Court File No. & Estate No. CV-19-627184-00CL (31-2560674)
CV-19-627185-00CL (31-2560984)
and CV-19-627186-00CL (31-2560986)

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE BANKRUPTCY OF QUADRIGA FINTECH SOLUTIONS CORP., WHITESIDE CAPITAL CORPORATION AND 0984750 B.C. LTD. D/B/A QUADRIGA CX AND QUADRIGA COIN EXCHANGE

BOOK OF AUTHORITIES
(Re: Approval of the Settlement Agreement)
(Returnable October 16, 2019)

October 11, 2019

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TAB 1

2001 CarswellOnt 1857
Ontario Superior Court of Justice (In Bankruptcy and Insolvency)

Graham Mining Ltd., Re

2001 CarswellOnt 1857, [2001] O.J. No. 2160, 105 A.C.W.S. (3d) 594, 26 C.B.R. (4th) 28, 9 C.L.R. (3d) 149

In the Matter of the Bankruptcy of Graham Mining Ltd.

Cameron J.

Heard: April 30, 2001
Judgment: May 30, 2001
Docket: 31-OR-206555

Counsel: *Michele S. Altaras*, *William Shanks*, *James Garofalo*, for Ernst & Young Inc., in its capacity as Receiver and Trustee in Bankruptcy of Graham Mining Ltd.
Vern Da Re, for Business Development Bank of Canada
David Corbett, *Karen Spector*, for Ted Graham, Construction MGM Inc., Gervais Contracting Ltd., Gestion Gerard Dufresne Inc.
Duncan Glaholt, *John Margie*, for Rapid Eau Technologies Inc., David de Montmorency, Twin Falls Limited Partnership, Kagiano Power Corporation, Corpfinance International Inc.
James MacLellan, for London Guarantee Insurance Company

Headnote
Bankruptcy --- Administration of estate — Trustees — Duty to act fairly
G Ltd. filed two liens against financier and R Inc. after it was removed from project for failure to complete on schedule — L Co., which provided performance bond, refused to complete project — G Ltd. brought action against R Inc., owner and financier — R Inc. brought counterclaim against G Ltd. and L Co. for damages caused by delay and failure to honour bond — Bank paid amount secured on bond — Bank appointed receiver and receiver was further appointed trustee — Financier offered proposal, effect of which would be to withdraw counterclaims and dismiss liens — Trustee and receiver brought motion for approval of proposal — Opposing creditors brought cross-motions to reverse trustee's decision to accept proposal and to expunge proof of claims filed by R Inc. and L Co. — Motion granted and cross-motions dismissed — Lengthy trial would be required to determine whether trustee acted improvidently — Although trustee had obligation to value every claim, it had not done so for claims by R Inc. and L Co. — Cost of analysing R Inc.'s claim would be large since claim was complex and turned on credibility — Since it was unclear if L Co. would have liability on its bond, claim could not be expunged under s. 135(5) of Bankruptcy and Insolvency Act — Considering factors that G Ltd.'s action was unmarketable, proposal had been made, counter-proposal was not forthcoming, and estate did not have funds to pursue G Ltd.'s action, issue of breach of obligation under s. 135(1) of Act was moot — Although trustee failed to value R Inc.'s claim, trustee had power to settle claims without interference if conduct was commercially reasonable — Receiver's and trustee's decision to accept proposal was commercially reasonable — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 135(1), (5).
Bankruptcy --- Proposal — Approval by court — Conditions — Reasonable terms
G Ltd. filed two liens against financier and R Inc. after it was removed from project for failure to complete on schedule — L Co., which provided performance bond, refused to complete project — G Ltd. brought action against R Inc., owner and financier — R Inc. brought counterclaim against G Ltd. and L Co. for damages caused by delay and failure to honour bond — Bank paid amount secured on bond — Bank appointed receiver and receiver was further appointed trustee — Financier offered proposal, effect of which would be to withdraw counterclaims and dismiss liens — Trustee and receiver brought motion for approval of proposal — Opposing creditors brought cross-motion to reverse trustee's decision to accept proposal — Motion granted and cross-motion dismissed — Opposing creditors did not make offer to purchase debtor action, and no evidence existed of other person interested in acquiring chose in action — While both G Ltd.'s and financier's claims had merit, trustee was not

able to fund litigation — Receiver and trustee made business decision to accept proposal, acting honestly, in good faith and in commercially reasonable manner — Proposal would enable L Co. to repay bank for guarantee, G Ltd.'s obligations to secured creditors would be satisfied and residual amount could be left for unsecured creditors.

Receivers --- Conduct and liability of receiver — Duties

G Ltd. filed two liens against financier and R Inc. after it was removed from project for failure to complete on schedule — L Co., which provided performance bond, refused to complete project — G Ltd. brought action against R Inc., owner and financier — R Inc. brought counterclaim against G Ltd. and L Co. for damages caused by delay and failure to honour bond — Bank paid amount secured on bond — Bank appointed receiver and receiver was further appointed trustee — Financier offered proposal, effect of which would be to withdraw counterclaims and dismiss liens — Trustee and receiver brought motion for approval of proposal — Opposing creditors brought cross-motion to reverse trustee's decision to accept proposal — Motion granted and cross-motion dismissed — Receiver, who was privately appointed, was agent of bank and did not have fiduciary duty to G Ltd. — Neither bank nor receiver breached obligation imposed on them by realizing bank's security in action by G Ltd. — Opposing creditors did not make offer to purchase debtor action, and no evidence existed of other person interested in acquiring chose in action — While both G Ltd.'s and financier's claims had merit, trustee was not able to fund litigation — Receiver and trustee made business decision to accept proposal, acting honestly, in good faith and in commercially reasonable manner — Proposal would enable L Co. to repay bank for guarantee, G Ltd.'s obligations to secured creditors would be satisfied and residual amount could be left for unsecured creditors.

Construction law --- Construction and builders' liens — Loss or discharge of lien — By agreement

G Ltd. filed two liens against financier and R Inc. after it was removed from project for failure to complete on schedule — L Co., which provided performance bond, refused to complete project — G Ltd. brought action against R Inc., owner and financier — R Inc. brought counterclaim against G Ltd. and L Co. for damages caused by delay and failure to honour bond — Bank paid amount secured on bond — Bank appointed receiver and receiver was further appointed trustee — Financier offered proposal, effect of which would be to withdraw counterclaims and dismiss liens — Trustee and receiver brought motion for approval of proposal — Opposing creditors brought cross-motion to reverse trustee's decision to accept proposal — Motion granted and cross-motion dismissed — Opposing creditors did not make offer to purchase debtor action, and no evidence existed of other person interested in acquiring chose in action — While both G Ltd.'s and financier's claims had merit, trustee was not able to fund litigation — Receiver and trustee made business decision to accept proposal, acting honestly, in good faith and in commercially reasonable manner — Proposal would enable L Co. to repay bank for guarantee, G Ltd.'s obligations to secured creditors would be satisfied and residual amount could be left for unsecured creditors.

***Cameron J.*:**

Motion by E&Y

1 Ernst & Young Inc. ("E&Y") is the privately appointed Receiver ("Receiver") and the Trustee in Bankruptcy ("Trustee") of Graham Mining Ltd. ("Graham").

2 E&Y moves under the *Bankruptcy and Insolvency Act* ("BIA") s.34, as Trustee, and s.249, as Receiver, for advice, directions and approval respecting:

(a) a decision to accept, subject to court approval, a proposed settlement (the "Proposal") of lawsuits (the "Litigation") in which Graham is:

(i) the plaintiff (the "Graham Claim") and defendant by counterclaim (collectively the "Graham Action"); and

(ii) a defendant (the "MGM Action"); and

(b) a declaration that the actions of the Receiver and the Trustee relating to its acceptance of the Proposal are commercially reasonable.

Motions by Objecting Creditors

3 Four preferred and unsecured creditors of Graham, namely Ted Graham, Construction MGM Inc. ("MGM"), Gestion Gerard Dufresne Inc. ("Dufresne") and Gervais Contracting Inc. ("Gervais") (collectively the "Objecting Creditors") move under BIA s.37 and s.135 (5) to:

(a) reverse the Trustee's decision to settle;

(b) expunge or reduce the proofs of claim filed in the bankruptcy by:

(i) Rapid Eau Technologies Inc. ("Rapid Eau") the general contractor on the Twin Falls hydro station project on the Kagiano River (the "Project");

(ii) London Guarantee Insurance Company ("London Guarantee") which provided a performance bond and a labour and materials bond respecting Graham's sub-contract on the Project for underground blasting and excavation;

(c) expunge or reduce the proof of security of London Guarantee in the bankruptcy and direct release of $450,000 of Graham's money it holds pursuant to any such security;

(d) relief collateral to or consequent upon the foregoing.

The Project and the Parties

4 The Project was the construction of a 4.9 megawatt hydroelectric generating station and related dams and tunnels on the Kagiano River near Manitouwadge, Ontario. The Project was built on Crown land under the authority of work and land use permits. It was intended that the owner ultimately hold the land under a water power lease.

5 The owner of the Project was Twin Falls Limited Partnership ("Twin Falls"). Kagiano Power Corporation was the general partner. The limited partners included Rapid Eau, a company controlled by David de Montmorency.

6 Rapid Eau was also the general contractor on the Project.

7 Corpfinance International Inc. ("Corpfinance") was the financier of the Project for the Owner.

8 Graham was engaged in the construction industry in Northern Ontario. Its long-time general manager was Aubrey Sproule ("Sproule"), now deceased. On July 22, 1998 following acceptance of Graham's bid based on tender documents, Sproule, on behalf of Graham, entered into a contract with Rapid Eau to perform the excavation, tunnelling and blasting work on the Project ("Graham Contract"). The Graham Contract provided a fixed price for some work and unit prices based on quantities for other work such as blasting, excavation and haulage. The estimated value of the contract was $2,461,000 plus GST. The Graham Contract contained a liquidated damages clause of $4,000 a day for delay of completion after February 28, 1999.

9 MGM, an experienced contractor, was a sub-contractor of Graham for surface civil work on the Project, such as concrete.

10 Gervais, an experienced contractor, was also a sub-contractor of Graham for temporary surface works on the Project such as cofferdams and access roads.

11 Dufresne, an affiliate of MGM, was retained by Graham on May 24, 2000 for an hourly fee plus a success fee to assist in the preparation of the Graham Claim.

12 Ted Graham is the grandson and son of the founders of Graham. He is the principal shareholder, a director and officer of Graham. He has a claim against Graham for unpaid wages and a contingent claim as a guarantor for up to $200,000 of a secured loan to Graham by Business Development Bank of Canada ("BDBC").

13 London Guarantee provided to Twin Falls and Corpfinance in September 1998 a performance bond in the amount of $2,461,433 providing that on default by Graham:

> ...the Surety may promptly remedy the default; or shall promptly
>
> 1) complete the Contract in accordance with its terms and conditions
>
> or
>
> 2) obtain a bid or bids for submission to the Obligee for completing the Contract in accordance with its terms ...

London Guarantee also provided a Labour and Material Payment Bond for $1,230,716.84. These bonds were partially secured by two letters of credit from the Royal Bank of Canada ("Royal Bank") totalling $450,000. London Guarantee is a defendant by counterclaim in the Graham Action.

14 Problems arose early in the Project respecting:

> (a) changes by Twin Falls and Rapid Eau in the design of the Project and the scope of the work under the Graham Contract which allegedly involved substantially more and different work than contemplated by the contract documents; and
>
> (b) responsibility for the cost of damage and delay caused by allegedly abnormal flooding of the Kagiano River in October and December, 1998.

15 Graham filed its first claim for lien in January 1999 in the amount of $869,000. The work under the Graham Contract was not completed on the scheduled completion date of February 28, 1999. Graham was removed from the Project on June 1, 1999. London Guarantee declined the request to complete the Graham Contract and told Twin Falls to complete the job itself, which it did.

Litigation

16 Graham filed a second claim for lien in July 1999 totalling $3,588,000. First power was produced on December 8, 1999 although the Project was not complete.

17 Graham commenced an action under the *Construction Lien Act* for about $4.5 million against Rapid Eau, Twin Falls, Corpfinance (the "Owner Group") and Her Majesty the Queen in Right of Ontario as represented by the Minister of Natural Resources (the "Crown"). Graham also commenced a civil action in October 1999 ("Graham Action") against the Owner Group and the Crown for $6,500,000 for some of the matters claimed in the lien action and for damages for wrongful termination of contract. Rapid Eau admits it is indebted to Graham for $318,000 but has counterclaimed against Graham for $2,350,000 in damages for delay and completion costs under the Graham Contract and against London Guarantee under its performance bond (the "counterclaim").

18 MGM commenced an action under the *Construction Lien Act* against Graham, the Owner Group and the Crown for $1,100,000.

19 On August 29, 2000 Royal Bank appointed E&Y as Receiver of Graham under its general security agreement.

20 On September 1, 2000 the Owner Group made demand of London Guarantee on its bond. On September 30, 2000 Royal Bank paid London Guarantee $450,000 under its letters of credit securing the bond. London Guarantee has spent about $20,000 in legal costs and is holding $430,000.

21 On October 13, 2000 BDBC also appointed E&Y as its Receiver under its general security agreement.

22 On November 16, 2000 E&Y was appointed trustee in bankruptcy under a receiving order against Graham.

23 A representative of Royal Bank was elected the inspector of the estate. The Objecting Creditors attended the first creditors meeting but none offered to stand as an inspector.

Legal Issues

Valuation of Claims

24 There are live issues as to the enforceability of the liquidated damages clause and as to the amount of Graham's liability under it. Rapid Eau claims damages at the rate of $4,000 per day from March 1, 1999. The Objecting Creditors argue that Rapid Eau's changes caused the delay and that the delay was not as long as Rapid Eau alleges. Rapid Eau claims engineering and other costs of completion at $885,000. The Objecting Creditors dispute that the costs of completion exceeded $542,000 and say Rapid Eau acknowledges it is liable for $527,000 which can be set-off, yielding a liability of only $15,000.

Credibility Issues

25 There are clearly issues of credibility as to alleged oral agreements by the site representatives of Twin Falls and Rapid Eau to pay for any change in the work covered by the Graham Contract, the scope of the changes in the work, Graham's entitlement to a different level of compensation, and circumstances at the Project site to provide a context in which the Graham Contract and alleged breaches must be interpreted. There are also issues of accounting, damages and mitigation. The latter issues may be complicated by the impact of Graham's alleged financial condition prior to embarking on the Project. A complete analysis of these issues would consume substantial legal and expert resources, probably without any clear result because of the credibility issues which will require a trial. A trial would probably take several weeks and substantial additional professional resources to prepare for and conduct the trial.

London Guarantee Liability

26 There is also a live issue as to whether London Guarantee would be liable under the bonds, in addition to the $15,000 acknowledged by the Objecting Creditors, for any liquidated damages ordered against Graham. There could be an issue that the clause is a penalty and so unenforceable. American authorities indicate that, subject to the wording of a performance bond, it would extend beyond the costs to complete the work and include liability of the contractor under other provisions: See *Boys Club of San Fernando Valley v. Fidelity & Deposit Co. of Maryland*, 8 Cal. Rptr. 2d 587 (U.S. Cal. C.A., 1982) at para. 8 respecting liability arising out of an arbitration; *Pacific Employers Insurance Co. v. City of Berkeley*, 204 Cal. Rptr. 387 (U.S. Cal. C.A., 1984) at paras. 5, 6 respecting liability under a liquidated damages clause. See also comments of Lamek J. of this Court in *Whitby Landmark Developments Inc. v. Mollenhauer Construction Ltd.* (2000), 4 C.L.R. (3d) 1 (Ont. S.C.J.), at pp. 4-7 suggesting that language in a bond similar to that in this case would extend to liquidated damages. *Whitby Landmark* was referred to with approval in *Lac La Ronge Indian Band v. Dallas Contracting Ltd.*, [2001] S.J. No. 280, 9 C.L.R. (3d) 25 (Sask. Q.B.). *Lac La Rouge* also refers to authorities which restrict bonds to the costs of work.

27 I have also been referred to *Johns-Manville Canada Inc. v. John Carlo Ltd.* (1983), 1 C.L.R. 169 (S.C.C.) at p. 178-180 suggesting a more liberal approach to the rights of claimants under bonds.

28 The issue of London Guarantee's liability under the bonds was not fully argued before me. Counsel advised me that *Whitby Landmark* is under appeal.

29 I do not see that resolution of London Guarantee's liability under the bonds as critical to the issues before me. There is however a practical concern that London Guarantee will look to the $430,000 it is holding to reimburse itself for its legal costs to defend claims against it under the bonds and for any liability it may have under the bonds.

The Proposal

30 During the late summer and early winter of 2000-2001 the Objecting Creditors indicated to the Receiver on several occasions that they were working on a proposal to purchase the Graham Action and the MGM Action. None was received from them by the Receiver or the Trustee.

31 On January 8, 2001 the Receiver received the Proposal from the Owner Group. The Proposal was open until January 11, 2001. The key terms of the Proposal are as follows:

(a) The Owner Group will make payment to the estate of Graham in the amount of $10,000;

(b) Rapid Eau will withdraw its proof of claim in the bankruptcy for $3,290,000 in its entirety;

(c) The Owner Group will dismiss its counterclaims against Graham and London Guarantee without costs and release both Graham and London Guarantee from all claims whatsoever;

(d) Graham will dismiss its liens and its claims against the Owner Group;

(e) The settlement is conditional on court approval.

32 As a result of the proposed release in favour of London Guarantee from the Owner Group, there would be no claims against London Guarantee in connection with the bonds. Accordingly, Royal Bank has requested payment of the $300,000 owing to it. Subject to obtaining the return of the original bond, the execution and delivery of the release in favour of London Guarantee and the entry of an order of this Court confirming that London Guarantee has no further liability in connection with the Litigation, London Guarantee has agreed to pay the $430,000 to Royal Bank or as the Court may direct. London Guarantee may claim further set-off unless the Proposal is settled quickly.

33 The Proposal will result in approximately $440,000 being paid or released to Royal Bank and the Trustee, which would have the effect of satisfying the remaining obligations of Graham to the secured creditors. At this point, it appears that there may also be some recovery for unsecured creditors.

34 On January 10 the Receiver and Trustee advised the Objecting Creditors of the Proposal and the deadline for its acceptance and that Royal Bank and the inspector, a Royal Bank representative, were prepared to accept the offer.

35 On January 11, 2001 the inspector passed a resolution which acknowledged that as the Graham Action constituted security for the Royal Bank claim and the estate had no funds with which to fund the Graham Action, the Trustee could not get involved in it. The Trustee was advised to instruct the creditors that Royal Bank would accept the Proposal subject to court approval. The Trustee accepted the Proposal on January 11, 2001, subject to court approval, and so notified the creditors on January 30, 2001. The Objecting Creditors had been advised of the Trustee's conditional acceptance of the Proposal on January 12, 2001.

The Liens

36 Following a hearing before Madam Justice Gauthier on January 12, 2001 the Owner Group obtained an order vacating the MGM lien and dismissing the MGM Action on the basis of the Owner Group having no lienable interest in the land as they owned only the improvement but did not have tenure of the land. MGM has appealed. No order was made in respect of Graham's lien because of the outstanding Proposal. However on October 6, 2000 an order had been made by Gauthier J. declaring Graham's lien as against the Crown invalid.

Graham's Financial Position

37 Graham's assets consisted of the following estimated values as shown on its Statement of Affairs dated November 16, 2000:

Accounts receivable (Excluding claim against Rapid Eau) for $6,500,000	$360,000
Inventory	$150,000
Equipment	$875,000

Land	$150,000

	$1,535,000

38 On January 29, 2001 Graham's admitted claims consisted of the following approximate amounts:

1.	BDBC, secured by a first charge on Graham's inventory, equipment and realty and a guarantee by Ted Graham of $200,000	$890,000
2.	Royal Bank, secured by a charge on Graham's accounts receivable	$300,000
3.	Canada Customs and Revenue Agency	$400,000
4.	16 Preferred Creditors (Total claims $60,356)	$32,000
5.	London Guarantee Contingent claim for $3,690,000 secured by Royal Bank letters of credit for $450,000	
	Unsecured Claims per proofs of claims, including MGM ($1,200,000), Dufresne ($118,000), Gervais ($475,000), Rapid Eau ($3,290,000), Royal Bank ($112,000)	$6,200,000

39 The Receiver and Trustee believe that the proposed settlement is commercially reasonable and that it is in the interests of all creditors generally for the settlement to proceed.

40 The Objecting Creditors complain that the offer is not reasonable in that:

(a) the Graham Contract is not enforceable by reason of Mr. Sproule's illness at the time of signing;

(b) the value of the Graham Claim is substantially more than the $318,000 which Rapid Eau admits plus the $430,000 which would be freed up to the Trustee on settlement;

(c) the Owner Group's counterclaim is not worth the $3,000,000 claimed against Graham and against London Guarantee on its bond.

41 The Objecting Creditors ask on this motion that I make findings of fact relative to issues based on innumerable pages of transcripts of cross-examinations and other evidence of their witnesses reviewing the troubled history of the Project and alleged improper actions of representatives of Rapid Eau in some detail and in the absence of contrary evidence from the Owner Group. This court is not in a position to make a finding of fact based on disputed facts in the absence of a trial.

42 The Objecting Creditors dispute the Rapid Eau damages claim and the liability of London Guarantee under the bond. They acknowledge the confusion of the evidence on the accounts between the parties. They complain they had insufficient time to respond to the Proposal before the deadline for its acceptance.

43 MGM and Gervais would probably lose their right to claim priority to the funds owing by Rapid Eau as beneficiaries under the contractor trust provisions of s.8 of the *Construction Lien Act* by reason of the application of s.12 of that Act to funds subject to the owner trust provisions of s.7 or the contractor trust in s.8.

44 MGM and Gervais claim they are now insolvent except for their claims against Graham. They say Rapid Eau's failure to pay Graham has destroyed them.

Receiver's Obligations and Rights

45 A privately appointed receiver is the agent of the party which appointed it. It must take possession of and protect the security of the secured party at whose instance it was appointed. It owes no fiduciary duty to the debtor. The receiver may exercise the power to sell in accordance with the security instrument and, in this case, the provisions of the *Personal Property*

and Security Act ("PPSA") s.63 and the Notice of Intent provisions of BIA s.244. In doing so the Receiver must act honestly and in good faith and deal with the property in a commercially reasonable manner: BIA s.247; *Ostrander v. Niagara Helicopters Ltd.* (1973), 1 O.R. (2d) 281 (Ont. H.C.) at p.286; *Northwest Territories (Commissioner) v. Simpson Air (1981) Ltd.*, [1994] N.W.T.J. No. 15 (N.W.T. S.C.), at paras. 8 and 9.

46 A cause of action that vested in the debtor at the time of the receivership is enforceable by the receiver in the debtor's name. The Graham Action is an asset of Graham subject to the claims of the secured creditors and does not vest in the Trustee in bankruptcy until the claims of the secured creditors of Graham are satisfied in full: *Simpson Air (1981) Ltd.* (*supra*) at para. 16; BIA s.71(2).

47 Under BIA s.249, a receiver may apply to the court for directions in relation to its obligation under BIA s.247 to act honestly and in good faith and in a commercially reasonable manner. The Receiver does so here because of the position of Royal Bank as a secured creditor in respect of receivables and the employer of the inspector and because E&Y is both Receiver and Trustee.

48 Under BIA s.248 a trustee or a creditor may establish that a secured creditor or a receiver has failed to carry out its duty to act in good faith and in a commercially reasonable manner whereupon this court may make an order directing the secured creditor or receiver to carry out that duty or restraining the secured creditor or receiver from dealing with the property of the bankrupt or insolvent person until that duty has been carried out.

49 A court appointed receiver cannot permit dissipation of the estates assets and should take action to enforce a claim which is an asset of the debtor. However if such a receiver believes the cause of action is not meritorious or that the cost could exceed the recovery the receiver need not pursue it. See Frank Bennett, *Bennett on Receiverships* 2nd ed. Carswell, Toronto, p. 201.

50 A privately appointed receiver is the agent of the secured creditor which appointed it: *Bennett* pp. 29-30. A privately appointed receiver has only the statutory obligations to act in good faith and in a commercially reasonable manner. It need not take on risks of the cost of uncertain litigation in enforcing its security. It is apparent that the Graham Action cannot be determined summarily. It will be defended and will take some days, even weeks, to try. The Receiver or Trustee asserting the Graham Claim will probably be required to post a substantial amount as security for costs under Rule 56. While there is a stay of the counterclaim against Graham by reason of the bankruptcy under BIA s. 69.3, there is no stay against London Guarantee. There may be a substantial set-off by reason of a decision of the Trustee under BIA s.135, or an appeal thereof.

51 A chose in action is not easily marketable by a secured creditor, particularly where its value is uncertain and is subject to set-off and where the costs of realization are unpredictable and could be substantial and exceed the recovery. Its value in this case must be sufficient to satisfy the secured claim of Royal Bank before the remainder becomes the property of the Trustee for the unsecured creditors. The Proposal will yield to Royal Bank an amount sufficient to satisfy its claim.

52 The Objecting Creditors made no offer to the Receiver to purchase the Graham Action, either prior to or after appointment of the Trustee. They have made no offer since being notified of the Proposal or even to the date of the hearing of this motion for advice and directions by the Trustee.

53 I am not persuaded that the Royal Bank or the Receiver has breached any obligation imposed on them in respect of the realization of Royal Bank's security over the Graham Claim.

Trustee's Obligations and Rights

Settle and Compromise Claims

54 A trustee in bankruptcy may, under the authority of BIA s.30(1) (h) and (i), with the permission of the inspectors, compromise and settle any debts owing to the bankrupt and any claim made by or against the estate. Court approval of such a transaction is not required. The court should interfere with a business decision only if there is a lack of *bona fides* or it is unreasonable from the standpoint of the estate: *Qualicum Builders Supply Co. (Trustee of) v. Mercantile Bank of Canada*, [1988] B.C.J. No. 192, 70 C.B.R. (N.S.) 302 (B.C. C.A.).

55 The trustee's exercise of discretion should not be interfered with under BIA s.37 if it acted in good faith and the decision is not unreasonable in the circumstances and is for the benefit of the estate: *Re Fogazzi* (1990), 77 C.B.R. (N.S.) 240 (Ont. S.C.).

56 In *Re Katz*, [1991] O.J. No. 1369 (Ont. Bktcy.) Farley J. considered a motion to set aside a trustee's sale of a chose in action. He said that the obligations of a trustee are similar to those of a court appointed receiver and cited Galligan J.A. in *Royal Bank v. Soundair Corp.* [reported (1991), 7 C.B.R. (3d) 1 (Ont. C.A.)] (Unrep.), July 3, 1991 summarizing the test to be applied in determining whether a receiver acted properly in the sale of assets:

1. It should consider whether the receiver has made a sufficient effort to get the best price.

2. It should ensure the receiver has not acted improvidently.

3. It should consider the interests of all parties.

4. It should consider the efficacy and integrity of the process by which offers are obtained.

5. It should consider whether there has been unfairness in the working out of the process.

57 In *Re Acepharm Inc.*, [2000] O.J. No. 942 (Ont. Bktcy.) Lane J. of this court dealt with a motion by the trustee for advice and directions as to a proposed settlement of litigation. At para. 20 he stated:

> The sale of the assets of a bankrupt is a matter for the Trustee acting with the consent of the inspectors ... the court should only interfere if they act unreasonably or if there is fraud: [citing *Re Qualicum Builders*, above]. The Trustee and the Inspectors must exercise reasonable business judgment and act with integrity. The courts should show deference to those entrusted by the creditors and authorized by the Act to make such decisions: *Re Hoque* (1996), 38 C.B.R. (3d) 133 at 141-2 (N.S.C.A.).

It is clear that any offer must be acceptable to Royal Bank as the secured creditor.

58 A chose in action such as this, with many issues of credibility and the need to establish a factual context in which the contract can be interpreted, counterclaims and substantial but uncertain legal costs, could not realistically be the subject of an auction process. The Objecting Creditors and the other creditors of the estate have had every opportunity to make an offer, both before and after the Proposal, but none has been forthcoming. There is no suggestion of any other person who would be interested in acquiring the chose in action.

59 It would take a lengthy trial with all its attendant costs to determine whether the Trustee has acted improvidently. The Graham Claim may have substantial merit to it. The position of the Owner Group persuades me that their position is not frivolous or vexatious and that there may be some merit to their counterclaim. The trustee is impoverished, without means to engage in such litigation.

60 The Proposal will yield some small recovery to the unsecured creditors. The amounts of the unsecured claims will be reduced substantially by the withdrawal of the Rapid Eau claim and the London Guarantee contingent claim.

61 If the Proposal was turned down there is no suggestion that a better one could be negotiated or found elsewhere. The $430,000 being held by London Guarantee could quickly be consumed in legal fees incurred by London Guarantee and the real possibility of damages for liability under the bond, to the detriment of the unsecured creditors. When such erosion might affect Royal Bank's secured interest, the decision of the Trustee and the inspector becomes less problematic.

62 Had the Trustee been a different person from the Receiver, the Receiver could have accepted the Proposal and left the Trustee with only the proceeds in excess of Royal Bank's secured claim.

Valuation of the Rapid Eau and London Guarantee Claims

63 There is an obligation on the Trustee under BIA s.135 to examine every proof of claim and every proof of security and to value every contingent or unliquidated claim. The Trustee may disallow any claim and any security, in whole or in part. If the Trustee does so, it shall notify the claimant of the reasons for the disallowance. The claimant may appeal the Trustee's decision to this court.

64 There is no evidence that the Trustee has valued the claims by Rapid Eau and London Guarantee. Had the Trustee done so it would have been obliged to act reasonably in assessing the evidence in support of the claim. The Trustee having declined to interfere in the validity of the claims, the Objecting Creditors move under s.135(5) to expunge or reduce the Rapid Eau and London Guarantee proofs of claim and London Guarantee proof of security.

65 I am satisfied that the cost of analyzing the Rapid Eau claim and any set-off alleged by the Objecting Creditors would be substantial. The claims are complex and turn on credibility. It is far from clear that London Guarantee would have no liability on its bonds.

Creditor's Right to Bring or Continue a Claim

66 BIA s.38 provides that if a trustee refuses or neglects to accede to a creditor's request to take or continue proceedings, which the creditor believes to be for the benefit of the estate, the creditor may obtain an order authorizing it to commence or continue the proceeding in its own name and at its own expense and risk. The creditor must notify the other creditors of the estate so that they too have an opportunity to participate in the proceeding. In granting the order the court may impose other conditions to ensure the procedure is fair. The creditors participating in the proceeding, and so in the risk, may recover from any fruits of the action their costs and their claims against the estate. Any residue or surplus must be turned over to the trustee. See also *Toyota Canada Inc. v. Imperial Richmond Holdings Ltd.*, 20 C.B.R. (3d) 102 (Alta. Q.B.); appeals to Alta. C.A. dismissed *Toyota Canada Inc. v. Imperial Richmond Holdings Ltd.* (1994), [1994] A.J. No. 520 (Alta. C.A.); and to S.C.C. dismissed (December 1, 1994) *Toyota Canada Inc. v. Imperial Richmond Holdings Ltd.* (1994), [1994] S.C.C.A. No. 346 (S.C.C.); *Jaston & Co. v. McCarthy*, [1998] B.C.J. No. 2911 (B.C. C.A.). These cases note that BIA s.38 is a means to make certain that the bankrupt's assets are preserved for the benefit of the creditors by allowing actions to be decided on their merits where the trustee refuses or fails to take the action.

67 The Trustee has no funds to buy the Royal Bank's security interest in the Graham Claim, let alone to prosecute the Graham Claim once it acquires title, or to post any security for costs that may be ordered under Rule 56 of the Rules of Civil Procedure. The Proposal will pay off the Royal Bank's secured claim, provide some funds not otherwise available to the unsecured creditors and increase their proportionate shares by removing the substantial unsecured claims of Rapid Eau and the contingent claim of London Guarantee.

68 None of the Objecting Creditors has made any offer to the Royal Bank, the Receiver or to the Trustee to take over Royal Bank's security interest. No creditor has moved under BIA s.38 to continue the Graham Claim in the name of that creditor and other participating creditors. There is no motion by the Objecting Creditors under BIA s.38 to continue the litigation. I presume this is because they cannot afford to pay off Royal Bank's secured claim and yield to the Trustee an amount equal to the yield under the Proposal.

Conclusion on Bankruptcy Issues

69 In view of the lack of marketability of a complex unliquidated claim, the Proposal from the Owner Group, the absence of any counteroffer from any other person and the lack of funds in the estate to pursue the Graham Claim to fully value it by way of detailed legal review and probable appeal requiring a trial, any breach of the obligation under BIA s.135(1) to value the claim is moot.

70 If the Objecting Creditors are not prepared to risk the costs to buy out Royal Bank's secured position and to continue the legal proceedings, it lies ill in their mouths to criticize an impoverished trustee in bankruptcy for failing to do so. If the creditors generally fail to match the Proposal with an offer that will yield as much or more to the secured creditors and the

bankrupt estate, the Proposal must prevail. There is no obligation on a secured creditor or a trustee to risk its assets in an attempt to maximize the value of its security or an estate asset if in their business judgment the risk is unwarranted. This court will not interfere in a business decision unless it is unreasonable or made in bad faith.

71 The Receiver has made a business decision. I am satisfied that in exercising its powers as a privately appointed receiver it has acted honestly and in good faith and in a commercially reasonable manner in the circumstances in accepting the Proposal. I am satisfied that the Trustee has acted honestly and in good faith and in a commercially reasonable manner in the circumstances in accepting the Proposal.

72 Notwithstanding the Trustee's failure to value the Rapid Eau claim, in view of the power of the Trustee, with the approval of the inspectors, to settle claims without interference, the absence of any lack of *bona fides* or fraud, the absence of any counteroffer by the Objecting Creditors or motion by the creditors to continue the Graham Action under BIA s.38, the lack of funds in the estate to prosecute the Graham Action and the benefits the Proposal offers to the estate, I find the Trustee's conduct was commercially reasonable.

Oppression

73 The Objecting Creditors also move for an oppression remedy under s.248 of the *Business Corporations Act of Ontario* ("OBCA"). A creditor can be a complainant under OBCA s.245 and so be entitled to make an application under OBCA s.248. However the Objecting Creditors do not complain of "an act or omission of the corporation" or the conduct of "the business or affairs of the corporation" or the exercise of "the powers of the directors". They complain of the conduct of a receiver on behalf of a secured creditor under a security agreement and of a trustee in bankruptcy under the BIA in their dealings with their security and the assets they hold for the benefit of the creditors, respectively. The OBCA oppression remedy is not applicable to these circumstances. See also *Toronto Dominion Bank v. Alex L. Clark Ltd.* (1993), 22 C.B.R. (3d) 6 (Ont. Gen. Div.).

Order

74 The Receiver and the Trustee are authorized to enter into minutes of settlement accepting the Proposal.

75 The cross-motions of the Objecting Creditors are dismissed.

76 Costs may be spoken to.

Motion granted and cross-motions dismissed.

TAB 2

2005 ABQB 679
Alberta Court of Queen's Bench

Cochard, Re

2005 CarswellAlta 1277, 2005 ABQB 679, [2005] A.J. No. 1166, 142 A.C.W.S. (3d) 733, 15 C.B.R. (5th) 38, 385 A.R. 1

In the Matter of the Bankruptcy of Darlene Agatha Cochard

Veit J.

Heard: November 12, 2004; April 11, 2005
Judgment: September 8, 2005 *
Docket: Edmonton Bk03-097400

Proceedings: additional reasons at *Cochard, Re* (2005), 2005 ABQB 870, 2005 CarswellAlta 1738 (Alta. Q.B.)

Counsel: Brian W. Summers for Trustee in Bankruptcy, A.C. Waring & Associates Inc.
Leonard J. Pollock, Q.C. for Pierre Cochard
Franco P. Tarulli for Darlene Agatha Cochard and the Berry Creditors
Michael Loberg for Bishop & McKenzie LLP

Headnote
Bankruptcy and insolvency --- Administration of estate — Trustees — Legal proceedings by trustee
Bankrupt and her former husband were married in 1984 — Former husband issued statement of claim for divorce and matrimonial property on January 18, 2001 — On June 26, 2002, bankrupt assigned herself into bankruptcy — On December 15, 2002, bankrupt and former husband were divorced — In June 2004, former husband proposed to trustee in bankruptcy to settle bankrupt's matrimonial property suit for $85,000 — Bankrupt opposed offer — Trustee in bankruptcy applied pursuant to s. 34(1) of Bankruptcy and Insolvency Act ("BIA") for approval of offer — Application granted — Trustee demonstrated that proposed settlement was reasonable based on information available — Decision to settle bankrupt's claims was made by trustee in good faith taking into account difficulties of prospective litigation — Arm's length creditors were in agreement with proposed settlement — Settlement was based, in part, on appraisals obtained by trustee — Although bankrupt relied on conflicting appraisals, there was nothing to suggest that bankrupt's position concerning appraisals would obviously be successful if litigation were to be undertaken — Given complications involved in matrimonial matters, including resale of matrimonial home and alleged participation by bankrupt in skimming of funds from business venture with her former husband, outcome of matrimonial litigation was uncertain.
Bankruptcy and insolvency --- Priorities of claims — Secured claims — Forms of secured interests — Liens — Solicitor's lien
Law firm of BM started to act for bankrupt on January 24, 2001, with respect to matrimonial proceedings — On June 26, 2002, bankrupt assigned herself into bankruptcy — As of date on which bankrupt assigned herself into bankruptcy, BM account was $34,848.90 — BM filed claim with trustee in bankruptcy as secured creditor — Trustee disallowed claim — Former husband of bankrupt proposed final settlement of bankrupt's matrimonial property suit for $85,000 — Trustee in bankruptcy applied successfully for approval of settlement offer — BM applied to court for charging order pursuant to R. 625 of Alberta Rules of Court against proceeds arising from settlement of matrimonial property action — Application was adjourned with respect to BM's expenses incurred prior to date of bankruptcy — Claim by BM for R. 625 charging order for work done after bankrupt became bankrupt was disallowed — BM was entitled to take proceedings against bankrupt without leave for recovery of services performed after bankruptcy — Bankruptcy legislation did not prevent court from making R. 625 order — Until R. 625 charge was granted, BM was not secured creditor with respect to bankruptcy — Court was unable to state whether BM was entitled to R. 625 charge as additional evidence and arguments were necessary to elucidate claim — Rule 625 was mechanism pursuant to which Alberta lawyers ask court for charging order pursuant to provisions of U.K. Solicitors Act, which is in force in Alberta

— Common law lien is not subject to statute of limitations, whereas provisions of R. 625 include provision that makes charging power subject to limitations — BM did not invoke common law solicitors' lien — In any event, distinction between statutory and common law charging order was probably insignificant in case at bar because of equitable factors that would have to be considered by court.

Barristers and solicitors --- Solicitor's lien — Statutory charging order — General

Law firm of BM started to act for bankrupt on January 24, 2001, with respect to matrimonial proceedings — On June 26, 2002, bankrupt assigned herself into bankruptcy — As of date on which bankrupt assigned herself into bankruptcy, BM account was $34,848.90 — BM filed claim with trustee in bankruptcy as secured creditor — Trustee disallowed claim — Former husband of bankrupt proposed final settlement of bankrupt's matrimonial property suit for $85,000 — Trustee in bankruptcy applied successfully for approval of settlement offer — BM applied to court for charging order pursuant to R. 625 of Alberta Rules of Court against proceeds arising from settlement of matrimonial property action — Application was adjourned with respect to BM's expenses incurred prior to date of bankruptcy — Claim by BM for R. 625 charging order for work done after bankrupt became bankrupt was disallowed — BM was entitled to take proceedings against bankrupt without leave for recovery of services performed after bankruptcy — Bankruptcy legislation did not prevent court from making R. 625 order — Until R. 625 charge was granted, BM was not secured creditor with respect to bankruptcy — Court was unable to state whether BM was entitled to R. 625 charge as additional evidence and arguments were necessary to elucidate claim — Rule 625 was mechanism pursuant to which Alberta lawyers ask court for charging order pursuant to provisions of U.K. Solicitors Act, which is in force in Alberta — Common law lien is not subject to statute of limitations, whereas provisions of R. 625 include provision that makes charging power subject to limitations — BM did not invoke common law solicitors' lien — In any event, distinction between statutory and common law charging order was probably insignificant in case at bar because of equitable factors that would have to be considered by court.

***Veit J.*:**

Summary

1 The Trustee in Bankruptcy for Darlene Cochard asks the court to approve the Trustee's conditional acceptance of an offer from Pierre Cochard, Darlene Cochard's former husband, to settle the bankrupt's matrimonial property claim against her former spouse for $85,000.

2 Darlene Cochard and Keith Berry oppose the Trustee's application: they state that Ms. Cochard is entitled to considerably more matrimonial property than her former husband has disclosed. They ask the court to refuse to approve the settlement agreement and, pursuant to the provisions of s. 38 of the *Bankruptcy and Insolvency Act*, to allow them to carry on the matrimonial property action and the joint venture action at their own expense.

3 The law firm of Bishop & McKenzie LLP asks the court for a charging order, pursuant to the provisions of Rule 625 of the Alberta Rules of Court, against any proceeds arising from the settlement of the matrimonial property action, and a declaration that Bishop & McKenzie LLP enjoys the status of a secured creditor against the proceeds of the matrimonial action. Part of the claim by the law firm is for work undertaken on Ms. Cochard's behalf after she assigned herself into bankruptcy; the law firm says that it had an obligation to continue to work for its client because the trustee did not appear to be interested in her various claims. In that context, Bishop & McKenzie LLP also appeals against the disallowance of their proof of claim by the Trustee.

4 The application by the Berry creditors for a s. 38 order is denied. The Berry creditors have failed to establish one of the pre-requisites to the exercise of the court's discretion under this section which is that the Trustee has refused or neglected to take proceedings relative to Ms. Cochard's claims. Here, the Trustee has proposed to settle Ms. Cochard's claims. A proposal for settlement is taking action relative to Ms. Cochard's claims. The pre-requisites to the use of section 38 have not been made out.

5 In the circumstances here, which include the vigorous objection by Ms. Cochard and the Berry claimants to the settlement of Ms. Cochard's claims which objections constitute an obvious prelude to a s. 37 application to contest the Trustee's decision, it is appropriate for the Trustee to ask the court, pursuant to the provisions of s. 34(1) of the *BIA*, to approve the settlement which the Trustee has conditionally approved.

6 The Trustee's application to approve the settlement is allowed: the Trustee has demonstrated that the proposed settlement is reasonable based on the information available, and that the decision to settle Ms. Cochard's claims is made by the Trustee in good faith taking into account the difficulties of prospective litigation. The Trustee's offer to give the Berry creditors a right of first refusal enhances the reasonableness of the Trustee's position.

7 Bishop & McKenzie's application for a Rule 625 charging order for work done prior to their client's bankruptcy is adjourned, *sine die*, for taxation of the costs incurred that protected and helped to produce the fund of matrimonial property, and for further argument concerning Bishop & McKenzie's entitlement to a charge given that they ceased to act for Ms. Cochard before the fund was created and various other issues relating to their entitlement.

8 In Alberta, there appear to be at least 4 *in rem* mechanisms available to lawyers to ensure payment for services rendered: the three mechanisms mentioned in Stevenson & Cote's *Alberta Civil Procedure Handbook 2004*, vol. 1, at p. 554 — a retaining lien on documents, set-off, and the court order permitted by Rule 625, together with a fourth mechanism, reliance on the solicitors' common law lien on funds. Rule 625 appears to be the mechanism pursuant to which Alberta lawyers ask the court for a charging order pursuant to the provisions of the English *Solicitors Act 1860*, which is in force in Alberta. It does not appear to be the mechanism whereby an Alberta lawyer asks the court to recognize a common lien on funds: the common law lien is not subject to the statute of limitations, whereas the provisions of Rule 625 appear to track the provisions of s. 28 of the *Solicitors Act, 1860*, including the provision that makes the charging power under that section subject to limitations. In this application, Bishop & McKenzie did not invoke the common law solicitors' lien. In any event, the distinction between these two types of lawyers' *in rem* remedies for the client's failure to pay for services — the charging order pursuant to statute and the common law lien — is probably insignificant in this particular case because of the equitable factors that would have to be considered by the court if either remedy was requested..

9 The claim by Bishop & McKenzie for a Rule 625 charging order for work done after Ms. Cochard became bankrupt is disallowed: the law firm is entitled to take proceedings against Ms. Cochard without leave for recovery of services performed after bankruptcy.

Cases and authority cited

10 **By the Trustee in Bankruptcy:** *Tater, Re* (1974), 19 C.B.R. (N.S.) 189 (Sask. C.A.); *Andrew v. FarmStart*, 1988 CarswellSask 28, 71 C.B.R. (N.S.) 124, 71 Sask. R. 146, [1989] 2 W.W.R. 127, 54 D.L.R. (4th) 406 (Sask. C.A.); *Price Waterhouse Ltd. v. St. Louis*, 1990 CarswellOnt 124, 47 B.L.R. 70, 72 O.R. (2d) 142, 1 P.P.S.A.C. (2d) 43, 78 C.B.R. (N.S.) 204 (Ont. Bktcy.); D.B. Casson, LL.B., J.D., F.R.S.A., *Odgers on High Court Pleading and Practice*, Twenty-third Edition, London Sweet & Maxwell/Stevens 1991; John McGhee, *Snell's Equity*, Thirtieth Edition, London Sweet & Maxwell 2000; The Honourable L.W. Houlden, B.A., LL.B. Formerly a Judge of the Court of Appeal for Ontario of the Ontario Bar and Geoffrey B. Morawetz, B.A., LL.B., *The 2004 Annotated Bankruptcy and Insolvency Act* Thomson Carswell; L.W. Houlden and G.B. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 3rd edition, Revised, Vol. 1, pp. 3-1 and 3-2, Vol. 2 pp. 5-95 and 5-96; *Tots & Teens Sault Ste. Marie Ltd., Re*, 1975 CarswellOnt 105, 21 C.B.R. (N.S.) 1, 11 O.R. (2d) 103, 65 D.L.R. (3d) 53 (Ont. Bktcy.); A.J. Roman, M.J. Sweatman, *A Conflict Between Canadian Provincial Personal Property Security Acts* and the *Federal Bankruptcy Act: The War is Over*; R. 71 C.B. Rev. 77; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, 128 D.L.R. (4th) 1 (S.C.C.); *Continental Casualty Co. v. MacLeod-Stedman Inc.* (1996), [1997] 2 W.W.R. 516, 141 D.L.R. (4th) 36 (Man. C.A.); *British Columbia v. Henfrey Samson Belair Ltd.* (1989), 75 C.B.R. (N.S.) 1 (S.C.C.); *Continental Casualty Co. v. MacLeod-Stedman Inc.*, 1996 CarswellMan 537 (Man. C.A.); *Higgs v. Higgs*, [1934] P. 95 (Eng. P.D.A.)

11 **On behalf of Bishop & McKenzie:** *Royal Bank v. Laughlin*, 2001 CarswellAlta 402 (Alta. C.A.); *West v. Caros Investments Ltd.*, 1992 CarswellSask 132 (Sask. Q.B.); *McCready Products Ltd. v. Sherwin-Williams Co. of Canada*, 1986 CarswellAlta 112 (Alta. C.A.); *McCready Products Ltd. v. Sherwin-Williams Co. of Canada*, 1986 CarswellAlta 33 (Alta. Q.B.); reversed in respect of one third-party claimant, 1986 CarswellAlta 112 (Alta. C.A.); *Tots & Teens Sault Ste. Marie Ltd., Re*, 1975 CarswellOnt 105 (Ont. Bktcy.); W. Stokes, *A Treatise on the Liens of Attornies and Solicitors*, 1860; *Barker v. St. Quintin* (1844), 12 M. & W. 441, 152 E.R. 1270 (Eng. Exch.); *Halsbury's Laws of England*; *Ross v. Buxton* (1889), 42 Ch. D. 190 (Eng. Ch. Div.), at 200;

Mason v. Mason & Cottrell, [1933] P. 199 (Eng. C.A.), at 205; *Hartley v. Fuld* (1967), [1968] P. 727, [1967] 2 All E.R. 649 (Eng. P.D.A.); *James Bibby Ltd. v. Woods*, [1949] 2 K.B. 449 (Eng. K.B.); *Cresswell v. Byron* (1807), 14 Ves. Jun. 271, 33 E.R. 525 (Eng. Ch. Div.); *Cole v. Eley*, [1894] 2 K.B. 180, [1894] 2 Q.B. 350 (Eng. K.B.); *Black's Law Dictionary*, pages 761-2; *James Bibby Ltd. v. Woods*, [1949] 2 All E.R. 1 (Eng. K.B.); *Client v. Law Firm*, 1999 CarswellAlta 1078 (Alta. Q.B.); *Blake, Re* (1944), [1945] 1 All E.R. 1 (Eng. Ch. Div.); *Greer v. Young* (1883), [1881-85] All E.R. Rep. 513 (Eng. C.A.); *Simpson, Re*, 1927 CarswellAlta 43 (Alta. C.A.); *Bloomaert v. Dunlop*, 1929 CarswellSask 117 (Sask. C.A.); *Paquet, Re*, [1997] A.J. No. 688 (Alta. Q.B.); *Hubbard v. Everyman's Saving & Mortgage Ltd.*, 1985 CarswellAlta 333 (Alta. Q.B.); *Feehan v. Pocock Floors Ltd.*, 1971 CarswellAlta 54 (Alta. Dist. Ct.); *Broadloom Warehouse (Edmonton) Ltd., Re*, 1980 CarswellAlta 184 (Alta. Q.B.); *Municipal Savings & Loan Corp. v. Evoy*, 1992 CarswellOnt 196 (Ont. Gen. Div.); *Born, Curnock v. Born* [1990-3] All. E.R. Rep. 923; *Richmac Interiors Ltd., Re*, 1994 CarswellAlta 339 (Alta. Q.B.); *Solomon v. McLaughlin*, 1982 CarswellAlta 89 (Alta. Q.B.); *Home Assurance Co. of Canada, Re*, 1949 CarswellAlta 7 (Alta. T.D.); *Home Assurance Co. of Canada, Re*, 1950 CarswellAlta 4 (Alta. C.A.); *Meter Cabs Ltd., Re* (1911), [1911-13] All E.R. Rep. 1118 (Eng. Ch. Div.); *Bankruptcy and Insolvency Act*, section 136; *Judicature Act*, R.S.A. 2000, C. J-2 (various sections); Rule 625 of Alta. Reg. 390/68; *Black's Law Dictionary*, pages 567, 922-3; *The Law and Practice Relating to Solicitors' Liens and Charging Oders*, Frederick Walton Atkinson, LL.D; *Cole v. Eley*, [1894] 2 K.B. 180 (Eng. K.B.); *Cole v. Eley*, [1894] 2 Q.B. 350 (Eng. Q.B.); *Phillipps & Scarth v. London Guarantee & Accident Co.*, 1927 CarswellMan 59 (Man. C.A.); The *White Book* 1999; *Shelson, Re*, [2004] O.J. No. 850, 70 O.R. (3d) 171 (Ont. C.A.); *Hama v. Werbes*, 2004 CarswellBC 713 (B.C. S.C. [In Chambers])

12 **On behalf of Darlene Cochard and Berry Creditors:** *Katz, Re*, [1991] O.J. No. 1369 (Ont. Bktcy.); *Qualicum Builders Supply Co. (Trustee of) v. Mercantile Bank of Canada*, [1986] B.C.J. No. 2199 (B.C. S.C.); *Rassell, Re* (1999), 177 D.L.R. (4th) 396 (Alta. C.A.); *Public Eyecare Management Inc., Re*, [1998] O.J. No. 5065 (Ont. Gen. Div. [Commercial List]); *Acepharm Inc., Re*, [2000] O.J. No. 942 (Ont. Bktcy.); *Salloum, Re*, [1988] B.C.J. No. 3103 (B.C. S.C.); *Lake Shore Motor Inc., Re* (1955), 2 D.L.R. (2d) 344 (C.S. Que.); *Liu v. Sung*, [1989] B.C.J. No. 111 (B.C. S.C. [In Chambers]); *Blackman v. Davison*, [1987] B.C.J. No. 200 (B.C. C.A.); *Engels v. Richard Killen & Associates Ltd.*, [2002] O.J. No. 2877 (Ont. S.C.J.); *Reed, Re*, [1980] O.J. No. 3008 (Ont. C.A.); *Davies Footwear Co., Re*, [1923] O.J. No. 152 (Ont. C.A.); *Kun, Re*, [2001] O.J. No. 1725 (Ont. S.C.J. [Commercial List]); Section 38 *Bankruptcy and Insolvency Act* (Canada); *B.N.R. Holdings Ltd. v. Royal Bank*, [1992] B.C.J. No. 198 (B.C. S.C.); *Toronto Dominion Bank v. Alex L. Clark Ltd.*, [1993] O.J. No. 2554 (Ont. Gen. Div.); *Jolub Construction Ltd., Re*, [1993] O.J. No. 2339 (Ont. Bktcy.); *Jaguar Asset Management Corp. v. Amalco Credit Services Ltd.*, [1997] S.J. No. 433 (Sask. Q.B.); Holden and Morawitz, *Bankruptcy Law of Canada* (Toronto: Carswell) at page 1-133 et seq.

