

2015 ABQB 158
Alberta Court of Queen's Bench

Indarsingh, Re

2015 CarswellAlta 378, 2015 ABQB 158, [2015] A.W.L.D. 1665, [2015] W.D.F.L. 1627, [2015] A.J.
No. 259, 15 Alta. L.R. (6th) 428, 251 A.C.W.S. (3d) 30, 25 C.B.R. (6th) 289, 59 R.F.L. (7th) 175

In the Matter of the Bankruptcy of Winston Indarsingh

Reg. W.S. Schlosser

Judgment: March 6, 2015
Docket: Edmonton BE03 1337358

Counsel: B.P. Maruyama, T. Ludwig (formerly), for Trustee, BDO Canada Ltd.
D. Galbraith, for Bankrupt
J.R. Thomas, for Verona Indarsingh

Subject: Evidence; Family; Insolvency; Property

Related Abridgment Classifications

Bankruptcy and insolvency

XI Avoidance of transactions prior to bankruptcy

XI.3 Settlements of property

XI.3.d Transfer of matrimonial home

Headnote

Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy — Settlements of property — Transfer of matrimonial home

Bankrupt entered into settlement of what was described as matrimonial property with wife — Bankrupt transferred his interest in matrimonial home to wife and wife released any claim to various assets of bankrupt — Trustee brought application to set aside undervalue transfer — Application dismissed — Transfer of matrimonial home to bankrupt's spouse was non-arm's length transaction — Transfer occurred within five years of bankruptcy — It was not proved that bankrupt was insolvent at time of transfer — Evidence did not disclose requisite intent to defraud, defeat or delay on balance — Transfer not set aside — There was not, in any event, sufficient evidence to define disparity between transfer value and fair market value so as to order transferee to pay difference even if other conditions applied.

Table of Authorities

Cases considered by Reg. W.S. Schlosser:

Anderson, Re (2012), 2012 BCSC 956, 2012 CarswellBC 1894, 92 C.B.R. (5th) 273 (B.C. S.C. [In Chambers]) — referred to

Circle Film Enterprises Inc. v. Canadian Broadcasting Corp. (1959), 20 D.L.R. (2d) 211, [1959] S.C.R. 602, 19 Fox Pat. C. 39, 31 C.P.R. 57, 1959 CarswellNat 27 (S.C.C.) — referred to

Henfrey Samson Belair Ltd. v. Wedgewood Village Estates Ltd. (1987), 14 B.C.L.R. (2d) 1, 65 C.B.R. (N.S.) 48, 40 D.L.R. (4th) 216, 1987 CarswellBC 512 (B.C. C.A.) — referred to

People's Department Stores Ltd. (1992) Inc., Re (2004), 2004 SCC 68, 2004 CarswellQue 2862, 2004 CarswellQue 2863, (sub nom. *Peoples Department Stores Inc. (Trustee of) v. Wise*) 244 D.L.R. (4th) 564, (sub nom. *Peoples Department Stores Inc. (Bankrupt) v. Wise*) 326 N.R. 267 (Eng.), (sub nom. *Peoples Department Stores Inc. (Bankrupt) v. Wise*) 326 N.R. 267 (Fr.), 4 C.B.R. (5th) 215, 49 B.L.R. (3d) 165, [2004] 3 S.C.R. 461, 2004 CSC 68 (S.C.C.) — referred to

Statutes considered:

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

Generally — referred to

s. 2 "transfer at undervalue" — considered

s. 4(3) — referred to

s. 4(5) — referred to

s. 96 — considered

s. 96(1) — referred to

s. 96(1)(b) — considered

s. 96(2) — considered

s. 100 — referred to

Matrimonial Property Act, R.S.A. 2000, c. M-8

s. 7 — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

Generally — referred to

R. 6.11 — considered

APPLICATION by trustee to set aside undervalue transfer.

Reg. W.S. Schlosser:

1 This is a Trustee's application to set aside an undervalue transfer pursuant to section 96 of the *Bankruptcy and Insolvency Act*, RSC 1985 c. B-3.

2 Section 96 of the Act is as follows:

96(1) Transfer at undervalue - 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 as the time of the transfer or was rendered insolvent by it, or

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

(2) Establishing values - 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 service 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.

R.S., 1985, c. B-3, s. 96, c.12, 2. 79, 2004, c. 25, s. 57, 2005, c. 47, s. 73, 2007, c. 36, s. 43.

