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Docket: CI 23-01-40291
(Winnipeg Centre)
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

CAPLAN AND COMPANY LTD, as Licensed Insolvency Trustee of the Estate of Thomas Harold Standing, a Bankrupt,	)	Richard Schwartz and Connor Jonsson for the plaintiff
plaintiff,	)	
- and -	)	
6136380 MANITOBA LTD, THOMAS HAROLD STANDING and BOBBI-LYNN STANDING,	)	Faron Trippier, Patricia West and Natasha Ellis for the defendants
defendants.	)	
	)	Judgment Delivered: September 09, 2026

BOWMAN J.

INTRODUCTION

[1] The plaintiff, Caplan and Company Ltd ("Caplan"), is the trustee in bankruptcy of the estate of the defendant Thomas Harold Standing, a bankrupt ("Tom"), who was a mortgage broker and the controlling mind of a number of companies.

[2] Tom and his wife, the defendant Bobbi-Lynn Standing ("Bobbi"), have been married since 1992. The defendant 6136380 Manitoba Ltd ("613") is a company incorporated by Tom in August 2010 and registered to carry on business in Manitoba as

a provider of miscellaneous services. In or about September 2010, 613 took an assignment of a lease on a cottage located at Falcon Lake, Manitoba, from Tom's parents, and became the owner of the cottage. Tom later caused the cottage to be demolished and a new cottage to be constructed. Tom and Bobbi acknowledge that after the new cottage was constructed they used it as their family cottage, in addition to recreational equipment stored at the cottage including two boats (collectively, the "Cottage"), all acquired through 613.

[3] Subsequent to a number of complaints, The Manitoba Securities Commission (the "MSC") issued a cease-trading order against Tom and Sigmar Mortgage Services Ltd ("Sigmar") on or about March 5, 2021. This MSC action effectively shut down Tom's businesses and severely restricted his income. As a result, Tom assigned two of his companies, Sigmar and OS Investment Corp ("OS"), and himself into bankruptcy on or about July 29, 2021. Caplan was appointed as their trustee.

[4] After being appointed trustee, and as acknowledged by Tom, Caplan learned that:

a) a few months earlier Tom had caused the Cottage to be sold and assigned to a third party, and, in doing so, declared the fair market value of the Cottage to be $1,800,000 (the "Sale");

b) on or about March 29, 2021, Tom had caused 613 to issue shares to Bobbi (the "Shares"); and

c) on or about July 21, 2021, Tom had caused Bobbi to become 613's sole director and officer.

[5] Tom did not disclose either the Cottage or his interest in 613 within the Statement of Affairs filed in his bankruptcy. Caplan takes issue with this non-disclosure and argues that the circumstances leading up to and involving the Sale and the issuance of the Shares are "highly suspicious". For instance, Tom issued the Shares and gave legal effect to his apparent intention to transfer beneficial ownership of 613 approximately 11 years after it was incorporated, and he did so immediately after his business was shut down by the MSC and shortly before making his assignment in bankruptcy. At its core, this is a dispute about the ownership of the Cottage prior to its sale in 2021. Caplan alleges that Tom was the *de facto* owner of the Cottage and that the events surrounding the Sale were a fabrication by Tom, Bobbi and 613 (the "Defendants") executed with the objective of defeating Tom's creditors.

[6] The Defendants argue that from the time the Cottage was gifted by Tom's parents in 2010 it was held in trust for the benefit of Bobbi, Tom and Bobbi's children, and future generations of their family. Tom submits that he caused 613 to be incorporated in 2010 for the sole purpose of holding the Cottage in trust as a bare trustee for the benefit of Bobbi, their children and future generations (the "Family Trust") and, as a result, Caplan's claim should fail.

[7] Caplan argues that Tom and Bobbi were aware in March 2021 that Tom was going to be required to make an assignment for the general benefit of his creditors, or that he was insolvent and "without any hope of fixing what appears to be a Ponzi scheme that Tom had been operating for years" (Argument of the Plaintiff at para 10). Caplan notes that until at least July 22, 2021, Tom was the sole controlling mind and owner of 613 and

so the Sale and issuance of the Shares to Bobbi were, in Caplan's submission, a "blatant attempt to shield the sale proceeds from Tom's creditors" (Argument of the Plaintiff at para 11).

[8] As a result of the foregoing, Caplan seeks a declaration that the Sale and the issuance of the Shares was:

a) made with the intent to defeat, hinder, delay, and/or defraud Tom's creditors pursuant to s. 2 of ***The Fraudulent Conveyances Act***, C.C.S.M. c. F160 (the "***FCA***");

b) a transfer at undervalue of Tom's property within the meaning of ss. 2, 95 and 96 of the ***Bankruptcy and Insolvency Act***, R.S.C., 1985, c. B-3 (the "***BIA***"), as amended; and

c) Tom and Bobbi conspired to defeat the claims of Tom's creditors by taking these actions.

Background

[9] A timeline of relevant events in this matter includes the following:

i) **1992:** Tom and Bobbi are married.

ii) **1996:** Tom and Bobbi have their first child. Since that time, Bobbi has been a homemaker. Tom and Bobbi later had a second child.

iii) **1999:** Tom and Bobbi purchase their current family residence (the "Family Home"), which has always been in Bobbi's sole name.

iv) **2009:** In advance of receiving the cottage as a gift from Tom's parents, Tom and Bobbi cause drawings to be made for the demolition of the existing cottage to be replaced with a new cottage. Tom causes a survey of the cottage property to be completed on or about October 22, 2009.

v) **August 24, 2010:** Tom incorporates 613 and is its sole director from the time of incorporation until after the closing date for the Sale of the Cottage in 2021. Between 2010 and March 2021 no shares are issued by 613.

vi) **August 25, 2010:** 613 applies for a variance to allow for the demolition of the existing cottage and the construction of the new cottage. As the sole director, Tom applies for the variance.

vii) **September 9, 2010:** The cottage lease is assigned by Tom's parents directly to 613. The lease assignment is registered with Manitoba Conservation, Parks and Natural Areas on September 9, 2010. The date on which it was assigned by Tom's parents is unknown.

viii) **October to December, 2010:** Tom and Bobbi, with the assistance of their lawyer Ken Tacium, obtain a line of credit ("LOC") from Steinbach Credit Union ("SCU") in the amount of $936,000.00, which is secured by a mortgage registered in the amount of $1,000,000 against title to their Family Home. The Family Home remains in Bobbi's sole name and is further secured through the Personal Property Registry against 613's interest in the cottage. The LOC application advises that it is needed to "establish LOC for investment purposes"; "Member wanting to invest in private mortgages, draw equity from residence and cottage at Falcon Lake", and then "pay out [mortgage] at RBC & LOC at CIBC to give SCU [first] charge" (Credit Application and Statement of Affairs, Book of Agreed Documents at Tab 7).

ix) **Between late 2010 and summer of 2011:** The new cottage is constructed.

x) **2019:** The cottage lease is renewed for an additional term of 21 years.

xi) **March 5, 2021:** Tom's businesses are effectively shut down when a cease-trade order is issued by the MSC.

xii) **March 2021:** Tom approaches Michael Romani, president of Clearwater Investments Inc, to see if he would buy the Cottage for $1.8 million.

xiii) **March 22, 2021:** A statement of claim is filed against Sigmar, Tom and Bobbi.