13 **By the court:** *On the nature of a Rule 625 charge:* Stevenson & Cote, *Alberta Civil Procedure Handbook 2004*, (Juriliber, 2004, Edmonton, Alberta) at p. 554; *White Resource Management Ltd. v. Durish*, 1997 CarswellAlta 998, 54 Alta. L.R. (3d) 207, [1998] 3 W.W.R. 204, 211 A.R. 376 (Alta. Q.B.); F.W.Atkinson, *The Law and Practice Relating to Solicitors' Liens and Charging Orders*, 1905

14 *On whether a solicitor who holds a solicitor's retaining lien is a secured creditor: Boscher, Re* (1961), 2 C.B.R. (N.S.) 72 (Alta. S.C.); *Lapointe c. Racine* (1979), 33 C.B.R. (N.S.) 19 (C.S. Que.) (M.); *422686 Ontario Ltd., Re* (1980), 36 C.B.R. (N.S.) 41 (Ont. H.C.);

15 *On the operation of a charging lien: Till v. Till*, [1974] 2 W.L.R. 447 (Eng. C.A.)

Appendix A: Retainer Agreement Between Ms. Cochard and Bishop & McKenzie LLP

Appendix B: Supplementary Report of the Trustee

1. Background

a) Factual background

16 Ms. Cochard states that she began to cohabit with Mr. Cochard on May 1, 1970 when she was approximately 23 years old and Mr. Cochard was approximately 45 years old. Mr. and Ms. Cochard were married in 1984. At the time of the marriage, Mr.

Cochard was approximately 59 years old and Ms. Cochard was approximately 37 years old. Each of the spouses had previously been divorced and each has children from former relationships. There are no children of this marriage.

17 Mr. and Ms. Cochard separated in October, 1996. On December 2, 1996, Ms. Cochard issued a Petition for Divorce which included a claim for spousal support. The Petition was issued by Oshry & Company. So far as I can ascertain, no separate matrimonial property action was commenced by Ms. Cochard at that time.

18 Mr. and Ms. Cochard reconciled in January 1997; they separated again in July 1997 and reconciled in October, 1997.

19 Oshry & Company ceased to act for Ms. Cochard in September 1997. Before ceasing to act, Oshry & Co. issued a Notice to Disclose in December 1996

20 In November, 1997, Mr. and Ms. Cochard each executed a Matrimonial Property Agreement concerning their outstanding differences. Each party was represented by a lawyer in the negotiations leading up to the signing of the Agreement; it appears from the material that is available to me on this application that Ms. Cochard was represented on the Agreement by Mr. Rand (see entry of March 11, 2002 in the Invoice for services rendered). It was a term of the agreement that each of the parties gave up any claim which they might have at law or in equity against any of the property referred to in the Agreement. The Agreement referred, in part, to money that Mr. Cochard had invested in Knokke, Belgium, which the agreement stated to be in the approximate sum of $400,000, and stated that Mr. Cochard was to have exclusive ownership of that property.. The Agreement required Mr. Cochard to cause his daughter Renee Cochard to transfer her share in the matrimonial home to Ms. Cochard so that the matrimonial home would belong as to one-half to Darlene Cochard. Following the execution of the Agreement, Ms. Cochard did not proceed with her Petition for Divorce.

21 Mr. and Ms. Cochard separated again in December, 2000.

22 Mr. Cochard issued a Statement of Claim for Divorce and Matrimonial Property on January 18, 2001.

23 A Statement of Defence and Counterclaim for Divorce and Matrimonial Property was filed by Ms. Cochard on February 2, 2001; in her pleadings, Ms. Cochard requested spousal support, retroactive spousal support, interim costs, an order for the distribution of all matrimonial property, an order giving her possession of the matrimonial home, and related relief.

24 Bishop & McKenzie started to act for Ms. Cochard on January 24, 2001.

25 At some time in June, 2002, Bishop & McKenzie made a demand of Ms. Cochard that she pay $44,000 for legal services.

26 On June 19, 2002, Ms. Cochard issued a Statement of Claim against Henri Cynamon and 107088 Investments Ltd. with respect to two joint ventures in which both Ms. Cochard and Mr. Cochard were part owners. That Statement of Claim was issued by Oshry & Company and claimed $750,000 damages.

27 On June 26, 2002, Ms. Cochard assigned herself into bankruptcy; Bishop & McKenzie LLP discovered that she had assigned herself into bankruptcy after the fact. When Ms. Cochard assigned herself into bankruptcy, the following groups of creditors filed proofs of loss:

- arms'-length creditors, primarily credit card companies, whose claims totalled $58,740.25. The Royal Bank is one of those creditors. The only Inspector in this bankruptcy is a representative of the Royal Bank;

- seven friends of Ms. Cochard who claimed loans to her totalling $10,285. The Trustee has disallowed $4,000 of those claims on the basis of their being time barred. The remaining claim for this group is $6,000;

- Keith Berry and Berry Projects Ltd. claimed to be secured creditors for a total of $180,962.52. This claim is based on a contract for personal services between Berry and Ms. Cochard pursuant to which Mr. Berry is, for a $6,000 per month fee, giving advice to Ms. Cochard concerning the various issues surrounding her divorce. The Trustee has disallowed that claim both as a secured claim and as an unsecured claim and notes that, in any event, any claim by the Berry group would be postponed. Bishop & McKenzie acted for Mr. Berry and the Berry group of creditors in discussions with the Trustee concerning their claim. The Berry group have not appealed the disallowance of their claim as a secured claim; they do appeal the disallowance of their claim as an unsecured claim;

• in the Statement of Affairs she filed when she petitioned herself into bankruptcy, Ms. Cochard disclosed that Bishop & McKenzie was one of her unsecured creditors in the amount of $35,000. More specifically, as of the date on which Ms. Cochard assigned herself into bankruptcy, the Bishop & McKenzie LLP account was $34, 848.90, including disbursements. The Trustee then specifically asked Bishop & McKenzie LLP whether it was a creditor of the bankrupt; this was done by letter and not by the issuance of a notice in Form 76 pursuant to section 128 of the *BIA*. On September 6, 2002, Bishop & McKenzie provided the following response to the Trustee:

> We have not demanded payment from Ms. Cochard. The Retainer Agreement we entered into with Ms. Cochard provides for payment at the conclusion of the law suit. In fact, the Retainer Agreement specifically provides Ms. Cochard is unable to pay accounts rendered. In the circumstances, our position is given Ms. Cochard has not been and is not at this stage indebted to our firm even though we have provided services. The claim of Bishop & McKenzie, once payment has been demanded from Ms. Cochard, will survive the bankruptcy.

When being cross-examined on an affidavit filed in these proceedings, a lawyer at Bishop & McKenzie stated that the firm took the position that, by September 6, 2002, the demand for payment that it had previously made from Ms. Cochard was revoked or abandoned so that, on September 6, 2002, there was no demand extant.

Approximately two years after she assigned herself into bankruptcy, Bishop & McKenzie LLP, Ms. Cochard's then lawyer, filed a claim as a secured creditor. That claim will be dealt with in more detail later in the decision.

28 In the Statement of Affairs that she filed in her bankruptcy, Ms. Cochard does not disclose any outstanding debts to the two previous lawyers who had been retained by her to deal with matrimonial property matters, Ms. Oshry and Mr. Rand.

29 Foreclosure proceedings relative to the matrimonial home had been commenced prior to Ms. Cochard's bankruptcy. After Ms. Cochard became a bankrupt, her fiancé, Keith Berry, who was living in the matrimonial home at the time, bought the matrimonial home in August 2002 for $240,000. He resold the home in September of 2002 for over $375,000. The role, if any, of Ms. Cochard's Trustee in these proceedings was not the subject of comment during the proceedings.

30 On October 17, 2002, there was a deposit to Ms. Cochard's matrimonial file account at Bishop & McKenzie of $10,000. Those funds were transferred to Mr. Berry's file account at Bishop & McKenzie on September 9, 29 and 30, 2003.

31 On December 15, 2002, Mr. and Ms. Cochard were divorced.

32 Bishop & McKenzie ceased to act for Ms. Cochard on June 17, 2004. The role of Ms. Cochard in this termination, if any, was not the subject of evidence during this hearing.

33 In late June, 2004, Mr. Cochard's lawyer contacted Ms. Cochard's Trustee's lawyer to propose a final settlement of Ms. Cochard's matrimonial property suit for $75,000. That offer was based on the Hagen appraisals of three properties owned by Mr. Cochard, financial statements for Chez Pierre which Mr. Cochard states is in a negative position and is worth nothing, a Statement of Assets and Liabilities sworn by Mr. Cochard in 2002 and a similar Statement sworn in June 2004. Mr. Cochard also stated that he took great issue with the flip of the matrimonial home and contends that, since the transaction took place while the parties were still married, one half of the profit on the flip belongs to him. He thus calculated that he owed Ms. Cochard an equalization payment of $52,500. He added: "Because of the risk, difficulty, and litigation expense anticipated in attempting to set aside the 'flip', I am instructed by Mr. Cochard to offer as a total and final settlement, $75,000." The offer was open to June 30, 2004 and was subsequently extended.

34 On July 5, 2004, Pierre Cochard accepted the Trustee's counter-offer of $85,000. The Trustee's counter-offer was conditional upon approval by the Court.

35 On July 9, the agent of the Royal Bank of Canada, who became the sole Inspector in Ms. Cochard's bankruptcy, approved the Trustee's proposal to settle Ms. Cochard's matrimonial property claims for $85,000.

36 On September 23, 2004, Bishop & McKenzie LLP filed a proof of claim in the Cochard bankruptcy claiming a total secured claim in the amount of $47,940.93.

37 Bishop & McKenzie LLP acted for Keith Berry in Darlene Cochard's bankruptcy.

38 At the date of this hearing, Ms. Cochard has not been discharged and the bankruptcy has not been cancelled.

39 At the time of this application, Mr. Cochard was nearly 80 years old; although he appears to be vigourous, he states that he suffers from heart problems and had a quadruple by-pass in May 2001. At the time of this application, Ms. Cochard was nearly 58 years old.

40 At the time of this application, Ms. Cochard and the Berry creditors are represented by a new solicitor.

b) Legislative background

41 Section 2(1) of the *BIA* defines a "secured creditor" as follows:

> "secured creditor" means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes
>
> (a) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the *Civil Code of Québec* or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or
>
> (b) any of
>
> (i) the vendor of any property sold to the debtor under a conditional or instalment sale,
>
> (ii) the purchaser of any property from the debtor subject to a right of redemption, or
>
> (iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation,
>
> if the exercise of the person's rights is subject to the provisions of Book Six of the *Civil Code of Québec* entitled *Prior Claims and Hypothecs* that deal with the exercise of hypothecary rights; *("créancier garanti").*

42 The section of the *BIA* which allows a Trustee to ask the court for directions reads as follows:

> S. 34(1) A trustee may apply to the court for directions in relation to any matter affecting the administration of the estate of a bankrupt and the court shall give in writing such directions, if any, as it appear proper in the circumstances.

43 The section of the *BIA* which allows a creditor to obtain the right to pursue a proceeding outside the bankruptcy reads as follows:

> S. 38 (1) Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.

(2) On an order under subsection (1) being made, the trustee shall assign and transfer to the creditor all his right, title and interest in the chose in action or subject-matter of the proceeding, including any document in support thereof.

(3) Any benefit derived from a proceeding taken pursuant to subsection (1), to the extent of his claim and the costs, belongs exclusively to the creditor instituting the proceeding, and the surplus, if any, belongs to the estate.

(4) Where, before an order is made under subsection (1), the trustee, with the permission of the inspectors, signifies to the court his readiness to institute the proceeding for the benefit of the creditors, the order shall fix the time within which he shall do so, and in that case the benefit derived from the proceeding, if instituted within the time so fixed, belongs to the estate.

44 Section 121 (1), which describes the claims that are provable in a bankruptcy reads as follows:

All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

45 The section of the *BIA* which allows a Trustee to demand the filing of a proof of claim for a secured security reads as follows:

S. 128(1) Where the trustee has knowledge of property that may be subject to a security, the trustee may, by serving notice in the prescribed form and manner, require any person to file, in the prescribed form and manner, a proof of the security that gives full particulars of the security, including the date on which the security was given and the value at which that person assesses it. (1992), c. 27, s. 51(1); 1999, c. 31, s. 25.)

46 Rule 625 of the Alberta Rules of Court states:

(1) The court may, on the application of a barrister and solicitor, declare the barrister and solicitor to be entitled to a charge upon the property recovered or preserved through his instrumentality in any proceedings prosecuted or defended by him for his proper fees and disbursements in reference to the proceeding, and may make such order or orders as may be just for he rasing of payment of the fees and disbursements out of that property.

(2) No act or thing defeats any such charge unless he property has been disposed of to a bona fide purchaser for value without notice.

(3) No order shall be made under this Rule where the right of the barrister and solicitor to recover payment of his fees and disbursements is barred by any statute of limitations.

2. Are the Berry creditors entitled to a s. 38 order?

47 For the purposes of this issue, I assume that the Berry creditors are, in fact, creditors of the estate, that their appeal from the Trustee's rejection of their claim as unsecured creditors will be successful, and that they therefore have status to bring the application.

48 In any event, however, it is not necessary to resolve the issue of whether the Berry creditors are entitled to a s. 38 order in this case because this is not a situation in which the Trustee proposes to do nothing. On the contrary, the Trustee proposes to settle the claim, which is to do something. The Berry creditors have not met the formal pre-requisite to the operation of s. 38 which is that the Trustee refuses to do anything. Therefore, they are not entitled to a s. 38 order.

3. Should the court accept the settlement proposal?

49 In assessing whether the court should approve the settlement proposed by the Trustee, the first issue to be addressed is whether the court should agree, pursuant to the provisions of s. 34(1) of the *BIA*, to vet the Trustee's proposal in light of the Trustee's authority to act independently of the court.

50 In the circumstances here, where Ms. Cochard and Mr. Berry have not formally brought an application to reverse or modify the settlement proposed by the Trustee, but where they have clearly challenged the Trustee's position, the court can, pre-emptively, embark on the assessment of the Trustee's actions that would be inevitable given s. 37 of the *BIA* and the challenge being mounted by the Berry creditors and Ms. Cochard. The process that was developed for the hearing allowed Ms. Cochard and Mr. Berry to bring forward all the arguments and evidence they might have advanced in a s. 37 hearing.

a) What general principles apply to guide the court in its assessment of this proposal?

51 Parliament has given to the Trustee the unrestricted right to settle a bankrupt's claims: s. 30 (h) and (i). Therefore, as a matter of public policy, the legislator has clearly indicated the degree of trust that is reposed in a trustee.

52 Not surprisingly, case law has applied this statutory policy in describing its relationship to a Trustee's decision to compromise any claim made by the estate. Case law clearly establishes that the Court will not interfere lightly with the Trustee's decision to settle a bankrupt's claim, *Brokerwood Products*, and will not interfere if the Trustee acted in good faith and the decision is not unreasonable in the circumstances, *Graham Mining*. Where the bankrupt's claim is a chose in action — including potential proceeds from a lawsuit — especially where there are many issues of credibility, it is yet more problematic to interfere with the Trustee's judgment, *Graham Mining*. The court ought not to second-guess the Trustee on the merits: *Beynon*.

b) How should the general principles be applied here?

53 The proposed settlement has been approved by the Trustee and by the sole Inspector. The arms' — length creditors are in agreement with the proposed settlement. These are strong factors in support of the proposed settlement.

54 There are, however, additional factors that support the settlement. First, the estate has no assets with which to pursue Ms. Cochard's claims.

55 Second, the settlement is based, in part, on appraisals obtained by the Trustee. Although Ms. Cochard relies on conflicting appraisals, there is nothing to suggest that Ms. Cochard's position concerning appraisals would obviously be successful if litigation were to be undertaken. For example, Ms. Cochard indicates that the disputed properties were previously listed for sale based on higher appraisals; it goes without saying that those appraisals are somewhat in question since no sale was effected based on those appraisals.

56 Third, Ms. Cochard's matrimonial property claims are choses in action. Given Ms. Cochard's statement that she participated in the skimming of cash from the revenues of Chez Pierre, the issue of credibility will be an important factor in future litigation relating to the value of property, especially where, as here, Ms. Cochard does not have documentation that clearly supports her various positions. Where credibility is an issue, it is difficult to predict results of litigation.

57 Fourth, the issue of the flip on the foreclosure during bankruptcy and during marriage is also a tangled litigation issue, the outcome of which is not clear.

58 Fifth, it is also clear from the amount of money that has been expended to date, that ongoing litigation relative to matrimonial property is likely to be time-consuming and expensive.

59 Finally, the Trustee's proposal to allow the Berry creditors to "buy" Ms. Cochard's claims by offering them a right of first refusal is reasonable. Although Ms. Cochard is in bankruptcy and Mr. Berry received a discharge from bankruptcy in 1995 and may not have $85,000 to put up front to purchase these lawsuits, if the claims were as well founded and easy to litigate as suggested by the Berry creditors, it appears likely that the Berry creditors could find someone to put up $85,000 for a $750,000 return.

4. Would Bishop & McKenzie have been entitled to a R. 625 charge absent the intervention of the bankruptcy? If the firm was entitled to such a charge, has Ms. Cochard's bankruptcy affected Bishop & McKenzie's right to a Rule 625 Charge? If the court grants such a charge, does such a charge make them a secured creditor within the meaning of the BIA?

a) The types of solicitors' liens in Alberta

60 There are several ways in which solicitors, like mechanics, innkeepers, landlords, and others, have rights to the property of a client/customer as security to ensure that they are paid. Authors such as Stevenson & Cote describe three such mechanisms as: a retaining lien, which is a common law lien allowing lawyer to hold client documents, in much the same way as a mechanic can hold a car until the repair bill is paid; set-off — which allows a lawyer to deduct what is owing to her for services from a fund that the lawyer has in hand before forwarding the remainder of the fund to the client; and a charging lien, which is obtained in Alberta by way of application for an order pursuant to R. 625.

61 The language used to describe the ways in which a solicitor can enforce her right to be paid is, however, somewhat misleading. In common law, a "lien" is defined as "the right of a bailee to retain possession of a chattel entrusted to him until is claim upon it is satisfied". From that perspective, the retaining lien is, in fact, a true lien at common law. Set-off might be thought of as an equitable lien over money that is in possession. A charge under R. 625 is not a lien of the usual type since it relates to property which is not in the possession of the person who claims a right to it; all of the case law emphasizes the inaccuracy of describing a R. 625 charge as a "lien".

62 The first two of these so-called "liens" are general, that is, a lawyer can retain all client documents in her possession when any of her services are unpaid and she can use set-off against all client funds in her possession when any of her services are unpaid. The Rule 625 charge is, however, specific — that is a lawyer has a right to claim a charge only for those services which produced or preserved the fund or the property which is the target of the charge.

63 However, what is not clear from the Stevenson & Cote summary is that Rule 625 appears to be the mechanism by which an Alberta lawyer may apply for statutory charge described in the English *Solicitors Act (1860)* 23 & 24 Vict., ch. 127 (Imp.) from England which is received law in Alberta. Stevenson & Cote does not mention, as one of the *in rem* remedies available to a lawyer who has not yet been paid for services, recourse to the common law solicitors' lien on funds. Although virtually no reference to the common law lien is made in Canadian jurisprudence subsequent to the glancing reference to the inherent jurisdiction of the court to grant such a lien in *Tots & Teens*, there is no reason to believe that Alberta and Canadian lawyers have lost the ability to rely on that lien: the court's common law jurisdiction to grant a charge which jurisdiction appears to continue to co-exist with the power to grant a charge pursuant to the statute. It is clear from the Atkinson text, and from other authorities such as Halsbury's, that the common law lien and the charge under the *Solicitors Act* co-exist in England and therefore presumably co-exist in Alberta.

64 In Alberta, the statutory provision relating to a solicitor's lien as a charge against property that is not in the lawyer's possession is found in section 28 of the *Solicitors Act* which reads as follows:

> S. 28 In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any Court of justice, it shall be lawful for the Court or Judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made, such attorney or solicitor shall have a charge upon and against, and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding; and it shall be lawful for such Court or Judge to make such order or orders for taxation of and for raising and payment of such costs, charges, and expenses out of the said property as to such Court of Judge shall appear just and proper; and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a *bonâ fide* purchaser for value without notice, be absolutely void, and of no effect

as against such charge or right; provided always, that no such order shall be made by any such Court or Judge in any case in which the right to recover payment of such costs, charges and expenses is barred by any statute of limitations.

65 As indicated above, by operation of Canadian constitutional law, that statutory provision is in place in Alberta: *Simpson, Re*. Rule 625 is the mechanism that has been adopted in Alberta to allow a solicitor to apply to the court for a charge on property in someone else's possession.

66 The exact wording of the statutory law in a jurisdiction is obviously critical to an assessment of the kind of charge that a lawyer can obtain for services performed. In British Columbia, for example, the wording chosen by the Legislature appears much stronger than the English/Alberta legislation. The wording in Saskatchewan can be seen from *Caros Investments* and the wording in Ontario can be seen from *Tots & Teens*. Case law from other jurisdictions must therefore be scrutinized to ensure that the legislative framework for a solicitor's charge is the same as in Alberta.

67 The solicitor's common law lien on a fund that was created by, or preserved through, a lawyer's efforts is subtly different from the statutory charge. These differences are outlined in the Atkinson text as follows:

> In the first place it will be observed that the operation of a charging order under the Act very closely resembles the lien on funds which we have seen was established by the Courts of law and equity quite a hundred years before the Act was passed, but we must not allow ourselves to be led astray by this resemblance. The two things are perfectly distinct in their origins, their subject-matter, as to the persons who can obtain them, the persons against whom they can be obtained or asserted, and the grounds of resistance. The following noteworthy differences will be found in the succeeding chapters: — until the charging order is actually pronounced there is no charge in existence; in the words of Lord Selborne in *Pinkerton v. Easton*, "The Legislature has not given a charge, for a solicitor's costs, upon property recovered or preserved, when meritorious services of the solicitor have resulted in such recovery or preservation". A lien on funds, on the contrary, is acquired by the solicitor *ipso facto* the moment property has been recovered or preserved by his proceedings. . . . The granting or refusing a charging order is in the discretion of the Court, whereas a lien is *ex debito justitiae*. . . . On applying for a charging order it is not necessary to prove either express notice of the solicitor's lien or collusion, but to successfully assert a lien either notice of the lien or collusion must be proved.
>
> (Emphasis added)

68 Dealing with the issue of priority, the learned author states:

> The charging order takes priority over every one and everything except a *bona fide* purchaser for value without notice, e.g. where a plaintiff has recovered judgment his solicitor is entitled to a charging order in priority to a creditor of the plaintiff who has obtained a garnishee order or a charging order under the partnership Act 1890, against the defendant. . . . The solicitor's right to a charging order would probably be held not to prevail against a trustee's right to indemnity out of the fund recovered or preserved, but the order would doubtless be made subject to such right of indemnity.
>
> . . . . .
>
> In bankruptcy the rule as to a solicitor's lien on assets administered in a partnership suit before bankruptcy is as follows: if a solicitor commences a partnership action and gets a receiver appointed he is entitled to a lien on the assets recovered for his costs, unless he knew that the partnership was insolvent and commenced the action merely to obtain costs when proceedings might have been taken in the bankruptcy.
>
> (Emphasis added)

69 The same author uses the following description of the common law solicitor's lien:

> The Court will exercise this equitable interference where the solicitor has given the opposite party or his solicitor notic of his lien, and that he claims the amount payable to his client to be paid to him in the first instance, in which case the opposite party will at his peril pay the client or release the claim, or compromise it without the assent of the solicitor. So

> the Court will exercise it, though no such notice has been given, in cases where it is clearly made out that there is some collusion or fraudulent conspiracy between the parties to cheat the solicitor out of his costs, but unless such notice has been given, or there has been such collusion or fraudulent conspiracy, the client, though he sues *in forma pauperis*, may compromise with the other party and give him a release without the intervention of his solicitor, and the solicitor in such a case can look to his client only for payment, and cannot proceed in the action. Even after such notice the parties may, it seems compromise before verdict or judgment without regard to the solicitor's claim for costs.

70 Although Atkinson indicates that a solicitor's common law lien on funds is acquired by the lawyer *ipso facto*, it is clear from authorities including Atkinson and Halsbury's that a common law solicitor's lien must be recognized or formalized or approved by the court. Despite the broad wording used in the first Atkinson extract to refer to the common law lien, there is no doubt that the court maintains a discretion, which must of course be exercised judicially, in determining whether the common law lien would be recognized. So, for example, while the common law lien is not subject to the statute of limitations, yet it is clear that a court may refuse to exercise its equitable interference on behalf of a lawyer if the lawyer has delayed excessively in bringing forward a claim for the lien.

71 Another possible ground of resistance to the common law lien, and one which might be pertinent here, is that outlined by Atkinson in the following way:

> Another ground of resistance to the solicitor's lien is that a *bona fide* compromise has been entered into between the litigants, and the money paid over in good faith, without any intention of depriving the solicitor of his lien, and without notice of his lien.

72 It will be recalled that in this case, when the Trustee asked Bishop & McKenzie if Ms. Cochard was indebted to them, the law firm indicated that she was not; the firm did the contrary of asserting a lien, and insisted that any claim they might have against Ms. Cochard would survive the bankruptcy.

73 The settlement between Mr. Cochard and the Trustee was reached before the Trustee has received notice of Bishop & McKenzie's claim.

74 Atkinson further indicates that it is also the case that a lawyer may lose the right to a common law lien if he discharges himself and that this is yet another situation where the factors for the court's consideration are subtly different according to whether the solicitor is asking for a common law lien or a statutory lien:

> Probably if a solicitor discharges himself, even for reasonable cause, from acting furhter for his client, he loses his lien, according to a dictum of Lord Eldon but in the analogous case of a charging order under the 28th section of the Solicitors Act, 1860, the solicitor can obtain that order notwithstanding that he has discharged himself if the grounds upon which he retired from the case were reasonable.

75 Here again, therefore, on the facts of this case it may not make any difference to the outcome whether Bishop & McKenzie were applying for a statutory charge or for a common law lien.

76 As to the mechanism by which a lawyer could ask the court to recognize a common law lien, Atkinson makes these comments:

> In a case in the Court of Chancery before the Judicature Acts, it was held that a solicitor could file a bill of complaint praying for a declaration of his lien, and for an injunction similar to that which has just been spoken of; but at the present day the Courts would probably not encourage a separate action being brought to protect a solicitor's lien, as it would be doubtless considered that the proper course was to proceed by summons or motion in the original action in which the property forming the subject of the lien was recovered. That certainly is the course which has been adopted in recent cases.
>
> Another mode of enforcing the solicitor's lien is by appearing on a motion made by one of the parties and intervening for protection of his lien. For instance, if a motion is made to set off a judgment recovered in one action against one

recovered in another the solicitor may appear and oppose. He may also appear on the further consideration, or on a petition or summons for payment out of Court, and oppose any order being made except subject and without prejudice to his lien. He may likewise appear and oppose any application by the opposite party to stay proceedings where the compromise has been made collusively, and if, in pursuance of any such collusive compromise, a bill or other security has been given or deposited with a third party, the Court will make an order that it be given up to the solicitor.

77 Because Rule 625 explicitly limits the court's ability to grant a charge to situations that come within the statute of limitations, and otherwise tracks the substance of s. 28 of the *Solicitors Act, 1860*, the Rule 625 mechanism does not appear to be the mechanism by which an Alberta lawyer asks the court for recognition of a common law lien on funds.

78 As stated earlier, Bishop & McKenzie did not invoke, on this application, the solicitors's common law lien on funds. Reference to that remedy was made merely to contrast and compare the use of that mechanism with the Rule 625 mechanism that was invoked by the law firm. I will now turn to the use of a Rule 625 charge in Alberta which is the remedy invoked by Bishop & McKenzie.

b) The relationship between Rule 625, a solicitor's charging lien, a solicitor's common law lien and a solicitor's retaining lien

79 It is clear from the weight of case law, and from authorities such as Atkinson, that, until the court grants a Rule 625 charge, the law firm has nothing. As of the date of the issuance of this decision, Bishop & McKenzie has no Rule 625 charge and is not a "secured creditor" within the meaning of the *BIA*.

80 The case law which underlies this conclusion includes Alberta case law. In *White Resource Management*, Mason J. made the following comments:

> [para16] The Rule 625 type of lien gives the court the power to declare counsel entitled to a charge "on anything recovered by judgment resulting from his or her labour and professional services." [See Note 1 below] Counsel must specifically apply for a solicitor's lien under Rule 625. The court may grant a charge against property which has been salvaged because of counsel's efforts. The retaining lien allows counsel to withhold documents in his or her possession from his or her client, or anyone else claiming under that client, until counsel has been paid. This passive retaining lien arises out of equity and exists as long as counsel withholds his or her Client's documents.
>
> Note 1: The Canadian Law Dictionary, (Law and Business Publications: Don Mills, 1980) at 355.

The learned trial judge continued:

> [para26] Based on these authorities, it is clear that a solicitor's lien is nothing more than an equitable right that stands no higher than the client's rights. The solicitor's lien is, therefore, limited by whatever rights may be exercised against the client, even though the client cannot imperil or affect the solicitor's rights. The following propositions appear to apply: (1) a solicitor's lien is nothing more than a equitable right against funds or property recovered by counsel for the client; (2) that equitable right may not be alienated by the client's unilateral action; (3) the right is limited and stands no higher than the client's rights at law; and (4) if it is just and equitable between the parties, set-off should have priority, unless there is fraud or some collusion practised upon counsel to defeat his or her equitable right, or unless counsel can claim a superior right at equity to the claim being made against the client.

81 Mason J.'s assessment of the time when a charge becomes effective is amply supported in the case law.

82 It is, therefore, with respect that I state that the conclusions in principle reached by Henry J. in *Tots & Teens* do not apply in this case. It may be that the conclusions reached there were based on an interpretation of the Ontario legislation which are particular to that province.

83 It may also be that Henry J.'s conclusions were based on his treatment of the application as one for a common law solicitors' lien.

84 It may also be that Henry J.'s conclusion was, at least to some extent, based on what he clearly felt was an injustice which was the result of his interpretation of a decision of the Ontario Court of Appeal that a solicitor could not apply for a charging lien after the party from whom funds were produced went into bankruptcy. The Court of Appeal decision which made this finding is apparently not available on an electronic data base, so I have been unable to review the appellate decision. However, abundant case law from across Canada establishes that a solicitor can make an application for a charging order after bankruptcy. Therefore, this concern of Henry J.'s has been alleviated.

85 Finally, as Henry J. himself recognized in his reasons, the weight of English and Canadian law is and was to the effect that until a solicitor obtained a charging order, he had "no right in" property: para. 13. of *Tots & Teens*.

86 Nothing in the Alberta Court of Appeal's decision in *Laughlin* undermines the conclusions that I have reached.

c) Absent the bankruptcy, is Bishop & McKenzie entitled to a Rule 625 charge?

87 The short answer to this question is that, as of the date of this decision, the court is unable to state whether Bishop & McKenzie is entitled to a R. 625 charge: additional evidence and arguments are necessary to elucidate the claim.

88 There is no doubt that Bishop & McKenzie has the potential of a claim.

89 By analogy to a salvage claim, if a solicitor creates a fund by winning a lawsuit, the solicitor is entitled to be paid out first from that fund: without the heavy lifting by the solicitor, the fund would not be available for the client or the client's creditors.

90 It is also clear that a solicitor doesn't have to "close" a file by starting it, taking it through pre-trial proceedings and trial, and obtaining a judgment before a claim can be recognized. Solicitors are entitled to be paid for all of their work that helped to produce a judgment or a settlement: *Caros Investments* is one example of abundant case law to this effect.

91 Did Bishop & McKenzie do the "heavy lifting" that produced the settlement?

92 As of January, 2001, Ms. Cochard's interest in the matrimonial home was protected by her legal interest in that property as was shown on title as a result of the efforts of Mr. Rand in 1997, rather than as a result of any work done by Bishop & McKenzie. There has never been any suggestion that Ms. Cochard was entitled to more than a one-half interest in the matrimonial home. Therefore, it may be that the Bishop & McKenzie firm did not do any work relative to that asset to preserve the asset for Ms. Cochard.

93 However, instinctively, one recognizes that, by instituting the matrimonial property case, Bishop & McKenzie's work protected Ms. Cochard's general interest in matrimonial property. The law firm is clearly entitled to the fees and disbursements connected to that work, including the assessment of Ms. Cochard's situation before Bishop & McKenzie issued a counter-claim on her behalf.

94 In addition to the filing of a Statement of Defence and Counter-claim, Bishop & McKenzie is entitled to be paid out of the settlement for work that was done towards obtaining a settlement, even though that work is not directly reflected in an order.

95 For example, the filing of the Notice to Disclose and the preparation of an offer of settlement are also standard at this stage. Similarly, work required relative to the filing of the affidavit of records must also be done at this stage.

96 However, some of the work undertaken by Bishop & McKenzie appears to have been undertaken only for the purpose of advancing Ms. Cochard's spousal support claim which survives the bankruptcy and is not captured by the settlement. That work is not directly connected to the settlement and Bishop & McKenzie cannot obtain a charge relative to that work.

97 Some of the work undertaken by Bishop & McKenzie appears to be related to restraining orders; that work, and work connected thereto such as work on contempt proceedings, is unrelated to the settlement. These are not services that can be charged against the settlement.

98 Some of the work done by Bishop & McKenzie was apparently done in relation to possible bankruptcy issues. That work was charged in late May, 2001 which was, of course, long before Ms. Cochard assigned herself into bankruptcy. It is difficult to imagine how the May 2001 services provided relative to bankruptcy could be related to the eventual settlement. Unless they can be characterized as having produced the settlement, they cannot be the subject of a charge.

99 Some of the work done by Bishop & McKenzie was apparently done in review of the enforceability of the settlement agreement of 1997. However, the settlement effected by the Trustee clearly does not include any reference to the $400,000 bank account in Belgium. Therefore, the services provided by Bishop & McKenzie relative to the assessment of the Belgium bank account is unrelated to the settlement and cannot be the subject of a charge.

100 Moreover, Bishop & McKenzie did not commence the action against Cynamon, or, apparently have anything to do with those proceedings. Nonetheless, the settlement also purports to include that claim.

101 In summary, in the absence of an agreement amongst the parties concerning the amount of the invoice rendered by Bishop & McKenzie up to the date of Ms. Cochard's bankruptcy which relates to the preservation of Ms. Cochard's property claim, further steps will have to be taken to settle this issue: a special form of taxation, or hearing by a referee, will determine which of the services provided by Bishop & McKenzie helped to produce the settlement. In additional support of this conclusion, I note that the *Solicitors Act 1860* speaks of a charge in relation to "taxed" costs.

d) Absent bankruptcy, what priority is granted to the solicitor who obtains a Rule 625 charge?

102 On the analogy of salvage, a solicitor who obtains a Rule 625 charge generally has a priority against every other creditor: if it were not for the work of the solicitor, there would be no fund available for anyone else's benefit. Therefore, it is fair that the solicitor should take her costs of creating that fund off the top of the settlement. However, it is important to emphasize, even in the context of a situation that does not involve bankruptcy, that the Rule 625 charge is a discretionary charge designed to allow the court to ensure fairness in the overall context. Among other issues to which it will address its mind, precisely because the granting of a Rule 625 charge can result in absolute priority, a court must be careful to ensure that only services that produced or protected the fund are charged against the fund.

e) Does the BIA affect entitlement to, and the terms of, a Rule 625 charge?

(i) Services rendered after the date of the bankruptcy

103 The first way in which Ms. Cochard's bankruptcy affects the potential entitlement of Bishop & McKenzie to a Rule 625 charge is the change of status relative to the property that was effected by the voluntary assignment into bankruptcy. The bankruptcy legislation itself essentially make the Trustee the new owner of all of Ms. Cochard's property, including her choses in action.

104 Since Ms. Cochard had no property of her own after she became a bankrupt, Bishop & McKenzie could not work for her on property issues.

105 One can imagine a situation in which a law firm would feel compelled to continue to assist a bankrupt where the law firm was of the view that the Trustee was not pursuing the bankrupt's interests. However, as indicated above in relation to the Berry creditors, s. 38 of the *BIA* was available to all creditors in June 2002. The scope of s. 121 of the *BIA* is extremely broad: on the date of her bankruptcy, Ms. Cochard did have a future contingent liability to Bishop & McKenzie. If Bishop & McKenzie were of the view that the Trustee was not doing anything to advance Ms. Cochard's property claims, the law firm — in its capacity as a creditor of Ms. Cochard — could have asked for the right to pursue Ms. Cochard's claims at its own expense. Such an application could at least have settled the issue of whether it had status to invoke s. 38. No such application was brought. Therefore, Bishop & McKenzie cannot now make any claim against the settlement fund for work done after Ms. Cochard's bankruptcy.

106 Therefore, the maximum claim that Bishop & McKenzie is entitled to make under a R. 625 application is for work done relative to Ms. Cochard's property claim up to June 26, 2002, or a maximum of a little less than $35,000. As indicated earlier,

from that maximum claim will have to be deducted the cost of services for purposes not connected to the settlement to reach a total of taxed costs of services performed to preserve Ms. Cochard's rights to matrimonial property.

(ii) Date of filing of claim

107 Where there is bankruptcy, solicitors face a problem concerning the timing of the perfection of their charge that they might not otherwise face. The *BIA* states that a Trustee can, using Form 76, make a demand of a secured creditor; such a demand imposes certain obligations on the secured creditor and makes that creditor vulnerable to actions by the Trustee if no response is given. In this case, the Trustee did not make such a demand of Bishop & McKenzie.

108 Therefore, the only timing issue in this case is the issue represented by s. 121 of the *BIA*. Pursuant to that section, even after a bankrupt goes into bankruptcy, ("liabilities . . . to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt *or to which the bankrupt may become subject before the bankrupt's discharge* by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt")a creditor can, until the bankrupt is discharged, or until there has been a distribution of the bankrupt's estate, file a proof of loss relative to a claim that originated prior to the bankruptcy but which crystallized after bankruptcy.

(iii) Does bankruptcy legislation prevent the court from making a R. 625 order?

109 The short answer to that question is, No.

110 *Evoy* specifically addresses this issue and comes to the following conclusion which I adopt:

> Moreover, even if the fruit or fund comes into existence, as is the case here, as property of the bankrupt after the bankruptcy, there is inherent power in the Court to exercise discretion and declare the fund charged as security for the solicitors' claim

111 The Trustee argues that the provisions of that Rule are not operational in a bankruptcy since allowing the Rule to operate would re-order priorities among creditors. With respect, I am of the view that this position fails to take into account the discretionary nature of a R. 625 charge. The potential exercise of that discretion to refuse a charge, or set priorities, or reduce the amount of the charge from the amount claimed are precisely the reasons why, until a solicitor has a charge, she has nothing. Two examples of the way in which the court's discretion could be exercised are given in the Atkinson text, and cited at para. 62 above: a court hearing an application for a R. 625 charge would ensure that the charge did not take priority over the trustee's right to indemnity out of the fund, and, if a court believed that a lawyer had abused the bankruptcy process to obtain priority, the court could obviously decline to grant the charge.

112 In addition to those ways in which the court's discretion might be exercised, in this case, the fact that Bishop & McKenzie ceased to act for Ms. Cochard in June 2004 might affect the court's decision as to whether the law firm is entitled to a charge. Atkinson states:

> . . . in the analogous case of a charging order under the 28th section of the *Solicitors Act 1860* (which has become the Rule 625 application in Alberta), the solicitor can obtain that order notwithstanding that he has discharged himself if the grounds upon which he retired from the case were reasonable.

This relates to the notion that "If the solicitor thinks fit to retire from the suit he has no claim to any special assistance from the Court: he is left to his ordinary remedy against his clients" as set out in Whitley Stokes. In this case, if the application for a R. 625 charge is pursued, it will be up to the court to determine whether Bishop & McKenzie has disentitled itself from obtaining such a charge because of the termination of its services to Ms. Cochard.

113 Moreover, assuming that the request for a R. 625 charging order is pursued, the court in this case will have to consider whether the preferred and unsecured creditors have been prejudiced by the decisions of the Inspector and Trustee to accept the proposed settlement before knowing that Bishop & McKenzie was making a claim to a considerable proportion of the entire estate of the bankrupt. In this context, the court will have to consider the fact that the Trustee was aware that Bishop & McKenzie

would be making a demand for payment "at the conclusion of the law suit", and that it therefore had notice that a Rule 625 application might be made.

114 In addition to considering the general fees of the Trustee relative to any eventual R. 625 charge, the court might also have to consider additional applications for R. 625 charges from other lawyers who may have contributed to the perfection of the fund. Although it appears that Mr. Oshry and Mr. Rand have been paid, the Trustee's lawyer may have a claim against the fund that was created through negotiations with Mr. Cochard's lawyer. Indeed, it would appear that the Trustee's lawyer's charge would take precedence over any charge that Bishop & McKenzie might have.

115 In broader terms, the scheme of distribution under the *BIA* as it relates to secured creditors is that the scheme of distribution contained in ss. 136 to 147 of the Act relates to all creditors except secured creditors. Secured creditors are entitled to realize on their security as if there were no bankruptcy. If it is granted, a Rule 625 charge grants to the person who holds it the status of a "secured creditor". Prior to the granting of a Rule 625 charge, a solicitor has nothing; therefore, the right of a solicitor to ask for a Rule 625 charge does not make the solicitor a "secured creditor" and the solicitor does not have any protection under the *BIA* system of priorities However, the granting of a R. 625 charge does not interfere with the priorities system established by the bankruptcy legislation. In summary, there is no operational conflict between the *BIA* and Rule 625.

116 While it is true that decisions such as *Evoy* and *Tots & Teens* do not discuss constitutional issues relating to the relative positions of provincial legislation (R. 625 charging orders) and federal legislation (the priority of secured creditors), it is not necessary to do so until there is a conflict between provincial and federal legislation. Preferred creditors know that, under the *BIA*, secured creditors have the right to realize on their security. The statement in s. 141 of the *BIA* that all claims proved in bankruptcy shall be paid rateably does not apply to secured creditors. If the Trustee had made a distribution of the bankrupt's property, or if there had been some other event which had prejudiced preferred or unsecured creditors, the court may have to consider constitutional issues. Indeed, because the court has not yet granted a R. 625 order, it may still consider whether its discretion should be exercised to grant a charge.

117 While Bishop & McKenzie did not have status as a secured creditor on the date of bankruptcy, there is nothing in the *BIA* which prevents a person who becomes a secured creditor after the date of the bankruptcy from filing in the bankruptcy; the only restrictions in the statute relate to the date of discharge and the date of distribution. If Bishop & McKenzie obtains a R. 625 order before the date of Ms. Cochard's discharge and before the date of distribution, they become a secured creditor.

118 In this context, it is important to note that the Trustee had notice, from the time of its correspondence with Bishop & McKenzie leading up to the September 2002 letter, but did not then, and has not until the date of this application, give a s. 128 notice to Bishop & McKenzie.

119 Thus, this is not one of the situations that is affected by "the quartet". As Gonthier J. put it in *Husky Oil Operations Ltd.*:

> The *Bankruptcy Act* defines 'secured creditor' in s. 2, but defers to provincial law for the purpose of creating secured claims.

e) In all the circumstances here, is Bishop & McKenzie entitled to a R. 625 charge for the services performed by them up to June 26, 2002, for Ms. Cochard in relation to Ms. Cochard's property claim?

120 For the reasons set out earlier, the court is not in a position, today, to grant a Rule 625 charge to Bishop & McKenzie. The law firm's application is adjourned until the matter can be referred to a referee who will report back to the court on the cost of the services provided by the law firm prior to June 26, 2002 that were directly related to the settlement. At that time, the court will receive additional submissions concerning all of the other matters that a court must take into account in determining whether a R. 625 charge should be granted, in the circumstances here, to Bishop & McKenzie.

f) In the absence of a specific R. 625 charge, is Bishop & McKenzie a secured creditor within the meaning of the BIA?

121 The short answer to this question is, No. Case law establishes that, until a R. 625 charge is granted, Bishop & McKenzie is not a secured creditor in Ms. Cochard's bankruptcy. In other words, on the date of its filing of a proof of loss, Bishop & McKenzie was not a secured creditor. It is still not a secured creditor.

122 Bishop & McKenzie argues that the creation of a R. 625 is, in many ways, a formality, and that solicitors have inchoate rights which are merely recognized, not created, by the courts. The law firm relies on the following extract from Atkinson:

> It is now the received doctrine that all persons dealing with a fund obtained by litigation must be taken to be aware that it is subject to the deduction of the costs to be paid to the solicitor who has conducted the litigation which has been successful, and that it is always right to make the order in favour of the solicitor unless he has been guilty of some *mala fides* and has "stood by" while the fund was being dealt with so as unfairly to prejudice the position of others.

123 With respect, the facts in this case demonstrate why the granting of a charge is not a mere formality: first, the process of determining what services are directly referable to the fund can be relatively complex, and second, the court might have to determine whether the approval of the settlement by the Trustee and the Inspector in circumstances where the law firm did not make a R. 625 application when alerted by the potential to do so can be said to have unfairly prejudiced the position of the other creditors.

5. Conclusion

124 The Trustee's request for the court's approval of the proposed settlement is granted. As of this date, Bishop & McKenzie does not have a charge against the $85,000 matrimonial property settlement; as of today, Bishop & McKenzie is not a secured creditor of Darlene Cochard. Bishop & McKenzie's application for a Rule 625 charging order is referred to a referee (a Taxing Officer or Master) to report on the services by Bishop & McKenzie which helped to produce the settlement.

6. Costs

125 If the parties are not agreed on costs, I may be spoken to within 30 days of the release of this decision.

Order accordingly.

APPENDIX — "A"

THIS AGREEMENT made this _________ day of _________, 2001.

BETWEEN:

BISHOP & McKENZIE, Barristers and Solicitors, of 2500, 10104-103 Avenue in the City of Edmonton, in the — Province of Alberta (hereinafter referred to as the "Solicitors")

— and

DARLENE AGATHA COCHARD, of the City of Edmonton in the Province of Alberta, (hereinafter referred to as the "Client")

<u>RETAINER AGREEMENT</u>

WHEREAS:

A. The Client has retained the services of the Solicitors herein to represent and pursue her legal interests arising with respect to a divorce and matrimonial property action including the issues of spousal support, division of property and costs (hereinafter referred to as the "Action").

B. The Client has requested the Solicitors to represent her on the issues of spousal support, division of property, and costs but is unable to provide an adequate retainer fee and, at the present time, is unable to pay accounts rendered on a monthly basis.

C. The Solicitors have undertaken to act on behalf of the Client with respect to the issues named in paragraph B on the basis set forth in this Agreement.

IT IS HEREBY COVENANTED AND AGREED AS FOLLOWS:

1. The Solicitors shall diligently and faithfully prosecute the claim in the best interests of the Client, if necessary to trial, and the Client authorizes the Solicitors to take any proceedings and do any acts which in their opinion may be necessary and advisable for this purpose.

2. The Solicitors shall be entitled to receive verbally, either in person or by telecommunication, or in writing, and to act upon instructions, including authority to settle the Action, from the Client.

3. The Client agrees to pay the Solicitors compensation for attending to these matters on behalf of the Client as follows:

(a) all reasonable legal fees based upon the Solicitors' usual hourly rate including the usual hourly rate or rates of every person associated with the Solicitors who has provided services in relation to this Action multiplied by the number of hours each person has spent working on the prosecution of this Action, or any matter directly or indirectly related to the prosecution of this Action, but also taking into account:

(i) the nature of the matter, including its difficulty and urgency; its importance to the client; its monetary value; and the need for special skills or services;

(ii) the time and effort expended;

(iii) the results obtained;

(iv) the customary charges of other lawyers of equal standing in the locality in similar matters and circumstances;

(v) any other relevant factors.

