently, any appeal from it is to the Divisional Court with leave, pursuant to s. 19(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43: *Clarke (Litigation Guardian of) v. Richardson*, 2013 ONCA 731 (Ont. C.A.).

16 Having never properly appealed the order adding them as parties, the appellants' complaints about procedural fairness, including proper service of the hearing of the motion on October 29, 2013, are not properly before this court. This portion of the appeal is quashed.

17 We note that this court raised the issue of jurisdiction with respect to the order adding the appellants as parties during the hearing of the appeal. The appellants did not dispute that the order is interlocutory and chose to proceed with the remaining grounds of appeal, which are properly before this court.

*(ii) Procedural fairness in failing to inquire into proper service*

18 The appellants' second argument is that the motion judge violated their rights to procedural fairness in relation to the summary judgment motion by failing to provide them with an opportunity to adequately prepare and respond to the motion. We reject this assertion.

19 The motion judge adjourned the summary judgment motion on the first return date — April 8, 2014 — because the Wife acknowledged that she did not serve the appellants with her motion materials. A review of the record reveals to us that, after some discussion about the availability of appellants' counsel, the motion judge fixed June 6, 2014 as the return date. The only comment appellants' counsel made was that he had an examination for discovery already scheduled the same week. He then advised the court that he was satisfied with the timeline fixed for the exchange of materials.

20 The appellants' counsel refused to accept service on behalf of his clients on the April 8 return date. The appellants were therefore given three weeks from the date set for substituted service by mail to respond to the motion. There is no evidence that they ever requested more time or an adjournment of the June 6 hearing date. There is no evidence of any attempt made by the appellants to examine the Wife. The appellants have not demonstrated any error and this ground of appeal is accordingly dismissed.

*(iii) Reliance on evidence at trial for the summary judgment motion*

21 The appellants submit that the motion judge improperly relied on evidence from the trial between the Husband and the Wife in adjudicating on, and granting, the summary judgment motion. We reject this submission.

22 The motion judge's findings were well-supported by the motion record. She relied on information in the record as well as the lack of affidavit evidence tendered by the appellants on the motion. While the motion judge appears to have made some reference to evidence adduced at trial that did not form part of the motion record, this referenced evidence is not essential to her decision and does not amount to a palpable and overriding error. This ground of appeal therefore fails.

*(iv) Transfer of Property was a fraudulent conveyance*

23 Finally, we do not accept the appellants' submission that the motion judge erred in finding that there was a fraudulent conveyance, pursuant to ss. 2 and 3 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29.

24 The motion judge considered the evidence and reached the following conclusions: (i) the appellants were not arm's-length parties in relation to the Husband; (ii) the appellants had knowledge of the January 2011 court order prohibiting any sale of the Property; and (iii) the Husband transferred the Property with the intent to defeat the Wife's claims and the appellants did not rebut the evidentiary presumption that they were privy to such intent.

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25 In the circumstances of this case, the motion judge relied on principles described in *Conte Estate v. Alessandro*, [2002] O.J. No. 5080 (Ont. S.C.J.), at paras. 20-24, affirmed by this court, [2004] O.J. No. 3275 (Ont. C.A.), to analyze intent to defraud for purposes of ss. 2 and 3 of the *Fraudulent Conveyances Act*. In doing so, the motion judge noted that an inference of fraudulent intent can be made by suspicious circumstances — or "badges of fraud" — surrounding the conveyance. The presence of such suspicious circumstances raises a presumption of fraud that must be rebutted by the parties to the conveyance.

26 Applying that analysis to this case, the motion judge found that there were ten badges of fraud surrounding the transfer of the Property, all of which were supported by the Wife's evidence. She further found that the appellants had not rebutted the presumption of fraud. We see no error in the motion judge's analysis and conclusions on this issue.

27 The appellants have failed to demonstrate any basis upon which this court may interfere with the motion judge's findings or analysis. We therefore reject this ground of appeal.

**DISPOSITION**

28 It is for these reasons that the appeal was dismissed. The respondent (the Wife) is entitled to costs of the appeal in the amount of $28,000, inclusive of disbursements and HST.

*Appeal dismissed.*

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# TAB 11

*Case Name:*

**Indcondo Building Corp. v. Sloan**

**Between**
**Indcondo Building Corporation, Plaintiff, and**
**Valerie Frances Sloan, David Robin Sloan and Cave Hill**
**Properties Ltd., Defendants**

[2014] O.J. No. 3722

**2014 ONSC 4018**

121 O.R. (3d) 160

243 A.C.W.S. (3d) 873

121 O.R. (3d) 160

16 C.B.R. (6th) 220

2014 CarswellOnt 10946

Court File No. CV-08-7587-00CL

Ontario Superior Court of Justice

**M.A. Penny J.**

Heard: May 26-30, June 2 and 3, 2014.
Judgment: July 31, 2014.

(168 paras.)

*Civil litigation -- Civil procedure -- Estoppel -- Estoppel in pais (by conduct) -- Laches or delay -- Action by Indcondo Building Corporation to set aside four property transfers allowed in part -- After obtaining judgment against the defendant Sloan for breach of contract, Indcondo became aware of transfers of property by Sloan to a corporation owned and controlled by his wife -- The defendants submitted that the action should be dismissed on the basis of laches -- While there was inordinate delay, the prejudice relied on by the defendants lacked sufficient specificity to dismiss the*

*action -- Two of the four property transfers were undertaken with the intent to defeat creditors and had to be set aside -- Fraudulent Conveyances Act, s. 2.*

*Creditors and debtors law -- Fraudulent conveyances -- Conveyances that are void -- Intent to defeat, hinder, delay or defraud creditors -- Action by Indcondo Building Corporation to set aside four property transfers allowed in part -- After obtaining judgment against the defendant Sloan for breach of contract, Indcondo became aware of transfers of property by Sloan to a corporation owned and controlled by his wife -- The defendants submitted that the action should be dismissed on the basis of laches -- While there was inordinate delay, the prejudice relied on by the defendants lacked sufficient specificity to dismiss the action -- Two of the four property transfers were undertaken with the intent to defeat creditors and had to be set aside -- Fraudulent Conveyances Act, s. 2.*

Action by Indcondo Building Corporation to set aside four transfers of property. In 1992, Indcondo obtained judgment against the defendant Sloan for damages for breach of contract. In the course of seeking to enforce its judgment, Indcondo discovered that Sloan had transferred half his interest in the matrimonial home to his wife after he was served with Indcondo's statement of claim. Indcondo commenced a fraudulent conveyance action which was stayed as a result of Sloan's bankruptcy. However, during the course of the fraudulent conveyance action, Indcondo became aware of other alleged transfers of property by Sloan to a corporation owned and controlled by his wife. Indcondo took the position that the property transfers were undertaken with the intent to defeat, hinder, delay, or defraud creditors. The defendants took the position that Indcondo's action should be dismissed on the basis of laches as there had been inordinate delay and prejudice resulting from that delay.

HELD: Action allowed in part. While Indcondo had been guilty of inordinate delay, the prejudice relied on by the defendants lacked sufficient specificity. Therefore, the action was not dismissed on the basis of laches. With respect to two of the four property transfers, the Court was unable to conclude on the evidence that they were undertaken with the intent to defeat creditors. However, the other two property transfers were undertaken with the intent to defeat Sloan's creditors and therefore had to be set aside.

**Statutes, Regulations and Rules Cited:**

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 38

Fraudulent Conveyances Act, R.S.O. 1990, c. F.29, s. 2, s. 3

**Counsel:**

*Trung Nguyen and P. James Zibarras*, for the Plaintiff.

*Philip P. Healey*, for the Defendants.

**M.A. PENNY J.:--**

**Overview**

**1** This is an action to set aside certain transfers of property on the basis that they were undertaken with the intent to defeat, hinder, delay or defraud creditors. The litigation began in 1992 with Indcondo's claim for damages for breach of a contract to purchase its shares in a real estate development company. John Di Paola is the sole shareholder of Indcondo. A judgment was obtained by the plaintiff at an undefended trial against the defendant, Robin Sloan, in 2001. A fraudulent preference action was commenced by the plaintiff in 2002 seeking to set aside the 1992 transfer of Sloan's half interest in his matrimonial home to his wife, Valerie Sloan. In the course of that action, the plaintiff became aware of other transfers of property from Sloan dating back to 1987 and 1988.

**2** Sloan declared bankruptcy in 2004 and the plaintiff's fraudulent conveyance action was stayed. The plaintiff filed a proof of claim in Sloan's bankruptcy. Sloan received an absolute discharge in 2005. In April 2006, the plaintiff obtained an *ex parte* order under s. 38 of *The Bankruptcy and Insolvency Act* authorizing it to proceed in its own name with an action to set aside the impugned transfers of property. This action was not commenced until June 2008.

**3** The action was dismissed by order of Morawetz J. on a limitations issue. The Court of Appeal reversed Morawetz J.'s order. The action was again dismissed as an abuse of process, on grounds of issue estoppel, by Mesbur J. That order too was reversed by the Court of Appeal. The matter was case managed to trial by D. Brown J. Thus, after 23 years of litigation, a seven-day trial was finally conducted in this matter from May 26 to June 3, 2014.

**4** There are four transfers of property by Sloan which are challenged:

(1) transactions involving the 1987 transfer of property referred to as the "Bowes property" to Cave Hill Properties Limited, a company owned by Valerie;

(2) transactions involving the transfer of the "Hill 'N' Dale" farm property to Cave Hill in1987 and 1988;

(3) transactions involving the transfer of the matrimonial home, 42 Riverside Boulevard to Valerie in 1992; and

(4) a transaction involving the transfer of a Florida condominium to Valerie in 1993.

**5** The plaintiff also seeks to pierce the corporate veil in connection with assets owned by Cave Hill. These assets include the properties listed above (apart from 42 Riverside), or proceeds from

the sale of these properties, as well as other assets alleged to have originated with Sloan but later been transferred to Cave Hill.

**6** Valerie suffered a serious stroke in 1996 and lives in a long-term care facility. Her affairs are managed by Sloan, who holds her power of attorney, and a long-time friend and former colleague of Sloan's, Bruce Pender. Valerie gave brief evidence by affidavit but was not cross-examined at trial.

7 Before turning to the specific transactions in issue, it is necessary to set out, in some detail, the background and circumstances giving rise to these transactions and the litigation.

**Background**

**8** In 1967, Sloan started a business with Frank Stronach called Unimade Industries Limited. In 1974, Unimade was acquired by Magna for Magna shares and Sloan went to work for Magna.

**9** From 1974 to 1986, Sloan was a vice president at Magna. During part of this time, he headed up MI Developments, Magna's real estate acquisition arm. While doing so, he came to know Bruce Pender, an accountant who was a fellow Magna employee, and Doug Ford, an in-house lawyer employed by Magna.

**10** In 1985, Sloan, Di Paola and several other businessmen formed a private real estate development company called Steeles-Jane Properties Inc. It is common ground that this was a period when the Toronto real estate market was booming. The company was set up as a vehicle to buy property, develop it, and either resell at a profit or lease and refinance, using the proceeds to invest in additional properties.

**11** The principals, who were all involved in construction or real estate development in some way, each invested in Steeles-Jane through holding companies. The plaintiff is Di Paola's company. Sloan's company was called Ascania Investments Inc.

**12** The shareholders and interests in Steeles-Jane were as follows:

| Shareholder | Principal | Number of Shares | % | Date of Share Issuance |
|---|---|---|---|---|
| Indcondo | John Di Paola | 100 | 10% | June 17, 1985 |
| Rocar Construction Limited | Carlo Rotundo | 200 | 20% | June 17, 1985 |
| Lostrock Corporation | Anton Czapka | 200 | 20% | June 17, 1985 |
| CIFU Safe Investments Limited | Carmen Alfano | 150 | 15% | June 17, 1985 |
| Conleo Holdings Limited | Leo Rinomato | 150 | 15% | June 17, 1985 |
| 623742 Ontario Inc. / Ascania Investments Inc. | David Robin Sloan | 200 | 20% | June 17, 1985 |

**13** Carlo Rotundo acted as President and was the most active of the principals in the operations and affairs of the company. Unlike the other shareholders, Di Poala/Indcondo did not invest any money in Steeles-Jane. Di Poala "earned" his shares by providing real estate agent services without commission.

**14** The parties entered into a shareholders' agreement in 1985. That agreement restricted the sale of shares by the shareholders. As between shareholders, the shareholders agreement contained a buy/sell, or "shotgun," clause which permitted any shareholder to make an offer to acquire another shareholder's shares. The offeree had the option to accept that offer or acquire the offeror's shares at the offered price.

**15** Paragraph 4.03 of the shareholders' agreement dealt with purported transfers of shares to persons who were not existing shareholders. In that case, any purported transfer was deemed to be a grant by the shareholder involved of an option to Steeles-Jane to purchase the shares at a value of 80% of the original purchase price.

**16** The shareholders agreement was amended in 1987 to provide that paragraph 4.03 would not apply to any transfer by any of the parties to the agreement if the "purported sale occurred within a period of 90 days after the fifth anniversary date of this agreement and/or every fifth anniversary thereafter." Thus, by June 1990, any Steeles-Jane shareholder had a 90 day window during which it

would be entitled to sell its shares to a third-party without penalty under paragraph 4.03.

**17** The financial statements of Steeles-Jane show that by the year ended May 31, 1988, Steeles-Jane had accumulated total assets of $35 million (based on acquisition and carrying costs). Steeles-Jane also had liabilities of $34 million, largely from mortgages and bank indebtedness. Retained earnings for that year were a little over $700,000.

**18** The Steeles-Jane financial statements show that by the year ended, May 31, 1989, the total assets of Steeles-Jane (again based on acquisition and carrying costs) had grown to over $70 million and liabilities, again largely in the form of mortgages and banking indebtedness, had grown to over $66 million, producing retained earnings of some $3.8 million in that year.

**19** It is not contested that the principals of the shareholders were required to give the bank and mortgage lenders personal guarantees as security for the financing of Steeles-Jane's acquisitions and operations.

**20** Di Paola's evidence was that from 1987 on he raised with the other principals including Sloan concerns about the direction Steeles-Jane was taking. He was concerned, he said, about the highly leveraged nature of the Steeles-Jane balance sheet and that, if the market turned, they would lose everything. Di Paola said that by the fall of 1988, he advised the other principals that he wanted out and would be exercising his right to sell on the first five-year anniversary.

**21** There is little objective support for Di Paola's evidence that he was sounding the alarm as early as 1987. First, Di Paola produced no documentary evidence reflecting or demonstrating his concerns. There is no evidence that he had any discussions with any of the other shareholders about using the buy/sell provisions to buy him out. He called no corroborative evidence from other principals or witnesses. There is no evidence that in 1987 the real estate market was entering a downturn. Sloan does not support the contention that Di Paola raised concerns about the viability of Steeles-Jane at this stage.

**22** Apart from the fact that the shareholders' agreement was amended to permit the sale (without penalty) of shares on the fifth anniversary of the formation of Steeles-Jane, there is no evidence of financial concerns being expressed about Steeles-Jane in 1987 or 1988, apart from Di Paola's uncorroborated evidence, which I find is tainted by both his self-interest in placing the date that concerns about Steeles-Jane's financial viability were raised as early as possible and the enormous passage of time since the relevant events.

**23** I do, however, accept that by September 1989, the five-year anniversary was on the horizon. The minutes of the shareholders' meeting from that month reflect the fact that Rotundo reminded the shareholders that the corporation's fifth year anniversary would be on May 30, 1990, that any of the shareholders had the right to dispose of their shares without penalty at that time and that, if any shareholder intended to exercise this right, he should make his intentions known so as to provide ample time to perform any necessary valuations. I find that, in or around this period, Di Poala

voiced his desire to sell Indcondo's Steeles-Jane shares. Sloan agreed on discovery that, in the period leading up to Di Paola's notice of his desire to sell, he and Di Paolo had "many discussions" about it.

**24** A reporting package to shareholders of October 25, 1989 shows established equity in Steeles-Jane at that time of almost $48 million. No evidence was presented about the basis or background of the calculations shown in this shareholder package. The significant difference from the May 1989 financial statements appears to derive from the use of market values for the properties owned rather than their acquisition cost.

**25** The evidence discloses that by April 23, 1990, Di Paola had negotiate a "put/call" agreement providing for the potential buyout of all of Indcondo's Steeles-Jane shares over time at a price of $50,000 per share (Indcondo held, following a stock split, 100 shares such that the purchase price, if Indcondo chose to exercise all of its put rights, was $5 million). Based on the schedule agreed to, if Di Paola exercised all of Indcondo's puts under the agreement, the last tranche would be acquired by October 1994.

**26** The put/call agreement was between Indconco and Steeles-Jane. It provided, however, in paragraph 3.03, that if Steeles-Jane defaulted by failing to purchase any of its shares from Indcondo when required to do so, the principals of the other shareholders, including Sloan, "shall be jointly and severally obligated to purchase such shares from Indcondo for the [agreed] option price per share" on the closing dates specified in the agreement.

**27** At the end of April 1990, Steeles-Jane's rights to purchase the first tranche of Indcondo's Steeles-Jane shares were assigned to CIFU (Alfano) and Conleo (Rimomato). In this way, Alfano and Rinomato would each increase their shareholdings in Steeles-Jane by 5%, such that the remaining five shareholders would each hold 20%.

**28** In October 1990, Indcondo gave notice to Steeles-Jane of its intention to exercise its option to sell 10 more shares under the schedule of put options. These shares were also purchased by CIFU and Conleo in November 1990 and January 1991.

**29** In March 1991, CIFU (Alfano) and Conleo (Rinomato) provided indemnities to Sloan (and, according to Sloan, the other remaining shareholders), in which they indemnified Sloan against any claims as a result of CIFU and Conleo's agreement to purchase Indcondo's Steeles-Jane shares.

**30** In April 1991, Indcondo again gave notice to Steeles-Jane of its intention to exercise its put option to sell 10 more of its shares. CIFU and Conleo failed to purchase Indcondo's shares.

**31** According to Di Paola, the reason Steeles-Jane was unable to purchase the shares was that the Toronto property market bubble had burst and that prices had started to drop. The failure of CIFU and Conleo, or Steeles-Jane, to acquire the April, 1991 tranche of Indcondo's shares gave rise to negotiated amendments to the put/call agreement.

**32** The First Amendment, dated May 28, 1991, provided that Steeles-Jane or its assignees would acquire one of Indcondo's Steeles-Jane shares per month, commencing May 15, 1991, for the following 10 months. The agreement reiterated that if Steeles-Jane or its assignees failed to close any of the transactions in the First Amendment, that failure would be subject to the joint and several liability of the other principals under paragraph 3.03 of the put/call agreement. The first five shares were purchased from Indcondo by CIFU and Conleo in accordance with the First Amendment. However, on October 15, 1991, Steeles-Jane breached the First Amendment when CIFU and/or Conleo failed to purchase the share designated for purchase on that date.

**33** Further, on October 16, 1991, Indcondo gave a third notice to Steeles-Jane of its intention to exercise its put option under the put/call agreement for the sale of the next tranche of its Steeles-Jane shares. Steeles-Jane/CIFU/Conleo failed to purchase Indcondo's 10 shares by the end of October 1991 in breach of the put/call agreement.

**34** As result, the parties discussed a second amended agreement. The Second Amendment provided that:

(a) the five shares that were the subject of the First Amendment would be purchased on certain specified dates;

(b) the 10 shares that were the subject of Indcondo's October 1991 notice would be purchased on March 14, 1992; and

(c) if Steeles-Jane, Conleo or CIFU failed to purchase the shares on the prescribed dates, the principals would be required to do so in accordance with paragraph 3.03 of the put/call agreement.

Although the Second Amendment was never signed, it appears that three of the five shares outstanding were purchased in October, November and December 1991 but that, in January 1992, Conleo and CIFU failed to purchase the common share designated for that date, in breach of the Second Amendment, and failed to purchase any additional shares, in further breach of the put/call agreement and the Second Amendment.

**35** Di Paola gave evidence that there were further verbal agreements, tied to pending sales of specific properties, under which Indcondo agreed to forbear from enforcement of its rights in exchange for the promise of payment once the pending property sales closed. These agreements were not fulfilled and so, in March 1992, Indcondo finally gave notice to the principals that it required the principals to purchase Indcondo's shares under paragraph 3.03. At that point, the principals were jointly and severally liable to purchase from Indcondo its remaining 69.5 common shares at a price of $65,847 (the amounts included accumulated interest) per share for a total amount owing of $4,576,366.50.

**36** The principals failed to acquire Indcondo's shares in accordance with paragraph 3.03 of the put/call agreement. Accordingly, on May 21 1992, Indcondo issued a statement of claim against Steeles-Jane and the principals to recover the $4,476,366.50 of indebtedness.

**37** From 1992 to 1996, Di Paola says he was unable to afford counsel and the action languished. In August 1996, however, he was able to retain counsel and the action continued. In September 2001, Indcondo obtained a trial date to commence in December 2001. On the eve of trial, Sloan's lawyer advised that he would not be attending as he had not been retained for the trial. The trial proceeded on an undefended basis against Sloan. Molloy J. granted judgment in the amount of $8,010,575.30 plus interest at 15% (apparently based on the interest rate payable on amounts due and owing to Indcondo under the put/call agreement).

**38** That judgment has never been set aside or appealed from.

**39** In the course of seeking to enforce its judgment, Indcondo discovered that Sloan had transferred his half interest in the matrimonial home, 42 Riverside, to Valerie after he had been served with Indcondo's statement of claim. Indcondo commenced an action in August 2002 to set aside the conveyance of Sloan's 50% interest in 42 Riverside as being contrary to the *Fraudulent Conveyances Act*. Apparently, sometime during the course of that proceeding, Indcondo became aware of other alleged transfers of property by Sloan to a corporation owned and controlled by Valerie.

**40** What happened next was comprehensively summarized by Mesbur J. in her Endorsement on a motion to dismiss this action, dated August 30, 2011. I cannot do better than simply repeat her words:

> [4] In January 2004, Mr. Sloan declared personal bankruptcy. As a result of the bankruptcy the First Fraudulent Conveyances Action was stayed. Mr. Sloan listed only two creditors: Indcondo in the amount of $8.7 million and the Royal Bank of Canada for about $12 million. Indcondo proved its claim in the bankruptcy. Its principal, Mr. DiPaola, was active in the bankruptcy proceedings, and urged the Trustee to follow up on trying to get the matrimonial home and other properties back into the estate.
>
> [5] Mr. DiPaola requested a meeting of creditors, which was held on March 26, 2004. At the meeting, Mr. DiPaola questioned the bankrupt regarding a number of financial issues, and asked the Trustee what he would be doing about pursuing some of the transactions. Many of the transactions related to events that occurred in the years 1993 to 1996. The Trustee advised that the items raised were "outside the timeframes for challenging transactions pursuant to the *Bankruptcy and Insolvency Act*. More importantly, any action to be pursued by the estate would have to be funded by the creditors as the estate is impecunious."
>
> [6] Mr. DiPaola then advised the meeting he would be requesting an examination of the bankrupt pursuant to Section 161 of the *Bankruptcy and Insolvency Act*.

The minutes of the meeting record that Mr. DiPaola was made aware of his rights under section 38 of the *Bankruptcy and Insolvency Act* to pursue any action not taken up by the estate.

[7] Mr. DiPaola's next action was to write to the office of the Superintendent of bankruptcy, seeking the OSB's cooperation in investigating this file. Although Mr. DiPaola knew of Indcondo's rights under section 38 in March of 2004, he did not take any steps at that time to obtain a section 38 order. He waited until 2006 to do so, and then waited another two years before actually commencing the section 38 Fraudulent Conveyances action itself.

[8] Because Mr. Sloan was a first time bankrupt, he came up for discharge in 2005. The Royal Bank of Canada did not oppose the discharge, but Mr. DiPaola did so on Indcondo's behalf. His notice of intended opposition set out alleged offences under Section 173 of the *Bankruptcy and Insolvency Act*, as well as section 195. The notice goes on to say "The creditor wishes to conduct Section 163 examinations of the following after it had received Section 161, Official Receiver's Report on September 24, 2004."

[9] Mr. Sloan's initial discharge hearing was set for April 5, 2005. Indcondo sought an adjournment in order to examine the bankrupt. Although the discharge hearing was adjourned for that purpose, Indcondo's counsel never conducted an examination. I have no evidence as to why not. The Trustee's report on Mr. Sloan's application for discharge showed nothing improper in the bankrupt's conduct. The Trustee did not oppose the bankrupt's discharge, but noted that a creditor had opposed the discharge. Mr. DiPaola's opposition on Indcondo's behalf was attached to the Trustee's report.

[10] Mr. DiPaola then wrote to the Trustee, and attached to his letter a resolution of the inspector (namely Mr. DiPaola) disapproving the Trustee's report.

[11] The discharge hearing was rescheduled for August 19, 2005. Counsel for the bankrupt sent a letter to Indcondo's counsel by fax and mail a month before the new date. In the letter, she advised Indcondo's counsel of the date and time for the new discharge hearing. Indcondo did not attend, nor did any other opposing creditor. The Registrar granted an absolute discharge. The discharge order recites that no one appeared for the opposing creditor, Indcondo, although properly

served. It goes on to recite that "No proof has been made of any facts under Section 173 of the *Bankruptcy and Insolvency Act*."

[12] Mr. Sloan's lawyer then send a copy of the discharge order to Indcondo's lawyer, Mr. Chapman. In the letter, he says:

> As a result of the discharge order, the action [i.e. the First Fraudulent Conveyances Action] should be dismissed. My proposal is that it be dismissed on a without costs basis... If I do not hear from you by the above noted diary date [October 3, 2005] I will presume that you will not consent and proceed to bring a motion... If I am forced to bring such a motion, I will be seeking costs of the action.

[13] Mr. Chapman did not respond. On October 17, 2005 Mr. Sloan's lawyer wrote to him again, and asked for the courtesy of a reply. He suggested Mr. Chapman simply obtain ups instructions to consent.

[14] About 10 days later Mr. Chapman responded, saying "I have asked my client for instructions." He did not, however, ever advise whether he received any instructions, or what those instructions were. As a result, Mr. Sloan's counsel proceeded to schedule a motion to dismiss the First Fraudulent Conveyances Action. Mr. Sloan's lawyer wrote to Mr. Chapman on January 5, 2006 to advise him that since Mr. Chapman had not responded regarding his client's position, a motion to dismiss was scheduled for April 5, 2006.Mr. Chapman was served with the motion materials, but did not appear on the motion, and did not deliver any responding materials to it.

[15] On April 5, 2006 Belobaba J made the requested order. Indcondo did not attend that motion, but the following day counsel for Indcondo attended *ex parte* before the Registrar and obtained an order under Section 38 of the *Bankruptcy and Insolvency Act* to take proceedings to set aside certain reviewable transactions by the bankrupt. Having shown it was a creditor, had requested the Trustee to act in terms of setting aside fraudulent conveyances, and the Trustee having refused to do so, the court made the order. Although Indcondo obtained the s. 38 order in 2006, it did not begin its action pursuant to the order until 2008. These new proceedings became the Section 38 Fraudulent Conveyances Action, namely, this action.

> [16] Some nine months after Belobaba J had dismissed the First Fraudulent Conveyances Action, Indcondo suggested its failure to attend the motion before Belobaba J was due to inadvertence. It sought to set aside the dismissal order on that basis. The motion came on before Low J on October 20, 2006. She dismissed the motion with costs against Indcondo of $2,500. She found first, there was no inadvertence; Indcondo simply failed to provide its counsel with instructions. Second, Low J held Indcondo had failed to explain its delay in moving to set the order side.
>
> [17] Once Low J made her order, the First Fraudulent Conveyances Action was definitively dismissed. Indcondo did not appeal Low J's order.
>
> [18] Even though it obtained the Section 38 order, Indcondo waited two years to commence the Section 38 Fraudulent Conveyances Action. In it, it makes identical claims as it had in the First Fraudulent Conveyances Action against the bankrupt, his wife and Cave Hill, the successor to the numbered company which had been the corporate defendant in the First Fraudulent Conveyances Action.

**41** As noted above, motions to dismiss this action on limitations grounds, initially granted by Morawetz J., and as an abuse of process, initially granted by Mesbur J., were overturned by the Court of Appeal for Ontario.

**42** With that background to set the context, I will now turn to the major issues in dispute.

## The Impugned Transactions

### *1. The Law of Fraudulent Conveyances*

**43** The *Fraudulent Conveyances Act,* R.S.O. 1990, c. F-29, provides, in s. 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 other persons and their assigns.

**44** Thus, in order for this section to apply so as to void a transaction, there must be:

(a) a "conveyance" of property;
(b) an "intent" to defeat; and

(c) a "creditor or other" towards whom that intent is directed,

see *Bank of Nova Scotia v. Holland*, [1979] O.J. 1190 at para. 12.

**45** The courts have interpreted the words "or others" broadly to include potential beneficiaries under a guarantee (where demand has not been made) and subsequent creditors. Indeed, courts have found that, in some circumstances, it is not necessary for there to be any creditors at all at the time of a transaction in order to conclude that it was done with the intent to defeat creditors.

**46** Galligan J. held in *Bank of Nova Scotia, supra,* that, although the holder of a guarantee upon which no demand has been made may not be a "creditor," the beneficiary of a guarantee is an "other" within the meaning of s. 2 and entitled to the protection of the *Act*. He cited May's *Laws of Fraudulent and Voluntary Conveyances*, 3rd ed. at p.2:

> The words "creditors and others" are wide enough to include any person who has a legal or equitable right or claim against the grantor or settler by virtue of which he is, or may become, entitled to rank as a creditor of the latter.

**47** Is also not necessary for a party, in attempting to impeach a conveyance, to demonstrate that it had an actual debt owing to it at the time of the conveyance. In *Benyon v. Beynon*, [2001] O.J. 3653, the court noted that "creditors and others" is broad enough to contemplate a person who, while not a creditor at the time of the conveyance, may become one in the future.

**48** If there was an intention to defeat creditors, then it does not matter whether it was to defeat present or future creditors, see *CIBC v. Boukalis* 1987 CarswellBC 513 (B.C.C.A.). If an intent to defraud existed at the time of the conveyance, it does not matter that the person attacking it was not a creditor at the time, *Iamgold v. Rosenfeld*, [1998] O.J. 4690 (S.C.J.).

**49** The *Fraudulent Conveyances Act* was enacted to prevent fraud. It is remedial legislation and must be given as broad an interpretation as its language will reasonably bear. The purpose of the *Act* was expressed by Prof. Dunlop in *Creditor-Debtor Law in Canada*, 2nd ed. at p. 598:

> The purpose of the Statute of Elizabeth and of the Canadian Acts based on it, as interpreted by the courts, is to strike down all conveyances of property made with the intention of delaying, hindering, or defrauding creditors and others except for conveyances made for good consideration and bona fide to persons not having notice of such fraud. The legislation is couched in very general terms and should be interpreted liberally.

**50** Prof. Dunlop also considered the judicial difficulties in establishing fraud by ascertaining the state of mind of the debtor; that is, the dominant motive for effecting the impugned transaction. In the absence of direct evidence of intent, he said, "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 being nothing more than typical and suspicious fact situations which may be enough to enable the court to make a finding."

**51** In most cases, a finding concerning the necessary intention to defeat creditors cannot be made except by drawing an inference from the circumstances. If existing creditors are well secured, it may be that one is unlikely to infer that the conveyance was made in order to defeat them. Of course, the time for considering intent is the time of the conveyance, *CIBC V Boukalis, supra*, at p. 4.

**52** The badges of fraud derive from *Twyne's Case* (1601) 76 E.R. 809. As interpreted by modern courts, the badges of fraud include:

(d) the donor continued in possession and continued to use the property as his own;
(e) the transaction was secret;
(f) the transfer was made in the face of threatened legal proceedings;
(g) the transfer documents contained false statements as to consideration;
(h) the consideration is grossly inadequate;
(i) there is unusual haste in making the transfer;
(j) some benefit is retained under the settlement by the settlor;
(k) embarking on a hazardous venture; and
(l) a close relationship exists between parties to the conveyance.

**53** The badges of fraud represent evidentiary rules developed over time which, when considered in all the circumstances, may enable the court to make a finding unless the proponents of the transaction can explain away the suspicious circumstances. Is clear that the legal or persuasive burden to prove the case remains on the plaintiff throughout the trial. Nevertheless, the plaintiff may raise an inference of fraud sufficient to shift the *evidentiary* burden to the defendant if the plaintiff can establish that the transaction has characteristics which are typically associated with fraudulent intent. Proof of one or more of the badges of fraud will not compel a finding for the plaintiff but it may raise a *prima facie* evidentiary case which it would be prudent for the defendant to rebut.

**54** The leading articulation of this burden was set out in *Koop v. Smith* (1915), 51 S.C.R. 554, where Duff J. held:

> I think the true rule is that suspicious circumstances coupled with [a close] relationship make a case of *res ipsa loquitor* 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.

**55** Kruzick J. put the matter succinctly when he said, in *Beynon, supra,* at paras. 49 and 52:

> I am mindful of the fact that I must be very careful to avoid using the badges of fraud doctrine mechanically... fraudulent assignment depends not so much on the tally of "badges" but upon the view of all the facts...
>
> Although the primary burden of proving the case 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 [evidentiary] onus on the defence to adduce evidence showing an absence of fraudulent intent.