xiv) **March 25, 2021:** Another statement of claim is filed against Sigmar, Tom and Bobbi.

xv) **March 28, 2021:** 613 and Bobbi execute a bare-trust declaration and agreement. Bobbi's signature is witnessed by friend, Ryan Dixon.

xvi) **On or about March 29, 2021:** The Manitoba Companies Office register is updated to indicate that 100 Class A shares in 613 have been issued to Bobbi.

xvii) **March 30, 2021:** Tom and Bobbi execute organizational resolutions for 613 as well as a subscription for shares.

xviii) **March 30, 2021:** A third statement of claim is filed against Sigmar, Tom and Bobbi.

xix) **April 1, 2021:** Michael Romani, on behalf of Clearwater Investments Inc, signs the formal Offer to Purchase for the Cottage from 613 with a closing date of May 14, 2021.

xx) **April 8, 2021:** Tom, on behalf of 613, signs the acceptance of the Offer to Purchase.

xxi) **April 26, 2021:** Tom executes the Parks Land Assignment of the cottage lease on behalf of 613.

xxii) **April 27, 2021:** Michael Romani executes the lease assignment on behalf of Clearwater Investments Inc.

xxiii) **April 26 and 27, 2021:** Tom, Bobbi and Mr. and Ms. Romani execute several additional documents including an amendment to the Offer to Purchase.

xxiv) **Between May 3 and 5, 2021:** Tom consents to judgment on his own behalf and on behalf of Sigmar in the three claims referenced above that have been filed against Sigmar, Tom and Bobbi in March 2021.

xxv) **May 4, 2021:** The lease assignment is registered with the Parks Branch.

xxvi) **May 14, 2021:** Scott Nichol with the Parks Branch confirms receipt of a request for information regarding the cottage from Andrew Tighe of the MSC. Scott Nichol responds to the request on May 17, 2021.

xxvii) **June 11, 2021:** The SCU LOC is paid out and discharged from the proceeds of the sale transaction on or about June 11, 2021.

xxviii) **July 21, 2021:** Tom resigns as officer and director of 613, and Bobbi is appointed its sole officer and director. Director and shareholder resolutions are executed.

xxix) **July 29, 2021:** Tom assigns himself, Sigmar and OS into bankruptcy. In his Form 79, Tom lists a house of which he is the registered owner, some household effects, and shares in Sigmar and OS as assets. Tom does not list the Family Home, the motor vehicles or 613.

ISSUES

[10] On the basis of the materials before me, the issues to be decided in this matter include:

i) Are the parties credible?

ii) Has there been a fraudulent conveyance pursuant to the ***FCA***?

iii) Was there a transfer at undervalue pursuant to the ***BIA***?

iv) Have Tom and Bobbi committed the tort of conspiracy?

v) What are the appropriate damages?

ARE THE PARTIES CREDIBLE?

[11] The parties agree on the applicable law and related legal tests as set out below. They also agree that this case will be determined largely through findings of credibility.

Applicable law

[12] In ***Moss Estate (Trustee of) v. Moss***, 2009 MBQB 21, at paragraph 25, Clearwater J. set out three principles for assessing credibility. The first principle sets out the burden of proof while the second and third principles may be summarized as follows:

a) The truth of a witness's story ought not to be based on the apparent sincerity or personal demeanor of a witness, but rather on its "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (quoting ***Macatula v. Tessier*** (28 March 2002), Winnipeg CI 00-01-20570 (MBQB) at para 37, quoting ***Faryna v. Chorny***, [1951] BCJ No 128 (BCCA) at para 10); and

b) When considering and assessing the evidence of a witness, the trier of fact must consider all of the evidence to determine "how much or how little of any witness's testimony one will believe or rely on"; the trier of fact may "<u>believe some, none or all of the evidence given by a particular witness</u>" (emphasis in original).

Witness Testimony

<u>Bruce Caplan</u>

[13] Bruce Caplan ("Bruce") testified that he and Tom articled together and, as a result, has known Tom for years. Bruce stated that Tom had contacted him to assist as trustee to help with Tom's businesses after Tom was prohibited from operating them by the MSC. Later, Bruce was engaged to serve as the trustee in bankruptcy for the estates of Tom, Sigmar and OS.

[14] Bruce testified that he discussed his role with the MSC but was not sure of the timing. He further testified that typically at a creditor's meeting in this kind of bankruptcy,

inspectors are nominated and elected, and that the inspectors oversee and approve the administration of estates.

[15] Bruce testified that Tom has been cooperative with him in respect to administering the estates. Bruce stated that an inspector for the estates brought to his attention the existence of the Cottage. He then questioned Tom about the Cottage and Tom responded that the Cottage was Bobbi's.

[16] Bruce testified that he reluctantly initiated the statement of claim in this matter at the direction of the inspectors and was concerned that initiating the action could create difficulties for him in properly administering the estates.

[17] During cross-examination, Bruce testified that there is no evidence of Tom having issues with creditors back in 2010.

Bobbi-Lynn Standing

[18] Bobbi testified about how she and Tom have historically managed their affairs and household. Bobbi explained that she is primarily responsible for domestic labour and child raising, while Tom manages all of the finances for their home.

[19] Bobbi stated that the Cottage was designed by a friend with the intent for it to benefit her, their children and future generations. Bobbi testified that she was aware that the Cottage was in a trust but that she really did not understand how these things worked. Bobbi explained that she would typically sign whatever she was asked to sign, even though she did not really understand the specifics of respective documents. Bobbi testified that she had a general idea of what the documents were about but did not truly or fully understand them. On cross-examination, Bobbi testified that she always knew

there was a trust but that she did not understand what it meant to "have an interest in" something.

[20] Bobbi described in detail the difficult day in March 2021 when Tom came home and told her that his businesses had been shut down by the MSC. Bobbi testified that Tom explained to her that day that the MSC action would cause significant financial distress for their family that would require the sale of the Cottage.

Thomas Harold Standing

[21] Tom testified about how he and Bobbi have historically managed their household and affairs. Tom explained that he manages the financial affairs of their home while Bobbi is responsible for domestic labour and child raising. Tom pays the household bills, undertakes business planning and arranges the division of assets. Tom testified that he has arranged their family affairs so that Bobbi owns their personal assets while Tom owns business assets. He explained that he has historically structured things in this manner for tax and estate planning purposes as well as to secure their family's personal assets.

[22] Tom testified about the nature of his business ventures and how Bobbi would generally only sign cheques for Tom's businesses when one of his employees, "Bonnie", was not available.

[23] Tom stated that he was not concerned about creditors when he caused 613 to be incorporated in 2010 to hold the Cottage. Tom explained his shock when the MSC "stormed into his office" on March 5, 2021, and how the MSC proceeded to take possession of all of Tom's files and his office computer. Tom testified about the claims filed against Sigmar and explained the different corporations that he has had a role or

interest in prior to his bankruptcy. Tom explained that he had anticipated that the Cottage would be part of his family for generations and so he caused 613 to be incorporated to hold the Cottage in trust for Bobbi and their children rather than simply registering it in Bobbi's name.

[24] Tom testified that due to the financial consequences of having his businesses shut down by the MSC, it became urgent to complete documentation for 613 and the Family Trust. Tom explained that he retained a lawyer to prepare the documents related to the Sale of the Cottage including having a minute book for 613 created.

