2017 ABQB 181
Alberta Court of Queen's Bench

Royal Bank of Canada v. Racher

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

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

J.T. Eamon J.

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

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

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

Related Abridgment Classifications

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

Headnote

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

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

Table of Authorities

Cases considered by *J.T. Eamon J.*:

Abba, Re (1998), 1998 CarswellAlta 820, 66 Alta. L.R. (3d) 277, (sub nom. *Abba (Bankrupt), Re*) 230 A.R. 185, 6 C.B.R. (4th) 10, [1999] 5 W.W.R. 705, 1998 ABQB 730 (Alta. Q.B.) — referred to

Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd. (2015), 2015 ABQB 120, 2015 CarswellAlta 287, 40 C.L.R. (4th) 187, 605 A.R. 303 (Alta. Q.B.) — followed

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Direct Rental Centre (West) Ltd. v. Norkus Estates (Trustee of) (2001), 2001 ABCA 233, 2001 CarswellAlta 1360, 205 D.L.R. (4th) 651, 29 C.B.R. (4th) 50, 18 B.L.R. (3d) 214, [2002] 2 W.W.R. 264, 97 Alta. L.R. (3d) 213, 299 A.R. 39, 266 W.A.C. 39 (Alta. C.A.) — considered

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Royal Bank v. Laughlin (2001), 2001 ABCA 78, 2001 CarswellAlta 402, 277 A.R. 201, 242 W.A.C. 201 (Alta. C.A.) — considered

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Siri Guru Nanak Sikh Gurdwara of Alberta v. Sandhu (2015), 2015 CarswellAlta 1535, 2015 CarswellAlta 1536 (S.C.C.) — referred to

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Wildeman v. Wildeman (2014), 2014 ABQB 732, 2014 CarswellAlta 2313, 53 R.F.L. (7th) 113, 603 A.R. 335 (Alta. Q.B.) — referred to

Statutes considered:

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

Generally — referred to

s. 2 "debtor" — considered

s. 2 "locality of a debtor" — considered

s. 2 "property" — referred to

s. 2 "transfer at undervalue" — considered

s. 4(2)(a) — considered

s. 4(5) — considered

s. 38 — considered

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s. 67(1) — considered

s. 67(1)(b) — considered

s. 91 — considered

s. 91(1) — considered

s. 96 — considered

s. 96(1)(b) — considered

s. 96(1)(b)(i) — considered

s. 96(2) — considered

s. 183 — referred to

s. 187(8) — considered

Civil Enforcement Act, R.S.A. 2000, c. C-15

Generally — referred to

s. 88 — considered

s. 88(f) — considered

s. 88(g) — considered

Fraudulent Conveyances Act, 1571 (13 Eliz. 1), c. 5

Generally — referred to

Fraudulent Preferences Act, R.S.A. 2000, c. F-24
Generally — referred to

s. 1 — considered
Land Titles Act, R.S.A. 2000, c. L-4
Generally — referred to
Rules considered:
Alberta Rules of Court, Alta. Reg. 124/2010
Pt. 5 — referred to

R. 3.2(6) — considered

R. 3.12 — considered

R. 3.14(1) — considered

R. 7.1(1)(a) — considered

R. 7.3 — considered
Regulations considered:
Civil Enforcement Act, R.S.A. 2000, c. C-15
Civil Enforcement Regulation, Alta. Reg. 276/95

s. 37(1)(e) — considered

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

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

I Introduction

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

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

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

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

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

II Procedural limitations — conflicting evidence on chambers application

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III The transaction under review

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

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

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

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

21 The farm lands were clear of any financial encumbrances.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV Mr. Racher's bankruptcy

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

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

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

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

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

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

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

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

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

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

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

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

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

V The grounds for review of the transaction

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

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

> (f) in the case of an enforcement debtor whose primary occupation is farming, up to 160 acres of land if the enforcement debtor's principal residence is located on that land and that land is part of that enforcement debtor's farm;
>
> (g) the principal residence of an enforcement debtor, including a residence that is a mobile home, up to the value prescribed by the regulations for that residence but if the enforcement debtor is a co-owner of the residence, the amount of the exemption allowed under this provision is reduced to an amount that is proportionate to the enforcement debtor's ownership interest in the residence;

(a) Section 96 of the BIA

40 Section 96 of the *BIA* provides:

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

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

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

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

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

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

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

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

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

"transfer at undervalue" means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) What law governs the exemptions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Fraudulent transfer

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

> 1. Subject to sections 6 to 9, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made
>
> (a) by a person at a time when the person is in insolvent circumstances or is unable to pay the person's debts in full or knows that the person is on the eve of insolvency, and
>
> (b) with intent to defeat, hinder, delay or prejudice the person's creditors or any one or more of them,
>
> is void as against any creditor or creditors injured, delayed or prejudiced.

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

(c) Fraudulent conveyance

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

> 1. There must be a conveyance of either real or personal property;
>
> 2. The transaction must have been for no or nominal consideration;
>
> 3. It must have been the intent of the settlor to defraud, hinder or delay his creditors;
>
> 4. The intent of the settlor may be inferred from his circumstances and the circumstances of the settlement or may be the result of direct evidence;
>
> 5. The fact that there was no consideration or voluntary consideration will in most cases justify the inference of the necessary intent absent evidence rebutting that inference;
>
> 6. Inference of intent will be strong if the settlor was insolvent at the time of settlement or the settlement effectively denuded him of assets sufficient to cover existing obligations;
>
> 7. The party challenging the conveyance must be a creditor or someone with a legal or equitable right to claim against the settlor;
>
> 8. The conveyance must have had the intended effect.

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

VI The alleged transfer at undervalue

(a) Nature of the transfer

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

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

(b) Proof of intention not necessary

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

(c) Whether transfer at undervalue

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

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

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

> (a) the values of Mr. Racher's interest in the farm lands, the consideration for the transfer, and (if applicable) the value of Mrs. Racher's interest in the Ontario land can be appropriately determined on the present record, or
>
> (b) the range of potential values are such that notwithstanding any inability to determine the values with precision, it is unassailable that the transaction was at undervalue.

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

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

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

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

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

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

(ii) RBC's opinion of value

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iv) Assessment whether transaction at undervalue

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Percentage of Consideration in Relation to Market Value

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

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

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

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

VII Mr. Racher's exemption claim

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

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

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

- He deposes that his income since 1990 has been predominantly from farming.
- His personal statement provided to RBC in November 2012 indicates he is the owner of the farm lands, and that he receives annual salary and wages, and farm income.
- His 2011 through 2013 tax returns clearly demonstrate he conducted the business of farming in Alberta.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VIII Other challenges to the transaction

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

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

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

IX Disposition

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

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

150 I am not seized with the matter.

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

Order accordingly.

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