**56** The transfer of property to a person in a close relationship is, of course, itself a badge of fraud. In such cases the testimony of the parties as to their subjective intent must be scrutinized with care and suspicion; it is very seldom that such evidence can be safely acted upon as in itself sufficient. In cases involving a transfer to near relatives, as matter of prudence the court should most often require corroborative evidence of the bona fides of the transaction.

**57** At the end of the day, however, the court must act on such a preponderance of evidence as to show whether the conclusion the plaintiff seeks to establish is substantially the most probable of the possible views of the facts; mere suspicion is not sufficient, *Clarke v. The King* (1921), 61 S.C.R. 608 at 616.

**58** This raises the question of the standard of proof in fraudulent conveyance actions. Different submissions were made on this issue at the close of trial. The plaintiff says the standard of proof in a fraudulent conveyances action is, like any civil action, on a balance of probabilities. The defendants argue that a higher standard must be met in quasi-criminal cases where allegations of serious misconduct, like fraud, are alleged.

**59** The Supreme Court of Canada in *C. (R.) v. McDougall*, [2008] 3 S.C.R. 41 put this issue to rest. That case involved a civil action for damages for sexual assault. Although some cases involve more serious consequences by the nature of the allegations made in them, the seriousness of the allegations does not alter the standard of proof in civil cases. The majority held that there is only one standard of proof in all civil cases and that standard is 'proof on a balance of probabilities.'

**60** Finally, I should comment on the expert evidence. Both parties filed expert reports from accountants on the transactions in issue and the flow of funds associated with those transactions. Both sides objected to the other expert's evidence, essentially on the grounds that their opinions exceeded their area of expertise and extended into purporting to answer the very question for the court in this case - were these transactions done with fraudulent intent?

**61** I allowed the testimony of both experts into evidence, indicating that the objections could be revisited in argument and would go to weight. Both were cross-examined on their reports. In the end, little reference was made to the testimony of the experts in argument.

**62** I found the factual presentation and organization of both experts helpful but I also found they both were, in effect, trying to answer the very question that must be addressed by the court in this case. As such, in the end, while I found the methodology helpful in parsing the transactions, I gave their conclusions little if any weight.

***2. The Formation of Cave Hill Properties Limited***

**63** The evidence is somewhat vague on this issue but sometime in 1987, Sloan decided to cash in his Magna shares (issued at the time of the acquisition by Magna of Unimade), reacquire Unimade from Magna and leave his employment at Magna to run Unimade.

**64** Sloan used the proceeds of the sale of his Magna shares, and other funds he had accumulated to that point, to purchase Unimade and to acquire the Hill 'N' Dale property. The manner in which these transactions were structured is controversial. I will begin by explaining how Cave Hill Properties Limited came to be.

**65** Sloan incorporated 723938 Ontario Limited (938) in June, 1987. In December 1987, Sloan transferred his shares in 938 to Valerie Sloan and executed a declaration of trust in respect of those shares. Thus, from December 1987 forward, Valerie was the sole shareholder of 938.

**66** When Unimade was set up in 1966, it acquired property in Vaughan from which Unimade's business (the supply of structural steel) was run. This was known as the Bowes property. In 1974, Unimade, including the Bowes property, was acquired by Magna. In 1987, 938 acquired the Bowes property from Magna for about $1.4 million. A vendor takeback mortgage was granted by Magna to 938 for the full amount. The mortgage payments were made by 938 from the proceeds of rents charge to tenants of the Bowes property.

**67** 938 leased the Bowes property to Unimade at market rates until Unimade ceased operations following the recession in 1991/1992. After that, 938 leased the Bowes property to a third-party and eventually sold it, in 1999, to another third-party for $2.5 million.

**68** In the course of these activities, 938 changed its name to Cave Hill Properties Limited and later, in 1996, amalgamated with other companies owned by Valerie to form the current Cave Hill entity.

**69** David Ford was called to the Bar in 1981 and practised corporate commercial, real estate and tax law as an in-house lawyer with Magna throughout the 1980s. While at Magna, he worked closely with Sloan, Bruce Pender and other senior officers of Magna.

**70** Ford started providing tax consulting and estate planning advice to Sloan, Valerie and Mr. Pender in the early 1980s. He testified that in about 1987, Sloan told him that, since he accumulated considerable assets, Sloan wanted his family to have their own "nest egg" independent of his assets. Sloan told Ford that the Hill 'N' Dale property, which was acquired in December 1987, could serve

the purpose of building that "nest egg." Ford told Sloan that he should enter into a nominee and trustee agreement to confirm that Sloan was holding title to Hill 'N' Dale as a nominee/bare trustee and that the beneficial owner should be a separate legal entity owned by Valerie so that all assets and liabilities would be contained in that entity.

**71** Ford testified that in 1988, he became aware of an opportunity to reduce future potential taxable gains on the Hill 'N' Dale property by creating an immediate gain in a tax efficient manner, thereby increasing the cost base and reducing taxable gains from a future potential sale. The transaction required three clean shelf corporations which had been incorporated before Sloan became the registered owner of Hill 'N' Dale. Ford had incorporated three such shelf corporations for Magna on June 4, 1987 which, he knew, were surplus to Magna's needs. As a result, these were sold to Sloan for Magna's cost of incorporation. The companies were 721310 Ontario Inc. (310), 721311 Ontario Inc. (311) and 721312 Ontario Inc. (312). The shares of 311 were transferred to 310 and the shares of 312 were transferred to Valerie, all on the same day Sloan acquired these corporations in July 1988. The transfers were said to "have effect from" December 1987.

**72** Ford's evidence was that the shares of both 310 and 312 were transferred to Valerie. Sloan's evidence, however, was that only shares of 312 were transferred to Valerie. In any event, the only documentation relating to the transfer of shares to Valerie that was produced at trial related to 312, which transfer took place on July 8, 1988.

**73** Ford also gave evidence that, about the same time, Sloan entered into a nominee and trust agreement with 311 whereby Sloan remained the registered owner of Hill 'N' Dale as a nominee/bare trustee for 311. Sloan, he testified, could not have been the beneficial owner of Hill 'N' Dale, otherwise Valerie would not have been able to complete the tax transaction that ensued. No such nominee agreement, however, was available or produced at trial.

**74** In essence, the 1988 tax transaction involved 311 (as beneficial owner) selling Hill 'N' Dale to 312 at its then fair market value in consideration for a note receivable, thereby creating a gain on the sale. The shares of 311 were then sold by 310 to a British Columbia numbered company which had accumulated tax losses. The net effect was that the British Columbia numbered company amalgamated with 311, thereby acquiring 311's taxable gain from the sale of Hill 'N' Dale. The British Columbia numbered company was able to offset that gain against its accumulated tax losses. These transactions were negotiated and completed for valuable consideration with an arms' length third party represented by counsel at Smith Lyons who, Ford testified, conducted thorough due diligence, including confirming that 311 held *bona fide* beneficial ownership of Hill 'N' Dale when it was sold to 312.

**75** As a result of these transactions, 312 owed 310 approximately $5 million on the purchase of Hill 'N' Dale (represented by a note receivable) and 312's adjusted cost base of the Hill 'N' Dale property was now based on the 1988 purchase price at fair market value. In 1996, 310, 312 and Cave Hill amalgamated forming the "new" Cave Hill. This had the effect, among other things, of

eliminating the note receivable owing from 312 to 310.

**76** Valerie has remained the sole shareholder of 312 and Cave Hill throughout. Mr. Pender is the manager of Cave Hill's assets and is paid a fee for his services in that regard. Sloan is an officer of Cave Hill but, since his bankruptcy in 2004, has not been a director. Cave Hill's assets are of considerable value and principally consist of an investment portfolio and the Hill 'N' Dale property, which has significant capital value and produces rental income. Distributions from Cave Hill, authorized by Valerie as the sole shareholder, essentially finance Valerie's care and Sloan's personal living expenses, as he has no assets of his own or other means of support.

*3. The Bowes Property*

77 The plaintiff attacks the transfer of the Bowes property on the following basis. Unimade was acquired from Magna with Sloan's assets. Sloan kept Unimade's shares in his name but put the Bowes property in the name of a holding company, 938, of which Sloan was the sole shareholder at the time. It was only a month later that Sloan transferred the shares of 938 to Valerie. Neither 938 nor Valerie paid any material consideration for the acquisition of the Bowes property.

**78** After transferring the Bowes property to 938 and the shares of 938 to his wife, Sloan continued to treat the Bowes property as his own by causing Cave Hill to rent it to Unimade for more than $10,000 per month. When Unimade went out of business in 1992, Sloan negotiated the rental of the Bowes property to a third-party commercial tenant. In 1999, Sloan negotiated the sale of the Bowes property by Cave Hill for $2.5 million. The sale proceeds of the Bowes property were used by Cave Hill to purchase securities that form part of Cave Hill's investment portfolio. Sloan continues to derive benefit from these assets through the "largesse" of Valerie.

**79** The plaintiff argues that this transfer exhibits several badges of fraud:

(a) it was made to a close relative;
(b) it was made without consideration;
(c) Sloan continue to use, or benefit from, the property post-transfer;
(d) Sloan had actual or potential liabilities on the date of the transfer; and
(e) the conveyance forms part of a pattern of conduct which resulted in essentially all of Sloan's assets being transferred to Valerie by the date of Indcondo's judgment for breach of the put/call agreement.

**80** The plaintiff argues that these suspicious circumstances raise a *prima facie* evidentiary basis for an inference that the transaction was done with the intent to defeat creditors which the defendants are bound to rebut. Indcondo says the defendants have failed to do so.

**81** As in so many cases involving alleged fraudulent conveyances, in this case a finding concerning the necessary intention to defeat creditors cannot be made except by drawing an inference from all of the surrounding circumstances. There is, for example, no explicit fraudulent

act in the sense of evidence that a representation was made concerning the ownership of Sloan's assets to a creditor or potential creditor which was not true. As the cases make clear, I must be careful to avoid using the badges of fraud doctrine mechanically. A finding of fraudulent intent to defeat creditors depends not on a tally of "badges" - these are but part of the factual matrix from which inferences may be drawn - but upon an assessment of all the facts bearing on the question of fraudulent intent.

**82** Taken alone, the mere fact that Sloan took title to this property in a company, the shares of which he transferred to his wife for no consideration, or even that Sloan now, with the benefit of hindsight, effectively controls the resulting asset due to his wife's stroke, would not be sufficient to conclude that the transfer was made with fraudulent intent.

**83** Sloan was a wealthy businessman in 1987. While at Magna, he was extremely well paid. Although the details of his profit on the sale of his Magna shares in 1987 are vague, it is nevertheless clear that he did very well indeed. As well, Sloan was about to fulfill a longtime dream of running his own business, a successful business with which he was already extremely familiar. He was also an investor in an apparently successful real estate development company along with a number of very wealthy friends and acquaintances. If he wanted to establish a nest egg for his wife and children, he was entitled to do so provided it was not with the intent of defeating creditors.

**84** Sloan and Valerie's protestations that, in transferring the property to 938 and 938's shares to Valerie, there was no thought of defeating creditors is, of course, of essentially no evidentiary value. This is a case where the testimony of the parties as to their subjective intent must be scrutinized with care and suspicion. As the authorities say, it is very seldom that such evidence can be safely acted upon as in itself sufficient. As matter of prudence, therefore, I should look for corroborative evidence of the *bona fides* of the transaction.

**85** The critical issue, in my view, relates to whether there were "creditors or others" toward which a fraudulent intent to defeat was directed. That there were creditors or others in 1987 is, I think, beyond doubt. The real question in analyzing the inference the plaintiff seeks to draw is whether Sloan had any reason to think that, as a result of this impugned transaction, his potential future liabilities would probably exceed his ability to pay. That requires an analysis of Sloan's assets and liabilities, or potential liabilities, at the end of 1987 in the context of what he would reasonably have believed were his prospects at the time.

**86** It is necessary to comment on the fact that a good deal of documentation that one would expect to have been produced in this litigation is not available. The plaintiff asks for adverse inferences to be drawn from Sloan's failure to produce, for example, more detailed evidence of his net worth, assets and liabilities, from the 1980s and early 1990s. Sloan's response to these allegations is simple: the plaintiff's claim was not instituted until four or five years after most of the relevant dates and, given the glacial pace of this litigation since 1992, documents have gone missing or were destroyed in the ordinary course.

**87** There is much to be said for the defendants' position. It is easy, with the benefit of hindsight, to say that this or that document ought to have been produced. However, the lethargy which seems to have infected the plaintiff's prosecution of its claims could easily have contributed to a false sense of security. The loss of documents is just as prejudicial to the defendants as it is to the plaintiff. While it has made everyone's job more difficult in the context of this trial, I am not willing, in the circumstances of this case, to draw any adverse inferences from Sloan's inability to produce documents which, it is to be assumed, must have existed at the relevant time.

**88** While not dispositive, it is relevant that the plaintiff was not a "creditor or other" in December 1987. The put/call agreement did not even exist until April 1990. Sloan owned a successful business, Unimade. It is unknown precisely what its assets and liabilities were in 1987 (apart from the transfer of the Bowes property) but there is no suggestion that its prospects were anything but excellent. Sloan had just sold his Magna shares for a substantial profit. Sloan's investment in Steeles-Jane was doing well. While its acquisitions were almost fully financed, the real estate market was, I find, still booming in 1987.

**89** The plaintiff seeks to paint a picture of looming disaster in the 1987 to 1990 period - of a real estate market, and Steeles-Jane in particular, heading for a cliff. This, in my view, is an argument entirely constructed with the benefit of hindsight. While it is true that markets have cycles, downturns, like car accidents, cannot be foreseen. It seems obvious, after the fact, what happened but at the time, it is business as usual.

**90** I find that in December 1987, Sloan's existing creditors were well secured. I do not think that Sloan reasonably believed, or ought reasonably to have believed, that giving title to the Bowes property to his wife's corporation would result in his inability to make good on his existing, or contemplated, financial obligations. I am therefore unable, on this evidence, to infer that the conveyance of the Bowes property was made with the intent to defeat Sloan's "creditors or others."

***4. The Hill 'N' Dale Property***

**91** The Hill 'N' Dale property was acquired in December 1987 for $2.17 million. It was sold in April 1989 for $7.33 million (comprised of $3.6 million cash and a $3.73 million vendor takeback mortgage). The cash and mortgage were received by 312. The purchaser eventually defaulted on the mortgage. Cave Hill took foreclosure proceedings, as a result of which Cave Hill re-acquired the Hill 'N' Dale property in November 1994 and continues to own it today.

**92** The plaintiff argues that this transfer exhibits similar badges of fraud:

(a) it was made to a close relative;
(b) it was made without consideration;
(c) Sloan continue to use, or benefit from, the property post-transfer;
(d) Sloan had actual or potential liabilities on the date of the transfer;
(e) the destruction or disappearance of relevant documents concerning the

transaction; and

(f) the conveyance formed part of a pattern of conduct.

**93** A great deal of time was spent at trial and in argument on the series of transactions which took place between December 1987 and the summer of 1988, all focusing on the question of whether Sloan held the Hill 'N' Dale property as bare trustee or not. As of April 1989, however, there is no question that the benefit of Hill 'N' Dale property ownership - that is, the proceeds of sale - was transferred to Cave Hill.

**94** What turns on all this is whether the gift of indirect beneficial ownership in the Hill 'N' Dale property to Valerie took place in December 1987 or April 1989. This seems to be viewed by the parties as important because it either places the transfer to Valerie earlier (and therefore further in time from the eventual falling out of the Steeles-Jane shareholders and the alleged real estate market reversal) or later (and, therefore, closer to those events).

**95** If, of course, the transfer of sale proceeds to Cave Hill in 1989 was not done with fraudulent intent, then what happened earlier does not matter. However, since this is a case where inferences must be drawn from the surrounding circumstances, I will address both scenarios.

**96** The plaintiff argues that the whole trust argument advanced by the defendants is a sham and an afterthought. The details of the trust agreement were not, it says, even pleaded and no mention of the trust's details surfaced until shortly before trial, in the pre-filed evidence of Mr. Ford.

**97** The plaintiff points to the lack of any nominee and trust agreement and to many of the "badges" described earlier - the fact that Sloan appears to have dealt with the property as if it were his own, etc.

**98** The plaintiff also attacks Mr. Ford's credibility, relying on his long relationship with Sloan, the alleged "back-dating" of documents, the fact that documents surfaced from Mr. Ford's basement at the last minute and his behavior at trial generally. This is a reference to the fact that, following the completion of his testimony at trial, where the lack of documentation was repeatedly pointed out during his cross-examination, Mr. Ford searched an old precedent file in a box in his basement and located some documents relating to the 1988 tax loss transaction described above. He called Mr. Healey and was told to attend in court the next day with the documents so that Mr. Healey could review them. What transpired was a bizarre incident in which Mr. Zibarras chased Mr. Ford, and the documents, to Mr. Ford's car parked on University Avenue in front of the court. At the lunch break, I was required to make a ruling on the street when the documents were being transferred from Mr. Ford's car to the courtroom where they were to be reviewed by both parties.

**99** While all of the details of the 1988 tax loss transaction were not pleaded, the essential fact, that Sloan acquired the Hill 'N' Dale property in trust for Valerie and that ownership ended up in 312, a company owned by Valeris, is pleaded. Mr. Ford is not a party and was not examined prior to trial. There is no doubt that documents one would expect to see, such as a nominee and trust

agreement executed by Sloan, have not been produced. Mr. Ford testified that there would have been such a document and that it was essential to the transaction that neither Sloan nor Valerie personally held beneficial title to the Hill 'N' Dale property. While it is true that, for tax purposes, who beneficially owned the shares of 310 and 312 was not critical, Ford's evidence was that the fundamental intent in 1987/1988 was that Valerie, through 312/Cave Hill, would have beneficial title to Hill 'N' Dale; it was a secondary purpose to reduce future tax liabilities on a sale of Hill 'N' Dale through the tax loss transaction, the result of which was to boost the adjusted cost base of the Hill 'N' Dale property in Cave Hill's hands.

**100** While it is true that the two issues, whether Sloan held title in trust and the tax loss transaction, are not *necessarily* related I find, as a fact, that they *were* related in this case. In other words, the intent of the tax loss transaction was not only to achieve a desirable tax outcome regardless of who held the ultimate beneficial interest in Hill 'N' Dale but a tax benefit for 312, the shares of which were held by Valerie from the date of its acquisition.

**101** The plaintiff attacks the 1988 tax transaction on essentially two levels. First, it argues that the tax transaction did not, in fact, confer title on 312. Secondly, the plaintiff argues that even if the tax transaction settled beneficial title in Hill 'N' Dale on 312, it was a sham; that is, a transparent attempt to defeat creditors.

**102** I do not think the first argument can be sustained. The plaintiff's main argument on this issue rests on the fact that no nominee/bare trustee agreement has been produced and that 310 shares were not owned by Valerie at the time of the transaction. The agreement of purchase and sale and the bill of sale describe Sloan as the purchaser of Hill 'N' Dale "in trust." Registered title was taken in Sloan's name. The deed and land transfer tax affidavit do not mention any trust. However, within months of the acquisition, Sloan and Ford initiated the tax transaction, the ultimate result of which was to put beneficial ownership of Hill 'N' Dale into 312. Ford testified that there would have been a nominee and trust agreement. He said it was necessary for the deal that title be transferred to 312, not Sloan.

**103** The plaintiff argues that Mr. Ford is not credible. While I agree with the plaintiff's general observation that Mr. Ford is not independent and that he shaded his evidence in an effort to help his old friend, on this point I find Mr. Ford's evidence credible. I say this for several reasons.

**104** First, this was the type of deal Mr. Ford was used to doing at Magna. He had experience and expertise in this area. A nominee trust agreement was, he said, a typical and necessary feature of these types of deals. Second, and more importantly, the tax transaction involved a third-party, materially adverse in interest to Sloan and the 300-series companies. The B.C. tax loss corporation was independently represented by Smith Lyons, a law firm also experienced in these types of deals. In order for everyone to get what they bargain for, Sloan could not have been the beneficial owner of Hill 'N' Dale. Is clear, therefore, that if legal title remained with Sloan, it was because beneficial ownership clearly and unambiguously rested first with 310/311 and, post-transaction, with 312.

**105** I do not think Mr. Ford intentionally sought to conceal relevant documents. Issues raised during his cross-examination prompted him to search an old precedent file in his basement. He found exhibits 11 and 12. He brought these to court to show Mr. Healey. During that process, plaintiff's counsel got wind of these new documents and aggressively sought access to them. I fault no one for this but Mr. Ford was "spooked" by plaintiff's counsel and took the documents back to his car. His stated purpose in doing so was to enable Mr. Healey to review them in private (and because he had to put more money in his parking meter). My ruling during the trial required the documents to be retrieved and brought into court, where they were reviewed by Mr. Healey and, ultimately, all provided to plaintiff's counsel. They were marked as exhibits in the trial and subject to subsequent cross-examination. The documents show the continuation of what we had seen earlier; Sloan signed documents on behalf of the companies, etc. The new documents, however, are not dispositive of any specific issue in dispute

**106** It is true that all of the documents were not perfectly organized or entirely consistent through the process of acquiring Hill 'N' Dale in 1987, transferring it to 312 in 1988 and selling it in 1989. However, as Hunt J. said in *Royal Bank of Canada v. Thiessen*, [1981] M.J. No. 45 at para. 12, "Financial arrangements between husband and wife are often not documented as thoroughly as they are between people acting at arms' length. This does not mean they are not real or that they should not be accepted as factual, or bona fides."

**107** In all of the circumstances, I find that Sloan held legal title to Hill 'N' Dale in trust for Valerie. He was not holding title in trust for himself and there was a known, intended beneficiary in his wife, Valerie. While the exact form of that trust was not determined until several months later, the intention was, I find, that Valerie was to hold the ultimate beneficial interest. The delay in implementing that intent was to enable Mr. Ford to structure the transaction in a way that would reduce exposure to tax on any future sale.

**108** The plaintiff's second argument rests on the proposition that, in the course of acquiring the Hill 'N' Dale property, Sloan converted his own asset, i.e. money, into an asset beneficially owned by Valerie, i.e., the Hill 'N' Dale property. This transaction was to a closely related party for no consideration. Sloan's subsequent dealings with the property, including to the present, is said to show that he continued to derive benefit from and, to some extent, control this property. These are suspicious circumstances which warrant careful scrutiny.

**109** In my view, as with the Bowes property, the issue of whether there was fraudulent intent to defeat creditors in December 1987 essentially turns on the question of whether Sloan ought reasonably to have understood that conveying Hill 'N' Dale beneficially to Valerie was likely to result in his inability to meet his obligations to others as they fell due.

**110** The analysis of this issue is similar to the analysis of the Bowes transaction. I am unable to conclude, on the evidence, that in buying the Hill 'N' Dale property for Valerie, Sloan intended, or reasonably ought to have been concerned, that in doing so he would defeat creditors.

**111** Indcondo was not a creditor in December 1987. The put/call agreement would not exist for several years into the future. The banks were clearly creditors of Steeles-Jane and Sloan was bound by personal guarantees to cover Steeles-Jane's indebtedness. However, in 1987 and 1988, there is no evidence that Steeles-Jane was in, or heading for, trouble. There is no evidence that the market was turning or that Sloan was embarking on a new, uniquely risky, venture. There is no evidence that any creditor relied on Hill 'N' Dale specifically as security for Sloan's current or possible future obligations.

**112** The plaintiff argues that when you take away the investment portfolio and the Hill'N'Dale property, there are no assets remaining to satisfy Sloan's creditors. On this basis, the plaintiff argues that Sloan must have intended that these transfers would leave his creditors with nothing. The flaw in this argument, however, is that it is based entirely on hindsight. In fact, in 1987/88 I find, these assets represented a relatively small proportion of what Sloan would reasonably have believed to be his net worth. To all intents and purposes, Sloan was flying high in 1987/88. He cashed in his Magna investment, acquired Unimade for his own and appeared to be heading for substantial profits arising out of Steeles-Jane's real estate development activities. The plaintiff's argument requires assuming that the failure of Steeles-Jane and Unimade were reasonably foreseeable by Sloan in 1987, 1988 and 1989. I do not think the evidence supports that assumption. The acquisition of the Hill 'N' Dale property beneficially for Valerie was, therefore, not done with intent to defeat Sloan's creditors.

**113** If I am wrong in the conclusion that Valerie beneficially owned Hill 'N' Dale and, in fact, Sloan remained the beneficial owner of Hill 'N' Dale until it was sold on April 6, 1989, there remains the question whether, when Hill 'N' Dale was sold, the transfer of the proceeds of that sale to 312 (both cash and vendor takeback mortgage) itself represents a fraudulent conveyance.

**114** There are three main factors said to have changed between December 1987 when the Hill 'N' Dale property was acquired and April 1989 when it was sold. First, by year-end May 1989, Steeles-Jane's balance sheet had changed. As of May 31, 1989, Steeles-Jane had assets of about $70 million, including over $40 million of property held for resale or future development. Steeles-Jane had liabilities of almost $67 million with retained earnings of some $3.8 million. The value of Sloan's stake in Steeles-Jane had grown but so had his potential liabilities. April 1989 is only about a year before the put/call agreement was reached, in the period of time Di Poala claims to have been giving dire warnings to the other shareholders of their possible exposure to a downturn and expressing his desire to be cashed out of Steeles-Jane. Finally, 1989 is when Di Poala says the market started to turn.

**115** In essence, the plaintiff argues that by April 1989, there were more warning signs and that the potential exposure under Sloan's personal guarantees to the CIBC and the percentage of raw land held by Steeles-Jane (and therefore the more risky part of its real estate portfolio) had grown significantly. Thus, the plaintiff takes the position that by April 1989 Sloan could no longer reasonably have believed that giving his assets to Valerie would not adversely affect his ability to

see that his creditors would be paid.

**116** As mentioned earlier, the parties take diametrically opposed views of when the market started to turn and when the collapse of the market was reasonably foreseen or foreseeable. The anecdotal evidence of the parties I find entirely unhelpful. Both sides have their self-interested reasons for placing the downturn earlier or later than the other. Neither party called any expert evidence on this issue. In my view, the best evidence of the buoyancy of the Toronto real estate market has to be taken from the objective evidence of third-party transactions involved in this case.

**117** The reporting package to shareholders of Steeles-Jane dated October 25, 1989 shows, as indicated earlier, established equity of almost $48 million, leaving aside budgeted gains on unserviced land. This approach appears to be consistent with the manner in which Indcondo's shares were valued for the purposes of the put/call agreement.

**118** In April 1990, a year after the sale of Hill 'N' Dale and the transfer of the proceeds to 312, Indcondo's 10% was agreed to be worth about $5 million, suggesting an underlying assumed net equity value of Steeles-Jane of $50 million. Indcondo is the only shareholder ever to receive a net equity return on its shares in Steeles-Jane. Had the business been in trouble, or on the known brink of trouble, as Di Poala alleges, it is inconceivable to me that all the other shareholders of Steeles-Jane would have agreed in April 1990 to a buy out for Di Poala at a price representing a *net equity value* of Steeles-Jane of $50 million.

**119** Further, this value suggests an assumed net equity value of Sloan's 20% interest in Steeles-Jane of $20 million. Thus, in April 1990, Sloan would reasonably have believed based on the market values of the underlying assets, that, after all Steeles-Jane's lenders had been paid, his interest in Steeles-Jane would still have had very substantial value indeed.

**120** In addition, in 1988, post-purchase of Hill 'N' Dale, Sloan and Ford thought it worth paying a substantial fee of some $133,000 to structure a transaction the entire purpose of which was to realize current gains against a future sale. This suggests an anticipation that the value would continue to grow. And, in fact, it did grow - the April 1989 sale of the Hill 'N' Dale property to HTB (an arms' length transaction) resulted in a gain of over $5 million over the 1987 purchase price.

**121** The put/call agreement was not signed until April 1990. The initial scheduled transaction posed no problem for Alfano and Rinomato, the intended purchasers of Indcondo's Steeles-Jane shares. Indcondo's October 1990 put also resulted in the scheduled purchases by Alfano and Rinomato, albeit some portion of payment for which was later than originally contemplated.

**122** It was not until November 1990 that Alfano and Rinomato gave indemnities to Sloan and not until April 1991 that Alfano and Rinomato defaulted on their scheduled purchases of Indcondo's Steeles-Jane shares. It was not until March 1992 that Indcondo served notice of its intention to require Sloan to purchase all of Indcondo's Steeles-Jane shares and only in April 1992 that Indcondo commenced an action to enforce this obligation (an action in respect of which it did

essentially nothing for four years).

**123** Another factor worthy of consideration in the analysis of this issue is the timing of Di Poala's release from his own personal guarantees of Steeles-Jane's indebtedness to its lenders. As noted in the put/call agreement, Indcondo and Di Poala had provided guarantees to various mortgagees in the amount of $22.8 million and to CIBC for $5.5 million (10% of $55 million). As of April 6, 1990, there was approximately $37.2 million of indebtedness owed to the CIBC (10% of which was $3.72 million).

**124** Under the put/call agreement, Steeles-Jane agreed to use its best efforts to obtain releases for Indcondo and Di Poala from their guarantees to the lenders and indemnified Indcondo and Di Poala in respect of all guarantees given by them.

**125** The evidence was that sometime after April 6, 1990, Di Paola and Indcondo were, in fact, released by the lenders from the obligations under their guarantees. There was no evidence provided about the specific timing or circumstances of obtaining these releases. However, it seems to me inconceivable that, if there had been any hint of Steeles-Jane's financial difficulty or possible inability to discharge its debts to the financial institutions, the release of Indcondo and Di Poala's guarantees could have been obtained in any circumstances.

**126** Accordingly, the only possible inference from the lender's conduct in agreeing to release Indcondo and Di Poala from their guarantees is that by, at least April 6, 1990, and most likely for some time after that, Steeles-Jane's creditors were satisfied with Steeles-Jane's balance sheet and unconcerned about the sufficiency of their security for Steeles-Jane's obligations.

**127** In my view, on the evidence, the earliest sign of market difficulty can be placed no earlier than November 1990, a year and a half after 312 received the benefit of the proceeds of sale of the Hill 'N' Dale property. At the time of that transfer in April 1989, therefore, Sloan had every reason to believe, reasonably, that the transfer of the benefit of the sale of Hill 'N' Dale to 312/Cave Hill would not impair his ability to make good on his other financial obligations.

**128** For these reasons and those previously stated, I do not think Sloan could be said to have had the required intent to defraud creditors in April 1989. I therefore find that, even if Sloan remained the owner of the Hill 'N' Dale property until it was sold in April 1989, the transfer of the proceeds of that sale to 312 was not done with the intent to defraud creditors.

***5. The Riverside Property***

**129** Sloan and Valerie purchased 42 Riverside as joint tenants in August 1989. Their prior home was also owned in joint tenancy. On July 8, 1992, Sloan conveyed his 50% interest in 42 Riverside to Valerie.

**130** The context for this transaction is materially different from those discussed above. By at least

early 1991, Alfano and Rinomato defaulted on their obligation to purchase Indcondo's shares in Steeles-Jane. Indcondo served notice of its call on Sloan to acquire its shares in March 1992. When the shares were not purchased, Indcondo issued a statement of claim in May 1992. The details are vague but it is known as well that somewhere between 1990 and 1992, CIBC, the Royal Bank of Canada and the Bank of Nova Scotia began "putting pressure" on Sloan in respect of his personal guarantees. The Royal Bank sued Sloan and apparently obtained judgment for $12 million in 1993. I find that this "pressure" likely became manifest in late 1991.

**131** Sloan had initially transferred his interest in 42 Riverside to Valerie in 1990 for no consideration. He received advice later, however, that the transfer of this interest without consideration was liable to be set aside and so the transfer was reversed. By July 1992, the Bank of Nova Scotia was pressing Sloan for repayment of a $500,000 line of credit. Mr. Ford's evidence was that he discussed the matter with Sloan and Valerie. Valerie, he said, wanted to help Sloan was unwilling to mortgage 42 Riverside. Mr. Ford recommended pursuing a tax efficient transaction in which Valerie would acquire Sloan's interest in 42 Riverside in exchange for causing Cave Hill to pay off Sloan's Scotiabank indebtedness. Sloan and Valerie followed this advice.

**132** Sloan and Valerie obtained an appraisal of 42 Riverside, valuing the property at $1,050,000. Cave Hill raised $500,000 by agreeing with HTB, the purchaser of the Hill 'N' Dale property, in exchange for a reduction of its vendor takeback mortgage to HTB of $900,000, to a prepayment on the mortgage of $500,000. This money was used to pay off Sloan's obligation to Scotiabank. The remaining $25,000 was paid to Sloan in cash. Title to Sloan's interest in 42 Riverside, therefore, passed to Valerie in exchange for consideration of half the appraised value, $525,000.

**133** The plaintiff attacks the transfer of Sloan's interest in the matrimonial home on the basis that:

(a) the transfer was made to a non-arms' length person;
(b) consideration was inadequate or nonexistent;
(c) the debtor continued in possession of the property after the conveyance;
(d) there were actual and potential liabilities facing the transferor at the time of the transfer; and
(e) the transfer forms part of a pattern of conduct.