[25] Tom testified that he never owned the Cottage but rather it was always a trust property for Bobbi and his children that was held by 613. Tom stated that from 2010 until 2021 he was a sole director of 613 but that the intention had always been that 613 would hold the Cottage as a bare trustee for Bobbi and their children. Tom confirmed that he did not list the Cottage in the bankruptcy forms because, in his view, the Cottage was not his asset but Bobbi's.

[26] Tom was presented with the transcript of his examination in aid of execution and maintained that the Cottage was not his property. Tom testified that he did not remember during the discoveries that he had discussed the issue of the Family Trust with Mr. Rakowski and that it was not until his counsel advised him before trial that Mr. Rakowski had recalled such a discussion. As a result, Tom testified that he similarly recalled discussing the Family Trust with Mr. Rakowski. While undergoing cross-examination, Tom testified that at the time of the examinations for discovery he simply did not remember discussing the Family Trust with Mr. Rakowski.

<u>Damian Rakowski</u>

[27] Damian Rakowski ("Damian") testified as the only non-party witness during the trial.

[28] Damian testified that he was the contractor that built the new cottage. He explained that he only invoiced 613 for his work, and not Tom or Bobbi personally. Damian explained that at the time that the new cottage was being built, Tom told him that 613 was a Family Trust. Damian explained that he had subsequent business dealings with Tom and that when Tom's businesses were shut down by the MSC he suffered losses. He testified that he had not spoken with Tom since 2021.

[29] During cross-examination, Damian testified that he did not understand what this litigation was about but confirmed that he built the new cottage by the summer of 2011 and was responsible for subtrades. He could not confirm the exact cost of construction of the new cottage, but testified that it would have been between $600,000 and $1,000,000.

The Plaintiff's Position

[30] Caplan argues that based on the principles established in ***Moss Estate (Trustee of)***, on a "preponderance of probabilities" a "practical and informed person" should not recognize Tom and Bobbi's testimony on any of the critical issues as "reasonable in that place and in those conditions" (at para 25). Caplan argues that Tom has demonstrated a pattern of explaining away a lack of documented or third-party evidence and instead providing only his own account of events that are "consistent with a concocted story" (Argument of the Plaintiff at para 39(b)). Caplan submits that Tom has contradicted his

own testimony and was "conveniently selective" with respect to his recollection of certain events. Caplan contends that Tom's responses fell exceedingly short of what would be expected from a reasonable person in his place and position, especially during cross-examination. Likewise, Caplan views Bobbi's testimony as questionable. As a result, Caplan submits that the Defendants are not credible and should not be believed on any matters of substance.

The Defendants' Position

[31] The Defendants submit that Tom and Bobbi are credible witnesses. In response to Caplan's submission that Tom lacks credibility (as evidenced by trust documents not being drafted as early as 2010), the Defendants argue that Tom's lawyer at the time, Mr. Tacium, was not comfortable in his knowledge of the specific trust documentation required in the circumstances.

[32] Tom does not recall ever discussing the issue of the Family Trust with Ms. Pirt from SCU. As a result, and considering the passage of time, the Defendants did not feel it would be helpful or appropriate to subpoena Ms. Pirt for the purposes of the trial. The Defendants note, however, that Tom consented to an order to have all of SCU's records produced for trial.

Analysis

[33] I have considered the principles established in ***Moss Estate (Trustee of)*** and am of the view that on a "preponderance of probabilities" a "practical and informed person" would not recognize Tom and Bobbi's testimony on any critical issues as being

"reasonable in that place and in those conditions". Simply put, Tom and Bobbi are not credible. I make this determination having considered the following.

[34] Tom testified that the reason he did not issue shares to Bobbi and his children in 2010 (when 613 was incorporated) was because his children were minors at the time and that his lawyer responsible for incorporating 613 did not know how to create an *inter-vivos* trust involving minors. I do not find this to be credible given that his lawyer at the time, Mr. Tacium, was a senior partner who specialized in commercial matters, wills and estates. Given that wills typically contain standardized provisions for minor beneficiaries, which can be modified for an *inter-vivos* trust, such an explanation is not reasonable.

[35] Tom testified that the SCU LOC was obtained for the express purpose of building the new cottage and that the account manager from SCU, Ms. Pirt, was aware that it was to be used for that purpose and that 613 held the Cottage in trust for Bobbi and their children. Notwithstanding this position, the Defendants did not attempt to contact Ms. Pirt in preparation for trial to determine whether she would provide evidence to confirm Tom's testimony. Given the importance of Ms. Pirt's possible testimony, such a position is neither credible nor reasonable. I have considered Tom's original evidence that he did not think that Ms. Pirt and he ever discussed the issue of the trust. I note that Tom consented to an order to have all of SCU's records produced for trial. Tom's explanation that there was no reason to believe that Ms. Pirt would remember more than what was contained in her notes on file is speculative and unreasonable given the potential importance of her testimony to the Defendants.

[36] With respect to the SCU LOC, I note that the credit application said its purpose was for "investment purposes"; "Member wanting to invest in private mortgages", and Tom's subsequent email asking "when can I start using the credit line as I have a couple mortgage investments I would like to fund". There is no evidence that any of the loan agreements acknowledge Tom's assertion that the LOC was used to fund the construction of the new cottage.

[37] Tom later emailed SCU and stated: "I have improved the cottage, and it is likely worth more." I note that when asked why he would have told SCU that he improved the cottage instead of building a new one, Tom testified that he did not check his wording that carefully. Tom's recollection and knowledge of certain events concerning documents entered into with SCU appeared selective. For example, Tom was asked under cross-examination how 613 signed a guarantee and pledged the cottage as security in 2012 if it was not the beneficial owner. Despite Tom's lengthy professional experience as a mortgage investor and broker, his response was that he relied on legal counsel when he signed the document. When asked if he discussed with his lawyer at the time whether consent of the beneficial owner was required on such a guarantee, Tom had no recollection. Again, despite having more than 20 years of professional experience as a mortgage investor and broker, Tom responded that he was not sure whether he thought SCU would have wanted to see the beneficial owner's signature on such a document.

[38] I note that Tom was asked about the cottage's insurance policy and whether the policy indicated that 613 was a bare trustee for Bobbi and their children. Tom's response was not what one would expect from a reasonable person in his place and position. Tom

acknowledged that there were policies in place for the cottage, but he did not look for them. Tom could not provide a reasonable answer when cross-examined and asked why he had not produced or even looked for a document that may have evidenced the purported ownership arrangement of the cottage.

[39] During cross-examination, Tom was asked why 613's tax returns for the 2020 tax year described Bobbi as a shareholder of 613, despite that she did not own shares in 613 until 2021. Tom did not provide a reasonable answer and acknowledged that he advised his accountant that Bobbi was the shareholder of 613 at the time despite the fact that no 613 shares had yet been issued to Bobbi.

[40] Considerable time was spent during cross-examination discussing a box and other documents that Tom claims were left in the cottage when it was sold to the new owner, Michael Romani. Tom claimed that finding invoices in the boxes would have been "nothing but beneficial" to him and that he knew the exact location of the folders in the cottage, yet he testified that he never asked Mr. Romani for them nor did he ask the general contractor who had built the new cottage, Damian, to produce any invoices he had issued for his work on the cottage.