(b) the Client agrees to provide such security for payment of such fees and for disbursements as the Solicitors; in their discretion acting reasonably, deem necessary; and

(c) the Client agrees to pay interest on the balance of such fees and disbursements outstanding from time to time calculated monthly at the rate of 1.5 % per month.

4. In addition to the foregoing, the Solicitors shall be paid, as part of the compensation, any taxable costs that may be recovered by way of settlement, or by way of taxation in the event that legal proceedings are necessary. Taxable costs shall be paid to the Solicitors forthwith upon recovery of such costs.

5. Should any monies be paid to the Client on a periodic basis as a result of the Solicitors' representation herein; whether such monies represent spousal support, an advance on property, a partial property division, or costs, the Solicitors. shall be paid from such funds for any outstanding accounts according to paragraph 3 herein.

6. It is understood and agreed that the fees indicated in paragraph 3 do not include any Provincial or Federal levies or taxes of any kind, including, but not restricted to, the Federal Goods and Services Tax (G.S.T.), which will be an additional charge to the fees quoted herein and which will be billed and submitted to the government pursuant to the regulations under the appropriate legislation.

7. The Client shall be responsible for all disbursements, which in the sole discretion of the Solicitors are deemed necessary and expedient, paid on behalf of the Client by of the Solicitors throughout the course of this Action, together with any tax levied thereon, and the Client will be required, from time to time, to place sufficient funds on retainer to satisfy the disbursements which have been or may be, incurred. The Solicitors may, render interim disbursement accounts to the Client for payment of same from time to time:

8. Any outstanding disbursements expended by the Solicitors on behalf of the Client shall be repaid to the Solicitors out of funds recovered.

9. The Client shall not be liable to pay the Solicitors any compensation other than as provided for in this Agreement. The only exception is where this Agreement has been terminated by either party prior to the conclusion of this Action. In that case the remuneration payable to the Solicitors is set out in paragraphs 14, 18 and 19 below.

10. The Solicitors shall not be responsible for any party and party costs or solicitor and client costs that may be awarded against the Client in this matter. Such costs shall be treated as disbursements for the purposes of this Agreement.

11. The Solicitors are authorized to deduct from the proceeds of any settlement or judgment, and pay any expert fees and other expenses relating to this matter.

12. It is understood and agreed between the parties that this Agreement does not deal with remuneration of the Solicitors acting on the Client's behalf in any appeal which may be brought by the Client or by any other party involved or interested in the lawsuit.

13. In the event that the Action is settled by the Client without the consent of the Solicitors, the Client agrees to pay fees to the Solicitors as provided in paragraph 3 hereof, and if by the terms of the said settlement it is agreed that the Client's legal fees will be paid, such fees shall be paid directly to Bishop & McKenzie.

14. This Agreement may be terminated by the Solicitors at any time, if, in their opinion, the Client does something to prejudice the Solicitors' efforts to effect recovery on behalf of the Client, such as, but not restricted to, failing to provide the Solicitors with instructions in a timely fashion or rejecting a settlement offer that the Solicitors view as being fair and reasonable. In the event of termination, the Client shall be responsible to pay all reasonable legal fees and disbursements incurred to that point in time calculated at the Solicitors' usual hourly rate.

15. This Agreement cannot be assigned by either party without the consent of the other. In the case of an assignment by the Client, the Client shall, unless otherwise specifically agreed to in writing, pay to the Solicitors a fee equal to the usual hourly rate or rates of every person associated with the Solicitors who has provided services in relation to this Action multiplied by the number of hours each person has spent working on the prosecution of this Action, or any matter directly or indirectly related to the prosecution of this Action. This fee is payable immediately before assignment or release of the Client's file by the Solicitors. Notwithstanding the foregoing, in the event that the amount the Solicitors would have received based on paragraph 3 and 4 herein, and the other provisions of this Agreement exceeds the fee the solicitors would be entitled to based on their usual hourly rates, the excess shall be paid by the Client to the Solicitors upon receipt of the settlement or judgment funds.

16. The Client shall be entitled to terminate this Agreement at any time and in that event:

(a) the Client shall be responsible for paying all reasonable legal fees and disbursements incurred to that point in time calculated at the Solicitors' usual hourly rate including the usual hourly rate or rates of every person associated with the Solicitors who has provided services in relation to this Action multiplied by the number of hours each person has spent working on the prosecution of this Action, or any matter directly or indirectly related to the prosecution of this Action, but also taking into account:

(i) the nature of the matter, including its difficulty and urgency; its importance to the client; its monetary value; and the need for special skills or services;

(ii) the time and effort expended;

(iii) the results obtained;

(iv) the customary charges of other lawyers of equal standing in the locality in similar matters and circumstances;

(v) any other relevant factors.

(b) in the event, the Solicitors are not paid such fees and disbursements or any part thereof prior to the Client retaining another barrister and solicitor with respect to the Action, the Solicitors shall be entitled:

(i) to receive such security for the payment of such fees and disbursements as the Solicitors, in their discretion acting reasonably, deem necessary; and

(ii) to be paid interest on the balance of such fees and disbursements outstanding from time to time calculated monthly at the rate of 1.5 % per month.

17. This Agreement may be reviewed by the Clerk of the Court at the Client's request and may either at the instance of the Clerk of the Client be further reviewed by a Judge of the Court of Queen's Bench and either the Clerk or the Judge may vary, modify or disallow the Agreement.

18. This Agreement shall be binding on the respective parties hereto, their heirs, executors, administrators, successors and assigns.

IN WITNESS WHEREOF the parties have hereunto affixed their signatures at the City of Edmonton, in the Province of Alberta, this 2 nd day of February, 2001.

BISHOP & McKENZIE

Per: "Doris I. Wilson"

Doris I. Wilson

"Sandra Ducka" Witness

D. Cochard:

CLIENT

ADDRESS: 10234 Churchill Cres.

Edmonton AB

T5N 3H8

APPENDIX — "B"

Court No.: 24-97400

Estate No.: 24-097400

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF EDMONTON

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY OF

DARLENE AGATHA COCHARD

SUPPLEMENTARY REPORT OF THE TRUSTEE

Introduction

A fundamental purpose of Canadian bankruptcy legislation is to give honest but unfortunate debtors the opportunity for a fresh start. That is accomplished in part by an orderly and fair distribution of the debtor's assets among his or her legitimate creditors.

In this case, Ms. Cochard has not been honest and her bankruptcy is an attempt to flow her assets through to her and an illegitimate creditor, Keith Berry. This bankruptcy is an attempt by Ms. Cochard and Mr. Berry to perpetrate a fraud on the Court, on the Trustee and on the legitimate creditors.

In this situation, the Trustee recommends that the Court make an order annulling the bankruptcy to strip away all advantage or benefit Ms. Cochard and Mr. Berry would otherwise obtain.

The major assets

So far as the Trustee has been able to determine, Ms. Cochard had three main assets at the date of bankruptcy (June 26, 2002):

a. A one-half interest in the former matrimonial home (the "Glenora House");

b. A claim (Q.B. Action 4803 119712) against Pierre Cochard under the Matrimonial Property Act for redistribution of matrimonial property;

c. A claim (Q. B. Action 0203 12026) against Henri Cynamon and 107088 Investments Ltd. for damages and an accounting in respect of two joint ventures formed to own and operate some real property in Edmonton.

Ms. Cochard had a statutory duty to make complete disclose of her assets through the Statement of Affairs she swore on June 25, 2002. Mr. Berry was actively involved in providing information to the Trustee that was used to prepare that Statement of Affairs. It is clear that Mr. Berry was also instrumental in advising Ms. Cochard and instructing counsel in relation to the claims against Pierre Cochard, Henri Cynamon and 107088 Investments Ltd.

The claim advanced against Henri Cynamon and 107088 Investments Ltd. includes a claim for damages of $1,250.000. In the claim against Pierre Cochard, the major asset in issue is apparently a bank account in Belgium said to be holding in excess of $300,000. Prior to the bankruptcy, Mr. Berry and Ms. Cochard told the Trustee one reason for the bankruptcy was to create a basis on which a matrimonial property settlement agreement could be set aside. However the Trustee does not have sufficient information to comment on the merits or to evaluate either of those claims initiated by Ms. Cochard.

If no objection to her discharge had been raised, Ms. Cochard would have been automatically discharged during March of 2003 and the Trustee in the normal course of events would have been discharged shortly thereafter. Ms. Cochard and Mr. Berry were aware of that usual timing and the Trustee believes their intention was to proceed with those claims once Ms. Cochard and the Trustee were discharged.

The Glenora House and the Royal Bank Foreclosure Action

The Glenora House was jointly owned by Pierre Cochard and Ms. Cochard. Early in 2001, Mr. Berry and Ms. Cochard began living together in that house.

The first mortgage over the Glenora House was held by Royal Bank. At some point, the parties stopped making mortgage payments and during October of 2001 Royal Bank started a foreclosure action (Q. B. Action 0103 22298). On December 11, 2001, Royal Bank obtained an Order Nisi/Order for Sale with a redemption. period expiring June 11, 2002.

A few days before the bankruptcy, Mr. Berry launched an application for an order permitting him to purchase the property for $210,000. On July 17, 2002 the Court made an order permitting him to purchase the property for $240,000.

On July 20, 2002 Mr. Berry listed the Glenora House for sale with two realtors for $369,000 and the same day the realtors presented an offer to purchase the property for $375,000. Mr. Berry accepted that offer on July 23, 2002. Meanwhile, on July 21, 2002, Mr. Berry made an offer to purchase a house near Fort Saskatchewan (the "Lamoureaux House") for $244,500 which was accepted by the vendor.

In due course, Mr. Berry's purchase and re-sale of the Glenora House and his purchase of the Lamoureaux House completed. Both of Mr. Berry's purchases were financed by mortgages from Royal Bank and at the end of the day:

a. Mr. Berry's purchase of the Glenora House produced net sale proceeds of $112,353.75, of which $56,176.87 was paid to the Trustee and $56,176.88 was paid to Pierre Cochard;

b. Mr. Berry made a profit on the re-sale of $135,000, none of which has been accounted for in the bankruptcy;

c. Mr. Berry is the registered owner of the Lamoureaux House subject to a mortgage to Royal Bank for $183,675.

Of the $56,176.87 paid to the Trustee, Ms. Cochard claims $20,000 as exempt proceeds and Mr. Berry claimed the balance as a secured creditor. Ms. Cochard has testified that upon receiving the $20,000, she will give it to Mr. Berry and have her name added to the title to the Lamoureaux House.

Ms. Cochard and Mr. Berry did not disclose any of those transactions to the Trustee. Prior to the bankruptcy, the Trustee discussed with Ms. Cochard and Mr. Berry the fact that Royal Bank was in a position to have the Glenora House offered for judicial sale but they did not indicate they had any plans.

Ms. Cochard's debts

Ms. Cochard's creditors fall into five categories:

First, Royal Bank and City of Edmonton were secured creditors arising from the mortgage and unpaid property taxes in relation to the Glenora House. Both of those creditors were paid when that property was purchased by Mr. Berry.

Second, Mr. Berry and a company owned by him filed Proofs of Claim totalling in excess of $162,000. They claimed to be secured creditors under an elaborate set of debt instruments and security documents, all of which were prepared by Mr. Berry. The Trustee issued Notices of Disallowance in respect of the security and in respect of the claims. Mr. Berry and his company have disputed the disallowances of their claims but not the disallowances of their security. Thus, Mr. Berry and his company still seek to rank as unsecured creditors and if those claims are allowed, they will be by far the largest unpaid creditors.

Third, a number of friends or acquaintances of Ms. Cochard have filed Proofs of Claim which total $11,535, all unsecured.

Fourth, Pierre Cochard has filed a Proof of Claim for $2,000, unsecured. Mr. Cochard has also filed an objection to Ms. Cochard's discharge.

Fifth, five credit card companies have filed Proofs of Claim which total $55,127.46, all unsecured. In addition to those unpaid credit cards, the telephone and utilities to the Glenora House went unpaid and those service providers have filed Proofs of Claim totalling $3,830.54.

In the result, if the claims of Mr. Berry and his company are allowed to stand, they would be entitled to approximately 70% of any dividends paid by the estate.

<u>Indicia of Fraud</u>

As indicated in the initial Section 170 Report, the Trustee has been investigating the circumstances surrounding the debts and the security claimed by Mr. Berry and his company and Mr. Berry's purchase and re-sale of the Glenora House. From the information obtained thus far, the Trustee has concluded the claims are bogus and that the purchase and re-sale, together with the false security, are parts of a scheme by Ms. Cochard and Mr. Berry to capture the majority of the substantial equity in the Glenora House. Mr. Berry and Ms. Cochard deny any such scheme but the Trustee believes there are indications of their fraudulent intent:

1. Ms. Cochard and Mr. Berry do not deal at arm's length. They have been living together since early 2001 and Ms. Cochard has referred to Mr. Berry as her fiance. Further, Mr. Berry has been extensively and intimately involved in the conduct of her affairs. Ms. Cochard has testified that Mr. Berry worked 12 to 16 hours a day on her legal affairs.

2. Ms. Cochard has lied about the indebtedness. According to the Proofs of Claim, Mr. Berry and his company were owed over $126,000 as of March 1; 2002. However, on that date Ms. Cochard swore under oath that her only debts were the credit card debts, the Royal Bank mortgage over the Glenora House and the unpaid property taxes on that house. That sworn statement was prepared by Ms. Cochard's lawyer who presumably did not knowingly prepare a false statement for her to sign.

3. The debt is unbelievable. The majority of the debt arises under a Consulting Agreement under which Ms. Cochard agreed to pay Mr. Berry's company $6,000 per month as and from January of 2001 for "consulting services". At the same time Ms. Cochard claims to be destitute. Much of the balance of the debt is nothing more than payment by Mr. Berry of joint living expenses during the period he was living rent free in the Glenora House.

4. The debt instruments and security documents are suspicious. Those elaborate and self-serving documents were all prepared by Mr. Berry and signed by Ms. Cochard without the involvement of lawyers or witnesses.

5. The security documents were hidden. Those documents were not registered in any public office until a few days before the bankruptcy. They were not mentioned in the statement sworn by Ms. Cochard on March 22, 2002, a statutory declaration sworn by Ms. Cochard on June 17, 2002 nor the Statement of Affairs sworn the day before bankruptcy. The Trustee was not told of the security until Mr. Berry filed Proofs of Claim for himself and his company.

6. The Trustee disallowed the security as bogus and was not challenged. Those documents are all dated during January or February of 2001 and Ms. Cochard testified they were signed by her at that time. However, the Trustee disallowed the security on the basis, inter alia, that the security had been given within one year of the bankruptcy and created a fraudulent preference. Neither Mr. Berry nor his company challenged those disallowances and that issue is res judicata.

7. Ms. Cochard was not in fact insolvent. On June 17, 2002 Ms. Cochard swore a statutory declaration which was prepared by Mr. Berry. The statutory declaration was presented to Ms. Cochard's creditors to induce them to write off 60% of the amounts they were owed. In that statutory declaration, Ms. Cochard represented her equity in the Glenora House was less than $30,000, calculated as follows:

$195,000	market value
(118,108)	Royal Bank mortgage
<u>(7,908)</u>	unpaid property taxes

$ 68,984	Total equity as represented

In fact, that house was sold less than five weeks later for $375,000, indicating her equity was almost $123,000, calculated as follows:

$375,000	sale price
(116,043)	actual payment of Royal Bank mortgage
(7,928)	actual payment of property taxes
(5,071)	legal and other costs actually paid
$245,958	Total actual equity

Two days after swearing that statutory declaration Ms. Cochard issued her Statement of Claim against Mr. Cynamon and 107088 Investments Ltd. She has testified she expected the properties involved in that claim to be a source of money to pay the "consulting fees" to Mr. Berry's company but did not see fit to mention that claim as an asset in that statutory declaration. Nor did she mention her intention of using bankruptcy proceedings as a basis for setting aside the matrimonial property settlement agreement.

8. Mr. Berry selectively disclosed important information about the Glenora House. During April of 2001, Mr. Berry obtained an inspection report on the Glenora House which showed it was in need of certain repairs. During June and July of 2002, Mr. Berry obtained three appraisal reports and ensured the appraisers were aware of the inspection report and other "problems" with the house. However, Mr. Berry did not disclose that information to the realtors with whom he listed the house, nor to the people who purchased the house from him, nor to the appraiser who appraised the house for the purchaser.

9. The explanation for the sale of the Glenora House is not believable. Ms.Cochard has testified it was curiosity that caused Mr. Berry to deal with the realtors two days after obtaining Court approval to purchase the Glenora House. However, the day after listing the house at $369,000, Mr. Berry was ready and willing to purchase the Lamoureaux House.

The claims against Pierre Cochard and Henri Cynamon

These two claims are related. Mr. Cochard and Mr. Cynamon are said to be members of both of the joint ventures alleged by Ms. Cochard. The Chez Pierre business is said to be a tenant of one of the joint ventures. Mr. Cochard is apparently the majority shareholder of that business with Ms. Cochard holding 1 % of the shares. The money in the Belgian bank account presumably came from the operations of those joint ventures or the Chez Pierre business.

The Trustee does not see how it would ever be in a position to fully evaluate and enforce the claims initiated by Ms. Cochard. Further, the Trustee notes that to the extent either of the claims produce any recovery in the estate, Mr. Berry will be claiming that money for himself and his company until his claims are fully paid. And if the claims produce a surplus in the estate, that surplus would be in due course payable to Ms. Cochard.

In the Trustee's view it is unlikely there will ever be any significant benefit to Ms. Cochard's legitimate creditors by having the Trustee expend estate resources evaluating and enforcing those claims. It makes no business sense to have the Trustee in the middle of disputes between the real plaintiffs and the real defendants.

The profit from the re-sale of the Glenora House

The estate has a cause of action against Mr. Berry for one-half of the $135,000 profit from the re-sale of the Glenora House. However, if the bankruptcy is annulled, there is no reason why the legitimate creditors would not be entitled to pursue that action for their own benefit. The Trustee does not see how the legitimate creditors are more likely to benefit from having the Trustee conduct such an action.

Further, Pierre Cochard no doubt has a cause of action in respect of the other one-half of the profit. That simply shows the degree to which the claims and cross-claims between the real plaintiffs and the real defendants are intertwined and the degree of difficulty the Trustee would have in unwinding those matters.

Recommendation

The Trustee has concluded this bankruptcy is a sham created for an improper purpose. Ms. Cochard does not need the protection of Canadian bankruptcy legislation to protect her from the claims of her common law spouse and his company. Ms. Cochard should be returned to the situation where she must deal directly with her legitimate creditors. !f she believes she has valuable claims against Pierre Cochard, Henri Cynamon and 107088 Investments Ltd., she, with the assistance of Mr. Berry, can litigate those claims to their hearts content.

Accordingly, the Trustee requests that the Court make an order under Section 181 of the *Bankruptcy and Insolvency Act* annulling this bankruptcy. In doing so it would be appropriate far the Court to give directions as to the disposition of the funds paid to the Trustee from Mr. Berry's purchase of the Glenora House.

All of which is respectfully submitted this 22nd day of September, 2003.

A.C. WARING & ASSOCIATES INC

Trustee of the estate of Darlene Agatha Cochard in bankruptcy

Per: Arthur C. Waring

Arthur C. Waring

Footnotes

* Additional reasons at *Cochard, Re* (2005), 2005 ABQB 870, 2005 CarswellAlta 1738 (Alta. Q.B.).

TAB 3

2003 CarswellOnt 3514
Ontario Superior Court of Justice

Wiggins, Re

2003 CarswellOnt 3514, [2003] O.J. No. 3685, [2003] O.T.C. 837, 125 A.C.W.S. (3d) 563, 50 C.B.R. (4th) 306, 67 O.R. (3d) 133

IN THE MATTER OF the Consumer Proposal of Sally Teresa Wiggins

Swinton J.

Heard: September 16, 2003
Judgment: September 18, 2003
Docket: 31-388321

Counsel: Sanjeev P.R. Mitra for Administrator
Valerie Anderson for Superintendent of Bankruptcy

Headnote
Bankruptcy and insolvency --- Proposal — Consumer proposals
Debtor failed to make payments under consumer proposal for three months and then resumed payments and made up arrears — Pursuant to s. 66.31(1) of Bankruptcy and Insolvency Act debtor's consumer proposal was deemed annulled — Administrator of consumer proposal nevertheless allowed debtor to pay arrears and continued to make distributions to creditors as if consumer proposal remained in effect — Administrator brought application for declaration that court had inherent jurisdiction to waive default in consumer proposal more than three months following default — Application dismissed — Inherent jurisdiction cannot be exercised if exercise conflicts with provisions of Act — Section 66.31 deals specifically with what follows if consumer debtor is in default in payments for three months and makes it clear that consumer proposal is deemed annulled unless court has ordered otherwise or unless amendment to proposal has been filed before three-month period expires — Court did not have inherent jurisdiction to waive debtor's default and to set aside deemed annulment of her consumer proposal in view of express terms of Act.

***Swinton J.*:**

1 The Administrator of the Consumer Proposal of Sally Teresa Wiggins and other individuals listed in Schedules A, B and C of the Motion Record sought a declaration that this Court has the inherent jurisdiction to waive default in a consumer proposal more than three months following the default and for other relief.

2 Section 66.31(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, provides:

> Independently of section 66.3,
>
> > (a) where payments under a consumer proposal are to be made monthly or more frequently and the consumer debtor is in default to the extent of three months payments, or
> >
> > (b) where payments under a consumer proposal are to be made less frequently than monthly and the consumer debtor is in default for more than three months on any payment,
>
> the consumer proposal shall thereupon be deemed to be annulled unless the court has previously ordered otherwise or unless an amendment to the consumer proposal has previously been filed, and the administrator shall forthwith so inform the creditors and file a report thereof in the prescribed form with the official receiver.

3 In this case, Ms. Wiggins failed to make payments for three months. She then resumed payments and made up the arrears. However, pursuant to s. 66.3(1), her consumer proposal was deemed annulled. Nevertheless, the Administrator allowed her to pay the arrears and has continued to make distributions to creditors as if the consumer proposal remained in effect.

4 Mr. Justice Ground approved the omnibus procedure for this motion, which groups individuals like Ms. Wiggins in Schedule A and seeks an order waiving the default and setting aside the deemed annulment. Schedule B includes individuals who were in arrears over three months and who are making progress to make up the arrears. The Administrator seeks an order of waiver of the default, the setting aside of the deemed annulment and filing of an amended proposal, or the granting of leave to file a second consumer proposal. Finally, Schedule C consists of individuals who were in arrears over three months and who made unsuccessful attempts to catch up. An order is sought with respect to the distribution of funds held by the Administrator which were received after the deemed annulment.

5 Decisions of the Registrar in both Nova Scotia and Ontario have held that there is no specific authority under the *BIA* to allow a court to waive the default by the debtor following the deemed annulment of a consumer proposal (*Schrader, Re* (1999), 13 C.B.R. (4th) 256 (N.S. S.C.); *Dziewiacien, Re* (2002), 37 C.B.R. (4th) 250 (Ont. S.C.J.)). Deputy Registrar Nettie in *Dziewiacien, Re* held that s. 187(11) of the Act does not permit the court to extend a time period in the Act where there has been an intervening statutory event consequent upon default. That decision was not appealed.

6 Section 183(1) of the Act vests the Superior Court of Justice in Ontario and the named courts in other jurisdictions with "such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy". The Administrator argued that this section confers inherent jurisdiction on this Court, which should be exercised in this case to waive the default and set aside the deemed annulment under the Act for debtors in Schedule A and B. Counsel for the Superintendent agreed with this position, based on the facts before me in this motion.

7 The Bankruptcy Court may authorize and sanction acts required to be done by a trustee for the due administration and protection of the bankrupt estate, even though there is no specific provision in the Act (*Tlustie, Re* (1923), 3 C.B.R. 654 (Ont. S.C.)). However, inherent jurisdiction can not be exercised if the exercise conflicts with the provisions of the Act (*Wasserman, Arsenault Ltd. v. Sone* (2000), 22 C.B.R. (4th) 153 (Ont. S.C.J. [Commercial List]), aff'd (2000), 33 C.B.R. (4th) 145 (Ont. C.A.)). Here, s. 66.31 deals specifically with what follows if the consumer debtor is in default in payments for three months: the consumer proposal is deemed annulled unless the court has ordered otherwise or unless an amendment to the proposal has been filed *before* the three month period expires.

8 In my view, there is no inherent jurisdiction to waive a default like that of Ms. Wiggins and to set aside the deemed annulment of her consumer proposal, given the express terms of the Act. While Ontario courts may have granted the relief sought in this motion prior to the decision in *Dziewiacien, Re*, in my view, they had no inherent jurisdiction to do so.

9 Given that individuals like Ms. Wiggins and those in Schedule A have continued to make payments as if the consumer proposal were still in effect, and the Administrator has continued to make distributions, leave is given to this group to file a second consumer proposal, and I order that they are entitled to the relief in ss. 69-69.2. Given the payment history since the default, it appears that there is a reasonable prospect of the new proposal being accepted by the creditors.

10 Given the history of the Schedule B debtors, I also grant leave to this group to file a second consumer proposal, and I order that they are entitled to the relief in ss. 69-69.2 for the same reason.

11 With respect to Schedule C, the Administrator has asked for directions with respect to the distribution of funds which it received after the deemed annulment. According to *White, Re* (2001), 31 C.B.R. (4th) 128 (N.S. S.C.), those funds should be distributed to the creditors.

Application dismissed.

TAB 4

2015 MBQB 85
Manitoba Court of Queen's Bench

Pitblado LLP v. Houde

2015 CarswellMan 269, 2015 MBQB 85, [2015] 11 W.W.R. 165,
[2015] M.J. No. 151, 255 A.C.W.S. (3d) 263, 318 Man. R. (2d) 39

Pitblado LLP, Plaintiff and Penny Lynne Houde, Defendant

Bond J.

Judgment: May 15, 2015
Docket: Winnipeg Centre CI 13-01-81739

Counsel: Thomas W. Turner, for Plaintiff
Sean C. Brennan, Brenden D. Collins (Student-at-Law), for Defendant

Headnote
Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy — Fraudulent and illegal transactions — Reviewable transactions under Act
Husband and wife jointly owned $100,000 house subject to $13,278.34 mortgage — In June 2009, husband transferred his half interest to wife for one dollar — In June 2012, creditor obtained $14,967.21 judgment against husband — In September 2012, husband made assignment into bankruptcy — Creditor brought action against wife to set aside transfer as undervalue transfer under s. 96 of Bankruptcy and Insolvency Act — Wife brought motion for summary judgment dismissing action on basis that version of s. 96 in force at time of transfer did not give rise to cause of action — Motion dismissed — While current version of s. 96 came into force after transfer, it applied to prior transfer as result of husband's September 2012 assignment — Act had no impact on wife's property rights until husband assigned himself into bankruptcy, whereupon provisions of Act in force at that time became applicable and review of prior transfer was triggered — Application of current version of s. 96 to prior transfer was not retrospective application — Presumptions against retrospective application and legislative interference with vested rights were each rebutted — Both prior and current versions of s. 96 of Act interfered with vested rights, as was intended — There was serious issue to be tried as to whether transfer was at undervalue and there was insufficient evidence to make proper determination on summary application.
Statutes --- Retroactive and retrospective operation — Rebutting presumption — Intention of legislature — Specific words
Husband and wife jointly owned $100,000 house subject to $13,278.34 mortgage — In June 2009, husband transferred his half interest to wife for one dollar — In June 2012, creditor obtained $14,967.21 judgment against husband — In September 2012, husband made assignment into bankruptcy — Creditor brought action against wife to set aside transfer as undervalue transfer under s. 96 of Bankruptcy and Insolvency Act — Wife brought motion for summary judgment dismissing action on basis that version of s. 96 in force at time of transfer did not give rise to cause of action — Motion dismissed — While current version of s. 96 came into force after transfer, it applied to prior transfer as result of husband's September 2012 assignment — Act had no impact on wife's property rights until husband assigned himself into bankruptcy, whereupon provisions of Act in force at that time became applicable and review of prior transfer was triggered — Application of current version of s. 96 to prior transfer was not retrospective application — Presumptions against retrospective application and legislative interference with vested rights were each rebutted — Both prior and current versions of s. 96 of Act interfered with vested rights, as was intended — There was serious issue to be tried as to whether transfer was at undervalue and there was insufficient evidence to make proper determination on summary application.

***Bond J.*:**

Background

1 Laurence and Penny Houde jointly owned property located at 373 Lipton Street, in Winnipeg. On June 17, 2009, Laurence Houde ("Laurence") transferred his half interest in the property to his wife Penny ("the defendant") for "One Dollar and other good and valuable consideration" ("the transfer"). On June 27, 2012, Pitblado LLP ("the plaintiff") was granted judgment against Laurence in the amount of $14,967.21, plus costs in the amount of $2,825. On September 4, 2012, Laurence made an assignment in bankruptcy. The plaintiff is seeking to have the transfer set aside as a transfer at undervalue under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

2 The value of the property at the time of the transfer was estimated to be $100,000. There was mortgage security held against the property in the amount of $13,278.34. The estimated equity was $86,721.66 with the valuation of the transferred half interest being worth $43,360.83.

3 In 2013, the plaintiff obtained an order allowing it to commence and prosecute an action in its own name to set aside the transfer. In its statement of claim, the plaintiff claims that the transfer was carried out at an insufficient value contrary to section 96 of the *BIA*. The plaintiff contends that the transfer occurred when Laurence was insolvent or resulted in Laurence becoming insolvent, and/or was intended by Laurence to defraud, defeat or delay his creditors. The claim refers specifically to section 96 of the *BIA* and is set out in the language of the current section 96 of the *BIA*.

4 The defendant's position is that she gave good and valuable consideration to Laurence sufficient to validate the transfer. She says that she supported Laurence and provided for his financial needs and living expenses from 2000 to 2008. She also says that she loaned him money in the amount of approximately $15,000. In addition, following the transfer, she took out a mortgage on the property in the amount of $55,791.12 and used some of that money to pay off debts accumulated by Laurence and for home renovations. In reply, the plaintiff says that the payment of debts and other expenses that the defendant claims to be consideration for the transfer constituted payment of debts and expenses for which she would have been jointly responsible and, therefore, was not consideration for the transfer.

5 The plaintiff has moved for summary judgment on the basis that the defendant has not demonstrated an issue to be tried because the payment of debts and other expenses claimed as consideration for the transfer cannot actually be consideration. The plaintiff's summary judgment motion was deferred pending the hearing of the defendant's motion for summary judgment.

6 The defendant has moved for summary judgment on the basis that the plaintiff has pleaded section 96 of the *BIA* and that this section *as it was in force at the time of the transfer* does not give rise to a cause of action. The defendant says that the section 96 of the *BIA* that is currently in force and is relied upon by the plaintiff was not in force at the time of the transfer and, therefore, is not applicable in this case ("the current section 96").

Issues

7 This motion for summary judgment raises three issues:

Issue #1: When did the current section 96 come into force?

8 Counsel were not in agreement regarding the date of coming into force of the current section 96. After considering the submissions of counsel, I conclude that the current section 96 came into force on September 18, 2009.

9 Chapter 47 of the Statutes of Canada 2005 ("chapter 47") made amendments to the *BIA* and replaced section 96 of the *BIA* with a newly worded section 96 and section 96.1. These amendments were to come into force on a day to be fixed by order of the Governor in Council. They were never proclaimed in force. Chapter 36 of the Statutes of Canada 2007 ("chapter 36") replaced both of the un-proclaimed sections 96 and 96.1 in chapter 47 with a newly worded section 96. The section of chapter 36 that provided for the replacement of the 2005 provisions in chapter 47 with the 2007 provision came into force on the date of Royal Assent for chapter 36, being December 14, 2007. The result was the replacement of the 2005 wording of section 96 and section 96.1 set out in chapter 47 with the 2007 wording of section 96. This did not, however, bring the amendment to section 96 of the *BIA* enacted in chapter 47 into force. The section of chapter 47 that resulted in the amendment to section 96

was proclaimed in force on September 18, 2009, by way of an order of the Governor in Council. Therefore, the current section 96 came into force on September 18, 2009.

10 My conclusion on this issue is supported by The Honourable L.W. Houlden, The Honourable G.B. Morawetz & Janis Sarra, eds., *Bankruptcy and Insolvency Law of Canada*, looseleaf (consulted on 15 May 2015), 4th ed. (Toronto: Thomson Reuters Canada Limited, 2013) vol. 2. Further support is set out in *Indarsingh, Re*, 2015 ABQB 158, [2015] A.J. No. 259 (Alta. Q.B.) at para. 3, where Master W.S. Schlosser refers to the current section 96 as follows: "This general and very powerful remedy was part of the 2009 amendments to the Act. It replaced the sections dealing with settlements and reviewable transactions."

11 Therefore, the current section 96 — the provision relied upon by the plaintiff in its statement of claim — was in force at the time of the assignment in bankruptcy (September 4, 2012), but was not in force at the time of the transfer (June 17, 2009).

12 Section 96 of the *BIA* that was in force on June 17, 2009 read as follows:

> **96.** If the transfer, charge, payment, obligation or judicial proceeding mentioned in section 95 is in favour of a person related to the insolvent person, the period referred to in subsection 95(1) shall be one year instead of three months.

13 That section was part of a statutory scheme within the *BIA* comprised of sections 91 and 94 to 101.2 and collected under the heading "Settlements and Preferences". See attached Appendix A.

14 The current section 96, which came into force on September 18, 2009, was in force on the date that Laurence filed his assignment in bankruptcy and is part of a statutory scheme comprised of sections 95 to 99 and collected under the heading "Preferences and Transfers at Undervalue". See attached Appendix B.

15 The current section 96 reads as follows:

> 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.

Issue #2: Is it the section 96 provision in force at the time of the transfer or at the time of the assignment in bankruptcy that governs?

16 The defendant argued that she should be entitled to summary judgment because the provision upon which the plaintiff relies was not in force at the time of the transfer and, therefore, the statement of claim discloses no cause of action. The plaintiff says that even if the provision did not come into force until after the transfer, it was in force at the time of the assignment in bankruptcy and is, as a consequence, applicable.

17 Counsel were unable to direct me to any case that was directly on point on this issue.

18 In *Anderson, Re*, 2012 BCSC 956, [2012] B.C.J. No. 1343 (B.C. S.C. [In Chambers]), the court applied the current section 96 to a case dealing with a transfer of property that had occurred in 2005. The assignment in bankruptcy occurred in 2010. The court made no reference to the timing of these events and the impact that the amendment to the *BIA* might have had on the matter. It does not appear that the issue was raised in that case.

19 In *Indarsingh, Re*, Master Schlosser (Registrar in Bankruptcy) dealt with a case where the impugned transfer of property occurred in May 2008. The assignment in bankruptcy was filed in 2010. Again, without argument, the current section 96 was applied. In that case, Master Schlosser notes that none of the parties took issue with the application of the current section 96 that came into force after the property transfer, and, therefore, it was unnecessary to address the issue.

20 The defendant's argument before me was twofold:

(1) to apply the current section 96 would offend against the presumption against the retrospective application of legislation;

(2) to apply the current section 96 would offend against the presumption against legislative interference with vested rights.

Counsel for the defendant argued that these two presumptions must be considered separately.

21 I will address each argument in turn.

Retrospective Application of Legislation

22 Does the current law apply to the transfer when that transfer occurred prior to its coming into force?

23 The issue is one of retrospective application, not retroactive application, of the law. It is important to understand the distinction. The terms are often used interchangeably, which can cause some confusion: Ruth Sullivan, ed., *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis Canada Inc., 2014) §25.12ff.

24 The Supreme Court of Canada in *Épiciers unis Métro-Richelieu inc., division "Econogros" c. Collin*, 2004 SCC 59, [2004] 3 S.C.R. 257 (S.C.C.) at para. 46, quoting from Elmer A. Driedger, "Statutes: Retroactive Retrospective Reflections" (1978), 56 *Can. Bar Rev.* 264 at 268-69, referred to the following definitions of these terms as helpful:

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute operates *forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. [Emphasis in original.]

25 Counsel for the defendant did not argue that to apply the current section 96 would result in the retroactive application of the statute. He argued that to apply the current section 96 would attach new consequences to the transfer, which occurred before the current section 96 came into force. This would result in a retrospective application of the legislation.

26 In deciding this issue, it is important to carefully consider the facts in this case in terms of the events and the legal effects of those events.

27 On June 17, 2009, the property was transferred to the defendant. There can be no doubt that the interest in the property was vested in the defendant when the transfer was complete. No argument to the contrary was made before me. The transfer had the legal effect of making the defendant the sole owner of the property. On September 4, 2012, Laurence filed his assignment in bankruptcy. The defendant was the owner of the property at that time. The transfer then became subject to review under the *BIA*.

28 It is important to note that the application of the *BIA* provisions to the transfer is triggered by the assignment in bankruptcy in 2012. That is, the *BIA* had no impact on the defendant's property rights until Laurence made his assignment in bankruptcy.

29 There is considerable discussion in the legal academic writings regarding the proper characterization of the factual situation in a given case and the proper categorization of the legal effects of a particular factual situation. It is fair to say that there has been some confusion about the approach to be taken to the analysis of the factual circumstances and their legal implications. See Sullivan, at §25.26ff.

30 A distinction is drawn between "discrete events", "momentary facts", "continuing facts", "pending facts", "successive facts", and "facts that constitute a status or characteristic". See Sullivan, at §25.26ff; Pierre-André Côté in collaboration with Stéphane Beaulac and Mathieu Devinat, *The Interpretation of Legislation in Canada*, 4th ed. (Toronto: Thomson Reuters Canada Ltd., 2011) at 135-37; and *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 (S.C.C.) at paras. 45-49.

31 The difficulties inherent in making the proper characterization of the legally relevant facts are illustrated in the case before me. The transfer of the property is a discrete event, but it results in the establishment of a continuing situation: ownership of the property. The transfer is potentially subject to review, which could result in the interruption of the continuing situation, but this effect only occurs if and when the assignment in bankruptcy is filed. The assignment in bankruptcy is another discrete event.

32 I am satisfied that for the purposes of this case, the facts are best characterized as "successive facts". The transfer of the property occurs on a particular date and is completed on that date. The transfer establishes an ongoing status of ownership. The filing of the assignment in bankruptcy occurs on a particular date, later in time. The *BIA only* applies to the property transfer, and only has an impact on the ongoing status of ownership *after* the final event in the series occurs, that is, the filing of the bankruptcy.

33 The relevant facts in the case before me are not only the transfer, as argued by the defendant, but also the assignment in bankruptcy. Both events are required in order for the *BIA* to have any application. Further, since the final act occurred after the coming into force of the current section 96, there is no retroactive or retrospective application of the legislation. Sullivan, at §25.76, quotes Driedger, at p. 276, in support of the following propositions:

> 2. (1) A retrospective statute is one that attaches new consequences to an event that occurred prior to its enactment.
>
> (2) A statute is not retrospective by reason only that it adversely affects an antecedently acquired right.

(3) A statute is not retrospective unless the description of the prior event is the fact-situation that brings about the operation of the statute.

Here the operation of the statute is brought about by the assignment in bankruptcy.

34 Further, I have concluded that even if the application of the current section 96 resulted in a retrospective application of the legislation, it would still apply. The presumption against retrospective application of legislation is rebuttable. It is necessary to consider the purpose of the legislation and the amendments in order to determine if retrospective application was intended by the legislature. See *Page Estate v. Sachs* (1993), 99 D.L.R. (4th) 209 (Ont. C.A.).

35 The legislative purpose of section 96 of the *BIA* is to ensure fair treatment of unsecured creditors following bankruptcy. It is to return to the bankrupt's estate assets that had been transferred by the debtor for no consideration or consideration that is less than their value. The goal is to protect creditors against the debtor's improper efforts to prefer one or more creditors over others or to remove assets from his or her estate.

36 As stated by Dickson J. in *Hudson v. Benallack*, [1976] 2 S.C.R. 168 (S.C.C.) at 175-76:

> The object of the bankruptcy law is to ensure the division of the property of the debtor rateably among all his creditors in the event of his bankruptcy. Section 112 of the Act [*Bankruptcy Act*, R.S.C. 1970, c. B-3] provides that, subject to the Act, all claims proved in the bankruptcy shall be paid *pari passu*. The Act is intended to put all creditors upon an equal footing. Generally, until a debtor is insolvent or has an act of bankruptcy in contemplation, he is quite free to deal with his property as he wills and he may prefer one creditor over another but, upon becoming insolvent, he can no longer do any act out of the ordinary course of business which has the effect of preferring a particular creditor over other creditors. If one creditor receives a preference over other creditors as a result of the debtor acting intentionally and in fraud of the law, this defeats the equality of the bankruptcy laws.

37 The 2009 amendments to the provisions dealing with settlements, preferences and transfers at undervalue have been described as follows by Robyn Gurofsky, "Fraudulent Preferences and Transfers at Undervalue: A Review of the Legal Developments under the *Bankruptcy and Insolvency Act*" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2011* (Toronto: Thomson Reuters Canada Limited, 2012) 567 at 584-85:

> Section 96 of the Act combines and simplifies the principles that were established pursuant to sections 91 and 100 in the pre-2009 amendments addressing settlements and reviewable transactions, respectively. Section 96 outlines the requirements for a trustee to challenge a transfer at undervalue, in other words, a disposition of property or provision of services provided by the bankrupt for less than fair value or for no consideration. Section 96, like section 95, is intended to create a framework for challenging transactions that have the effect of diminishing the value of the bankrupt's estate and limiting the ability of creditors to recover all or a portion of their debt from the estate. [Footnote omitted.]
>
> . . . . .
>
> ... Section 96 governing the treatment of transfers at undervalue, combines the principles of the former settlements and reviewable transactions provisions, while at the same time simplifying the language and eliminating the redundancies contained in those sections.

38 The difference between the "old" and the current section 96 legislation is in relation to the circumstances under which the transfer of property might be deemed to be void after the transferor has become bankrupt. Both the pre-2009 *BIA* and the current *BIA* contain a number of provisions that provide a comprehensive scheme to address that issue. There are some differences in the language of the provisions, but the essential principles remain the same. The 2009 amendments replaced the earlier scheme. As noted by Houlden, Morawetz & Sarra, at F§201 "Preferences and Transfers at Undervalue" (p. 4-70, 2014- Rel. 9): "Under the 2009 amendments, settlements and reviewable transactions were replaced with a single cause of action, 'transfer at undervalue'." The amendments were intended to simplify and clarify the provisions.

39 Finally, I would note that if the defendant was correct, and the legislation in force at the time of the transfer is to be applied, this could result in the inconsistent application of legislation to transactions being reviewed in the context of a single bankruptcy. If a debtor transferred one piece of property in 2008, prior to the amendment coming into force, and a second piece of property in 2010, after the amendment came into force, and then filed an assignment in bankruptcy in 2011, different provisions would apply to each of the two transfers. In my view, while such a result is not impossible, it is undesirable. The current section 96 was intended to simplify and clarify the law, not to further complicate it.

Legislative Interference with Vested Rights

40 Counsel for the defendant also argued that to apply the current section 96 would offend against the presumption against legislative interference with vested rights.

41 In *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271 (S.C.C.) at 282, Dickson J. wrote:

> ... The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction: *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [[1933] S.C.R. 629] at p. 638. The presumption that vested rights are not affected unless the intention of the legislature is clear applies whether the legislation is retrospective or prospective in operation. A prospective enactment may be bad if it affects vested rights and does not do so in unambiguous terms. This presumption, however, only applies where the legislation is in some way ambiguous and reasonably susceptible of two constructions. It is perfectly obvious that most statutes in some way or other interfere with or encroach upon antecedent rights, and taxing statutes are no exception.

42 The presumption against legislative interference with vested rights is rebuttable. It may be rebuttable by legislative intention expressed in a transitional provision or by implication. "In the absence of a transitional provision, it is left to the courts to determine legislative intent. Evidence of intent is gathered in the usual way, by reading the legislation in context having regard to its purpose and the consequences of applying it to particular facts." See Sullivan, at §25.159.

43 In this case, both the "old" legislative regime and the current legislation interfere with vested rights. Indeed, the legislation is specifically *intended* to interfere with vested rights when necessary to protect the interests of creditors from efforts by a debtor to put his or her assets out of reach. The purpose of the legislation is stated in *Anderson, Re* as follows:

> [2] Section 96 of the *BIA* is designed to claw back into a bankrupt's estate property that has been conveyed out of the bankrupt's hands by transactions at less than the proper value of the property transferred within a specified time period preceding the bankruptcy.

44 The intent of the legislation is to reach back up to five years prior to the bankruptcy to determine the validity of transactions that might diminish the insolvent debtor's estate. In the case before me, both the "old" legislative regime and the current one could have the effect of rendering the transfer void and clawing the property back into the estate. In both cases, there is a legislative interference with a vested right.

45 The focus of the legislation is on the actions, circumstances and intent of the debtor and the interests of the creditors. The interests of the person to whom the property was transferred are secondary. In *Hudson*, at p. 176, Dickson J. confirmed that in considering whether a transfer of property is void under the *Bankruptcy Act*, as it then was, the intent of the recipient of the transfer is irrelevant. The Supreme Court of Canada recognized that it is understandable that the courts may wish to protect the innocent recipient who may be unaware of the transferor's insolvency or intent, but to do so would be contrary to the language and the policy of the *Bankruptcy Act*. The intent of the *BIA* is to protect all creditors equally. As this requires the review of transfers of property even to innocent transferees, to accomplish this it is necessary that the legislation interfere with vested rights.

Issue #3: Is the defendant entitled to summary judgment?

46 The test for summary judgment is that set out by the Supreme Court of Canada in the case of *Hryniak v. Mauldin*, 2014 SCC 7, 366 D.L.R. (4th) 641 (S.C.C.), and adopted by the Manitoba Court of Queen's Bench in *Ryan v. Canadian Farm Insurance Corp.*, 2014 MBQB 178, [2014] M.J. No. 254 (Man. Q.B.). Simply stated, summary judgment motions must be granted whenever there is no genuine issue requiring a trial. In *Ryan*, Suche J. analyzes the *Hryniak* decision and, citing the decision, states:

> [27] In light of the above, it seems clear that Karakatsanis J.'s description of when summary judgment is appropriate applies equally in Manitoba. That is:
>
>> 49 There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.
>>
>> 50 These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

47 There are two aspects to the defendant's application for summary judgment in this case. The first is strictly a legal issue. Counsel for the defendant argued that the current section 96 is not applicable and that the court should not permit the plaintiff to rely on the section 91 of the *BIA* that was in force at the time of the transfer because that section was not formally pleaded in its statement of claim. It is not necessary for me to address this argument, because I have already concluded that the current section 96 is applicable. It follows that the defendant is not entitled to summary judgment on that basis.

48 Second, counsel for the defendant argued that if the court did allow the plaintiff to rely on section 91 as it was in force at the time of the transfer, the defendant should nonetheless be entitled to summary judgment because the requirements of that section are not met on the evidence. This raises an issue of fact finding. Since I have concluded that the current section 96 does apply, I will consider the evidence and argument in that light.

49 There is no dispute that the transfer occurred within the five-year period before the assignment in bankruptcy as required in section 96(1)(b)(ii).

50 For the transfer to be set aside or for the defendant to be ordered to pay to Laurence's estate the difference between the value of the consideration given and the value of the property, the following requirements must be met by the plaintiff:

> (1) First, it must be determined that the transfer was indeed at undervalue as defined in the *BIA*. "Transfer at undervalue", as defined at section 2 of the *BIA*, 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".
>
> (2) Second, one of the following two situations must exist: either Laurence was insolvent at the time of the transfer or was rendered insolvent by the transfer, or in transferring the property Laurence intended to defraud, defeat or delay a creditor.

51 Regarding the first requirement, I must ask: is there evidence from which it can be concluded that the transfer was at undervalue? The evidence before me is that Laurence transferred his half interest in the property to the defendant for "One Dollar and other good and valuable consideration". The defendant claims that she made debt payments on behalf of Laurence, paid his living expenses for a period of time, and paid for home renovations, and that these payments were sufficient to validate the transfer. The plaintiff says that these various payments cannot be consideration, either because they were made after the transfer,

because they were obligations for which Laurence and the defendant were jointly responsible, or because they were made for the couple's mutual benefit, not just Laurence's. Counsel for the defendant responds that while Laurence and the defendant may have been jointly responsible for the credit card debts pursuant to the credit cardholder's agreement, this does not address the agreement between Laurence and the defendant with respect to those payments. The evidence before me on these issues is in the affidavits of Laurence and the defendant. I do not have the benefit of cross-examination on those affidavits.

52 On a summary judgment motion, I am entitled to consider the credibility of the evidence to determine whether the plaintiff's case has a realistic chance of success or an air of reality. In *Manitoba Hydro Electric Board v. John Inglis Co.*, 2000 MBQB 218, [2000] M.J. No. 578 (Man. Q.B.), MacInnes J., as he then was, states:

> [20] I take from the authorities that on a summary judgment motion I am to review all of the evidence before me. That includes considering credibility, where possible, not for the purpose of weighing the evidence to determine whether the plaintiff will or will not succeed in its litigation, that is, whether its case passes muster on a balance of probabilities, but rather to determine whether the case has a realistic chance of success. And, in this context, "real" is not intended to establish a level of probability. Rather, it is to denote a realistic rather than theoretical prospect of success; in other words, the plaintiff's case, when held up to scrutiny in light of all of the evidence available for consideration on the motion, must have an air of reality to it and not be merely the product of wishful, fanciful or imaginative thinking on the part of the plaintiff.

53 Indeed, summary judgment should not be denied *merely* because there may be issues of credibility to be determined. However, where there are real issues of credibility, those issues must be resolved based upon *viva voce* evidence at trial. See *Ryan*, at paras. 22-25.

54 On the evidence before me, I have concluded that it is not appropriate to grant summary judgment in favour of the defendant on this issue. There is at least an air of reality to the plaintiff's assertion that the payments claimed by the defendant as consideration for the transfer cannot be so. The defendant's claim that she was paying off Laurence's debts for him when those debts were on jointly held credit cards depends on agreements between them, the details of which are not in evidence. The nature of these agreements cannot be determined based on the evidence before me.