**134** The defendants seek to justify this transaction on the basis that the defendants had a continuing intention to transfer Sloan's interest to Valerie since 1990 (that is, from before the market collapse) and on the basis that the transaction was done for valuable consideration.

**135** I do not think the fact that an earlier attempt, perhaps in more favourable circumstances, to transfer Sloan's interest in 42 Riverside to Valerie can save the transaction from attack. The law is clear that the time for evaluating fraudulent intent is at the time of the impugned transaction. Thus, hindsight does enter into the analysis.

**136** Sloan knew by July 1992 that he was in significant financial jeopardy, not only to the Bank

of Nova Scotia but to Steeles-Jane's lenders, Unimade's lenders and, potentially, to Indcondo as well. He also knew that at least some of his others assets had been given to Valerie. In the circumstances, I can come to no other conclusion but that Sloan knew, or ought to have known, that the transfer of his interest in 42 Riverside to Valerie in 1992 would be likely to have a material adverse impact on his ability to pay his creditors. Indeed, in the circumstances, I find that this was the very reason the transaction was done.

**137** This leaves the issue of consideration. The defendants say that Valerie, through her company, 312, paid valuable consideration to Sloan in the form of satisfaction of Sloan's obligation to the Bank of Nova Scotia. They argue that consideration cures all, rendering valid what would otherwise be an attack-able transaction. The plaintiff argues that there was no consideration at all or that, if there was any consideration, it was grossly inadequate. The plaintiff first argues that the assets of 312 were, in fact, Sloan's assets, such that Sloan simply paid himself funds for the reduction of the Scotiabank indebtedness. In the alternative, the plaintiff argues that, since 312 was itself on the hook to Scotiabank as guarantor of Sloan's indebtedness, the payment of $500,000 to the Bank of Nova Scotia was not consideration paid to Sloan for his half interest in 42 Riverside but, rather, a payment to reduce indebtedness of its own which 312 already had. The remaining consideration paid, $25,000 in cash, was grossly inadequate given the evidence of a valuation of the property at $1,050,000. Finally, the plaintiff argues that even with consideration, the 1992 transfer of Sloan's interest in 42 Riverside to Valerie constitutes, in the circumstances, a fraud on his creditors.

**138** I am not persuaded by the plaintiff's first argument. For the reasons outlined earlier, I find that Valerie was the sole owner of 312 and, therefore, had the ultimate financial benefit of 312's assets. If Valerie wanted to spend 312's money bailing out Sloan from his personal financial difficulties, that was her prerogative. I accept that, absent the issue of fraudulent intent to defeat creditors, the deal as proposed by Mr. Ford was a valid one.

**139** I agree, however, with the plaintiff's second and third arguments. On February 27, 1990, 312 executed an unlimited guarantee of Sloan's obligations to the Bank of Nova Scotia. The evidence is that Sloan was being pressed by the Bank of Nova Scotia in 1992 for payment of Sloan's obligations to the bank. While Valerie seeks to characterize 312's payment of $500,000 to the bank as consideration for Sloan's interest in the matrimonial home, in reality the payment was necessary to avoid 312's own liability under its guarantee. That payment, therefore, in the circumstances cannot be considered valid consideration for Sloan's half interest in 42 Riverside. The remaining aspect of the payment, $25,000, was grossly inadequate.

**140** Even if 312's payment in respect of Sloan's obligation to Scotiabank could have been considered valid consideration for the transfer of Sloan's interest in the matrimonial home, in the circumstances that existed by mid-1992, I would have found the transaction invalid in any event.

**141** This is because even where the court determines that there is good and valuable consideration, it may still find that the conveyance was fraudulent if:

(a) it was not done in good faith; and
(b) it was made to a person with knowledge of the debtor's intent to defraud.

**142** Section 3 of the *Fraudulent Conveyances Act* provides that good consideration is a defence to a fraudulent conveyance action *provided that* the conveyance was done "in good faith to persons not having at the time of the conveyance to the person notice or knowledge of" the fraudulent intent. Given the close relationship Sloan enjoyed with Valerie, emphasized repeatedly throughout his evidence, and the extent of the business dealings in which Valerie was already engaged with the family unit's assets, it is inconceivable that Valerie was not aware of Sloan's financial problems by July 1992. I find that Valerie must have known that the chief purpose of the transfer of Sloan's interest in 42 Riverside was to protect their home against execution by Sloan's creditors.

**143** For these reasons, I find that the transfer of Sloan's interest in 42 Riverside to Valerie in July 1992 was done with the intent to defeat Sloan's creditors and must, on this basis, be set aside.

***6. The Florida Condominium***

**144** Sloan purchased a Florida condominium in 1981 in his own name and using his own money. In 1993, Sloan conveyed 50% of his interest in this property to Valerie for no consideration. In April 1994, the condominium was sold for $275,000. The proceeds of sale went to Valerie personally or to Cave Hill. The explanation for this transfer at trial was simply that Valerie asked Sloan to do it this way.

**145** In my view, the same analysis applying to 42 Riverside applies to the Florida condominium. The condominium was clearly Sloan's asset. The transfer of a half interest to Valerie in 1993 and the transfer of the entire proceeds of sale to Cave Hill (or Valerie) in 1994 were done at time when Sloan had been sued, not only by the plaintiff but by the Royal Bank of Canada as well. The badges of fraud in this case overwhelming point to fraudulent intent. The defendants have not overcome their evidentiary, or tactical, burden of providing a plausible explanation justifying the validity of this transfer.

**146** For these reasons, the transfer of the proceeds of sale, in the amount of $275,000, to Cave Hill must be set aside. There being no evidence of the amount of any encumberance on this property, the full amount of the proceeds must be considered available for Sloan's creditors.

***The Evidence of Tony Di Poala***

**147** The plaintiff's only other witness besides John Di Poala was his brother, Tony Di Poala. Tony gave evidence about a conversation he had with Sloan in September 1991, in which the subject of the plaintiff's pending action came up. During the conversation, Sloan is alleged to have said that he was taking steps to make himself judgment-proof, as were the other shareholders, and that this was what businessmen do when faced with threatened litigation.

**148** I do not find this evidence to be especially probative or compelling. First, as John Di Poala's brother, Tony has an obvious "stake" in these proceedings; he is not an entirely independent witness. Second, this evidence involves events that happened 23 years ago. For this reason, I do not find either the specific content or the specific timing of the conversation particularly reliable. Most importantly, however, even if I were to accept Tony's evidence, it does little more than tend to corroborate conclusions I have already reached based on other, more objective evidence. The conversation, on Tony's own evidence, took place in the fall of 1991. The Bowes and Hill 'N' Dale property transactions had already taken place. At best, therefore, Tony's evidence is relevant to the transfers of 42 Riverside and the Florida condominium, which I have already found, on the basis of other evidence, were invalid as having been undertaken with the intent to defeat Sloan's creditors. For these reasons, I have placed little weight on Tony's evidence.

**Piercing the Corporate Veil**

**149** The plaintiff also argues that, in addition to the specific transactions attacked under s. 3 of the *Fraudulent Conveyances Act*, it is entitled to trace all of Sloan's assets to Cave Hill in order to satisfy its judgment. The plaintiff claims, in the circumstances of this case, that it is entitled to pierce the corporate veil.

**150** In essence, the plaintiff argues that Cave Hill has, since 1988, operated as little more that Sloan's personal bank account. Put simply, the plaintiff says that Sloan's name is all over Cave Hill's transactions since its formulation as 938 and 312. It was Sloan who, in reality, was the directing mind of Cave Hill's activities. All of Cave Hill's assets came from Sloan for no consideration. Yet now that Sloan is insolvent, these assets have been removed from the reach of Sloan's creditors. Even Sloan's consulting income in the 1990s was deposited into Cave Hill's account for no consideration. The assets of Cave Hill continue to provide the cash for money transfers to Sloan and Valerie's joint bank account, which funds all of not only Valerie's but Sloan's ongoing living expenses. Sloan does not even need, the plaintiff says, to go through the charade of having Valerie (as sole Cave Hill shareholder) authorize these transfers because, at least since Valerie's stroke, Sloan has held her power of attorney for property and Sloan's old friend, Mr. Pender, is the business manager of Cave Hill. Cave Hill is, argues the plaintiff, a flagrant abuse of the corporate form.

**151** I take the definitive, and most current, formulation of the principles underlying when the corporate veil may be pierced from the decision of Sharpe J. (as he then was) in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* 1996 CarswellOnt 1699 at paras. 22 and 23:

> ...the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct. The first element, "complete control", requires more than ownership. It must be shown that there is complete domination and that the subsidiary company does not, in fact, function independently...

> The second element relates to the nature of the conduct: is there "conduct akin to fraud that would otherwise unjustly deprive claimants of their rights?"

**152** Sharpe J. relied on the prior decision of the Ontario Court of Appeal in *Gregorio v. Intrans Corp.* (1994), 18 O.R. (3d) 527, a decision of Laskin J.A., at p. 536:

> Generally, a subsidiary, even a wholly-owned subsidiary, will not be found to be the alter ego of its parent unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability. The alter ego principle is applied to prevent conduct akin to fraud that would otherwise unjustly deprive claimants of their rights.

**153** An appeal from the decision of Sharpe J. was dismissed by the Court of Appeal in a brief endorsement at 1997 CarswellOnt 3496. See also *Fleisher v. 642947 Ontario Limited*, [2001] O.J. No. 4771 at para. 68.

**154** In my view, the corporate veil argument adds nothing to the analysis of the situation here. The corporate veil argument cannot succeed separate and apart from the issue of fraudulent conveyances.

**155** I say this because, while I would be prepared to accept that Sloan sufficiently dominated the affairs of Cave Hill to meet the first part of the test, the basis for the alleged fraudulent conduct which has deprived the claimant of its rights under the second part of the test is the same conduct on which the plaintiff relies to set aside the impugned transfers as fraudulent conveyances of property dealt with earlier in these Reasons. Thus, the corporate veil argument adds nothing and has no effect apart from the specific transactions which are under attack and which have been dealt with on their own merits.

**156** For this reason, I dismiss the plaintiff's claims relating to piercing the corporate veil.

**The Defence of Laches**

**157** Laches is an equitable doctrine, akin to estoppel, founded on the principle that one is obliged to assert legal rights in a timely way or risk losing them. Laches is a form of equitable limitation period. Two factors dominate the consideration of this doctrine:

(1) delay and its circumstances; and
(2) prejudice resulting from that delay.

**158** In *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221 at 239-240 the principle was stated as follows:

> ...[it] is not an arbitrary or technical doctrine... Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

**159** The Supreme Court of Canada discussed these critical factors in *M. (K.) v. M. (H.),* [1992] 3 S.C.R. 6 at pp. 77-78:

> What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches... Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.

**160** In this case, the defendants argue that the plaintiff's action should be dismissed on the basis of laches. The defendants argue that there has been inordinate delay (now 23 years) and prejudice resulting from that delay. The prejudice, it is said, is the presumed prejudice of fading memories over time and the loss or destruction of relevant documents.

**161** In respect of the delay, the defendants rely, among other things, on the conclusions of Mesbur J. in her ruling of August 30, 2011 in this case when she said:

> When I look at all the facts of this case and its tortured history, I can come to no other conclusion than that it is an abuse of the court's process. I cannot see how Indcondo can purport to pursue the identical claims yet again, particularly in light of its inordinate delay.

**162** I note, however, that central to Mesbur J.'s conclusion in this ruling was the finding that the plaintiff's action was an abuse process - a conclusion founded on the further conclusion that the plaintiff's claim was precluded by the principle of issue estoppel. That central finding on issue estoppel was, however, reversed by the Court of Appeal, which found that, because in *this* case the plaintiff stood in the shoes of the Trustee, it was not seeking to re-litigate earlier, dismissed claims which had been advanced by the plaintiff in its own capacity.

**163** Nevertheless, I would be prepared to conclude that the plaintiff has been guilty of inordinate delay in the prosecution of its claims, whether or not those claims are asserted on its own behalf or standing in the shoes of the Trustee. This finding alone, however, as noted above, is insufficient to support a claim of laches. The defendants must also prove circumstances, such as irredeemable prejudice, which show that the continued prosecution of this action is unreasonable. The defendants have failed to do so in this case.

**164** In my view, the prejudice relied on - fading memories and loss of documents - lacks

sufficient specificity. While the plaintiff is unquestionably guilty of delay, all parties must take some responsibility for aspects of the more than 23 years which has elapsed since the relevant events. More importantly, while Sloan makes the generic claim that documents were lost or destroyed in the usual and ordinary course of business, there is no evidence of specific documents being destroyed at specific stages of the proceeding as a result of the plaintiff's delay. The relevant property transfers took place between 1987 and 1989. Sloan was first notified of claims in early 1992. Sloan has failed to give any content to the generic complaint that documents that would have been helpful to him were lost or destroyed before that point in time. Since then, while there have been long periods of inactivity on the plaintiff's part, only a fool would have jettisoned important documents with litigation hanging over his head. The fact that Mr. Ford (while not a party nevertheless a friend of Sloan's) produced documents at the eleventh hour also casts some doubt on the rigor with which Sloan fulfilled his document production obligations. While I am sympathetic to the defendants' plea that adverse inferences ought not to be drawn from the loss or destruction of relevant document in the circumstances of this case, the evidence does not rise to the level of proof of acquiescence or actual, material prejudice sufficient to support a claim of laches. For these reasons, the defendants' argument for the dismissal of this action on the basis of laches is dismissed.

**CPL Motion**

**165** The defendants had a pending motion before this court to set aside an *ex parte* order for a certificate of pending litigation based on alleged incomplete disclosure by the plaintiff. This motion, it seems, was overtaken by other events including the two motions to dismiss the action, and the two trips to the Court of Appeal, and the case management order of D. Brown J., which suspended all motions and reserved this issue to trial.

**166** The *ex parte* motion was for an interlocutory order, the sole purpose of which was to prevent the dissipation of assets in dispute pending the trial of this action. There has now been, of course, a full hearing on the merits of the plaintiff's claims and, subject to rights of appeal, a final determination of those claims. In my view, therefore, the issue of the sufficiency of the evidence on the plaintiff's *ex parte* motion for a CPL is now moot. I therefore find it unnecessary to rule on the defendants' motion to set aside the CPLs. Any CPL affecting Hill 'N' Dale must and shall be discharged. Any CPL affecting 42 Riverside has been superceded by my judgment.

**167** Should there be an appeal, any further motions to preserve assets pending appeal will have to be brought on fresh evidence which would include the evidence adduced at trial.

**Costs**

**168** Any party seeking its costs shall do so by filing a written submission, not to exceed five typed, double-spaced pages, together with a Bill of Costs and supporting documents, within 21 days of the release of these Reasons. Anyone wishing to respond to such a request shall do so by filing a written response, subject to the same page limit, within a further 14 days.

M.A. PENNY J.

---- End of Request ----
Email Request: Current Document: 1
Time Of Request: Thursday, January 25, 2018 19:50:07

*Case Name:*

**Indcondo Building Corp. v. Sloan**

**Between**
**Indcondo Building Corporation, Plaintiff/Appellant/Respondent in Cross-Appeal, and**
**Valerie Francis Sloan, David Robin Sloan and Cave Hill Properties Ltd., Defendants/Respondents/Appellant in Cross-Appeal**

[2015] O.J. No. 5768

**2015 ONCA 752**

31 C.B.R. (6th) 110

259 A.C.W.S. (3d) 691

2015 CarswellOnt 16689

Docket: C59303

Ontario Court of Appeal

**G.R. Strathy C.J.O., E.E. Gillese and R.A. Blair JJ.A.**

Heard: October 19, 2015.
Judgment: November 5, 2015.

(20 paras.)

*Civil litigation -- Civil procedure -- Estoppel -- Estoppel in pais (by conduct) -- Laches or delay -- Appeal by judgment creditor and cross-appeal by debtors from judgment setting aside some, not all, of debtor's property transfers as fraudulent conveyances dismissed -- Judge did not err in finding debtor unaware by 1987 and 1988 that he was in financial difficulty, therefore lacking intent to defraud by transferring property to wife and her company -- Laches not available as defence to other fraudulent conveyance claims relating to transfers of property after debtors knew of his financial problems, where no evidence of prejudice by debtors provided.*

*Creditors and debtors law -- Fraudulent conveyances -- Conveyances that are void -- Intent to defeat, hinder, delay or defraud creditors -- Burden of proof -- Exception -- No knowledge of intent -- Appeal by judgment creditor and cross-appeal by debtors from judgment setting aside some, not all, of debtor's property transfers as fraudulent conveyances dismissed -- Judge did not err in finding debtor unaware by 1987 and 1988 that he was in financial difficulty, therefore lacking intent to defraud by transferring property to wife and her company -- Laches not available as defence to other fraudulent conveyance claims relating to transfers of property after debtors knew of his financial problems, where no evidence of prejudice by debtors provided.*

Appeal by Indcondo and cross-appeal by the Sloans and Cave Hill from a judgment setting aside some transfers of property Mr. Sloan made as fraudulent conveyances. Indcondo sought to have four conveyances set aside to satisfy a judgment it obtained against the Sloans and Cave Hill, Mrs. Sloan's company, in 2001. The judge found that Mr. Sloan's conveyances in 1987 and 1988 to his wife and her company were not made with intent to defraud his creditors, while the transfers of the matrimonial home and a Florida property between 1992 and 1994 made for that purpose, setting aside the latter two transactions. He based this decision on his determination that Mr. Sloan could not reasonably have known he was in financial trouble when he made the 1987 and 1988 conveyances, but that he knew, by 1992, that he was in significant financial jeopardy, given that Indcondo had commenced an action against him and three banks were pressuring him. The judge dismissed Indcondo's claim to pierce the corporate veil of Mrs. Sloan's company, and dismissed the defence of laches.

HELD: Appeal and cross-appeal dismissed. The judge made no palpable or overriding error in any of his factual findings. The lack of complete documentation for Mr. Sloan's 1987 and 1988 transactions did not mean the transactions were lacking in good faith. The corporate veil argument did not add anything to Indcondo's attacks on the individual transactions. The judge was in the best position to determine whether the defence had been prejudiced by the 23-year delay in bringing the matter to trial. The appeal court would not interfere with the factual finding that laches was not made out because prejudice was not established. The appeal court declined to consider section 5(1) of the Assignments and Preferences Act, as the provision was not pleaded to the trial judge.

**Statutes, Regulations and Rules Cited:**

Assignments and Preferences Act, R.S.O. 1990, c. A.33, s. 5(1)

Fraudulent Conveyances Act, R.S.O. 1990, c. F.29,

**Appeal From:**

On appeal from the judgment of Justice Michael A. Penny of the Superior Court of Justice, dated July 31, 2014.

**Counsel:**

Trung Nguyen, for the appellant.

Philip Healey, for the respondents.

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**ENDORSEMENT**

The following judgment was delivered by

**1** THE COURT:-- Following oral argument, we dismissed the appeal and cross-appeal with reasons to follow. These are those reasons.

**2** The appellant sought to set aside four transfers of property pursuant to the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F-29, in order to satisfy a judgment it obtained against the respondents in 2001. The action was twice dismissed prior to trial, first on a limitations issue and second as an abuse of process. Both orders were reversed by this court and the matter went to trial.

**3** Success was divided. The trial judge found that the respondent Sloan's conveyances in 1987 and 1988 to his wife and her company were not made with intent to defraud his creditors. He found, however, that transfers of the matrimonial home and a Florida property between 1992 and 1994 were made for that purpose, and set them aside.

**4** The trial judge's analysis hinged primarily on his determination of when Sloan knew he was in financial trouble. He found the conveyances in 1987 and 1988 occurred at a time when Sloan could not reasonably have known that they would impair his ability to discharge his financial obligations. By 1992, however, his circumstances had changed. He knew that he was in significant financial jeopardy. The circumstances surrounding those transactions pointed to a fraudulent intent.

**5** The trial judge also dismissed the appellant's claim to pierce the corporate veil of the wife's company and dismissed the respondents' defence that the action should be dismissed on the basis of the doctrine of laches.

**6** The appeal and cross-appeal impugn the trial judge's findings of fact. This was a case in which the documentary and testimonial evidence suffered from some infirmities due to the passage of time. The trial judge was in the best position to consider and weigh all that evidence, recognizing the challenges faced by both parties. His findings were based on inferences he drew from the evidence, and from the lack of evidence, and on his assessment of the credibility of the witnesses. They are supported by that evidence. We are not persuaded that the trial judge made a palpable and overriding error in any of his factual findings.

7 In attacking the 1987 and 1988 conveyances, the appellant says the trial judge should have found the trust arrangements were a "sham", relying on *Duca Financial Services Credit Union Ltd. v. Bozzo*, 2011 ONCA 455, 68 E.T.R. (3d) 1. It says that on the trial judge's findings, Sloan maintained control of his wife's company, and this is inconsistent with having parted with the beneficial interest in the properties.

**8** We do not accept this submission. Although the *Duca* case was not brought to the attention of the trial judge, he addressed the argument that the transactions were shams and found otherwise. Indeed, in both cases, based on Sloan's evidence and that of his lawyer, the trial judge found that the appellant had failed to establish that the conveyances were made with fraudulent intent. The trial judge recognized that the documentation was not as complete as it might have been, but observed this did not mean the transaction was lacking in good faith.

9 Applying the principles from *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at pp. 433-34, affirmed by [1997] O.J. No. 3754 (C.A.), the trial judge concluded that the corporate veil argument could not succeed separate and apart from the issue of the fraudulent conveyances. He was willing to accept that Sloan dominated the affairs of his wife's company to bring it under his complete control. He noted, however, that the second part of the test -- "conduct akin to fraud that would otherwise unjustly deprive claimants of their rights" -- had not been met. The conduct upon which the appellant relied was the same conduct it relied upon to set aside the transactions as fraudulent conveyances. Thus, the corporate veil argument did not add anything to its attacks of the specific transactions, which he had already dismissed on their merits.

**10** Turning to the cross-appeal, the trial judge found that Sloan's circumstances were markedly different by 1992. The appellant had started an action against Sloan and three banks were putting pressure on him. It was in these circumstances that Sloan transferred his interest in the matrimonial home to his wife in 1992 and his half interest in their Florida condo to her in 1993. On the matrimonial home, the trial judge found that Sloan knew the transfer would materially impact his ability to pay his creditors. That was the very reason he made the transfer, and his wife knew that was the reason it was done.

**11** As for the Florida condo, the trial judge found that the badges of fraud pointed overwhelmingly to a fraudulent intent and the respondents had not overcome their evidentiary burden of establishing the validity of the transfer.

**12** The trial judge was then entitled to determine that the entire proceeds of sale were available to Sloan's creditors, as the respondents produced no evidence to show the property was encumbered.

**13** On the cross-appeal, the respondents also say the trial judge erred in not giving effect to the defence of laches.

**14** We see no merit to this submission. As the trial judge noted, laches is an equitable doctrine.

The party relying on the defence must establish both delay and prejudice resulting from the delay. The trial judge indicated that he would be prepared to find the appellant had been guilty of inordinate delay in the prosecution of the claims. He found, however, that the defendants had not established actual prejudice as a result of the delay.

**15** Having presided at the trial, the trial judge was in the best position to determine whether the respondents' defence was prejudiced by the 23-year delay in bringing the matter to trial. The respondents essentially ask us to re-assess the circumstances and to make our own findings as to prejudice. We are not prepared to do so. Nor are we prepared to interfere with the trial judge's exercise of his discretion.

**16** The respondents also submit on the cross-appeal that the trial judge erred in failing to give effect to s. 5(1) of the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33, which, the respondents claim, "exempts any payment of money to a creditor provided it was made in satisfaction of a pre-existing debt, whether the payment was intended to prefer the creditor or not." This submission does not reflect the actual words of the section, which contains no reference to a "pre-existing debt." Nor does it take into account the concluding words of the sub-section:

> ... 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.

**17** The wording of the provision suggests that it does *not* refer to payments for *pre-existing* debts but rather to *present* payments, advances, sales or deliveries.

**18** We do not, however, find it necessary to resolve the issue. This provision was not pleaded and the submission was not made to the trial judge. We are not satisfied that we have all the facts necessary to address the issue and that it can be addressed without causing unfairness to the appellant: *767269 Ontario Ltd. v. Ontario Energy Savings L.P.*, 2008 ONCA 350, at para. 3; *Kaiman v. Graham*, 2009 ONCA 77, 245 O.A.C. 130, at para. 18.

**19** Both parties sought to introduce fresh evidence on the appeal. In a case of this vintage, a party's claim to have discovered new evidence is viewed with some scepticism. We are not satisfied that the evidence could not have been obtained by due diligence before trial. Whether we apply the *Palmer* test (*R. v. Palmer,* [1980] 1 S.C.R. 759), or the *Sengmueller* test (*Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (C.A.)), the fresh evidence is not admissible. See *Chiang (Trustee of) v. Chiang*, 2009 ONCA 3 at paras. 72-78.

**20** For these reasons, the motions to admit fresh evidence are dismissed. The appeal and cross-appeal are dismissed. As success is divided, there will be no order as to costs.

G.R. STRATHY C.J.O.
E.E. GILLESE J.A.
R.A. BLAIR J.A.

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Time Of Request: Thursday, January 25, 2018 19:49:59

# TAB 12

2017 ONSC 1366
Ontario Superior Court of Justice [Commercial List]

Ernst & Young Inc. v. Essar Global Fund Ltd et al

2017 CarswellOnt 4049, 2017 ONSC 1366, 137 O.R. (3d) 438,
277 A.C.W.S. (3d) 243, 46 C.B.R. (6th) 107, 66 B.L.R. (5th) 189

# ERNST & YOUNG INC. in its capacity as Monitor of all of the following: ESSAR STEEL ALGOMA INC., ESSAR TECH ALGOMA INC., ALGOMA HOLDINGS B.V., ESSAR STEEL ALGOMA (ALBERTA) ULC, CANNELTON IRON ORE COMPANY and ESSAR STEEL ALGOMA INC. USA (Plaintiff) and ESSAR GLOBAL FUND LIMITED, ESSAR POWER CANADA LTD., NEW TRINITY COAL, INC., ESSAR PORTS ALGOMA HOLDINGS INC., ALGOMA PORT HOLDING COMPANY INC., PORT OF ALGOMA INC., ESSAR STEEL LIMITED and ESSAR STEEL ALGOMA INC. (Defendants)

Newbould J.

Heard: January 31; February 2-5, 2017
Judgment: March 6, 2017
Docket: CV-16-11570-00CL

Counsel: Clifton Prophet, Nicholas Kluge, Michael Watson, Marco Romeo, Delna Contractor, Brent Arnold, for Monitor
Patricia D.S. Jackson, Andrew Gray, Jeremy R. Opolsky, Davida Shiff, Alexandra Shelley, for Defendants, Essar Global Fund Limited, Essar Ports Algoma Holdings Inc., Algoma Port Holding Company Inc., Port of Algoma Inc.
Peter H. Griffin, Monique J. Jilesen, Matthew B. Lerner, for GIP Primus, LP and Brightwood Loan Services LLC
Eliot Kolers, Patrick Corney, for Applicants
John A. MacDonald, Alex Cobb, for Intervenors, Deutsche Bank AG
L. Joseph Latham, David Conklin, for Intervenors, Ad Hoc Committee of Essar Algoma Noteholders
Karen Ensslen, for Intervenors, Retirees
Robert A. Centa, for Intervenors, USW and Local 2724
Alexandra Teodorescu, for Intervenors, USW Local 2251

Subject: Civil Practice and Procedure; Corporate and Commercial; Evidence; Insolvency
**Related Abridgment Classifications**
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.9 Miscellaneous
Business associations
III Specific matters of corporate organization
III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.ii Relief from oppression
III.3.e.ii.C Oppressive conduct
III.3.e.ii.C.4 Improper transfer of assets
Business associations
III Specific matters of corporate organization

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III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.ii Relief from oppression
III.3.e.ii.D Orders for relief
III.3.e.ii.D.5 Miscellaneous

**Headnote**

Bankruptcy and insolvency --- Practice and procedure in courts — Miscellaneous

E Global acquired steel company A Ltd. in 2007 — A Ltd. experienced financial issues and in 2014, steps were taken to refinance — A Ltd. became insolvent in 2015 and received Companies' Creditors Arrangement Act (CCAA) protection — Monitor brought oppression proceedings under Canada Business Corporation Act related to refinancing transactions — E defendants alleged Monitor was not proper complainant — Monitor was proper complainant in oppression claim — Under s. 23(1)(k) of CCAA, Monitor shall carry out any function in relation to debtor that court may direct — Monitor was authorized and directed to take oppression action by court order.

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief from oppression — Oppressive conduct — Improper transfer of assets

E Global, part of E group of companies, acquired steel company A Ltd. — E Global entered into Restructuring Support Agreement (RSA) with A Ltd. and pledged $250 to $300 million cash investment — Five of A Ltd.'s eight directors were affiliated with E group — RSA was amended to provide $150 million funded largely by loan from third parties, not E Global — Refinancing included transfer of A Ltd.'s port assets, without which A Ltd. could not function economically, to E Global subsidiary P Inc. — Port Transaction involved A Ltd. selling Port assets excluding land to P Inc. and A Ltd. leasing land to P Inc. for 50 years — A Ltd. and P Inc. entered into Cargo Handling Agreement (CHA) which required P Inc.'s consent to change of control of A Ltd. — A Ltd. received Companies' Creditors Arrangement Act (CCAA) protection — Monitor brought oppression proceedings under CBCA — Claims regarding Port Transaction allowed — Reasonable expectations of trade creditors, employees, pensioners and retirees of A Ltd. were that A Ltd. would not deal with critical asset like Port in way as to lose long-term control over asset to related party on terms that permitted related party to control A Ltd.'s ability to do significant transactions or restructure and which gave unwarranted value to third party — These reasonable expectations were violated by Port Transaction and change of control veto provided to P Inc., and thus E Global, in Port Transaction — Port Transaction and third party loan would not have been necessary had E Global lived up to its obligations under RSA — E Global acted in bad faith — Port Transaction and change of control provision were unfairly prejudicial to interests of A Ltd.'s trade creditors, employees, pensioners and retirees — Change of control provision gave P Inc. and thus E Global effective control over who might acquire A Ltd. — Any buyer of A Ltd. business would require CHA to be assigned to it in order to be able to operate steel mill — Thus veto of P Inc. under CHA was effectively veto of E Global over any change of control of A Ltd. business — Business judgment rule did not provide defence.

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief from oppression — Orders for relief — Miscellaneous

E Global acquired steel company A Ltd. — E Global entered into Restructuring Support Agreement (RSA) and pledged $250 to $300 million cash investment — Five of A Ltd.'s eight directors were affiliated with E group of companies — RSA was amended to provide $150 million funded largely not by E Global but by loan from third parties including G LP — Refinancing included transfer of A Ltd.'s port assets, without which A Ltd. could not function economically, to E Global subsidiary P Inc. — Port Transaction involved A Ltd. selling Port assets excluding land to P Inc. and A Ltd. leasing land to P Inc. for 50 years — A Ltd. and P Inc. entered into Cargo Handling Agreement (CHA) and shared services agreement (SSA) — Section 15.2 of CHA required P Inc.'s consent to change of control of A Ltd. — A Ltd. became insolvent and received Companies' Creditors Arrangement Act protection — Monitor brought oppression proceedings under Canada Business Corporations Act — Claims regarding Port Transaction allowed — Reasonable expectations of trade creditors, employees, pensioners and retirees of A Ltd. were that A Ltd. would not deal with critical asset like Port in such way as to lose long-term control over strategic asset to related party on terms that permitted related party to veto and control A Ltd.'s ability to do significant transactions or restructure and which gave unwarranted value to third party — These reasonable expectations were violated by Port Transaction and change of control veto provided to

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P Inc., and thus E Global, in Port Transaction — Appropriate relief for oppression involving change of control clause in CHA was to delete s. 15.2 and insert provision that if G LP becomes equity owner of P Inc., A Ltd. or its parent cannot agree to or undertake change of control of A Ltd. without consent of G LP — Appropriate relief for oppression in Port Transaction was that lease to P Inc., CHA and SSA be amended to provide that after G LP loan has matured and been paid, A Inc. shall thereafter have option of terminating lease to P Inc., CHA and SSA — Further, if CHA continues and if P Inc. elects not to renew it in certain circumstances, lease to P Inc. shall terminate along with CHA and SSA — Upon termination of lease, A Ltd. to repay to P Inc. $4.2 million with interest.

E Global, through a chain of subsidiaries, acquired steel company A Ltd. in 2007. E Global was a part of a group of companies (E group) owned by members of the R family.