3 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. The Court's permission is required and the remedy remains discretionary. (Section 96(1) says "may" and see: *People's Department Stores Ltd. (1992) Inc., Re*, [2004] 3 S.C.R. 461 (S.C.C.), at p. 498, para. 81, which deals with old section 100). The new section allows the trustee, with the court's permission, not only to ignore an undervalue transfer and claim the property transferred for the benefit of the estate, it also allows the trustee to claim the difference from the transferee or a person who is privy. Section 96(2) creates a classic self-contained presumption in favour of the trustee's opinion of value.

4 An undervalue transfer is not the end of the story. A transfer that is conspicuously less than fair market value starts the process but the court's ability to deal with the transaction is a function of the elements of time, relationship, insolvency or an intent to defraud, defeat or delay. In a manner of speaking, proof of an undervalue transfer gets you to the door but it doesn't get you through it.

5 On May 4, 2008, the Bankrupt entered into a settlement of what was described as a matrimonial property with his wife, Verona Indarsingh. In that agreement the Bankrupt transferred his interest in the matrimonial home to Mrs. Indarsingh. The house was valued at \$525,000.00. It is now owned by Mrs. Indarsingh free and clear. In exchange for the surrender of his interest in the matrimonial home, Mrs. Indarsingh released any claim to various assets of the Bankrupt. The property scheduled and exchanged was as follows:

SCHEDULE "A"

To Settlement Agreement Between Winston Indarsingh and Verona Kurt Indarsingh

BUSINESS ASSETS, INCLUDING REAL ESTATE PROPERTIES, OWNED BY WINSTON INDARSINGH:

House located at Skelton Lake, near Boyle, Alberta	
Current Appraised Value:	\$325,000.00
House located at 2742 - 119 Street, Edmonton, Alberta	
Current Appraised Value: \$240,000.00	
Winston owns a 40% interest in this property,	
Winston's equity after selling expenses:	\$100,000.00
Vacation Cabin located near Cabarette, Dominican Republic:	
Current Appraised Value: \$200,000.00	
Winton owns a 50% interest in this property	

Winston's equity:	\$100,000.00
Total Value of Real Estate Assets Owned by Winston Indarsingh:	\$525,000.00

REAL ESTATE OWNED JOINTLY BY WINSTON INDARSINGH AND VERONA KURT INDARSINGH

1. Principal Residence (Matrimonial Home) of the parties located at 7027 - 163 Avenue NW, Edmonton, Alberta Legal Description: Plan 0323576, Block 28, Lot 11 Current Appraised Value of the Property	\$525,000.00
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6 Mrs. Indarsingh is still the bankrupt's wife. She still owns the matrimonial home. Mr. Indarsingh resides there at least part time (the evidence is not clear on this point) but they apparently have separate rooms. Mrs. Indarsingh received legal advice with respect to the settlement agreement and has made no attempts to shield the asset post-transfer.

1. 'Arm's length'

7 Whether the transaction is arm's-length makes a difference to the timing of transactions that can be impugned. Arm's-length transactions are only vulnerable within a year of the initial bankruptcy event: non arm's-length transactions, potentially within five years. The transfer occurred outside of the year prior to the bankruptcy but it was within five years.

8 Mrs. Indarsingh has conceded that the transfer was non arm's-length.

9 I do not need to decide the issue, but whether a transfer between spouses is non arm's-length is also a rebuttable presumption for the purposes of section 96(1)(b). (Section 4(3), (5)). Spouses going through a divorce might not only be arm's length, they may be in an adversarial relationship.

10 There is no evidence in this case of whether spousal support payments would have been appropriate and in this context a waiver of spousal support could form part of the consideration for a property transfer and might be a factor to be considered in determining value exchanged.

11 The date of the initial bankruptcy event is a defined term as well. (Section 2) In this case the bankrupt filed an assignment March 24, 2010, roughly 22 months after the transfer.

2. Value

12 The next question is whether the value given by Mrs. Indarsingh for the bankrupt's interest in the matrimonial home was worth roughly \$262,500.00.

13 There is consensus that the value of the matrimonial home at the time of transfer was \$525,000.00. The value of the bankrupt's interest in question was \$262,500.00, if we follow the presumption of a 50/50 split of matrimonial property (eg Section 7 of the *Matrimonial Property Act*, RSA 2000, c. M-8).