55 On the second issue, I must ask myself: is there evidence from which it can be concluded that Laurence was insolvent at the time of the transfer or was rendered insolvent by the transfer, or, is there evidence that Laurence in transferring the property intended to defraud, defeat or delay a creditor? Based on the evidence before me, I find that the plaintiff has demonstrated an air of reality to its claim that Laurence was unable to meet his obligations as they came due in June 2009 when the property was transferred. On April 12, 2010, Laurence was cross-examined on an affidavit filed in relation to an application for security for costs in a lawsuit he was pursuing. During that cross-examination, he stated that he had no assets in his name and no employment. In addition, there is evidence that when the defendant and Laurence approached the bank to refinance their house in June 2009, the bank advised that they would not qualify because of Laurence's financial position at that time.

56 In addition, I find that there is some evidence to support the plaintiff's alternative claim that Laurence transferred the property with the intent of defeating or delaying his creditors. During that same April 2010 cross- examination, when pressed regarding his assets he stated, "I have nothing that you can get your hands on, but I am sure I can get a job." More importantly, in my view, the question of Laurence's intent, while it may be inferred from other evidence, is something to be determined at trial through *viva voce* evidence.

Conclusion

57 The defendant's motion for summary judgment is denied.

58 The plaintiff is entitled to costs. If the parties cannot agree on the amount, they may speak to the matter.

Motion dismissed.

Appendix A

Settlements and Preferences

Certain settlements ineffective

91. (1) Any settlement of property made within the period beginning on the day that is one year before the date of the initial bankruptcy event in respect of the settlor and ending on the date that the settlor became bankrupt, both dates included, is void as against, or in the Province of Quebec, may not be set up against, the trustee.

If bankrupt within five years

(2) Any settlement of property made within the period beginning on the day that is five years before the date of the initial bankruptcy event in respect of the settlor and ending on the date that the settlor became bankrupt, both dates included, is void as against, or in the Province of Quebec, may not be set up against, the trustee if the trustee can prove that the settlor was, at the time of making the settlement, unable to pay all the settlor's debts without the aid of the property that was the subject of the settlement or that the interest of the settlor in the property did not pass on the execution of the settlement.

Non-application of section

(3) This section does not extend to any settlement made in favour of a purchaser, incumbrancer or holder of a charge in good faith and for valuable consideration.

. . . . .

General assignments of book debts ineffective

94. (1) If a person engaged in any trade or business makes an assignment of their existing or future book debts or any class or part of those debts and subsequently becomes bankrupt, the assignment of book debts is void as against, or in the Province of Quebec, may not be set up against, the trustee with respect to any book debts that have not been paid at the date of the bankruptcy.

Foregoing provisions not to apply in some cases

(2) This section does not apply to an assignment of book debts that is registered pursuant to any statute of any province providing for the registration thereof if the assignment is valid in accordance with the laws of the province.

Other cases

(3) Nothing in this section renders void or, in the Province of Quebec, null any assignment of book debts due at the date of the assignment from specified debtors, or of debts growing due under specified contracts, or any assignment of book debts included in a transfer of a business made in good faith and for adequate valuable consideration.

Definition of "assignment"

(4) For the purposes of this section, "assignment" includes assignment by way of security, hypothec and other charges on book debts.

Preferences

95. (1) Every transfer of property, every charge made on property, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view to giving that creditor a preference over the other creditors is, when it is made, given, incurred, taken or suffered within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date the insolvent person became bankrupt, both dates included, deemed fraudulent and void as against, or in the Province of Quebec, may not be set up against, the trustee in the bankruptcy.

When view to prefer presumed

(2) If any transfer, charge, payment, obligation or judicial proceeding mentioned in subsection (1) has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed, in the absence of evidence to the contrary, to have been made, incurred, taken, paid or suffered with a view to giving the creditor a preference over other creditors, whether or not it was made voluntarily or under pressure and evidence of pressure shall not be admissible to support the transaction.

Exception

(2.1) Subsection (2) does not apply in respect of the following:

(a) a margin deposit made by a clearing member with a clearing house; or

(b) a transfer, charge or payment made in connection with financial collateral and in accordance with the provisions of an eligible financial contract.

Definitions

(3) In this section,

"clearing house"

« chambre de compensation »

"clearing house" means a body that acts as an intermediary for its clearing members in effecting securities transactions;

"clearing member"

« membre »

"clearing member" means a person engaged in the business of effecting securities transactions who uses a clearing house as intermediary;

"creditor"

« créancier »

"creditor" includes a surety or guarantor for the debt due to the creditor;

"margin deposit"

« dépôt de couverture »

"margin deposit" means a payment, deposit or transfer to a clearing house under the rules of the clearing house to assure the performance of the obligations of a clearing member in connection with security transactions, including, without limiting the generality of the foregoing, transactions respecting futures, options or other derivatives or to fulfil any of those obligations.

Extended period

96. If the transfer, charge, payment, obligation or judicial proceeding mentioned in section 95 is in favour of a person related to the insolvent person, the period referred to in subsection 95(1) shall be one year instead of three months.

Protected transactions

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

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

(b) a payment or delivery to the bankrupt;

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

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

Definition of "adequate valuable consideration"

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

Law of set-off or compensation

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

Recovering proceeds if transferred

98. (1) If a person has acquired property of a bankrupt under a transaction that is void or voidable and set aside or, in the Province of Quebec, null or annullable and set aside, and has sold, disposed of, realized or collected the property or any part of it, the money or other proceeds, whether further disposed of or not, shall be deemed the property of the trustee.

Trustee may recover

(2) The trustee may recover the property or the value thereof or the money or proceeds therefrom from the person who acquired it from the bankrupt or from any other person to whom he may have resold, transferred or paid over the proceeds of the property as fully and effectually as the trustee could have recovered the property if it had not been so sold, disposed of, realized or collected.

Operation of section

(3) Notwithstanding subsection (1), where any person to whom the property has been sold or disposed of has paid or given therefor in good faith adequate valuable consideration, he is not subject to the operation of this section but the trustee's recourse shall be solely against the person entering into the transaction with the bankrupt for recovery of the consideration so paid or given or the value thereof.

Trustee subrogated

(4) Where the consideration payable for or on any sale or resale of the property or any part thereof remains unsatisfied, the trustee is subrogated to the rights of the vendor to compel payment or satisfaction.

Dealings with undischarged bankrupt

99. (1) All transactions by a bankrupt with any person dealing with the bankrupt in good faith and for value in respect of property acquired by the bankrupt after the bankruptcy, if completed before any intervention by the trustee, are valid against the trustee, and any estate, or interest or right, in the property that by virtue of this Act is vested in the trustee shall determine and pass in any manner and to any extent that may be required for giving effect to any such transaction.

Receipt of money by banker

(2) For the purposes of this section, the receipt of any money, security or negotiable instrument from or by the order or direction of a bankrupt by his banker and any payment and any delivery of any security or negotiable instrument made to or by the order or direction of a bankrupt by his banker shall be deemed to be a transaction by the bankrupt with his banker dealing with him for value.

Examination of consideration in a reviewable transaction

100. (1) Where a bankrupt sold, purchased, leased, hired, supplied or received property or services in a reviewable transaction within the period beginning on the day that is one year before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, the court may, on the application of the trustee, inquire into whether the bankrupt gave or received, as the case may be, fair market value in consideration for the property or services concerned in the transaction.

Judgment for difference

(2) Where the court in proceedings under this section finds that the consideration given or received by the bankrupt in the reviewable transaction was conspicuously greater or less than the fair market value of the property or services concerned in the transaction, the court may give judgment to the trustee against the other party to the transaction, against any other person being privy to the transaction with the bankrupt or against all those persons for the difference between the actual consideration given or received by the bankrupt and the fair market value, as determined by the court, of the property or services concerned in the transaction.

Establishing values

(3) In making an application under this section, the trustee shall state what in his opinion was the fair market value of the property or services concerned in the transaction and what in his opinion was the value of the actual consideration given or received by the bankrupt in the transaction, and the values on which the court makes any finding pursuant to this section shall be the values so stated by the trustee unless other values are proven.

Inquiry into dividends and redemptions of shares

101. (1) Where a corporation that is bankrupt has paid a dividend, other than a stock dividend, or redeemed or purchased for cancellation any of the shares of the capital stock of the corporation within the period beginning on the day that is one year before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, the court may, on the application of the trustee, inquire into the transaction to ascertain whether it occurred at a time when the corporation was insolvent or whether it rendered the corporation insolvent.

Judgment against directors

(2) If a transaction referred to in subsection (1) has occurred, the court may give judgment to the trustee against the directors of the corporation, jointly and severally, or solidarily, in the amount of the dividend or redemption or purchase price, with interest on the amount, that has not been paid to the corporation if the court finds that

(a) the transaction occurred at a time when the corporation was insolvent or the transaction rendered the corporation insolvent; and

(b) the directors did not have reasonable grounds to believe that the transaction was occurring at a time when the corporation was not insolvent or the transaction would not render the corporation insolvent.

Criteria

(2.1) In making a determination under paragraph (2)(b), the court shall consider whether the directors acted as prudent and diligent persons would have acted in the same circumstances and whether the directors in good faith relied on

(a) financial or other statements of the corporation represented to them by officers of the corporation or the auditor of the corporation, as the case may be, or by written reports of the auditor to fairly reflect the financial condition of the corporation; or

(b) a report relating to the corporation's affairs prepared pursuant to a contract with the corporation by a lawyer, notary, accountant, engineer, appraiser or other person whose profession gave credibility to the statements made in the report.

Judgment against shareholders

(2.2) Where a transaction referred to in subsection (1) has occurred and the court makes a finding referred to in paragraph (2)(a), the court may give judgment to the trustee against a shareholder who is related to one or more directors or to the corporation or who is a director not liable by reason of paragraph (2)(b) or subsection (3), in the amount of the dividend or redemption or purchase price referred to in subsection (1) and the interest thereon, that was received by the shareholder and not repaid to the corporation.

Directors exonerated by law

(3) A judgment pursuant to subsection (2) shall not be entered against or be binding on a director who had, in accordance with any applicable law governing the operation of the corporation, protested against the payment of the dividend or the redemption or purchase for cancellation of the shares of the capital stock of the corporation and had thereby exonerated himself or herself under that law from any liability therefor.

Directors' right to recover

(4) Nothing in this section shall be construed to affect any right, under any applicable law governing the operation of the corporation, of the directors to recover from a shareholder the whole or any part of any dividend, or any redemption or purchase price, made or paid to the shareholder when the corporation was insolvent or that rendered the corporation insolvent.

Onus of proof — directors

(5) For the purposes of subsection (2), the onus of proving

(a) that the corporation was not insolvent at the time the transaction occurred and that the transaction did not render the corporation insolvent, or

(b) that the directors had reasonable grounds to believe that the transaction was occurring at a time when the corporation was not insolvent or that the transaction would not render the corporation insolvent

lies on the directors.

Onus of proof — shareholder

(6) For the purposes of subsection (2.2), the onus of proving that the corporation was not insolvent at the time the transaction occurred and that the transaction did not render the corporation insolvent lies on the shareholder.

Application of sections

101.1 (1) Where a proposal is made under Division I of Part III, sections 91 to 101 apply to the proposal, with such modifications as the circumstances require, except where the proposal otherwise provides.

Interpretation

(2) For the purposes of subsection (1), any reference in sections 91 to 101 to "becomes bankrupt" shall be construed as a reference to "files a notice of intention" or "files a proposal", whichever filing was done first, and any reference in those sections to a bankrupt shall be construed as a reference to the debtor in respect of whom the proposal is filed.

Provisions to apply

101.2 Sections 91 to 101 apply as though the debtor became bankrupt on the date of the initial bankruptcy event if the proposal is annulled either by the court under subsection 63(1) or as a result of a bankruptcy order or assignment.

Appendix B

Preferences and Transfers at Undervalue

Preferences

95. (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

> (a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and
>
> (b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

Preference presumed

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

Exception

(2.1) Subsection (2) does not apply, and the parties are deemed to be dealing with each other at arm's length, in respect of the following:

> (a) a margin deposit made by a clearing member with a clearing house; or
>
> (b) a transfer, charge or payment made in connection with financial collateral and in accordance with the provisions of an eligible financial contract.

Definitions

(3) In this section,

"clearing house"

« chambre de compensation »

"clearing house" means a body that acts as an intermediary for its clearing members in effecting securities transactions;

"clearing member"

« membre »

"clearing member" means a person engaged in the business of effecting securities transactions who uses a clearing house as intermediary;

"creditor"

« créancier »

"creditor" includes a surety or guarantor for the debt due to the creditor;

"margin deposit"

« dépôt de couverture »

"margin deposit" means a payment, deposit or transfer to a clearing house under the rules of the clearing house to assure the performance of the obligations of a clearing member in connection with security transactions, including, without limiting the generality of the foregoing, transactions respecting futures, options or other derivatives or to fulfil any of those obligations.

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.

Protected transactions

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

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

(b) a payment or delivery to the bankrupt;

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

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

Definition of "adequate valuable consideration"

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

Law of set-off or compensation

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

Recovering proceeds if transferred

98. (1) If a person has acquired property of a bankrupt under a transaction that is void or voidable and set aside or, in the Province of Quebec, null or annullable and set aside, and has sold, disposed of, realized or collected the property or any part of it, the money or other proceeds, whether further disposed of or not, shall be deemed the property of the trustee.

Trustee may recover

(2) The trustee may recover the property or the value thereof or the money or proceeds therefrom from the person who acquired it from the bankrupt or from any other person to whom he may have resold, transferred or paid over the proceeds of the property as fully and effectually as the trustee could have recovered the property if it had not been so sold, disposed of, realized or collected.

Operation of section

(3) Notwithstanding subsection (1), where any person to whom the property has been sold or disposed of has paid or given therefor in good faith adequate valuable consideration, he is not subject to the operation of this section but the trustee's recourse shall be solely against the person entering into the transaction with the bankrupt for recovery of the consideration so paid or given or the value thereof.

Trustee subrogated

(4) Where the consideration payable for or on any sale or resale of the property or any part thereof remains unsatisfied, the trustee is subrogated to the rights of the vendor to compel payment or satisfaction.

General assignments of book debts ineffective

98.1 (1) If a person engaged in any trade or business makes an assignment of their existing or future book debts, or any class or part of those debts, and subsequently becomes bankrupt, the assignment of book debts is void as against, or, in the Province of Quebec, may not be set up against, the trustee with respect to any book debts that have not been paid at the date of the bankruptcy.

Foregoing provisions not to apply in some cases

(2) Subsection (1) does not apply to an assignment of book debts that is registered under any statute of any province providing for the registration of assignments of book debts if the assignment is valid in accordance with the laws of the province.

Other cases

(3) Nothing in subsection (1) renders void or, in the Province of Quebec, null any assignment of book debts due at the date of the assignment from specified debtors, or of debts growing due under specified contracts, or any assignment of book debts included in a transfer of a business made in good faith and for adequate valuable consideration.

Definition of "assignment"

(4) For the purposes of this section, "assignment" includes assignment by way of security, hypothec and other charges on book debts.

Dealings with undischarged bankrupt

99. (1) All transactions by a bankrupt with any person dealing with the bankrupt in good faith and for value in respect of property acquired by the bankrupt after the bankruptcy, if completed before any intervention by the trustee, are valid against the trustee, and any estate, or interest or right, in the property that by virtue of this Act is vested in the trustee shall determine and pass in any manner and to any extent that may be required for giving effect to any such transaction.

Receipt of money by banker

(2) For the purposes of this section, the receipt of any money, security or negotiable instrument from or by the order or direction of a bankrupt by his banker and any payment and any delivery of any security or negotiable instrument made to or by the order or direction of a bankrupt by his banker shall be deemed to be a transaction by the bankrupt with his banker dealing with him for value.

TAB 5

2017 ONSC 1475
Ontario Superior Court of Justice [Commercial List]

National Telecommunications Inc., Re

2017 CarswellOnt 3184, 2017 ONSC 1475, 277 A.C.W.S. (3d) 247, 45 C.B.R. (6th) 181

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

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 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.

***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
>
> (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) 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.

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 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 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 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 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:

> 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.

TAB 6

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

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 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.

***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.

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:

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 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 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.

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.

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.

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*

TAB 7

2019 ONSC 2344
Ontario Superior Court of Justice [Commercial List]

1085372 Ontario Limited v. Kulawick

2019 CarswellOnt 6882, 2019 ONSC 2344, 305 A.C.W.S. (3d) 22, 69 C.B.R. (6th) 189

1085372 Ontario Limited (Plaintiff) and Geoff Kulawick and Linus Entertainment Inc. (Defendants)

Penny J.

Heard: October 15-19, 2018; January 28-30, 2019
Judgment: April 30, 2019
Docket: CV-10841-CL

Counsel: Brendan F. Morrison, Madison Robins, for Plaintiff
Julian Heller, for Defendants

Headnote

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

Bankrupt's corporations leased commercial premises from plaintiff creditor, bankrupt personally guaranteed leases, leases went into default, creditor sued bankrupt and was granted summary judgment — Bankrupt had previously invested $1 million in music company started by K in exchange for common shares — Bankrupt wanted money out of company but he did not want to exercise his withdrawal rights so loan was agreed to, and K and bankrupt executed letter agreement, promissory note, share pledge agreement and consent to pledge of bankrupt's shares — When loan came due bankrupt did not repay loan, K exercised his right to foreclose under share pledge agreement, and shares were transferred to K — Bankrupt filed assignment in bankruptcy — Trustee in bankruptcy brought action, assigned to creditor, under s. 96(1) of Bankruptcy and Insolvency Act (BIA) to set aside transfer of shares in company on basis that transfer was at undervalue or that it was fraudulent conveyance made with intent to defeat creditors under s. 2 of Fraudulent Conveyances Act — Action dismissed — Bankrupt was dealing with K at arm's length, at all times they acted in their separate, adverse interests, there was no common mind directing bargaining for both parties, and one did not control other or outcome of bargain — K's evidence was accepted that he was not acting in concert with bankrupt but was trying to accommodate bankrupt's desire to recover capital, while at same time trying to minimize impact of that return of capital on operations of company — Bankrupt's desire to monetize his investment promptly and his willingness to accept discount was opportunity that K took — Bankrupt's financial trouble did not negate his independent economic interest in his shares or his ability to negotiate at arm's length — Lack of any consultation with accountants was not evidence of lack of independent economic interest — As bankrupt and K were dealing at arm's length, for impugned transaction to be invalid under s. 96(1) of BIA, it must have occurred within one year of initial act of bankruptcy, which was January 2013 — Relevant date was date loan agreement, promissory note and share pledge agreement were executed, which was end of March 2011, as at that time contract was made and obligation to advance funds became operative, as did obligation to repay or forfeit shares upon failure of repayment — Only other relevant date was December 2011 when shares were actually transferred by right of forfeiture upon non-payment of loan, and both dates occurred more than one year before bankrupt made assignment in bankruptcy — Transaction was outside reach of s. 96(1) and could not be set aside under BIA.

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

Bankrupt's corporations leased commercial premises from plaintiff creditor, bankrupt personally guaranteed leases, leases went into default, creditor sued bankrupt and was granted summary judgment — Bankrupt had previously invested $1 million in music company started by K in exchange for common shares — Bankrupt wanted money out of company, but he did not want to exercise his withdrawal rights so loan was agreed to, and K and bankrupt executed letter agreement, promissory note, share pledge agreement and consent to pledge of bankrupt's shares — When loan came due bankrupt did not repay loan, K exercised his right to foreclose under share pledge agreement, and shares were transferred to K — Bankrupt filed assignment in bankruptcy — Trustee in bankruptcy brought action, assigned to creditor, under s. 96(1) of Bankruptcy and Insolvency Act to set aside transfer of shares in company on basis that transfer was at undervalue or that it was fraudulent conveyance made with intent to defeat creditors under s. 2 of Fraudulent Conveyances Act — Action dismissed — Transaction was not at undervalue, and transaction did not defeat, hinder, delay or defraud any creditor — Transaction was not secret, it took place before any threat of legal proceedings against bankrupt, consideration was not grossly inadequate, there was no unusual haste, bankrupt retained no benefit from shares, bankrupt was not embarking on hazardous new venture, and bankrupt and K negotiated transaction at arm's length — Transaction was not undertaken with fraudulent intent — Even if bankrupt was motivated by fraudulent intent, K paid good consideration for his shares, acted in good faith and did not have knowledge of fraudulent intent.

***Penny J.*:**

Overview

1 This is an action under s. 96(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, to set aside a transfer of shares in Linus Entertainment Inc. on the basis that the transfer was at undervalue. Alternatively, the plaintiff seeks to set aside the transfer of shares on the basis that it was a fraudulent conveyance made with the intent to defeat creditors under s. 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29.

2 The action arises out of the bankruptcy of Michael Shumak. The action was commenced by the trustee in bankruptcy, Deloitte Restructuring Inc. The action was subsequently assigned to 1085372 Ontario Limited, Mr. Shumak's largest creditor.

Background

Shumak Debt and Bankruptcy

3 Mr. Shumak had two corporations which leased commercial premises from companies owned by Paul Oulahen. The plaintiff, 1085372 Ontario Limited, is one of Mr. Oulahen's corporations. Mr. Shumak personally guaranteed both leases. In February and March 2011, these leases went into default.

4 Notices of termination were served in May 2011. Demands for payment and threats to sue were issued in August 2011. No payment was ever made. 1085372 sued Mr. Shumak and his company, MacPherson Properties Limited, in November 2011. On April 27, 2012, 1085372 was granted summary judgment on its claim. Enforcement proceedings were largely unsuccessful. On December 19, 2012, Spence J. ordered Mr. Shumak to re-attend for an examination in aid of execution, which Mr. Shumak did in mid-January 2013.

5 Nine days later, on January 23, 2013, Mr. Shumak filed an assignment under s. 49 of the *BIA*. 1085372's claim in the bankruptcy was for a little over $340,000. The total claims against the estate exceeded $775,000. Mr. Shumak remains undischarged from his bankruptcy.

Linus

6 Geoff Kulawick is passionate about the Canadian music industry. He graduated from the Music Industry Arts program at Fanshawe College. Since then, he has worked in a variety of Canadian record and entertainment settings, always involved in the production and promotion of Canadian music.

7 In the year 2000, significant technological change was sweeping through the music business as a result of digital/streaming technologies which made it much easier to pirate musical works. In addition, the larger American labels (for whom Mr. Kulawick had been working until then) were becoming less and less interested in the Canadian market, partly because of its relatively small size. Mr. Kulawick decided he wanted to start his own independent Canadian record label and entertainment business. He went looking for investors.

8 Mr. Kulawick was introduced to Mr. Shumak, who was also interested in the music business. Mr. Shumak agreed to invest $1 million in Mr. Kulawick's new enterprise in exchange for 46.5% of the business' common shares. This business became Linus Entertainment Inc. Mr. Shumak also found another investor, Fazel Salooje, who invested $300,000 for 7% of the shares.

9 Mr. Kulawick was the President/CEO and ran the company with full authority and control. He put in the "sweat equity" for the remaining 46.5% of the shares.

10 Mr. Kulawick's lawyer at Blakes drafted the incorporation and other documents, including a shareholders' agreement, which was signed as of December 27, 2000. The shareholders' agreement requires the consent of both Mr. Kulawick and Mr. Shumak for any change in capital structure or any significant change or decision affecting the business. Thus, Mr. Kulawick maintained an effective veto in respect of any material change.

11 The shareholders' agreement also places limits on capital being taken out of the business. Under Article 6 of the shareholders' agreement there could be no return of capital for the first two years. After that, a shareholder is entitled to offer to sell all (but not less than all) of his shares to the corporation and the corporation is bound to accept that offer. The purchase price is determined in accordance with Article 10.

12 Article 10 essentially provides that the purchase price for a withdrawing shareholder's shares is the book value of those shares as of the date of delivery of notice of the shareholder's exercise of the buy-out right under Article 6. Article 10.03 provides that any dispute regarding calculation of the purchase price "shall be conclusively determined by the Corporation's auditor."

13 However, Article 12 of the shareholders' agreement goes on to provide that the corporation has the option of paying the purchase price over four years in four equal instalments (Article 12.03). The corporation has the further option, under Article 13.01, to elect, in any year, not to purchase shares which exceed 5% of the total number of issued and outstanding shares. Thus the period for payment to a withdrawing shareholder with 46.5% of the shares, such as Mr. Shumak, could effectively be extended for up to 12 years.

14 Mr. Kulawick testified that he required these terms because he knew it would be difficult for the company to return Mr. Shumak's capital. He did not want Mr. Shumak, or anyone else, to be able to strip capital out of the business in a way that would impair the company's ability to carry on business.

15 Mr. Shumak initially started working at the business with a salary but within 1 year to 18 months the capital was depleting and the business was struggling. In order to maintain a sustainable business and have a job to support his family, Mr. Kulawick had to cut staff, rent smaller space and change his approach to focus on a more niche market.

16 Mr. Shumak was taken off salary. The evidence was that Mr. Shumak was agreeable to this: he had formed a band and was writing songs and doing recordings. He moved to Los Angeles and dealt with a different record label. Mr. Shumak became an entirely passive investor in Linus. Further, Mr. Kulawick testified that Mr. Shumak never had any interest in Linus and independent Canadian music. After Mr. Shumak's departure in 2002, Mr. Kulawick rarely saw Mr. Shumak until 2010, when Mr. Shumak moved back to Toronto.

17 The third investor, Mr. Salooje, was always a passive investor. He lived on a different continent had no involvement in the business. Mr. Kulawick has never met Mr. Salooje.

18 From 2003 to 2011, Mr. Kulawick continued to operate Linus. He moved operations into his home in 2006. Linus had a few employees. Linus acquired interests in some other Canadian record labels, such as True North, and acquired rights to certain types of children's and educational music products.

19 Linus is heavily dependent on federal and provincial tax credits and subsidies. About half of its revenue is derived from this type of subsidy. Linus' business is not sustainable without these grants, tax credits and culture-related subsidies. As a result of this government involvement, Linus has always been required to prepare audited financial statements. Michael Mulholland has been Linus' auditor for many years. Mr. Mulholland specializes in auditing businesses in the Canadian heritage and arts fields

because it is a complicated and unique area of practice. As reflected in the December 31, 2010 audited financial statements, Linus, on a consolidated basis, had earnings before income taxes of $88,004 and a net book value of $991,284. For 2011, Linus enjoyed $150,690 in earnings before income taxes and had a $1,114,060 net book value.

The Transaction

20 Mr. Kulawick testified that sometime in 2010 Mr. Shumak came to him, complaining that he had invested $1 million in Linus and received no return. Mr. Shumak said he needed money for a new business he was setting up and asked if Mr. Kulawick could free up some of his capital from Linus.

21 Mr. Kulawick testified that he felt obliged to pay something, as Mr. Shumak had been very patient and uncomplaining for 10 years. Mr. Kulawick felt he had sufficient cash available to make some payments to Mr. Shumak. There is evidence that between June 2010 and January 2011, Mr. Kulawick made miscellaneous payments to Mr. Shumak totalling about $100,000. These payments were not booked as dividends or return of capital, although Mr. Kulawick testified that he regarded them in substance as a return of capital.

22 In any event, Mr. Shumak came back to Mr. Kulawick, asking for more money. Mr. Kulawick told Mr. Shumak that he could not just arbitrarily keep taking money out of the company. Mr. Shumak did not exercise his withdrawal rights under Article 6 of the shareholders' agreement. I find that this was because any payout under Articles 10, 12 and 13 of the shareholders' agreement would be lengthy and Mr. Shumak wanted a return of his capital right away. Thus, Mr. Shumak explored a negotiated solution to his problem. In the end, they decided on a loan.

23 Mr. Kulawick discussed his options with his lawyer, Darren Brown. As a result, Mr. Kulawick was prepared to advance a $100,000 loan secured by a pledge of Mr. Shumak's shares in Linus.

24 Mr. Shumak did not want to risk forfeiture of his shares for only the $100,000 loan, however. Mr. Kulawick testified that, in his mind, he was prepared to credit Mr. Shumak up to an additional $250,000 for his shares, but could only do so if he spread out the payments over time. He did this by agreeing to loan $100,000 to Mr. Shumak and, few months later, to provide up to an additional $150,000 by way of "consulting fees" that would be paid over five years.

25 Mr. Kulawick testified that although he initially expected the loan to be repaid, he also viewed this transaction as an opportunity to acquire Mr. Shumak's shares in Linus in the event of non-payment.

26 The terms of the transaction were negotiated between Mr. Kulawick and Mr. Shumak. Mr. Shumak told Mr. Kulawick he was consulting his own lawyer but neither Mr. Kulawick nor Mr. Brown ever dealt with a lawyer for Mr. Shumak. They simply sent documents to Mr. Shumak and the documents were returned.

27 As of the end of March 2011, Mr. Kulawick and Mr. Shumak executed a letter agreement, documenting the loan and the security, a grid promissory note for up to $100,000 in advances, repayable on December 1, 2011, a share pledge agreement pledging Mr. Shumak's shares in Linus as security for the loan and a consent (as required by the shareholders' agreement) to the pledge of Mr. Shumak's shares (the Transaction). Mr. Kulawick's security interest in Mr. Shumak's shares was registered under the PPSA on April 19, 2011.

28 From April to June 2011, Mr. Kulawick advanced a total of $100,000 to Mr. Shumak under the loan. In July 2011, the parties executed a consulting agreement under which Linus would pay Mr. Shumak $30,000 per year (at the rate of $7,500 per quarter) for five years, commencing in July 2012. This represented additional consideration for Mr. Shumak's shares in the event he did not repay the loan. However, almost immediately Mr. Shumak told Mr. Kulawick he wanted to accelerate the consulting payments because he needed the money. This caused Mr. Kulawick to suspect that the loan would not be repaid.

29 Commencing in July 2011 and through to May 31, 2012, Mr. Kulawick caused Linus to advance an additional $77,000 to Mr. Shumak by way of accelerated consulting fees under the consulting agreement. Mr. Kulawick candidly admitted that Mr. Shumak provided no services in connection with these payments nor were any services contemplated. This was simply a way to

transfer more money to Mr. Shumak in consideration for the pledge of his shares. However, because of the acceleration of the payments, Mr. Kulawick insisted that Mr. Shumak execute an amendment to the consulting agreement in May 2012 whereby Mr. Shumak agreed, in consideration for the acceleration of the consulting fees, that his consulting fees would be discounted by 50% (in other words, payments of $75,000 would be made immediately in replacement for the five year stream of payments of $150,000).

30 Mr. Kulawick testified that he had no knowledge of Mr. Shumak's potential liability as a guarantor of commercial leases or of any default in respect of leases. He testified that he had no knowledge that Mr. Shumak was in financial difficulty or of Mr. Shumak's other creditors, if any. Mr. Shumak, he said, drove an expensive, flashy car and appeared, and acted, optimistic about his future prospects. Mr. Kulawick was only told that Mr. Shumak needed the money to finance a new business. When asked at trial, for example, whether he was concerned that Mr. Shumak was prepared to take a significant discount in exchange for acceleration of the consulting agreement fees, Mr. Kulawick testified that he had come to view Mr. Shumak as an embarrassment to Linus and a potential source of difficulty. Mr. Kulawick viewed the loan, share pledge and consulting agreement as an opportunity to secure Mr. Shumak's exit from the business.

31 Mr. Brown, Mr. Kulawick's solicitor on the Transaction, gave similar evidence. Prior to closing the Transaction, Mr. Brown caused searches to be made about Mr. Shumak's liabilities. This included a litigation and execution search. Nothing turned up. Mr. Brown was also unaware of Mr. Shumak being in any financial difficulty, or that Mr. Shumak had any other creditors besides Mr. Kulawick.

Default and Realization on Linus Shares

32 The loan was fully advanced and came due on December 1, 2011. Mr. Shumak did not repay the loan. Accordingly, Mr. Kulawick issued a demand for payment in full of the promissory note together with accrued interest of $8,013.07 (with a per diem interest amount of $44.38). The demand stipulated that, failing immediate repayment of all indebtedness, Mr. Kulawick would foreclose on the pledged Linus shares in full satisfaction of Mr. Shumak's indebtedness.

33 Mr. Shumak failed to repay the loan or any portion thereof. Mr. Kulawick exercised his right to foreclose under the terms of the share pledge agreement. Mr. Shumak acknowledged receipt of the full amount of the loan, his default and the foreclosure on his shares in full satisfaction of the indebtedness in a signed confirmation and acknowledgement. As a result of the default and foreclosure, the shares were duly transferred to Mr. Kulawick on the books and records of the corporation. This took place on December 20, 2011.

Issues

34 There are two basic issues:

(1) should the Transaction be set aside as a transfer at undervalue under s. 96(1) of the *BIA*; and

(2) should the Transaction be set aside as a fraudulent conveyance undertaken with the intent to hinder, defeat, delay or defraud creditors, under s. 2 of the *FCA*?

Analysis

35 The proper analysis of these issues requires breaking them down into a series of sub-issues.

(1) Section 96(1) of the BIA

36 Section 96(1) of the *BIA* provides:

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.

37 There are two branches to s. 96(1) and each branch has, in effect, a five-part test. The first branch, (a), applies where a transaction has taken place at undervalue and the party is dealing at arm's-length with the debtor. Branch (a) then requires consideration of whether (i) the transfer occurred within one year of the initial bankruptcy event (January 23, 2013); (ii) the debtor was insolvent at the time of the transfer; and (iii) the debtor intended to defraud, defeat or delay a creditor.

38 Thus, to come within the first branch of s. 96(1), the evidence must support the conclusion that:

(1) the transfer of shares took place at undervalue; and

(2) Mr. Kulawick and Mr. Shumak were dealing at arm's-length; and

(3) the share transfer occurred within one year of bankruptcy event, January 23, 2012; and

(4) Mr. Shumak was insolvent at the time of the transfer; and

(5) Mr. Shumak intended to defraud defeat or delay a creditor.

39 The second branch, (b), applies where a transaction has taken place at undervalue and the party was *not* dealing at arm's length with the debtor. Branch (b) then requires consideration of whether (i) the transfer occurred within one year of the initial bankruptcy event or (ii) the transfer occurred within five years of the initial bankruptcy event and (A) the debtor was insolvent at the time of the transfer or (B) the debtor intended to defraud defeat or delay a creditor.

40 With regard to the second branch of s. 96(1), therefore, the evidence must support the conclusion that:

(1) the transfer of Mr. Shumak's shares took place at under value; and

(2) Mr. Kulawick and Mr. Shumak were *not* dealing at arm's-length; and

(3) the transfer occurred within one year of the initial bankruptcy event, i.e., January 23, 2012; or

(4) the transfer occurred within five years of the initial bankruptcy event, i.e., January 23, 2008; and

(5)

(a) Mr. Shumak was insolvent at the time of the transfer; or

(b) Mr. Shumak intended to defraud defeat or delay a creditor.

41 The plaintiff relies on the second branch of s. 96(1) and argues that:

(1) the transfer of shares took place at undervalue;

(2) Mr. Shumak and Mr. Kulawick were not dealing at arm's-length;

(3) the transfer occurred within five years of the initial bankruptcy event, i.e., March or December 2011 is within five years of January 23, 2013; and

(4) Mr. Shumak was insolvent at the time of the transfer; or

(5) Mr. Shumak intended to defraud, defeat or delay the plaintiff.

42 The defendants argue that the first branch applies and that:

(1) the transfer of shares did not take place at undervalue;

(2) Mr. Shumak and Mr. Kulawick were dealing at arm's-length; and

(3) the transfer did not occur within one year of the bankruptcy event, i.e., March to December 2011.

Either parts (1) or (2) and (3) combined of the first branch of the test under s. 96(1) are sufficient to dispose of the s. 96(1) claim. However, the defendants also argue in any event that;

(4) Mr. Shumak was not insolvent at the time of the transaction; and

(5) Mr. Shumak did not, by virtue of engaging in the transaction, intend to defraud, defeat or delay the plaintiff.

43 Even if the second branch of s. 96(1) were to apply, the defendants argue that:

(1) the share transfer did not take place at undervalue. This is sufficient to dispose of the claim under s. 96(1); but in any event,

(2) if Mr. Shumak and Mr. Kulawick were not dealing at arm's-length; and

(3) the transaction occurred within five years of bankruptcy, the requirements of s. 96(1) are still not met because;

(4) Mr. Shumak was neither insolvent at the time the transaction; nor

(5) did Mr. Shumak, by virtue of engaging in the transaction, intend to defraud, defeat or delay the plaintiff.

Arms' Length/Non-arms' Length

44 The plaintiff's claim under s. 96(1) of the *BIA* depends upon a finding that Mr. Kulawick and Mr. Shumak were not dealing at arm's-length. Because this is the threshold issue, I will address it at the outset. The plaintiff argues that the parties were not dealing at arm's-length because:

(a) the flow of funds was between Linus and a company owned by Mr. Shumak, who was also a significant shareholder of Linus;

(b) Mr. Kulawick and Mr. Shumak were partners in and co-founders of Linus;

(c) Mr. Kulawick had a history of causing Linus to make gratuitous payments to Mr. Shumak;

(d) at the time of the transaction, Mr. Shumak did not have a real economic interest in his shares of Linus given the extent of his financial problems;

(e) Mr. Shumak did not exercise his right to force Linus to purchase his shares for their book value under Article 6.01 of the shareholders' agreement, even though that would have generated greater consideration;

(f) Mr. Shumak and Mr. Kulawick did not consult any accountants or valuators to determine the value of Mr. Shumak's shares;

(g) the consulting agreement was not structured as a payment for Mr. Shumak's shares but, rather, as fees for services; and

(h) none of the transactions were reflected in financial records of Linus.

45 The term "arm's-length" is not defined in the *BIA*. It is clear, however, that none of these parties are "related" to one another such that the deeming provision of s. 4(5) is not engaged. Whether the parties were at arm's-length is, therefore, a question of fact, *BIA*, s. 4(4).

46 The leading case on the meaning of arm's length in the *BIA* is *Piikani Nation v. Piikani Energy Corp.*, 2013 ABCA 293 (Alta. C.A.), cited with approval by the Ontario Court of Appeal in *Montor Business Corp. (Trustee of) v. Goldfinger*, 2016 ONCA 406 (Ont. C.A.). In *Piikani*, the Alberta Court of Appeal held that jurisprudence under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), provides the most appropriate guidance for determining whether two parties deal at arm's-length in connection with the *BIA*. The court came to this conclusion for essentially four reasons: 1) the terms 'related persons' and 'arm's-length' are similar in both statutes; 2) when these terms were incorporated into the *BIA*, they had already existed in the *ITA* for some time; 3) cases defining arm's-length in the *BIA* had already drawn on *ITA* jurisprudence for interpretive guidance; and 4) the "statute book" approach to interpretation seeks to minimize conflict or incoherence between similar language used in different enactments of the same legislative entity (at paras. 23-26).

47 The general concern in non-arm's-length transactions is that there is no assurance that such a transaction "will reflect ordinary commercial dealing between parties acting in their separate interests." Provisions dealing with non-arm's-length parties are "intended to preclude artificial transactions from conferring" benefits on one or more of the parties, *McLarty v. R.*, 2008 SCC 26 (S.C.C.), at para. 43, citing *Swiss Bank Corp. v. Minister of National Revenue* (1972), [1974] S.C.R. 1144 (S.C.C.), at p. 1152.

48 Useful criteria which have been developed and accepted by the courts include: (i) was there a common mind which directs the bargaining for both parties to a transaction; (ii) were the parties to the transaction acting in concert without separate interests; and (iii) was there *de facto* control by one over the other? *McLarty*, at para. 62.

49 In *Juhasz (Trustee of) v. Cordeiro*, 2015 ONSC 1781 (Ont. S.C.J.), at para. 41, Wilton-Siegel J. applied these principles in the context of s. 96(1) to conclude that 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 is intended to address situations in which the economic self-interest of the transferor is, or is likely to be, displaced by other, non-economic factors that result in the consideration for the transfer failing to reflect the value of the transferred property.

50 Applying these principles to the facts of this case, I am unable to conclude that the parties were not dealing at arm's-length; they were, in my opinion, dealing at arm's length.

51 It is well settled that directors and shareholders cannot be presumed to be non-arm's-length with the corporations to which they are connected, absent special circumstances. The fact that a director or shareholder is a creditor of a company is also not a conclusive indicator that he is not acting at arm's-length, *Piikani*, paras. 31-36.

52 Mr. Kulawick and Mr. Shumak were, on the evidence, at all times acting in their separate, and adverse, interests. Mr. Shumak wanted to monetize his shareholding in Linus for as much and as quickly as he could; Mr. Kulawick wanted to pay Mr. Shumak as little, over as long a time, as possible for his shares. There was no common mind directing the bargaining for both parties. One did not control the other, or the outcome of the bargaining.

53 Mr. Kulawick gave his evidence in a straightforward and forthright manner. He was not evasive. His evidence was fundamentally consistent with the documentary record (in substance, although, as discussed later, not in form) and his clear economic incentives at the time. While he argued with opposing counsel from time to time while giving his evidence, it was no more than most witnesses do in the stress of a trial and cross-examination. Mr. Kulawick and Mr. Shumak were not friends. They did not "hang out" together. After Mr. Shumak returned to Toronto in 2010, Mr. Kulawick found Mr. Shumak's association with Linus embarrassing and bothersome. Mr. Shumak had no interest in what Linus was actually doing in the Canadian music industry. Mr. Shumak's incentive was to maximize his return from Linus; however, he was not willing to wait for payment in accordance with his rights under the shareholders' agreement. In exchange for faster payment, he was willing to accept what might be regarded as less than his full entitlement. Mr. Kulawick was prepared to consider buying Mr. Shumak out sooner than required under the shareholders' agreement if it was at a discount.

54 I accept Mr. Kulawick's evidence that he was not acting in concert with Mr. Shumak. I accept his evidence that he was trying to accommodate Mr. Shumak's desire to recover his capital while, at the same time, trying to minimize the impact of that return of capital on the operations of Linus and to keep the amount within the constraints of what he felt he could afford and what he was prepared to pay. Mr. Shumak's desire to monetize his investment promptly and his willingness to accept a discount was an opportunity for Mr. Kulawick, and he took it.

55 It is clear that Mr. Shumak was beginning to have some financial trouble by the end of March 2011. Mr. Shumak's companies were recently in default of payment under two commercial leases, both of which Mr. Shumak had personally guaranteed. However, he was not a defendant in any claim until November 2011 and it was not until April 2012 that he became a judgment debtor. His assignment under s. 49 of the *BIA* was not filed until January 23, 2013. There is no evidence Mr. Kulawick was aware of any of this until well after the fact.

56 I do not agree with the plaintiff's argument that Mr. Shumak's financial trouble negated his independent economic interest in his Linus shares or his ability to negotiate at arm's-length on the basis of that independent economic interest. To be sure, Mr. Shumak needed money in March 2011. That need, however, did not result in the overbearing of Mr. Shumak's will but instead resulted in a rational economic choice. His entitlement to a return of capital from Linus was highly constrained under the terms of the shareholders' agreement. At Mr. Kulawick's sole discretion under the shareholders' agreement, Mr. Shumak would only be entitled to receive incremental annual amounts for up to 12 years. Mr. Shumak, I find, was not willing to wait. This necessitated that he negotiate a bargain that was different than the shareholders' agreement. This is what happened in March 2011. Mr. Kulawick drove a hard bargain; Mr. Shumak bargained for the highest amount and earliest payment he could get from Mr. Kulawick in an arm's-length negotiation.

57 The lack of any consultation with accountants is not evidence of the lack of an independent economic interest. Given Mr. Shumak's desire for a quick return, Mr. Shumak's potential entitlements under the shareholders' agreement ceased to be material. The only question was how much of a discount Mr. Shumak was willing to take in order to receive ready cash.

58 The peculiar manner in which part of the purchase price was paid in the guise of consulting fees or the manner in which the transaction was reflected in Linus's financial statements does not change my view. Mr. Kulawick was the sole directing mind of Linus. He had the ability to structure the Transaction the way that he wanted. Whether the structure he adopted was

justified for other purposes, or how the Transaction appeared on the books of Linus, was completely immaterial to Mr. Shumak. Mr. Kulawick's explanation was, in any event, credible and in keeping with his approach to dealing with Mr. Shumak generally.

59 The plaintiff also argues that Thomas Sheppard was a sometime lawyer and a friend of Mr. Shumak's, that Mr. Sheppard was a director of Linus and that Mr. Sheppard and Mr. Brown practised law together. The plaintiff suggests that these associations support the conclusion of a non-arm's length relationship between Mr. Shumak and Mr. Kulawick. I do not agree.

60 There is no evidence that Mr. Sheppard played any material role in the Transaction. Mr. Brown had acted for Linus and Mr. Kulawick before. Mr. Brown and Mr. Sheppard were not partners; they merely practised in association with one another. Mr. Shumak was asked for, and provided, a waiver of any potential conflict. There is no suggestion that Mr. Brown gave anything less than complete and unambiguous loyalty and support to his client, Mr. Kulawick. Mr. Brown's role only supports, and does not detract from, the arm's length nature of Mr. Kulawick's relationship to Mr. Shumak in March through December of 2011.

61 For these reasons, I find that the first branch of s. 96(1) applies. Mr. Kulawick and Mr. Shumak were dealing at arm's-length. Therefore, the impugned transaction, to be invalid under s. 96(1), must have occurred within one year of the initial act of bankruptcy, i.e., within one year of January 23, 2013.

One Year Before Bankruptcy

62 There is, in this case (as in many cases), a timing difference between when the Transaction was entered into, when it closed and when it was fully implemented. The loan agreement, the promissory note and the share pledge agreement were all executed at the end of March 2011. The PPSA registration regarding the share pledge took place on April 19, 2011, although nothing turns on the timing or priorities of registration. The share transfer documents were endorsed as part of the pledge agreement. The loan amount was fully advanced by June 2011. Some of the consulting fees had also been advanced. Default under the loan occurred on December 1, 2011. Demand was made on December 2, 2011 for payment no later than December 19, 2011. Payment was not made and Mr. Shumak's shares were duly forfeited and transferred to Mr. Kulawick on December 20, 2011.

63 The relevant date is the date the loan agreement, promissory note and share pledge agreement were executed; that is, the end of March 2011. At the end of March, the contract was made: the obligation to advance funds became operative, as did the obligation to repay or, upon failure of repayment, to forfeit Mr. Shumak's Linus shares. The "date of transfer" is the date on which the agreement entitling Mr. Kulawick to the transfer was signed, i.e., the date of the Transaction. The completion, in law, relates back to the date of the contract, *Mercado Capital Corporation v. Qureshi*, 2018 ONCA 711 (Ont. C.A.), at paras 29-33.

64 Even if I am wrong in this conclusion, the only other relevant date is clearly December 20, 2011. This the date upon which the shares were actually transferred by right of forfeiture upon non-payment of the loan.

65 Either of these dates, March 30, 2011 or December 20, 2011, occurred more than one year before Mr. Shumak's assignment in bankruptcy. Accordingly, the Transaction is, in either case, outside the reach of s. 96(1) and cannot, therefore, be set aside under the *BIA*.

66 The combined effect of my findings under these two issues (arm's length and within one year of bankruptcy) is dispositive of the plaintiff's claim under the *BIA*. The plaintiff's claim to set aside the transaction by which Mr. Kulawick acquired Mr. Shumak's Linus shares under s. 96(1) of the *BIA* is therefore dismissed.

67 I will, nevertheless, deal with the question of undervalue because it is also both central to and dispositive of the plaintiff's claim under the *BIA*.

Undervalue

68 To address the plaintiff's burden of proving the Transaction was at undervalue, the plaintiff called the expert valuation evidence of Peter Weinstein, of KSV. Mr. Weinstein has extensive training and expertise in business valuation and damage calculation. He candidly admitted having no experience in the independent Canadian record label business or with financing, tax and other subsidy programs associated with the operation of Canadian cultural or heritage enterprises like Linus. I qualified

Mr. Weinstein as an expert, ruling that his experience, or lack of experience, with a business precisely like Linus would go to the weight to be attributed to his opinion.

69 Mr. Weinstein based his valuation of Mr. Shumak's equity interest on three scenarios using December 20, 2011 as valuation day. Mr. Weinstein testified that he was told to use December 20, 2011 as the date for the valuation and that he did not consider other possible valuation dates.

70 In scenario one, he calculated the book value of Linus's shareholder equity from the audited financial statements in accordance with Article 10 of the shareholders' agreement ($1.08 million). He then assumed, consistent with Article 12.03 of the shareholders' agreement, that the corporation would elect to pay the purchase price in four annual instalments. Under the assumptions contained in scenario one, Mr. Weinstein calculated the value of Mr. Shumak's 46.5% to be in a range of $408,000 to $459,000, with a midpoint of $432,000.

71 In scenario two, Mr. Weinstein again calculated the book value of Linus's shareholder equity from the audited financial statements in accordance with Article 10 of the shareholders' agreement (again $1.08 million). He then assumed, not only that the purchase price would be paid in four annual instalments but that, consistent with Article 13.01(b) of the shareholders' agreement, the corporation would elect to purchase no more than 5% of the total shares outstanding in any one year. This resulted in a theoretical payment stream which extended from 2011 to 2023. Importantly, however, under this scenario Mr. Weinstein assumed that Linus's book value would increase by 10% per year (based on his estimation of Linus's historical annual compound growth rate of approximately 15%) from 2011 until 2023, the final year of payment under this scenario. He also assumed that the book value for the purchase would be updated in each year. These assumptions produced a present valued range for Mr. Shumak's shares of $291,000 to $457,000, with a midpoint of $360,000.

72 In the third valuation scenario, Mr. Weinstein ignored the shareholders' agreement and attempted to calculate a fair market value of Mr. Shumak's shares using a combination of asset, book value and earnings approaches applied to different components of Linus's business. Mr. Weinstein also included calculations which both discounted and did not discount for the fact that Mr. Shumak held a minority share interest in Linus. Without a minority discount, the assumptions used in this scenario produced a range of value for Mr. Shumak's shares of $451,000 to $586,000, with a midpoint of $516,000; with a discount, the values ranged from $361,000 to $410,000 with a midpoint of $387,000. Mr. Weinstein made a point of noting that KVS did not expose Linus for sale in the marketplace to determine if some purchaser might have been prepared to entertain a transaction at some other value. As a result, Mr. Weinstein conceded that "it is not possible to comment with any degree of certainty on the price that would be paid by such a purchaser in an open market transaction."

73 Michael Mulholland has been a chartered accountant since 1975 and has spent his entire career working as a public accountant and as an auditor in the Canadian independent music business and associated government-sponsored and non-profit entities which support the independent Canadian music business. Neither he, nor Mr. Kulawick, were able to find any Canadian chartered business valuators with experience in valuing independent Canadian music companies.