A Ltd. experienced financial issues and in 2014 steps were taken to refinance. At that time, five of the eight directors of A Ltd. were affiliated with E group. E Global entered into a Restructuring Support Agreement (RSA) with A Ltd. and signed an Equity Commitment Letter (ECL) pledging a cash investment of $250 to $300 million. It was a condition of the approved plan of arrangement under s. 92 of the Canada Business Corporations Act that E Global would comply with its financing obligations under the RSA. The RSA was later amended to provide a cash injection into A Ltd. of $150 million to be funded largely not by E Global but by a $150 million loan to P Inc. from third party lenders including G LP. The refinancing also included the transfer of A Ltd.'s adjacent port facility assets, without which A Ltd. could not function economically, to E Global subsidiary P Inc. (Port Transaction). The Port Transaction involved A Ltd. selling its Port assets excluding land to P Inc.; A Ltd. leasing the realty to P Inc. for 50 years; P Inc. agreeing to provide services necessary for the operation of the Port assets for a monthly payment from A Ltd. to P Inc.; and A Inc. agreeing that it would provide the services necessary to operate the Port, in return for a monthly payment from P Inc. to A Ltd. that would be less than the monthly payment from A Ltd. to P Inc. As part of the Port Transaction, A Ltd. and P Inc. entered into a Cargo Handling Agreement (CHA) which, in s. 15.2, required P Inc.'s consent to a change of control of A Ltd.

A Ltd. became insolvent in 2015 and received Companies' Creditors Arrangement Act (CCAA) protection. In 2016, the Monitor brought oppression proceedings under s. 241 of the Canada Business Corporations Act in relation to a number of related party transactions, including the Port Transaction. The claims regarding the Port Transaction proceeded first.

**Held:** The claims with respect to the Port Transaction were allowed.

The Monitor was a proper complainant in the oppression claim. Under s. 23(1)(k) of the CCAA, the Monitor shall carry out any function in relation to the debtor that the court may direct. In this case, the Monitor was authorized and directed to take this oppression action by court order.

The direction and decision making regarding the recapitalization and Port Transaction was by E Global and E Capital. While A Ltd.'s board of directors in form made the decisions for A Ltd., the strategic decisions were made by E Global and E Capital.

The reasonable expectations of the trade creditors, the employees, pensioners and retirees of A Ltd. were that A Ltd. would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control A Ltd.'s ability to do significant transactions or restructure and which gave unwarranted value to the third party. These reasonable expectations were violated in two ways: the Port Transaction itself and the change of control veto provided to P Inc., and thus E Global, in the Port Transaction.

The entire Port Transaction and the G LP secured loan to P Inc. would not have been necessary had E Global lived up to its obligations under the RSA and ECL pledging a cash investment of $250 to $300 million. Despite its obligations, E Global had no intention of living up to its promises and acted in bad faith in that regard.

The Port Transaction and the change of control provision were unfairly prejudicial to the interests of A Ltd.'s trade creditors, employees, pensioners and retirees. The change of control provision gave P Inc. and thus E Global effective control over who might acquire the A Inc. business.

The Port facilities were of crucial importance to the operation of the A Ltd. steel mill. In light of the 50 year lease of the Port facilities from A Ltd. to P Inc., and the CHA and Shared Services Agreement (SSA), any buyer of the A Ltd. business would require the CHA to be assigned to it in order to be able to operate the steel mill. Thus the veto of P Inc. under this clause, which E Global controlled, was effectively a veto of E Global over any change of control of the A Ltd. business.

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The business judgment rule did not provide a defence. What happened in the Port Transaction was an exercise in self-dealing in that A Ltd.'s critical Port asset was transferred out of A Inc. to a subsidiary of E Global with a change of control provision that benefited E Global at a time that a future insolvency was a possibility. That would not have been necessary had E Global lived up to its cash injection commitment. Yet the board did not take any steps to call E Global on its commitment, even in the face of legal advice that it should do so.

The appropriate relief for the oppression involving the change of control clause was to delete s. 15.2 from that agreement and insert a provision that if G LP becomes the equity owner of P Inc., A Ltd. or its parent cannot agree to or undertake a change of control of A Ltd. without the consent of G LP.

The appropriate relief for the oppression in the Port Transaction was that the Lease to P Inc., the CHA and the SSA be amended to provide that after the G LP loan has matured and been paid, A Inc. shall have the option of terminating the lease to P Inc., the CHA and the SSA. Further, if the CHA continues and if P Inc. elects not to renew it after 20 years or any three year extension, the Lease to P Inc. shall terminate at that time along with the CHA and SSA. Upon termination of the lease, A Ltd. shall repay to P Inc. $4.2 million with interest.

**Table of Authorities**

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*Brant Investments Ltd. v. KeepRite Inc.* (1991), 1 B.L.R. (2d) 225, 3 O.R. (3d) 289, 45 O.A.C. 320, 80 D.L.R. (4th) 161, 1991 CarswellOnt 133 (Ont. C.A.) — referred to

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*Nortel Networks Corp., Re* (2014), 2014 ONSC 6973, 2014 CarswellOnt 17291, 20 C.B.R. (6th) 171, 17 C.C.P.B. (2nd) 10 (Ont. S.C.J. [Commercial List]) — considered

*Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2003), 2003 CarswellOnt 5210, (sub nom. *Olympia & York Developments Ltd. (Bankrupt) v. Olympia & York Realty Corp.)* 180 O.A.C. 158, 46 C.B.R. (4th) 313, 42 B.L.R. (3d) 14, 68 O.R. (3d) 544 (Ont. C.A.) — considered

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**Statutes considered:**

*Canada Business Corporations Act*, R.S.C. 1985, c. C-44

Generally — referred to

s. 92 — considered

s. 238 "complainant" — considered

s. 241 — considered

s. 241(2) — considered

s. 241(3) — considered

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Generally — referred to

s. 23(1)(k) — considered

*Courts of Justice Act*, R.S.O. 1990, c. C.43

Generally — referred to

RULING on part of oppression claim under s. 241 of *Canada Business Corporations Act*, regarding related party transactions.

***Newbould J.:***

1 Ernst & Young Inc. was appointed Monitor of Essar Steel Algoma Inc. ("Algoma"), Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company and Essar Steel Algoma Inc. USA (the "Applicants") pursuant to the CCAA on November 9, 2015.

2 This is not the first time that Algoma has been under CCAA protection. It went through a restructuring in CCAA proceedings in 1991 and again in 2001. In late 2013 Algoma faced another liquidity crisis and restructured in 2014 under the CBCA.

3 Essar Global Fund Limited ("Essar Global") is a Cayman Island company. Its investments are managed by Essar Capital Limited ("Essar Capital") based in London, U.K. The Essar Group of companies has worldwide interests in assets across the core sectors of energy, metals and mining, infrastructure and services. It was founded in India by two brothers, Shashi and Ravi Ruia, and members of the Ruia family are the beneficial owners of the Essar Group. [1]

4 Essar Global is also the ultimate parent of Port of Algoma Inc. ("Portco") through a chain of subsidiaries, which includes Essar Port Holdco and Algoma Port Holding Company Inc.

5 Essar Global acquired all of the shares of Algoma Steel Inc. through subsidiaries in April, 2007 and changed the name to Essar Steel Algoma Inc. ("Algoma").

6 On September 26, 2016, the Monitor was authorized by court order to commence oppression proceedings under section 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C. 44 ("CBCA") in relation to a number of related party transactions, including the transactions involving the conveyance of Algoma's Port facility assets (the "Port Transaction") to Portco. The action was commenced shortly thereafter. The claims regarding the Port Transaction proceeded first and these reasons for judgment deal solely with those claims.

7 The Port assets are located immediately adjacent to the Algoma buildings and facilities. Algoma is dependent upon the Port to receive the raw materials to make steel, and to ship its steel products to market. Algoma could not function

economically without unfettered access to the Port. The Port has always been utilized almost exclusively by Algoma. It is not viable without Algoma as a customer. Algoma employees have always operated the Port.

**The Algoma Restructuring and the Port Transaction**

8 By the end of 2013, it was clear that Algoma was facing significant financial issues involving a liquidity crisis and upcoming debt maturity issues. Algoma was operating with very tight liquidity, resulting in low inventory levels. Algoma's capital structure was untenable and it would not be able to meet a coupon payment to unsecured bondholders due in June 2014 and an approximately $300 million term loan maturity payment due in September 2014. While support from Essar Global had been enabling Algoma to meet its liabilities as they came due, by early 2014 Essar Global was increasingly hesitant to advance cash to Algoma.

9 Steps were taken to refinance Algoma. These steps ultimately resulted in two main transactions which closed at the same time on November 14, 2014, being a recapitalization transaction (the "Recapitalization") and the Port Transaction. There is a huge record of what took place in 2014 leading to these transactions. It need not all not be described. However there were events that are of some relevance to the issues raised.

10 On January 17 2014, a refinancing plan was presented to Algoma's board of directors in a memo dated January 16, 2014. Two scenarios were proposed. "Plan A" contemplated the refinancing of the entire capital structure, which required a minimum cash infusion of $200 million ($300 million was ideal); "Plan B" contemplated refinancing only the term loan.

11 At the time, there were eight directors of Algoma. Five were not independent and were affiliated with the Essar Group or the Ruia family. Three were independent of Essar, being Thomas Dodds, Hans J. Jacobsen and Navin Dave. In the fall of 2013 these three began expressing concerns about their role on the Board, noting that the disclosure of information to the independent directors was limited, especially when compared to the information being provided to the other members of the Board. Through December 2013 and into January of 2014, their concerns became more acute due to the serious financial challenges facing Algoma. The refinancing plans in the January 16 memo were presented to them for the first time on January 17, 2014 at an informal meeting of the Algoma Board and they felt that they had little or no time to review and reflect on the memo, which was a concern to them.

12 As a result, they prepared an email proposing a committee of independent directors to work with outside financial advisors to advise the Board. Mr. Dave sent it to the Algoma directors on January 19, 2016. The email stated in part:

> Further, the company's internal forecast indicates that the company will not have internally generated cash to pay the interest payments due in mid-March. As of the 17th of January there were no solutions as to how the company will find this cash. Of course, one option is for the shareholder to put in the required cash as it has in the past. However, there is no firm commitment to do so.
>
> Given that we do not know where we will get the funds to pay the interest amount due about two months from now and not having seen a plan for unforeseen events, we believe the Company should be prepared and not be surprised in the event the scenario does not unfold as laid out. The probability of something internal or external event happening is high, and this may have a detrimental effect on the refinancing effort and significant adverse consequences for the Company.
>
> It is with this in mind that we are proposing that the company appoint a committee made of Independent Directors to work with outside financial advisors selected by the committee to advise the Board on a contingency plan which will hopefully not be needed. If it is needed, then we will have it ready for implementation and it will be very helpful in serving the best interest of the Company.
>
> We are asking that a special Board meeting be called to discuss and vote on a resolution to appoint a special committee of Independent Directors to advise the Board on contingency plans and recommendations emanating there from.

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13 At the board meeting on February 11, 2014, Mr. Dave asked that his memo and its request for an independent committee of the Board be added to the agenda and approved. In the Board discussion which ensued, the other directors, including the chairman of the Board, Mr. Jatinder Mehra of Essar Global in India, expressed the view that a special committee of independent members to address refinancing issues was not needed and provided assurances that independent members of the Board would be informed and engaged as Algoma's refinancing plans moved forward. As the three independent directors had been given similar assurances in the past without material change, it was their view that the matter could not be dealt with in this way and they requested a vote on their independent committee motion. By a vote of 4 to 3, with the three independent directors voting against, the Board held that the independent committee request was not approved.

14 Mr. Jacobsen came to the conclusion that he could no longer serve as an independent director in the absence of the governance changes proposed in the independent committee motion. He resigned a few hours after the meeting.

15 It is said that there is no evidence that Mr. Ghosh, the CEO, was not free to vote at that meeting as he wished. That may be, just as there was no evidence that any of the directors were not free to vote as they wished. But it cannot be overlooked that prior to becoming CEO of Algoma, Mr. Ghosh had been with Essar Steel India. Mr. Marwah, the CFO of Algoma, described the four directors who voted against the independent committee as "Essar-affiliated directors". That accords with the common sense of the situation, and I accept it. It was clear that the Ruia family did not want an independent committee.

16 On February 17, 2014, Mr. Dodds wrote an email to Prashant Ruia, the son of one of the founders of the Essar Group and a director of Essar Capital which controls Essar Global's investment decisions. He was the chair of Algoma's board at the time, although he did not attend board meetings during the recapitalization efforts of Algoma. The email requested the opportunity to discuss the situation directly with Mr. Ruia, and stated in part:

> If your expectation of ESAI [Algoma] Board is to simply be a formality and our role as independent directors is to essentially "rubberstamp" shareholder and management decisions, we are not prepared to continue serving as directors.
>
> As you know, Directors and particularly independent directors have a legal, fiduciary responsibility to all the stakeholders of the Company starting with the Company first, followed by the shareholders, employees, community and others. This Director responsibility may on occasion conflict with the objectives of the shareholder who may, understandably, be more interested in matters of import to themselves. Most of the time there will be no conflict between the responsibilities of the Directors, objectives of the shareholder and that of the Company stakeholders as broadly defined. However, there are other occasions when they do.
>
> What we as independent directors have experienced in the last few Board meetings is a complete disregard for any discussion or wholesome debate on alternatives to re-financing or contingency planning at ESAI.
>
> As an example, we are very happy that Essar Global, acting on behalf of the shareholder, has appointed Mr. Joe Siefert to lead the effort on refinancing the debt and restructuring the balance sheet of ESAI. We hope he comes through with all he has promised. The ESAI Board, in particular the Independent Directors, had no input on this appointment, the scope of the work, or the output. For a company like ESAI, with its urgent need for refinancing, the Directors need to be actively involved in the whole refinancing effort. Not only were we not all involved; we are not getting any regular, timely progress reports. In addition when we ask questions, or propose alternatives, we are asked to wait a while for additional information and told that everything will work out.
>
> We cannot discharge our obligations under such an environment.

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17 The two remaining independent directors were not able to meet with Mr. Ruia and felt their concerns were not adequately recognized. Mr. Dave resigned as a director of Algoma on February 21, 2014. Mr. Dodd resigned on May 5, 2014. In his resignation letter, he described the reason behind his decision:

> The fundamental reason for the decision to resign was my conclusion that as an independent director, that I lacked confidence that I was receiving information and engaged in decision-making in the same manner as those Board members who are directly affiliated with the company and or its parent. This became more acute over the past months, when short term liquidity and long term debt issues have increasingly become problematic. I have been of the understanding that as a Director, I would be provided information and engaged in decision-making on the affairs of the company at the board governance level on equitable and timely basis in the manner as non-independent directors. The role I had envisioned is that what I and the former independent directors (Dave and Jacobsen) have described to you verbally and in writing.

18 It is apparent that the Recapitalization and Port Transaction efforts were run by Mr. Joe Seifert of Essar Capital. As will be discussed, I do not accept the contention of the Essar Defendants that Mr. Siefert was merely an advisor to the Algoma Board that independently made all of the critical decisions.

19 Leading to the Recapitalization, Essar Global entered into a Restructuring Support Agreement ("RSA") with Algoma and some of its unsecured noteholders dated July 24, 2014 which set out the principal terms of a restructuring. As a condition in the RSA, Essar Global agreed to make a cash investment of $250 to $300 million in Algoma under an Equity Commitment Letter dated July 24, 2014. [2] [3]

20 The Recapitalization as contemplated by the RSA was first approved as an arrangement under section 92 of the CBCA on September 15, 2014. It was a condition of the plan of arrangement that Essar Global would comply with its financing obligations under the RSA to provide a cash equity infusion of $250 million to $300 million. However, as early as March 28, 2014, representatives of the Ruia family had made clear that they did not have $250 million for equity. Different amounts of an equity cash injection were proposed by Essar Global, including at one point $90 million that was shown to potential investors in a roadshow presentation that failed. In the end, the RSA was amended on November 6, 2014 and approved by an amended approval order on November 10, 2014. It provided for a cash injection into Algoma of only $150 million to be funded largely not by Essar Global but by a loan from third party lenders to Portco of $150 million. The Monitor asserts this was a breach of the equity commitment made by Essar Global. In the consent plan of arrangement that followed, based on an Amended RSA, Essar Global was released from its obligations under the Equity Commitment Letter.

21 The reorganized debt structure in the amended plan of arrangement of Algoma was as follows:

> (a) Algoma's unsecured noteholders (the "Unsecured Noteholders") were paid a portion of their principal and were issued new junior secured notes pursuant to the CBCA plan of arrangement;
>
> (b) $375 million of senior secured notes were issued pursuant to an offering memorandum;
>
> (c) Algoma entered into a new $50 million senior secured asset-based revolving credit facility (the "ABL Facility" (the lenders under the facility are referred to as the "ABL Lenders"));
>
> (d) Algoma entered into a new $350 million term loan (the "Term Loan" (and the lenders under the loan are referred to as the "Term Lenders"); and
>
> (e) all other Algoma lenders, including the pre-Recapitalization senior secured noteholders and the revolving credit facility, were repaid in full.

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22 The Port Transaction involved (i) Algoma selling to Portco the Port assets consisting of the buildings, the plant and machinery but excluding the land, (ii) Algoma leasing to Portco the realty for 50 years, (iii) Portco agreeing that it would provide the services necessary for the operation of the Port assets in return for a monthly payment from Algoma to Portco and (iv) Algoma agreeing that it would provide to Portco the services necessary to operate the Port, in return for a monthly payment from Portco to Algoma that would be less than the monthly payment paid by Algoma to Portco.

23 The Port Transaction was carried out under a master purchase and sale agreement between Algoma and Portco dated November 14, 2014 (the "MPSA"). Under the terms of the MPSA:

(i) Algoma conveyed to Portco all of the fixed assets owned and used by Algoma in relation to the Port. Portco agreed to pay to Algoma $171.5 million for the purchased assets to be satisfied by the payment of $151.6 million and a one-year promissory note for $19.8 million. The total payable was allocated $3.8 million in respect of the purchased assets, $154.8 million in respect of the leasehold interest and $12.9 million in respect of the cargo handling services.

(ii) Portco agreed to pay the $154.8 million to Algoma as prepaid rent under the Lease.

24 Under the MPSA, Algoma and Portco entered into four agreements dated November 14, 2014 to effect the transaction:

(a) A promissory note for $19.8 million payable by Algoma to Portco with interest at 10% per annum. Under an assignment and assumption agreement dated the same day, the promissory note was assigned by Portco to Essar Global which is now the obligor under the promissory note, and Algoma released Portco from any obligation under the promissory note. The promissory note matured and was payable in full on November 13, 2015. It has not been paid.

(b) A Lease of the land used by the Port from Algoma to Portco (the "Lease") for 50 years. Under the Lease, Algoma has responsibility for all maintenance and repairs, insurance and property taxes.

(c) A Cargo Handling Agreement under which Portco agrees to provide cargo handling services to Algoma for an initial term of 20 years. The contract is a take or pay contract under which Algoma is required to pay for at least 6 million net tons of cargo at the Port each year at a cost of approximately $6 per ton. That is, Algoma is obliged to pay Portco at least $36 million per year under the Cargo Handling Agreement for 20 years, subject to escalation beginning in 2016 at the rate of 1% per annum.

(d) A Shared Services Agreement under which Algoma is responsible for providing all the services necessary for Portco to fulfill its obligations under the Cargo Handling Agreement, and all such services are to be performed by employees of Algoma who will not be employees of Portco. Portco agreed to pay Algoma $11 million annually subject to escalation beginning in 2016 at the rate of 3% per annum.

25 The Cargo Handling Agreement contains a change of control clause that requires Portco's consent to a change of control of Algoma. The Monitor takes the position that this clause gives Essar Global, the ultimate parent of Portco, a veto over any party acquiring Algoma in the CCAA process and that it is negatively affecting the sales process. The Monitor says that the clause in itself constitutes oppression.

26 The cash amount to be paid by Portco to Algoma under the MPSA was largely funded by a $150 million Term Loan made to Portco by GIP Primus, LP (as to $125 million) and Brightwood Loan Services LLC (as to $25 million)[4]. The loan is secured by all of Portco's assets, has an 8 year term and an interest rate between 9.25% and 8.375%, depending on the year. When the costs of operating the Port (shared services) are netted from the cargo handling charges, the result is that Algoma will pay approximately $25 million per year to Portco, which is the amount required by Portco to service the Term Loan each year. That amount of $25 million for 20 years comes to $500 million, far more than the amount needed to repay the $150 million GIP loan.

**Form of the proceeding**

27 Because of the urgency to select a buyer for the Algoma business and conclude a transaction in the CCAA process under the SISP, it was important that the issues in this case be tried quickly. A number of pre-trial conferences were held to iron out how the case would be presented. Pleadings were ordered. It was agreed that the evidence in chief would be provided by affidavit evidence or expert reports and that cross-examination would take place during the trial. Eventually, however, after all of the affidavits and expert reports were delivered, the parties decided to cross-examine the witnesses and experts before the trial and so the trial consisted of argument on the affidavits and expert reports, the transcripts of the cross-examinations and exhibits made to the affidavits or put to witnesses on their cross-examinations. Subsequently, written argument was submitted in accordance with the protocol agreed by the parties. The argument in this case therefore has taken place during and after the hearing, with parties relying on what was argued during the motions to strike the claim, what was argued during the hearing and what was argued in the written submissions made after the hearing.

28 At one of the case conferences prior to the trial, counsel for the Essar Defendants and counsel for GIP said they intended to move to strike the claim of the Monitor at the opening of the trial for the purpose of educating me on their defences. I permitted the motions to be argued on the understanding that I would not rule on the motions at that time. I see no need to decide on these motions as my decision on the merits of the claim and defences will dispose of them.

29 This was real time litigation to be sure. All counsel are to be commended for the professional way in which they dealt with the case, which was no easy task.

**Standing of the Monitor to be a complainant**

30 The Essar Defendants and GIP contend that the Monitor is not a proper complainant to bring this oppression action involving the Port Transaction. They contend that the action is in substance for alleged damage caused to Algoma and that any action, if it existed, could only be a derivative action which has not been brought. They contend that an oppression action can only be brought by persons who have been damaged directly by the oppressive conduct. For a number of reasons I do not accept these arguments.

31 When the Monitor delivered particulars of its claim it initially cast the net of stakeholders affected by the Port Transaction quite widely. Currently, those stakeholders who the Monitor says were harmed are mainly the trade creditors, Algoma pensioners and retirees.

32 As of the date of the Portco Transaction, Algoma had a number of creditors who were owed significant amounts, including:

a. Accounts payable and accrued liabilities owing to trade creditors in the amount of approximately CDN$136.6 million;

b. Municipal taxes and interest owed to the city of Sault Ste. Marie in the amount CDN$13.4 million;

c. A solvency deficiency owed to the pension plans of Algoma retirees in the amount of CDN$400.9 million; and

d. Post-employment life insurance, health care and dental benefits for Algoma retirees in the amount of CDN$361 million.

Together, these outstanding debts of Algoma totalled $911.9 million as of the date of the Portco Transaction.

33 A person who may be a complainant under the oppression provisions of the CBCA is contained in section 238, which provides:

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In this Part,...

complainant means

(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 any of its affiliates,

(c) the Director, or

(d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

34 While it is the case that normally a Monitor, as an officer of the court, is to be neutral in its role and not take sides in favour of one stakeholder against another, there are exceptions. Under section 23(1)(k) of the CCAA, the Monitor shall carry out any function in relation to the debtor that the court may direct. In this case, the Monitor was authorized and directed to take this oppression action by court order.

35 This is not the first action in which a monitor has been authorized to act as a litigant. In *Nortel Networks Corp., Re* [2014 CarswellOnt 17291 (Ont. S.C.J. [Commercial List])], orders were twice made that gave the Monitor all of the powers of the Nortel debtors in Canada after all of the directors and senior executive had resigned. This resulted in the Monitor litigating in defence of claims made against Nortel and in favour of an allocation of the sale proceeds of the business. The Monitor did so in *Nortel* to protect the interests of Nortel's Canadian creditors.

36 Whether a person can be a complainant is a discretionary matter. In *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* (2003), 46 C.B.R. (4th) 313 (Ont. C.A.), a trustee in bankruptcy acting on behalf of the creditors of the bankrupt estate was held to be entitled to be a complainant in an oppression action against a non-arm's length party that had entered into an agreement with the debtor that was alleged to be an oppressive agreement. Goudge J.A. expressed the wide flexible discretion contained in the OBCA to determine if a person is a proper complainant in an oppression case:

> 45 ...s. 245(c) confers on the court an unfettered discretion to determine whether an applicant is a proper person to commence oppression proceedings under s. 248. This provision is designed to provide the court with flexibility in determining who should be a complainant in any particular case that accompanies the court's flexibility in determining if there has been oppression and in fashioning an appropriate remedy. The overall flexibility provided is essential for the broad remedial purpose of these oppression provisions to be achieved. Given the clear language of s. 245(c) and its purpose, I think that where the bankrupt is a party to the allegedly oppressive transaction, the trustee is neither automatically barred from being a complainant nor automatically entitled to that status. It is for the judge at first instance to determine in the exercise of his or her discretion whether in the circumstances of the particular case, the trustee is a proper person to be a complainant.
>
> 46 In this case the appellants were affiliates of OYDL, the party with which the allegedly oppressive transaction was concluded. In that transaction, OYDL gave up something of significant value (the OYSF note) in return for something of no value (additional shares in OYRC). It would have been reasonable for the trial judge to conclude that since the appellants unfairly disregarded the interests of the OYDL creditors, those creditors have properly been recognized as complainants. Thus it was equally reasonable in the circumstances for the trial judge to find that this was a proper case in which to conclude that the trustee of OYDL was a proper person to be a complainant in effect on behalf of the creditors of OYDL. This conclusion is consistent with the bankruptcy principle of collective action to pursue the claims of the creditors of the bankrupt and the trustee's role as their representative. See *Husky Oil Operations Ltd. v. Canada (Minister of National Revenue)*, [1995] 3 S.C.R. 453. The appellants have put forward no reason why this principle should not be followed in this case. The trial judge therefore exercised his discretion

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reasonably in finding that the respondent was a proper person to be a complainant here and I would dismiss the appellants' first argument.

37 I see no reason why the principle of collective action to pursue the claims of creditors in a bankruptcy should not be followed in this CCAA proceeding. There are very large amounts owing to trade creditors, pensioners and retirees. Aspects of the Port Transaction, such as the change of control clause in the Cargo Handling Agreement that gives the parent control over who can be a buyer of the Algoma business, are harmful to a restructuring process and negatively impact creditors. The Monitor has taken this action as an adjunct to its role in facilitating a restructuring.

38 The Essar Defendants and GIP contend that this action should be dismissed because it is properly a derivative action. Under section 241(2) of the CBCA, relief may be granted if an action of the corporation or its affiliates is oppressive or unfairly prejudicial to or unfairly disregards the interests of any security holder, creditor, director or officer. It is said that no such person has been harmed beyond the harm that may have been done to Algoma.

39 Reliance is placed on *Rea v. Wildeboer*, 2015 ONCA 373 (Ont. C.A.). I do not see that case as supporting the argument. That case involved a shareholder who sued for a wrong done only to the company and the case was dismissed on a summary judgment motion. The reasoning for the result was stated by Blair J.A.:

> 27 However, I agree with the respondents that claims must be pursued by way of a derivative action after obtaining leave of the court where, as here, the claim asserted seeks to recover solely for wrongs done to a public corporation, the thrust of the relief sought is solely for the benefit of that corporation, and there is no allegation that the complainant's individualized personal interests have been affected by the wrongful conduct.

40 In this case it is asserted by the Monitor that the personal interests of the creditors have been affected. *Rea* created no new law, but merely set out a number of well-known principles, including the principle that a derivative remedy and an oppression remedy are not mutually exclusive and can co-exist as there may be overlap in the factual circumstances. Blair J.A. cited a number of such cases involving creditors who successfully pursued an oppression remedy in circumstances in which a derivative remedy also existed, such as *Malata Group (HK) Ltd. v. Jung*, 2008 ONCA 111 (Ont. C.A.); *Deluce Holdings Inc. v. Air Canada* (1992), 12 O.R. (3d) 131 (Ont. Gen. Div. [Commercial List]); *C.I. Covington Fund Inc. v. White*, [2000] O.J. No. 4589 (Ont. S.C.J.), aff'd [2001] O.J. No. 3918 (Ont. Div. Ct.); and *Waxman v. Waxman*, [2004] O.J. No. 1765 (Ont. C.A.) at para. 526, leave to appeal refused, (2005), [2004] S.C.C.A. No. 291 (S.C.C.). *Olympia & York* is no different in that respect.

41 This is not a case such as in *Rea* in which the thrust of the relief sought was solely for the benefit of the corporation. In *Rea*, there was no allegation that the complainant's individualized personal interests were affected by the wrongful conduct.

42 I find that the Monitor is a proper complainant in this oppression claim.

***Who directed the Recapitalization and Port Transaction?***

43 The Monitor says that these transactions were directed by Essar Global personnel, particularly the Ruia brothers and Mr. Joe Seifert who worked for Essar Capital, which is responsible for Essar Global investments world-wide. The Essar Defendants say that Mr. Seifert was only an advisor to the Algoma board of directors and that it was the Algoma board that made the decisions, acting in good faith in accordance with its fiduciary duties.

44 In some respects it does not really matter who made the decisions. If they were oppressive or unfairly prejudicial to or unfairly disregarded the interests of the creditors, relief can be granted under section 241 of the CBCA whether the decisions were made by Essar Global or by the Algoma board of directors. Section 241(2) provides:

> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

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(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.

45 Moreover, it is settled law that conduct need not have been in bad faith to attract sanction under section 241. See *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289 (Ont. C.A.) at para. 47; *Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board)* (2006), 79 O.R. (3d) 81 (Ont. C.A.) at para. 91; and *BCE Inc., Re*, [2008] 3 S.C.R. 560 (S.C.C.) in which it was stated:

> 67 Having discussed the concept of reasonable expectations that underlies the oppression remedy, we arrive at the second prong of the s. 241 oppression remedy. Even if reasonable, not every unmet expectation gives rise to claim under s. 241. 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: see Koehnen, at pp. 81-88. The phrases describe, in adjectival terms, ways in which corporate actors may fail to meet the reasonable expectations of stakeholders.

46 *Palmer v. Carling O'Keefe Breweries of Canada Ltd.* (1989), 67 O.R. (2d) 161 (Ont. Div. Ct.) is an example of a finding of oppression despite the good faith actions of the corporate directors.

47 Based on my reading of the evidence, however, and I find, the direction and decision making in so far as the Recapitalization and Port Transaction are concerned was by Essar Global and Essar Capital, particularly led by Mr. Seifert. While the board of directors of Algoma in form made the decisions for Algoma, the strategic decisions were made by Essar Global and Essar Capital.

48 The Essar Defendants contend that Messrs. Ghosh and Marwah, the CEO and CFO of Algoma, were particularly instrumental in the decision making process leading to the Recapitalization and the Port Transaction. In my view, this argument greatly overstates their roles.

49 I do not intend to refer to all of the evidence on this issue. I will refer to only some of it, although it is overwhelming in substantiating that Essar Global and Essar Capital were calling the shots.

50 In January 2014, Algoma's board of directors received a presentation dated January 16, 2014 that outlined the plans for a debt refinancing. The presentation set out the names of the individuals who would be responsible for various aspects of the transactions. All of the names listed but one were employees of Essar Capital or Essar Services in India. The then VP Finance & Capital Markets of Algoma, Mr. Bakshi, was named as having some tasks but never actually performed any tasks relating to the Port Transaction. He held other roles within the Essar Group and did not spend the majority of his time in Sault Ste. Marie. Notably, neither Mr. Ghosh nor Mr. Marwah were named as having any responsibility.

51 Algoma's Annual Business Plan dated February 3, 2014, which was shown to Mr. Prashant Ruia for his approval before it went to the Board of Algoma, stated that "Refinancing of the balance sheet is critical for the company and beyond management control. The refinancing is headed and coordinated by Essar Global." The Plan also stated that Essar Global was developing a strategy and referred to Mr. Seifert of Essar Capital, Mr. Pankaj (sic, meaning Mr. Pankaj Saraf) of Essar Services, Mr. Bakshi and Mr. Iqbal of Essar Capital as comprising the Essar Global team. Management,

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including Messrs. Ghosh and Marwah, did not play any strategic role. Mr. Ghosh was told by the chairman of the board of Algoma, Mr. Mehra, and by Prashant and Ravi Ruia that Mr. Seifert and his team would lead the refinancing.

52 Both Mr. Ghosh and Mr. Marwah said they did not negotiate the economic terms of the Debt Refinancing or the Portco Transaction. I accept this evidence. It is consistent with the statements in the Algoma February 3, 2014 business plan that the refinancing was beyond management control and was headed by Essar Global. The fact that Mr. Ghosh spent a great deal of time in New York was explained by him and I accept that he was not negotiating any deal. I put little weight on internal lists of things to be done and where on the list Mr. Ghosh appeared. Mr. Seifert was on those lists as well.

53 For the same reason, I do not accept the evidence in Mr. Seifert's affidavit that his role was merely as an advisor to the management team of Algoma and that all material decisions were made by its board and senior management. It is inconsistent with the statements in the Algoma February 3, 2014 business plan that the refinancing was beyond management control and was headed by Essar Global. Mr. Seifert was somewhat evasive in his evidence on cross-examination. He did, however, admit that he was leading the efforts with specific investors in March 2014. Mr. Saraf of Essar Services India Limited said that Mr. Seifert was the point person for the meetings with investors at that time.