[41] Tom was examined as a judgment debtor a few months after the Sale of the Cottage, during which time he repeatedly failed to mention that 613 held title of the cottage in trust for Bobbi and their children despite being pressed to disclose the ownership arrangement.

[42] I note inconsistencies with the version of events that Tom provided during testimony at trial with those he provided under oath at his 2024 examination for

discovery. For example, when questioned during examinations as to whether he told anyone else other than Ms. Pirt from SCU that the Cottage was owned by 613 as a bare trustee for Bobbi and their children, Tom said "No. We are private people. We don't spill our guts." However, at trial Tom testified that he had discussions with both Mr. Tacium and Damian about the ownership status of the Cottage. When challenged about this inconsistency, Tom explained that he had put more thought into the matter with the passage of time. Given the importance of these statements, one cannot reasonably attribute the passage of time and memory "revival" as a reasonable explanation for such an inconsistency.

[43] There are no documents to adequately confirm Tom's assertion that the SCU LOC (or a CIBC line of credit for that matter) was used to fund construction of the new cottage. The recorded value of the new cottage is also inconsistent with the SCU LOC being used to fund its construction. For instance, when applying for a building permit Tom stated that the value of the work (which included the demolition of the existing cottage) was $400,000, and the appraisal obtained by SCU in 2012 assessed the value at $1,200,000, which included the value of the lease itself.

[44] Bobbi's testimony at trial is inconsistent with the version of events she provided under oath at her 2024 examination for discovery. For example, she did not mention that the Cottage was held in trust in her January 31, 2024 examination but at trial testified that she had "always" known that the Cottage was held in trust for her and her children. Bobbi's explanation as to why she did not advise her lawyer that her views had changed

since her examination was that she was not familiar with the effects of a bare trust agreement.

[45] During examinations for discovery, Bobbi testified that she "had nothing to do with the construction of the cottage" and did not participate in the design, but then at trial she recalled that she did play a role in the design of the new cottage.

[46] Bobbi stated during examinations for discovery that she had no knowledge of or involvement in the household finances and that she did not know what happened to the proceeds of the Sale of the Cottage. Given the circumstances at the time, including the significant financial implications of the MSC actions against Tom, it is not credible for Bobbi to claim that she did not know what happened to the proceeds of Sale for the Cottage.

[47] As a result of the foregoing, I do not find that Tom or Bobbi are credible witnesses to be believed on matters of substance in this matter.

[48] The testimony of Damian provides the only contemporaneous evidence that the Cottage was held in trust as submitted by the Defendants. I found Damian's testimony to be unclear and vague, possibly as a result of the fact that his testimony largely related to his recollection of a single conversation that apparently took place more than a decade ago. As a result, I find his testimony to be unreliable and worthy of little to no weight in this proceeding.

<u>HAS THERE BEEN A FRAUDULENT CONVEYANCE PURSUANT TO THE FCA?</u>

Applicable Law

[49] The ***FCA*** provides a comprehensive framework to apply to transactions made with the intent of defeating creditors.

[50] The ***FCA*** states:

i) Definitions

> 1 In this Act,
>
> **"conveyance"** includes transfer, assignment, delivery over, payment, gift, grant, alienation, bargain, charge, encumbrance, limitation of use or uses of, in, to or out of real property or personal property, by writing or otherwise;
>
> **"personal property"** includes goods, chattels, effects, bills, bonds, notes and securities, and shares, dividends, premiums and bonuses in any bank, company or corporation, and any interest therein;
>
> **"real property"** includes lands, tenements, hereditaments, and any estate or interest therein.
>
> **When convenances declared void as against creditors.**
>
> 2 Every conveyance of real property or personal property and every bond, suit, judgment, and execution at any time had or made, or at any time hereafter to be had or made, with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties, or forfeitures is void as against such persons and their assigns.

[51] The law is clear that the intent to defeat, hinder, delay or defraud creditors may be inferred from the circumstances. In cases of a voluntary transaction such as the execution of a bare trust agreement, the issuance of shares, and the sale of property, it is only necessary to establish the fraudulent intention of the transferor at the time of the transaction. In ***Bank of Nova Scotia v. Bass***, [1983] MJ No 52 (MBQB), Kroft J. (as he then was) canvassed some of the principles behind the ***FCA*** stating:

> [8] If the conveyance is voluntary and particularly if, as here, it is between relatives, the transaction will be regarded with suspicion and there will be a substantial evidentiary burden upon the grantor to explain why the transaction should not be regarded as fraudulent. Considerable judicial attention has been given to the question

> of whether, when the transaction is voluntary and within a family, the trial judge must presume the transaction to have been fraudulent or whether the presumption is rebuttable. I am satisfied, based on the reasons expressed by Freedman J.A. (as he then was) in the ***Mandryk*** case and Learner J. in the ***Commerce Capital Mortgage*** case (both *supra*), that while a judge may treat the evidence as to the nature of the transaction as sufficient to establish a *prima facie* case, he is not, in law, bound to do so. In the final analysis, even in circumstances which fall in the category of being "suspicious", if the plaintiff is to succeed, it is necessary to show that there was in fact a fraudulent intent on the part of the grantor to defeat the plaintiff creditor.

[52] In ***Royal Bank v. O'Brien***, [1997] MJ No 429 (MBQB), Clearwater J. expanded on this analysis stating:

> [16] Courts and writers have identified typical and suspicious fact situations which are often described as "badges" or "inferences" of fraud. These situations, taken separately, or combined, may (but not necessarily will) result in a finding of fraud, if proven. The following list (and it is not intended to be comprehensive) of "badges" or "inferences" of fraud is summarized from Springman, Stewart and MacNaughton's text, *Fraudulent Conveyances and Preferences* (1994 ed.) and are found at pp. 13-11 to 13-14:
>
> > 1) the gift was of most, if not all, of the property owned by a debtor;
> >
> > 2) the debtor continued in possession and used or benefitted from the property after the conveyance;
> >
> > 3) the consideration is grossly inadequate;
> >
> > 4) there is unusual haste to make the transfer;
> >
> > 5) a close relationship exists between the parties to the conveyance;
> >
> > 6) the property is transferred to a grantee without his or her knowledge;
> >
> > 7) the transfer of property creates a trust and trusts are used to conceal or cover a fraud;
>
> To this list I would add the following:
>
> > 8) a debtor continues to represent to a lender that the property, or the equity in the property, remains part of the net worth of the debtor for purposes of obtaining financing or further financing (at a point in time after title to the property has been conveyed and without disclosing to the lender that title was transferred).