74 Following a *voir dire*, I permitted Mr. Mulholland to provide opinion evidence on certain matters relating to the independent Canadian record industry and about Linus in particular. For reasons given during a mid-trial ruling, however, I limited Mr. Mulholland's evidence to essentially two matters: 1) his views on the likelihood of there being a market for a minority interest in Linus's shares; and 2) a calculation schedule, Tab 1A to the Defendants' Calculation of Share Value brief, marked at trial as Exhibit 31. Exhibit 31 reflects a recalculation of Mr. Weinstein's scenario two with a March 30, 2011 valuation date and no increase in book value after 2011.

75 Essentially, Mr. Mulholland's evidence was that there is no market for even a majority, much less a minority, interest in an independent Canadian record business; in effect, Mr. Mulholland's view is that the only market for Mr. Shumak's minority interest in Linus was Mr. Kulawick.

76 Mr. Mulholland advances essentially five reasons for this conclusion:

(1) Linus's portfolio of assets is unusual and occupies an extremely small niche — Canadian roots music, jazz, classical and children's music;

(2) all of the Canadian players in this industry are small. The most successful of them are only interested in rock music;

(3) there is a lack of any financing, let alone bank financing, available for acquisitions in this industry in Canada;

(4) only large American music enterprises could afford to acquire a Canadian music entity like Linus. However, the heavy dependence of the independent Canadian music business on government grants and tax subsidies prohibits acquisition by American record labels. This is because the subsidies on which independent Canadian music companies like Linus subsist would cease immediately upon any change of control to a U.S. entity; and

(5) the Canadian music market is also unattractive to U.S. music enterprises because it is so small, a disadvantage which is exacerbated by its further subdivision into an English and a French sector.

77 In the view I take of the matter, only scenario two of Mr. Weinstein's analysis has any relevance to the circumstances of this case. Scenario three, the fair market value scenario, has no application because a sale of Mr. Shumak's interest on the open market is not permitted by the shareholders' agreement without Mr. Kulawick's consent and was never in the cards.

78 Article 2.02(b) of the shareholders' agreement provides that shares in Linus could only be sold or transferred with the prior written consent of shareholders representing a Voting Majority (i.e., both Mr. Kulawick and Mr. Shumak). Mr. Kulawick, therefore, had an absolute veto over the sale of any of Mr. Shumak's shares other than in accordance with, among other things, Article 6, Withdrawal. Mr. Kulawick's unchallenged evidence was that he would not have given his consent to anyone else acquiring Mr. Shumak's minority interest.

79 Further, Mr. Weinstein was unable to give any opinion on the price that might actually have been achieved in an open market transaction for a minority interest. Mr. Mulholland's opinion, well supported by his extensive experience in the industry, was that there was no market for a minority interest in an independent Canadian music company. In light of Mr. Mulholland's expertise and Mr. Weinstein's admitted inability to comment on the issue, I accept Mr. Mulholland's evidence on this issue.

80 All of these factors satisfy me that the fair market value approach is not relevant to the assessment of whether Mr. Shumak's minority interest was acquired at undervalue.

81 Scenario one, in my view, is also unhelpful in the circumstances of this case. While it was open to Mr. Shumak to invoke his rights to be bought out under Article 6 and to have his shares valued at book value in accordance with Article 10, as discussed above Mr. Shumak did not invoke this right. The reason he did not do so is that he knew Mr. Kulawick and the company could, at their sole discretion, extend the time frame for the purchase not only to four years under Article 12.03 but to 12 years under Article 13.01.

82 The unchallenged evidence is that Mr. Shumak wanted cash and did not want to wait. It is also the unchallenged evidence of Mr. Kulawick that, although interested in acquiring Mr. Shumak's shares, he wanted to pay the least amount over the longest time period possible. Had Mr. Shumak exercised his contractual rights under the shareholders' agreement, it necessarily follows that Mr. Kulawick (and Linus) would have exercised Linus's rights under Article 13.01 to extend the time period for the acquisition of Mr. Shumak shares and diminish the impact on Linus's operations of that acquisition.

83 Since Mr. Shumak's only real option to a negotiated solution was to invoke his withdrawal rights and almost certainly wait up to 12 years for his money, scenario two is the only realistic baseline against which to assess what actually happened.

84 Mr. Weinstein's opinion on the value of Mr. Shumak's minority interest under scenario two ($291,000 to $457,000, with a midpoint of $360,000) is challenged by the defendants on two grounds:

(i) the valuation date of December 20, 2011 used by Mr. Weinstein; and

(ii) the 10% year-over-year growth imputed by Mr. Weinstein to Linus's shareholder equity for the purpose of calculating the value derived under scenario two.

85 Mr. Shumak's agreement to pledge his shares in exchange for a loan was made at the end of March 2011. He had, as I will discuss in more detail below, already received about $100,000 in payments which, while not explicitly characterized at the time, can only sensibly be treated as some form of return of capital. By the end of June 2011, Mr. Shumak had received a further $100,000 by way of advances on the loan secured by a pledge of his shares. And, before December 20, 2011, Mr. Shumak had also received a number of payments ostensibly on account of the July 2011 consulting agreement.

86 This evidence suggests that the end of March, rather than December 20, 2011 is the more appropriate date to establish the value of Mr. Shumak shares, as this is the date on which the Transaction became effective. By December 20, 2011, the date on which the shares were actually transferred, Mr. Shumak had already received most of the money. This evidence also suggests that, in the absence of the negotiated solution actually reached, the end of March 2011 is the date on which Mr. Shumak would likely have exercised his rights under the shareholders' agreement to withdraw and have his shares acquired.

87 Exhibit 31 is an alternative calculation of the scenario two value using the end of March as valuation date. Mr. Weinstein agreed in cross-examination that using March instead of December 2011 as the valuation date lowers the indicated value.

88 During his evidence in chief, Mr. Weinstein provided an explanation for his decision to impute a 10% year over year growth rate to the book value of shareholder equity for Linus when calculating value under scenario two. This was based on his interpretation of Article 13.01(b) of the shareholders' agreement which, he readily conceded, is a legal issue. Mr. Weinstein interpreted 13.01(b) to provide for a separate "purchase" each year for 12 years. This purchase, he concluded required a separate calculation of book value in each of those years. I do not agree with this interpretation.

89 Under scenario two, it is assumed that Mr. Shumak had the right to have his shares purchased upon withdrawal. That right is only triggered "by written notice." The purchase price payable must be determined in accordance with Article 10 "as to the date of delivery of such notice." Article 10 refers to the "time" for calculation of book value. These references to "time" can only be a reference to "the date of delivery of written notice" of withdrawal. That is the time at which book value and the purchase price are to be determined.

90 Article 12.03 provides a "payment" option over four years. Article 13.01 entitles the corporation to elect "not to purchase" in any year more than 5% of the total issued and outstanding shares "on the date such purchase is made."

91 The book value calculation of shareholder equity under Article 10 does not change by virtue of a "payment" deferral under Article 12.03 or an election not to "purchase" more than 5% of the total shares in any financial year under Article 13.01. All that might potentially change under Article 13.01 is the calculation "of the total number of issued and outstanding shares on the date the purchase is made."

92 There is no evidence that there was ever any change in the number of issued and outstanding Linus shares at any time. Even if there were, this does not give rise to any recalculation of the book value of the company. There is simply no basis under the shareholders' agreement for the imputation of an annual increase in the book value of shareholder equity in calculating what Mr. Shumak might have been entitled to receive under scenario two just because payment likely would have been deferred and an election made not to purchase more than 5% of the total outstanding number of shares in each year.

93 There is an alternate calculation without the annual assumed growth in the book value of shareholder equity in Exhibit 31. Mr. Weinstein agreed with the arithmetic calculations in Exhibit 31.

94 I find that the collective impact of these two factors reduces Mr. Weinstein's scenario two present value, at the very least, to the low end of his range, i.e., from his present value range in 2011 of $291,000 to $457,000 (midpoint $360,000) down to $196,000 to $291,000 (midpoint $236,000), depending on the choice of discount rate.

95 Against this amount must be compared the amount Mr. Shumak actually received and the circumstances surrounding how and when he received it. The defendants say Mr. Shumak received the following consideration regarding his Linus shares: $100,000 pre-loan; $100,000 by way of loan; and $77,000 by way of "consulting" fees (discounted by approximately 50% from the negotiated $150,000 to be paid over five years, due to the acceleration of these payments to Mr. Shumak).

96 The defendants argue therefore that Mr. Shumak and Mr. Kulawick negotiated a package valued at $350,000 for Mr. Shumak's 46.5% equity in Linus, which was reduced to $277,000 by virtue of Mr. Shumak requesting the full amount of his consulting fee payments almost immediately. The defendants therefore argue that Mr. Shumak received substantially all, or more than, he was entitled to receive under the terms of the shareholders' agreement.

97 The plaintiff attacks the pre-loan amounts on the basis that Mr. Kulawick's story about them changed over time and that it lacks credibility and on the basis that the paper trail for these payments was inconsistent and incomplete.

98 I find that these pre-loan amounts were paid to Mr. Shumak. I agree that Mr. Kulawick's explanation for these payments changed and that they were not accurately documented in Linus's books and records. I find, however, as a matter of substance, that the payments were intended to be on account of the return of Mr. Shumak's capital. The fact that Mr. Kulawick was prepared to manipulate the characterization of these payments to his own best advantage, while not laudable, does not detract from this essential point of substance. Thus, in my view, the pre-loan advances, which I find on the evidence were made to Mr. Shumak, for the reasons I have just stated, were at the time considered by both parties to be, and should be considered objectively and as a matter of substance to be payments on account of Mr. Shumak's capital in Linus.

99 The fact of the $100,000 loan and the pledge and forfeiture of shares is straightforward and not, on its own terms at least, controversial.

100 The plaintiffs also, however, attack the characterization of the post-loan consulting payments as payment for Mr. Shumak shares. They do so principally on the basis that these payments were, again, treated as accounts payable by Linus, not as a return of capital paid for by Mr. Kulawick.

101 Again, I accept Mr. Kulawick's evidence that, although booked as Linus expenses, these payments were, in substance, on account of Mr. Shumak's shares. While Mr. Kulawick chose at the time to characterize these payments differently and in a manner most advantageous to him, in all of the circumstances the evidence clearly demonstrates that these payments were not on account of consulting services (which, I find, were never provided and never intended to be provided). These payments were, I find, intended to constitute, and did constitute, a form of payment to Mr. Shumak for his shares if they were to be forfeited.

102 Three aspects of the consulting agreement itself also lend support to the conclusion that these payments were, in substance, intended to be an additional form of payment if Mr. Shumak did not repay the loan and forfeited his Linus shares.

103 First, section 3 of the consulting agreement provides that if Mr. Kulawick did not before December 31, 2011 own at least 46.5% of Linus's shares or, after that date, if Mr. Kulawick did not own at least 93% of Linus's shares, then payment of the amounts due to Mr. Shumak would be accelerated and paid in full within 12 months and Mr. Shumak would not be required to provide services to the company.

104 Second, under section 5(b)(a) of the consulting agreement, the company was at liberty to terminate the consulting agreement at any time if Mr. Shumak repaid the loan and Mr. Kulawick did not realize on Mr. Shumak's shares.

105 Third, under section 5(b)(b) of the consulting agreement, the company was also at liberty to terminate the consulting agreement if, having realized on Mr. Shumak's shares, Mr. Kulawick's ownership were to be challenged by a third party claiming a prior right to Mr. Shumak's shares.

106 Thus, as contemplated by the consulting agreement, in the possible scenario where Mr. Kulawick would no longer be a shareholder, Mr. Shumak would be entitled to payment without providing any service. And, in the two possible scenarios

where Mr. Kulawick would not end up with Mr. Shumak's Linus shares (repayment of the loan or someone else making claim to them), any obligation under the consulting agreement to pay consulting fees to Mr. Shumak would come to an end.

107 The overall context in which all of the payments to Mr. Shumak in 2010 and 2011 arose involved, initially, a series of ad hoc payments, then a formalize loan, promissory note and share pledge, and then a formalized consulting agreement. I find that the underlying motivation to make all these payments was the same — to provide Mr. Shumak with a return of his capital in a way, and to an extent, that a) would not detrimentally affected Linus's operations and b) was acceptable to both Mr. Shumak and Mr. Kulawick.

108 I find, therefore, that the amount actually paid to Mr. Shumak for his shares was $277,000. The amount Mr. Shumak could have been paid, had he been willing to wait for the five-year consulting agreement payments, was $350,000. The present value of the amount Mr. Shumak might have received had he exercised his rights under the shareholders' agreement is a maximum of $291,000 (at a 2011 present value) and almost certainly less. It must also be noted that Mr. Shumak had no entitlement under the shareholders' agreement to the present value of the future stream of payments authorized under Articles 12.03 and 13.01. Thus, Mr. Shumak did not have a contractual entitlement to the present value payment — his only contractual entitlement was to wait for the periodic payments over 12 years.

109 The plaintiff also relies on the fact that Mr. Shumak invested $1 million in 2000 as evidence the Transaction was at undervalue. I do not agree.

110 The independent Canadian music business is, on the evidence of Mr. Weinstein, Mr. Mulholland and Mr. Kulawick, risky. It is, among other things, heavily dependent on tax and other government subsidies. Mr. Shumak had a minority interest. He signed a shareholders' agreement which specifically provided for how his shares would be valued were he to withdraw. Those provisions constrain marketability quite severely and, in any event, in no way depend upon what Mr. Shumak paid for his investment in 2000. What Mr. Shumak paid for his 46.5% interest in 2000 simply has no bearing on what his shares were worth 11 years later.

111 The plaintiff also relies on Mr. Weinstein's suggestion that Linus had sufficient cash to pay "full value," without a present value calculation of a deferred stream of payments, for Mr. Shumak's shares. While this is perhaps a relevant fact, I do not find it a persuasive one. First, Mr. Kulawick, who actually ran this business, disagreed with Mr. Weinstein's observation, which was based only on Mr. Weinstein's review of the financial statements. Second, and more importantly, whether Linus *could* have paid Mr. Shumak without reliance on the deferred payment provisions in Articles 12.03 and 13.01 is not the issue. The issue is that Linus was *not obliged* to do so. Linus was entitled, at its sole discretion, to elect to defer the payments. It is the unchallenged evidence of Mr. Kulawick that he would have caused Linus to do so.

112 Section 2 of the *BIA* defines a transfer at undervalue as:

> 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.

113 The test for determining whether a difference in consideration is "conspicuously less than fair market value" under the *BIA* requires the court to have regard to all relevant factors, including the margin for error in valuing the assets in question, any appraisals made of the assets and the parties honestly held beliefs regarding the value of the assets, *People's Department Stores Ltd. (1992) Inc., Re*, 2004 SCC 68 (S.C.C.), at paras 85-86.

114 In this case, there is a significant margin for error given the number of assumptions inherent in Mr. Weinstein's calculations. Mr. Weinstein's $291,000 present value must be regarded as being at the high end of the range. Further, any 2011 present value amount (whether the one calculated by Mr. Weinstein or another, lower amount) was not contractually available to Mr. Shumak under the terms of the shareholders' agreement. In addition, the constraints of the payment terms to which Mr. Shumak was contractually bound, given his desire for an expeditious monetization of his shares, left him no alternative but to negotiate payment on a different basis, one that turned out to involve a discount.

115 Given these considerations, I cannot conclude that the amount Mr. Shumak actually received was conspicuously less than what was reasonably available to him under the terms of the shareholders' agreement. For these reasons, I conclude that the Transaction by which Mr. Kulawick acquired Mr. Shumak's shares was not at undervalue within the meaning of s. 96(1) of the *BIA*.

Other Section 96(1) Factors

116 Given my findings on the prior three issues, which are dispositive of the plaintiff's claim under s. 96(1) of the *BIA*, it is not necessary to consider the further two requirements for the application of the first branch of s. 96(1), namely whether Mr. Shumak was, at the time of the Transaction, insolvent or rendered insolvent by it and whether Mr. Shumak entered into the transaction with the intend to defraud, defeat or delay his creditors. I will, however, return to these questions when dealing with the claim under the *FCA*.

(2) Fraudulent Conveyances Act

117 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.

118 The voiding of a transfer as fraudulent under the *FCA* therefore requires:

(a) the conveyance of property;

(b) an intent to defeat, hinder, delay or defraud; and

(c) a creditor or other towards whom that intent is directed.

119 I am quite sure that Mr. Shumak was capable of defrauding the plaintiff and, given the opportunity, would have delighted in doing so. Mr. Shumak's dislike of (or perhaps the better word is hatred for) Mr. Oulahen was palpable and coloured all of Mr. Shumak's evidence. For this and other reasons, I did not find Mr. Shumak to be a credible witness. I have not relied on *his* uncorroborated evidence for any of the factual findings in these reasons.

120 However, on the facts surrounding the Transaction as I have found them to be, Mr. Shumak was acting in his own self-interest to maximize, in the circumstances in which he found himself, the amount of money he would receive for his Linus shares. Given the constraints as a signatory to the shareholders' agreement, Mr. Shumak had no contractual ability to achieve timely and expeditious payment from Linus for his shares. His only alternative was to negotiate an alternative solution with Mr. Kulawick. As it happens, and as I have found, the solution negotiated was approximately equal to the then present value of his shares as provided in the shareholders' agreement, given the constraints under Articles 12.03 and 13.01.

121 The Transaction was not at undervalue. The Transaction did not defeat, hinder, delay or defraud any creditor. What defeated creditors was Mr. Shumak's failure to use this money, and other available resources, to pay his creditors. That had nothing to do with the Transaction with Mr. Kulawick.

122 Put another way, to use the terminology often applied in *FCA* cases, the burden is on the plaintiff to prove fraudulent intent which is to be assessed at the time of the Transaction. Since fraudulent intent is rarely stated explicitly, it is most often inferred from the relevant circumstances. This entails a review of what is referred to in the cases as the "badges of fraud." In this case, essentially none of the badges of fraud have been proved:

(i) Mr. Shumak did not continue in possession of the shares. Forfeiture took place following default under the loan;

(ii) the transaction was not a secret. Mr. Kulawick's interest was registered under the PPSA;

(iii) the Transaction took place well before there was any threat of legal proceedings against Mr. Shumak;

(iv) in substance, the consideration was correctly stated in the documents;

(v) the consideration was not grossly inadequate;

(vi) this was a simple transaction and Mr. Shumak wanted his money. There was no "unusual" haste;

(vii) Mr. Shumak retained no benefit from his shares;

(viii) Mr. Shumak was not embarking on a hazardous new venture; and

(ix) Mr. Kulawick and Mr. Shumak negotiated the Transaction at arm's-length.

123 As a result of these considerations, I am bound to find that the Transaction was not undertaken with fraudulent intent. I therefore dismiss the claim under s. 2 of the *FCA* on this basis.

124 Section 3 of the *FCA* has a saving provision:

> 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.

125 A person seeking to rely s. 3 must therefore show that:

(a) good consideration was paid;

(b) the person was acting in good faith; and

(c) the person did not have knowledge of the debtor's fraudulent intent.

126 Even if I had concluded that Mr. Shumak was motivated by fraudulent intent, I would have found that Mr. Kulawick:

(a) paid good consideration for Mr. Shumak's shares;

(b) was acting in good faith; and

(c) did not have knowledge of Mr. Shumak's fraudulent intent. [1]

The basis for each of these conclusions is set out earlier in these reasons in the context of dealing with the background facts and Issue #1, Section 96(1) of the *BIA*.

Conclusion

127 For all these reasons, the action is dismissed.

Costs

128 If the parties cannot agree on the disposition of costs, any party seeking costs shall do so by filing a brief written submission not to exceed three typed, double-spaced pages together with a bill of costs, within 14 days of the release of these reasons. Any party wishing to respond to a request for costs shall file a responding submission subject to the same page limit also supported by the bill of costs that party would have filed had it been successful, within a further 14 days.

Action dismissed.

Footnotes

1 There is evidence from which it might be inferred that, by July 2011, Mr. Kulawick was probably aware that Mr. Shumak was struggling financially. This could be inferred from surrounding circumstances which include: a) Mr. Shumak's renewed efforts to obtain cash promptly in the form of his desire to accelerate payment of the consulting fees and to take a significant discount in exchange for doing so; and b) the provision in paragraph 5(b)(b) of the consulting agreement which provides that any obligation to pay consulting fees would terminate if a third party made claim to the shares acquired by Mr. Kulawick. This evidence significantly post-dates the Transaction and does not, standing alone in any event, go so far as to prove Mr. Kulawick had knowledge of *fraudulent intent* on the part of Mr. Shumak.

TAB 8

2016 ONSC 792
Ontario Superior Court of Justice

Cambone v. Okoakih

2016 CarswellOnt 1633, 2016 ONSC 792, 263 A.C.W.S. (3d) 941, 67 R.P.R. (5th) 305

Gina Cambone and David Mannell, Plaintiffs and Jonathan Okoakih and Abisola Okoakih, Defendants

Gray J.

Heard: November 17-20, 25, 2015
Judgment: February 2, 2016
Docket: 2677/12

Counsel: Glenn E. Cohen, for Plaintiffs
Jonathan Speigel, Timothy Morgan, for Defendants

Headnote

Debtors and creditors --- Fraudulent conveyances — Fraudulent intent — "Badges of fraud"

Plaintiff judgment creditors brought action against defendant judgment debtor, arising from failed property sale — Debtor and his wife purchased house after action was commenced, and made decision to place 99 per cent of title in wife's name and one per cent in debtor's name — After creditors obtained judgment against debtor, debtor disposed of his one per cent interest in house to wife — Creditors brought action for relief under Fraudulent Conveyances Act — Action allowed — Debtor and his wife expressed actual intent that house was put in wife's name so that debtor's creditors could not get at property — There were number of badges of fraud that put evidentiary burden on debtor and wife to persuade judge that transaction was not caught by Act — Not all money for purchase of house came from wife, as considerable amount came from debtor or from his corporation — To maintain fiction of separation between corporation and debtor would be to perpetrate fraud — As it was not possible to make accurate determination as to proportions contributed by debtor and his wife, it was determined that debtor and his wife were each entitled to equal share — Wife either held debtor's proportionate share on resulting trust for him or debtor made gift of his share to her — If debtor made gift of his share to wife, it was made with intent to defeat, hinder, delay or defraud debtor's creditors — Pursuant to s. 2 of Act, transaction under which property was placed in wife's name was void as against debtor's creditors.

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

Plaintiff judgment creditors brought action against defendant judgment debtor, arising from failed property sale — Debtor and his wife purchased house after action was commenced, and made decision to place 99 per cent of title in wife's name and one per cent in debtor's name — After creditors obtained judgment against debtor, debtor disposed of his one per cent interest in house to wife — Creditors brought action for relief under Fraudulent Conveyances Act ("FCA") and s. 96 of Bankruptcy and Insolvency Act ("BIA") — Action allowed — Not all money for purchase of house came from wife, as considerable amount came from debtor or from his corporation — In absence of precise calculation of respective contributions, it was concluded that debtor and his wife were each entitled to equal share — Wife either held debtor's proportionate share on resulting trust for him or debtor made gift of his share to her with intent to defeat, hinder, delay or defraud debtor's creditors — Pursuant to s. 2 of FCA, transaction under which property was placed in wife's name was void as against debtor's creditors — Given conclusion under FCA, it was not necessary to rule on s. 96 of BIA, but it seemed clear that wife's purchase of debtor's undivided one-half interest in property was at under-value — Wife paid more than $7,000 for his interest, and it was worth at least $350,000 — Having regard to timing of transaction and badges of fraud, intent was to defeat interests of creditors.

***Gray J.*:**

1 The *Fraudulent Conveyances Act* is powerful legislation that authorizes the court to set aside, for the benefit of creditors, a myriad of transactions that are entered into with the intent to defeat the claims of creditors. However, it is not intended to permit a creditor to set aside a legitimate purchase of an asset by a person who is not a debtor, with the purchaser's own money, even if the intent was to ensure that the creditor would not have access to that asset to satisfy the creditor's claim.

2 In this case, the plaintiffs claim that the defendants purchased a home with money furnished by both of them, and made it appear that it was actually purchased by only one of them, the party who is not the debtor. At the same time, the debtor was taking steps to ensure that no assets remained in his name. In these circumstances, the plaintiffs contend, the provisions of the *Fraudulent Conveyances Act* are triggered, and they are entitled to relief. At the same time, they contend that they are entitled to relief under s.96 of the *Bankruptcy and Insolvency Act*.

Background

3 The defendants, Dr. Okoakih and Ms. Okoakih (hereafter, for convenience only, referred to as "Jonathan" and "Abisola"), were formerly residents of Nigeria and, in 2006 or 2007 applied to immigrate to Canada under the Investor Class. Jonathan was trained as a medical practitioner, but no longer practices medicine, and Abisola has been employed primarily in the banking business. For several years, Jonathan has been a consultant through a consulting company known as Dale & Parker Limited. More will be said about that organization later.

4 On November 7, 2009, after he arrived in Canada, Jonathan executed an agreement of purchase and sale, as purchaser, for the purchase of property in Oakville at 1009 Lakeshore Road East, for the purchase price of $2,800,000. The plaintiffs in this action were the vendors. The stipulated closing date was April 1, 2010.

5 On November 12, 2009, Jonathan was approved by Scotiabank, based on information he provided, for a first mortgage in the amount of $1,820,000.

6 Jonathan was unable to come up with the closing funds by April 1, 2010, and he requested a brief extension to the closing date. That was refused by the plaintiffs. The deal did not close.

7 The plaintiffs relisted the property, and it remained on the market for over a year. Ultimately, it was sold for less than the amount Jonathan had agreed to pay, and the plaintiffs sued Jonathan for damages. The plaintiffs brought a motion for summary judgment which was heard on October 17, 2011. As it happened, I was the motion judge. I granted judgment to the plaintiffs against Jonathan in the amount of $317,731.17, and $20,000 in costs. An appeal to the Court of Appeal was dismissed on April 12, 2012: see *Cambone v. Okoakih*, 2012 ONCA 259 (Ont. C.A.).

8 On January 18, 2011, Jonathan and Abisola, as purchasers, executed an agreement of purchase and sale for property in Oakville at 225 Dunwoody Drive, for a price of $2,475,000. The transaction closed on April 29, 2011. It is this property that it is the subject matter of this action. The plaintiffs claim that the transaction, under which Abisola ultimately became the sole owner of the property, is void as against the plaintiffs, and that Jonathan should be declared to be the owner of an undivided one-half interest in the property, which would then be available to satisfy the plaintiffs' judgment which, to this day, remains unsatisfied.

9 To complete the general background, at least two examinations in aid of execution have been conducted, which have produced practically nothing in satisfaction of the judgment. The plaintiffs applied for a Bankruptcy order against Jonathan, which was granted by Newbould J. on December 9, 2013, after a contested hearing on December 3 & 4, 2013: see *Okoakih, Re*, 2013 ONSC 7492 (Ont. S.C.J.). Pursuant to Section 38 of the *Bankruptcy and Insolvency Act*, the plaintiffs were granted leave on October 28, 2014 to continue this action in place of Jonathan's Trustee in Bankruptcy.

10 After judgment was delivered against Jonathan on October 17, 2011, there was some delay in having Jonathan's solicitor approve the formal order as to form. As a result, a writ of execution was not filed until November 9, 2011. This will have some significance in view of certain other events.

11 As noted, the transaction involving the Dunwoody property closed on April 29, 2011. The agreement called for a deposit of $50,000, a further deposit of $100,000 payable by February 21, 2011, and the balance of approximately $617,000 due on closing. Both deposits were paid by cheques written by Abisola. There is considerable controversy about the source of the funds, which I will discuss in a moment.

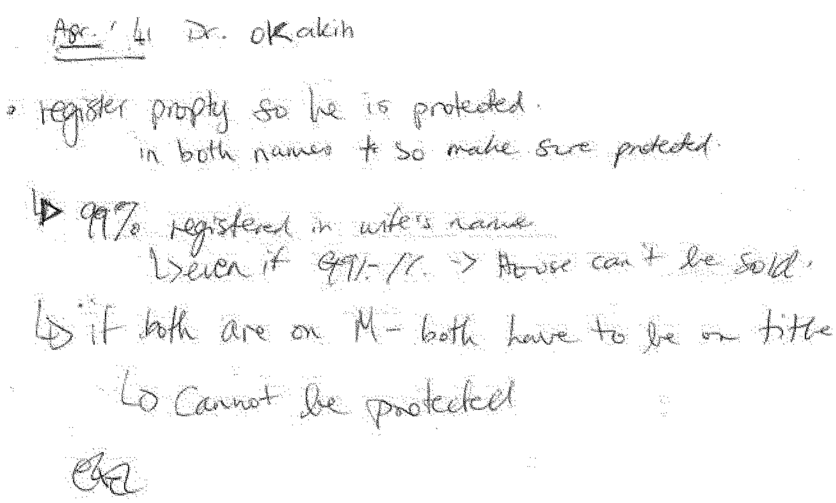
12 Once again, mortgage financing was approved by Scotiabank. By letter from Scotiabank dated January 25, 2011 addressed to Jonathan and Abisola, they were advised that a first mortgage had been approved in the amount of $1,758,750. Among other things, the letter states "This mortgage pre-approval is subject to verification of downpayment, in the amount $716,250 and net worth of $354,400 in addition to downpayment. The net worth must reside in Canada."

13 The office of Russell Allegra was retained to act for Jonathan and Abisola on the transaction. Included within Russell Allegra's office was a lawyer by the name of Frank Torchia, who testified at this trial.

14 By letter dated April 19, 2011, Mr. Allegra instructed the solicitors for the vendor that title to the property would be taken in the names of both Jonathan and Abisola, in a manner to be advised. Ultimately, the vendor was directed to engross the transfer in the names of Jonathan and Abisola as tenants-in-common, with a one per cent share to Jonathan and a 99 per cent share to Abisola. It was stipulated in evidence that both parties were required to be on title at the insistence of Scotiabank, although Scotiabank was indifferent as to the percentages of ownership.

15 As noted, Frank Torchia testified. He is no longer in Russell Allegra's office.

16 Mr. Torchia identified a note made in his handwriting, which is dated sometime in April, 2011 (a punched hole is in the middle of the date). The note is headed "Dr. Okakih". In the note, the following is found:


Apr. '11 Dr. Okakih
• register propty so he is protected.
in both names + so make sure protected.
↳ 99% registered in wife's name
↳ even if 99/1% -> House can't be sold.
↳ if both are on M - both have to be on title
↳ Cannot be protected

Graphic 1

17 Mr. Torchia testified that he cannot recall the note or what it means.

18 An internal document was produced that is taken from Mr. Allegra's file. After recording the names of Jonathan and Abisola as the purchasers, beside the words "taking title" there is a note in brackets: "(see Frank's note)".

19 Various amounts of money were transferred from Nigeria. As noted, the source of those funds is of some controversy, which will be discussed later. The funds were transferred to Jonathan, as follows:

a) January 11, 2011 - $59,985US;

b) April 5, 2011 - $99,985US;

c) April 6, 2011 - 69,990;

d) April 8, 2011 - 69,990;

e) April 8, 2011 - 69,990;

f) April 12, 2011 - 69,990;

g) April 13, 2011 - 69,990;

h) April 14, 2011 - 69,990;

i) July 11, 2011 - $50,015US;

j) July 25, 2011 - $50,005US;

k) August 15, 2011 - $50,000US;

l) September 21, 2011 - $29,802US

20 Effective November 23, 2011, funds began to be transferred from Nigeria to Abisola, as follows:

a) November 23, 2011 - $15,080US;

b) December 12, 2011 - $40,150US;

c) December 30, 2011 - $30,195US;

d) January 31, 2012 - $99,985US.

21 On October 28, 2011, Jonathan and Abisola attended upon a solicitor, Walter Lalka, and executed a transfer of Jonathan's one per cent interest in the property to Abisola. Abisola wrote a cheque to Jonathan in the amount of $7,412.50, also dated October 28, 2011. As noted earlier, the plaintiffs' writ of execution for their judgment against Jonathan was not filed until November 9, 2011. Thus, it did not affect even Jonathan's stated one per cent interest.

22 Abisola testified. She is well educated, with a BSc and an MBA. She has primarily been involved in the banking business, although she is also in business with her sister, operating a company in Nigeria called Spa One.

23 Abisola started in the banking business in 1991, and ultimately became the General Manager of Oceanic Bank, which is located in Nigeria. In the 2006 annual report for Oceanic Bank, she is identified as "General Manager/Group Head, Corporate & Commercial Banking".

24 Abisola's salary from Oceanic Bank as of September 4, 2007 was approximately 34,000,000 Nigerian Naira, or approximately $200,000 US.

25 Abisola testified that while she was employed as a banker, she was involved in purchasing foreign currency for various people, for which she was paid for her services in cash. Various documents were produced in support of her testimony in this respect, although it is impossible to know, from the documents produced, whether the payments were actually in cash and if so, what happened to it.

26 Abisola testified that in September, 2008, she joined Parkway Microfinance Bank as its Managing Director. She testified that her husband, Jonathan, who was and still is a director of Parkway, requested that she take the position. She testified that he made the request on behalf of a number of directors at Parkway.

27 Abisola testified that Jonathan was conducting his business through a consulting company, Dale & Parker Limited, of which Jonathan owns 70 per cent and Abisola owns 30 per cent. According to the articles of association for Dale & Parker Limited, of the 500,000 issued shares, Jonathan owns 300,000, Abisola owns 150,000, and another individual owns 50,000.

28 Abisola testified that after her arrival in Canada in April, 2010, she did her work for Parkway remotely. However, due to a change in operations at Parkway in January or February, 2011, she discovered she could not wake up at 3:00 a.m. for remote discussions and meetings, and she was given a "sabbatical" so that she would attend in Nigeria for three weeks every quarter. She continued to receive the same salary, which was approximately $220,000 annually. She testified that effective 2014, she is now back to the same arrangement, that is, she does her work remotely. She produced her passport, which shows her various comings and goings from and to Nigeria, Canada and a few other places.

29 Abisola acknowledged that her income tax return for 2010 disclosed income of $32,828, and for 2011 it disclosed $33,125. She acknowledged that those figures are seriously inaccurate, but blamed her accountant for the misinformation. She says she now has a better accountant. She produced no revised income tax returns, and none more recent than 2011, nor was her former accountant or current accountant called to give evidence.

30 In her direct evidence, Abisola said nothing further about the directorships or shareholdings of Parkway Microfinance Bank.

31 Abisola testified that she and her sister own a company, Spa One Enterprises. It was established in Nigeria in 2000. It has a beauty salon, a spa and a gym. Her sister effectively runs the business while Abisola is in Canada.

32 Abisola testified that she and Jonathan immigrated to Canada under the Investors Immigration program. She said Jonathan was primarily responsible.

33 Abisola testified that she earned more money than Jonathan; she earned approximately 55 per cent more than he did. Notwithstanding this, she testified that Jonathan was in charge of the finances for the family. This was based on the cultural norm in Nigeria, that the male is in charge of the family and its finances. She testified that Jonathan was responsible for setting up the bank accounts in Canada, both his and hers.

34 Abisola testified as to the first property purchased, that led to the aborted transaction. She said she was in Nigeria at the time. She was advised of the purchase by Jonathan, who said he liked the property. She told him to go ahead with the transaction. She said the deposit of $50,000 came from Jonathan but the additional $100,000 came from her.

35 Abisola identified a letter, dated November 4, 2009, addressed to Jonathan, from Parkway Microfinance Bank, disclosing an investment of 170, 050,000 Naira, or approximately $1,164,000. She said that while the investment was in Jonathan's name, some of the money came from her and some from investments that were in Jonathan's name. She testified that Jonathan obtained the mortgage commitment from Scotiabank, and she was not involved. She testified that if the deal had closed, she would have been shown on title and some of her money would have been used. She identified a statement from Scotiabank for Jonathan, showing a balance as of April 17, 2010 of $555,826.32. She testified that she and Jonathan were both contributors to the fund.

36 Abisola testified that ultimately Jonathan could not come up with the balance required to close the transaction. As a result of the crash in 2009, they had lost money on a number of investments, and some of their funds had to be used to retire various loans.

37 Abisola testified that she was aware of the lawsuit against Jonathan following the failure to close the transaction, but she did not think it would succeed. In Nigeria, apparently it is common to back out of property transactions without penalty.

38 Abisola testified that after she arrived in Canada with the children in April, 2010, she and the family lived in rented premises in a 3-bedroom apartment on Forsythe Street in Oakville. She testified that the children were unhappy living there.

39 Abisola testified that both she and her husband signed the agreement of purchase and sale for the purchase of the property at Dunwoody. She said she liked the house, but her husband did not. She said she wanted her husband on title, because she was

married to him and she was comfortable with having him on title. She said she had confirmed that she was able to come up with the funds for the downpayment. She had discussed the matter with her uncle in Nigeria, who promised to lend her some money, and she had some personal funds in her businesses. She testified that she supplied the deposit and the supplementary deposit totalling $150,000.

40 Abisola testified that she spoke to Marco Khoshkabari, the person at Scotiabank who was responsible for arranging the mortgage, about financing. She acknowledged that the letter dated January 25, 2011 from Marco regarding the financing was addressed to both her and Jonathan. With respect to the requirement set out in Marco's letter that there had to be a net worth of $354,400 in Canada in addition to the downpayment of $716,250, her husband had that amount in assets in Canada, consisting of certain luxury cars that he owned, including a Rolls Royce and a Range Rover. She testified that she knew her husband was intending to buy a number of luxury cars, and she agreed that he should do so.

41 Abisola testified that when she and her husband signed the agreement of purchase and sale, they had not decided how to take title to the property. She said they came to a decision just before closing. In discussions with her friends, she had been advised that she should separate her assets from those of her husband, because of her husband's financial difficulties. As a result, she and her husband would have preferred to have the title to the property in her name alone. However, Marco had said that her husband's name had to be on title. Scotiabank did not care what percentage of ownership Jonathan had. Thus, it was decided that title would be taken 99 per cent in her name and one per cent in Jonathan's name, and that was all right with Marco.

42 Abisola testified that they met with a lawyer on April 27, 2011, to finalize the documents for closing. She said that they met with a clerk named Sara, but no lawyer was present. Various documents were signed in order to place title in her name as to 99 per cent, and Jonathan's name as to one per cent.

43 Abisola identified documents relating to her various bank accounts at Oceanic Bank, Parkway Microfinance Bank, and Standard Chartered Bank. Some of these are relevant as to the source of funds supplied to purchase the Dunwoody property. She testified that the accounts do not reflect all of the money she earned, because some of what she received was in cash from activities such as arranging foreign currency transactions.

44 Abisola testified as to the source of funds for the first deposit of $50,000, the second deposit of $100,000, and the balance due on closing of over $600,000.

45 Abisola testified that the first deposit of $50,000 came from her business that she owned with her sister, Spa One.

46 Abisola testified that her sister, Lola Ajayi, the Managing Director of Spa One Enterprises, instructed Adymar Integrated Nigeria Limited to transfer to Jonathan the sum of $60,000US, and confirmed that $60,000US had been deposited with Adymar for that purpose. She testified that Adymar acknowledged receipt of the funds and acknowledged that the funds would be transferred to Jonathan as instructed. An internal Scotiabank document dated January 11, 2011 was produced, which showed a transfer of funds from Adymar to Jonathan in the amount of $59,985US.

47 Abisola's sister, Lola Ajayi, testified to confirm this information, but I pause at this point to mention certain difficulties with the documentary evidence.

48 The original of the letter to Adymar from Lola Ajayi, dated January 11, 2011 was produced. While it clearly has a date stamp of Adymar on the original, dated January 11, 2011, the letter itself appears to be a printed copy of an original. Furthermore, the letter from Adymar acknowledging receipt of the $60,000US and the instructions to transfer the money to Jonathan, is dated January 12, 2011, and has on it a handwritten note that states "Recd by Fatai 12/1/2011". The letter itself states "Kindly note that the funds will be treated as soon as possible." The Scotiabank document reflects a transfer to Jonathan's Scotiabank account, which was effected on January 11, 2011. No explanation was offered as to the clear conflict in the dates.

49 Abisola testified that the supplementary deposit of $100,000 came from funds with Standard Chartered Bank. She testified that the Standard Chartered Bank account in Nigeria was a joint account held by herself and Jonathan, but all the funds in the account came from her. They also had an account with Standard Chartered Bank in London, England, but it was not possible

to get the bank records for that account. She testified that she wanted the account in both names so that Jonathan would have a right of survivorship.

50 Abisola testified that funds totalling £105,000 was transferred from the account in Nigeria to the account in London. Apparently, the only document that could be obtained from Standard Chartered Bank in London was a single page with the heading "Payment Execution", which appears to show a transfer of $116,655CAD to an account at Scotiabank. The "date of instruction" is said to be "110210", which I take it is February 10, 2011. An internal Scotiabank document was produced that shows a transfer to Jonathan's account, in the amount of $99,985US. However, that transfer was effected on April 5, 2011, and was transferred through First City Monument Bank, Nigeria.

51 Abisola testified as to the source of funds for the balance due on closing, of approximately $617,000.

52 She testified that 16,000,000 Naira were obtained from her funds at Spa One Enterprises. She identified a letter dated April 4, 2011, from her sister, Lola Ajayi to Parkway Microfinance Bank instructing the bank to credit Abisola's current account with 16,000,000 Naira. I pause at this point to note that the original of that letter raises the same issue as the other letter signed by Lola Ajayi, namely, that while it has on it a date stamp from Parkway Microfinance Bank dated April 5, 2011, the letter itself appears to be a copy of an original.

53 Abisola testified that an additional 100,000,000 Naira came from a relative, who she calls her "uncle", but who is really her cousin. He is apparently the King of a local tribe in Nigeria.

54 Abisola testified that during discussions with her uncle in December, 2010, he said he would lend her 100,000,000 Naira, and she could return the money whenever she could. She identified a document apparently signed by her uncle that states "This is to certify that his Royal Majesty, Oba Mufutau Gbadamosi, the Olofa of Offa gave financial support to Mrs. Abisola Awele Okoakih for the purchase of her house in Canada in April, 2011. The financial assistance is non-interest bearing and repayable when able." The document is dated October 19, 2013. The document is clearly hearsay. The signatory was not called as a witness, even though Lola Ajayi, Abisola's sister, came from Nigeria to testify. Another witness called by the defendants, Michael Oreglemhe, testified through Skype.

55 Entries from Abisola's current account at Parkway Microfinance Bank appear to show two deposits from Two R Global Ventures (a company apparently owned by Abisola's uncle) in the amounts of 50,000,000 Naira each, on April 1 and 4, 2011, and a deposit of 16,000,000 Naira from Spa One on April 4, 2011. It also shows the issuance of a draft on April 4, 2011 in favour of Fairmont BDC Ltd in the amount of 116,000,000 Naira. Fairmont BDC is an organization that does currency transfers. I should note here that there are some issues respecting these transactions, which I will discuss more fully later.

56 Six internal Scotiabank documents bearing dates between April 6, 2011 and April 14, 2011 show transfers of 69,990 each from First City Monument Bank, Nigeria, to Jonathan. Presumably, this was sufficient to provide the balance due on closing.

57 Additional funds were sent to Jonathan after the closing of the transaction. On July 11, 2011, the sum of $50,015US was transferred. On July 25, 2011, the sum of $50,005US was transferred. On August 15, 2011, the sum of $50,000US was transferred. On September 22, 2011, the sum of $29,802US was transferred. Abisola testified that the funds were for the purpose of mortgage payments, upkeep of the property and living expenses. She said the money was furnished to Jonathan because he was in charge of the family's finances.

58 Commencing in November, 2011, additional funds were transferred but instead of to Jonathan, they were transferred to Abisola. On November 23, 2011, the sum of $15,080US was transferred. On December 12, 2011, the sum of $40,150US was transferred. On December 30, 2011, the sum of $30,195US was transferred. On January 31, 2012, the sum of $99,985US was transferred. Abisola testified that some of the funds came from Spa One.

59 Abisola testified that the reason for the change in the recipient of the funds was because Jonathan had litigation against him. She did not want to be bound by her husband's legal problems. Thus, she had to ensure that any funds transferred were in her name. She knew about the judgment against Jonathan.

60 Abisola testified that she decided to purchase her husband's one per cent interest in the property. They attended on a lawyer for that purpose. She said she did not want to be bound by her husband's legal problems, and therefore she bought him out. She paid $7,412.50 for her husband's one per cent interest. To arrive at the amount, she added $25,000 to the original purchase price, to take account of inflation, and paid one per cent of the equity.

61 On cross-examination, she testified that the shares of Spa One are owned by herself and her sister. She testified that both she and her sister are signatories for matters involving the company, but she acknowledged that in the proceedings involving her husband's bankruptcy she testified that she was not a signatory. She testified that her memory gets better as time goes on.

62 She was questioned about the letters regarding the sum of $60,000 from her sister Lola to Adymar dated January 11, 2011, and the acknowledgement from Adymar dated January 12, 2011. She acknowledged that these documents were not provided to counsel for the plaintiffs until December, 2013. She had no explanation for the discrepancy in the dates of the two letters. She also acknowledged that the documents regarding her discussion with her uncle as to borrowing money were not produced until December, 2013.

63 Abisola was questioned with respect to the account with Standard Chartered Bank in London. She insisted that she could not get statements for that account from the bank. She acknowledged that she did not check with the bank in London. Rather, she only made inquiries of the bank in Nigeria.

64 She was asked about her tax returns. She said her new accountants, KPMG, are working on them. However, they have not been produced.

65 Abisola stated that Parkway Microfinance Bank was incorporated in 2007. The head office of the bank was first listed as the address of her husband's office. She said he was consulting for the bank at the time. It then moved to its current location in Lagos.

66 Abisola confirmed a number of the original shareholders of the bank. She was then asked if she would identify the one remaining shareholder. She hesitated, paused for a long time, and then barely audibly said "I don't know — you tell me." She then acknowledged that the remaining original registered shareholder was her husband, who held 12,000,000 shares, or at that time, 4 per cent of the issued capital.

67 Abisola also acknowledged that subsequently Dale & Parker Limited, the consulting company owned by her husband and herself, was issued 280,000,000 shares, or 93 per cent of the issued capital. Thus, shareholders other than Jonathan Okoakih and Dale & Parker Limited have only 2.7 per cent of the issued shares.

68 Abisola acknowledged that Jonathan was one of the original directors in 2007, and remains a director.

69 She became Managing Director in 2009, and as Managing Director she is on the Board of Directors.

70 When asked why she did not advise the court in her direct testimony as to the shareholdings of Parkway Microfinance Bank, she said she was not asked.

71 Abisola was asked about the account at the Standard Chartered Bank. She acknowledged that the account was a joint account. She said that if she died, her husband would have access to the account. She said the bank invested the funds in an account in London at her request. The funds were held in both names in the account in London. She testified that the transfer of $116,000 effectively wiped out the account.

72 Abisola acknowledged that the transfer of $50,000US on August 15, 2011 was from Standard Chartered Bank in Nigeria, and was at the order of herself and Jonathan.

73 On re-examination, Abisola testified that while the shares in Parkway Microfinance Bank that are registered in Jonathan's name belong to him, the shares registered in the name of Dale & Parker are beneficially owned by others. She does not know who they are.

74 Michael Oreglemhe testified. He was in Atlanta, Georgia, when he gave evidence and he did so through Skype.

75 Mr. Oreglemhe has been a banker for 21 years. He is the Branch Manager of First City Monument Bank in Lagos, Nigeria. Mr. Oreglemhe testified that First City Monument Bank is involved in foreign exchange transfers. He knows Abisola, and he has done foreign exchange transfers for her. He has met Lola, Abisola's sister. He has never met Jonathan.

76 Mr. Oreglemhe identified a number of transfers that were effected in April, 2011.

77 Mr. Oreglemhe testified that Parkway Microfinance Bank had an investment with First City Monument Bank of 250,000,000 Naira. On April 4, 2011, Parkway Microfinance Bank instructed First City Monument Bank, in writing, to liquidate 116,000,000 Naira from that investment, and transfer it to Fairmont BDC Ltd. The instruction was signed by two officers of Parkway, not Abisola. The transfer was effected on April 5, 2011.

78 Mr. Oreglemhe confirmed that the transfers of funds, some in US dollars and some in Euros, were effected by First City Monument Bank on January 11, April 5, April 6, April 8, April 12, April 13, April 14, July 11, July 25, September 21, November 23, December 12, and December 21, 2011, and January 31, 2012.

79 On cross-examination, Mr. Oreglemhe acknowledged that nothing on the documents suggested that he was personally involved in any of the transfers.

80 He was asked what was involved in effecting a transfer of funds through the use of a draft. He said a draft would be used if a customer had funds in his or her account, and the draft would be purchased with those funds. When the draft is presented to the receiving bank, it would be shown as a deposit in the account at that bank.

81 Olupola Ajayi testified. She goes by the name of Lola. She is Abisola's sister. She is well educated with a Bachelor of Science degree.

82 Ms. Ajayi testified that she assisted her mother with a business in Nigeria. That business has 45 employees. She has lived in both Nigeria and the United States, and has children living in the United States.

83 Ms. Ajayi testified that Spa One was started in January, 2010. It consists of a guest house, a salon, a gym, and provides body massage and shoes. In 2010, she became the Managing Director. She collects the revenue and supervises the staff. Abisola owns 70 per cent of the shares, and Ms. Ajayi owns 30 per cent.

84 Ms. Ajayi testified that after Abisola moved to Canada, she would call Abisola and update her every couple of days. She testified that Abisola had signing authority for the business before she moved and still has signing authority although she does not use it much.

85 Ms. Ajayi testified that about 90 per cent of the business' revenue is in cash. She said it is not unusual to keep large amounts of cash on hand.

86 Ms. Ajayi testified that Abisola talked to her about her living arrangements in Oakville, and said she needed more space for the kids. She said she wanted to buy a house. She would need money to do so. Ms. Ajayi testified that one way or another, she could come up with $60,000US. She did so. It was in cash, which came out of Abisola's share of the business. She testified that she prepared the letter dated January 11, 2011 addressed to Adymar, and gave the letter and the $60,000 in cash to a salesgirl and asked her to deliver both the letter and the cash to Adymar. She instructed the salesgirl to get a stamp acknowledging receipt. She was not surprised that the money was being transferred to Jonathan, as this was a cultural thing.

87 Ms. Ajayi testified that the salesgirl told her that she was not too familiar with the person at Adymar to whom she delivered the letter and the cash. Accordingly, she got a letter acknowledging receipt.