14 'Transfer at undervalue' is defined in Section 2 of the Act to mean:

a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is *conspicuously less* than the fair market value of the consideration given by the debtor; (emphasis added)

15 Though it is impossible to come up with an exact range, the decided cases seem to suggest that 17% below fair market value is 'conspicuously less' and therefore undervalue: Wood (following) citing *Henfrey Samson Belair Ltd. v.*

Wedgewood Village Estates Ltd. (1987), 65 C.B.R. (N.S.) 48 (B.C. C.A.); but that 6% might not be: *People's Department Stores* (above) at para. 88. (See Wood, *Bankruptcy and Insolvency Law*, Irwin Law, page 210-211).

i) The Presumption Favouring the Trustee's Opinion of Value

16 The values on which the court makes any finding under section 96(2) are, *in the absence of evidence to the contrary*, the value stated by the trustee.

17 This portion of section 96 creates a classic rebuttable presumption of law which compels the court to assume a presumed fact, that being the trustee's valuation, in the absence of evidence to the contrary (see Sopinka, Lederman and Bryant the *Law of Evidence in Canada*, (3rd ed) Bryant et al, Lexis Nexis, page 144 at seq.). Section 96(2) is silent about the standard required to rebut the presumption.

18 In my view, the starting point is that the transferee is not obliged to rebut the presumption on a balance of probabilities. Rather, once some contrary evidence is adduced, the presumption has 'no more than its own weight' (Sopinka, p. 152, para 4.46). The effect of the contrary evidence in effect, makes the presumption vanish: *Circle Film Enterprises Inc. v. Canadian Broadcasting Corp.*, [1959] S.C.R. 602 (S.C.C.), at 606, per Judson J., writing for the court. In a manner of speaking, the contrary evidence is the wand that makes the magician's assistant disappear. The evidence from both sides then competes on equal terms and the question becomes, 'what value is proved on the balance of probabilities'? To this end, the court is obliged to weigh competing factors and consider expert opinion in order to gauge the extent of the disparity between fair market value and value received.

19 In this case the Respondents will have to prove something in the area of \$218,000 to save this transaction.

3. 'Solvent, Insolvent, or Rendered Insolvent by the Transfer'?

20 The Bankrupt says, in his second supplemental Affidavit that he had a positive net worth of approximately one million dollars at the time of the transfer. He lists a bank account, an RRSP investment, loan equity and equity in three properties (which include the matrimonial home). These assets, along with a property in the Dominican Republic, have been subject to much scrutiny in these proceedings, including Affidavits, Supplemental Affidavits and examinations which has made the evidence something of a moving target.

21 The Bankrupt argues that the downturn in the Alberta economy was responsible for his insolvency. His income derived from being a realtor. I take notice that the 2008 timeframe was a difficult period for real estate values in the province. The downturn was responsible for many bankruptcies, foreclosures and much consumer debt litigation.

22 It is proposed to go through each of these assets in turn. This will demonstrate the bankrupt's equity position at the time of the transfer for the purposes of determining his solvency and also show how the value of the assets released by Mrs. Indarsingh stacks up against the value of the bankrupt's interest in the matrimonial home.

23 Whether or not the matrimonial property settlement was actuated by unhappy differences between the spouses, the main purpose of the settlement appears to have been to shield Mrs. Indarsingh from potential claims. As she put it in her Affidavit, she wanted to protect her assets from his activities.

(i) Edmonton House Value - \$100,000.00

24 (This is a separate property from the matrimonial home). The Bankrupt says that his equity in the property, which was owned with another, was a \$100,000.00. The trustee concedes this amount. I am assuming this was an investment property and that Mrs. Indarsingh would not have had a dower interest. However, if this property wasn't something brought into the marriage by Mr. Indarsingh, it is not clear why this shouldn't be reduced by one half to represent her matrimonial interest. This value may amount to a concession on the part of the trustee. On that basis I am willing to accept this agreed amount at face value.

(ii) Skeleton Lake House Value - Nil

25 The Bankrupt says this property was worth \$325,000.00. The trustee argues that it had nil value (or negative equity). I accept the trustee's opinion of value summarized in their second Brief as follows. This opinion has not been displaced by the Respondent:

3 The Bankrupt was not a registered owner of the Skelton Lake House at the time of the transfer of the Matrimonial Home on June 6 2008. The Bankrupt and Ron Mercier became registered owners as joint tenants on November 26, 2008, about five months after the transfer of the Matrimonial Home. The Bankrupt became the sole registered owner on April 29, 2009, about one year after the transfer of the Matrimonial Home: Paragraph 17 and Exhibit "L" of Affidavit of Trustee; paragraphs 22 and 71 of First Brief of Trustee.