[53] In ***Garlicki (Trustee of) v. Garlicki***, 2015 MBQB 125, Bond J. stated:

> [77] In the absence of direct evidence, fraudulent intent may be inferred from suspicious circumstances: ***Royal Bank v. O'Brien***, [1997] 9 W.W.R. 439 (Man. Q.B.); ***Shoukralla v. Shoukralla***, 2014 ONSC 4205, [2014] O.J. No. 3329 (QL). Both Justice Clearwater of the Manitoba Court of Queen's Bench in ***Royal Bank*** and Justice

> Croll of the Ontario Superior Court of Justice in ***Shoukralla*** provide lists of fact situations that have been identified as "badges of fraud". As Justice Clearwater states, at para. 16, "These situations, taken separately, or combined, may (but not necessarily will) result in a finding of fraud, if proven."
>
> [78] In this case, the following circumstances mirror those referred to in ***Royal Bank*** and ***Shoukralla*** and support an inference of fraudulent intent:
>
> > (1) The assignment is within a close family relationship.
> >
> > (2) The *MPA* claim was the only asset of any significant value held by Lucy between 2003 and her assignment in bankruptcy in 2007.
> >
> > (3) The amount of the consideration for the assignment is unclear and appears to be inadequate. In July 2003, when it is claimed by the defendants that the assignment was contemplated and the letter prepared, Lucy owed Krystyna approximately $20,000 according to the summary of debts filed. The potential *MPA* settlement was acknowledged to be at minimum $168,000 and potentially much more. It was ultimately settled for $180,000. The evidence provided by the defendants regarding the total amount ultimately loaned to Lucy by Krystyna is at best inflated, and at worst false. Many of the purported payments are without any documentary corroboration and despite requests made of her during examinations conducted prior to trial, Lucy has produced no bank statements, credit card statements, or receipts to support her assertions.
> >
> > (4) The assignment letter was purported to have been signed on or
> >
> > about July 1, 2003, but the assignment was not registered under *The Personal Property Security Act* until April 28, 2006.
> >
> > (5) Lucy failed to disclose the assignment to her trustee in bankruptcy and during two separate examinations in aid of execution conducted in June 2006.
>
> [79] To these enumerated circumstances, I would add that I found Lucy and Krystyna to generally lack credibility and to be willing to tailor their evidence to what they perceived to be to their advantage.

[54] When found, the "badges" of fraud form a *prima facie* case that shifts the evidentiary burden to defendants. This was canvassed in ***Conte (Executrix and trustee of) v. Alessandro***, [2002] OJ No 5080 (ONSC), as follows:

> [21] These suspicious facts or circumstances are sometimes referred to as the "badges of fraud." These badges of fraud are evidentiary indicators of fraudulent intent and their presence can form the *prima facie* case needed to raise a presumption of fraud. These badges of fraud can be traced back to *Twyne's* Case (1601), 3 Co. Rep. 80b (Eng. K.B.) and are elaborated upon in ***Prodigy Graphics Group Inc. v. Fitz-Andrew***s, [2000] O.J. No. 1203 (Ont. S.C.J.).
>
> [22] The presence of one or more of the badges of fraud raises the presumption of fraud. Once there is a presumption, the burden of explaining the circumstantial

evidence of fraudulent intent falls on the parties to the conveyance. The persuasive burden of proof stays with the plaintiff; it is only the evidentiary burden that shifts to the defendants.

[23] In cases of non arm's length transactions, independent corroborative evidence is strongly recommended but not required if the defendants' evidence is found to be credible. In ***Koop v. Smith*** (1915), 51 S.C.R. 554 (S.C.C.), Duff J. discussed the need for corroborative evidence in a case involving a transaction between two near relatives for no consideration. Duff J., at p.559 stated as follows:

> I think the true rule is that suspicious circumstances coupled with relationship make a case of *res ipsa loquitur* which the tribunal of fact may and will generally treat as a sufficient *prima facie* case, but that it is not strictly in law bound to do so; and that the question of the necessity of corroboration is strictly a question of fact. Having examined the evidence carefully I am satisfied that the learned trial judge was entitled to take the course he did take and not only that the evidence, as I read it in the record, casts the burden of explanation upon the respondent, but that the testimony given by her brother ought not in the circumstances to be accepted as establishing either the actual existence of the debt or of the *bona fides* of the transaction.

[24] Another useful case is ***Petrone v. Jones*** (1995), 33 C.B.R. (3d) 17 (Ont. Gen. Div.). That case supports the proposition that where, as in the present case, the transferor is transferring the only asset he has remaining with which to pay his debts, there is a presumption of an intent to defeat creditors. Wright J., at p.20, stated the proposition as follows:

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

Even if we consider the direct evidence that the defendant had no intention of defeating, hindering, *et cetera* the claims of the plaintiff, can this evidence remain standing in the face of the undoubted evidence that for the past year the defendant has in fact acted in every way to defeat, hinder or delay the plaintiff's claim?

Even if the defendant had no intention, at the time of the conveyance, of defeating, hindering or delaying the plaintiff's claim, surely his actions since that date, the defence of the claim on the promissory note, the defence of this action, prevent him from raising that lack of specific intent as a defence.

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

[55] In ***Botham Holdings Ltd (Trustee of) v. Braydon Investments Ltd***, 2009 BCCA 521, the British Columbia Court of Appeal considered the issue of requisite intent

under analogous legislation in British Columbia and, specifically, whether a dishonest intent was required to find the defendant liable for transactions that removed significant assets from a company that later became insolvent. The British Columbia Court of Appeal canvassed applicable case law citing, *inter alia*, the following:

> [59] ***Freeman*** was applied in ***Mackay v. Douglas*** (1872) L.R. 14 E.Q. 106, where Vice-Chancellor Malins said at p. 120:
>
>> … It is not at all necessary to shew [*sic*] that a man had any fraudulent intent in making a settlement as the law is now settled. … The statute speaks of cases where the creditors "are, shall, or might be in any wise disturbed, hindered, delayed, or defrauded," and it is not necessary to shew [*sic*] an intention to do that, because if the settlement must have that effect the Court presumes the intention and will attribute it to the settlor. … So I dare say that Mr. *Douglas* had no fraudulent intention, according to his view, in making the settlement, and that he thought it a prudent thing to protect his wife and children. But in doing that he has, within the meaning of this statute, committed a fraudulent act, because, going into trade, he was taking away the only property which would be available for his creditors.
>
> [60] In this Province, there are several cases articulating the intent required by s. 1 to render a disposition void. In ***Ocean Construction Supplies Ltd. v. Creative Prosperity Capital Corp***. (1995), 34 C.B.R. (3d) 241, 1995 CanLII 740 (B.C.S.C.), Madam Justice Baker said:
>
>> 25 In essence, a fraudulent conveyance is a transfer of an interest in property which is made with the intention, and which has the effect, of hindering or impairing the right of a creditor or other person to satisfy a claim against the transferor. It is not necessary for the person seeking relief to show that the transferor was insolvent at the time the transfer was made, and the applicant need not establish that he or she was a creditor, or an unsecured creditor, at the time the transfer was made: ***Re Skinner*** (1960), 1960 CanLII 349 (BC SC), 27 D.L.R. (2d) 74 (B.C.S.C.).
>>
>> 26 All the applicant must show is that the transferor, in making the gift or transfer, did so with intent to delay, hinder or defraud creditors or others: ***Canadian Imperial Bank of Commerce v. Ash*** (1964), 1964 CanLII 546 (BC SC), 47 D.L.R. (2d) 620 (B.C.S.C.); *Canad**ian Imperial Bank of Commerce v. Boukalis*** (1987), 1987 CanLII 2694 (BC CA), 11 B.C.L.R. (2d) 190 (C.A.).
>
> [61] In ***Jaston & Co. v. McCarthy*** (1996), 41 C.B.R. (3d) 212, 1996 CanLII 2982 (B.C.S.C.), Mr. Justice K. Smith said much the same thing:
>
>> 85 The plaintiffs' case on this claim is made out on the testimony of Mr. and Mrs. McCarthy. Each testified that their intention was to distance the shares in McCarthy Realty (72) Ltd. and Dev-Gro Holdings Ltd. from potential claims by clients of Mr. McCarthy's notary practice. That intention resulted, they say, from advice they received at a notaries' convention to shelter their assets from such