88 Ms. Ajayi testified that she prepared the letter dated April 4, 2011, addressed to Parkway Microfinance Bank, requesting the bank to withdraw cash amounting to 16,000,000 Naira and credit Abisola's current account. She said the letter was delivered by a salesgirl, and was stamped as received on April 5, 2011.

89 Ms. Ajayi testified that she provided the letters she had prepared to Abisola when she asked for them but could not recall when that was.

90 Ms. Ajayi testified that there were other occasions in which she was involved in transferring money to Abisola. She dealt with Mike at First City Monument Bank. Sometimes a salesgirl delivered cash, and sometimes it was by cheque. She could not recall if the money was transferred to Jonathan's or Abisola's account. She said in the Nigerian culture, it is the male who pays the bills.

91 On cross-examination Ms. Ajayi testified that the name of the salesgirl that she used to deliver letters and cash is Noye Peters.

92 Ms. Ajayi testified that Adymar charges a fee for its services but she could not recall what that was.

93 She acknowledged that the letter dated January 11, 2011 states "Kindly transfer to Dr. Jonathan Okoakih as per attached bank details". She said the "attached bank details" were prepared and typed by the salesgirl, but she did not know what they were. She could not recall when other transactions involving Abisola were effected.

94 Ms. Ajayi testified that she was the one who called the person at Adymar and asked for a letter confirming receipt of the funds.

95 Counsel for the plaintiffs requested production of the originals of the letters dated January 11 and April 4, 2011, which were marked as Exhibits 10 and 11. Ms. Ajayi, when confronted with these documents, was asked to say whether they were originals or copies. After some equivocating she finally took the position that they were originals. To me, they appear to be copies.

96 Jonathan testified.

97 Jonathan was qualified as a medical practitioner in Nigeria in 1987. In 1990, he joined Arthur Anderson and was involved in consulting, including in the United States. In 1994, his consulting company, Dale & Parker Limited was incorporated. Since then, he has been involved in consulting through Dale & Parker.

98 Jonathan testified that as of April, 2010, Abisola earned more money than he did. He estimated that she earned 45-50 per cent more. He testified that he handled the finances of the family until December, 2011.

99 Jonathan testified as to the incorporation of Parkway Microfinance Bank. He was involved in setting up the bank. Dale & Parker were the consultants. He said they were involved on behalf of a number of investors.

100 Jonathan testified that there are eight investors in the bank. Not all of them are shown as shareholders. In terms of the 12,000,000 original shares, he wanted to put them in the name of Dale & Parker. However, the Nigerian central bank said it needed the name of an individual. Jonathan testified that when he got the shares, he signed them back to the investors.

101 When it came time to issue a second tranche of shares, Mr. Aduci, the third shareholder in Dale & Parker, brought in some additional investors. They wanted to put the shares in the name of Dale & Parker, and they were. Jonathan testified that the shares were signed over to the investors, and he has never held a beneficial interest in the shares of Parkway, nor has Dale & Parker.

102 Jonathan testified that the investors wanted Abisola to join the bank as its managing director. She was hesitant at first, but ultimately agreed. Jonathan testified that the bank has not paid any dividends to shareholders. Jonathan testified that while he is a director of Parkway he has not been active, at least since he moved Canada.

103 Jonathan testified that he immigrated to Canada in 2009, after applying in 2006 or 2007. After he arrived, he began renting a property for $6,000 or $7,000 per month. A real estate agent suggested that he buy a house. Ultimately, he signed the agreement of purchase and sale for the purchase of the property on Lakeshore Road. He testified that the deposit of $50,000 came from cash he had brought with him.

104 Jonathan testified that he spoke to Marco, a private banker at Scotiabank. On November 12, 2009, he was approved for a first mortgage in the amount of $1,820,000.

105 Jonathan testified that he and his counsel requested the entire file from Scotiabank. What he received is probably incomplete. For example, he believes he signed a mortgage application, which is not in the file that was supplied by Scotiabank.

106 Jonathan testified that the bank wanted a downpayment of $1,000,000. He provided to the bank a letter dated November 4, 2009, showing that he had an investment in his name in the amount of 170,050,000 Naira, which is approximately $1,164,000CAD. Some of the investment consisted of funds from his wife, but he did not tell the bank that.

107 A further $100,000 transfer to Jonathan came from Abisola, from her funds.

108 Jonathan testified that he could not close the transaction, as he could not get the necessary balance due on closing. Parkway liquidated a number of investments to collect debts and accordingly he could not get access to the necessary funds. As a result, a lawsuit ensued, which ultimately led to the judgment against him.

109 Jonathan testified that his family arrived in Canada in April, 2010. They rented a townhouse at 111 Forsythe Street in Oakville. He said his children did not like the property.

110 Jonathan testified that his wife wanted to buy a house, but he had no money. He said that on a trip to Nigeria, his wife spoke to her uncle and to Lola about getting some money.

111 Jonathan testified that he and Abisola signed the agreement of purchase and sale for the Dunwoody property. He said that he did not like the house. The purchase price was $2,475,000, and Abisola did not have immediate access to the funds.

112 Jonathan testified that he signed the agreement of purchase and sale because Abisola wanted him to take the lead as the male of the family. He said that in Nigeria, Abisola would normally provide him with about 80 per cent of her income and he would pay the bills.

113 Jonathan said that his name was on the account at the Standard Chartered Bank in case anything happened. An account with Standard Chartered Bank was opened in England because it was possible that their daughter might go to school there. He testified that none of his money was in the account, and he had no access to it.

114 Jonathan testified that none of the money that went into the house came from him.

115 Jonathan testified that while both he and Abisola signed the agreement of purchase and sale, Abisola decided that she wanted the house in her name only because she did not want to be involved with his legal affairs. He said he discussed it with Marco, who told him the bank would insist that he be on title but that the bank did not care what percentage he owned.

116 Jonathan testified that when he moved to Canada he thought he would still do work through Dale & Parker, but he testified that he does not do very much now. He acknowledged that an internal Dale & Parker memo to him dated June 12, 2002 appears to show income to him up to and including March, 2012. He said the income is used to pay a loan.

117 Jonathan testified that he transferred his one per cent interest in the Dunwoody property to Abisola because Abisola did not want to be involved in his legal issues. He said an appraisal was obtained, and they calculated that one per cent of the equity including an allowance for inflation came to $7,412.50, and Abisola wrote him a cheque for that amount.

118 Jonathan reviewed the documents regarding the transfer of funds, and stated that none of the money came from him. He said he had never met Michael Oreglemhe.

119 On cross-examination, Jonathan acknowledged that the shares of Parkway Microfinance Bank were not disclosed to his Trustee in Bankruptcy.

120 Jonathan confirmed that he owns 300,000 shares of Dale & Parker, Abisola owns 150,000 shares, and a third person owns 50,000 shares.

121 Jonathan stated that he has signed over the shares in Parkway Microfinance Bank, but that he does not have the documents to show that. He said there is a secrecy agreement. He is not sure how much profit Parkway earns.

122 Jonathan testified that his relationship with the Bank of Nova Scotia started in 2009, when he arrived in Canada. He said he provided Bank of Nova Scotia with a statement disclosing how much he had. He said the letter from Parkway Microfinance Bank, which showed that he had over $1,000,000CAD actually reflects a combination of his money and his wife's money.

123 Jonathan acknowledged that his tax returns, at least as they were filed, show that he earned more money than Abisola.

124 Jonathan acknowledged that in obtaining the approval for the mortgage on the Dunwoody property, he told Marco that he owned luxury cars, which the bank was satisfied gave him enough net worth in Canada to qualify for the mortgage. On the Rolls Royce alone, he appeared to have equity of $193,000. Shortly after the judgment was obtained against him, he traded the car in and got in exchange a leased vehicle with no equity.

125 Jonathan acknowledged that between April and October, 2010, various amounts were withdrawn from his account at Scotiabank and transferred to another account. He also acknowledged that on November 9, 2010, he transferred $250,000 to Dale & Parker Canada, effectively depleting his account entirely. He said the money was transferred there with Abisola's permission, but could not recall why. Dale & Parker Canada was set up in 2009, but had not done any significant consulting work. He then acknowledged that a draft was purchased from the Dale & Parker account on November 25, 2010 in the amount of $182,917.18, which undoubtedly was used to purchase the Rolls Royce. He acknowledged that on February 14, 2011 the sum of $10,378.83 was transferred from the Dale & Parker account to an unknown account, and on February 28, 2011, the sum of $15,764.58 was also transferred from the Dale & Parker account to an unknown account. Jonathan said he could not recall why this was done. He acknowledged that on December 13, 2010, $20,000 was transferred from the Dale & Parker account to his own account at Scotiabank, but he could not say why. He testified that he never thought the money in the Dale & Parker account was there so it would not be exposed to creditors. He acknowledged a number of other transfers from the Dale & Parker account, including one that was made five days after the judgment. On November 22, 2011, the account was closed.

126 Jonathan acknowledged that over the course of their marriage, he would transfer money to Abisola and Abisola would transfer money to him, as needed.

Submissions

127 Mr. Cohen, counsel for the plaintiffs, submits that his clients are entitled to relief under both the *Fraudulent Conveyances Act* and the *Bankruptcy and Insolvency Act*.

128 Mr. Cohen submits that there are a number of badges of fraud that should cause the court to view, with suspicion, the circumstances surrounding the purchase of the Dunwoody property, and the decision to place the property in the name of Abisola, first as to 99 per cent, and ultimately in her name alone.

129 The transaction occurred at a time when litigation was underway respecting the aborted first transaction involving the property on Lakeshore Road in Oakville. An action was commenced on April 19, 2010, following the failure of Jonathan to close that transaction. The agreement of purchase and sale respecting the Dunwoody property was executed on January 18, 2011. That transaction closed on April 29, 2011.

130 Summary judgment was granted in favour of the plaintiffs against Jonathan following the aborted Lakeshore transaction, in the amount of $317,731.17, and $20,000 for costs, on October 17, 2011. An appeal was dismissed on April 12, 2012, with costs of $5,000.

131 In the face of the litigation against Jonathan, and ultimately the judgment against him, the defendants made efforts to place the Dunwoody property beyond the reach of the plaintiffs, by placing title to the property in Abisola's name to the extent of 99 per cent, and ultimately 100 per cent. In the meantime, Jonathan had effectively placed the equity in his Rolls Royce beyond the reach of his creditors by trading it in for a leased vehicle that had no equity. To secure a mortgage on the Lakeshore property, he represented to Scotiabank that he had assets worth at least $1,000,000, and to secure the mortgage on the Dunwoody property he persuaded the same bank that he had net worth in Canada of at least $345,000.

132 While the defendants seek to persuade the court that Abisola provided all of the money for the purchase of the Dunwoody property, Mr. Cohen submits that, in fact, the evidence shows that that is not so. The lion's share of the money came from Parkway Microfinance Bank, an entity owned and controlled by Jonathan and Abisola.

133 The evidence shows that Parkway had money on deposit at First City Monument Bank, in the amount of 250,000,000 Naira. The signing officers of Parkway directed First City Monument Bank to cash in the certificate to the extent of 116,000,000 Naira, and forward the funds to Fairmont BDC, a transfer agent. This was confirmed by Mr. Oreglemhe, and the documentary evidence supports this.

134 Contrary to the clear documentation, which explains exactly how the money was furnished to First City Monument Bank and then to Fairmont BDC, Abisola produced her bank records which purport to show that the money went directly from her account to Fairmont BDC through the issuance of a draft. Mr. Oreglemhe, in his evidence was clear that there is a distinct difference between a transfer of funds through an electronic transfer, and the transmission of funds through the issuance of a draft. Where a draft is issued, it will then be transmitted physically to the recipient's bank and recorded as a deposit.

135 In view of the clear documentary evidence as to the source of the funds, Abisola's explanation that the funds came from her uncle and from her interest in Spa One must be rejected. No confirmation from her uncle/cousin was tendered, except for a hearsay document apparently signed more than two years after the fact. The author of the document was not called as a witness, although clearly he could have been. As for the money from Spa One, the documentary evidence allegedly prepared by Ms. Ajayi, and her evidence itself, is highly suspect.

136 It can only be concluded that the alleged banking records that purport to show money coming from TwoR Global Ventures and Spa One, and being transmitted through a draft issued to Fairmont BDC, cannot be relied on.

137 In the final analysis, at least the money used to provide the balance due on closing came from Parkway Microfinance Bank, an organization owned and controlled by Jonathan and Abisola, and primarily Jonathan.

138 As far as the first deposit of $50,000 is concerned, Mr. Cohen points out that on discovery Abisola took the position that the funds were "her money". At trial, she said the money came to her through Spa One. Ms. Ajayi's evidence as to that transaction is highly suspect, and should not be relied on.

139 As far as the second deposit of $100,000 is concerned, the funds allegedly came from an account at Standard Chartered Bank in London, England. Mr. Cohen points out that the account, in both Nigeria and England, was in the names of both Jonathan and Abisola. The parties had different explanations as to how and why the money ended up in England as opposed to Nigeria. Both parties testified that Jonathan looked after the finances, as a male in Nigeria is expected to do so. Jonathan testified that each gave each other money as needed. There is no evidence, apart from Abisola's own evidence, that the sole source of funds in the Standard Chartered Bank accounts came from cash generated by Abisola as a foreign exchange broker. It is more likely, as was clearly the case with respect to all of their other financial dealings, that the funds came from both of them.

140 In the final analysis, it stretches credulity to the breaking point to accept that all of the money for the purchase of the Dunwoody property came from Abisola. More likely, it mostly came from Parkway Microfinance Bank, an entity owned and controlled primarily by Jonathan, and the balance from a mixture of funds owned by both Abisola and Jonathan.

141 Mr. Cohen points out that prior to Jonathan's attempt to purchase the Lakeshore property, a large amount of cash was deposited to Jonathan's account and there is no dispute, indeed Jonathan acknowledges, that Jonathan was the source of that money. On November 9, 2010, after the lawsuit arising out of the Lakeshore property had been commenced, $250,000 was diverted from Jonathan's account to the Dale & Parker account. Scotiabank was satisfied with Jonathan's net worth for the purpose of a mortgage of $1,800,000, and made its mortgage commitment knowing that Jonathan needed to come up with about $700,000 to buy the property.

142 Until October, 2011, funds continued to be deposited into Jonathan's account, and payments, including mortgage payments, were made from that account. It was only in October, 2011, that funds began to be deposited only into Abisola's account.

143 Mr. Cohen submits that even if it is not accepted that Jonathan contributed the entire amount for the purchase of the Dunwoody property, it must at least be concluded that he contributed a significant amount, and his interest should be considered to be at least a one half interest. He submits that the 99 per cent/one per cent split is entirely artificial, and does not reflect Jonathan's contribution.

144 Mr. Cohen submits that in addition to Jonathan's financial contribution, his contribution as a mortgagor is also a significant contribution. The bank insisted that Jonathan be on title, and if he had not been on title the bank would not have granted the mortgage.

145 Mr. Cohen submits that in view of Jonathan's contribution, both financial and through his signing the mortgage as a mortgagor, Abisola holds her interest, or at least a substantial part of it, on a resulting trust for Jonathan. Alternatively, she holds it on a constructive trust. He submits that structuring the transaction so as to place the property in Abisola's name to place it beyond the reach of Jonathan's creditors is, pursuant to the *Fraudulent Conveyances Act*, void and of no effect as against his creditors.

146 Mr. Cohen submits that the transfer of Jonathan's interest in the property to Abisola for slightly more than $7,000 constitutes a transfer at undervalue, as contemplated in s.96 of the *Bankruptcy and Insolvency Act*. Jonathan's interest in the property was worth considerably more than $7,000. The transaction was effected with the clear intent to defeat claims of Jonathan's creditors, and particularly the claims of the plaintiffs, and thus a remedy under s.96 of the Act should be awarded.

147 Mr. Cohen submits that there are serious issues respecting the credibility of the witnesses called on behalf of the defendants.

148 Mr. Cohen points out that Jonathan removed $250,000 from his account and transferred it to his company, Dale & Parker. He had no satisfactory explanation. He had no satisfactory explanation for failing to disclose the shareholdings of Parkway Microfinance Bank, until the information was dragged out of Abisola on cross-examination. While he claims that the shares in his name and in the name of Dale & Parker are held in trust for others, no evidence was produced to support this.

149 While Jonathan claimed not to have spoken to any lawyer in Russell Allegra's office, the note made by Frank Torchia, which discloses that there had to have been discussion of how he could be "protected", belies this evidence. Frank Torchia's notation is supported by the note of the clerk in Russell Allegra's office, which states "see Frank's note" in terms of how title is to be taken.

150 Mr. Cohen notes that Justice Newbould had difficulty with Jonathan's credibility and his explanation for trading in his equity in the Rolls Royce for a leased vehicle. Newbould J. was prepared to draw an inference that the vehicle transaction "was at least a *prima facia* preference or fraudulent conveyance of his equity interest." Newbould J. noted that Jonathan traded in his

Rolls Royce, which then had an equity value of $78,548, for a leased vehicle. Transferring his equity to the leasing company resulted in a lower lease payment for the new Rolls Royce. Newbould J. called this "more than a suspicious circumstance."

151 Mr. Cohen also notes that when Jonathan and Abisola went to another lawyer to transfer Jonathan's one per cent interest to Abisola, it was done just before the filing of a writ of execution against Jonathan. The filing of the writ of execution had been delayed only because Jonathan's solicitor had delayed approving the judgment as to form.

152 With respect to Abisola's credibility, Mr. Cohen points out that her income tax returns are clearly wrong, and grossly understate her income. Her explanation is that she gave all the necessary information to her accountant. It is difficult to believe that a responsible accountant would not have advised her as to the basis upon which income tax returns are prepared in Canada. She knew about the lawsuit at the time they were prepared. No other documents have been produced, nor any evidence from her former or current accountants.

153 Mr. Cohen notes that Abisola and Jonathan waited until after judgment had been issued on the aborted transaction before transferring Jonathan's one per cent interest.

154 Mr. Speigel, counsel for the defendants, submits that the action should be dismissed.

155 Mr. Speigel submits that all of the money for the purchase of the Dunwoody property came from Abisola. He submits that credible evidence has been tendered to show that that is so.

156 With respect to the initial deposit of $50,000, credible evidence has been tendered to show that the money came from Spa One. Abisola's sister, Lola Ajayi, testified to support Abisola's evidence. While the differences in the dates of some of the documents may not have been explained very well, nevertheless that does not detract from the credible and compelling evidence that was given by Abisola and her sister.

157 With respect to the secondary deposit of $100,000, credible evidence has been tendered to show the source of that money. Abisola testified that it came from cash generated from her foreign exchange earnings, and nothing was produced to contradict that assertion. While the money was placed in a joint account, nevertheless the money belonged to Abisola. The account was joint only so that Jonathan would have access to it, should anything happen to Abisola, and the account was in London, England because it was possible that their daughter might go to school in England.

158 The downpayment of $617,000 was transmitted in two tranches, first, of $100,000US, and second, of 420,000Euros.

159 There were two sources for that money. First, 16,000,000 Naira came from Spa One. Second, 100,000,000 Naira came from Abisola's relative, which may or may not have been repayable on generous terms. For this purpose, this was her money.

160 The issue of whether the money was transferred to Fairmont BDC through a draft, or whether it was transferred electronically to Fairmont BDC through Parkway Microfinance Bank, is of no moment. Mr. Speigel notes that none of the witnesses were cross-examined as to the distinction or the difference, and it is unfair to now rely on the distinction when none of the witnesses had an opportunity to explain. Indeed, he submits that the failure to cross-examine on this issue contravenes the rule in *Browne v. Dunn* (1893), 6 R. 67 (U.K. H.L.). Mr. Speigel submits that it can only be concluded that the money came from Abisola, and the underlying source of the funds was Spa One and Abisola's relative.

161 Mr. Speigel submits that the evidence of Mr. Oreglemhe was clear and compelling. Mr. Oreglemhe is entirely independent, and his evidence should be accepted. The instructions were given by Abisola to transfer the money to Jonathan, and he did so.

162 Mr. Speigel submits that Abisola at all times wanted the title to the property placed in her name alone. It was only placed in the name of Jonathan to the extent of one per cent at the insistence of Scotiabank.

163 Mr. Speigel submits that the plaintiffs have not established any entitlement to rely on the *Fraudulent Conveyances Act*. While it is clear that Abisola did not want the Dunwoody property to be available to Jonathan's creditors, there is nothing

unlawful about having that intention. There is nothing unlawful about the transaction, provided she provides all of the funds for the purchase of the property. She did so.

164 As far as the issue under s.96 of the *Bankruptcy and Insolvency Act* is concerned, there was no sale at an under-value. Jonathan actually had no equitable interest in the property because he provided none of the money to purchase it. However, on the assumption that he had a one per cent interest, he was fairly compensated for the value of that interest by the payment to him of slightly more than $7,000.

165 Various cases referred to by the parties include *Juhasz (Trustee of) v. Cordeiro*, [2015] O.J. No. 1654 (Ont. S.C.J.); *Rehman, Re*, [2015] O.J. No. 1748 (Ont. S.C.J. [Commercial List]); *Montor Business Corp. (Trustee of) v. Goldfinger*, [2013] O.J. No. 4871 (Ont. S.C.J. [Commercial List]); *Mitchell Jenner & Associates Inc. v. Saunders*, 2011 ONSC 2930 (Ont. S.C.J.); aff'd. 2012 ONCA 290 (Ont. C.A.); *Elez, Re*, 2011 ONSC 4687 (Ont. S.C.J.); *Fontaine & Associates Inc. (Trustee of) v. Albert*, [1997] O.J. No. 6265 (Ont. Gen. Div.); *McNeilly Estate v. McNeilly*, [2005] O.J. No. 2488 (Ont. S.C.J.); *Lavie v. Lavie*, [2015] O.J. No. 5121 (Ont. S.C.J.); *Salisbury v. Dumond*, [2002] O.J. No. 4899 (Ont. S.C.J.); *CIT Financial Ltd. v. Zaidi*, [2006] O.J. No. 1073 (Ont. S.C.J.); *Ehrmantraut v. Ehrmantraut (Trustee of)*, [2008] M.J. No. 196 (Man. Q.B.); aff'd. [2008] M.J. No. 370 (Man. C.A.); *Indarsingh, Re*, [2015] A.J. No. 259 (Alta. Q.B.) (in Bankruptcy, Registrar); and *FL Receivables Trust 2002-A (Administrator of) v. Cobrand Foods Ltd.* (2007), 85 O.R. (3d) 561 (Ont. C.A.).

Analysis

166 As noted at the outset of these reasons, the *Fraudulent Conveyances Act* is powerful legislation that is to be given a broad and liberal interpretation and construction. The relevant provisions of that Act are as follows:

> **1.** In this Act,
>
> <u>"conveyance" includes gift, grant, alienation, bargain, charge, encumbrance, limitation of use or uses of, in, to or out of real property or personal property by writing or otherwise</u>; ("cession")
>
> "personal property" includes goods, chattels, effects, bills, bonds, notes and securities, and shares, dividends, premiums and bonuses in a bank, company or corporation, and any interest therein; ("biens meubles")
>
> <u>"real property" includes lands, tenements, hereditaments and any estate or interest therein.</u> ("biens immeubles")
>
> **2.** <u>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</u> and their assigns.
>
> **3.** Section 2 does not apply to an estate or interest in real property or personal property conveyed upon good consideration and in good faith to a person not having at the time of the conveyance to the person notice or knowledge of the intent set forth in that section.
>
> **4.** Section 2 applies to every conveyance executed with the intent set forth in that section despite the fact that it was executed upon a valuable consideration and with the intention, as between the parties to it, of actually transferring to and for the benefit of the transferee the interest expressed to be thereby transferred, unless it is protected under section 3 by reason of good faith and want of notice or knowledge on the part of the purchaser.
>
> [emphasis added]

167 Also of relevance is section 14 of the *Family Law Act*, which provides:

> **14.** The rule of law applying a presumption of a resulting trust shall be applied in questions of the ownership of property between spouses, as if they were not married, except that,

(a) the fact that property is held in the name of spouses as joint tenants is proof, in the absence of evidence to the contrary, that the spouses are intended to own the property as joint tenants; and

(b) money on deposit in the name of both spouses shall be deemed to be in the name of the spouses as joint tenants for the purposes of clause (a).

168 The plaintiffs also rely on s.96 of the *Bankruptcy and Insolvency Act*, which provides:

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

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

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

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

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

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

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

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

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

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

(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.

[emphasis added]

169 There is no doubt that the *Fraudulent Conveyances Act* is to be given a large and liberal interpretation and construction. In *Ramgotra (Trustee of) v. North American Life Assurance Co.*, [1996] S.C.J. No. 17 (S.C.C.), Gonthier J. stated for the Court, at para. 59:

All the provincial fraud provisions are clearly remedial in nature, and their purpose is to ensure that creditors may set aside a broad range of transactions involving a broad range of property interests, where such transactions were effected for the purpose of defeating the legitimate claims of creditors. Therefore, the statues should be given the fair, large and liberal construction and interpretation that best ensures the attainment of their objects, as required by provincial statutory interpretation legislation (see, for example, The Interpretation Act, 1993, S.S. 1993, c.I11.1, s. 10). I agree with the following observation by Professor Dunlop in Creditor-Debtor Law in Canada (2nd ed. 1995), at p.598, that the purpose of fraudulent conveyance legislation:

> ...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.

170 Much of the provincial legislation, including the Ontario *Act*, was taken from the *Statute of Elizabeth*, (*Acte agaynst fraudulent Deedes Gyftes Alienations &c.*) first enacted in 1571, 13 Eliz. 1, c.5. Thus, English cases interpreting the *Statute of Elizabeth* are of assistance.

171 No matter how broadly the legislation is to be interpreted, and no matter what fair, large and liberal construction and interpretation should be given to it, it cannot be construed so as to set aside a conveyance, to a person, of property purchased with that person's own money, even if the intent is to ensure that a creditor of some other person cannot get at the property. All counsel agree that that is so.

172 Where the money to purchase an asset is furnished by one person, but the asset is placed in the name of another, the doctrines of resulting trust and constructive trust come into play.

173 Resulting trusts can arise in a number of ways, but of relevance here is where an asset is purchased by one person and placed in the name of another. In that situation, it is presumed that the recipient holds his or her interest in trust for the person who purchased the asset and provided the funds for it, unless it was intended that there be a gift. The onus is on the recipient to prove the intention was to make a gift. Where there is more than one contributor to the purchase price, it is presumed that the trust is in favour of all of them. See *Waters' Law of Trusts in Canada*, (4th Ed., Carswell, 2012), chapter 10, pp. 394-475.

174 A constructive trust can also arise in a number of ways, but fundamentally it has been applied to prevent unjust enrichment, which arises where there has been enrichment of one party; corresponding deprivation to another; and no juristic reason for the enrichment and corresponding deprivation: see *Waters*, at pp.534-540.

175 In this case, apart from the statutory considerations, if Jonathan contributed all or part of the money to purchase the Dunwoody property, a resulting trust would arise in his favour to the extent of his contribution, unless he intended to make a gift of his contribution to Abisola. Alternatively, his contribution would represent an enrichment to Abisola and a corresponding deprivation to him. If he did not intend to make a gift, there would be no juristic reason for the enrichment.

176 There is no dispute that the Dunwoody property was taken in Abisola's name so that the plaintiffs and other creditors of Jonathan could not get at the property. At the end of the day, therefore, the real question is whether Jonathan supplied all or at least some of the money for the purchase of the property. If he did, then as between himself and Abisola, Abisola held his share of the property on a resulting trust for Jonathan or, perhaps, the law would impose a constructive trust on Abisola to hold Jonathan's share in trust for him. If Jonathan intended to make a gift of his share of the property to Abisola, the *Fraudulent Conveyances Act* would operate so as to hold that that gift would be void as against Jonathan's creditors if the intent was to defeat, hinder, delay or defraud creditors.

177 Apart from the evidence of actual intent, expressed by both Jonathan and Abisola, to ensure that the Dunwoody property would not be available to Jonathan's creditors, it has been established for over four centuries that the court can have regard for what are called "badges of fraud" in assessing whether a transaction was effected for a fraudulent purpose. As long ago as 1601 in *Twyne's Case, Re* (1601), 76 E.R. 809, 3 Co. Rep. 80b (Eng. K.B.), the Court made reference to the fact that a gift "had the signs and marks of fraud", where a debtor had transferred sheep to another, and the creditor, upon attempting to seize the sheep to satisfy his debt, was resisted by the transferee of the sheep. The Court held, at p.812 E.R., that the gift had the signs and marks of fraud because the donor continued in possession of the sheep; used them as his own; the transaction was made

in secret; the transaction was made pending the writ; and the transaction was subject to a trust between the parties, because the donor continued to possess and use the sheep as his proper goods. At p.815 E.R., the court stated:

> And because fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole Court, that all statutes made against fraud should be liberally and beneficially expounded to supress the fraud.

178 The main statute under consideration by the Court in *Twyne's Case* was the *Statute of Elizabeth.*

179 Since *Twyne's Case*, the courts have invariably looked for badges of fraud in order to assist in determining whether a transaction is one that is caught by the statute.

180 The significance of badges of fraud, and their use, are explained by Penny J. in *Indcondo Building Corp. v. Sloan* (2014), 121 O.R. (3d) 160 (Ont. S.C.J.), at paras. 52 and 53 as follows:

> The badges of fraud derive from *Twyne's Case* (1601), 76 E.R. 809. As interpreted by modern courts, the badges of fraud include
>
> a) the donor continued in possession and continued to use the property as his own;
>
> b) the transaction was secret;
>
> c) the transfer was made in the face of threatened legal proceedings;
>
> d) the transfer documents contained false statement as to consideration;
>
> e) the consideration is grossly inadequate;
>
> f) there is unusual haste in making the transfer;
>
> g) some benefit is retained under the settlement by the settlor;
>
> h) embarking on a hazardous venture; and
>
> i) a close relationship exists between parties to the conveyance.
>
> 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. It's 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 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.

181 The existence of badges of fraud is not, of course, determinative. They simply constitute circumstantial evidence from which it may be inferred that a transaction was undertaken with fraudulent intent. This is made clear from the judgment of Laskin J.A. in the Court of Appeal in *FL Receivables*, *supra*. At paras. 39 and 40, Laskin J.A. stated as follows:

> The crucial question in any fraudulent conveyance action is whether the plaintiff has proved the fraudulent intent of the debtor. While the legal burden to prove fraudulent intent remains on the plaintiff throughout the trial, the plaintiff can raise an inference of fraud sufficient to put a "burden of explanation" on the defendant debtor. The plaintiff typically raises an inference of fraud by putting forward "badges of fraud." These "badges of fraud" vary from case to case. They are no more than typical and suspicious facts that may allow the court to make a finding of fraud absent an explanation from the debtor. See C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2d ed. (Toronto: Thomson Canada, 1995) at 613-15.

> The court, however, is not compelled to draw this inference of fraudulent intent from badges of fraud pleaded by the plaintiff. See *Koop v. Smith* (1915), 51 S.C.R. 554 (S.C.C.) at 558-59. The court may dismiss a fraudulent conveyance action because it has decided that the surrounding circumstances taken as a whole explain away the plaintiff's evidence. It seems to me that is what the trial judge did in this case.

182 Notwithstanding the existence of badges of fraud, the burden of proof remains on the plaintiff: see *Conte Estate v. Alessandro*, [2002] O.J. No. 5080 (Ont. S.C.J.), at para. 22. However, the existence of badges of fraud places an evidentiary burden on the defendant to explain the transaction.

183 Whether the burden on the defendant is described is an evidentiary burden, or a burden of persuasion, or whether the various burdens are referred to as "shifting" burdens, it seems clear that as a practical matter, once suspicious circumstances are raised the defendant must explain the transaction or transactions in order to persuade the court that it or they are not caught by the *Fraudulent Conveyances Act*. In part, the placing of an onus on the defendant is consistent with the fact that it is the defendant who has knowledge of the circumstances of the transaction. Once suspicious circumstances are raised, it is the defendant who can dispel the suspicions. As stated by Sopinka J. in *Snell v. Farrell*, [1990] S.C.J. No. 73 (S.C.C.), in discussing the burden of proof in a medical malpractice action, at para. 16:

> The legal or ultimate burden of proof is determined by the substantive law "upon broad reasons of experience and fairness": 9 Wigmore on evidence para. 2486, at p.292. In a civil case, the two broad principles are:
>
> 1. that the onus is on the party who asserts a proposition, usually the plaintiff;
>
> 2. that where the subject matter of the allegation lies particularly within the knowledge of one party, that party may be required to prove it.

184 At para. 29, Sopinka J. referred with approval to the famous dictum of Lord Mansfield in *Blatch v. Archer* (1774), 1 Cowp. 63, 98 E.R. 969 (Eng. K.B.), at p. 970 E.R.:

> It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

185 There are a number of badges of fraud in this case. They include:

a) the transaction involving the Dunwoody property occurred after Jonathan had defaulted on the Lakeshore property, and after action had been commenced against him.;

b) a decision was made to place title in the name of Abisola solely, or at 99 per cent, at a time when the action against Jonathan was underway;

c) Jonathan disposed of his apparent one per cent interest in the property after judgment against him had been delivered, but before a writ of execution could be filed;

d) Jonathan disposed of his equity in his Rolls Royce after judgment had been rendered against him;

e) Jonathan transferred $250,000 from his bank account to the account of Dale & Parker after proceedings were commenced against him;

f) Jonathan has resided in the Dunwoody property throughout, and has continued to enjoy the property.

186 At the very least, there is an evidentiary burden on the defendants to persuade me that the transaction is not one that is caught by the statute.

187 I am not persuaded, having heard and considered the evidence, that all the money for the purchase of the Dunwoody property came from Abisola. A considerable amount of it came from Jonathan or from an organization that he owns and controls.

188 There were three payments made for the property:

a) the initial $50,000 deposit;

b) the supplementary $100,000 deposit;

c) the balance due on closing, of approximately $617,000.

189 Not without hesitation, I am persuaded that it is more probable than not that the initial deposit came from funds generated from Spa One. The documents that appear to show that $60,000US was transmitted from Spa One to Adymar are certainly suspicious. The conflict in the dates of the relevant letters was not adequately explained. It is not clear that what was produced as originals are actually originals or are copies. The reason for getting a receipt stamp on the original letter, assuming it is original, and then requiring a follow-up acknowledgement letter, was also not adequately explained. To entrust $60,000US with a salesgirl, and require a follow-up letter simply because the salesgirl did not recognize the person at Adymar, seems odd. The fact that the letters were produced in this litigation very late in the day is also suspicious.

190 Having made these observations, I need only be convinced on a balance of probabilities that the funds came from Spa One. Not without doubt, I am so persuaded.

191 I am not so persuaded with respect to the supplementary deposit of $100,000. That money was said to have come from Abisola's money, received in cash from her transactions involving currency transfers. The account into which the funds were placed was a joint account, at a bank that had operations in both Nigeria and England.

192 I note that while Jonathan's bank account records in Canada, and Abisola's bank records in Nigeria and Canada, were produced, none of Jonathan's bank records in Nigeria were produced. That he had at least one bank account in Nigeria is clear from para. 17 of his affidavit sworn October 6, 2011. According to both Jonathan and Abisola, while Abisola earned more money than Jonathan did, nevertheless he earned a considerable amount. Abisola had bank accounts in her own name in Nigeria, and they had one joint account at the Standard Chartered Bank. Jonathan earned his own money, and it is inconceivable that he would not have had his own bank account or bank accounts. Indeed, he testified that each party would give the other money as needed.

193 I am entitled to draw an adverse inference from the failure to produce Jonathan's Nigerian bank accounts and I do so. As stated by Lord Mansfield in *Blatch*, the evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted. It would have been open to show that none of the money in the joint account at the Standard Chartered Bank came from any of Jonathan's Nigerian bank accounts, but none of the records for those accounts were produced.

194 I am similarly not persuaded that Abisola was the source of the funds required for the balance due on closing, from funds made available through her relative or from Spa One.

195 It is clear, in my view, that the entire sum of 116,000,000 Naira that was ultimately transferred to Jonathan's Scotiabank account in Euros came from an investment of Parkway Microfinance Bank of 250,000,000 Naira that it had on account with First City Monument Bank. That is clear from the letter of instruction dated April 4, 2011. That letter refers to an "existing investment", and requires First City Monument Bank to liquidate that investment and transfer the sum of 116,000,000 Naira to Fairmont BDC, and rollover the balance. For what it is worth, that transaction was confirmed on October 30, 2015, by letter of that date from First City Monument Bank to Parkway, confirming that 116,000,000 Naira was transferred by debit transfer from Parkway Microfinance Bank to Fairmont BDC on April 5, 2011. That transaction was confirmed, once again, by an entry in the records produced by First City Monument Bank. It was also confirmed by Mr. Oreglemhe. In my view, there is no ambiguity in the transaction.

196 The transaction cannot be explained, in my view, by a purported excerpt from a bank account record of Abisola at Parkway Microfinance Bank, purporting to show two transfers to her account, of 50,000,000 Naira each, from Two R Global Ventures, and a transfer from Spa One of 16,000,000 Naira, and the issuance of a draft to Fairmont BDC in the amount of 116,000,000 Naira. I am also unconvinced by a purported letter from Lola Ajayi for Spa One Enterprises addressed to Parkway Microfinance Bank dated April 4, 2011, purportedly instructing the bank to withdraw 16,000,000 Naira and credit Abisola's account, or Abisola's purported letter to Parkway dated April 3, 2011 instructing the bank to debit her account with the sum of 116,000,000 Naira and transfer that amount to Fairmont BDC in First City Monument Bank "as per attached". It would seem odd that Abisola's letter of instruction was dated the day before Spa One's purported letter of instruction, at a time when Spa One's funds would not have been in Abisola's account. The document said to be "as per attached" to Abisola's letter was not included in what was produced to the court.

197 I also note, as I did earlier, that there is no confirmation of any contribution from Abisola's relative, other than the purported bank record which I discount, and other than the clearly hearsay document produced two years after the fact, and which was not supported by any *viva voce* evidence.

198 If it comes to a choice between accepting the clear documentary evidence that the funds came from Parkway Microfinance Bank, supported by the evidence of Mr. Oreglemhe, or the purported bank records of Abisola, supported only by suspicious evidence from her sister and only hearsay evidence from her relative, I have no hesitation in preferring the former.

199 I am not persuaded that any *Browne v. Dunn* issue arises from the failure of Mr. Cohen to cross-examine the defendants' witnesses, particularly Abisola, as to the conflict in the documentary evidence. *Browne v. Dunn* requires that a witness be confronted with contradictory evidence that will be called by the opposite party that is different from the evidence given by the witness. It does not require that a party confront the opposite party's witness with contradictions that arise from other evidence also called by the opposite party. Mr. Cohen is perfectly entitled to rely on the glaring contradictions in the evidence called by the defendants. The contradiction could and should have been explained by the defendants themselves without any prompting by counsel for the plaintiffs. There is no violation of the rule in *Browne v. Dunn*.

200 In the result, I conclude that the funds came from money owned by Parkway Microfinance Bank. That entity appears to be owned and controlled primarily by Jonathan, albeit with some control on the part of Abisola.

201 No convincing evidence has been produced to show that Jonathan is not the beneficial owner of the shares of Parkway held in his name or in the name of Dale & Parker, his consulting company. If there is documentary evidence that would show that he and/or Dale & Parker are not the beneficial owners, it was not produced. I draw the appropriate inference.

202 In the result, I hold that the balance due on closing did not come solely from Abisola. Rather, it came from an entity owned, for the most part, by Jonathan and/or his consulting company and controlled by Jonathan and, to some extent, from both Abisola and Jonathan.

203 Does it matter that some of the money came not from Jonathan but from a corporation owned directly or indirectly by him? Generally speaking the corporate veil is not to be pierced. However, an exception exists where the corporation is inserted and being used as a shield for fraudulent or improper conduct: see *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Ont. Gen. Div.), at pp.431 and 433, per Sharpe J., as he then was; aff'd. [1997] O.J. No. 3754 (Ont. C.A.). In this case, to maintain the fiction of a separation between the corporation and Jonathan would be to perpetrate a fraud. Indeed the whole purpose of the *Fraudulent Conveyances Act* is to protect against fraud. As noted earlier, the legislation is to be given a broad and liberal interpretation.

204 At the end of the day, it seems clear that some of the money to purchase the property came from Abisola, and some came from Jonathan. It is not possible, on this record, to make an accurate, or indeed any, determination as to the proportions contributed by each.

205 I also agree with Mr. Cohen's submission that the fact that Jonathan was a co-owner and a co-mortgagor represented a significant contribution of value to the purchase. Without Jonathan's covenant on the mortgage, the transaction would not have occurred. I agree in this respect with the reasoning of McKelvey J. of the Manitoba Court of Queen's Bench in *Ehrmantraut*, *supra*, at para. 49, upheld by the Manitoba Court of Appeal.

206 In the final analysis, both parties made contributions of value to the purchase, but it is not possible to calculate their respective contributions.

207 There is a suggestion in an early Ontario case that where two people contribute to the purchase of a property, which is placed in the name of one of them, and it is impossible to determine the proportions in which each has contributed, there cannot be any resulting trust in favour of the person in whose name the property is not placed: see the judgment of Strong V.C. in *Wilde v. Wilde* (1873), 20 Gr. 521, [1873] O.J. No. 199 (Ont. C.A.), at para. 58.

208 This seems wrong to me in principle. It would be a fairer result, in my view, that in the absence of a precise calculation of respective contributions, it should be concluded that each party is entitled to an equal share. This is particularly so in the case of married contributors. Indeed, that was the conclusion in an English case, *Jones v. Maynard*, [1951] Ch. 572 (Eng. Ch. Div.), where Vaisey J. decided that where a husband and wife effectively operated by a pooling of their respective monies, and it was thus impossible to determine the respective investments made by each, it should be concluded that each is entitled to half. At p.575, Vaisey J. stated:

> I think that the principle which applies here is Plato's definition of equality as a "sort of justice": if you cannot find any other, equality is the proper basis. When monies were taken out of the joint account for the purpose of making an investment, the intention which I attribute to the parties is equality, and not some proportional entitled to be arrived at an inquiry as to the amounts contributed respectively by the husband and wife to the common purse. Where one is searching for justice, as one must, and cannot find any other source and sound basis, I think that equality is the best rule.

209 A similar approach has been adopted in the courts of Manitoba: see, for example, *Atamanchuk v. Atamanchuk* (1955), 15 W.W.R. 301 (Man. Q.B.); aff'd. except as to a minor variation, (1956), 21 W.W.R. 335 (Man. C.A.). See also *S. v. S.* (1952), 5 W.W.R. (N.S.) 523, [1952] M.J. No. 13 (Man. Q.B.). At para. 14, Campbell J. stated:

> I take the view that when spouses have a common purse and a common bank account, and pool their resources, the husband's earnings, even if they be more than those of the wife, are on behalf of both of them, and the idea that years afterwards one can dissect the contents of the fund by taking an elaborate account as to how much was paid in by each is inconsistent with the idea of a joint bank account or common pool insofar as husband and wife are concerned.

210 I think the policy reflected in the Manitoba cases is persuasive. Where the parties have effectively pooled their resources and purchased an asset, it is difficult, if not impossible, to try, at some later date, to unwind the pooling and determine the proportions in which each party has contributed to the asset. In this case, it is clear that up until the judgment was granted against Jonathan, the parties operated by pooling their resources. It was agreed that while Abisola earned more than Jonathan, he looked after the finances. Each provided money to the other as needed. I expect if each was asked how much each of them owned individually, before the judgment was delivered, neither party would have been able to answer with any particularity. That is quite common among married couples.

211 Jonathan contributed a substantial amount to the purchase price of the Dunwoody property. Abisola either holds his proportionate share on a resulting trust for him or he made a gift of his share to her. If the latter, it was made with the intent of both himself and Abisola to defeat, hinder, delay or defraud Jonathan's creditors and, pursuant to s.2 of the *Fraudulent Conveyances Act*, the transaction under which the property was placed in Abisola's name to the exclusion of Jonathan is void as against Jonathan's creditors.

212 Since, at the end of the day, it is not possible to determine the proportions in which Abisola and Jonathan contributed to the purchase of the Dunwoody property, I conclude that each of them should be held to be the owner of an undivided one half

interest. I emphasise that this holding is only for the purpose of determining their rights as they relate to Jonathan's creditors, and is not determinative as it relates to their interests as between themselves.

213 Having regard to this holding, it is not certain that I need to make any determination under s.96 of the *Bankruptcy and Insolvency Act*. However, it seems clear that the purchase, by Abisola, of Jonathan's undivided one-half interest in the property was at an under-value. She paid slightly more than $7,000 for his interest, and it was worth, at the time of purchase, at least $350,000. Having regard to the timing of the transaction, as well as the other badges of fraud I have identified, the intent was to defeat the interests of creditors, including those of the plaintiffs.

214 I will await advice from counsel as to whether any other remedial orders are requested. Once I have heard from counsel, I will also invite submissions as to the matter of costs.

Action allowed.

TAB 9

1924 CarswellOnt 58
Ontario Supreme Court, In Bankruptcy

Dale, Re

1924 CarswellOnt 58, 27 O.W.N. 50, 5 C.B.R. 65

In re Dale

Holmested, K.C., Registrar

Judgment: September 5, 1924

Counsel: *I. Levinter*, for trustee.
H. R. Cluff, for Mrs. Dale.

Headnote
Chattel Mortgages and Bills of Sale --- Property covered by Act — After-acquired property
Chattel Mortgages and Bills of Sale --- Non-compliance with Act — Effect of non-compliance with Act — General
Chattel Mortgages and Bills of Sale --- Alternative to registration — Actual and continued change of possession — Where parties in same premises
I. Bill of Sale — Failure to Register — Sale of Chattel from Husband to Wife — No Actual or Continued Change of Possession — Bankruptcy of Husband — Validity of Sale as against Trustee — Bills of Sale and Chattel Mortgage Act, R.S.O., 1914, Ch. 135.
The non-registration of a bill of sale of a chattel such as an automobile from a husband to his wife there being no actual and continued change of possession, is fatal to the validity of the sale as against the trustee in bankruptcy of the husband, under sec. 8 of *The Bills of Sale and Chattel Mortgage Act*, R.S.O., 1914, ch. 135.
[*Hogaboom v. Graydon* (1894), 26 O.R. 298, followed].
II. Preferences — Automobile — Fraudulent Sale by Debtor to Wife — Exchange by Wife for Another Car — Right of Trustee in Bankruptcy to Car taken in Exchange — Bankruptcy Act, Sec. 31, 1 C.B.R. 33, Sec. 33, 1 C.B.R. 39.
If the wife of a bankrupt debtor claiming title to an automobile under a bill of sale which is void for non-registration as required by *The Bills of Sale and Chattel Mortgage Act*, (Ont.), exchanges it for another car, the transaction is regarded as that of the husband, and the trustee in bankruptcy is entitled to the car taken in exchange, the principle being that the proceeds of a sale, still in the hands of a wrongful transferee may be followed by the trustee for creditors.
[*Masuret v. Stewart and Lampman* (1891), 22 O.R. 290, followed; *Davis v. Wickson* (1882), 1 O.R. 369; *Ross v. Dunn* (1889), 16 O.A.R. 552; *Stuart v. Tremain* (1882), 3 O.R. 190; *Antoniadi v. Smith*, [1901] 2 K.B. 589, 8 Manson 335, 70 L.J.K.B. 869, 85 L.T. 200, 49 W.R. 693, 17 T.L.R. 643, referred to].

***Holmested, K.C.* (Registrar):**

1 It is admitted that the Studebaker motor car was the property of the debtor prior to its alleged sale by him to his wife. A bill of sale of it was drawn up which it is admitted was never registered. The material dates are as follows: October 5, 1923, alleged sale to wife; December 28, 1923, composition of certain debts owing by the debtor; December 31, 1923, exchange of cars; March 26, 1924, petition in bankruptcy filed; April 7, 1924, receiving order made.

2 I suggested to the parties that the motion should be heard on oral evidence in the usual way; both of them, however, desired that the application should be disposed of on the affidavits and depositions of the debtor Dale and his wife, who were orally examined before a special examiner in London, and as the question at issue depends mainly on a question of law, there seems less objection to this being done than when facts are in dispute.

3 As regards the alleged sale, I would, from the mutually destructive statements of Dale and his wife, be inclined to discredit them both as to there ever having been any real and *bona fide* sale of the Studebaker car by Dale to his wife; no corroborative proof of payment of the alleged consideration is adduced and there is an air of improbability about the whole transaction as detailed by them which leads me to the conclusion that it is a mere trumped-up story.

4 It appears from the depositions of both Dale and his wife that after the alleged sale there was no actual and continued change of possession of the Studebaker car until it was exchanged for the Moon car now in question. The non-registration of the bill of sale was therefore, under sec. 8 of *The Bills of Sale and Chattel Mortgage Act*, R.S.O., 1914, ch. 135, fatal to the validity of the sale of the Studebaker car as against the trustee for creditors. *Hogaboom v. Graydon* (1894), 26 O.R. 298. As far as the creditors of Dale are concerned, the car remained his property until December 31, 1923, when it was exchanged for the Moon motor car, which car, when taken in exchage, his creditors and the trustee were entitled to say was the property of the debtor and not of the wife. It appears that in making the exchange the wife paid $25 but I do not think that entitled her to any lien or charge on the car in question for that sum. Any such lien must depend on Mrs. Dale having acquired some legal possessory right to the Moon car, and, in my opinion she has none. If the debtor himself had paid the money, he would certainly not be entitled to any lien or charge therefor as against his creditors or a trustee in bankruptcy, and I do not think Mrs. Dale, by wrongfully assuming to be transferee, can put herself in any better position than the debtor himself. Here the case is freed from any difficulty as to the earmarking of the property acquired for and in exchange for the Studebaker car.