54 Mr. Seifert's role never changed throughout 2014. At a meeting of the board of Algoma on October 30, 2014, he stated that he was leading an effort on several alternatives with specific investors to place the remaining debt and was considering other alternatives if this should prove unsuccessful. I do not accept his evidence on cross-examination that he was leading the effort to help Algoma on the transaction as an advisor. It is contrary to the October 30, 2014 board meeting minutes and it was his experience in the capital markets at JP Morgan that made him fit to lead the effort. Neither Mr. Ghosh nor Mr. Marwah were involved in the renegotiation of the RSA.

55 In a February 25, 2014 email to Mr. Dodds, one of the independent directors of Algoma at the time, Mr. Prashant Ruia, a director of Essar Capital and of Algoma, said that there was a need to recapitalize the Algoma balance sheet and that "We [meaning Essar Global as investors] deployed the services of Joe Seifert, CFO of Essar Capital, to undertake this exercise." This was no statement that Mr. Seifert was asked to advise the Algoma board of directors who would be making the decisions. On his cross-examination Mr. Prashant Ruia made clear that Mr. Seifert was given the responsibility by Essar Capital to manage the investment in Algoma and that it was Mr. Seifert who had the responsibility for the discussions relating to the Recapitalization of Algoma.

56 The evidence is clear that the decisions were being made by Essar Global or its subsidiary, Essar Capital, throughout the piece. In a July 1, 2014 email, Mr. Rewant Ruia, identified in the Essar Groups's material as responsible for the strategic oversight of Essar Group's North America operations including Algoma, said that the financing was "our responsibility" and that they would not talk about any asset sales with the unsecured creditors. In spite of his waffling on his cross-examination, it is clear that Mr. Rewant Ruia was the family lead in the Essar Group's North American operations. I do not accept Rewant Ruia's evidence on cross-examination that he was not responsible for the North American operations of Essar or that it was Mr. Ghosh, as CEO of Algoma, that was responsible for the refinancing of Algoma, with Mr. Seifert merely providing assistance.

57 Mr. Rewant Ruia, like Mr. Seifert, was evasive in much of his testimony. Mr. Rajiv Saxena, the Executive Director of Essar Steel India Ltd. based in Mumbai, was also somewhat evasive on his examination, saying at first that he did not know the roles played by Rewant and Prashant Ruia in the Essar Group but eventually after being shown a publication from Essar's website conceded that Mr. Rewant Ruia's role was to oversee the North American operations of the Essar Group including Algoma. Mr. Saraf of Essar Services India Ltd who assisted Mr. Seifert with the Recapitalization of Algoma acknowledged on his examination that the views of Rewant Ruia and the other members of the Ruia family as to the cash equity that could be invested were extremely influential to the Recapitalization team.

58 Prashant Ruia, a director of Essar Capital and clearly involved in the affairs of Essar Global and its affiliates, although quite evasive on his cross-examination about this, admitted that Essar Capital had given the responsibility

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for managing the investment in Algoma to Mr. Seifert and it was Mr. Seifert that was given responsibility for running Algoma, the refinancing by the Port Transaction and the discussions on the Recapitalization.

59 The Portco Transaction documents (the Master Purchase and Sale Agreement, the Lease, the Cargo Handling Agreement and the Shared Services Agreement) were negotiated with GIP primarily by Mr. Seifert, along with Messrs. Harrold and Anshumali Dwivedi. Mr. Dwivedi was an Essar Global employee during the relevant period and is the current CEO of Portco. Algoma personnel provided operational information as necessary. I am satisfied that Mr. Seifert had primary carriage over the negotiations, as stated by Mr. Ghosh. The evidence of Mr. Sreckovic of GIP supports this conclusion. Mr. Sreckovic was clear that the primary negotiators on behalf of Algoma were Mr. Seifert and Mr. Harrold of Essar Capital who reported to Mr. Seifert. It was those negotiated terms that became the reason for the Port Transaction.

60 I am satisfied that representatives of Essar Global including Essar Capital carried out the Recapitalization and Port Transaction negotiations and made the critical decisions. Algoma management were handed the economic terms of the Recapitalization and Port Transaction and implemented them from an operational perspective. Algoma management did not negotiate the terms. Their role was to support the negotiations with regard to non-economic, primarily operational, issues.

**Reasonable expectations**

61 It is clear from the authorities that an action under section 241 of the CBCA requires a two-step process. The first is to consider whether the evidence supports the reasonable expectation asserted by a claimant and the second is to consider whether the evidence establishes that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest. See *BCE* at para. 68.

62 As to how a reasonable expectation may be established, the evidence may take many forms depending on the facts of a case. See *BCE* at para. 70:

> 70 At the outset, the claimant must identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held. As stated above, it may be readily inferred that a stakeholder has a reasonable expectation of fair treatment. However, oppression, as discussed, generally turns on particular expectations arising in particular situations. The question becomes whether the claimant stakeholder reasonably held the particular expectation. Evidence of an expectation may take many forms depending on the facts of the case.

63 Expectations can be established by direct evidence or by drawing reasonable inferences from circumstantial evidence. It is not the case that a claimant must give direct evidence as to his or her expectation; caution is to be exercised in not proving an expectation based on a claimant's wish list. [5] See *Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board)* at paras. 65-66:

> [65] I can find no support for the proposition that there must be evidence, in the form of testimony, from the shareholders as to their expectations. The existence of reasonable expectations is a question of fact and like any question of fact can be proved by direct evidence or by drawing reasonable inferences from circumstantial evidence. ...
>
> [66] Where the minority shares in a public company are widely held it may be difficult to adduce cogent direct evidence of the reasonable expectations of the shareholders. In such cases, it is open to the trial judge to infer reasonable expectations from the company's public statements and the shared expectations about the way in which a public company should be run. As Farley J. said in *820099 Ontario Inc. v. Harold E. Ballard Ltd.*, [1991] O.J. No. 266, 3 B.L.R. (2d) 113 (Gen. Div.), at para. 129, affd [1991] O.J. No. 1082, 3 B.L.R. (2d) 113 (Div. Ct.), "It does not appear to me that the shareholder expectations which are to be considered are those that a shareholder has as

his own individual 'wish list'. They must be expectations which could be said to have been (or ought to have been considered as) part of the compact of the shareholders."

64 In this case, the reasonable expectations asserted by the Monitor relate to the loss by Algoma of a critical asset and value to Portco and the change of control clause in the Cargo Handling Agreement. The Monitor contends that the reasonable expectations of the creditors of Algoma, including the trade creditors, employees, pensioners and retirees, were that Algoma would not deal with its core assets like the Port in such a way as it would lose long-term control and value over those assets to a related party on terms that permitted the related party to veto or thwart Algoma's ability to do significant transactions or restructure, as was done in this case.

65 The Monitor relies on two affidavits of trade creditors. One is by Mr. Brian Wallenius, the General Manager of Sling Choker Manufacturing (Sault) Ltd that has supplied sling and cable products to the steel mill at Algoma since 1975 and has consistently carried a balance owing on its invoices to Algoma that varies, but is generally above $300,000. In November of 2015 the balance owing by Algoma to Sling-Choker was approximately $637,370.45. This amount remains unpaid. The other affidavit is by Mr. Donnie Varcoe, the President and sole shareholder of Lakeway Truck Centre Ltd. which has leased heavy trucks, boom trucks and other types of vehicles, provided vehicle repair and sold vehicle parts to Algoma since 1959. In November of 2015 the balance owing by Algoma to Lakeway was approximately $599,000. It remains unpaid. Both state that, as a creditor of Algoma, they want Algoma Steel to come out of bankruptcy and may suffer if the arrangements made by Portco and its parent company concerning the Algoma port facilities, including any arrangement giving Portco control over the port, make it harder for Algoma Steel to come out of bankruptcy. Both say they were not aware of the transaction between Algoma and Portco in November of 2014 and are surprised to learn that Algoma no longer has full control over its port facility. They say they would not have expected this outcome.

66 This evidence is not very surprising. Creditors dealing with Algoma over the years would likely expect that if Algoma got into financial trouble, it would have the ability to take steps itself to try to get out of the financial trouble. I hesitate however to put too much reliance on this evidence as it suffers from the risk that it is a hindsight view rather than a view held contemporaneously with the events in 2014 when the Recapitalization and the Port Transaction were worked out and settled.

67 I would not disregard the evidence, however, on the argument advanced that these witnesses or trade creditors had no expectation to be consulted on corporate transactions involving Algoma. In some cases, past practices and contractual terms may be of importance, as discussed in *BCE*, but I do not see them as particularly relevant in considering the expectations of trade creditors here. Nor do I agree that the expectations of the other creditors, such as the employees, pensioners and retirees, are governed only by their agreements with Algoma. [6]

68 In *BCE* at para. 72, the Court referred to factors from case law that are useful in determining whether a reasonable expectation exists. I do not read that as requiring each listed factor to be satisfied in any particular case. In para. 71, the Court began by saying that it is impossible to exhaustively catalogue situations where a reasonable expectation may arise due to their fact-specific nature. I do not think in this case, for example, that the prior sale of a non-critical asset, such as a co-gen power facility, would lead to the creditors in question expecting a critical asset to be sold to a related party. The co-gen power facility was not necessarily the sole source of electricity for Algoma, whereas the Port is necessary for all of Algoma's business. Nor do I see the fact that change of control provisions may be the norm in infrastructure lending as being helpful in considering the expectations of the creditors.

69 The Essar Defendants argue that the creditors knew, or ought to have known, about Algoma's history of insolvency and yet, despite the fact that the trade creditors, unions, and retirees all have rights defined by contract, no steps were taken to protect themselves from related party transactions or the disposition of assets. I find this an astonishing argument. Trade creditors or retirees could not expect to bargain for any such rights. So far as the union is concerned, it has acknowledged that it had no right to be making decisions regarding the disposition of assets. Management rights clauses in the union contract make that clear. These creditors had no functional control over decisions made by Algoma and its board and no expectation of being able to control those decisions.

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70 There is evidence that Ms. Dale, the president of Local 2724, expected that any sale of the Port facilities would be given full value. Whether she had any other expectations was not explored. She did not learn that Algoma no longer owned the Port facilities until May, 2015 when she was told that there would be no job losses. There is also evidence that Mr. Da Prat, the president of Local 2251, thought that the Port Transaction was positive, although when he formed that idea was not clear. However, in my view the evidence of local union officials is not neutral because the USW and its Locals have aligned themselves with the attempts by Essar Global to acquire the Algoma assets in the CCAA process.

71 Essar North America, a subsidiary of Essar Global submitted a bid during the CCAA sales process through a numbered company. It was disqualified to be a Phase II bidder because it failed to provide sufficient evidence of the financial ability to pursue the assets. Local 2251, supported by Local 2724 and the USW, brought a motion on May 13, 2016 to have the Essar Global bid qualify as a Phase II bidder. At the motion, counsel for Essar Global said that Essar Global still wanted to be a bidder. That motion was dismissed. On July 18, 2016, Local 2251 served a motion authorizing Local 2251 to advance a transaction in accordance with a term sheet under which Ontario Steel Investments Ltd., owned by Essar Global, proposed to acquire all of the Algoma assets. Apparently, Local 2251 and Ontario Steel signed the term sheet. The affidavit of Mr. Da Prat in support of the motion stated that Local 2251 had been approached by Ontario Steel and that Local 2251 supported the term sheet. The motion was adjourned. Essar Global is still interested in purchasing the assets of Algoma. On January 30, 2017, Essar Capital served a motion for an order directing the applicants to re-open the SISP. The motion referred to the continued interest of Essar Global.

72 There is support in the evidence for a finding that the expectations relied on by the Monitor have been established by drawing reasonable inferences from the circumstances that existed at Algoma in 2014. Algoma has gone through a number of insolvencies and court proceedings to restructure since the early 1990s. In 2014, Algoma was under financial distress with a highly leveraged debt structure and liquidity issues. Given the cyclical nature of the steel business, it was entirely reasonable in the circumstances for all stakeholders to expect that significant corporate changes might be necessary for Algoma in the future, i.e. a restructuring might be necessary again. GIP made it clear that it had concerns that Algoma might find it necessary to go through another insolvency proceeding in light of its history and for that reason structured its loan and the resulting Port Transaction to provide some protection against that. It was reasonable for the stakeholders to expect that Algoma would not lose its ability to restructure in the future without the agreement of its parent, Essar Global.

73 Often equity is entirely wiped out in a restructuring. This substantially occurred at Algoma in 1992 when majority ownership of the restructured company ended up in the hands of the employees. It would not seem reasonable to expect in 2014 that the equity holder would in the future have the right to veto any restructuring in a CCAA process in which it was not an applicant and thus the right to prefer its own interests to those of other stakeholders. That would not be fair treatment of creditors. Stakeholders have a reasonable expectation of fair treatment. See *BCE* at para. 70. This is particularly the case in Sault Ste. Marie in which Algoma is of critical importance and the major industry which trade creditors and employees rely on.

74 I do not accept the argument that the Algoma secured lenders or senior noteholders, who were informed of the Recapitalization and Port Transaction at the time and decided to support it, could be considered as proxies for all stakeholders and that their expectations should be accepted as the expectations of all stakeholders. Different groups of stakeholders can have different expectations, particularly from sophisticated institutional participants who were quite able to negotiate for themselves in the new capital structure. See *BCE* at para. 64.

75 I find that the reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

***Were the reasonable expectations violated?***

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76 These reasonable expectations were violated in two principle ways, being (1) the Port Transaction itself and (2) the change of control veto provided to Portco, and thus Essar Global, in the Port Transaction.

*(1) The Port Transaction*

77 The Port Transaction, which was caused as a result of the breach by Essar Global of the Restructuring Support Agreement and the Equity Commitment Letter under which Essar Global agreed with Algoma to inject $250 to 300 million into Algoma, transferred control of the Port facilities from Algoma to Portco/Essar Global. This transfer of control was caused by the Port Transaction under which the fixed assets were transferred to Portco and a lease of the land used by the Port was given by Algoma to Portco for 50 years. The Cargo Handling Agreement, under which Portco agreed to provide cargo handling services to Algoma, provided for an initial term of 20 years and automatic renewal for successive three year periods unless either party gave notice of termination. Thus Essar Global will be in a position to terminate the Cargo Handling Agreement after 20 years which would give it leverage to negotiate a new payment schedule from Algoma, assuming it wanted to continue providing services to Algoma. Algoma will be at its mercy.

78 The transfer of the Port assets to Portco was driven by the desires of GIP. GIP first became involved in April, 2014 when it was approached by Barclays, which was exploring alternative financial structures for Algoma on behalf of Essar Global. Mr. Seifert of Essar Capital was introduced to GIP by Barclays.

79 On May 12, 2014, representatives of GIP met with representatives of Essar Global and Barclays to discuss Algoma's infrastructure assets and potential asset disposition transactions. They discussed the possibility of a Port transaction in which Algoma might sell its Port assets to a new corporate entity as a means to generate cash proceeds. GIP thought it of critical importance that an independent corporate entity for the Port assets be set up. On May 22, 2014, GIP sent Barclays a term sheet for a $150 million facility described as a facility "with a bankruptcy remote SPV that includes the ports and related infrastructure of Essar Steel Algoma Inc."

80 Regarding the need for a "bankruptcy remote structure", GIP was aware that Algoma had sought insolvency protection twice in the last 25 years, largely due to high leverage combined with economic downturns and the cyclical volatility of the steel industry. One of GIP's main concerns was bankruptcy remoteness. It would only lend to a new entity that would purchase the Port assets if that entity was separate and distinct from Algoma and had a mechanism in place, i.e a take or pay contract, to receive a stable cash flow stream rather than cash flow dependent upon fluctuating steel prices. The utilization of a "bankruptcy remote" structure is apparently very common in project finance transactions associated with infrastructure assets and frequently utilized by banks and other institutional investors such as GIP.

81 That the Port Transaction took on a form dictated by GIP does not, however, excuse the actions of Essar Global in breaching its equity commitment to Algoma, without which breach the Port Transaction would not have been necessary.

82 The entire Port Transaction and the GIP secured loan to Portco would not have been necessary had Essar Global lived up to its obligations under the Restructuring Support Agreement it made with Algoma and the accompanying Equity Commitment Letter dated July 24, 2014 pledging a cash investment of $250 to $300 million. However, it is quite clear from the evidence that, despite its obligations to Algoma under these agreements, Essar Global had no intention of living up to its promises. Essar Global acted in bad faith in this regard.

83 On March 28, 2014, the Ruias made it clear to Mr. Saraf of Essar Services India Limited in Mumbai that they did not have $250 million for an equity investment in Algoma, that they did not want to tell any banks or investors that they would put in $250 million of equity and that they could only put in $120 million but would just take it out to reduce liabilities of Algoma owed to Essar companies.

84 Mr. Saraf was dealing with Goldman Sachs, who were advising on the Recapitalization that would pay out Algoma's junior unsecured noteholders. Goldman Sachs advised that up to $300 million was needed as an equity contribution. On July 29, 2014, just five days after Essar Global signed the Equity Commitment Letter obliging it to provide equity

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of $250 to 300 million (less $50 million in potential third party inventory financing), Mr. Saraf advised Goldman Sachs that Essar Global wanted to limit its equity contribution to Algoma to $150-160 million and asked if it could be reduced to $100 million. On his cross-examination, Mr. Seifert referred to the equity commitment in the Restructuring Support Agreement as "a temporary agreement to an ultimate refinancing". That agreement was not by its terms a temporary agreement. While the Equity Commitment Letter provided for a payment to be made if it or the RSA were breached, it did not make the agreement temporary.

85 Beginning in October, 2014, Mr. Seifert led a series of roadshow presentations to potential investors, marketing the securities being offered through the recapitalization. The transaction presented in the roadshow presentation was not what was contemplated by the RSA. Instead, it described a transaction in which the Essar Group contributed less than $100 million of cash to Algoma, rather than the $250-$300 million required under the Equity Commitment Letter. This alternative transaction also contemplated cash being contributed to the recapitalization through the sale of the Port, something forbidden by the terms of the RSA without the express consent of the noteholders which had not been obtained. This roadshow presentation failed, and one reason given by Deutsche Bank, the lead bookrunner in the roadshow, was an insufficient contribution of cash equity into Algoma by Essar Global. This concern of potential investors over current and previous support from Essar Global was referred to at a board meeting of Algoma on October 30, 2014.

86 The Essar Defendants argue that a shareholder has no obligation to inject cash equity into the company in which it owns shares. In the abstract that is certainly the case. But it was not the case with Essar Global which had obligated itself to inject $250 to 300 million in cash into Algoma.

87 The Essar Defendants also argue that there was no connection between the Essar Global equity commitment, i.e., the failure to advance under that commitment, and the Port Transaction and that the Port Transaction was a "key component" of the Recapitalization by May, 2014. I do not accept that. It is the case that the Port Transaction was contemplated as a possible transaction when first introduced in May, 2014, but it was by no means a certainty. In the first plan of arrangement to effect the Recapitalization that was approved by the Court on September 15, 2014, it was a condition of the plan that Essar Global comply with its cash funding commitment of $250 to 300 million under its Equity Commitment Letter. The Port Transaction was not a part of the plan at all.

88 It was Essar Global's decision not to fund Algoma according to the terms of the Equity Commitment Letter that made it necessary to carry out the Port Transaction. The Port Transaction was the result of the structure required by GIP to support the loan of $150 million to Portco that was advanced to Algoma net of costs. That reduced the amount of cash equity previously promised by Essar Global to be advanced to Algoma. In the amended RSA, $150 million of historical debt owed by Algoma to Essar Global was converted into preferred equity for Essar Global. That however was not cash as had been agreed to be advanced by Essar Global to Algoma in the Equity Commitment Letter. Moreover, the $150 million debt had been at the bottom of the capital structure of Algoma and its value was certainly questionable, making the conversion of debt to equity also of questionable value. On cross-examination, Mr. Seifert chose not to "speculate" on what he would pay for the $150 million debt and said the value was something in the eye of the beholder. This is confirmatory of the fact that the loans and equity conversion was of questionable value and certainly less than the cash infusion that Essar Global had previously agreed to put into Algoma and later reneged on.

89 In my view, Essar Global's failure to inject cash equity into Algoma as agreed was the root cause of the Port Transaction and the resulting long-term effect on Algoma and its stakeholders of the transfer of control over the Port facilities from Algoma to Portco/Essar Global. The cash equity injection agreed to by Essar Global was a contractual alternative and clearly more beneficial to Algoma. That root cause was an exercise in bad faith. Had an independent committee of the board of directors of Algoma been struck, it may have been that steps may have been taken to hold Essar Global to its bargain rather than simply look to third party financing from GIP under the structure of the Port Transaction. The failure of the board of Algoma to look to some other way to effect a Recapitalization was in itself an indication of a lack of regard for the interests of stakeholders of Algoma.

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90 The Essar Defendants contend that there was no legal requirement to appoint an independent committee of the Algoma board. However, actual unlawfulness is not required to invoke section 241 of the CBCA. The remedy is focused on concepts of fairness and equity rather than legal rights. A court is to look beyond legality to what is fair, given all of the interests at play. See *BCE* at para. 71. [7]

91 The Monitor argues that although it is no longer claiming that the Port assets were transferred to Portco at an undervalue, the long-term value given to Essar Global, after the GIP loan is repaid, was itself oppressive. Essar Global paid cash to Algoma of under $5 million, but will receive a stream of payments of $25 million each year after GIP has been repaid. It would not be in the interests of the lenders to Algoma to want such a stream being paid out after the GIP loan was repaid. Their interest, as understood by Ms. Glass, was that they wanted to ensure that the port charges did not result in an ever increasing cost to Algoma and thus the reason for the amount to be paid by Portco annually for the shared services was to escalate at a higher rate of 3% as against an increase in the annual cost to be paid by Algoma to Portco for access to the Port facilities of 1%. It also would not be in the interests of the trade creditors, pensioners and retirees of Algoma.

92 Two critical assumptions in the Duff & Phelps valuation of the cash flows were (i) that the amount of $6 per ton to be paid by Algoma to Portco under the Cargo Handling Agreement was reasonable and (ii) that the price would escalate by 1% for each of the 50 years. The Monitor is critical of the evidence of the comparable transactions used by Duff & Phelps and Susan Glass to test the $6 per ton to be paid by Algoma to Portco under the Cargo Handling Agreement. I am not satisfied that the criticism is warranted. I accept the evidence of Duff & Phelps and Susan Glass in that regard that the $6 per ton at the time in 2014 was reasonable.

93 Regarding the assumption that the price to be paid by Algoma to Portco would be $6 per ton escalated by 1% for 50 years, I find it somewhat difficult to accept that anyone can anticipate what the price of anything will be for 50 years, particularly in the steel industry, which on the evidence is quite cyclical. While the Cargo Handling Agreement provides for such an increase, an issue is whether that could be considered to be an indication of the market value over 50 years, albeit discounted to the present value. Duff & Phelps assumed that to be the case without any analysis to support it. The comparables they looked at were for three years only. Ms. Glass said that in her experience, annual price escalation can be something less than one percent or slightly higher than one percent and that the one percent in the Cargo Handling Agreement was not out of line with industry practice. No particulars were provided as to any other agreements and how long the escalation terms were, except for three comparables and two years of pricing in 2013 and 2014. No evidence of any comparable transaction for any port for anything close to 50 years was provided.

94 One cannot question the expertise of Duff & Phelps or Ms. Glass. But I must say that the assumption that the price to be paid by Algoma to Portco of $6 per ton for 50 years increased by 1% each year for 50 years was reasonable is weakly supported (in reality virtually not at all). Thus whether the amount paid to Algoma for the lease represented market value is to my mind somewhat questionable. Thus whether it was fair to the stakeholders whose reasonable expectations are to be taken into account is also questionable. The concern is heightened by the fact that Essar Global advanced only approximately $4.2 million of its own money for this right to the cash flow, with by far the lion's share of the money going to Algoma coming from the $150 million GIP Loan advanced to Portco. Essar Global also became obligated to pay the $19.8 million promissory note from Portco to Algoma that was assigned to Essar Global, which Essar Global has refused to pay since due in November 2015.

95 There is evidence that Mr. Ghosh voted in favour of the Port Transaction as being in the best interests of Algoma at the board meeting in November 2014. However, it is clear that he did so not because it was ideal, but because there was no other option given the failure of Essar Global to capitalize Algoma with the $250 to $300 million.

96 Mr. Ghosh said that on a stand-alone basis, he would not have done the Port Transaction as it was too expensive with effective interest at 20%, being a cost of $25 million annually on $150 million. However, he said he had to agree to the Port Transaction as it was the only way to close the refinancing that was bringing in $150 million and it was the only

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deal on the table because Essar Global was not providing $250 to $300 million in equity as previously agreed. He did not think that the refinancing at the time was adequate for Algoma's needs. I accept this evidence.

97 Mr. Marwah, the CFO of Algoma (but not a director), said the same thing. He thought the payment of $25 million annually on $150 million was high and said that it did not concern him as it was the only option available at that point in time. In his words, there was no other option to keep the company alive. I accept that evidence as well.

98 The Essar Defendants submit that Mr. Marwah, in his capacity as CFO, swore an affidavit in support of the arrangement application deposing that Algoma's trade creditors, retirees and employees "will not be affected" by the Recapitalization. I do not see that as assisting Essar Global. That was an affidavit in support of the first plan of arrangement approved by the Court. It was a condition of that plan of arrangement that Essar Global would comply with its financing obligations under the RSA to provide a cash equity infusion of between $250 million to $300 million. Mr. Marwah referred to this in his affidavit and said that Essar Global will fund up to $300 million by way of equity on the closing of the Recapitalization. When Essar Global failed to provide that equity and a revised plan of arrangement was approved, there was no affidavit of Mr. Marwah saying that the trade creditors, retirees and employees would not be affected. Whether he was obliged as argued by the Essar Defendants to say in that affidavit that these creditors would be affected was really not for him to say.

99 The fact that Mr. Ghosh and Mr. Marwah acted in good faith thinking they were doing the best for Algoma in the circumstances is not in itself an answer to an oppression claim. Good faith is not necessary.

100 The Essar Defendants argue that in the amended RSA and order approving it, a release was given to Essar Global for breach of the Equity Commitment Letter, and it would be an improper attempt to re-litigate an issue previously decided by Morawetz R.S.J. and an abuse of process which should not be allowed. I do not see this as an issue in this proceeding. First, the release in the amended RSA was a release of any claim arising out of the Equity Commitment Letter. The Monitor is not making a claim under the Equity Commitment Letter or asking that Essar Global provide the equity it agreed to provide in that commitment. Nor is the Monitor asking that the release be set aside. The Monitor contends, and I agree, that the failure of Essar Global to fund as agreed in the RSA and Equity Commitment Letter is a part of the factual circumstances to be taken into account in considering whether the affected stakeholders who were not party to the agreements were treated fairly by the Port Transaction.

101 Second, it was only the failure of the roadshow to attract investor interest that left Algoma with a shortfall of funds to refinance its debt. Algoma was compelled to amend the RSA to permit proceeds from the Port Transaction to be used as a source of funding. Nowhere in the affidavits adduced in support of the amendment to the Plan of Arrangement was there any reference to the Port Transaction. The order approving the amendment to the RSA was obtained without opposition. It cannot be said that the Court adjudicated at all on the terms of the Port Transaction. Nor did the Court make any finding in the unopposed order that a release of Essar Global in respect of that transaction was warranted as being fair and reasonable in the circumstances. The trade creditors, employees, pensioners and retirees of Algoma were not a party to the motion approving the amended RSA.

102 It is also argued by the Essar Defendants that the claim of the Monitor is only brought with the benefit of hindsight and that there is no evidence that a subsequent CCAA filing was reasonably foreseeable in 2014 when the amended Recapitalization was agreed and closed. I disagree. It was the concern based on Algoma's past history and its previous CCAA filings that led GIP to require a "bankruptcy remote" loan structure to protect it in the event of a future insolvency. At the time, Mr. Ghosh did not think that the amended Recapitalization was adequate for Algoma in the future without the equity injection of $250 to $300 million that Essar Global had agreed to make. That turned out to be prescient. This argument by the Essar Defendants is also somewhat inconsistent with its argument that the trade creditors, employees, retirees and pensioners knew, or ought to have known, of Algoma's history of insolvency in 2014 and taken steps to protect themselves.

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103 I conclude and find that the Port Transaction was in itself unfairly prejudicial to, and unfairly disregarded, the interests of Algoma's trade creditors, employees, pensioners and retirees.

*(2) Change of control provision*

104 The change of control provision contained in section 15.2 of the Cargo Handling Agreement gives Portco (and thus Essar Global) effective control over who may acquire the Algoma business. It provides that the Cargo Handling Agreement may not be assigned by either party, being Algoma and Portco, without the prior written consent of the other and that a change of control of a party will be deemed to be an assignment:

> **15.2 Assignment**
>
> ... this Agreement may not be assigned by either Party without the prior written consent of the other Party. This Agreement shall enure to the benefit of the successors and permitted assigns of the Parties hereto. For greater certainty, a change of control of a Party will be deemed to be an assignment. Any successor to PortCo or assignee of PortCo's obligations hereunder will enter into an express agreement to be bound by this Agreement in favour of ESAI.

105 It is clear that the Port facilities are of crucial importance to the operation of the Algoma steel mill. [8] In light of the 50 year lease of the Port facilities from Algoma to Portco, and the Cargo Handling Agreement and Shared Services Agreement, any buyer of the Algoma business would require the Cargo Handling Agreement to be assigned to it in order to be able to operate the steel mill. Thus the veto of Portco under this clause, which Essar Global controls, is effectively a veto of Essar Global over any change of control of the Algoma business.

106 The change of control clause in the Cargo Handling Agreement was driven by GIP. The evidence of Mr. Sreckovic of GIP was that GIP required the Cargo Handling Agreement to have an assignment or change of control provision (section 15.2) to ensure that Portco (and GIP) would always know who its counterparty to the agreement was. For instance, if Algoma was sold to an entity with limited financial resources or a hedge fund with no experience in running a steel company, Portco would have the ability to withhold consent to the assignment of its contract. GIP also had a change of control provision in its credit agreement with Portco for its protection. It provided that if a change of control of Portco or Algoma occurred, GIP had the right to require immediate repayment of 101% of the loan amount.

107 Mr. Seifert, who had been chosen by Essar Global to undertake the exercise to recapitalize Algoma's balance sheet, had no discussion with any other party other than GIP regarding a debt investment, i.e. a loan to Portco. Thus it was the decision of Mr. Seifert and the controlling shareholder not to have any lender to Portco other than GIP. Had there been other investment advisors to an independent committee of the board of Algoma, it may have been that the purpose of the control clause given to Portco in section 15.2 of the Cargo Handling Agreement could have been achieved by some other means. There is no evidence that anyone at Essar Global or Algoma tried to avoid the clause. There was a way to achieve that purpose other than giving Portco/Essar Global a veto over a change of control of Algoma.

108 The Essar Defendants say that any infrastructure lender would have required a clause giving Portco a veto over any change of control. It relies on the opinion of Mr. Weisdorf as to why GIP, as an infrastructure lender, would want Portco to hold a veto over any change of control of Algoma. In his report he said that it is ordinary practice in the circumstances for Portco to require change of control provisions in order to be assured that any new potential owner of Algoma would continue to operate the Port to the same standard as the prior owner of Algoma. He explained this in his cross-examination, saying that the reason why GIP would request the clause is because if GIP elected to act on its security and become the equity owner of Portco i.e. it was no longer a lender to, but an owner of Portco, it could no longer act or rely on its security that had a change of control provision and it would have to rely on the right of Portco to veto any purchaser. Mr. Weisdorf conceded that such a scenario was remote and unlikely to occur.

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109 There was, however, another way for GIP to protect itself in this scenario, but no one from Essar Global or Algoma sought to pursue it with GIP.

110 One of the agreements signed at the time of the Recapitalization and Port Transaction on November 14, 2014 was an Assignment of Material Contracts made among a number of the secured lenders, including GIP, Portco and Algoma. It contained covenants by Algoma in favour of GIP, such as a clause precluding it from selling or assigning any material contract, which included the Cargo Handling Agreement. There was no reason why the agreement could not have contained a change of control provision that Algoma or its parent could not enter into any arrangement leading to a change of control of Algoma without the consent of GIP if GIP became an equity owner of Portco under its security and unable to act on the change of control provision contained in its security. Such a clause would have given GIP everything that Mr. Weisdorf said an infrastructure lender would want. It was an alternative definitively available and clearly more beneficial to Algoma.

111 Had there been a committee of independent directors with advisors independent of the Essar Global interests, that result may have been achieved. What happened however is that GIP, the lender to Portco decided on by Essar Global and Mr. Seifert, had no real pushback on the change of control giving Portco/Essar Global a veto. It was in Essar Global's interest to have such a veto reside in Portco and it had no reason to argue against it.

112 In its pleading, the Monitor claimed a declaration that the Port Transaction was a transfer of assets from Algoma to Portco at undervalue. At the time of the Port Transaction, GIP required that a valuation be done to assist it in later defending any possible attack in a bankruptcy that the assets had been transferred to Portco at an undervalue. For that purpose, Duff & Phelps did a valuation which would suggest that the assets were not transferred at an undervalue. For the purposes of the trial Essar Global obtained an opinion from Susan Glass of KPMG that the Duff & Phelps opinion was reasonable. It is important however to note that none of the opinions took into account the change of control provision in the Cargo Handling Agreement or attempted to value it.