> claims because of a reduction in the limit of third party liability insurance available to notaries. Thus, the transfer of these shares was not *bona fide* but was made for the purpose of avoiding future claims of creditors.
>
> 86 <u>It is sufficient to fix the defendants with liability if they foresaw potential creditors who might be defeated by the conveyance</u>: ***Newlands Sawmills Ltd. v. Bateman***, 1992 CanLII 742 (BC CA), 31 B.C.R. 351, [1922] 3 W.W.R. 649, 70 D.L.R. 165 (C.A.), appl'd ***Canadian Imperial Bank of Commerce v. Boukalis*** (1987), 1987 CanLII 2694 (BC CA), 11 B.C.L.R. (2d) 190 (C.A.), at p. 196; ***Bank of Montreal v. Kelliher*** (1980), 36 C.B.R.) (N.S.) 205 (B.C.S.C.) at p. 210. On their own evidence they foresaw such creditors here. [emphasis in original]

. . .

[64] Most recently, in ***Royal Bank of Canada v. Clarke***, 2009 BCSC 481, Madam Justice Griffin said:

> [21] I am bound by the authorities that have clearly held that it is unnecessary to show any dishonest intention, other than the intention to move the property out of reach of potential creditors, for the *Act* to apply: ***Jaston & Co. v. McCarthy*** (1996), 1996 CanLII 2982 (BC SC), 41 C.B.R. (3d) 212 (B.C.S.C.) as cited in ***Abakhan*** at para. 75.

. . .

[84] Counsel for the appellant argues that the judge made a palpable and overriding error in relying on Mr. Botham's evidence on examination for discovery. He argues that those answers suggest that Mr. Botham and BHL had only one intention, namely to protect the assets from creditors' claims. He argues that there was other evidence of Mr. Botham's legitimate business purposes, namely to gain the benefit of the s. 85 tax rollover. Counsel for the appellant placed much emphasis on the facts that the appellant was pursuing a prudent and legitimate business strategy in attempting to take advantage of the capital cost allowance claims available under s. 85 of the ***Income Tax Act***, and in attempting to limit his liability when investing in the new venture, JW Auto.

[85] Such arguments do not establish a palpable and overriding error. As this Court put it in ***Chan v. Stanwood***, "the question in every case is whether it was carried out 'to delay, hinder or defraud creditors and others of their just and lawful remedies'." While Botham may have been pursuing other business objectives, such as trying to obtain tax advantages, it is nevertheless clear that he had the intent to put BHL's assets beyond the reach of JW Auto's creditors. This is what the trial judge found, stating:

> BHL entered into the partnership with Mr. Welsh at a time when BHL had substantial assets. As a partner, BHL was responsible for all debts incurred by the partnership. BHL then acted to shelter its assets from the claims of present and future creditors of the partnership. BHL did this by transferring its assets to Braydon, a related company, for little to no consideration. (para. 81).

. . .

> [87] There is also no dispute that the *effect* of the transfer was to delay and hinder the creditors of BHL, both present and future. Section 1 captures transfers intended to defeat the rights of creditors and "others," which includes future creditors: ***Canadian Imperial Bank of Commerce v. Bukalis*** (1987), 1987 CanLII 2694 (BC CA), 34 D.L.R. (4th) 481, 11 B.C.L.R. (2d) 190 (C.A.) at 484. As a general partner of JW Auto, BHL was, as the trial judge found, "responsible for all debts incurred by the partnership." Therefore, by transferring its assets to Braydon, BHL was not only hindering its creditors, but was hindering the present and future creditors of JW Auto. As the trial judge found, at para. 81, creditors' claims currently exceed $20 million.

[56] The British Columbia Court of Appeal concluded that "a review of the case law amply demonstrates that a dishonest intent, or *mala fides*, is not necessary to avoid a transaction under s. 1 of the *Act*" (***Botham Holdings Ltd*** at para 65). The only intent that is necessary is the intent to put one's assets out of the reach of creditors, and such intent can be found even with respect to creditors who do not yet exist at the time of transfer but arise subsequently to the time of transfer.

The Plaintiff's Position

[57] Caplan argues that s. 2 of the ***FCA*** is applicable in this case. Section 2 has two components: firstly, there must be a conveyance of real or personal property, and secondly, the conveyor must have intended to "defeat, hinder, delay or defraud creditors". Caplan highlights that a "conveyance" includes an assignment or transfer, and "personal property" includes shares of a corporation and any interest therein. Caplan submits that the "conveyance" of "personal property" in this matter was the issuance of the Shares in Bobbi's name, the Cottage itself, and the proceeds from the Sale. Caplan argues that it does not matter whether Tom and/or Bobbi formed an intent in 2010 for 613 to hold the Cottage in trust for Bobbi and their children. What matters is that s. 2 of the ***FCA*** applies to the conduct of the Defendants whether the conveyance of property

or personal property occurred in 2010 (as the Defendants assert) or in 2021 (as Caplan asserts).

[58] Citing ***Botham Holdings Ltd (Trustee of)***, Caplan argues it is sufficient to fix the Defendants with liability "had they even potential creditors who might be defeated by the conveyance" (Argument of the Plaintiff at para 44). Caplan submits that an intent to defeat, hinder, delay or defraud creditors should be inferred from the circumstances (see ***Bank of Nova Scotia***, wherein the court provided that voluntary conveyances between relatives will be regarded with suspicion, however, it is still necessary for the plaintiff to establish a fraudulent intent on the part of the conveyor).

[59] Caplan cites ***Botham Holdings Ltd***, wherein the British Columbia Court of Appeal held that fraudulent intent on the part of a transfer does not need to be established under the ***FCA*** but rather all that needs to be demonstrated is that in making the gift or transfer, the transferor did so with the intent to delay, hinder or defraud creditors or others.

[60] In respect to the description of "badges of fraud" as articulated by the court in ***Royal Bank***, citing ***Bank of Nova Scotia***, Caplan submits that there are multiple "badges" in this case. Caplan argues that there clearly is a close relationship between the parties to the conveyance (by virtue that Tom and Bobbi are married), and that the transfer of the Shares was far in excess of any value legitimately owed to Bobbi by Tom. Caplan contends that the consideration received by Tom was "grossly inadequate" and that there was unusual haste to the transfer. Caplan highlights that Tom transferred ownership of 613, executed the bare trust agreement, and sold the Cottage, a month or so before having his business shut down by the MSC. All of this occurred within a few

months of Tom assigning himself into bankruptcy. Caplan highlights that all of the relevant documentation was prepared by a new lawyer and not the lawyer who had originally assisted 613 (except for filing annual returns) and that there is no documentation asserting that Bobbi was a beneficial owner since 2010. Caplan argues that the transfer of property created a trust used to conceal or cover a fraud.