5 I have considered the cases referred to by the learned counsel for Mrs. Dale, and they do not appear to me to validate her title; *Antoniadi v. Smith*, [1901] 2 K.B. 589, 8 Manson 335, 70 L.J.K.B. 869, 85 L.T. 200, 49 W.R. 693, 17 T.L.R. 643, may perhaps be authority for validating the title of the person who acquired the Studebaker car in exchange, as against the creditors, but it appears to me to be no authority for validating Mrs. Dale's title to the Moon car. The exchange of the cars took place within three months of the filing of the petition in bankruptcy but the exchange cannot, I think, be said to be a transfer within sec. 31 of *The Bankruptcy Act* [1 C.B.R. 38]. There was no suggestion that the exchange involved any intent thereby to give any creditor a preference and the transaction was not attacked under sec. 31 nor any other section of *The Bankruptcy Act*. It appears by the evidence that the exchange was made with the knowledge and concurrence of the debtor and as between him and his wife and the trustee the exchange, though ostensibly made by the wife, may be regarded as in law made by the debtor himself, and it can hardly be pretended that, if a debtor on the eve of his bankruptcy allows a stranger to sell the debtor's goods and permits that stranger to appropriate the proceeds, such stranger can acquire a good title to those proceeds as against a trustee, and the present case stripped of all subterfuge seems to be exactly that case; and I regard the case simply as that of a person having a bill of sale (void as against creditors) at tempting to deal with the property mentioned in the bill of sale to the prejudice of creditors. As against the creditors and trustee, Mrs. Dale had no beneficial interest in the Studebaker car and if no exchange had taken place, the trustee would have been entitled to that car as being still the property of the debtor at the date of the bankruptcy; then could she, by exchanging the debtor's property for something else, acquire any beneficial interest in the property so acquired in exchange, as against the trustee? The exchange was made with the debtor's concurrence and was as between him and the trustee, in effect, an exchange by him and, as between Mrs. Dale and the trustee, the property taken in exchange became the debtor's property and, as such, is now recoverable by the trustee. But if Mrs. Dale did actually advance the consideration as alleged, she may, in that view, be considered to be a creditor for that sum, and, if so, then that the debtor's allowing her to deal with the car might be regarded as an attempt to give her a preference which would be void under sec. 31, and in that case, sec. 33 [1 C.B.R. 39] would be applicable.

6 But even if sec. 33 of *The Bankruptcy Act* does not apply to this particular case (as it possibly does not) seeing that the deed in question, viz., the bill of sale, is not void under *The Bankruptcy Act* but under *The Bills of Sale and Chattel Mortgage Act, supra*, still the general law entitles the trustee to follow the proceeds, where the same can be said to be earmarked, into the hands of the wrongful transferee.

7 This question has been debated and judicial opinions have, it is true, been expressed adversely to the right to follow the proceeds of goods sold in similar circumstances to those existing here; see *Davis v. Wickson* (1882), 1 O.R. 369; *Ross v. Dunn* (1889), 16 O.A.R. 552; *Stuart v. Tremain* (1882), 3 O.R. 190, and per Meredith, J. (reluctantly), in *Masuret v. Stewart and Lampman* (1891), 22 O.R. 290; but the Divisional Court overruled Meredith, J., in the latter case and decided that the proceeds

of a sale still in the hands of the wrongful transferee may be followed by the trustee for creditors, and that is a sufficient authority for holding, as I do, that the Moon car in this case may be followed.

8 The Moon car I hold, therefore, is the property of the trustee in bankruptcy, and I direct Mrs. Dale forthwith to deliver the same up to the trustee, and I continue the injunction restraining her from in any way dealing with the said car otherwise than in accordance with this order. The costs of the application must be paid by Mrs. Dale and so far as the same may be irrecoverable from her, they must be paid out of the debtor's estate as part of the costs of administration.

Judgment accordingly.

TAB 10

1977 CarswellSask 5
Supreme Court of Canada

Robinson v. Countrywide Factors Ltd.

1977 CarswellSask 138, 1977 CarswellSask 5, [1977] 1 A.C.W.S. 137, [1977] 2 W.W.R. 111, [1977] S.C.J. No. 76, [1978] 1 S.C.R. 753, 14 N.R. 91, 23 C.B.R. (N.S.) 97, 72 D.L.R. (3d) 500

Robinson v. Countrywide Factors Ltd.

Laskin C.J.C., Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

Judgment: January 25, 1977

Counsel: *D. G. McLeod, Q.C.*, and *G. Morris*, for appellant.
W. N. Lawton, Q.C., for Attorney General of Saskatchewan.
J. Polika, for Attorney General of Ontario.
W. G. Burke-Robertson, Q.C., for Attorney General of British Columbia.
W. Henkel, Q.C., for Attorney General of Alberta.
E. J. Moss, Q.C., and *B. J. Scherman*, for respondent.
T. B. Smith, Q.C., for Attorney General of Canada.

Headnote
Fraud and Misrepresentation --- Fraudulent preferences — Validity of provincial legislation
Fraudulent preferences — Provincial legislation dealing with insolvency — Validity — The Fraudulent Preferences Act, R.S.S. 1965, c. 397, ss. 3, 4 — Insolvency — Burden of proof on trustee — The Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 50(6), 73.
Section 3 of The Fraudulent Preferences Act of Saskatchewan dealing with transactions taken with the intent to defeat, hinder, delay or prejudice creditors, and s. 4 of the Act, which is concerned with transactions taken with the intent to give one creditor a preference over other creditors, are valid and subsisting provincial legislation available to a trustee in bankruptcy in his attack on certain transactions. The sections are not in conflict with the Bankruptcy Act. Section 73 of the Bankruptcy Act should be confined to providing for the invalidity of transactions within its exact scope; the Parliament of Canada has refrained from completely covering the whole field of transactions avoided by provincial legislation. Section 50(6) of the Bankruptcy Act is an indication that Parliament recognizes that provisions in provincial statutes dealing with preferential transactions are still valid provincial enactments in reference to "property" and "civil rights" and are valuable aids to trustees in bankruptcy in attacking the validity of such transactions and should be available to the trustees in bankruptcy.
Although the burden is on the trustee to prove the insolvency of the debtor at the time of the transaction — as the burden is always upon the plaintiff to prove his case — the trustee may adduce such a prima facie case as will call upon the defendant to adduce evidence to rebut that prima facie evidence. It must be remembered that a trustee is often faced with a situation where he has to go back into the past and establish an insolvency which he alleges existed at some earlier time. The trustee in such a situation must deal with records which are, in many cases, fragmentary and may well be intentionally deceptive. For instance, he has no means of checking the actual stock-in-trade which existed at that time and sometimes can place little dependence upon the evidence of the debtor.
Annotation

In this case, the majority of the Supreme Court of Canada ruled that the provincial legislation dealing with fraudulent preferences is intra vires. In the past, there were a number of obiter dicta, and the opinions varied greatly. It seems that this issue has now been laid at rest.

The judgment of the majority is also very interesting in another respect, namely, it makes the burden of a trustee in proving insolvency somewhat easier. In the words of Spence J., "the trustee may adduce such a prima facie case which will call upon the defendant to adduce evidence to rebut that prima facie evidence."

It has previously been held that, although insolvency need not be proved beyond a reasonable doubt, the court would not presume insolvency — it must be proved as a matter of fact; it must be shown with reasonable certainty that at the date or dates of payment the debtor was an insolvent person as defined in the Bankruptcy Act, R.S.C. 1970, c. B-3.

As Spence J. said, "trustees in many cases must deal with records which are fragmentary and may well be intentionally deceptive. Under such circumstances, it would be very difficult for a trustee to prove that insolvency was a fact in existence some years earlier."

Reference may be had to Houlden and Morawetz, Bankruptcy Law of Canada, p. 148, and 1976 Supplement, pp. 102-103.

Laskin C.J.C. **(dissenting) (*Martland, Dickson*** **and** ***De Grandpre JJ.*** **concurring):**

1 There are two issues in this appeal, which is here by leave of this court. The first is whether a certain transaction and, in particular, a certain debenture granted on a debtor's stock in trade in pursuance of the transaction between the debtor and the respondent creditor was a fraudulent preference that was impeachable under ss. 3 and 4 of The Fraudulent Preferences Act, R.S.S. 1965, c. 397. The second is whether, if it was so impeachable, those provisions of the provincial Act were ultra vires as an invasion of exclusive federal power in relation to bankruptcy and insolvency or, alternatively, were inoperative in the face of the preference provisions of the Bankruptcy Act, R.S.C. 1970, c. B-3.

2 The appellant is trustee in bankruptcy of Kozan Furniture (Yorkton) Ltd. pursuant to a receiving order of 19th November 1968. On 19th November 1966 Kozan entered into a transaction with a pressing creditor, the respondent, whereby it sold certain stock in trade to a third person (payment being made to the respondent which reduced Kozan's indebtedness accordingly) and it also agreed to give the respondent a debenture on its stock in trade for its remaining indebtedness. The debenture was executed on or about 20th March 1967 and duly registered. After the receiving order against Kozan was made, proceedings were taken by the appellant trustee in bankruptcy to set aside the transaction of 19th November 1966 as constituting a fraudulent preference under the provincial Fraudulent Preferences Act and to recover the money paid to the respondent and to annul the debenture.

3 MacPherson J. found that Kozan was insolvent at the time of the transaction of 19th November 1966, that there was a concurrent intention of Kozan and the respondent to give and receive a preference and that, consequently, both the payment made to the respondent and the debenture constituted fraudulent preferences under the provincial statute and were hence impeachable [(1971), 16 C.B.R. (N.S.) 120]. On appeal, this judgment was set aside on the view of the majority of the Saskatchewan Court of Appeal that the appellant had failed to prove that Kozan was insolvent on 19th November 1966 [19 C.B.R. (N.S.) 24]. The trial judge was not called upon to deal with any constitutional issue and the majority of the Court of Appeal did not have to do so in view of its finding on insolvency. Hall J.A., who dissented, supported the trial judge's finding of insolvency, and in a one sentence assertion, in reliance upon *Re Panfab Corpn. Ltd.; Duro Lam Ltd. v. Last*, 15 C.B.R. (N.S.) 20, [1971] 2 O.R. 202, 17 D.L.R. (3d) 382, he rejected the contention that The Fraudulent Preferences Act was ultra vires.

4 I would not interfere with the findings of the judge of first instance that Kozan was insolvent at the material time and that Kozan intended to give and the respondent intended to receive a preference. This is the view of my brother Spence who, in exhaustive reasons, also concluded that The Fraudulent Preferences Act as a whole was not ultra vires nor was either s. 3 or s. 4 inoperative in the face of the Bankruptcy Act. I have a different opinion on the constitutional issue in this case, as appears from what now follows. That issue does not invite this court to pronounce on the validity of provincial legislation dealing with fraudulent conveyances or with fraudulent transactions in general. Thus, to take as an example The Fraudulent Conveyances Act, R.S.O. 1970, c. 182, nothing said in these reasons is to be taken as impugning the validity of that or similar enactments. They do not, ex facie, depend on proof of insolvency or on bankruptcy. In so far as any of the case law — some of it canvassed by my brother Spence — relates to such legislation and carries it into a consideration of the validity of provincial preference

legislation which depends, as do ss. 3 and 4 of the Saskatchewan Fraudulent Preferences Act, on a condition of insolvency, I find it inapt for the determination of the constitutional question in this appeal.

5 Sections 3 and 4 aforesaid are in the following terms:

> 3. Subject to sections 8, 9, 10 and 11 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 a 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.

> 4. Subject to sections 8, 9, 10 and 11 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 a 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 to or for a creditor, with intent to give that creditor preference over his other creditors or over any one or more of them, is void as against the creditor or creditors injured, delayed, prejudiced or postponed.

6 Sections 8, 9, 10 and 11, to which each of the foregoing provisions is subject, do not affect the constitutional issue, being concerned with bona fide sales or payments to innocent purchasers, valid sales for consideration and protection of security given up by a creditor. The present case does not involve ss. 8 to 11.

7 I approach the question of validity on principle and on authority. So far as principle is concerned, the starting point is in the relevant words of the B.N.A. Act, 1867, namely, s. 91(21), "Bankruptcy and Insolvency", as they relate to s. 92(13), "Property and Civil Rights in the Province". The elucidation of the meaning and scope of s. 91(21), as of the meaning and scope of any other heads of legislative power, can hardly ever be a purely abstract exercise, even where an attempt is made at neutral definition; but I see no reason why judicial pronouncements, especially at the appellate level where they are those of the court, should not be considered as throwing light upon the integrity of the head of power in the scheme of the B.N.A. Act as a whole.

8 Four things stand out. First, s. 91(21) is an exclusive federal power; second, it is a power confided to the Parliament of Canada notwithstanding anything else in the Act; third, it is a power, like the criminal law power, whose ambit did not and does not lie frozen under conceptions held of bankruptcy and insolvency in 1867 (see *A.G.B.C. v. A.G. Can.; Reference re Farmers' Creditors Arrangement Act*, [1937] A.C. 391 at 402-403); and fourth, the term "Insolvency" in s. 91(21) has as much an independent operation in the reservation of an exclusive area of legislative competence to the Parliament of Canada as the term "Bankruptcy" (see *Can. Bankers Assn. v. A.G. Sask.*, 35 C.B.R. 135, [1956] S.C.R. 31, *(*sub nom. *Re Moratorium Legislation)* [1955] 5 D.L.R. 736, per Rand J. at p. 46).

9 The view taken by the Privy Council and by this court as to the meaning of "insolvency", after as well as before the abolition of Privy Council appeals, has been a uniform one. Lord Thankerton, speaking for the Privy Council in the *Farmers' Creditors Arrangement Act* reference, supra, at p. 402 expressed it as follows:

> In a general sense, insolvency means inability to meet one's debts or obligations; in a technical sense, it means the condition or standard of inability to meet debts or obligations, upon the occurrence of which the statutory law enables a creditor to intervene, with the assistance of a Court, to stop individual action by creditors and to secure administration of the debtor's assets in the general interest of creditors; the law also generally allows the debtor to apply for the same administration.

10 This definition was referred to with approval in the majority judgment of the Supreme Court of Canada delivered by Kerwin C.J.C. in *Reference re Orderly Payment of Debts Act, 1959* (*Alta.*), 1 C.B.R. (N.S.) 207 at 212, [1960] S.C.R. 571, 23 D.L.R. (2d) 449. Earlier in *Reference re Debt Adjustment Act, 1937* (*Alta.*); *A.G. Alta. v. A.G. Can.*, 24 C.B.R. 144 at 148, [1942] S.C.R. 31, [1942] 1 D.L.R. 1, affirmed [1943] 1 W.W.R. 378, 24 C.B.R. 129, [1943] A.C. 356, [1943] 1 All E.R. 240, [1943] 2 D.L.R. 1, Duff C.J.C., speaking for all but one of the members of the court, took as an additional ground for invalidating the

challenged provincial legislation in that case that the powers of the provincial statutory tribunal set up under that legislation would normally "come into operation when a state of insolvency exists"; and he continued:

> It is not too much to say that it is for the purpose of dealing with the affairs of debtors who are pressed and unable to pay their debts as they fall due that these powers and duties are created.

11 If it is for Parliament alone to deal with insolvency, indeed to define it where it chooses to do so and to leave it otherwise to judicial definition, there can be no argument about unlawful invasion of provincial power in relation to property and civil rights. A limitation upon such power necessarily inheres in the federal catalogue of powers in s. 91, and it was recognized as early as 1880 in *Cushing v. Dupuy* (1880), 5 App. Cas. 409 at 415, in respect of the federal bankruptcy and insolvency power.

12 I refer to two other propositions before turning to what I consider to be the relevant cases. First, there is the well-recognized proposition that federal abstinence from legislation in relation to an exclusive head of legislative power does not leave that legislative area open to provincial action: see *Union Colliery Co. v. Bryden*, [1899] A.C. 580 at 588. The principle of our Constitution as it relates to legislative power is not one of simple concurrency of authority subject only to a variable doctrine of paramountcy. Exclusiveness is central to the scheme of distribution, save as to a specified number of concurrent powers such as those in s. 95. It is only under the umbrella of the doctrine of exclusiveness that the relative scope of federal and provincial authority is assessed, the assessment being carried forward to determine whether there is preclusion or supersession where both federal and provincial legislation are in competition. This brings me to the second point. I take the same view here that was taken by Duff C.J.C. in the *Debt Adjustment Act* reference, supra, and I adopt his words at p. 148, namely, that although the motives of a provincial legislature may be laudable ones, it is precluded from seeking to realize its object by entering into a field not open to it.

13 *A.G. Ont. v. A.G. Can.*, [1894] A.C. 189, generally known as the *Voluntary Assignments* case, stands as the general support for provincial legislation of the kind or allied to the kind of legislation that is challenged in the present case. It concerned only one section, s. 9, of the Ontario Assignments and Preferences Act, R.S.O. 1887, c. 124, first enacted in 1885 (Can.), c. 26. That section was as follows:

> 9. An assignment for the general benefit of creditors under this Act shall take precedence of all judgments and of all executions not completely executed by payment, subject to the lien, if any, of an execution creditor for his costs, where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs who has the first execution in the sheriff's hands.

14 This Act replaced earlier pre-Confederation legislation found in C.S.U.C. 1859, c. 26, under the title "The Relief of Insolvent Debtors Act", which was continued in the post-Confederation legislation of Ontario as An Act respecting the Fraudulent Preference of Creditors by persons in insolvent circumstances, and included in R.S.O. 1877, c. 118. What is significant in this earlier legislation is that (as set out in s. 2 of R.S.O. 1877, c. 118) it dealt with "any 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". The substituted Act of 1885 continued the reference to insolvency in respect of preferences but it also introduced new provisions respecting assignments for the benefit of creditors and these provisions, as was noted in the *Voluntary Assignments* case, were not predicated on insolvency and, indeed, were to a large degree separated from the preference provisions of the Act, as is reflected in s. 3 of R.S.O. 1887, c. 124.

15 Certainly, as the Privy Council noted, the challenged provision, s. 9, had to be taken in the context of the entire Act. There is no doubt, as well, that the issue of validity was recognized as arising at a time when there was no federal bankruptcy or insolvency legislation in force, the only such legislation, the Insolvency Act of 1875, having been repealed in 1880 by 1880 (Can.), c. 1. The majority of the Ontario Court of Appeal, to which the question of the validity of s. 9 had been referred, had found that it was ultra vires as invading exclusive federal power in relation to bankruptcy and insolvency: see (1893), 20 O.A.R. 489. The reversal of this judgment by the Privy Council was accompanied by an acknowledgement of the broad scope of federal power under s. 91(21) when affirmatively exercised but it was held that this power was not invaded by an enactment relating to an assignment that was purely voluntary.

16 The explanation for this result is found in two passages of the Privy Council's reasons. First [at p. 198]:

> ... it is to be observed that an assignment for the general benefit of creditors has long been known to the jurisprudence of this country and also of Canada, and has its force and effect at common law quite independently of any system of bankruptcy or insolvency, or any legislation relating thereto.

17 Second [at p. 199]:

> ... the operation of an assignment for the benefit of creditors was precisely the same, whether the assignor was or was not ... insolvent ... The validity of the assignment and its effect would in no way depend on the insolvency of the assignor, and their Lordships think it clear that the 9th section would equally apply whether the assignor was or was not insolvent.

18 What is evident, therefore, from that case is that, unlike the situation here, the operation of the provincial enactment did not depend on insolvency and the Privy Council was willing to treat s. 9 as having an object that was independent of it. This may even be a supportable view today, albeit there is a range of existing federal legislation dealing with bankruptcy and insolvency. I should note, however, that in the majority judgment of this court in *Reference re Orderly Payment of Debts Act, 1959* (*Alta.*), supra, at pp. 212-13, Kerwin C.J.C., referring to the *Voluntary Assignments* reference, said,

> ... it is doubtful whether in view of later pronouncements of the Judicial Committee it would at this date be decided in the same sense, even in the absence of Dominion legislation upon the subject of bankruptcy and insolvency.

19 The later pronouncements of the Privy Council include its judgment in the *Debt Adjustment Act* reference, supra, as well as in the *Farmers' Creditors Arrangement Act* reference, supra. Equally important is the judgment of this court in *Can. Bankers Assn. v. A.G. Sask.*, supra, dealing with the validity of provincial moratorium legislation. It was in line with the decision in the *Debt Adjustment Act* reference in finding an invasion of federal power in relation to bankruptcy and insolvency. I think it enough, for present purposes, to refer to what Locke J., speaking for the majority of the court, said at p. 146:

> Power to declare a moratorium for the relief of the residents of a province generally in some great emergency, such as existed in 1914 and in the days of the lengthy depression in the thirties, is one thing, but power to intervene between insolvent debtors and their creditors, irrespective of the reasons which have rendered the debtor unable to meet his liabilities, is something entirely different.

20 Although judgments of the Privy Council and of this court (and I add to those already cited, *Royal Bank of Can. v. Larue*, [1928] 1 W.W.R. 534, 8 C.B.R. 579, [1928] A.C. 187, *(*sub nom. *Bélanger v. Royal Bank of Can.)* [1928] 1 D.L.R. 945) have recognized the broad power of Parliament to embrace in its legislation in relation to bankruptcy or insolvency provisions which might otherwise fall within provincial competence, I know of no case in those courts, other than *Ladore v. Bennett*, [1939] 2 W.W.R. 566, 21 C.B.R. 1, [1939] A.C. 468, [1939] 3 All E.R. 98, [1939] 3 D.L.R. 1, where provincial legislation has been sustained, either in the absence of or in the face of federal legislation, when such provincial legislation depends for its operation only upon insolvency. *Ladore v. Bennett* can best be explained as involving municipal re-organization and hence as being concerned with the amalgamation and financial restructuring of units of local government for which the provincial legislature has a direct responsibility, albeit some of the municipalities involved in the legislatively-directed re-organization were insolvent. It is, indeed, a special case of a piece of special legislation enacted in pursuance of the power conferred by s. 92(8) of the B.N.A. Act, and I do not regard it as offering any lead to continuing legislation relating to private debtors and their creditors.

21 It is plain to me that, if provincial legislation avowedly directed to insolvency and to transactions between debtor and creditor consummated in a situation of insolvency can be sustained as validly enacted unless overborne by competent federal legislation, there is a serious breach of the principle of exclusiveness which embraces insolvency under s. 91(21). This court so held in a series of cases where the encroachment on the federal bankruptcy and insolvency power was less obvious than that exhibited here. I refer, of course, to the *Debt Adjustment Act* reference, supra, to the *Can. Bankers Assn.* case, supra, and to the *Orderly Payment of Debts Act, 1959* (*Alta.*) reference, supra. It would be a curious reversal of the proposition enunciated

in *Madden v. Nelson and Fort Sheppard Ry. Co.*, [1899] A.C. 626, namely, that you cannot do indirectly what you cannot do directly, to hold that the province can do directly what it cannot do indirectly.

22 The case put forward by the appellant and by the intervening provinces which supported him goes even farther. It is contended that notwithstanding the existence of federal bankruptcy legislation dealing with preferences the challenged provincial legislation can still operate in respect of a particular preference which is given outside of the time limits within which the federal control operates, so long at least as the provincial provision is not more stringent.

23 I do not follow this line of reasoning, especially on the submission of greater or lesser stringency. The relevant federal provision is s. 73 of the Bankruptcy Act which reads as follows:

> 73.(1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view to giving such creditor a preference over the other creditors shall, if the person making, incurring, taking, paying or suffering the same becomes bankrupt within three months after the date of making, incurring, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy.
>
> (2) Where any such conveyance, transfer, payment, obligation or judicial proceeding has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed *prima facie* to have been made, incurred, taken, paid or suffered with a view to giving such creditor a preference over other creditors, whether or not it was made voluntarily or under pressure and evidence of pressure shall not be receivable or avail to support such transaction.
>
> (3) For the purposes of this section, the expression 'creditor' includes a surety or guarantor for the debt due to such creditor.

24 This provision cannot be taken in isolation. The Bankruptcy Act is a code on the subject of bankruptcy and insolvency, defining what is an act of bankruptcy and who is an insolvent person; prescribing what are vulnerable settlements as well as what are vulnerable preferences; declaring what is comprised in a bankrupt's estate, and providing for priorities in distribution and for rateable distribution. It provides also, as in the present s. 31(1), for the making of an assignment by an insolvent person for the benefit of creditors as well as providing by s. 24(1)(*a*) that it is an act of bankruptcy to make an assignment for the benefit of creditors whether the assignment is or is not authorized by the Bankruptcy Act. In short, apart from the question whether provincial legislation predicated on insolvency is ipso facto invalid, I see no room for any assertion that such provincial legislation can continue to have operative effect in the face of the scope of the Bankruptcy Act embracing both bankruptcy and insolvency in its provisions.

25 It is worth a reminder that there is no common law of bankruptcy and insolvency and hence it cannot be said that there was an existing common law course of decision which was being embraced by provincial legislation. The common law did not distinguish the fraudulent from the insolvent debtor; it was through legislation that such a distinction was made. If a provincial legislature wishes to proscribe fraudulent transactions, it is compelled by the B.N.A. Act to ensure that its legislation dealing with such transactions does not focus on insolvency.

26 Of the many cases cited in argument before this court, I can put to one side *Re Davison*, 5 C.B.R. 860, 52 O.L.R. 244, [1923] 4 D.L.R. 1049, and *Re Panfab Corpn. Ltd.*, supra, both of which were decisions of single judges and dealt largely with the Ontario Fraudulent Conveyances Act which, as I have already said, does not depend for its activation either on insolvency or on bankruptcy nor on any question of preference such as that presented here. Similarly, I put to one side *Allison & Burnham Concrete Ltd. v. Mountain View Construction Ltd.* (1965), 53 W.W.R. 274, 9 C.B.R. (N.S.) 52, 54 D.L.R. (2d) 67, a judgment of Ruttan J. of the British Columbia Supreme Court, in so far as it was concerned with the British Columbia Fraudulent Conveyances Act, R.S.B.C. 1960, c. 155, akin to the Ontario Act of the same name.

27 Chronologically, the first of the cited cases that calls for consideration here is *Hoffar Ltd. v. Can. Credit Men's Trust Assn. Ltd.*, [1929] 1 W.W.R. 557, 10 C.B.R. 369, 40 B.C.R. 454, [1929] 2 D.L.R. 73, leave to appeal refused [1929] S.C.R. 180, [1929] 2 D.L.R. 106. It was a judgment of the British Columbia Court of Appeal involving the question whether s. 3 of

the provincial Fraudulent Preferences Act, R.S.B.C. 1924, c. 97 (similar to ss. 3 and 4 of the Saskatchewan Act in the present case), was in conflict with the then preference provision, s. 64, of the federal Bankruptcy Act, R.S.C. 1927, c. 11.

28 It is important to note, as stated by British Columbia chief justice Macdonald, that no argument was raised in the *Hoffar* case as to the validity of either the provincial Fraudulent Preferences Act or the Bankruptcy Act. A second significant aspect of the decision is that the court felt it was immaterial that the federal Act prescribed a 3-month period for invalidation of a transaction while the provincial Act prescribed a 60-day period. In fact, the transaction sought to be impugned was made less than 60 days before an assignment under the Bankruptcy Act, and there was a finding that the debtor was insolvent at the time of the transaction. The judge of first instance found that although the transaction had the effect of giving a preference it was not made with a view thereto. Under the Bankruptcy Act there was a rebuttable presumption in such a case that the transaction was concluded with a view to a preference and it was found that there was rebutting evidence. However the provincial Act made the transaction void irrespective of rebutting evidence, and the judge at first instance applied this Act.

29 The British Columbia Court of Appeal reversed this decision holding that the provincial provisions were inoperative because they were in conflict with the federal Act. A for tiori, the provincial provisions would be inoperative, in my view, if a transaction was made with a view to giving a preference. Leave to appeal was refused by Mignault J. in the Supreme Court of Canada on the ground that the decision sought to be appealed was plainly right, and he added a reference to a passage in the reasons in the *Voluntary Assignments* case where the Privy Council spoke of the preclusion of the provincial legislature from interfering with federal bankruptcy legislation.

30 This preclusive principle of non-interference is as applicable in connection with the federal power in relation to bankruptcy and insolvency as it is in the field of criminal law. In that connection, I point to the words of the late Rand J. in *Johnson v. A.G. Alta.*, 18 C.R. 173 at 183, [1954] S.C.R. 127, 108 C.C.C. 1, [1954] 2 D.L.R. 625, and adapt them here to say that "any local legislation of a supplementary nature that would tend to weaken or confuse [the] enforcement [of the Bankruptcy Act] would be an interference with the exclusive power of Parliament".

31 It is worth adding that in his reasons in the British Columbia Court of Appeal in the *Hoffar* case M. A. Macdonald J.A. indicated that provincial fraudulent conveyances legislation could be invoked where the Bankruptcy Act did not apply on the facts, even if provincial fraudulent preference legislation could not be.

32 The next case for consideration is *Re Pommier*, 11 C.B.R. 449, 65 O.L.R. 415, [1930] 4 D.L.R. 113, a judgment of Fisher J.A. sitting in bankruptcy. I accept one of its premises, namely, that the Bankruptcy Act did not oust all provincial legislation respecting fraudulent transactions, for example, the Ontario Fraudulent Conveyances Act. This was the same point taken in the *Hoffar* case. However, unlike the result in the *Hoffar* case (which was cited but not followed) the court in *Re Pommier* held that in the case of a preferential transaction which took place more than three months before an assignment in bankruptcy (and therefore outside the preference period under the federal Act) resort could be had to the provincial Assignments and Preferences Act, R.S.O. 1927, c. 162, to impeach it. The learned judge invoked a so-called doctrine of overlapping, which he distinguished from a situation of conflict, in holding the provincial Act to be available. In my opinion, he misconceived its purport as it was enunciated in *Grand Trunk Ry. Co. v. A.G. Can.*, [1907] A.C. 65 at 68, 7 C.R.C. 472. The proposition there related to a situation where "the field is clear" to one legis lature or the other. The Privy Council noted that "if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail".

33 It is only necessary to add that *Re Pommier* was overruled by the Ontario Court of Appeal in *Re Trenwith*, 15 C.B.R. 372, [1934] O.R. 326, [1934] 3 D.L.R. 195, where Masten J.A. said at p. 376 (after referring to the *Voluntary Assignments* case, to *Royal Bank of Can. v. Larue*, supra, and to the *Hoffar* case):

> ... it seems clear to me that the common field of legislation respecting the distribution of the estates of insolvents having now become occupied by the Dominion *Bankruptcy Act*, the provisions of *The Assignments and Preferences Act* respecting the preference of one creditor over another have been thereby superseded and have ceased to have any operation. If I am right in this conclusion, the effect is to overrule ... *Re Pommier*.

34 Davis J.A., who dissented on other grounds, was also of the opinion that "since the enactment of bankruptcy legislation by the Dominion Parliament, this provincial statute cannot be invoked" (at p. 384).

35 To the same effect was the opinion of this court expressed by Duff C.J.C. in *Re Bozanich; A. H. Boulton Co. v. Trusts & Guarantee Co.*, 23 C.B.R. 234, [1942] S.C.R. 130, [1942] 2 D.L.R. 145, that "the provisions of *The Assignments and Preferences Act*, R.S.O. 1927, ch. 162, in relation to preferences are superseded by sec. 64 of *The Bankruptcy Act*, and that the authority of the Ontario Legislature to enact such legislation is, in consequence of the enactment of sec. 64, suspended in view of the concluding paragraph of sec. 91 of The British North America Act".

36 Three judgments at first instance may be mentioned before I go on to consider the unanimous judgment of the Alberta Appellate Division, sitting as a bench of five, in *A.G. Alta. v. Nash* (1964), 50 W.W.R. 155, 7 C.B.R. (N.S.) 92, *(*sub nom. *Re McIntosh-Marshall Equipment Ltd.; Nash v. Guelph Engineering Co.)* 48 D.L.R. (2d) 619, affirming 48 W.W.R. 420, 7 C.B.R. (N.S.) 84. The three cases are *Crown Coal Co. Ltd. v. Swanson Lumber Co. Ltd.*, [1935] 3 W.W.R. 245, 17 C.B.R. 115, [1935] 4 D.L.R. 707 (C.A.); *Gard v. Yates*, [1936] 1 W.W.R. 212, 17 C.B.R. 168, 50 B.C.R. 353, [1936] 2 D.L.R. 50, and *Totem Radio Supply Co. Ltd. v. Stone* (1959), 29 W.W.R. 552, 38 C.B.R. 112. All three of these cases concerned issues of alleged conflict between provincial and federal legislation respecting rights of creditors of a person who has made an authorized assignment or was insolvent at a material time. The *Crown Coal Co. Ltd.* case, an Alberta judgment, did not turn on a constitutional issue and, at any rate, it cannot stand in the face of the *Nash* case; I am, similarly, unable to appreciate how either *Gard v. Yates* or the *Totem Supply* case, both British Columbia decisions, can stand against the reasoning in *Nash*, the views expressed in *Re Trenwith* and those expressed by Duff C.J.C. in *Re Bozanich*. The first represents a decision overtaken by later authority and the second cites no authorities at all but on the point of alleged conflict between the respective provincial and federal preference provisions is content to say simply that there is no conflict where the preference is given outside the three-month period fixed by the federal Bankruptcy Act when the provincial Act fixes a larger period for impeachment. Reliance was placed on the then s. 41(6) [of R.S.C. 1952, c. 14], now s. 50(6), of the Bankruptcy Act, to which I will return later in these reasons. I should add that in another later British Columbia case, the *Allison & Burnham Concrete Ltd.* case already mentioned (also a judgment of a single judge), Ruttan J. did canvass later authorities but decided to rest on earlier decisions such as *Gard v. Yates* to justify a construction that avoided any constitutional infirmity in the event that the provincial Act gave a longer impeachment period than the federal Act. In effect, his view was to leave the constitutional issue to a higher court. That is where it now is.

37 *A.G. Alta. v. Nash* came before Milvain J., as he then was, through a proceeding by a trustee in bankruptcy to set aside payments made by the bankrupt company to its creditors within one year prior to bankruptcy but, save as to one payment, beyond the three-month period under the then s. 64 (now s. 73) of the Bankruptcy Act. The trustee relied on s. 4 of the Alberta Fraudulent Preferences Act [R.S.A. 1955, c. 120] which, like the Saskatchewan provisions in issue here, is predicated for its operation on insolvency. It fixes a one-year period within which a transaction having the effect of giving a preference may be impeached as being utterly void. Milvain J. held that the Alberta Act was ultra vires as being in pith and substance insolvency legislation.

38 In the Alberta Appellate Division Johnson J.A., speaking for a unanimous court of five, was content to consider the Alberta Fraudulent Preferences Act, first enacted in 1922, and, in particular, s. 4 (with a 60-day impeachment period, enlarged in 1931 to one year) from the standpoint of its preclusion by the prior enactment of the federal Bankruptcy Act and its preference provisions. After a canvass of the authorities to date, he said this (at pp. 160-61):

> There can, I think, be no doubt that the impugned Act was *ultra vires* of the legislature when it was passed. Whatever can be said for similar legislation that was passed before the *Bankruptcy Act* become (sic) operative, this legislation, viewed in the light of sec. 64, becomes an attempt to cover the same ground that section covers. The enlargement of the time from 60 days to one year must be viewed as an attempt to strengthen the remedy which sec. 64 gives to creditors. Sec. 4 cannot be looked upon as legislation which was intended to deal with contracts and which only incidentally and as part of a larger scheme dealt with matters which were within the scope of one or more of the subjects mentioned in sec. 91. This section is what it purports to be. Legislation intended to prevent 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' (4 [*a*]), from disposing of his property in such a manner as to prefer one creditor over another. It is exactly what sec. 64 of the *Bankruptcy Act* was passed to prevent. If

> it is not in pith and substance insolvency legislation under the earlier cases, it has become so under the enlarged definition [of later cases] and also by virtue of sec. 64 of the *Bankruptcy Act*.
>
> Viewing sec. 64 as being ancillary to bankruptcy and insolvency legislation, there can be no doubt of the conflict between that section and this section of *The Fraudulent Preferences Act*. Sec. 64 fixes three months as the time within which proceedings must be taken to avoid preferential dealings. Transactions beyond that period cannot be attacked under that section and are, therefore, legal. To enlarge that period to one year is to render void payments and transfers of property which were valid under sec. 64. The exclusions from the operation of the two sections, while similar, exhibit a differing approach and there can be little doubt that sec. 64 gives a wider exemption than sec. 7 of *The Fraudulent Preferences Act*.

39 In coming to the conclusion that s. 4 of the Alberta Act was in conflict with the then s. 64 of the federal Act, the learned judge in the *Nash* case took into consideration s. 41(6) of the Bankruptcy Act, now s. 50(6), which read as follows:

> 41. ...
>
> (6) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict ... with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by such law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

40 In my opinion, this provision is not designed to enlarge provincial authority, and Johnson J.A. rightly held that because of conflict it had no application. The provision aforesaid does not provide for the effacement of federal legislation to allow provincial legislation to operate but relates to provincial provisions which satisfy two conditions: first, they must be provisions which are independently valid; and second, they must be provisions which do not conflict with the application and operation of federal provisions. I do not see how provincial legislation whose operation is predicated on insolvency can be anything but insolvency legislation, nor do I see how a provincial statute can validly provide that what a federal statute says is not impeachable can nonetheless be impeached. There is no difference, in my view, between the situation where a province seeks to narrow the period of impeachability of a transaction and the situation where it seeks to enlarge it, especially when in either case it is doing this from the standpoint of insolvency as the triggering factor. This is a different thing from legislation dealing only with fraudulent preferences apart from or unrelated to insolvency. Here, although such legislation may be valid in the absence of federal legislation, there may nonetheless be operative incompatibility in particular cases but no general supersession or preclusion.

41 I wish now to address myself to an issue which, I think, has influenced the approach by single judges to the constitutional question in this case, and wrongly so. That issue is the undesirability of interfering with what appeared to be a practical way of reaching as many alleged preferences in fraud of creditors as possible, by using provincial legislation where federal legislation did not reach far enough, and by using provincial insolvency legislation if nothing else was available. Hence, the approach by way of construction (albeit a dip into a constitutional area was inevitable) avoiding a direct constitutional confrontation. There are cases even in this court and on this very subject which have proceeded on a straight construction basis to examine whether operative effect can be given to provincial legislation in the face of a federal enactment. Two examples are *Traders Finance Corpn. v. Levesque*, 2 C.B.R. (N.S.) 52, [1961] S.C.R. 83, 26 D.L.R. (2d) 384, and *Re Gingras Automobile Ltée.; Produits de Caoutchouc Marquis Inc. v. Trottier*, 4 C.B.R. (N.S.) 123, [1962] S.C.R. 676, 34 D.L.R. (2d) 751. I do not regard either of these cases as requiring a decision on constitutional grounds. The *Traders Finance* case concerned a largely procedural matter, namely, whether the failure of a trustee in bankruptcy to impeach a preference illegal under the Bankruptcy Act precluded a suit by a creditor to that end. The *Trottier* case dealt with the effect of the Bankruptcy Act on the extent of a landlord's claim to rank as a preferred creditor.

42 There are numerous illustrations in other branches of the law where practices carried on for some time without objection on constitutional grounds were brought to an end when the constitutional question was raised directly. Perhaps the most celebrated instance was that considered by the Privy Council in *Nadan v. The King*, [1926] 1 W.W.R. 801, [1926] A.C. 482, 45 C.C.C. 221, [1926] 2 D.L.R. 177, where a federal enactment of 1888, purporting to exclude appeals to the Privy Council in criminal

matters, was invalidated almost 40 years later. Equally significant because the issue was well-known to the Ontario Bar, which seems to have agreed to live with it as a matter of convenience, was the constitutional propriety of provincial legislation vesting jurisdiction in the master to try mechanics' lien actions in the county of York. Once the constitutional issue was squarely raised the courts did not back away from it and held that s. 96 of the B.N.A. Act was offended; see *A.G. Ont. v. Victoria Medical Building Ltd.*, [1960] S.C.R. 32, (sub nom. *Display Service Ltd. v. Victoria Medical Building Ltd.)* 21 D.L.R. (2d) 97.

43 There have been a number of recent cases where this court has proceeded on a construction basis rather than on a constitutional basis in respect of the operation of both federal and provincial legislation although aware that a constitutional question was involved but being unwilling to deal with it unless raised by a party so that necessary notice could be given to the Attorneys General, federal and provincial. One example is *Les Immeubles Fournier Inc. v. Construction St. Hilaire Ltée*, [1975] 2 S.C.R. 2, 52 D.L.R. (3d) 89, involving s. 8 of the Interest Act, R.S.C. 1970, c. I-18. Another is *Can. Labour Relations Bd. v. C.N.R.*, [1974] 4 W.W.R. 661, [1975] 1 S.C.R. 786, 45 D.L.R. (3d) 1, which concerned the scope of s. 53(*g*) of the federal Industrial Relations and Disputes Investigation Act, R.S.C. 1952, c. 152 (now s. 108, Pt. V [reen. 1972, c. 18, s. 1] of the Canada Labour Code, R.S.C. 1970, c. L-1) and whether it embraced (validity not put in issue) a hotel operated by the respondent railway.

44 Finally, on this phase of the case, I refer to *Gingras v. General Motors Products of Can. Ltd.*, [1976] S.C.R. 426, 57 D.L.R. (3d) 705, which involved a question of prescription in respect of an action by a trustee in bankruptcy to set aside an illegal preference under the Bankruptcy Act. No constitutional question was directly involved and the majority judgment held that a certain prescriptive provision of the Civil Code of Quebec did not apply so as to limit the trustee's right of action.

45 I conclude, therefore, as follows. Provincial legislation which purports to provide for impeachment of preferences to creditors given by a person who is then insolvent, where insolvency is the sine qua non of impeachability, is invalid as a direct invasion of exclusive federal power in relation to bankruptcy and insolvency. Hence, ss. 3 and 4 of Saskatchewan Fraudulent Preferences Act are ultra vires. Moreover, in so far as these sections prescribe an impeachment period which enables a creditor to set aside a preference made beyond the period fixed by the Bankruptcy Act and hence not impeachable under that Act, it interferes with the operation of the Bankruptcy Act and is, indeed, repugnant to it. It must be remembered that where, as in the present case, there has been a receiving order, the intrusion of provincial legislation relating to transactions entered into by an insolvent must interfere with the rateable distribution of the bankrupt's property according to the scheme of distribution prescribed by the Bankruptcy Act. Whether that scheme is faulty in the view of a court is immaterial; the correction must come from the responsible legislature. No more under bankruptcy and insolvency law than under the criminal law can a province make unlawful what is lawful under valid federal legislation, or make lawful what is unlawful under valid federal legislation.

46 In the result, I would answer the two questions in issue here in the affirmative. The judgment of the Saskatchewan Court of Appeal should be varied so as to restore the finding of insolvency by the trial judge but the appeal should otherwise be dismissed in view of the affirmative answers aforesaid. Leave is also given for a reference to determine the amount due under the debenture if the parties are unable to agree thereon. The respondent should have its costs in this court but there should be no order as to costs to or against any of the intervenors.

***Spence J. (Judson, Ritche* and *Pigeon JJ.* concurring):**

47 This is an appeal from the judgment of the Court of Appeal for Saskatchewan pronounced on 14th March 1974 [19 C.B.R. (N.S.) 24]. By that judgment the Court of Appeal allowed an appeal from the judgment of MacPherson J., pronounced on 16th June 1971 [16 C.B.R. (N.S.) 120]. By the latter judgment, MacPherson J. had declared that the payment of the sum of $9,152.31 to the respondent was void as a preference under The Fraudulent Preferences Act, R.S.S. 1965, c. 397, and had given judgment in favour of the appellant against the respondent for that amount.

48 The issue determined by MacPherson J., insofar as may be adjudged from a perusal of the reasons for judgment delivered by the learned trial judge, was simply whether the transaction was or was not a preferential one voided by the provisions of that statute.

49 On the appeal to the Court of Appeal, the present respondent not only dealt with that issue but with the issue of whether the provincial statute was available to the appellant in this court (there respondent) in an attack on the transaction.

50 Maguire J.A., in giving reasons for the majority of the Court of Appeal, held that the transaction was not a preferential one within the meaning of the section in the provincial Fraudulent Preferences Act, and, therefore, was not called upon to determine whether that statute was available in whole or in part to the trustee in bankruptcy. Hall J.A., giving a dissenting judgment, found that the transaction was a preferential one within The Fraudulent Preferences Act and was, therefore, called upon to deal with the issue as to the validity and applicability of the provisions of The Fraudulent Preferences Act. Perhaps realizing that his reasons were dissenting, he did so in a very short paragraph, which I quote [p. 34]:

> The appellant contends that The Fraudulent Preferences Act, is ultra vires of the legislation of the province. For the reasons given in *Re Panfab Corpn. Ltd.; Duro Lam Ltd. v. Last*, 15 C.B.R. (N.S.) 20, [1971] 2 O.R. 202, 17 D.L.R. (3d) 382, with which I agree, this contention must be rejected.

51 Upon the trustee in bankruptcy obtaining leave to appeal to this court, the respondent Countrywide Factors Ltd., in accordance with the rules of this court and in view of the fact that it wished to argue the ultra vires character of the provincial Fraudulent Preferences Act, applied to this court for directions and this court ordered that notice of two questions be served on the Attorney General of Canada and the Attorneys General of the provinces. The two questions were:

> 1. Whether The Fraudulent Preferences Act, R.S.S. 1965, Chapter 397, is *ultra vires* of the Legislature of the Province of Saskatchewan.
>
> 2. Alternatively, whether sections 3 and 4 of The Fraudulent Preferences Act, R.S.S. 1965, Chapter 397, while being within the legislative competence of the Legislature of the Province of Saskatchewan, are in conflict with valid legislation of the Parliament of the Dominion of Canada relating to bankruptcy and insolvency, namely, the Bankruptcy Act, R.S.C. 1970, Chapter B 3.

52 As will be demonstrated hereafter, the transaction attacked by the trustee in bankruptcy occurred on 19th November 1966 or, at any rate, not later than 20th March 1967.

53 Kozan Furniture (Yorkton) Ltd. was the subject of a receiving order in bankruptcy on 19th November 1968. Therefore the Bankruptcy Act provisions as to preferential transactions contained in s. 73 of the Bankruptcy Act, R.S.C. 1970, c. B-3, which provides:

> 73.(1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view to giving such creditor a preference over the other creditors shall, if the person making, incurring, taking, paying or suffering the same becomes bankrupt within three months after the date of making, incurring, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy.
>
> (2) Where any such conveyance, transfer, payment, obligation or judicial proceeding has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed *prima facie* to have been made, incurred, taken, paid or suffered with a view to giving such creditor a preference over other creditors, whether or not it was made voluntarily or under pressure and evidence of pressure shall not be receivable or avail to support such transaction.
>
> (3) For the purposes of this section, the expression 'creditor' includes a surety or guarantor for the debt due to such creditor,

has no application nor has s. 5 of The Fraudulent Preferences Act. In the Bankruptcy Act the interval between the transaction and the declaration of bankruptcy is limited to three months, and in The Fraudulent Preferences Act, s. 5 only applies if the attack is made within 60 days after the transaction. Therefore, in order to succeed, the appellant must have available to him the provisions of ss. 3 and 4 of the said Fraudulent Preferences Act. It is the submission of the respondent that either of those sections, or indeed the whole statute, is ultra vires of the province of Saskatchewan or that ss. 3 and 4, while being within the legislative competence of the legislature of the province, are in conflict with the legislation of the Parliament of Canada relating to bankruptcy and insolvency. That problem is one which has plagued the courts from 1894 on.

54 The Bankruptcy Act was enacted only in the year 1919, but in *A.G. Ont. v. A.G. Can.*, [1894] A.C. 189, the Judicial Committee dealt with the problem of whether s. 9 of an Ontario statute, the then counterpart of the present Ontario Assignments and Preferences Act, R.S.O. 1970, c. 34, was intra vires of the province of Ontario. It is to be remembered that s. 91(21) of the B.N.A. Act, 1867, granted exclusive legislative jurisdiction to the Parliament of Canada on subjects entitled "Bankruptcy and Insolvency". Section 9 of the Ontario statute, R.S.O. 1887, c. 124, read as follows:

> 9. An assignment for the general benefit of creditors under this Act shall take precedence of all judgments and of all executions not completely executed by payment, subject to the lien, if any, of an execution creditor for his costs, where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs who has the first execution in the sheriff's hands.

55 The Judicial Committee held that such a provision was within the constitutional powers of the province as granted in s. 92(13) of the B.N.A. Act, i.e., "Property and Civil Rights in the Province". The Lord Chancellor said at pp. 198-99:

> But it is argued that inasmuch as this assignment contemplates the insolvency of the debtor, and would only be made if he were insolvent, such a provision purports to deal with insolvency, and therefore is a matter exclusively within the jurisdiction of the Dominion Parliament. Now it is to be observed that an assignment for the general benefit of creditors has long been known to the jurisprudence of this country and also of Canada, and has its force and effect at common law quite independently of any system of bankruptcy or insolvency, or any legislation relating thereto. So far from being regarded as an essential part of the bankruptcy law, such an assignment was made an act of bankruptcy on which an adjudication might be founded, and by the law of the Province of Canada which prevailed at the time when the Dominion Act was passed, it was one of the grounds for an adjudication of insolvency.
>
> It is to be observed that the word 'bankruptcy' was apparently not used in Canadian legislation, but the insolvency law of the Province of Canada was precisely analogous to what was known in England as the bankruptcy law.
>
> Moreover, the operation of an assignment for the benefit of creditors was precisely the same, whether the assignor was or was not in fact insolvent. It was open to any debtor who might deem his solvency doubtful, and who desired in that case that his creditors should be equitably dealt with, to make an assignment for their benefit. The validity of the assignment and its effect would in no way depend on the insolvency of the assignor, and their Lordships think it clear that the 9th section would equally apply whether the assignor was or was not insolvent.

56 And at pp. 200-201 continued:

> It is not necessary in their Lordships' opinion, nor would it be expedient to attempt to define, what is covered by the words 'bankruptcy' and 'insolvency' in sect. 91 of the British North America Act. But it will be seen that it is a feature common to all the systems of bankruptcy and insolvency to which reference has been made, that the enactments are designed to secure that in the case of an insolvent person his assets shall be rateably distributed amongst his creditors whether he is willing that they shall be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only as an alternative. In reply to a question put by their Lordships the learned counsel for the respondent were unable to point to any scheme of bankruptcy or insolvency legislation which did not involve some power of compulsion by process of law to secure to the creditors the distribution amongst them of the insolvent debtor's estate.
>
> In their Lordships' opinion these considerations must be borne in mind when interpreting the words 'bankruptcy' and 'insolvency' in the British North America Act. It appears to their Lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the

> legislative competence of the provincial legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence.

57 It will be seen, therefore, that the Judicial Committee in this decision only determined that a system providing for voluntary assisgnments enacted in a province prior to the enactment of any federal Bankruptcy Act was intra vires, but acknowledged that a subsequently enacted Bankruptcy Act by the federal Parliament might well overcome the provisions of the provincial statute. It would seem that the decision is quite silent as to the effect of provisions in a provincial Assignments and Preferences Act other than one permitting a voluntary assignment of debts except that one might well argue that by implication provisions in the provincial statute dealing with fraudulent preferences would be equally within the purview of the province under "property" and "civil rights" unless and until overcome by federal legislation ancillary to its power in bankruptcy and insolvency.