4 After the First Brief of the Trustee, the Bankrupt deposed that he had paid a "George Wolen" in full for the Skelton Lake House in 2007, and that George Wolen held the Skelton Lake House in trust for him (no supporting documents or details were provided): paragraph 23 of First Supplemental Affidavit of the Bankrupt. The transfer of land and affidavit of value to place title to the Skelton Lake House into the joint names of the Bankrupt and Ron Mercier as joint tenants on November 26, 2008 shows the true consideration to be \$1.00, and does not mention any previous purchase by the Bankrupt: page 23, lines 7-27, pages 24-25, and page 26, lines 1-11, First Cross-Examination of Bankrupt. There was no caveat registered against title to the Skelton House in favor of the Bankrupt for any alleged interest: Exhibit "K" and paragraph 16, Affidavit of Trustee. The evidence of the Bankrupt on the "George Wolen" issue is respectfully submitted to be self-serving and insufficient.

5 In any event, there was no equity in the Skeleton Lake House at the time of the Agreement with the Spouse, and thereafter. It was subject to an existing mortgage in favor of Dynamic International Financial Corporation in the principal amount of \$353,000.00 (at the time of the Agreement with the Spouse, and the time of transfer into the joint names of Ron Mercier and the Bankrupt) and then later subject to a replacement mortgage in favor of Servus Credit Union in the principal amount of \$355,000.00 (at the time of the transfer into the sole name of the Bankrupt). In the transfer of land and affidavit of value to place title into the name of the Bankrupt, he deposed the current value of the Skeleton Lake House to be \$360,000.00, paragraphs 22 - 24, 37, 71 - 72, First Brief of Trustee; paragraphs 16 - 20, Exhibits "K" to "O", Affidavit of Trustee.

26 The Skeleton Lake House cannot form a positive part of the value for the transfer. It is neutral as to whether the bankrupt was rendered insolvent by the transfer.

iii Dominican Republic Cabin Value - Nil

27 The Bankrupt says this condominium had a value of \$100,000.00. The trustee attributes nil value.

28 There is unsworn opinion evidence about the value of the condominium. I appreciate that a certain informality is required under the Act but unsworn opinion evidence, or opinion evidence that is merely exhibited to an affidavit of someone other than the expert, is in my view, is inadmissible or virtually weightless. The Act provides that where a specific matter of procedure is not dealt with in the Act or the Rules, the rules of practice in the jurisdiction apply. (Rule 3) In Alberta, ARC Rule 6.11 permits opinion evidence in support of an application, but only if it is sworn; and presumably, without the strict necessity of having to prove the qualifications of the expert.

29 However, this is not the decisive point about the Dominican condominium. Ownership was said to be governed by a letter agreement which gave the bankrupt a 'life lease'. There is no proof of Dominican Republic law (which I understand to be Napoleonic) so I am obliged to assume it is the same as here. There is no evidence that the 'life lease' is an interest in land, or anything other than a mere license. The title was not in the bankrupt's name and the condominium was later given up in the face of fees and/or special assessments totalling something in the range of \$65,000.00 which itself casts significant doubt on the realtor's valuation at \$200,000.

30 The bankrupt has not demonstrated that the value of his interest in this property at the time of transfer was \$100,000.00. It may not have had no value, as the trustee asserts, but no particular value has been proved on a balance of probabilities.

iv Winston Realty 5-Nil

31 The trustee says nil value. The Bankrupt says 'nominal value'. No particular value has been proved.

v HSBC Account - \$35,423.24

32 The balance of this account was apparently \$70,847.48 as at the date of transfer. Another person was listed on the account as a joint holder. The evidence was that she had limited signing authority, but not ownership.

33 I am not prepared simply to reduce the value of this account by one half because another person was on the account. However, it is not clear why Mrs. Indarsingh should not have had a claim to one half of this account as matrimonial property, which would be the presumption in an ordinary matrimonial property division. It is on this basis, and not because this other individual was on the account, that I am accepting the valuation put on this account by the trustee at half of its face value.

vi Bond Street Loan - Nil

34 The Bankrupt deposed that he had loaned \$200,000.00 to a company called Bond Street. This loan is supported by what purports to be a letter from the president of Bond Street dated April 3, 2013 acknowledging the debt at the time of the transfer. A letter indicates that the loan was given September 15, 2007. It went on to say that the loan was interest only and was to have been paid September 1, 2008. It doesn't come right out and say to whom the money was owed.