113 There is little doubt that the change of control clause is of considerable value to Essar Global. On May 10, 2016, counsel for Portco wrote to counsel for Algoma to highlight matters of particular concern to Portco in connection with the CCAA process. Included was a concern that any prospective bidder be told of the veto right of Portco/Essar Global under the change of control clause. The letter stated:

> Portco and ESAI [Algoma] are party to a Cargo Handling Agreement pursuant to which ESAI has committed to long-term use of the Port. Portco has, of course, a keen interest in any successor to ESAI as counterparty to that Agreement and would like it to be clear to prospective bidders that, pursuant to the terms of the Cargo Handling Agreement, Portco has a consent right in the event of any assignment by ESAI of the Agreement or a change of control of ESAI. Again please confirm that this has been made clear to prospective bidders.

114 This letter was sent around the time that Ontario Steel, a subsidiary of Essar Global, negotiated and signed a term sheet with Local 2251 under which Ontario Steel would acquire the Algoma business. The letter was clearly meant to be a shot across the bow of any potential buyer of the Algoma assets. Essar Global continues to have an interest in being a bidder, as is clear from the motion of Essar Capital to reopen the SISP, first made returnable on January 30, 2017.

115 The evidence of Mr. Ghosh is that, as the Cargo Handling Agreement governs the rights of Algoma to access the Port and since Algoma cannot survive without access to the Port, this right of Portco to refuse assignment in the event of a change of control is a material impediment to restructuring Algoma. The evidence of Mr. Marwah, formed from discussions with several potential purchasers, is that Portco's right to refuse an assignment is an impediment to the sale of Algoma. This evidence is not surprising and was not challenged. I accept it. It is clear that the dictate of Portco through its solicitors that prospective purchasers should be made aware of the change of control provision was successful.

116 I do not accept GIP's argument that they had no chance to consider this issue. It was clear from the opening bell in this proceeding in the conferences held that this change of control power was central to the claim of the Monitor. It was

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pleaded in the statement of claim. The affidavits of Mr. Ghosh and Mr. Marwah were served on the parties, including GIP, and GIP could have answered them in its own affidavit evidence if its wished. Mr. Ghosh and Mr. Marwah could have been cross-examined on this issue as well. They were not.

117 In argument, counsel for Essar Capital said that it would not unreasonably withhold its consent to a transaction. There is no evidence to this effect, but I put little weight in that statement in any event. As long as Essar Global holds out a prospect of being a buyer, it cannot be expected to consent to another bidder buying Algoma. It would be in its interest to dissuade other buyers in order for it to achieve the lowest possible purchase price. Essar Global has moved to reopen the bidding process and indicated an interest in being a bidder, perhaps with some financial partner, and I would not be prepared to say there is no concern raised by the change of control provision on the mere say so of Essar Global. [9] The letter from counsel for Essar Global on May 12, 2016 speaks volumes. It clearly invites any bidder to understand that Essar Global has control rights.

118 I conclude and find that the change of control provision in favour of Portco in section 15.2 of the Cargo Handling Agreement was unfairly prejudicial to, and unfairly disregarded the interests of, Algoma's trade creditors, employees, pensioners and retirees.

**The business judgment rule**

119 The Essar Defendants rely on the business judgment rule as a defence to the claims made against them. The business judgment rule was described in *BCE* at para. 40:

> 40 In considering what is in the best interests of the corporation, directors may look to the interests of, inter alia, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives.... It reflects the reality that directors, who are mandated under s. 102(1) of the CBCA to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions.

120 In this case I do not think that the business judgment rule provides a defence to the Essar Defendants.

121 The Essar Defendants argue that throughout the Recapitalization and Port Transaction, Algoma's Board had the benefit of advice from sophisticated financial and legal advisors. That surely was the case. What all the advice was that was provided is not in the record. However there was one piece of advice not heeded by the Algoma board that is of central importance in this case.

122 Algoma's Board held meetings on October 30 and November 1, 2014. It is quite clear from the meeting minutes that it was Mr. Seifert who was leading the Recapitalization effort. At the November 1 meeting, Mr. Schrock of Weil, Gotschal & Manges advised that unsecured noteholders would not react well to proposed changes to the Port Transaction and would likely push for a higher infusion of cash/equity from Essar Global, as promised in the Equity Commitment Letter. The advisors said that the board should insist that Algoma press all parties to fully satisfy their commitments and this could include a letter to Essar Global setting forth its obligations regarding the equity commitments. That advice was not followed.

123 I fail to see how the directors of Algoma can rely on the business judgment rule in the face of not following advice to go after Essar Global on its cash equity commitment. There was no issue about the validity of that commitment. If the Ruia interests had acquiesced to forming an independent committee of the board, or listened to the truly independent directors before they resigned in frustration, steps may have been taken differently including accepting and following Mr. Schrock's advice. What happened in the Port Transaction was an exercise in self-dealing in that Algoma's critical Port

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asset was transferred out of Algoma to a wholly owned subsidiary of Essar Global with a change of control provision that benefited Essar Global at a time that a future insolvency was a possibility. [10] That would not have been necessary had Essar Global lived up to its cash injection commitment. Yet the board did not take any steps to call Essar Global on its commitment, even in the face of legal advice that it should do so.

124 The Board of Algoma also accepted the change of control provision without considering whether other steps could be taken to protect GIP. There is no evidence that the Board even considered the issue. There were steps that could be taken and failure to consider those steps on such an important matter for Algoma was not reasonable.

**The appropriate remedy**

125 The Monitor has taken somewhat different positions on the appropriate remedy as this case has progressed. In the original statement of claim, the Monitor sought to set aside the Port transaction and the relief sought against GIP was vague other than to say that its interests should be addressed. The pleading requested:

> an order setting aside the Port Transaction, and vesting Algoma with all right, title and interest in and to the lands....which are subject of the Port Transaction...free and clear of the claims of Portco, EGFL, Essar Ports Algoma Holding Inc. and Algoma Port Holding Company Inc. on such terms as this Court deems just, including terms addressing thė interests of those arm's length parties unrelated to the Essar Group who have provided secured credit facilities in connection with the Port Transaction...

126 GIP sought particulars of the relief claimed against it. In a short handwritten endorsement of January 5, 2017 I ordered further particulars as follows:

> I appreciate that without the evidence of GIP, the plaintiff is not able to clearly articulate what specific relief should be granted and what relief to GIP, if any, should be granted.
>
> GIP needs to know what evidence to lead in its affidavit evidence to be filed, and needs to know as best it can which evidence it thinks it needs to cross-examine on.
>
> In my view, the statement of claim should be amended to provide as much particulars of possible relief against GIP it will seek, presumably in alternatives depending on the evidence.
>
> GIP should then file a defence as an intervening party setting out its position and as best as it can what relief (or protection) it seeks if the Port Transaction is set aside.
>
> There is no particular easy solution here in light of the way this trial is being structured. It may be that GIP may need to lead more than less evidence it wishes.
>
> I urge the plaintiff to give as many particulars as it can at their (sic) stage of what relief it may seek.

127 In its amended statement of claim, the Monitor claimed an order setting aside the Port Transaction free and clear of the security interests of GIP and directing Algoma to enter into alternative arrangements as to its indebtedness to Portco and security in favour of GIP:

> (o) an Order setting aside the Port Transaction and vesting Algoma with all right, title and interest in and to the lands, fixtures and chattels which are the subject of the Port Transaction (the "Port Assets") free and clear of all security interests...[of GIP];
>
> (p) further or in the alternative, and on the condition that the Port Transaction is set aside... an order directing that Algoma enter inter alternative arrangements as to any indebtedness owed to the Port Lenders [GIP] and as to any security in favour of the Port Lenders on such terms as this Court deems just, including arrangements addressing the terms of such indebtedness and the priority of such security;

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(q) further or in the alternative, and on the condition that the Port Transaction is set aside... an order directing that Algoma enter into arrangements as to any indebtedness owed to the Port Lenders and as to any security in favour of the Port Lenders on terms no less favourable on the whole than the terms currently in effect in favour of [GIP];

128 In its response to the motions of Portco and GIP to strike the claim as disclosing no cause of action heard at the outset of the trial, the Monitor stated in its factum that it was no longer seeking the relief in (o) and therefor was not seeking relief against GIP directly. During the argument on the motion, counsel for the Monitor stated that the Monitor was seeking to set aside the Port Transaction as per (p) and (q) of the amended statement of claim, and that what was not being sought under (o) was the relief "free and clear of all security interests [of GIP]". What I take from counsel's statement, while not acknowledged as such, was that the factum was sloppily, and no doubt quickly, drafted.

129 In its factum on the motion to strike, the Monitor did state:

[29] Should an oppression remedy be granted, the plaintiff will seek to have it tailored as carefully as possible so as not to disturb the legitimate interests of the Lender Intervenors; and

[30] The remedy sought is to have the Port returned to Algoma ownership so as to facilitate a restructuring. If a restructuring is ultimately successful and a new owner purchase Algoma, then if that new owner does not pay out the Lender Intervenor loan as part of the purchase transaction, the Monitor will seek to put in place substantially the same package of security currently enjoyed by the Lender Intervenors, but in a structure where the Port is under Algoma ownership.

130 In oral argument, counsel for the Monitor said that one thing that could have been done was to insert a clause in the Assignment of Material Contracts to which Algoma and GIP were parties preventing a change of control of Algoma without the consent of GIP. He argued that I could strike the change of control clause from the Cargo Handling Agreement if it was found to be oppressive.[11] He also argued that it the entire Port Transaction was found to be oppressive, a remedy could be to transfer the shares of Portco to Algoma and keep all of the agreements relating to GIP in place as against Portco and Algoma. This argument was reiterated in the closing written submissions of the Monitor.

131 GIP argues that its interests as a stakeholder in the Port Transaction must be taken into account in considering an oppression remedy and that it expected the terms of the secured loan to be respected. I have considerable doubt that GIP is a stakeholder whose interests were to be protected under oppression principles. The stakeholders whose interests were to be protected were the existing stakeholders and the issue is whether the transaction that is attacked was oppressive to those stakeholders. In *BCE* at para. 70 it is stated that "the claimant must identify the expectations that he or she claims have been violated by the conduct at issue". The conduct at issue here is the Port Transaction and the GIP loan.

132 Nevertheless, I am reluctant to order the shares of Portco to be transferred to Algoma. GIP lent on a certain basis. That included lending to a company that was separate and not owned by Algoma with a cash flow stream generated by the Cargo Handling Agreement on a take or pay basis.

133 I have some sympathy with the argument of the Monitor that in substance and practically, the position of GIP will realistically be no different if Portco becomes a subsidiary of Algoma. What GIP strove to do was to achieve a "bankruptcy remote" structure with its loan to Portco. As a practical matter, however, the cash flow generated by the Cargo Handling Agreement will certainly be affected if Algoma does not survive in the hands of a solvent buyer. The cash flow has already been affected by the order that payments under the Cargo Handling Agreement were to be stopped, as Essar Global was not paying the $19.8 million owing to Algoma under the promissory note assigned to Essar Global and a set-off issue arose from Essar Global's refusal to pay this promissory note.

134 Transferring the shares of Portco to Algoma would have a negative effect on GIP. GIP's security, which was to be a first ranking security, would rank behind each of several charges in the CCAA proceedings over Algoma's assets

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if Portco were a subsidiary of Algoma. There might also be a risk of Algoma leveraging itself and taking on additional debt. Also, GIP was prepared to lend at a higher multiple of EBITDA because Portco was considered bankruptcy remote and the loan would not have been for the full $150 million if Portco was not bankruptcy remote.

135 Under section 241(3) of the CBCA, a court may make any interim or final order it thinks fit. It has been said, however, that a remedy for oppression should be taken with a scalpel. In *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (Ont. C.A.), Galligan J.A. quoted with approval the following statement of Farley J. in *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.):

> The court should not interfere with the affairs of a corporation lightly. I think that where relief is justified to correct an oppressive type of situation, the surgery should be done with a scalpel, and not a battle axe. I would think that this principle would hold true even if the past conduct of the oppressor were found to be scandalous. The job for the court is to even up the balance, not tip it in favour of the hurt party. I note that in *Explo [Explo Syndicate v. Explo Inc.*, a decision of the Ontario High Court, released June 29, 1989], Gravely L.J.S.C. stated at p. 20:
>
> > In approaching a remedy the court, in my view, should interfere as little as possible and only to the extent necessary to redress the unfairness.

136 If there were no less obtrusive way to remedy the oppression in this case, I would order the shares of Portco to be transferred to Algoma. But in my view there are less obtrusive ways. Included under section 241(3) is the power to order a variation of a transaction.

137 The change of control provision in section 15.2 of the Cargo Handling Agreement was inserted at the instance of GIP. It was not something that Essar Global requested, although it is something that Essar Global wants to take advantage of now. GIP can be protected from the very thing that motivated section 15.2 according to the evidence of Mr. Weisdorf whose opinion was relied on by Essar Global and GIP. The purpose was to protect GIP in the unlikely event that GIP elected to act on its security and become the equity owner of Portco, i.e. if it were no longer a lender but an owner of Portco, it could no longer act on its security that contained a change of control provision.

138 That purpose, however, could have been accomplished by an agreement between GIP and Algoma that if GIP became the owner of Portco, Algoma or its parent could not effect or be a party to any arrangement leading to a change of control of Algoma without the consent of GIP. GIP and Algoma were parties to the Assignment of Material Contracts agreement that contained covenants by Algoma in favour of GIP. In my view, and I so order, the appropriate relief for the oppression involving the change of control clause in the Cargo Handling Agreement is to delete section 15.2 from that agreement and to insert a provision in the Assignment of Material Contracts agreement that if GIP becomes the equity owner of Portco, Algoma or its parent cannot agree to or undertake a change of control of Algoma without the consent of GIP.

139 GIP has not provided any argument as to why that relief would not protect it instead of relying on section 15.2 of the Cargo Handling Agreement. GIP has instead made arguments on the pleadings and said that relief was not spelled out in the claim. I am not sympathetic to this argument.

140 As can be seen by my endorsement on the motion by GIP for particulars, I had some concerns that without the evidence of GIP, the Monitor could not clearly articulate what specific relief should be granted. I urged the Monitor to provide as full particulars as possible at that stage of the relief that it was seeking.

141 The evidence subsequently filed and relied on by GIP was that of Mr. Weisdorf, who was cross-examined on January 18, 2017 shortly before the trial was to commence. It is the cross-examination of Mr. Weisdorf that revealed the real reason why section 15.2 was required and it is that cross-examination that the Monitor relies on to support its claim to delete section 15.2 from the Cargo Handling Agreement. I grant leave to the Monitor to amend its claim to support this relief that I order. Neither GIP nor Essar Global were taken at all by surprise. The issue with the change of control clause was pled by the Monitor and the affidavit material filed by Essar Global and GIP dealt with the issue.

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142 The other concerns are with respect to the obligations in the Cargo Handling Agreement. I have a concern with the imbalance in the term of the lease to Portco for 50 years against the term of the Cargo Handling Agreement for 20 years with automatic renewal for successive three year periods unless either party gives written notice of termination to the other party. If Essar Global thought that it wanted an increased payment after 20 years, it could refuse to continue the Cargo Handling Agreement and put Algoma at its complete mercy. If the market did not support an increased payment, or indicated that the payments from Algoma to Portco should be less in the future, Algoma would still be at the mercy of Essar Global. As the Port facilities are critical to the operation and survival of Algoma, it would be foolhardy indeed for Algoma to refuse to extend the Cargo Handling Agreement. The language in the Cargo Handling Agreement that Algoma can refuse to extend it after 20 years is illusory and not realistic. In reality, it is a provision that is one-sided in favour of Essar Global.

143 GIP is entitled to the assurance that the net $25 million (as adjusted by the 1% increase to be paid by Algoma to Portco and the 3% increase to be paid for shared services by Portco to Algoma) is to be paid by Algoma to Portco so long as the GIP loan to Portco has not matured and remains unpaid. That is the basis on which it made the loan and GIP is entitled to that protection. The loan terms require that any principal and interest amounts outstanding on the maturity of the loan be repaid on the maturity date of November 14, 2022. Without oversimplifying the details of the loan agreement and the charges under it, in the 8 years during which the loan is outstanding, the expected $25 million per year to be paid by Algoma to Portco and paid by way of a cash sweep to GIP would amount to $200 million. The loan was for $150 million. Interest was to be LIBOR plus, I believe, around 8% and there were costs. Whether Algoma is able to pay off GIP at the maturity date or required to refinance it through GIP is not known.

144 For the balance of the first 20 years under the Cargo Handling Agreement after the GIP loan matures, if that agreement survives only to that date, Algoma will pay a further 12 years at $25 million, or $300 million, to Portco which will benefit Essar Global after the balance of the GIP loan is paid off. If the Cargo Handling Agreement is not terminated before the end of its life of 50 years, that will be another 30 years at $25 million, or $750 million, paid to Portco/Essar Global. Taken with the small amount paid by Essar Global, the $4.2 million in cash (and the $19.8 million note that it has refused to pay), it means that Essar Global will obtain an extremely large amount of cash from Algoma for little money. I realize that if Algoma became solvent and able to pay its debts, it would be able to pay a dividend to Essar Global (or the appropriate subsidiary) so long as Essar Global remained its shareholder. Whether and when Algoma could become solvent with its pension deficits that have existed for some time and be in a position to pay dividends to its shareholder is a significant unknown. But the payments under the Cargo Handling Agreement do not require any solvency test and are in the financial circumstances Algoma finds itself in, a clear contractual benefit for little money. It is an unreasonable benefit that was prejudicial to, and unfairly disregarded, the interests of the creditors on whose behalf this action has been brought by the Monitor.

145 In my view, the appropriate relief for the oppression that I have found in the Port Transaction, and I so order, is that the Lease to Portco, the Cargo Handling Agreement and the Shared Services Agreement be amended to provide that after the GIP loan has matured and been paid, Algoma shall have at any time thereafter during which the Lease exists the option of terminating the Lease to Portco, the Cargo Handling Agreement and the Shared Services Agreement. Further, if the Cargo Handling Agreement continues and if Portco elects not to renew it after 20 years or after any three year extension, the Lease to Portco shall terminate at that time along with the Cargo Handling Agreement and Shared Services Agreement. Upon termination of the Lease, Algoma shall repay to Portco $4.2 million with interest from the date of the termination of the Lease calculated under the *Courts of Justice Act*, R.S.O. 1990, c. C. 43. If there is any issue as to any payment to be made by Algoma to Portco under section 2.1 of the Lease, that issue shall be arbitrated under the provisions of article 18 of the Lease.

146 I do not think that any amendment to the claim of the Monitor is necessary for this order to be made. It goes partway to the full setting aside of the Port Transaction that was claimed by the Monitor. However, if necessary I would grant leave to the Monitor to amend its claim to support this relief that I order. The issues were fully canvassed in the evidence and argument.

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**Counterclaim**

147 Portco has made a counterclaim for a declaration that the $19.8 million note has been paid in full as a result of set-off and for payments beyond that amount said to be owing under the Cargo Handling Agreement. When and how the set-off occurred is not in the record and whether that could be affected by the stay of proceedings in the CCAA has not been argued. Nor are the amounts said to be owing set out with any precision. In my view the appropriate place to make this claim is in the CCAA proceedings and I do not intend to deal with it in this counterclaim.

**Costs**

148 Any party seeking costs may make brief cost submissions in writing within two weeks along with a proper cost outline and brief responding cost submissions may be made in writing within a further two weeks.

*Order accordingly.*

Footnotes

1 All statements of fact in these reasons are findings of fact unless indicated otherwise.

2 All dollar amounts in this decision are US dollars unless otherwise stated.

3 Up to $50 million of this could be provided by third party inventory financing.

4 GIP Primus, LP took the lead in negotiating the loan to Portco and for ease of reference, both will be referred to simply as GIP.

5 The Essar Defendants contend that a party must have a subjective expectation, relying on a statement of Justice Myers in *Couture v. Toronto Standard Condominium Corp. No. 2187*, 2015 ONSC 7596 (Ont. S.C.J.) at para. 58. The authority that Myers J. referred to for this statement says no such thing, and I do agree with it. As stated in BCE, the expectation held must have been reasonably held and the evidence of that may take many forms. As stated in Ford, there is no requirement that there be testimony from claimants as to their expectations.

6 The USW collective agreement for Local 2251 provides for a joint steering committee of representatives of the company and the union. One of its functions is to review proposed major sale, lease or rental of assets. Mr. Da Prat, the president of Local 2251, could not say how many times the committee had met over the past two years, i.e. in the two years since the Recapitalization and Port Transaction, but said no grievance had been brought with respect to the joint committee. In the CCAA proceedings, the union had complained that the decision to disqualify a bid by a numbered company owned by Essar Global had not been discussed with the union. I do not see this evidence as relevant to what expectations were at the time of the Recapitalization and Port Transaction in 2014.

7 On June 16, 2014 Prashant Ruia resigned as a director of Algoma. On June 23, 2014 Mr. Mirchandani became a director and on August 24, 2014 Mr. Kothari became a director. The four directors were then Mr. Mehra of Essar Global, Mr. Ghosh and Messrs. Mirchandani and Kothari. In an October 2014 offering memorandum, it was said that there were two independent directors, presumably being Messrs. Mirchandani and Kothari. They may have been legally independent of Essar Global, but there is no evidence of what their business connections to Essar Global were, or why they were appointed. Mr. Kothari had over 19 years' experience in financial services in India. Mr. Mirchandani had over 25 years' experience in the finance and accounting fields, having held numerous senior positions in major international firms. As will be seen, they took no steps to hold Essar Global to its original equity commitment under the RSA, despite being advised by Algoma's legal advisors to do so.

8 The fact that the Port was referred to in an offering memorandum as a non-core asset of Algoma does not mean that it was not crucial to the operation of the steel mill. Mr. Seifert's evidence is that whether an asset is important to a business is not determinative of whether it is core and that companies regularly sell off infrastructure without which they cannot operate.

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9 In a decision released contemporaneously with this judgment, I have dismissed the motion to re-open the SISP. However, as stated in that decision, it is open to any person to reach out to the Term Lenders and the Consenting Secured Noteholders to propose and negotiate a transaction that they are willing to accept and support.

10 I do not agree with the Essar Defendants' argument that control of the Port remained unchanged by the Port Transaction as control rested with Essar Global before and after the Port Transaction. The argument ignores the reality of Algoma as a separate company that had control of the Port assets and would continue to have control in this insolvency that would not be control in the hands of Essar Global once the Initial Order was made in the CCAA proceedings and after the SISP was ordered.

11 GIP says that the Monitor has not sought this remedy, as it is not in its closing written submissions. I do not agree. The remedy was claimed by the Monitor in oral argument. All parties, including GIP at para. 13 of its closing written submissions, rely on their opening submissions, the submissions on the motion to strike, their oral submissions, as well as their closing written submissions.

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# TAB 13

# Shareholder Remedies in Canada

## Second Edition

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LexisNexis

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Dennis H. Peterson and Matthew J. Cumming, 2009
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for distribution of his estate, any change which he wishes to make in the rights attaching to the shares, for which he obtains necessary shareholder consent, cannot thereafter be attacked on equitable grounds by one of the donee shareholders. After perhaps too much hesitation, I have concluded that it would be wrong for the court, in the exercise of discretionary power, to interfere in the matter.

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[1] [1983] B.C.J. No. 79, 49 B.C.L.R. 378 (S.C.).

[2] [1983] B.C.J. No. 79, 49 B.C.L.R. 378 (S.C.), at p. 382 B.C.L.R.

## 4. Breach of Reasonable Expectations

**§17.144** Specific examples of expectations courts have found to be reasonable and thereby worthy of protection are found below. It should be kept in mind, however, that the oppression analysis is highly contextual, and thus, conduct that is found to undermine reasonable expectations in one situation may not lead to the same result in another. In each case, the court will consider the factors enumerated in *BCE*[1] and all of the other circumstances of the case in order to determine the reasonableness of the expectations put forward.

- shareholders and creditors have a reasonable expectation that their corporate contractual obligations will be adhered to,[2] unless there is no basis to infer such reasonable expectations from the agreement;[3]
- each order made under the oppression remedy should only interfere with management to the extent necessary to protect the reasonable expectations of aggrieved corporate stakeholders;[4]
- a shareholder has a reasonable interest in assuring himself of the corporation's financial stability, and thereby has a reasonable expectation that as long as he is a shareholder he will receive financial information and notice of shareholder meetings;[5]
- a 50 per cent shareholder has a reasonable expectation to share in the management of the corporation;[6]
- a 49 per cent shareholder who is also an employee does not have a reasonable expectation to never be dismissed, but *such dismissal cannot occur in a* peremptory and unilateral manner;[7]
- shareholders who purchased shares on the basis that they would become employees and on the expectation that they would remain as such as long as their continued employment was in the best interests of the corporation and there was no cause for dismissal were oppressed if they were in fact dismissed;[8]
- a minority shareholder has a reasonable expectation that his employment will continue as long as it is in the best interests of the company,[9] even if an employment agreement provides that he may be dismissed without cause;[10]
- shareholders have a reasonable expectation to be treated equally and share in the profits of the enterprise according to their ownership interest. One shareholder should not be entitled to appropriate to himself a disproportionate share of the

remuneration, management fees, bonuses and other like payments,[11] including an enhanced share price on a share sale;[12]

- a fundamental reasonable expectation of a shareholder is for management to maintain basic records and not co-mingle corporate funds with those of non-related enterprises;[13]
- reasonable expectations give rise to a duty of reasonableness and good faith. There is an obligation on the majority shareholder to provide accurate information to direct questions raised by a minority shareholder.[14] Majority shareholders have a duty to keep minority shareholders advised of the status of discussions which could lead to a sale, particularly where the company is purchasing the interest of the minority shareholder and the minority shareholder has expressed and interest about participating in a sale of the entire company.[15] On the other hand, where the parties have agreed that a transaction is conditional on due diligence, the party who has the benefit of the condition is not obligated to exercise that condition in good faith where it clearly has the right to proceed as it wishes;[16]
- the following have been identified as reasonable expectations of creditors:[17]
  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.
- where life insurance is acquired on a shareholder's life to fund a buy-out of his shares upon his death, the proceeds of such policy will be applied as the reasonable expectations of the shareholders would dictate, and this may not necessarily be to fund a buy-out on the death of that shareholder.[18] In general, although a deceased shareholder has a reasonable expectation to be treated fairly, it would not be fair to expect the company to pay him more than was required pursuant to the shareholder agreement;[19]
- if a board of directors initiates a sale process, the reasonable expectations of stakeholders is that the directors will comply with their duty to act in the best interests of the corporation having regard to all relevant considerations.[20] These considerations include, but are not confined to, the "need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible citizen".[21] Affected stakeholders may include shareholders, employees, creditors, consumers, government and the environment. There is no principle

that the interests of any one of these groups (such as shareholders) should be prioritized over the interests of any other group;

- in the context of an acrimonious hostile takeover attempt of a vulnerable but successful public company, the reasonable expectations of the hostile bidder[21.1] may be "nearly coincident with legal rights", and the only reasonable expectation of the bidder may be that the target's board will act "within its legal rights in the best interests of the company, based on their reasonably held views";[21.2]
- the legitimate expectation of shareholders is that the business will not fail and will not liquidate. Therefore, the company has a duty of prudent management to forestall that event. It can be brought to account if it strips the company of its assets or adopts a liquidation policy;[22]
- statements in public disclosure documents can create reasonable expectations that can be enforced under the oppression remedy, such as where valuation assumptions that are suggested to be appropriate are not ultimately used,[23] or where certain payments and other transactions to be made upon a change of control were always disclosed and generally known so that it can be expected that they will occur in a take-over bid,[24] or where a company employs voting procedures that were not disclosed in its management proxy circular in advance of a contested shareholders' meeting,[24.1] but reasonable expectations cannot be implied where there is no basis for them in public disclosure documents;[25] unless such public announcements are incorrect and it should be expected that management will follow the terms of contractual arrangements as generally understood;[26]
- in certain circumstances, a shareholder may have a reasonable expectation to receive a dividend;[27]
- a minority shareholder has a reasonable expectation not to be removed from a family business because his family disapproves of his personal life, and can be compensated for his loss. On the other hand, the shareholder does not have a reasonable expectation to control the family business if it was understood that he would work together with other family members;[28]
- a minority shareholder has a reasonable expectation that her shares will be redeemed pursuant to her husband's will. The husband's intention was that the company would be wound up within five years after his death. Rather than redeeming his mother's shares and liquidating the company, the son effected a personal loan to himself, which unfairly disregarded his father's intentions and mother's interests. The court held that the company must redeem the mother's shares or be liquidated and dissolved;[29]
- in the absence of a shareholder agreement or other commitment to do so, the mere existence of a personal or family relationship does not create a reasonable expectation which compels a majority shareholder to purchase the shares of a minority shareholder;[30]
- in determining the reasonable expectations of persons who received their shares by gift, all of the circumstances must be examined and the donor will not be

entitled to disregard what is fair;[31]

- a minority shareholder has a reasonable expectation to be included in a new business enterprise that is closely linked in business objectives and for which it would be difficult to control conflicts of interest;[32]
- where the provision of office premises is inextricably tied to partnership in a business from which the minority shareholder was removed, the minority shareholder has a reasonable expectation that his interest in the building would be acquired by the other shareholders;[33]
- there is no breach of reasonable expectations where a shareholder who participates in a restructuring subsequently complains about matters which could have been addressed in the restructuring;[34]
- a shareholder agreement is often viewed as reflecting the reasonable expectations of shareholders;[35] other written agreements between the parties might also constitute the best evidence of the parties' reasonable expectations,[36] although perfect compliance with every technical provision of an agreement (such as an overly punitive lease provision that the parties clearly did not expect to apply in the circumstances) is not necessarily a reasonable expectation;[37]
- management shareholders have no reasonable expectation to maintain their shareholder equity at a prescribed level where a carefully negotiated shareholder agreement was settled with the assistance of legal counsel which specifically excluded this right, even though representatives of the controlling shareholder subsequently misunderstood the shareholder agreement for a period of time as the management group knew at all times that they had no such right;[38]
- in the interpretation of an executive bonus plan, it was not a reasonable expectation to share in an enhanced pay-out which resulted from interest earned on a tax refund, but it was a reasonable expectation to expect a pay-out on certain assets preserved for a dissolution even though the dissolution never happened;[39]
- an interim order for documentary disclosure will not be made unless there is evidence for a strong *prima facie* case that the reasonable expectations of the shareholder are not being met;[40]
- a shareholder has no reasonable expectation to profit from the development potential of real estate where he had no demonstrated interest in the land over many years and thereby would only be justifiably entitled to his share of the fair market value of the land in a sale which satisfied tax arrears;[41]
- where sophisticated parties purchase property together without entering into a co-tenancy agreement, the parties' reasonable expectations would be that they are governed by the provisions of the *Partition Act*;[42]
- upon the sale of a family business without the consent of the minority family shareholders there is a denial of reasonable expectations where such minority shareholders were removed from management and the historical shareholder reporting and profit distribution practices were altered in favour of the new majority shareholders;[43]

- shareholders have a reasonable expectation that management will deal with regulators in a candid manner;[44]
- a long standing shareholder has no reasonable expectation to be bought out where the business has been run consistent with past practice and there is no oppression;[45]
- a reasonable expectation is that a corporation would remain neutral in the interpretation of a shareholder agreement; a corporation that pays the legal costs of both shareholders to a shareholder dispute is immune from challenge by other shareholders if the expenditure can be defended on the ground it was in the corporation's best interests to have the underlying dispute resolved in an efficient and timely manner (*e.g.*, arbitration);[46]
- the award of stock options to make incentives and retain management, and the application of the terms of shareholder incentive plans to such shareholdings and verbal assurances with respect thereto are reasonable expectations;[47]
- a dissident shareholder has a reasonable expectation that voting procedures in advance of and at a shareholders' meeting will be conducted properly, in accordance with accepted methods and protocols, and consistent with the methods disclosed in the applicable management information circular;[48]
- lawyers retained by a sole shareholder and director of a company have a reasonable expectation that they will be paid;[49] and
- a 50 per cent shareholder of a closely held corporation held with another 50 per cent partner has the reasonable expectation of having access to all financial information, receiving full and fair disclosure of all material facts from his partner, that his partner would not cause the corporation to pay criminal kickbacks to suppliers, and that his partner would not appropriate corporate assets to himself.[50]

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[1] *BCE Inc. v. 1976 Debentureholders,* [2008] S.C.J. No. 37, [2008] 3 S.C.R. 560.

[2] *West v. Edson Packaging Machinery Ltd.*, [1993] O.J. No. 2362, 16 O.R. (3d) 24 (Gen. Div.), at p. 29 O.R.; *Harmer v. McNeely Engineering Consultants Ltd.*, [1997] O.J. No. 4272, 44 B.L.R. (2d) 254 (Gen. Div.); *Flatley v. Algy Corp.*, [2000] O.J. No. 3787, 9 B.L.R. (3d) 255 (S.C.J.); *Working Ventures Canadian Fund Inc. v. Angoss Software Corp.*, [2000] O.J. No. 4537, 101 A.C.W.S. (3d) 282 (S.C.J.), affd [2001] O.J. No. 2950 (C.A.); *Hawley v. North Shore Mercantile Group*, [2007] O.J. No. 3822 (S.C.J.); *Cox v. Aspen Veterinary Services Professional Corp.*, [2007] S.J. No. 449, 37 B.L.R. (4th) 257 (Q.B.).