[61] Caplan further argues that even if I conclude that a bare trust agreement provides sufficient evidence of the Defendants' prior intention for 613 to hold the Cottage in trust for Bobbi and their children in 2010, the transfer of property created a trust used to conceal or cover a fraud. Tom issued the Shares to Bobbi with the clear intention in 2010 to shield his assets from future creditors. Caplan contends that s. 2 of the ***FCA*** captures transfers intended to defeat the rights of creditors and "others", which includes future creditors. Damian testified that Tom told him in 2010 that he had arranged things in order to protect his assets. Tom testified that 613 held title to the Cottage in trust for Bobbi and their children to protect the assets from creditors.

[62] Caplan cites ***Garlicki (Trustee of)***, wherein the court identified additional "badges" of fraud to include that the bankrupt failed to disclose the assignment to her trustee in bankruptcy during two separate examinations in aid of execution. Caplan argues that this "badge" is present in this case. Noting that in 2012 Tom was examined in aid of execution and asked repeatedly about the ownership status of the Cottage, during which time he did not disclose that the Cottage was owned by 613 and held in trust for Bobbi but claimed that it was gifted directly to Bobbi by his parents.

[63] Caplan argues that numerous "badges" of fraud provide a preponderance of probabilities of fraud on at least a *prima facie* basis. As a result, Caplan submits that the evidentiary burden falls on the Defendants. Caplan contends that the Defendants have failed to produce evidence discharging the evidentiary burden and, as a result, Caplan says that it has established fraudulent intent on the preponderance of probabilities.

[64] Caplan submits that the requirements of s. 2 of the ***FCA*** have been met, and both the bare trust agreement and the issuance of the Shares should be declared void.

The Defendants' Position

[65] The Defendants argue that the Cottage is a trust property and does not form part of the property of the bankrupt estates. Specifically, the Defendants submit that the Family Trust was created in 2010 when 613 was incorporated to hold the Cottage for the benefit of Bobbi, their children and for future generations. The Defendants argue that Tom has consistently taken the position that the Cottage was never his property. As a result, the Defendants submit that Caplan's claim should be dismissed.

[66] The Defendants cite ***Bajwa v. Bajwa***, 2024 BCSC 1428, wherein Lamb J. cited the law of trusts and how it applied to the circumstances in the case:

> [58] To establish an express trust, there must be certainty of intention to create a trust, certainty of subject-matter or trust property, and certainty of object or beneficiary of the trust: *Waters' Law of Trusts in Canada*, 4th ed., by Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith (Toronto: Carswell, 2012) at 140. To establish certainty of intention, the settlor of the trust must demonstrate through words or actions that the settlor intended the trustee to hold the trust property in trust, though no specific or technical words are required to create a trust: ***Larochelle v. Soucie Estate***, 2019 BCSC 1329 at para. 183. The onus of proof to establish the existence of a valid trust lies on the person asserting it: ***Larochelle*** at para. 176.
>
> [59] I find that the Conversation between Habib Bajwa and Jamal Bajwa was sufficient to establish an express trust in favour of Habib Bajwa, as it included the three certainties required to establish an express trust:

> a) the Surrey Property was clearly identified as the trust property or subject of the trust;
>
> b) Habib Bajwa was clearly identified as the object or beneficiary of the trust; and
>
> c) Habib Bajwa (as settlor of the trust) clearly expressed that he intended Jamal Bajwa would hold the Surrey Property in trust for Habib Bajwa (as beneficiary of the trust).
>
> [60] In short, the Parents have proven on a balance of probabilities that Jamal Bajwa held the Surrey Property pursuant to an express trust in favour of Habib Bajwa, thus rebutting the presumption of indefeasible title. Despite being the registered owner of the Surrey Property from March 2005 to December 2016, Jamal Bajwa was not the beneficial owner.

[67] The Defendants argue that the evidence, when looked at as a whole, demonstrates that in 2010 there was an intention to create the Family Trust. The Defendants submit that the Cottage held by 613 was "clearly identified as the trust property or subject of the trust". In this respect, the Defendants contend that Bobbi, their children and future generations were objects of the Family Trust and that 613 was incorporated for the purpose of holding the Cottage in trust for their benefit.

[68] The Defendants accept that the onus is theirs to demonstrate the existence of the trust and argue that on a balance of probabilities standard they have met that onus.

[69] The Defendants argue that Damian's testimony corroborates that 613 was, in fact, a trust at the time that the new cottage was constructed. Accordingly, the Defendants contend that the evidence demonstrates that Caplan's submission that the Family Trust was a fabrication in 2021 is without merit.

[70] The Defendants cite ***Campbell et al***, wherein Justice Edmond (as he then was) expressed doubt as to whether a written declaration of a trust could have retroactive effect in the circumstances. The Defendants argue that the decision, and the subsequent appeal before the Manitoba Court of Appeal, does not (as argued by Caplan) definitively

stand for the proposition that written declarations of a trust cannot be applied retroactively to evidence and earlier intention to create a trust.

[71] The Defendants argue that on a balance of probabilities, I should conclude that the reason for 613 was incorporated was so that the Cottage could be held in trust for the benefit of Bobbi, their children and future generations. The Defendants highlight that both Tom and Bobbi provided complementary testimony that the intention in the design of the new cottage was for the benefit of their family to enjoy for generations to come.

[72] Caplan highlights that Tom signed a guarantee in his capacity as director of 613 in 2012 that pledged the cottage as security rather than having the beneficial owner(s) execute relevant documents. The Defendants submit that there is no authority that such a guarantee much be executed by a beneficial owner nor is there authority that provides that the director of a bare trust corporation must be a beneficiary of the trust.

[73] With respect to the issue of whether the issuance of the Shares to Bobbi in March of 2021 constitute a fraudulent conveyance pursuant to the ***FCA***, the Defendants distinguish the circumstances in this matter from the case law authorities provided by Caplan. In particular, the Defendants argue that there is no evidence that the incorporation of 613 in 2010 was undertaken for any fraudulent or improper purpose; there does not appear to be any falsifying of documentation as was found in the case law authority provided by Caplan; and the Family Trust was created in 2010, more than a decade before Tom's bankruptcy (at which time there was no need to shield his assets from creditors).

[74] The Defendants submit that setting up a corporation is a common practice and that all taxpayers are entitled to arrange their affairs in order to reduce their tax liability. The Defendants argue that there is no evidence that 613 was incorporated for the purpose of defeating creditors.

[75] The Defendants cite ***Mandryk v. Merko***, 19 DLR (3d) 238 (MBCA), wherein the ***FCA*** was considered by the Manitoba Court of Appeal in respect to voluntary transfers to a spouse in the context of the other spouse declaring bankruptcy. The Defendants submit that the Manitoba Court of Appeal found that gratuitous transfers from one spouse to another were not fraudulent conveyances because the purpose for the transfers was well supported by evidence and not for the purpose of defeating creditors. The Defendants argue that I should consider the facts and circumstances surrounding the Cottage in order to determine whether 613 issued the Shares to Bobbi in 2021 as a fraudulent conveyance. In this respect, the Defendants contend that Bobbi was already a beneficial owner of the Cottage at the time and that the issuance of the Shares should not be construed as a fraudulent conveyance. The Defendants argue that Caplan is required and has failed to demonstrate that Tom owns 613 to some extent.

Analysis

[76] In my view, s. 2 of the ***FCA*** is applicable in this case. There has been a conveyance of real or personal property and the conveyor intended to "defeat, hinder, delay or defraud creditors". I am mindful that a "conveyance" includes an assignment or transfer, and "personal property" includes shares of a corporation and any interest therein. In

these circumstances, the "conveyance" of "personal property" is the issuance of the Shares to Bobbi, the Cottage itself, and the proceeds from the Sale of the Cottage.