35 The evidence in support of the loan is very weak. It is an unsworn letter exhibited to one of Mr. Indarsingh's affidavits. The evidence appears to have been displaced on cross-examination on the affidavit and the answers to undertakings. At the very least, the evidence given by the bankrupt on pages 32 and 33 of the first cross examination is equivocal, as is the letter, when viewed in the context of the evidence on cross examination. It casts significant doubt on whether this loan was an asset of the bankrupt. In my view, the evidence about this asset was effectively displaced by the trustee.

vii WAR Developments Inc.

36 The bankrupt asserts that the value of this asset was \$540,393.65. The trustee argues that the value is nominal.

37 The evidence indicates that the bankrupt was a fifty percent shareholder of this company at the time of transfer. The trustee notes that the financial statements show retained earnings of \$77,478.00 and a debt by the bankrupt to the company of \$50,616.00. It was acknowledged that the real estate assets indicated on the income statement were not assets of the company or the bankrupt.

38 However, the financial statement provided in response to an undertaking appears to show cash in the assets column of \$550,000.00 and investments of \$285,065.80. The balance sheet shows net assets of well over a million dollars. Even if we were to discount some of the other assets listed on the balance sheet (as at October 31, 2008, which is several months post transfer) there appears to be significant equity in this company. This may well have been the case as at the time of transfer. The trustee argues that the value of this asset should be either nil or negative \$50,616.00, representing the debt owed by the bankrupt to the company. However, the value of the cash and the investments has not been addressed. There may be other off-setting items on the balance sheet and a particular positive value has not been proved. However, by the same token, I am not satisfied that the value of this asset to the bankrupt was either nil or negative \$50,616.00.

39 The bankrupt would need something in the order of \$50,000.00 to bring the total of the assets released into the 'value zone'. Although I cannot say exactly what the interest in WAR Development Inc. was worth, there is evidence that it had some, perhaps substantial value.

40 I admit to having difficulty with the bankrupt's evaluation but I cannot say that the value of the bankrupt's interest in WAR Developments Inc. is nominal or nil or, for that matter, that it is less than the threshold amount needed (roughly an additional \$50,000.), which, together with the other assets indicated above, would balance the two interests or, at least not create a conspicuous difference.

viii RRSP, Income - \$33,233.34

41 The bankrupt had an RRSP in the agreed amount of \$33,233.34 at the time of transfer. I note that the bankrupt also had a small income disclosed on his Notice of Assessment for that year.

ix Contingent Liabilities

42 The trustee points to two liabilities under guarantees. I acknowledge that contingent liability can be taken into account (eg *Anderson, Re*, 2012 BCSC 956 (B.C. S.C. [In Chambers]) at para. 10). One of the guarantees was granted two days after the transfer. It is not necessary to form an opinion about the validity or exposure of the bankrupt to these contingent liabilities at this time because we have the benefit of hindsight. Although judgment was given against the bankrupt and others March 16, 2010 in the amount of \$456,150.56, shortly before his assignment, neither of these liabilities are indicated in the trustee's Supplemental Report. I am not satisfied that there is enough to infer anything about these contingent claims at the time of transfer or that the contingent liabilities conspired to make the bankrupt insolvent by the transfer or that the contingent liabilities conspired to make the bankrupt insolvent by the transfer.

Conclusion

43 The trustee has not proved undervalue on a balance of probabilities in the face of the bankrupt's competing evidence and after the presumption is removed.

44 Even if the transfer proved to be conspicuously less than fair market value, I cannot conclude that the bankrupt was insolvent or rendered insolvent by the transfer or that the evidence discloses an intent to defraud, defeat or delay. The circumstances might equally well be explained by the downturn in the economy that coincided with the timing of the transfer.

45 There is a long and involved procedural history to this case. The evidence was sketchy and evolving with the bankrupt attempting to improve upon earlier evidence with further affidavits. Nevertheless, I am able to conclude as follows:

1. The transfer of the matrimonial home to the bankrupt's spouse was a non-arm's length transaction.
2. The transfer occurred within five years of the bankruptcy.
3. It is not proved that the bankrupt was insolvent and the time of transfer.
4. The evidence does not disclose the requisite intent to defraud, defeat or delay on balance.

46 Accordingly, I decline to set aside the transfer. There was not, in any event, sufficient evidence to define the disparity between transfer value and fair market value so as to order the transferee to pay the difference even if the other conditions applied.

47 No one took issue with whether this enhanced remedy that came into force in 2009 should apply to this 2008 transfer and, in the circumstances, I need not consider this.

Application dismissed.

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