[3] *Schicchi v. Orveas Bay Estates Ltd.*, [1994] B.C.J. No. 2447, 98 B.C.L.R. (2d) 391 (S.C.).

[4] *Classic Organ Co. v. Artisan Organ Ltd.*, [1997] O.J. No. 2161, 35 B.L.R. (3d) 285 (Gen. Div.).

[5] *Buttarazzi Estate v. Bertolo,* [2004] O.J. No. 20, 40 B.L.R. (3d) 287 (S.C.J.).

[6] *Besner v. J.A. Besner & Sons (Canada) Ltd.*, [1993] O.J. No. 1105, 15 B.L.R. (2d) 261 (S.C.), at p. 277 B.L.R.; *M. v. H.*, [1993] O.J. No. 2492, 15 O.R. (3d) 721 (Gen. Div.); *Ambler v. Courtney Ballycroy Investments Ltd.*, [1997] O.J. No. 1821, 28 O.T.C. 372 (Gen. Div.); *Waxman v. Waxman*, [2002] O.J. No. 2528, 25 B.L.R. (3d) 1 (S.C.J.).

[7] *Kabutey v. New-Form Manufacturing Co.*, [1999] O.J. No. 3635, 49 C.C.E.L. (2d) 252 (S.C.J.); *Krynen v. Bugg*, [2003] O.J. No. 1209, 64 O.R. (3d) (S.C.J.). See para 17.92.

[8] *Elliott v. Opticom Technologies Inc.*, [2005] B.C.J. No. 782, 4 B.L.R. (4th) 103 (S.C.).

[9] *Deluce Holdings Inc. v. Air Canada*, [1992] O.J. No. 2382, 12 O.R. (3d) 131 (Gen. Div.), at pp. 142-48 O.R.; *Harmer v. McNeely Engineering Consultants Ltd.*, [1997] O.J. No. 4272, 44 B.L.R. (2d) 254 (Gen. Div.); *Beck v. Dumais*, [2003] O.J. No. 1265, 33 B.L.R. (3d) 118 (S.C.J.); *Luebke v. Manluk Industries Inc.*, [2013] A.J. No. 506, 2013 ABQB 264.

[10] *Stauffer Motors Ltd. v. Hartnell* (1999), 90 A.C.W.S. (3d) 220 (Ont. Div. Ct.).

[11] *Waxman v. Waxman*, [2002] O.J. No. 2528, 25 B.L.R. (3d) 1 (S.C.J.), affd [2004] O.J. No. 1765, 44 B.L.R. (3d) 165 (C.A.); *Beck v. Dumais*, [2003] O.J. No. 1265, 33 B.L.R. (3d) 118 (S.C.J.); *Buttarazzi Estate v. Bertolo*, [2004] O.J. No. 20, 40 B.L.R. (3d) 287 (S.C.J.).

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[15] *Agrium v. Hamilton*, [2005] A.J. No. 83, 2 B.L.R. (4th) 3 (Q.B.).

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[17] M.A. Springman, George R. Stewart, and J.J. Morrison, Frauds on Creditors: Fraudulent Conveyances and Preferences (Toronto: Thompson Reuters Canada Ltd., 2009) at pp. 24-12.1, 24-13, 24-15, 24-16. See also: *First Edmonton Place Ltd. v. 315888 Alberta Ltd.*, [1988] A.J. No. 511, 40 B.L.R. 28 (Q.B.), at p. 64 B.L.R., stayed on appeal [1989] A.J. No. 1021, 45 B.L.R. 110 (C.A.); *Levy-Russell Ltd. v. Shieldings Inc.*, [1998] O.J. No. 3571, 41 O.R. (3d) 54 (Gen. Div.), at pp. 61-62 O.R., affd (1998), 41 B.L.R. (2d) 142 (Gen. Div.); *C.I. Covington Fund Inc. v. White*, [2000] O.J. No. 4589, 10 B.L.R. (3d) 173 (S.C.J.), affd [2001] O.J. No. 3918, 17 B.L.R. (3d) 277 (Div. Ct.); *Adecco Canada Inc. v. J. Word Broome Ltd.*, [2001] O.J. No. 454, 12 B.L.R. (3d) 275 (S.C.J.); *Builders' Floor Centre Ltd. v. Thiessen*, [2013] A.J. No. 181, 2013 ABQB 23; *1107374 Alberta Ltd. v. Ruggieri*, [2014] A.J. No. 1165, 2014 ABQB 641.

[18] *Gordon Glaves Holdings Ltd. v. Care Corp. of Canada*, [1999] O.J. No. 780, 43 O.R. (3d) 348 (Div. Ct.), revg [1998] O.J. No. 801, 38 B.L.R. (2d) 56 (Gen. Div.), at p. 65 B.L.R.

[19] *Ribeiro Estate v. Braun Nursery Ltd.*, [2009] O.J. No. 198, 55 B.L.R. (4th) 115 (S.C.J.).

[20] *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37, [2008] 3 S.C.R. 560, at para. 82.

[21] *BCE Inc. v. 1976 Debentureholders*, [2008] S.C.J. No. 37, [2008] 3 S.C.R. 560, at para. 82.

[21.1] This assumes that the hostile bidder has standing to bring an oppression claim, which it likely will not if it brings its complaint *qua* bidder rather than *qua* shareholder. See *Icahn Partners LP v. Lions Gate Entertainment Corp.*, [2010] B.C.J. No. 2130, 2010 BCSC 1547, aff'd [2011] B.C.J. No. 876, 84 B.L.R. (4th) 1, 2011 BCCA 228.

[21.2] See *Icahn Partners LP v. Lions Gate Entertainment Corp.*, [2010] B.C.J. No. 2130, 2010 BCSC 1547, aff'd [2011] B.C.J. No. 876, 84 B.L.R. (4th) 1, 2011 BCCA 228.

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refused (1993), 7 B.L.R. (2d) 86n (S.C.C.), aff'd [2011] B.C.J. No. 876, 84 B.L.R. (4th) 1, 2011 BCCA 228.

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[24] *Gazit (1997) Inc. v. Centrefund Realty Corp.*, [2000] O.J. No. 3070, 8 B.L.R. (3d) 81 (S.C.J.).

[24.1] *International Energy and Mineral Resources Investment (Hong Kong) Co. v. Mosquito Consolidated Gold Mines Ltd.*, [2012] B.C.J. No. 1644, 2012 BCSC 1191.

[25] *Pente Investment Management Ltd. v. Schneider Corp.*, [1998] O.J. No. 2036, 40 B.L.R. (2d) 244 (Gen. Div.), at p. 284 B.L.R.; *Metropolitan Toronto Police Widows and Orphans Fund v. Telus Communications Inc.*, [2003] O.J. No. 128, 30 B.L.R. (3d) 288 (S.C.J.); *Casurina Limited Partnership v. Rio Algom Limited*, [2004] O.J. No. 177, 40 B.L.R. (3d) 112 (C.A.) at p. 124. In general, see para. 17.157ff.

[26] *Hawley v. North Shore Mercantile Group*, [2009] O.J. No. 3956, 99 O.R. (3d) 142 (C.A.).

[27] In *Re A Company*, [1988] 1 W.L.R. 1068 (Ch.); *Flatley v. Algy Corp.*, [2000] O.J. No. 3787, 9 B.L.R. (3d) 255 (S.C.J.); *Beechy Stock Farm (1996) Ltd. v. SPI Marketing Group Ltd.*, [2003] S.J. No. 704, 242 Sask. R. 55 (Q.B.); and paras. 17.131 and 17.258; *1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd.*, [2016] B.C.J. No. 1227, 2016 BCCA 258.

[28] *Naneff v. Con-Crete Holdings Ltd.*, [1993] O.J. No. 1756, 11 B.L.R. (2d) 218 (Gen. Div.), vard in part [1994] O.J. No. 1811, 19 O.R. (3d) 691 (Div. Ct.), vard in part [1995] O.J. No. 1377, 23 O.R. (3d) 481 (C.A.), discussed in M. Koehnen, "Oppression Remedy: Reasonable Expectations: *Naneff v. Con-Crete Holdings Ltd.*" (1994), 73 Can. Bar Rev. 274. See also *Castillo v. Xela Enterprises Ltd.*, [2016] O.J. No. 6723, 2016 ONSC 6088.

[29] *Cohen v. Jonco Holdings Ltd.*, [2005] M.J. No. 126, 4 B.L.R. (4th) 232 (C.A.).

[30] *Miklos v. Thomasfield Holdings Limited*, [2001] O.J. No. 1432, 82 C.R.R. (2d) 126 (S.C.J.) - minority shareholder (OBCA).

[31] *820099 Ontario Inc. v. Harold E. Ballard Ltd.*, [1991] O.J. No. 266, 3 B.L.R. (2d) 123 (Gen. Div.), at pp. 185-91 B.L.R., affd [1991] O.J. No. 1082, 3 B.L.R. (2d) 113 (Div. Ct.) and para. 17.131.

[32] *Chiaramonte v. World Wide Importing Ltd.*, [1996] O.J. No. 1389, 28 O.R. (3d) 641 (Gen. Div.); *Buttarazzi Estate v. Bertolo*, [2004] O.J. No. 20, 40 B.L.R. (3d) 287 (S.C.J.), affd [2005] O.J. No. 2197, 6 B.L.R. (4th) 131 (S.C.J.).

[33] *LeBlanc v. Corporation Eighty-Six Ltd.*, [1997] N.B.J. No. 375, 37 B.L.R. (2d) 129 (C.A.).

[34] *Alberta Treasury Branches v. Sevenway Capital Corp.*, [1999] A.J. No. 1312, 50 B.L.R. (2d) 294 (Q.B.), affd [2000] A.J. No. 801, 8 B.L.R. (3d) 1 (C.A.). See also *Matthews v. Muroff*, [1998] O.J. No. 2165, 65 O.T.C. 216 (Gen. Div.).

[35] *Main v. Delcan Group Inc.*, [1999] O.J. No. 1961, 47 B.L.R. (2d) 200 (S.C.J.); *Comuzzi v. 705542 Ontario Inc.*, [1998] O.J. No. 3572, 82 A.C.W.S. (3d) 675 (Gen. Div.); *Taylor v. London Guarantee Insurance Co.*, [2000] O.J. No. 1430, 11 B.L.R. (3d) 295 (S.C.J.); *Kabutey v. New-Form Manufacturing Co.*, [1999] O.J. No. 3635, 49 C.C.E.L. (2d) 252 (S.C.J.); *Kempf v. Fraser*, [1999] O.J. No. 1988, 37 C.P.C. (4th) 303 (S.C.J.); *Trudell Partnership Holdings Ltd. v. Retirement Counsel of Canada Inc.*, [2001] O.J. No. 314, 20 B.L.R. (3d) 76 (S.C.J.); *Schwabe (Litigation Guardian of) v. Heilborn*, [2002] O.J. No. 2755, 28 B.L.R. (3d) 309 (S.C.J.); *Gold v. Rose*, [2001] O.J. No. 12 (S.C.J.); *McNeely Engineering Consultants Ltd. v. Harmer*, [1997] O.J. No. 4272 (C.J.); *Fiorillo v. Krispy Kreme Doughnuts Inc.*, [2009] O.J. No. 2430, 98 O.R. (3d) 103 (S.C.J.); *Uraizee v. Pacific Art Stone Inc.*, [2014] B.C.J. No. 257, 2014 BCSC 236; *Herber v. Guse*, [2014] B.C.J. No.

2526, 2014 BCSC 1908. See also *2235512 Ontario Inc. v. 2235541 Ontario Inc.*, [2016] O.J. No. 6422, 2016 ONSC 7812. See also para. 17.299. For a discussion of the impact of shareholders' agreements on the reasonable expectations of minority shareholders in the Australian context, see Duffy, M., "Shareholders Agreements and Shareholder Remedies; Contract versus Statute", (2005) Bond University ePublication.

[36] *Levine v. 1751060 Ontario Inc.*, [2016] O.J. No. 3484, 2016 ONSC 3691. *Minshall v. Minshall Estate*, [2017] O.J. No. 2415, 2017 ONSC 2952.

[37] *1658586 Ontario Inc. v. Can-Am Lubricants Inc.*, [2014] O.J. No. 2144, 2014 ONSC 2673.

[38] *Taylor v. London Guarantee Insurance Co.*, [2000] O.J. No. 1430, 11 B.L.R. (3d) 295 (S.C.J.).

[39] *Lewis v. Coastal Acquisition Corp.*, [2000] O.J. No. 4538, 13 B.L.R. (3d) 137 (S.C.J.).

[40] *Stern v. Imasco Ltd.*, [1999] O.J. No. 4235, 1 B.L.R. (3d) 198 (S.C.J.), at p. 211-12 B.L.R. See also para. 17.168ff.

[41] *Picavet v. Salem Developments Ltd.*, [2000] O.J. No. 2806, 9 B.L.R. (3d) 276 (S.C.J.).

[42] R.S.O. 1990, c. P.4; *First Capital (Canholdings) Corp. v. North American Property Group*, [2010] O.J. No. 2504, 2010 ONSC 3196.

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[44] *Hawley v. North Shore Mercantile Group*, [2007] O.J. No. 3822 (S.C.J.).

[45] *Stapleton v. Fleming Feed Mill Ltd.*, [2001] O.J. No. 4170, 18 B.L.R. (3d) 280 (S.C.J.); *Stel-Van Homes Ltd. v. Fortini*, [2001] O.J. No. 2243, 16 B.L.R. (3d) 103 (S.C.J.); *Miklos v. Thomasfield Holdings Limited*, [2001] O.J. No. 1432, 82 C.R.R. (2d) 126 (S.C.J.); *Basha v. Singh*, [2016] Q.J. No. 3044, 2016 QCCS 1564.

[46] *Lizotte v. Arseneault*, [2012] N.B.J. No. 359, 2012 NBCA 89.

[47] *Vlasblom v. Net PCS Networks Inc.*, [2003] O.J. No. 535, 31 B.L.R. (3d) 255 (S.C.J.); *Premier Tech ltee. c. Dollo*, [2015] J.Q. no 6308, 2015 QCCA 1159.

[48] *International Energy and Mineral Resources Investment (Hong Kong) Co. v. Mosquito Consolidated Gold Mines Ltd.*, [2012] B.C.J. No. 1644, 2012 BCSC 1191.

[49] *Paulsen v. Wolfson Law Professional Corp.*, [2015] O.J. No. 4495, 339 O.A.C. 200 (Div. Ct.).

[50] *Bhangal v. Singh*, [2017] O.J. No. 2916, 2017 ONSC 3511.

**§17.145** In *Senyi Estate v. Conakry Holdings Ltd.*[1] the court summarized reasonable expectations in a private company for which there is no shareholder agreement:

> In the present circumstances, the applicant has inherited a minority common share position in a private company for which there is no shareholders' agreement. What are the reasonable expectations of a shareholder in such circumstances? I think they are limited to the following five general expectations: (1) that the directors and officers will conduct the affairs of the corporation in accordance with the statutory and common law duties required of them in such capacities; (2) that the shareholder will be entitled to receive annual financial statements of the corporation and to have access to the books and records of the corporation to the limited extent contemplated by the Act; (3) that the shareholder will be entitled to attend an annual meeting of the corporation for the limited purposes of receiving the annual financial statements and electing the directors and auditor of the corporation, or will participate in the approval of such matters by way of a shareholder resolution; (4) that a similar approval process will be conducted in respect of fundamental transactions involving the corporation for which such approval is required under the Act;

# TAB 14

2017 SCC 39, 2017 CSC 39
Supreme Court of Canada

Wilson v. Alharayeri

2017 CarswellQue 5230, 2017 CarswellQue 5231, 2017 SCC 39, 2017 CSC 39, [2017] 1 S.C.R. 1069, 280 A.C.W.S. (3d) 523, 412 D.L.R. (4th) 387, 65 B.L.R. (5th) 169

# Andrus Wilson (Appellant) v. Ramzi Mahmoud Alharayeri (Respondent)

McLachlin C.J.C., Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown, Rowe JJ.

Heard: November 29, 2016
Judgment: July 13, 2017
Docket: 36689

Proceedings: affirming *Black c. Alharayeri* (2015), 2015 CarswellQue 7661, EYB 2015-255559, 2015 QCCA 1350, 53 B.L.R. (5th) 43, 2015 CarswellQue 13380, Morissette J.C.A. (C.A. Que.) [Quebec]

Counsel: Terrence J. O'Sullivan, Paul Michell, Zain Naqi, for Appellant
Douglas C. Mitchell, Emma Lambert, for Respondent

Subject: Civil Practice and Procedure; Corporate and Commercial
**Related Abridgment Classifications**
Business associations
III Specific matters of corporate organization
  III.1 Directors and officers
    III.1.h Liabilities
      III.1.h.vii Oppression
**Headnote**
Business associations --- Specific matters of corporate organization — Directors and officers — Liabilities — Oppression
As result of private placement, proportion and value of common shares held by CEO of corporation were significantly reduced — Consequently, value of CEO's A and B shares, which were convertible into common shares, was also greatly reduced — This prompted CEO to file application for oppression under s. 241 of Canada Business Corporations Act against corporation's directors, including two members of audit committee — Trial judge found that CEO had reasonable expectation that board would consider his rights as A and B shareholder in any transaction impacting A and B shares — Trial judge held that two directors who were also members of audit committee had personally benefitted from private placement — Trial judge concluded that those two directors were personally liable for CEO's loss — Court of Appeal dismissed directors' appeal, holding that imposition of personal liability was justified, given positions of directors on audit committee — Directors appealed before Supreme Court of Canada — Appeal dismissed — Determining personal liability of director required two-pronged approach — First, oppressive conduct must be properly attributable to director because of his or her implication in oppression — In this case, trial judge found that those two directors had played lead roles in board discussions resulting in non-conversion of CEO's A and B shares — In making that finding, trial judge held that those two directors were implicated in oppressive conduct — It was therefore open to trial judge to determine that oppression was properly attributable to those two directors — Second, imposition of personal liability must be fit in all circumstances — In this case, trial judge found that, in addition to lead role he had played, one of directors had accrued personal benefit as result of oppressive conduct — Additionally, remedy went no further than necessary to rectify CEO's loss — Remedy was appropriately fashioned to vindicate CEO's reasonable expectations — Therefore, trial judge's decision did not reflect any errors warranting appellate intervention.

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Associations d'affaires --- Questions spécifiquement liées à l'organisation corporative — Administrateurs et dirigeants — Responsabilités — Oppression

À la suite d'un placement privé, la proportion et la valeur des actions ordinaires que possédait le chef de la direction d'une société ont considérablement diminué — Par conséquent, la valeur des actions A et B du chef de la direction, qui pouvaient auparavant être converties en actions ordinaires, a aussi grandement diminué — Cela a poussé le chef de la direction à déposer une demande de redressement pour abus en vertu de l'art. 241 de la Loi canadienne sur les sociétés par actions contre les administrateurs de la société, dont les deux membres du comité de vérification — Juge de première instance a conclu que le chef de la direction s'attendait raisonnablement à ce que le conseil d'administration tienne compte de ses droits en tant que détenteur des actions A et B lors de toute opération ayant une incidence sur elles — Juge de première instance a conclu que les deux administrateurs qui étaient également membres du comité de vérification avaient personnellement bénéficié du placement privé — Juge de première instance a conclu que ces deux administrateurs étaient personnellement responsables de la perte subie par le chef de la direction — Cour d'appel a rejeté l'appel des administrateurs, estimant qu'une responsabilité personnelle était justifiée, en raison du rôle des administrateurs au sein du comité de vérification — Administrateurs ont formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Il faut appliquer un test à deux volets pour déterminer s'il y a responsabilité personnelle d'un administrateur — D'abord, la conduite abusive doit être véritablement attribuable à l'administrateur en raison de son implication dans l'abus — En l'espèce, le juge de première instance a conclu que les deux administrateurs avaient joué un rôle prépondérant dans les discussions du conseil d'administration ayant mené à la non-conversion des actions A et B du chef de la direction — En concluant ainsi, le juge de première instance a jugé que ces deux administrateurs étaient impliqués dans la conduite abusive — Il était donc loisible au juge de première instance de décider que l'abus était véritablement attribuable à ces deux administrateurs — Ensuite, l'imposition d'une responsabilité personnelle doit être pertinente, compte tenu de toutes les circonstances — En l'espèce, le juge de première instance a conclu que, outre le rôle prépondérant d'un des administrateurs, l'abus lui avait procuré un avantage personnel — De plus, la réparation n'a pas accordé plus que ce qui était nécessaire pour remédier à la perte du chef de la direction — Réparation a été adéquatement élaborée eu égard aux attentes raisonnables du chef de la direction — Par conséquent, la décision du juge de première instance ne comportait aucune erreur justifiant une intervention en appel.

As a result of a private placement, the proportion and value of common shares held by the President and CEO of a corporation were significantly reduced. Consequently, the value of the CEO's A and B shares, which were convertible into common shares, was also greatly reduced. This prompted the CEO to file an application for oppression under s. 241 of the Canada Business Corporations Act against four of the corporation's directors, including two members of the audit committee. The trial judge found that the CEO had a reasonable expectation that his A and B shares would be converted if they met the applicable financial tests laid out in the corporation's articles and that the board would consider his rights as an A and B shareholder in any transaction impacting the A and B shares. The trial judge held that the two directors who were also members of the audit committee had personally benefitted from the private placement and the dilution of the CEO's shares. The trial judge concluded that those two directors were personally liable for the board's refusal to convert the CEO's A and B shares into common stock and the failure to ensure that the CEO's rights as an A and B shareholder were not prejudiced by the private placement. The directors appealed.

The Court of Appeal dismissed the appeal, holding that the imposition of personal liability was justified, given the positions of the two directors on the audit committee. In that respect, the Court of Appeal found that the trial judge's conclusions contained no errors warranting their reversal. The directors appealed before the Supreme Court of Canada.

**Held:** The appeal was dismissed.

Per Côté J. (McLachlin C.J.C., Abella, Moldaver, Karakatsanis, Wagner, Gascon, Brown, Rowe JJ. concurring): The oppression remedy exists to rectify harm to the complainant. What was at issue in the present case was whether the trial judge appropriately exercised the remedial powers provided in s. 241(3) by holding the two directors personally liable for the oppression. Section 241(3) gives a trial court broad discretion to make any interim or final order it thinks fit. However, this discretion is not limitless and must be exercised within the bounds expressly delineated by the case law.

As stated by the Ontario Court of Appeal, determining the personal liability of a director requires a two-pronged approach. First, the oppressive conduct must be properly attributable to the director because of his or her implication in the oppression. In this case, the trial judge found that the two directors had played the lead roles in board discussions

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resulting in the non-conversion of the CEO's A and B shares. In making that finding, the trial judge held that the two directors were implicated in the oppressive conduct. It was therefore open to the trial judge to determine that the oppression was properly attributable to the two directors. Second, the Ontario Court of Appeal held that the imposition of personal liability must be fit in all the circumstances. In this case, the trial judge found that, in addition to the lead role he had played, one of the directors had accrued a personal benefit as a result of the oppressive conduct. Nothing about this line of reasoning reflected an incorrect invocation of principle or improper consideration. Additionally, the remedy went no further than necessary to rectify the CEO's loss. The trial judge held the two directors solidarily liable for the oppression and ordered them to pay the CEO compensation in the amount of $648,310, which represented the CEO's loss. The remedy was appropriately fashioned to vindicate the CEO's reasonable expectations as a series A and B shareholder. Therefore, the trial judge's decision to hold the directors personally liable for the oppression did not reflect any errors warranting appellate intervention.

À la suite d'un placement privé, la proportion et la valeur des actions ordinaires que possédait le président et chef de la direction d'une société ont considérablement diminué. Par conséquent, la valeur des actions A et B du chef de la direction, qui pouvaient auparavant être converties en actions ordinaires, a aussi grandement diminué. Cela a poussé le chef de la direction à déposer une demande de redressement pour abus en vertu de l'art. 241 de la Loi canadienne sur les sociétés par actions, et ce, contre quatre des administrateurs de la société, dont les deux membres du comité de vérification. Le juge de première instance a conclu que le chef de la direction s'attendait raisonnablement à ce que, si elles satisfaisaient aux tests financiers applicables énoncés dans les statuts de la société, ses actions A et B soient converties, et à ce que le conseil d'administration tienne compte de ses droits en tant que détenteur de ces actions lors de toute opération ayant une incidence sur elles. Le juge de première instance a conclu que les deux administrateurs qui étaient également membres du comité de vérification avaient personnellement bénéficié du placement privé et de la dilution des actions du chef de la direction. Le juge de première instance a conclu que ces deux administrateurs étaient personnellement responsables du refus du conseil d'administration de convertir les actions A et B du chef de la direction en actions ordinaires et de l'omission de faire en sorte que le placement privé ne porte pas atteinte aux droits de ce dernier à titre de détenteur d'actions A et B. Les administrateurs ont interjeté appel.

La Cour d'appel a rejeté l'appel, estimant qu'une responsabilité personnelle était justifiée, en raison du rôle des deux administrateurs au sein du comité de vérification. À cet égard, la Cour d'appel a conclu que les conclusions du juge de première instance ne contenaient aucune erreur justifiant leur infirmation. Les administrateurs ont formé un pourvoi devant la Cour suprême du Canada.

**Arrêt:** Le pourvoi a été rejeté.

Côté, J. (McLachlin, J.C.C., Abella, Moldaver, Karakatsanis, Wagner, Gascon, Brown, Rowe, JJ., souscrivant à son opinion) : Le redressement pour abus existe pour réparer le préjudice causé au plaignant. La question qui se posait en l'espèce était celle de savoir si le juge de première instance a correctement exercé les pouvoirs de réparation prévus à l'art. 241(3) en concluant que les deux administrateurs étaient personnellement responsables de l'abus. L'article 241(3) confère au juge de première instance un large pouvoir discrétionnaire pour rendre les ordonnances provisoires ou définitives qu'il estime pertinentes. Toutefois, ce pouvoir discrétionnaire n'est pas illimité et doit être exercé dans des limites légales expressément énoncées dans la jurisprudence.

Comme la Cour d'appel de l'Ontario l'a indiqué, il faut appliquer un test à deux volets pour déterminer s'il y a responsabilité personnelle d'un administrateur. D'abord, la conduite abusive doit être véritablement attribuable à l'administrateur en raison de son implication dans l'abus. En l'espèce, le juge de première instance a conclu que les deux administrateurs avaient joué un rôle prépondérant dans les discussions du conseil d'administration ayant mené à la non-conversion des actions A et B du chef de la direction. En concluant ainsi, le juge de première instance a jugé que ces administrateurs étaient impliqués dans la conduite abusive. Il était donc loisible au juge de première instance de décider que l'abus était véritablement attribuable à ces deux administrateurs. Ensuite, la Cour d'appel de l'Ontario a estimé que l'imposition d'une responsabilité personnelle doit être pertinente, compte tenu de toutes les circonstances. En l'espèce, le juge de première instance a conclu que, outre le rôle prépondérant d'un des administrateurs, l'abus lui avait procuré un avantage personnel. Rien dans ce raisonnement ne révélait de considérations ou de principes erronés. De plus, la réparation n'a pas accordé plus que ce qui était nécessaire pour remédier à la perte du chef de la direction. De fait, le juge de première instance a conclu que les deux administrateurs étaient solidairement responsables de l'abus et les a

condamnés à payer au chef de la direction une indemnité s'élevant à 648 310 $, ce qui représentait la perte subie par le chef de la direction. La réparation a été adéquatement élaborée eu égard aux attentes raisonnables du chef de la direction en tant que détenteur d'actions de série A et B. Par conséquent, la décision du juge de première instance de tenir les administrateurs solidairement responsables de l'abus ne comportait aucune erreur justifiant une intervention en appel.

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**Statutes considered by *Rosalie Abella J.C.S.C., Russell Brown J.C.S.C., Suzanne Côté J.C.S.C., Clément Gascon J.C.S.C., Andromache Karakatsanis J.C.S.C., Beverley McLachlin Juge en chef, Michael J. Moldaver J.C.S.C., Malcolm H. Rowe J.C.S.C., Richard Wagner J.C.S.C.*:**

*Loi canadienne sur les sociétés par actions*, L.R.C. (1985), ch. C-44

art. 241 — considered

Appeal by director from decision reported at *Black c. Alharayeri* (2015), 2015 QCCA 1350, EYB 2015-255559, 2015 CarswellQue 7661, 2015 CarswellQue 13380, 53 B.L.R. (5th) 43 (C.A. Que.), affirming trial judge's decision to hold him and another director personally liable for financial loss suffered by CEO as result of private placement.

Pourvoi formé par un administrateur à l'encontre d'une décision publiée à *Black c. Alharayeri* (2015), 2015 QCCA 1350, EYB 2015-255559, 2015 CarswellQue 7661, 2015 CarswellQue 13380, 53 B.L.R. (5th) 43 (C.A. Que.), ayant confirmé la décision du juge de première instance de tenir cet administrateur et un autre administrateur personnellement responsables des pertes financières subies par le chef de la direction à la suite d'un placement privé.

***Côté J.* (McLachlin C.J.C., Abella, Moldaver, Karakatsanis, Wagner, Gascon, Brown, Rowe JJ. concurring):**

**I. Introduction**

1 Section 241(3) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*"), allows a court to "make any interim or final order it thinks fit" to rectify the matters complained of in an action for corporate oppression. The principal question raised by this appeal is when an order for compensation under this section may properly lie against the directors of a corporation personally, as opposed to the corporation itself.

2 For almost 20 years, the leading authority on this question has been the Ontario Court of Appeal's decision in *Budd v. Gentra Inc.* (1998), 43 B.L.R. (2d) 27 (Ont. C.A.) ("*Budd*"), and in my view, there is no reason to depart from the guidance provided in *Budd* now.

3 In this case, the trial judge did not err in his application of *Budd* or the principles governing orders under s. 241(3) when he found the appellant director personally liable for the oppressive conduct. Appellate intervention is therefore unwarranted, and I would accordingly dismiss the appeal.

**II. Background**

***A. Context and the Corporation's Capital Structure***

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4 From 2005 to 2007, the respondent, Mr. Alharayeri, was the President, the Chief Executive Officer ("CEO"), a significant minority shareholder and a director of Wi2Wi Corporation ("Corporation"), a technology company incorporated under the *CBCA*. Prior to the events leading to the instant litigation, he held 2 million common shares, 1 million Class A Convertible Preferred Shares ("A Shares") and 1.5 million Class B Convertible Preferred Shares ("B Shares") in the Corporation. The respondent was the sole holder of the A and B Shares, which were issued to him as performance-linked incentives. The A Shares were convertible into common shares if the Corporation met certain financial targets in the 2006 fiscal year, and the B Shares were convertible into common shares if certain financial targets were met in the 2007 fiscal year. If the targets were not met, the shares were to be converted into a reduced number of common shares prorated according to the shortfall.

5 The Corporation also issued Class C Convertible Preferred Shares ("C Shares") as an incentive to those involved in finding financing for it. Like the A and B Shares, the C Shares were convertible into common shares if the Corporation met a financial target laid out in its articles of incorporation. The appellant, Mr. Wilson, was one of the C shareholders and beneficially owned or controlled 100,000 C Shares through YTW Growth Capital Management Corp. ("YTW Corp."). Like the A and B Shares, the C Shares were non-participating, non-voting, non-transferable and non-assignable.

***B. Origins of the Dispute***

6 In March 2007, as a result of recurring cash flow issues, the Corporation began to seriously consider merging its operations with those of another business, Mitec Telecom Inc. ("Mitec"). While negotiating the merger, the respondent was also separately negotiating with Mitec the sale of his own shares in the Corporation in order to alleviate personal financial difficulties. Without notifying the Corporation's Board, the respondent agreed to sell some of his common shares to Mitec, and he signed a share purchase agreement to that effect on April 2, 2007. On May 31, 2007, when the Corporation's Board finally learned of the respondent's personal share purchase agreement, he was censured for concealing the deal and failing to disclose the potential conflict of interest. This triggered his resignation as President, CEO and director of the company on June 1, 2007.

7 After the respondent's resignation, the appellant became Wi2Wi's President and CEO. The Corporation's Board consisted of seven remaining directors. However, its audit committee comprised only two directors: the appellant and Dr. Hans Black — the chairperson of the audit committee.

8 During the months following the respondent's resignation, further negotiations were conducted by the respondent, the Corporation, and Mitec, but none materialized into a merger or a share purchase agreement.

9 In September 2007, the Corporation's Board decided to issue a private placement of convertible secured notes ("Private Placement") to its existing common shareholders in response to its continuing financial difficulties. Under the terms of the issuance, each shareholder was entitled to subscribe for $1.00 of notes for every two common shares the shareholder had in the Corporation. The notes were convertible into common shares at the rate of 50,000 common shares per $1,000 principal amount of notes. The Private Placement would therefore substantially dilute the proportion of common shares held by any shareholder who did not participate in it.