58 In 1922 Orde J. gave a decision in *Re Davison*, 5 C.B.R. 860, 52 O.L.R. 244, [1923] 4 D.L.R. 1049, in a matter where a mortgage was being attacked by a trustee in bankruptcy as void under The Fraudulent Conveyances Act, R.S.O. 1914, c. 105, and also The Assignments and Preferences Act, R.S.O. 1914, c. 134. The mortgagee submitted that if the transaction could not be avoided under s. 31 [now s. 73] of the Bankruptcy Act, 1919 (Can.), c. 36, it could not be set aside at all. In other words, that the provincial statutes aforesaid were no longer applicable in the province when bankruptcy occurred, having been superseded by the provisions of the Bankruptcy Act. At p. 861 the learned justice said:

> This is a startling suggestion, and, if sound, would turn back the clock for three centuries and enable a debtor to commit a deliberate fraud upon his creditors, and by holding off his bankruptcy for three months to validate the transaction. There is nothing in sec. 31 or in any other part of *The Bankruptcy Act* which either expressly or impliedly abrogates the existing law of each province as to the invalidity of fraudulent transactions. On the contrary, in the enumeration of the different kinds of acts of bankruptcy in sec. 3(*b*), it is clearly intended to include cases of fraudulent conveyances which are fraudulent quite independently of *The Bankruptcy Act*, those which are fraudulent under the Act being mentioned in par. (c). Rule 120 clearly contemplates other laws than *The Bankruptcy Act* itself, under which a transaction may be declared invalid, though, if the effect of the Act is as Mr. White contends, the Rules cannot nullify that effect.

59 Orde J. was the first judge dealing with bankruptcy matters in Ontario after the enactment of the statute. The report books for the years following the enactment of the statute are filled with his wise decisions in reference to bankruptcy and, in my view, he firmly established the course of bankruptcy law in Ontario and largely affected the course of the law throughout Canada in the early years of bankruptcy administration. I am of the view that his observation, which I have cited, is a very sound one and is still applicable today. I might even go further: It is not only possible for a debtor to hold off his bankruptcy for three months in order to validate the transaction but it is quite possible for a creditor, improperly and fraudulently preferred, to support a debtor and enable him to postpone the date of his eventual declaration of bankruptcy beyond the three months.

60 The view expressed by Orde J. seems to have prevailed for a considerable length of time.

61 In *Hoffar Ltd. v. Can. Credit Men's Trust Assn. Ltd.*, [1929] 1 W.W.R. 557, 10 C.B.R. 369, 40 B.C.R. 454, [1929] 2 D.L.R. 73, leave to appeal refused [1929] S.C.R. 180, [1929] 2 D.L.R. 106, the Court of Appeal for British Columbia had considered a situation where a transfer had been made by a debtor less than 60 days before the debtor's assignment under the provisions of the Bankruptcy Act. The transaction was attacked on two grounds: firstly, that it was avoided by the provisions of s. 64 [now s. 73] of the Bankruptcy Act, R.S.C. 1927, c. 11, and, secondly, that it was utterly void as against the trustee under the provisions of s. 3(2) of The Fraudulent Preferences Act of British Columbia [R.S.B.C. 1924, c. 97]. It was found at trial and not contested on appeal that s. 64 of the Bankruptcy Act could not apply because it had not been proved that the transaction was made with a view to prefer one creditor over another and, in the Court of Appeal, it was also held that s. 3 of the provincial statute had been rendered inoperative by the enactment of s. 64 of the Bankruptcy Act. M. A. Macdonald J.A. said [at p. 561]:

> The Dominion statute adds however subsec. (2) quoted *ante*, stating when the view or intent to prefer shall be presumed. If it has the effect of giving a preference it is *prima facie* proof that it was made with that intent. That is a presumption and evidence may be adduced to rebut it. That right is given by the Dominion Act on a state of facts common to both Acts. The provincial statute denies that right. Given the insolvency as in the Dominion Act and the intent as in the Dominion Act ("with a view of") the transfer is utterly void under sec. 3(1) without any right to offer evidence to rebut it. And under sec. 3, subsec. (2), if action is taken within 60 days or if an assignment follows within 60 days the transfer is void.
>
> The provincial Act is not dealing with a new situation; the variation in words and figures does not affect the subject-matter. But the result is different. Under the provincial Act the transfer is void; under the Dominion Act it is deemed void with however the right to rebut. If this is given by Dominion legislation a provincial Act destroying it is *ultra vires* to the extent of the conflict. Under the Dominion Act the assignor has the benefit of that right. Under the provincial Act invalidity is an irrebuttable presumption. That is the conflict.

62 M.A. Macdonald J.A. added the very important comment [p. 562]:

> This is not to say that the trustee cannot resort to a provincial Act to impeach a transaction. Provincial legislation respecting fraudulent conveyances may be resorted to. The *Bankruptcy Act* does not abrogate provincial Acts simply because they deal with preferential transactions. But obviously both Parliaments cannot enact that one result shall follow in one case and a different result in the other. Counsel for respondent submitted that the section in the provincial Act deals with a topic not dealt with by the Dominion Act. I cannot agree. He also urged that there is no conflict where the Dominion Act voids a transaction on one ground and a provincial Act avoids it on other and additional grounds; in other words, the Dominion Act does not say that transactions of another kind shall be lawful. That is not this case. We are dealing with legislative results following the same transaction and the results differ. That result in case of conflict must be determined by the Dominion Act. The test is, can both sections be enforced?

63 So, in *Hoffar*, the Court of Appeal for British Columbia acknowledged that, of course, valid federal legislation on the subject of bankruptcy and insolvency would overcome provincial legislation on the subject of property and civil rights but only to the extent of the conflict. In that case, the court found a conflict but foresaw cases where there would be no conflict and where, therefore, the provincial legislation would still be in full force and effect. Leave to appeal to this court in the *Hoffar* case was refused by Mignault J.

64 In *Re Pommier*, 11 C.B.R. 449, 65 O.L.R. 415, [1930] 4 D.L.R. 113, Fisher J.A. considered an application to set aside as preferential a transaction between the bankrupt and the creditor which took place more than three months before the making of the authorized assignment and which, therefore, was not within the prohibition in s. 64 [now s. 73] of the Bankruptcy Act. At pp. 116-17 the learned justice said:

> After careful consideration of the provisions of the Bankruptcy Act, the Assignments and Preferences Act and the decisions to which I shall make reference, I am unable to give effect to Mr. Hellmuth's contentions.
>
> I frankly admit that conflict is to be found when sec. 64 is read in connection with sec. 5 of the Assignments and Preferences Act and the following sections, except possibly sec. 12, and that, the Bankruptcy Act, being Dominion legislation, as to this conflict the Dominion Act prevails; but, in my opinion, sec. 64 does not attempt to interfere directly with provincial legislation dealing with the same subject-matter, because it is quite clear that s-ss. (3) and (4) of s. 4 of the Assignments and Preferences Act cover transactions not covered by the Bankruptcy Act, and in those respects are not in conflict with the Bankruptcy Act, and that these subsections are still operative; but, even if it could be said that these subsections do deal with the same subject-matter, it is not one of conflict but of 'overlapping'.

65 And at p. 119 said:

> It appears to me, and I am of opinion, that the combined effect of Rule 142, s. 64, and the other sections of the Acts to which I have referred, is to give to a trustee in bankruptcy, without special enabling words, power to impeach all fraudulent or

> preferential transactions which may by the Bankruptcy Act or provincial law be avoided; that neither the Assignments and Preferences Act nor the Fraudulent Conveyances Act has been abrogated, and that these Acts, apart from the conflicting sections mentioned, are still running concurrently with the provisions of the Bankruptcy Act and may be resorted to by a trustee under that Act, if it is found that relief cannot be obtained thereunder, or, to adopt the words of Macdonald, J.A., in the *Hoffar* case, unless on the same state of facts we find a different result arising, resort may be had to the provisions of whichever legislation fits the case.

66 So, therefore, another most eminent and experienced judge in bankruptcy matters came to the like conclusion that the provincial statute, insofar as it was not overcome by the provisions of the Bankruptcy Act, was still available to the trustee in bankruptcy.

67 However, the Court of Appeal for Ontario in *Re Trenwith*, 15 C.B.R. 372, [1934] O.R. 326, [1934] 3 D.L.R. 195, again considered a transaction allegedly preferential which had occurred much more than three months prior to the petition which resulted in the receiving order. Kerwin J., as he then was, had at trial set aside the impugned transaction using the provisions of The Assignments and Preferences Act, being of the opinion that he was so required by the decision in *Re Pommier*, supra. But upon appeal Masten J.A. said at p. 376:

> The question is, therefore, open for adjudication by this Court, and on a consideration of the cases of *A.G. Ont. v. A.G. Can.* [supra, at p. 200]; *Royal Bank of Can. v. Larue*, [1928] 1 W.W.R. 534, 8 C.B.R. 579, [1928] A.C. 187, *(*sub nom. *Bélanger v. Royal Bank of Can.)* [1928] 1 D.L.R. 945 , and *Hoffar Ltd. v. Can. Credit Men's Trust Assn. Ltd.* [supra] it seems clear to me that the common field of legislation respecting the distribution of the estates of insolvents having now become occupied by the Dominion *Bankruptcy Act*, the provisions of *The Assignments and Preferences Act* respecting the preference of one creditor over another have been thereby superseded and have ceased to have any operation. If I am right in this conclusion, the effect is to overrule the view expressed by Fisher, J.A., in *Re Pommier* [supra].

68 The Court of Appeal for Ontario, therefore, came to exactly the opposite conclusion, not to the actual decision in *Hoffar* but to the reservation made by M.A. Macdonald J.A., which I have cited above, and to a conclusion opposite to that reached by Fisher J.A. in *Re Pommier*. The conclusion, however, may well be considered obiter because Masten J.A. follows the statement which I have quoted above with a holding that, although the transaction could not be attacked under either s. 64 of the then Bankruptcy Act or under The Assignments and Preferences Act of the province, it could be attacked as a settlement under the then s. 60 [now s. 69] of the Bankruptcy Act.

69 The statement which I have quoted above, however, is plainly that by enacting the then s. 64 of the Bankruptcy Act the federal Parliament, enacting valid legislation on the subject of bankruptcy and insolvency, has covered the field and therefore cannot be reconciled with decisions to which I have referred which reduce the deleterious effect of the federal legislation to points of actual conflict only. The decision, however, has some support in this court and in the Courts of Appeal of the provinces. In *Re Bozanich; A. H. Boulton Co. v. Trusts & Guarantee Co.*, 23 C.B.R. 234, [1942] S.C.R. 130, [1942] 2 D.L.R. 145, this court considered whether a chattel mortgage was or was not a settlement within the meaning of the then s. 60 of the Bankruptcy Act and held it was not such a settlement. There seems to have been no allegation whatsoever that the transaction could be subject to attack under the provisions of the Ontario Assignments and Preferences Act or the Ontario Fraudulent Conveyances Act, but Duff C.J.C. said at p. 136:

> I may add that, in my opinion, the provisions of R.S.O. 1927, Chap. 162, in relation to preferences are superseded by section 64 of the *Bankruptcy Act*, and that the authority of the Ontario Legislature to enact such legislation is, in con sequence of the enactment of section 64, suspended in virtue of the concluding paragraph of section 91.

70 The statement is, of course, plainly obiter and it is not reflected in the reasons for judgment of Rinfret J., who came to the same result as did the chief justice.

71 In 1949, the Parliament of Canada enacted the Bankruptcy Act, 1949 Can., c. 14 (2nd Sess.) [in particular, s. 41(6)], which now appears as s. 50(6) of the statute and which provides:

> (6) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by such law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

72 In *Totem Radio Supply Co. v. Stone* (1959), 29 W.W.R. 552, 38 C.B.R. 112 (B.C.), Whittaker J., sitting in single judge court, held that The Fraudulent Preferences Act, R.S.B.C. 1948, c. 132, was not in conflict with s. 64 [now s. 73] of the Bankruptcy Act and at p. 553 said:

> Prior to 1949 there were conflicting decisions as to whether or not the dominion legislation entirely superseded provincial Acts dealing with preferences, but this matter is now resolved by sec. 41(6) of the *Bankruptcy Act* of 1949.

73 Other cases in the various provincial courts went either way but the next case which I shall consider is *A.G. Alta. v. Nash* (1964), 50 W.W.R. 155, 7 C.B.R. (N.S.) 92, *(*sub nom. *Re McIntosh-Marshall Equipment Ltd.; Nash v. Guelph Engineering Co.)* 48 D.L.R. (2d) 619. There the Appellate Division of the Supreme Court of Alberta held, confirming Milvain J. [48 W.W.R. 420, 7 C.B.R. (N.S.) 84], that The Fraudulent Preferences Act of Alberta, R.S.A. 1955, c. 120, was ultra vires. Johnson J.A. said at pp. 160-61:

> There can, I think, be no doubt that the impugned Act was *ultra vires* of the legislature when it was passed. Whatever can be said for similar legislation that was passed before the *Bankruptcy Act* became operative, this legislation, viewed in the light of s. 64, becomes an attempt to cover the same ground that section covers. The enlargement of the time from 60 days to one year must be viewed as an attempt to strengthen the remedy which sec. 64 gives to creditors. Sec. 4 cannot be looked upon as legislation which was intended to deal with contracts and which only incidentally and as part of a larger scheme dealt with matters which were within the scope of one or more of the subjects mentioned in sec. 91. This section is what it purports to be. Legislation intended to prevent 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' (4 [*a*]), from disposing of his property in such a manner as to prefer one creditor over another. It is exactly what sec. 64 of the *Bankruptcy Act* was passed to prevent. If it is not in pith and substance insolvency legislation under the earlier cases, it has become so under the enlarged definition and also by virtue of sec. 64 of the *Bankruptcy Act*.

74 Johnson J.A. cited s. 41(6) [now s. 50(6)] of the Bankruptcy Act, R.S.C. 1952, c. 14, and then continued [at p. 163]:

> Whittaker, J. of the British Columbia supreme court considered this amendment in *Totem Radio Supply Co. v. Stone* [supra] and as he could find no conflict between sec. 64 of the *Bankruptcy Act* and the section of the *Fraudulent Preferences Act*, RSBC, 1948, ch. 132 (similar to our Act), set aside a mortgage which had been given more than three months before the company became bankrupt. With respect, I must disagree with his conclusion. Having concluded, as previously stated, that there is a conflict between the two sections, it would follow that the section in the provincial Act is unaffected by the amendment.
>
> The court of appeal of Ontario again considered the *Assignments and Preferences Act*, RSO, 1960, ch. 25, in *Re Shelly Films Ltd.; Clarkson Co. v. Overland Finance Corpn.*, 4 C.B.R. (N.S.) 186, [1963] 1 O.R. 431, 37 D.L.R. (2d) 419, reversing 3 C.B.R. (N.S.) 94, [1961] O.W.N. 371 (C.A.), and held that sec. 12(1) of that Act was abrogated by sec. 64 of the *Bankruptcy Act*. Because no mention was made of the amendment to the *Bankruptcy Act* in that case, we are asked to assume that it had been overlooked and was not considered by that court. Judicial comity would make one hesitate to impute to the court of another province such an oversight. The case does point out the conflicts in the two Acts and it is much more reasonable to assume that the amendment was in fact considered by the court.
>
> It may be that certain sections of the *Fraudulent Preferences Act* are continued effective by the amendment to sec. 41 of the *Bankruptcy Act*, but because of the conflict between the section we are considering and sec. 64, sec. 4 is not one of them.

75 It would seem that Johnson J.A.'s judgment, although he commences with the statement that the Act is ultra vires, ends with the conclusion that only the section under attack in that particular decision was ultra vires. The particular section was s. 4, which avoided preferential transactions where an action had been brought within one year thereafter. The statute under consideration in this appeal, the Saskatchewan Fraudulent Preferences Act, in ss. 3 and 4 makes no reference whatsoever to any time limit. The section which does make such reference and which creates a presumption is s. 5 and it is not advanced by the trustee.

76 In *Re Panfab Corpn.*, supra, Houlden J. considered an appeal from a registrar to whom an issue had been directed as to the validity of a security given by an individual to a corporation and held that s. 64A [en. 1966-67, c. 32, s. 11; now s. 74] did not apply. He continued at p. 24:

> The next issue is whether the transaction, not being a fraudulent preference because it does not come within s. 64A, can be attacked as a fraudulent conveyance. Counsel for the appellants gave notice to the Attorney General for Canada and the Attorney General for Ontario pursuant to s. 33 of The Judicature Act, R.S.O. 1960, c. 197, that he proposed to argue that The Fraudulent Conveyances Act, R.S.O. 1960, c. 154, was ultra vires of the legislature of the Province of Ontario, or ineffective in that it is legislation relating to either bankruptcy or insolvency which by s. 91, para. 21 of the B.N.A. Act, 1867, is under the exclusive legislative authority of the Parliament of Canada.

77 And at p. 25 he expressed the view that The Fraudulent Conveyances Act in Ontario was not in pith and substance bankruptcy legislation but was valid legislation as in reference to property and civil rights within s. 92(13) of the B.N.A. Act. He continued [p. 25]:

> The Fraudulent Conveyances Act is used constantly to attack transactions which have no connection with bankruptcy. It is an important part of the weapons available to creditors in recovering assets that have been fraudulently transferred by debtors. In my opinion, there is no conflict between the provisions of The Fraudulent Conveyances Act and the Bankruptcy Act. Section 41(6) of the Bankruptcy Act recognizes that provincial legislation such as The Fraudulent Conveyances Act exists and provides that the trustee is entitled to make use of such legislation in addition to the rights and remedies provided by the Bankruptcy Act.

78 Houlden J.'s decision is obiter, however, in that he found that the transaction was not within The Fraudulent Conveyances Act because it was bona fide. It is to be noted also that Houlden J.'s concern was with The Fraudulent Conveyances Act while this appeal is concerned with the exact provisions of ss. 3 and 4 of The Fraudulent Preferences Act of Saskatchewan. Perhaps it should also be noted that Houlden J., in the *Panfab* case, had inclined to the opposite conclusion in reference to this problem which he found, in his comment reported in (1960), 38 C.B.R. 114, to be one of great importance, and where he found the decision in *Re Trenwith* had been a block to trustees. Houlden J. does not mention *Re Trenwith* in his reasons for judgment in *Panfab*. It is to be remembered that *Re Panfab Corpn.* was not appealed to the Court of Appeal and we, therefore, have not an opportunity to determine whether that court had recanted from its view taken 35 years before in *Re Trenwith*.

79 In *Traders Finance Corpn. Ltd. v. Levesque*, 2 C.B.R. (N.S.) 52, [1961] S.C.R. 83, 26 D.L.R. (2d) 384, the court considered a transaction, allegedly preferential, occurring within three months before the declaration of bankruptcy. The attack upon the transaction, however, was not made until more than a year after the bankruptcy when the creditor — the trustee having refused to take the action — obtained the leave of the court to proceed under the provisions of s. 16 of the Bankruptcy Act [now s. 20]. The provisions of art. 1040 of the Civil Code purported to place a limitation period of one year upon such attack. This court, confirming the Court of Appeal of Quebec, by a majority judgment held that art. 1040 of the Civil Code would not apply because the action was taken within a year of the creditor obtaining knowledge of the payment as the said article provides. Locke J. did consider art. 1040 of the Civil Code and held that it had no application whatever to proceedings under the provisions of the Bankruptcy Act, saying at pp. 58-59:

> It may be said that provisions similar to those contained in the articles of the Civil Code to which I have referred are to be found in statutes of most of the provinces of Canada. They are to be found in British Columbia in the Fraudulent Preferences Act, R.S.B.C. 1948, c. 132, in Alberta in the Fraudulent Preferences Act, R.S.A. 1955, c. 120, in Saskatchewan

> in the Fraudulent Preferences Act, R.S.S. 1953, c. 362, in Manitoba in the Assignments Act, R.S.M. 1954, c. 11, and in Ontario in the Assignments and Preferences Act, R.S.O. 1950, c. 26. All of these statutes deal with the rights of creditors to set aside conveyances made by persons in insolvent circumstances, which have the effect of giving a creditor a preference over the others and all of them provide that, in the event of action being brought within a certain period of the date of the conveyance, it is to be held null and void. The remedies thus given are quite distinct from those given to the trustee in bankruptcy under s. 64 of the Bankruptcy Act. The right to enforce such claims by creditors does not depend upon the fact that the person making the transfer has been declared bankrupt and these rights may be enforced under the provincial statutes unless bankruptcy has intervened. This has been held in a number of cases in various provinces, which are to be found collected in the 3rd edition of Bradford and Greenberg on the Bankruptcy Act, at p. 158 *et seq.* In Quebec the limitation provided by art. 1040 only refers to proceedings under the articles mentioned.

80 One might infer from Locke J.'s words that once bankruptcy has intervened then the provincial statutes have no application even to a transaction occurring before the period covered by the present s. 73. I am not of the view that that is a proper implication from Locke J.'s words. I am assisted in coming to that conclusion by the decision of this court in *Gingras v. General Motors Products of Can. Ltd.*, [1976] 1 S.C.R. 426, 57 D.L.R. (3d) 705. There, the Court of Appeal of Quebec had confirmed a decision of the Superior Court which had dismissed a "motion to cancel preferential payments" instituted by the trustee in bankruptcy. The trustee had in such motion attacked a transaction which had occurred less than three months before the declaration of the bankruptcy but had not instituted the action within one year of his appointment as provided in art. 1040 of the Civil Code.

81 The defendant filed an exception relying on the said art. 1040 of the Civil Code and such exception was successful in both courts below. However, this court by a majority judgment held that the trustee, in taking action under s. 73 of the Bankruptcy Act to attack a transaction as a preference occurring within three months before the bankruptcy, was not affected by art. 1040 of the Civil Code and was controlled alone by the provisions of the Bankruptcy Act. de Grandpré J., dissenting, was of the opinion that in proceeding in the Superior Court the trustee was governed by the procedural provisions of the Civil Code and that therefore art. 1040 would apply to bar the action.

82 It is noted that Pigeon J., giving reasons concurred in by Martland and Dickson JJ., said at p. 437:

> I would therefore allow the appeal and dismiss the exception to dismiss submitted by respondent. This does not mean that the latter will not be entitled to rely on Art. 1040 in answer to a claim based on the goods taken back, if the trustee should contend that his petition allows him to go beyond the three months preceding the bankruptcy, and base a claim not only on the *Bankruptcy Act* but also on Arts. 1032 to 1040 *C.C.*

83 In my view, Pigeon J., therefore, expressed the view that in the attack upon transactions not within the three-month period provided by s. 73 of the Bankruptcy Act the trustee was free to use the provisions of the Civil Code as to preferential transactions.

84 de Grandpré J., in his dissenting reasons, said at p. 443:

> In my view, the *Bankruptcy Act* overrides the Paulian action only to the limited extent that it deals with acts in defraud of the debtor; all aspects of fraudulent action falling outside the provisions of the *Bankruptcy Act* may be considered in the light of the principles of the *Civil Code*.

85 Again, a plain statement that any reference to transactions outside of the narrow limits of the provisions of what is now s. 73 of the Bankruptcy Act, the Civil Code remained in full force and available to the trustee in bankruptcy.

86 I have dealt with what, in my view, are the main cases upon the subject in Canada. Upon considering them all, as well as the decision of the Judicial Committee in *A.G. Ont. v. A.G. Can.*, supra, I have come to the conclusion that the better view is to confine the effect of what is now s. 73 of the Bankruptcy Act to providing for the invalidity of transactions within its exact scope. To that extent, the Parliament of Canada, by valid legislation upon "bankruptcy" and "insolvency", has covered the field but has refrained from completely covering the whole field of transactions avoided by provincial legislation. I am of the opinion that the enactment in 1949 of the provisions now found in s. 50(6) of the Bankruptcy Act was a plain indication that Parliament recognized that provisions in provincial statutes dealing with preferential transactions were still valid provincial enactments

in reference to "property" and "civil rights" and were valuable aids to trustees in bankruptcy in attacking the validity of such transactions and should be available to the said trustees in bankruptcy.

87 I am assisted in coming to this conclusion by the view which I believe was behind the Lord Chancellor's reasons in *A.G. Ont. v. A.G. Can.* that the words "bankruptcy" and "insolvency" in s. 91(21) of the B.N.A. Act were aimed at legislative schemes which had the purpose of governing the distribution of a debtor's property amongst his creditors. There may well be (and there are) provisions in such legislative schemes, i.e., the Bankruptcy Act, dealing with "property" and "civil rights". Such provisions are properly ancillary to the bankruptcy and insolvency legislation and, to the extent to which they go, overcome existing valid provincial legislation and bar future provincial legislation contra thereto but do not purport to extend beyond that point to invalidate other valid provincial legislation upon "property" and "civil rights".

88 I have, therefore, come to the conclusion that the provisions of ss. 3 and 4 of The Fraudulent Preferences Act of Saskatchewan are valid and subsisting provincial legislation available to the trustee in his attack upon the transactions with which this appeal is concerned. In my view, s. 3 of that statute, dealing with transactions taken with the intent to defeat, hinder, delay or prejudice creditors, is not as relevant as s. 4 which provides:

> 4. Subject to sections 8, 9, 10 and 11 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 a 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 to or for a creditor, with intent to give that creditor preference over his other creditors or over any one or more of them, is void as against the creditor or creditors injured, delayed, prejudiced or postponed,

and is concerned with transactions taken with the intent to give one creditor preference over other creditors.

89 In order to determine whether that section applies to avoid the transaction in question in this appeal, a detailed analysis of the circumstances is necessary.

90 Kozan Furniture (Yorkton) Ltd. had carried on business for a period of years in Saskatchewan. Part of that business was the sale of floor coverings, paints, draperies, interior decorating material, etc. The supplier of those items was Kennedy Flooring Limited of Winnipeg, a wholly-owned subsidiary of Gaultco Limited of Winnipeg. Another wholly-owned subsidiary of the said Gaultco was Countrywide Factors Limited. By some mysterious and unspecified arrangement, Countrywide Factors Limited became the accounting firm and the billing agent for Kennedy Flooring.

91 The three corporations, Gaultco Limited, Kennedy Flooring Limited and Countrywide Factors Limited, were all controlled by the same officers and we are not concerned with the arrangements between the three companies.

92 As early as 1965 Countrywide Factors Limited was unsatisfied with the payments being received from Kozan Furniture (Yorkton) Limited on its open account and placed Kozan Furniture (Yorkton) Limited on a "C.O.D." basis. The learned trial judge found — and it was confirmed by the majority on appeal — that by the spring of 1966 Kozan Furniture (Yorkton) Limited was not paying the accounts as they became due. One Tony Ollinger was the manager of the floor covering department in Kozan Furniture (Yorkton) Limited and he arranged with Kozan Furniture (Yorkton) Limited and its controlling shareholder, George E. Kozan, to purchase the floor covering inventory for the sum of $10,300. Of course, it was of crucial interest to Ollinger that he should continue to have Kennedy Flooring Limited supply him with stock. On 19th November 1966 two officers of Countrywide Factors went from Winnipeg to Yorkton, Saskatchewan, and conferred with George E. Kozan and Tony Ollinger. The two officers were Mr. David Albert Bowles, a director of Countrywide and also its solicitor, and Mr. Philip Douglas Medhurst, its credit manager. As a result of that conference, a document was drawn up and executed which read as follows:

> I, Tony Ollinger, agree to pay Countrywide Factors Ltd. $10,300.00 (more or less) representing sale of inventory of floor coverings, paint & Drapery as determined by stocktaking of Sept. 21/66; payment as follows:
>
> > (a) Before Nov. 26/66 ...... $7,000.00

(b) Before Jan. 31/67, the balance & int. at 7%

(If substantially paid — say within $300.00 — this will be adequate compliance & any unpaid balance will be paid by the last day of Feb. 1967.)

Countrywide will agree to the sale of said inventory on such compliance & will reduce the account of Kozan Furniture (Yorkton) Ltd. now at $25,000.00 (more or less) by the amount of said inventory price.

George Kozan guarantees repayment of the account of Kozan Furniture (Yorkton) Ltd. as set out in his letter of Oct. 1/66 & attached. He & Kozan Furniture (Yorkton) Ltd. will give a debenture on the stock in the form attached, an assignment of book debts in Countrywide's form & a collateral mortgage on 76 and 80 Circlebrook Drive.

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Kozan Furniture (Yorkton)            Countrywide Factors
Ltd.                                 Ltd.
Per: 'George E. Kozan'               Per: 'D. A. Bowles'
     'Tony Ollinger'
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93 At the same time and place George E. Kozan executed a personal guarantee of the debt to Countrywide and, in accordance with the agreement set out above, in February of 1967 Kozan Furniture (Yorkton) Limited granted to Countrywide Factors Limited a debenture in the sum of $35,512 covering all of its remaining assets. The floor coverings, which under the transaction had been transferred from Kozan Furniture (Yorkton) Limited to Tony and Rudolph Ollinger, were conveyed by a bill of sale which was, however, executed only on 15th February 1967. Again a mysterious company appears. That transfer was not made by Kozan Furniture (Yorkton) Limited, the owner of the inventory, but purportedly by a corporation entitled Kozan Interiors Limited and purportedly for a consideration of $10,300. The actual inventory of the material covered in the bill of sale had only amounted to $9,152.31 and that was the exact amount of the money paid by Ollinger to Countrywide under the provisions of the agreement of 19th November 1966 which I have set out in full above.

94 Kozan Interiors Limited was unknown to Kennedy Flooring Limited and, in fact, the learned trial judge refers to that corporation in the words [p. 122], "... if ever incorporated, which is unlikely, never carried on business and never owned the assets which were the subject of Ex. D 22" (the bill of sale of 17th February 1967). George E. Kozan attempted to explain the interjection of this corporate name. The learned trial judge referred to that explanation in the following words [p. 122]:

Mr. Kozan weakly suggested that he made the mistake when he instructed Mr. Wentzell, the solicitor who drew Ex. D 22. I suppose it is the type of error made by a businessman who is in the throes of insolvency.

95 Another light may be thrown on the topic by a document produced at trial and marked as Ex. P10, which reads as follows:

IN THE MATTER OF A CERTAIN SALE MADE UNDER THE BULK SALES ACT FOR THE PROVINCE OF SASKATCHEWAN.

BETWEEN:

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Kozan Interiors Ltd.,
of Yorkton, in the Province
of Saskatchewan,
                -- and --
Anthony Ollinger and Rudolf Ollinger
both of Yorkton, in the Province of
Saskatchewan,
```

KNOW ALL MEN BY THESE PRESENTS that Country Wide Factors Ltd., the undersigned does for the purpose of Section 6 of the Bulk Sales Act for the Province of Saskatchewan, HEREBY RENOUNCE AND WAIVE any right which the said Country Wide Factors Ltd., has under the said Act against Anthony Ollinger and Rudolph Ollinger and against any right or claim to any of the goods, draperies, paints, floorings and materials covered in the sale agreement dated the 7th day of February, A.D. 1967.

IN WITNESS WHEREOF Country Wide Factors Ltd., has hereunto set their hands and affixed their corporate seal on its behalf this 13th day of April A.D. 1967.

Country Wide Factors Ltd.

____

____

Secty-Treasurer.

96 Certainly the transaction between Kozan Furniture (Yorkton) Limited and Ollinger, whereby the title to the floor coverings was transferred from one to the other but the sale price was paid to Countrywide Factors, was one within the provisions of The Bulk Sales Act, R.S.S. 1965, c. 389, but if the vendor had, in truth, been Kozan Interiors Limited, then that company had no creditors and The Bulk Sales Act provisions would not have applied. It is, I think, significant in dealing with the bona fides of the transaction. After that transfer of the inventory of floor coverings, etc., Kozan Furniture (Yorkton) Limited was said to have paid to Countrywide Factors the following sums:

1966, November $1,000.00

1967, February 1,000.00

March 6,000.00

April 2,152.31

June 1,000.00

September 500.00

97 As a matter of fact, the payments in March, April and June were payments by Ollinger totalling $9,152.31, the amount of the inventory and the amount which he had agreed to pay to Countrywide Factors by the agreement of 9th November 1966.

98 Kozan Furniture (Yorkton) Limited continued doing business, after a fashion, until 19th November 1968, when a receiving order in bankruptcy was made out against the company.

99 On 10th July 1969 the trustee in bankruptcy moved for an order that the proceeds of the sale be declared a fraudulent preference contra to the provisions of ss. 3 to 6 of The Fraudulent Preferences Act and for an order directing the respondent to pay the sum of $10,300 to the said trustee. MacPherson J. directed a trial of that issue and then himself conducted the trial. MacPherson J., in written and detailed reasons, found that the transaction was a preference and directed that the trustee recover from Countrywide the sum of $9,152.31 and that the debenture given by Kozan Furniture (Yorkton) Limited to Countrywide Factors Limited be declared void. The majority of the Court of Appeal — Maguire J.A. giving reasons which were concurred in by Woods J.A. — reversed that judgment, holding that the trustee had failed to establish that Kozan Furniture (Yorkton) Limited, on 19th November 1966, the date of the agreements aforesaid, or in March 1967, the date when the payments under that agreement to Countrywide Factors Limited commenced, was insolvent, unable to pay its debts in full or on the eve of bankruptcy. Hall J.A. dissented, being of the opinion that Kozan Furniture (Yorkton) Limited was, on either of those dates and throughout, insolvent. Hall J.A. expressed the view that The Fraudulent Preferences Act was intra vires and applicable.

100 It would appear, from a perusal of the reasons given by Maguire J.A. for the majority, that he was of the opinion that in order to bring himself within the benefit of the section the trustee had to prove that the debtor was not only in insolvent circumstances but was also unable to pay his debts in full and knew that he was on the eve of insolvency. A reading of the section would seem to make it quite clear that those three are alternatives and not conjunctives and that all the trustee had to prove was that the debtor was insolvent or that he was unable to meet his debts in full or that he knew he was on the eve of insolvency. I am not concerned particularly with the last-named alternative as that is quite subjective and I do not find it necessary to pierce the mind of George E. Kozan.

101 I am in agreement with the view expressed by Hall J.A. that although the burden is on the trustee to prove the insolvency of the debtor at the time of the transaction — as the burden is always upon the plaintiff to prove his case — the trustee may adduce such a prima facie case which will call upon the defendant to adduce evidence to rebut that prima facie evidence. It must be remembered that a trustee is often faced with a situation, which faced this trustee when he was not appointed until November 1968, where he had to go back into the past and establish an insolvency which he alleged had existed in November 1966. The trustee in such a situation must deal with records which are, in many cases, fragmentary and may well be intentionally deceptive. He has no means of checking the actual stock in trade which existed at that date and sometimes can place little dependence upon the evidence of the debtor. In the particular case I am of the opinion, as were Hall J.A. and MacPherson J., that the trustee as plaintiff (here appellant) had certainly shown such a prima facie case.

102 Maguire J.A., giving reasons for the majority of the Court of Appeal, said [at p. 25]: "It is established that Kozan as early at least as spring of 1966 was not paying all accounts as they became due."

103 In *Ladore v. Bennett*, [1939] 2 W.W.R. 566, 21 C.B.R. 1, [1939] A.C. 468, [1939] 3 All E.R. 98, [1939] 3 D.L.R. 1, Lord Atkin said at p. 571:

> Insolvency is the inability to pay debts in the ordinary course as they become due; and there appears to be no doubt that this was the condition of these corporations.

104 I am of the opinion that the statement by Maguire J.A. which I have quoted above would have been sufficient to have disposed of the issue and justify a holding that the debtor was in insolvent circumstances within the words of s. 4 of The Fraudulent Preferences Act at the time of the transaction. However, there is no need to put the decision on that single ground for I have come to the conclusion that the debtor was unable to pay his debts in full at the date of the transaction.

105 The Court of Appeal, as I have said, seemed to be of the opinion that the difficulty facing the trustee was that he could not prove that the debtor was unable to pay his debts in full or, to use the words appearing in *Walter v. Adolph Lumber Co.* (1915), 8 W.W.R. 351 at 355, 23 D.L.R. 326 (Alta.), that "[he] had not the means of paying [his creditors] in full out of the assets realized upon a sale for cash or its equivalent", because the trustee could not prove the extent of the inventory possessed by the debtor on 19th November 1966. It is true that the debtor had no inventory which could be produced and to which a dollars-and-cents value could be attached. Mr. Medhurst, credit manager of the respondent, however, had given some evidence where he, in a very casual manner, estimated the value of that inventory at that time at about $75,000, admitting however that he was no expert on furniture valuations. Since Mr. Medhurst was anxious to uphold the transaction and, therefore, to see that the debtor had assets sufficient to cover his liabilities, he certainly would not have underestimated the value of the inventory. Therefore, even if we take that valuation of $75,000, we have this situation (and I am quoting here figures adopted by Maguire J.A. and appearing in his majority reasons for the Court of Appeal at p. 28):

```
Trade accounts and liability
to bank                               $111,199.16
Shareholders loan                       22,702.62
                                      -----------
       Total liabilities                                $133,901.78
Accounts receivable, subject to
```

```
some deductions for disputed
items                                   $ 44,099.62
Delivery truck -- ...
[subsequently sold by trustee]             1,000.00
                                        -----------
      Total of those assets                             $ 45,099.62
```

106 Even adopting those figures, the other assets in inventory, that is, stock in trade and store fixtures, would have had to amount to $88,802.16; yet, two full years later, those remaining assets were sold for only $31,200, which sum was subject to a landlord's lien for $3,200, leaving a net amount in the trustee's hands of only $28,000 not $88,000. In addition, the accounts receivable shown in Maguire J.A.'s figures at $44,099.62 were reduced in December 1966 on the instructions of the debtor's auditor to $23,598.51 so that to establish that the debtor could have paid all his debts by realization of his assets would have required an increase in the value of the stock in trade and fixtures of another $20,600, requiring the valuation of that stock in trade and fixtures at over $100,000, an amount for which there has been no scintilla of evidence.

107 I agree with Hall J.A. when he said [at p. 31]: "There was, in my opinion, evidence from which the trial Judge could infer the value of the stock-in-trade was nowhere near $100,000."

108 Under the circumstances, I am of the opinion that the trustee had produced a prima facie case to show that the debtor was unable to pay his debts in full by realization of his assets in November 1966. As MacPherson J. remarked [at p. 126]:

> Two years is a long time to continue in a state of insolvency, that is true, but the evidence indicates that that is what happened. There was no time in that period when it was not insolvent. Perhaps its affairs were worse, perhaps better from time to time, but there was a continued state of insolvency.

109 For these reasons, I am of the opinion that the appeal should be allowed, the judgment of the Court of Appeal of Saskatchewan quashed and the judgment at trial restored. As I have already said, the questions upon which leave was given to the various intervenors should be answered as follows:

110 Q. 1: No.

111 Q. 2: Sections 3 and 4 of The Fraudulent Preferences Act are not in conflict with the provisions of the Bankruptcy Act.

112 The appellant should have his costs against the respondent in the Court of Appeal and in this court. There will be no costs to intervenors.

***Beetz J.*:**

113 I have had the advantage of reading the opinions of the chief justice and of Spence J. I agree with Spence J. To his reasons for judgment I would, however, like to add some of my own.

114 The power to repress fraud by avoiding fraudulent conveyances and preferences is an indisputable part of provincial jurisdiction over property and civil rights. The risk of fraud is increased when a debtor finds himself in a situation of impending or actual insolvency and, in my view, provincial laws can, without undergoing a change in nature, focus upon that situation as upon a proper occasion to attain their object. Given their purpose, they do not cease to be laws in relation to property and civil rights simply because they are timely and effective or because Parliament could enact similar laws in relation to bankruptcy and insolvency.

115 Insolvency has been defined by Lord Thankerton in *A.G. B.C. v. A.G. Can.; Reference re Farmers' Creditors Arrangement Act*, [1937] A.C. 391 at 402:

> In a general sense, insolvency means inability to meet one's debts or obligations; in a technical sense, it means the conditio or standard of inability to meet debts or obligations, upon the occurrence of which the statutory law enables a creditor to intervene, with the assistance of a Court, to stop individual action by creditors and to secure administration of the debtor's assets in the general interest of creditors; the law also generally allows the debtor to apply for the same administration.

116 The primary meaning of "insolvency" in s. 91(21) of the Constitution is insolvency in the technical sense, not in the general sense. This Lord Thankerton made clear just a few lines after the passage quoted above: with respect to the jurisdiction of Parliament under s. 91(21) he referred to "the statutory conditions of insolvency which enabled a creditor or the debtor to invoke the aid of the bankruptcy laws".

117 There is no common law of bankruptcy and insolvency in the technical sense, but the disruptions resulting from insolvency in the general sense had of necessity to be taken into account by general legal systems such as the common law and the civil law. Insolvency lies at the core of those parts of the common law and of the civil law which relate to such matters as mortgage, pledge, pawning, suretyship and the securing of debts generally which are implicitly or explicitly predicated on the risk of insolvency and which produce their full effect when the risk has been converted into reality; so it is with the rules which determine the rank of privileges and hypothecs or which ordain that an insolvent or bankrupt debtor shall lose the benefit of the term (art. 1092 of the Quebec Civil Code). Some of the most fundamental principles of the civil law are expressed in arts. 1980, 1981 and 1982 of the Quebec Civil Code:

> Art. 1980. Whoever incurs a personal obligation, renders liable for its fulfilment all his property, moveable and immoveable, present and future, except such property as is specially declared to be exempt from seizure.
>
> Art. 1981. The property of a debtor is the common pledge of his creditors, and where they claim together they share its price rateably, unless there are amongst them legal causes of preference.
>
> Art. 1982. The legal causes of preference are privileges and hypothecs.

118 Although not expressly referred to, insolvency forms the web of these articles; there would be little need for them, particularly the last two, were it not for insolvency. But I cannot be persuaded that they are not laws relating to property and civil rights.

119 When the exclusive power to make laws in relation to bankruptcy and insolvency was bestowed upon Parliament, it was not intended to remove from the general legal systems which regulated property and civil rights a cardinal concept essential to the coherence of those systems. The main purpose was to give to Parliament exclusive jurisdiction over the establishment by statute of a particular system regulating the distribution of a debtor's assets. However, given the nature of general legal systems, the primary jurisdiction of Parliament cannot easily be exercised together with its incidental powers without some degree of overlap in which case federal law prevails. On the other hand, provincial jurisdiction over property and civil rights should not be measured by the ultimate reach of federal power over bankruptcy and insolvency any more than provincial competence in relation to the administration of justice can be determined by every conceivable and potential use of the criminal law power. This, I believe, is the general import of the *Voluntary Assignments* case, *A.G. Ont. v. A.G. Can.*, [1894] A.C. 189. The Judicial Committee declared that the validity of the provision it had to consider and of the assignments made under the authority of that provision did not depend on the insolvency of the assignor: an assignment was also open "to any debtor who might deem his insolvency doubtful" [p. 199]. All that one can say is that legislation of the type considered in the *Voluntary Assignments* case presents little interest for prosperous persons; it is of concern chiefly to debtors in strained circumstances whose solvency is, at best, uncertain. It should be noted that the impugned voluntary assignments enactment did not only deal with assignments: it also provided that an assignment for the general benefit of creditors should take *precedence* of all judgment and of all executions not completely executed by payment.

120 I am reinforced in those views by a consideration of the Civil Code of Lower Canada, 1866, in light of An Act respect ing Insolvency, c. 17 of the Statutes of the Province of Canada, 1864. Both were enacted at a time when Confederation was being discussed. The French title of The Insolvent Act of 1864, was "l'Acte concernant la Faillite, 1864", the word "faillite" being the

one now currently used to translate the word "bankruptcy". In spite of its English title, the Act was in fact a bankruptcy Act. It applied to all persons in Upper Canada and to traders only in Lower Canada and it contained detailed provisions relating to fraudulent conveyances and preferences. Nevertheless, the Civil Code comprised a section of nine articles (arts. 1032 to 1040 inclusive) entitled "Of the avoidance of contracts and payments made in fraud of creditors", applicable to traders and to non-traders alike except where The Insolvent Act was to prevail. The legislative history of those articles was set forth by Pigeon J. in *Gingras v. General Motors Products of Can. Ltd.*, [1976] 1 S.C.R. 426, 57 D.L.R. (3d) 705. Some have been amended. It will suffice to quote a few of them as they then read:

> 1034. A gratuitous contract is deemed to be made with intent to defraud, if the debtor be insolvent at the time of making it.
>
> 1035. An onerous contract made by an insolvent debtor with a person who knows him to be insolvent is deemed to be made with intent to defraud.
>
> 1036. Every payment by an insolvent debtor to a creditor knowing his insolvency, is deemed to be made with intent to defraud, and the creditor may be compelled to restore the amount or thing received or the value thereof, for the benefit of the creditors according to their respective rights.
>
> 1037. Further provisions concerning the presumption of fraud and the nullity of acts done in contemplation of insolvency are contained in The Insolvent Act of 1864.

121 Article 17.23 of the Code defines "bankruptcy" ("faillite") as meaning "the condition of a trader who has discontinued his payments"; insolvency was left undefined, the word being clearly used by the Code in the general sense. Even though arts. 1034, 1035 and 1036 are predicated on insolvency, the commissioners appointed for codifying the laws of Lower Canada in civil matters would have been astonished had they been told that those articles formed no part of the civil law: except perhaps for art. 1036, which appears to be an improvement of relatively modern origin (although it was not considered new law), such provisions were derived from a division of Roman law called Paulian law and, from time immemorial, had constituted a pivot of the civil law system. Other provisions of the Code are of the same nature and also depend on insolvency, such as art. 803 (revocation of a gift made by an insolvent debtor), and art. 2023 (hypothec consented to by an insolvent debtor). Other provisions still, although not expressly predicated on insolvency, are related to insolvency and to the protection of creditors, for instance, art. 655 (the creditors of an heir who renounces a succession to their prejudice can have the renunciation rescinded and accept the succession in his stead).

122 The constitutional validity of such provisions is not in issue: they antedate Confederation and were continued by s. 129 of the Constitution. The only issue which could arise with respect to them is whether they are in conflict with federal law. But the content and integrity of the Civil Code are indicative of the extent of provincial jurisdiction over property and civil rights: *Citizens Insur. Co. of Can. v. Parsons* (1881), 7 App. Cas. 96 at 110-11. The fact that there existed a statutory scheme of bankruptcy and insolvency to which the Code explicitly referred as to a distinct and specific body of law, without curtailing for that reason its own normal ambit, illustrates how the respective domains of property and civil rights and of bankruptcy and insolvency were viewed during the very period when the federal union was being discussed; it also reveals how it was intended that the distribution of powers should operate with respect to those domains.

123 In *Reference re Debt Adjustment Act, 1937 (Alta.); A.G. Alta. v. A.G. Can.*, [1943] 1 W.W.R. 378, 24 C.B.R. 129, [1943] A.C. 356, [1943] 1 All E.R. 240, [1943] 2 D.L.R. 1, in *Can. Bankers Assn. v. A.G. Sask.*, 35 C.B.R. 135, [1956] S.C.R. 31, *(*sub nom. *Re Moratorium Legislation)* [1955] 5 D.L.R. 736, and in *Reference re Orderly Payment of Debts Act, 1959 (Alta.)*, 1 C.B.R. (N.S.) 207, [1960] S.C.R. 571, 23 D.L.R. 449, the various provincial laws found ultra vires were predicated upon insolvency. But they went further and set up elaborate statutory schemes involving one or more of the following features: the denial of creditors' access to courts or the restriction of their right to enforce their claims, the establishment of administrative boards, mediation, composition, arrangements, moratoriums, consolidation orders, staying of proceedings and the relief of debtors from liability to pay their debts. No such features are to be found in the presently impugned Saskatchewan statute where all that is at stake is the avoidance of fraudulent acts for the better enforcement of civil obli gations. Some doubt was expressed in the *Orderly Payment of Debts Act* reference at pp. 576-77 as to whether the *Voluntary Assignments* case would have been decided

in the same way at a later date even in the absence of federal legislation on the subject of bankruptcy and insolvency. However, even if this doubt was not expressed in an obiter dictum, I would regard it as questioning not the general principles enunciated in the *Voluntary Assignments* case, but their application in that particular instance. Accordingly, I do not think that those previous decisions of the Judicial Committee and of this court preclude my abiding by my conclusions: laws provincial in their purpose, object and nature as those under attack cannot be rendered ultra vires because of virtual federal paramountcy; they can only become inoperative in case of actual repugnancy with valid federal laws.

124 On this latter point, I believe the test of repugnancy to be applied in this case should not differ from the one which was admitted in *Provincial Secretary of P.E.I. v. Egan*, [1941] S.C.R. 396, 76 C.C.C. 227, [1941] 3 D.L.R. 305; *O'Grady v. Sparling*, 33 W.W.R. 360, 33 C.R. 293, [1960] S.C.R. 804, 128 C.C.C. 1, 25 D.L.R. (2d) 145, and *Ross v. Registrar of Motor Vehicles* (1973), 23 C.R.N.S. 319; provincial law gives way to federal law in case of operational conflict. Even if the test be one of conflict of legislative policies entailing no operational inconsistency and depending solely "upon the intention of the paramount legislature" as was said by Dixon J. in a passage of *Ex parte McLean* (1930), 43 C.L.R. 472 at 483, quoted by Pigeon J. in the *Ross* case (at p. 326), I am of the view that s. 50(6) of the Bankruptcy Act provides a clear indication that Parliament, far from intending to depart from the rule of operational conflict, did in fact aim at the highest possible degree of legal integration of federal and provincial laws. Attacks upon transactions within the three-month period provided by s. 73 of the Bankruptcy Act constitute a minimum but the trustee in bankruptcy is entitled to avail himself of all other rights and remedies provided by provincial law "as supplementary to and in addition to the rights and remedies provided by" the Bankruptcy Act.

125 I would dispose of this appeal as is proposed by Spence J.

IN THE MATTER OF THE BANKRUPTCY OF QUADRIGA FINTECH SOLUTIONS CORP., WHITESIDE CAPITAL CORPORATION AND 0984750 B.C. LTD. D/B/A QUADRIGA CX AND QUADRIGA COIN EXCHANGE

Court File No. & Estate No.:
CV-19-627184-00CL (31-2560674)
CV-19-627185-00CL (31-2560984)
and CV-19-627186-00CL (31-2560986)

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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