10 Prior to the Private Placement, the Board accelerated the conversion of 100,000 C Shares, beneficially held by YTW Corp. for the appellant, into common shares. It did so despite doubts expressed by the auditors as to whether or not the test for the C Share conversion had been met. The other two holders of C Shares did not benefit from their expedited conversion.

11 On the other hand, the respondent's A Shares were never converted into common shares. The Board never approved the 2006 audited financial statements, which contained a note stipulating that, on the basis of the financial test laid out in the articles of incorporation, the A Shares were convertible into 1 million common shares at the option of the holder. In Board meetings, both the appellant and Dr. Black expressed doubts as to whether it was appropriate to permit the conversion of the A Shares in light of the respondent's conduct, particularly his involvement in parallel share purchase

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negotiations with Mitec. Consequently, the Board never sent the respondent a formal notice of his crystallized conversion rights, and his A Shares were never converted into common shares, despite his requests for conversion at Board meetings, in emails, and otherwise.

12 Similarly, the respondent's B Shares were never converted into common shares, notwithstanding that, based on the approved 2007 financial statements, the respondent's B Shares were convertible into 223,227 common shares.

13 As a result of the Private Placement, the respondent's proportion of common shares, and the value thereof, were significantly reduced. Consequently, the value of the respondent's A and B Shares — convertible as they were into common shares — was also greatly reduced. This prompted the respondent to file an application for oppression under s. 241 of the *CBCA* against four of the Corporation's directors, including the two members of the audit committee: the appellant and Dr. Black.

**III. Judicial History**

***A. Quebec Superior Court, 2014 QCCS 180 (C.S. Que.)***

14 At trial, the respondent alleged seven specific acts of oppression against the four defendant directors. The Corporation was joined as an impleaded party. Hamilton J. addressed all seven of the respondent's allegations using the framework laid out by this Court in *BCE Inc., Re*, 2008 SCC 69, [2008] 3 S.C.R. 560 (S.C.C.) ("*BCE*"). He found that the respondent had a reasonable expectation that his A and B Shares would be converted if they met the applicable financial tests laid out in the Corporation's articles and that the Board would consider his rights as an A and B shareholder in any transaction impacting the A and B Shares. He concluded that two of the four defendants, the appellant and Dr. Black, were personally liable for the Board's refusal to convert the respondent's A and B Shares into common stock and the failure to ensure that the respondent's rights as an A and B shareholder were not prejudiced by the Private Placement.

15 Hamilton J. adopted the test for a director's personal liability in an oppression case from *Budd.* Applying *Budd*, he held that it was "fit" to order the appellant personally to pay damages to the respondent because (1) along with Dr. Black, the appellant had personally benefitted from the Private Placement and the dilution of the respondent's shares, and (2) the appellant alone had benefitted from the conversion of his C Shares into the full number of common shares notwithstanding issues as to whether the conversion test had been met (para. 167 (CanLII)).

16 In the result, Hamilton J. held the appellant and Dr. Black solidarily liable for the oppression and ordered them to pay the respondent compensation in the amount of $648,310.

***B. Quebec Court of Appeal, 2015 QCCA 1350, 53 B.L.R. (5th) 43 (C.A. Que.)***

17 On appeal, Mr. Wilson and Dr. Black argued, among other things, that the trial judge had erred by holding them personally liable on the basis of the lead roles they had played in the oppression, especially in the discussion at the Board level, and that the trial judge had violated the *audi alteram partem* rule by relying on facts that had not been alleged and arguments that had not been raised (para. 30).

18 The Court of Appeal rejected both of these grounds and dismissed the appeal.

19 On its review of the facts, the Court of Appeal held that the imposition of personal liability was justified, noting that both Mr. Wilson and Dr. Black must have known that Mr. Alharayeri's A Share conversion rights had crystallized because of their positions on the audit committee (para. 41). As the only audit committee members, Mr. Wilson and Dr. Black wielded significant influence over the conversion decision and used this influence to advocate against conversion of Mr. Alharayeri's shares while also advocating for the Private Placement (paras. 43-47). Further, Mr. Wilson admitted at trial that the issue concerning Mr. Alharayeri had "disappeared because he was no longer a shareholder in a position to block and be a big influence on all of the stuff that the company was doing" (para. 47). In light of these facts, the Court of Appeal held that the trial judge's conclusions — that Mr. Wilson and Dr. Black had played a lead role in the

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oppression and that the circumstances justified the imposition of personal liability — contained no errors warranting their reversal (paras. 33 and 48).

20 Regarding the *audi alteram partem* issue, the Court of Appeal held that the pleadings did not preclude the trial judge's imposition of personal liability. In doing so, it reasoned that the matter of the appellant's personal advantage could not have surprised him, because multiple pleadings — including amended versions of the Motion to Institute Proceedings, the parties' Joint Declaration That a File Is Complete, and the Defence and Amended Defence — had specifically identified this to be at issue. The Court of Appeal also distinguished *Budd* — in which the pleadings were held to disclose no reasonable cause of action and the plaintiff's claim was against, *inter alia*, 30 directors, 9 officers, and 5 portfolio companies — as involving a different situation altogether. The Court of Appeal therefore refused to give effect to this ground of appeal, before going on to uphold the trial judge's decision.

**IV. Issues**

21 The trial judge's conclusions regarding the oppressive conduct are not at issue before this Court. Rather, Mr. Wilson challenges the conclusion that it is "fit" to hold him personally liable for that oppressive conduct. In particular, this appeal raises two issues relating to the imposition of personal liability in an oppression action:

(1) When may personal liability for oppression be imposed on corporate directors?

(2) Were the pleadings sufficient to ground the imposition of personal liability in this case?

**V. Analysis**

***A. When May Personal Liability for Oppression Be Imposed on Corporate Directors?***

22 It is helpful to begin by situating the analysis within the context of an oppression action under the *CBCA*. Sections 241(1) and 241(2) of the *CBCA* provide:

> **241 (1)** A complainant may apply to a 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.

23 The nature of the oppression remedy is well recognized in our jurisprudence. Section 241 creates an equitable remedy that "seeks to ensure fairness what is 'just and equitable'" (*BCE Inc.*, at para. 58). It gives "a court broad, equitable jurisdiction to enforce not just what is legal but what is fair" (*ibid.*). Courts considering claims for oppression are therefore instructed to engage in fact-specific, contextual inquiries looking at "business realities, not merely narrow legalities" (*ibid.*).

24 The two requirements of an oppression claim are equally well known. First, the complainant must "identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held" (*BCE Inc.*, at para. 70). Second, the complainant must show that these reasonable expectations were violated by corporate conduct that was oppressive or unfairly prejudicial to or that unfairly disregarded the interests

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of "any security holder, creditor, director or officer," pursuant to s. 241(2). As stated above, the presence of these two elements is not at issue in this appeal.

25 What is at issue is whether the trial judge appropriately exercised the remedial powers provided in s. 241(3) by holding Mr. Wilson personally liable for the oppression. Section 241(3) reads as follows:

> **(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 a security holder any part of the monies that the security holder paid 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 155 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 243;
>
> (l) an order liquidating and dissolving the corporation;
>
> (m) an order directing an investigation under Part XIX to be made; and
>
> (n) an order requiring the trial of any issue.

26 Section 241(3) thus gives a trial court broad discretion to "make any interim or final order it thinks fit," before enumerating specific examples of permissible orders. But this discretion is not limitless. It must be exercised within legal bounds, and, as a starting point, it must be exercised within the bounds expressly delineated by the *CBCA*.

27 Any order made under s. 241(3) exists solely to "rectify the matters complained of," as provided by s. 241(2). The purpose of the oppression remedy is therefore corrective: "... in seeking to redress inequities between private parties ...", the oppression remedy seeks to "apply a measure of corrective justice" (J. G. MacIntosh, "The Retrospectivity of the Oppression Remedy" (1987), 13 *Can. Bus. L.J.* 219, at p. 225; see also *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (Ont. C.A.) ("*Naneff*"); *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.), at p. 197 ("*Ballard*")). In other words, an order made under s. 241(3) should go no further than necessary to correct the injustice or unfairness between the parties.

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28 However, where, as in this case, the trial judge has determined that a monetary order is fit, applying the principle that the oppression remedy is corrective tells us only about the proper extent of a party's liability. It does not help us decide whether the monetary order should have been made against the corporation or the director personally.

29 Some of the examples enumerated in s. 241(3) show that the oppression remedy contemplates liability not only for the corporation, but also for other parties. For instance, ss. 241(3)(f) and 241(3)(g) allow for orders against "any ... person," requiring them to purchase securities, or pay to the security holder monies paid by him for securities, respectively. Section 241(3)(j) considers an "order compensating an aggrieved person," but does not identify against whom such an order may lie. The *CBCA*'s wording goes no further to specify when it is fit to hold directors personally liable under this section. We must therefore turn to the case law for illustrations.

*(1) Budd v. Gentra Inc.*

30 In *Budd*, Doherty J.A. considered the personal liability of directors under the oppression remedy. Doherty J.A. rejected the proposition that common law principles as to when directors will bear personal liability applied equally in an oppression case (*Budd*, at paras. 31, 34-36 and 40). In particular, he rejected the view that a director's conduct must reveal a separate identity or interest from that of the corporation by falling outside the normal scope of his or her duties in order to attract personal liability (*Budd*, at paras. 26, 32, 35-36). In doing so, Doherty J.A. held that

> [a] director or officer may be personally liable for a monetary order ... <u>if that director or officer is implicated in the conduct</u> said to constitute the oppression <u>and if in all of the circumstances</u>, rectification of the harm done by the oppressive conduct is appropriately made by an order requiring the director or officer to personally compensate the aggrieved parties
>
> [Emphasis added; para. 46.]

31 Two requirements emerge from this passage. The first is that the director or officer must be implicated in the oppressive conduct. In other words, the oppressive conduct must be attributable to the individual director because of his or her action or inaction. The second is that the order must be fit in all of the circumstances. These two criteria comprise the *Budd* "test."

32 However, *Budd* also featured a survey of the case law illustrating when personal orders against directors may be appropriate. In an oft-cited passage, author Markus Koehnen suggests that this survey revealed five situations in which personal orders against directors might be appropriate:

> (1) Where directors obtain a personal benefit ... from their conduct;
>
> (2) Where directors have increased their control of the corporation by the oppressive conduct;
>
> (3) Where directors have breached a personal duty they have as directors;
>
> (4) Where directors have misused a corporate power;
>
> (5) Where a remedy against the corporation would prejudice other security holders.

(M. Koehnen, *Oppression and Related Remedies* (2004), at p. 201 ("Koehnen"))

33 According to Koehnen, *Budd* may have also referred to a sixth category of cases: those "involving closely held corporations where a director or officer has virtually total control over the corporation" (p. 202; and *Budd*, at para. 44).

34 *Budd* has since been applied and endorsed by courts across the country (see, e.g., *Wood Estate v. Arius3D Corp.*, 2014 ONSC 3322 (Ont. S.C.J. [Commercial List]) ("*Wood Estate*"), at paras. 133-34 (CanLII); *GC Capital Inc. v. Condominium Corp. No. 0614475*, 2013 ABQB 300, 83 Alta. L.R. (5th) 1 (Alta. Q.B.), at para. 41; *Moon v. Golden Bear Mining Ltd.*,

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2012 BCSC 829 (B.C. S.C.), at para. 315 (CanLII); *Belliveau v. Belliveau*, 2011 NSSC 397, 3 B.L.R. (5th) 87 (N.S. S.C.), at para. 85; *2082825 Ontario Inc. v. Platinum Wood Finishing Inc.* (2009), 96 O.R. (3d) 467 (Ont. Div. Ct.), at para. 54; *Cox v. Aspen Veterinary Services Professional Corp.*, 2007 SKQB 270, 301 Sask. R. 1 (Sask. Q.B.), at para. 158; *Danylchuk v. Wolinsky*, 2007 MBCA 132, 225 Man. R. (2d) 2 (Man. C.A.), at para. 59).

35 However, courts have also diverged in their understanding of the case law examples identified in *Budd*. Some courts appear to treat the examples as discrete categories in which a personal order may be appropriate or as factors to be considered in fashioning a remedy (see, e.g., *Inc. Broadcasters Ltd. v. Canwest Global Communications Corp.*, 2008 MBQB 296, 244 Man. R. (2d) 127 (Man. Q.B.), at para. 46; *Moon*, at para. 315). Others appear to treat either the "personal benefit" category or the "closely held" category, or both, as giving rise to necessary conditions for the imposition of personal liability (see, e.g., *Adecco Canada Inc. v. J. Ward Broome Ltd.* (2001), 12 B.L.R. (3d) 275 (Ont. S.C.J. [Commercial List]), at para. 30; *Walls v. Lewis* (2009), 97 O.R. (3d) 16 (Ont. S.C.J.), at para. 48; *Waiser v. Deahy Medical Assessments Inc.* (2006), 14 B.L.R. (4th) 317 (Ont. S.C.J.), at paras. 57-58). Still others appear not to apply *Budd* at all (see, e.g., *Levenzon c. Korres*, 2014 QCCS 258 (C.S. Que.), at para. 69 (CanLII)).

36 It is apparent that Canadian courts are unsettled as to when the guidance in *Budd* should lead to the imposition of personal liability. Unsurprisingly, then, the jurisprudential debate in this appeal centred on the content of the personal liability "test." The appellant does not submit that *Budd* was wrongly decided, but rather that it put forth no stringent "test" at all. He urges the Court to adopt necessary criteria governing the imposition of personal liability in every case.

*(2) The Appellant's Proposed Criteria*

37 According to the appellant, oppressive conduct should be attributable to a director only where the director has control of the corporation and acts in bad faith by using the corporation to advance his or her own personal interest, or where the corporation functions as the director's alter ego. Overall, the appellant says, "the oppressive conduct must take on the character of personal conduct of the director." On this theory, the trial judge would have erred in holding the appellant personally liable because the Corporation had some 50 shareholders, none of whom was independently controlling, so he alone was not "pulling the strings." The appellant therefore invites the Court to narrow the remedial scope of s. 241(3) by reference to principles traditionally limiting director liability at common law. In my view, this invitation should be declined.

38 In *Budd*, Doherty J.A. warned against "overlaying restrictive common law principles on the broad statutory language of s. 241" (para. 40). The appellant's proposed reading of the attribution prong of the *Budd* test boils down to integrating the same common law rule rejected in *Budd*:

> ... officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or <u>exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own</u>.
>
> [Emphasis added.]
>
> (*Budd*, at para. 25, citing *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc.* (1995), 26 O.R. (3d) 481 (Ont. C.A.), at p. 491, leave to appeal refused, [1996] 3 S.C.R. viii (note) (S.C.C.).)

39 While this proposition may remain true at common law, s. 241's remedial purpose lies in applying general standards of commercial fairness given that the sometimes "clumsy tools" of the common law failed to promote such standards (Koehnen, at p. 2). Realizing this purpose may require imposing personal liability on a director where the director is not a controlling shareholder but is nevertheless implicated in the oppression. For example, where otherwise fit, it may be open to a court to impose liability on a director who strongly advocates for an oppressive decision motivated by a personal gain unique to that director, despite lacking control. But adopting the appellant's proposed control criterion would preclude this.

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40 Additionally, adopting this criterion would effectively give the directors of public companies (including small public companies and new ventures) an additional layer of protection against liability unavailable to the directors of private companies. However, neither the *CBCA* nor the case law support such a distinction. To the extent that some cases emphasize control, they do so not to provide "a more lax standard for public company directors," but rather to recognize "that personal benefit and increased personal control" — two hallmarks of conduct attracting personal liability — "are more likely to arise in private companies than in public companies" (Koehnen, at p. 202). Therefore, although the presence or absence of control may be considered as a factor in determining whether it is fit to impose personal liability, it is not a necessary criterion for personal liability.

41 Further, while a director's bad faith may militate strongly in favour of holding him or her personally liable, bad faith is not a necessary condition to imposing personal liability. Conduct may run afoul of s. 241 even when it is driven by lesser states of mental culpability:

> "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 . ...
>
> (*BCE*, at para. 67)

42 As Gascon J. (as he then was) recognized, the oppression remedy is concerned with the effects of oppressive conduct, not the intent of the oppressor:

> In oppression matters, it is the effect of the acts and omissions of directors and officers of a company, rather than their intentions, that determines whether the conduct complained of is unfairly prejudicial. The rights conferred by Section 241 *CBCA* turn on effect, not intent. What is important is the result. Effect is key.
>
> (*Segal v. Blatt*, 2007 QCCS 1488 (C.S. Que.), at para. 43 (CanLII), aff'd 2008 QCCA 1094 (C.A. Que.), at paras. 16-17 (CanLII); see also *Wood Estate*, at para. 127, per D.M. Brown J. (as he then was).)

43 Emphasizing the motivation of the defendant director, to the exclusion of other considerations, would inappropriately shift the focus of the analysis away from the effects of the oppression, and the director's role therein. Courts have accordingly recognized the possibility of director liability for oppression in the absence of bad faith conduct (*Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 (Ont. C.A.), at paras. 55-57; *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.* (1998), 40 O.R. (3d) 563 (Ont. C.A.) ("*Sidaplex*")). However, while bad faith is not a necessary condition, it is an important consideration. A director who acts out of malice or with an eye to personal benefit is more likely to attract personal liability than one who acts in good faith.

44 The appellant also submits that a personal order against a director can be "fit" only where the director has obtained a personal benefit at the expense of the oppressed party and where there is a direct connection between the impugned conduct and that benefit. On this view, a personal order against the appellant was inappropriate because there was no correlation between the Board's failure to convert the A and B Shares and the benefits accruing to the appellant in the form of increased control of the Corporation and the expedited conversion of his C Shares.

45 In my view, this argument is unavailing. As explained above, the oppression remedy exists to rectify harm to the complainant. It is not a gain-based remedy. Gain-based remedies "are, in any context, a striking form of redress insofar as they represent a departure from the norm of loss-based or compensatory relief" (P. B. Miller, "Justifying Fiduciary Remedies" (2013), 63 *U.T.L.J.* 570, at pp. 570-71). Treating a personal benefit as a necessary condition to a director's personal liability inappropriately emphasizes the gain to the director, at the expense of considering the oppressive conduct leading to the complainant's loss. For example, oppressive conduct that does not yield a personal benefit may trigger personal liability where the director acts in bad faith or in a Machiavellian fashion (for instance, where the director seeks

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to punish a shareholder for interpersonal reasons regardless of whether that punishment brings the director any personal benefit). But treating a personal benefit as a necessary condition would preclude personal liability in such a case, where it may otherwise be a fit and fair remedy. Further, demanding a strict correlation between the complainant's loss and the director's benefit would imbue an otherwise discretionary, equitable remedy that looks to commercial realities with a legal formalism inimical to its remedial purpose.

46 Like the appellant's tendered criteria of control and bad faith, personal benefit should not be treated as a necessary criterion for personal liability. That said, an archetypal case of personal liability will often feature a personal benefit. And courts have regularly looked — and should continue to look — to the presence or absence of a personal benefit in determining whether an order may properly lie against a director personally.

*(3) The Principles Governing Orders Under Section 241(3) and the Application of the Personal Liability Test Going Forward*

47 To reiterate, *Budd* provides for a two-pronged approach to personal liability. The first prong requires that the oppressive conduct be properly attributable to the director because he or she is implicated in the oppression (see *Budd*, at para. 47). In other words, the director must have exercised — or failed to have exercised — his or her powers so as to effect the oppressive conduct (*Sidaplex*, at p. 567; see also *Budd*, at paras. 41-44, citing *Gottlieb v. Adam* (1994), 21 O.R. (3d) 248 (Ont. Gen. Div.), at pp. 260-61).

48 But this first requirement alone is an inadequate basis for holding a director personally liable. The second prong therefore requires that the imposition of personal liability be fit in all the circumstances. Fitness is necessarily an amorphous concept. But the case law has distilled at least four general principles that should guide courts in fashioning a fit order under s. 241(3). The question of director liability cannot be considered in isolation from these general principles.

49 First, "the oppression remedy request must in itself be a fair way of dealing with the situation" (*Ballard*, at para. 142). The five situations identified by Koehnen relating to director liability are best understood as providing indicia of fairness. Where directors have derived a personal benefit, in the form of either an immediate financial advantage or increased control of the corporation, a personal order will tend to be a fair one. Similarly, where directors have breached a personal duty they owe as directors or misused a corporate power, it may be fair to impose personal liability. Where a remedy against the corporation would unduly prejudice other security holders, this too may militate in favour of personal liability (see Koehnen, at p. 201).

50 To be clear, this is not a closed list of factors or a set of criteria to be slavishly applied. And as explained above, neither a personal benefit nor bad faith is a necessary condition in the personal liability equation. The appropriateness of an order under s. 241(3) turns on equitable considerations, and in the context of an oppression claim, "It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise" (*Ebrahimi v. Westbourne Galleries Ltd.* (1972), [1973] A.C. 360 (U.K. H.L.), at p. 379 ("*Ebrahimi*")). But personal benefit and bad faith remain hallmarks of conduct properly attracting personal liability, and although the possibility of personal liability in the absence of both of these elements is not foreclosed, one of them will typically be present in cases in which it is fair and fit to hold a director personally liable for oppressive corporate conduct. With respect to these two elements, four potential scenarios can arise:

i) The director acted in bad faith and obtained a personal benefit;

ii) The director acted in bad faith but did not obtain a personal benefit;

iii) The director acted in good faith and obtained a personal benefit; and

iv) The director acted in good faith and did not obtain a personal benefit.

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51 In general, the first and fourth scenarios will tend to be clear-cut. If the director has acted in bad faith and obtained a personal benefit, it is likely fit to hold the director personally liable for the oppression. On the other hand, where neither element is present, personal liability will generally be less fitting. The less obvious cases will tend to lie in the middle. In all cases, the trial judge must determine whether it is fair to hold the director personally liable, having regard to all the circumstances. Bad faith and personal benefit are but two factors that relate to certain circumstances within a larger factual matrix. They do not operate to the exclusion of other considerations. And they should not overwhelm the analysis.

52 Further, even where it is appropriate to impose personal liability, this does not necessarily lead to a binary choice between the directors and the corporation. Fairness requires that, where "relief is justified to correct an oppressive type of situation, the surgery should be done with a scalpel, and not a battle axe" (*Ballard*, at para. 140). Where there is a personal benefit but no finding of bad faith, fairness may require an order to be fashioned by considering the amount of the personal benefit. In some cases, fairness may entail allocating responsibility partially to the corporation and partially to directors personally. For example, in *Wood Estate*, a shareholder made a short-term loan to the corporation with the reasonable expectation that it would be repaid from the proceeds of a specific transaction. Those proceeds were instead applied to corporate purposes, as well as to repayment of the loans made to the corporation by the defendant directors and officer and by another shareholder. D.M. Brown J. held the defendant directors and officer liable for the amounts used to repay their own loans and the shareholder loan, and also ordered the corporation to pay an equal amount towards the balance of the loan. As this last example shows, the fairness principle is ultimately unamenable to formulaic exposition and must be assessed on a case-by-case basis having regard to all of the circumstances.

53 Second, as explained above, any order made under s. 241(3) should go no further than necessary to rectify the oppression (*Naneff*, at para. 32; *Ballard*, at para. 140; *Themadel Foundation v. Third Canadian Investment Trust Ltd.* (1998), 38 O.R. (3d) 749 (Ont. C.A.), at p. 754 ("*Themadel*")). This follows from s. 241's remedial purpose insofar as it aims to correct the injustice between the parties.

54 Third, any order made under s. 241(3) may serve only to vindicate the reasonable expectations of security holders, creditors, directors or officers in their capacity as corporate stakeholders (*Naneff*, at para. 27; *Smith v. Ritchie*, 2009 ABCA 373 (Alta. C.A.), at para. 20 (CanLII)). The oppression remedy recognizes that, behind a corporation, there are individuals with "rights, expectations and obligations inter se which are not necessarily submerged in the company structure" (*Ebrahimi*, at p. 379; see also *BCE Inc.*, at para. 60). But it protects only those expectations derived from an individual's status as a security holder, creditor, director or officer. Accordingly, remedial orders under s. 241(3) may respond only to those expectations. They may not vindicate expectations arising merely by virtue of a familial or other personal relationship. And they may not serve a purely tactical purpose. In particular, a complainant should not be permitted to jump the creditors' queue by seeking relief against a director personally. The scent of tactics may therefore be considered in determining whether or not it is appropriate to impose personal liability on a director under s. 241(3). Overall, the third principle requires that an order under s. 241(3) remain rooted in, informed by, and responsive to the reasonable expectations of the corporate stakeholder.

55 Fourth — and finally — a court should consider the general corporate law context in exercising its remedial discretion under s. 241(3). As Farley J. put it, statutory oppression "can be a help; it can't be the total law with everything else ignored or completely secondary" (*Ballard*, at para. 124). This means that director liability cannot be a surrogate for other forms of statutory or common law relief, particularly where such other relief may be more fitting in the circumstances (see, e.g., *Stern v. Imasco Ltd.* (1999), 1 B.L.R. (3d) 198 (Ont. S.C.J.)).

56 Under s. 241(3), fashioning a fit remedy is a fact-dependent exercise. When it comes to the oppression remedy, Carthy J.A. put the matter succinctly:

> The point at which relief is justified and the extent of relief are both so dependent upon the facts of the particular case that little guidance can be obtained from comparing one case to another and I would be hesitant to enunciate any more specific principles of approach than have been set out above.

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(*Themadel*, at p. 754)

57 The four principles articulated above therefore serve as guideposts informing the flexible and discretionary approach the courts have adopted to orders under s. 241(3) of the *CBCA*. Having surveyed these principles, I turn now to their application in the instant case.

*(4) Application of the Principles Governing Orders Under Section 241(3) and Director Liability in This Case*

58 The trial judge's decision to hold the appellant personally liable for the oppression does not reflect any errors warranting appellate intervention.

59 As stated above, s. 241 vests the trial court with broad discretion. Appellate courts should therefore adopt a deferential stance when reviewing judgments rendered on oppression applications. Three principles govern the applicable standard of review. First, absent palpable and overriding error, an appellate court must defer to the trial court's findings of fact (see also *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 (S.C.C.), at paras. 36 and 90). Second, an appellate court may intervene and substitute its own decision for the trial court's if the judgment is based on "errors of law ... erroneous principles or irrelevant considerations" (*Trackcom Systems inc. v. Trackcom Systems international inc.*, 2014 QCCA 1136 (C.A. Que.), at para. 36 (CanLII)). Third, even if it was not so based, an appellate court may intervene if the trial judgment is manifestly unjust (*ibid.*).

60 The first prong of the test for personal liability requires that the oppressive conduct be properly attributable to the director because he or she is implicated in the oppression. In this case, the trial judge found that, although each of the four named defendant directors had been involved in the oppressive conduct, it was the appellant and Dr. Black — the only members of the audit committee — who had played "the lead roles" in Board discussions resulting in the non-conversion of the respondent's A and B Shares (para. 167). In making that finding, the trial judge held that Mr. Wilson and Dr. Black were implicated in the oppressive conduct. It was therefore open to the trial judge to determine that the oppression was properly attributable to these two defendants.

61 As explained above, attribution alone is insufficient to ground a director's personal liability. It follows that merely adopting a "lead role" at Board meetings, without something more, can never suffice to ground a director's personal liability. Here, however, that "something more" consisted of the factors properly considered at the second prong of the personal liability inquiry.

62 The second prong requires that the imposition of personal liability be fit in all the circumstances. In this case, the trial judge found that, in addition to the "lead role" he had played, Mr. Wilson had accrued a personal benefit as a result of the oppressive conduct:

> ... although all of the Defendants benefitted from the changes to the stock option plan, it is the Defendants Black and Wilson who participated in the Private Placement and benefitted from the dilution of [the respondent's] A and B Shares. Wilson also benefitted from the conversion of his C Shares into the full number of common shares notwithstanding issues as to whether the test had been met. In the circumstances, I consider that it is "fit" to order the Defendants Black and Wilson personally to pay the damages to [the respondent]. [para. 167]

63 Notably, the Board accelerated the conversion of the appellant's C Shares into common shares (but not the C Shares held by others) to allow him to participate in the Private Placement, despite issues as to whether the test for conversion had been met. This benefitted him by increasing his control over the Corporation, to the detriment of the respondent, whose own stake in the company was diluted due to his inability to participate in the Private Placement — a consequence of the oppressive conduct.

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64 Nothing about this line of reasoning reflects an incorrect invocation of principle or improper consideration on the part of the trial judge. The trial judge was entitled to consider that the appellant played a "lead role" in advocating for the oppressive conduct and that he ultimately increased his control over the Corporation as a result.

65 Additionally, the remedy went no further than necessary to rectify the respondent's loss. After adjusting for exchange rates, the trial judge found that the value of the common shares had been Can$0.53 per share prior to the Private Placement. He also found that, but for the oppressive conduct, the respondent's A and B Shares would have been converted into 1,223,227 common shares. This put the respondent's loss at $648,310 — the extent of the appellant's and Dr. Black's personal liability.

66 Finally, the remedy was appropriately fashioned to vindicate the respondent's reasonable expectations as a Series A and B shareholder. The respondent reasonably expected that his A and B Shares would be converted if the Corporation met the applicable financial tests laid out in the Corporation's articles and that the Board would consider his rights as a Series A and B shareholder in any transaction impacting the A and B Shares. The appellant concedes that the Board's failure to meet these expectations amounted to oppression. Given the absence of any palpable and overriding errors in the trial judge's calculation, the amount of $648,310 represents the value that would have accrued to the respondent had his reasonable expectations been respected.

67 Accordingly, the trial judge's order against the appellant represents a fair way of rectifying the oppression that goes no further than necessary to vindicate the respondent's reasonable expectations. In my view, it should be permitted to stand.

***B. Were the Pleadings Sufficient to Ground the Imposition of Personal Liability in This Case?***

68 The appellant further submits that the respondent's pleadings were inadequate to ground the imposition of personal liability, consequently depriving the appellant of his basic right to know the case against him. This argument may be addressed summarily.

69 First, the respondent's pleadings named four individual directors, including the appellant, as defendants. As the Court of Appeal recognized, the respondent specifically alleged that these four defendants "acted in their own personal interest" and "to the detriment of Wi2Wi and its shareholder in focusing mainly on their personal financial gains" (paras. 51-52). In turn, the defendants specifically denied these allegations in their Defence dated January 25, 2011, pleading that "[t]he business decisions at issue were i) made by the Defendants in good faith, ii) not motivated by self-interest, iii) based on informed judgment and on the honest belief that each action was taken in the best interest of Wi2Wi" (A.R., vol. II, at p. 34). I agree with the Court of Appeal that "[i]n such conditions, it may be difficult to argue that the matter of the appellants' personal interest (or the advantage they derived) came as a surprise to them" (para. 52).

70 Second, in his initial Motion to Institute Proceedings, the respondent specifically sought damages against the four named defendants — not the Corporation — under s. 241(3)(j) of the *CBCA*. Coupled with the fact that the pleadings made specific allegations against the defendant directors, this alone sufficed to put the appellant on notice that his own personal liability was engaged.

71 Third, the main authorities invoked by the appellant on this point, namely *Rodaro v. Royal Bank* (2002), 59 O.R. (3d) 74 (Ont. C.A.) ("*Rodaro*") and *Budd*, are distinguishable. In *Rodaro*, the trial judge relied on a theory of liability that had been neither pleaded nor argued by either party over the course of a 92-day trial (paras. 59-63). In *Budd*, the complainant's claim targeted more than forty defendants, including thirty directors, nine officers and five portfolio companies, an accounting firm and Gentra. As a result, Doherty J.A. found that the claims against the individual directors amounted to an abuse of process:

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> I am left with the uneasy impression that the claim against the directors and officers personally is included in the appellant's statement of claim for purposes other than to ultimately establish their personal liability. If this impression is correct, those claims are properly characterized as an abuse of process. [para. 50]

72 The pleadings here, albeit sparse, specifically alleged that all four defendants had acted in their personal interest to the detriment of the plaintiff. This is worlds apart from both *Rodaro* and *Budd*.

73 Finally, a right of appeal is not a backstop for procedural choices made prior to trial. In this case, the more appropriate response to the respondent's bare pleadings lay in a motion for particulars or discovery prior to trial, not in a plea before the appellate courts.

**VI. Conclusion**

74 For these reasons, I would dismiss the appeal, with costs.

*Appeal dismissed.*

*Pourvoi rejeté.*

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IN THE MATTER OF *THE COMPANIES CREDITORS ARRANGEMENT ACT*, R.S.C.1985, c. C-36, AS AMENDED

**Court File No. CV-16-11389-00CL**

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 DEVELOPMENTS INC., URBANCORP (952 QUEEN WEST) INC., KING RESIDENTIAL INC., URBANCORP NEW KINGS INC., URBANCORP 60 ST. CLAIR INC., HIGH RES.INC., BRIDGE ON KING INC. (THE "APPLICANTS") AND THE AFFILIATED ENTITIES LISTED IN SCHEDULE "A" HERETO

***ONTARIO***
**SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST**

Proceeding Commenced at Toronto

**BOOK OF AUTHORITIES OF THE MONITOR**
(Motion Returnable May 1, 2018 – Speedy Electrical Claim Dispute)

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