[77] In my view, Tom and/or Bobbi likely formed the intent in 2021 for 613 to hold the Cottage in trust for Bobbi and their children.

[78] In the alternative, if Tom and/or Bobbi formed the intent in 2010 for 613 to hold the Cottage in trust for Bobbi and their children (as argued by the Defendants), s. 2 of the ***FCA*** nonetheless applies to the conduct of the Defendants. The only intent that is necessary is the intent to put one's assets out of the reach of creditors, and such intent can be found even with respect to creditors who do not yet exist at the time of transfer but arise subsequently to the time of transfer (***Botham Holdings Ltd***). I have inferred from the circumstances an intent to defeat, hinder, delay or defraud creditors. I have considered ***Bank of Nova Scotia***, wherein the court articulated that voluntary conveyances between relatives will be regarded with suspicion. Nonetheless, it is still necessary for Caplan to establish a fraudulent intent on the part of the Defendants, which I find has been established in this case. I am mindful that in ***Botham Holdings Ltd***, the court noted that all that needs to be proven is that in making the gift or transfer, the transferor did so with intent to delay, hinder, or defraud creditors or others. I find that that is exactly what occurred in this circumstance.

[79] I note there are a number of "badges of fraud" in this case including, *inter alia*, that the transfer of the Shares to Bobbi was far in excess of any value legitimately owed to her by Tom. The consideration received by Tom was grossly inadequate.

[80] I note a "badge" of fraud involves unusual haste to make the transfer, which I find occurred in this instance. Tom's transfer of ownership of 613, execution of the bare trust agreement, the Sale of the Cottage shortly after his business was shut down by the MSC, all occurred within a few months of Tom assigning himself into bankruptcy. Up until that point, there was no documentation that asserts Bobbi or their children as beneficial owners of the Cottage.

[81] A "badge" of fraud is that a "close relationship exists between the parties to the conveyance", which is clearly present in this case between husband and wife.

[82] In my view, the creation of the bare trust agreement was an attempt to give an air of legitimacy to the transfer of ownership of 613, which was done with the primary intention of ensuring that Tom's creditors received nothing.

[83] Even if I were to have found that the bare trust agreement is evidence of the Defendants' intention for 613 to hold the Cottage in trust for Bobbi and their children in 2010, another "badge" of fraud is present in this case as follows. I note that Tom testified that 613 held title to the Cottage in trust for Bobbi and their children specifically to, among other things, protect the assets from creditors and Damian testified that Tom advised him in 2010 that he had arranged his affairs in this manner in order to protect his assets. I do not believe the Defendants' argument that the transfer of the Shares to Bobbi was simply to provide effect to what had always been the legal ownership arrangement. Section 2 of the ***FCA*** captures transfers intended to defeat the rights of creditors and "others", which includes future creditors. The creation of the bare trust agreement, even

if conceived of in 2010, was in my view intended to put Tom's assets beyond the reach of future creditors as evidenced by Tom and Damian's testimony.

[84] I am mindful that in ***Garlicki (Trustee of)*** the bankrupt failed to disclose the assignment to her trustee in bankruptcy during separate examinations in aid of execution. This has occurred in this matter. In 2021, Tom was examined and asked repeatedly about the ownership status of the Cottage and did not disclose that the Cottage was owned by 613 in trust for Bobbi and their children. Instead, Tom claimed that it was gifted directly to Bobbi by his parents.

[85] On a preponderance of probabilities, and in accordance with ***Conte (Executrix and trustee of)***, Caplan has made out its case on a *prima facie* basis. As a result, the evidentiary burden falls on the Defendants.

[86] In my view, the Defendants have failed to produce evidence discharging this evidentiary burden and, as a result, Caplan has established fraudulent intent on a preponderance of probabilities. The bare trust agreement itself and its specific wording leads to the conclusion that Tom intended to delay, defeat or hinder the claims of his creditors.

Was There a Transfer at Undervalue Pursuant to the *BIA*?

Applicable Law

[87] The ***BIA*** defines property in s. 2 as

> any type of property, whether situated in Canada or elsewhere, and includes money, good, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property; . . .

[88] In ***Chartier v. MNP Ltd***, 2013 MBCA 41, the Manitoba Court of Appeal noted that appellant jurisprudence has endorsed a broad definition of property under s. 2 of the ***BIA*** recognizing "a clear legislative intention to catch every conceivable type of property right and interest", which "transcends the traditional categories established in property and trust law that distinguish between personal and real rights, equitable and legal interests" (at para 49, emphasis in original, quoting ***PricewaterhouseCoopers Inc v. Manulife Financing et al***, 2003 NBCA 9; and para 50, emphasis in original, quoting Yoine J. Goldstein, "Property of the Bankrupt", *Halsbury's Laws of Canada - Bankruptcy and Insolvency*, online: LexisNexis <http://www.lexisnexis.ca> (at HBI-62)).

[89] A "transfer at undervalue" is defined in s. 2 of the ***BIA*** as:

> a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor; . . .

[90] Section 96 of the ***BIA*** provides as follows:

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

> **(ii)** the transfer occurred during the period that beings on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and
>
> > **(A)** the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or
> >
> > **(B)** the debtor intended to defraud, defeat or delay a creditor.
>
> **Establishing values**
>
> **(2)** In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

[91] ***Re Paul W. Lee, a Bankrupt***, 2017 ONSC 388 (***Lee, Re***), provides that:

> [16] . . . For a non-arm's length transaction that is attacked within one year, the transaction may be avoided without any consideration or proof of an intention to defraud, to prefer, or any other fact other than the simple existence of the transaction at an undervalue.

[92] Section 4(5) of the ***BIA*** provides that "persons who are related to each other are deemed not to deal with each other at arm's length while so related".

[93] In order to rebut this presumption in favour of the trustee, those seeking to oppose are required to demonstrate that the transaction was "with appropriate consideration, in the normal course of business, and with no view to insolvency" (***PricewaterhouseCoopers Inc v. Legge***, 2011 NBQB 255, at para 15).

[94] The creation of a valid trust may rebut the presumption in favour of a trustee but for a trust to come into existence it must have three essential characteristics: (1) certainty of intent; (2) certainty of subject matter; and (3) certainty of object. A trust is declared void if it fails to establish any three of these elements (see ***Bankruptcy of Taylor Ventures Ltd (554925 BC Ltd)***, 2004 BCSC 1612, at para 32).

[95] In accordance with ***Campbell et al v. Brar et al***, 2022 MBKB 225, written declarations of trust cannot be applied retroactively to evidence of an early intention to create a trust. Instead, "evidence to be considered to support or rebut a trust or a resulting trust must relate only to the intention of the parties at the date of the purchase or transfer" (at para 84).

[96] The common law has developed a rebuttal presumption of a trust, but the modern approach as elaborated in ***Ehrmantraut v. Keith G. Collins Ltd***, 2008 MBQB 140, supports weighing all of the evidence to determine what was intended by the parties at the time of transfer rather than accepting a presumption of resulting trust as a matter of course. McKelvey J. stated:

> [24] It must be emphasized that equity will not allow a fraud to occur in any circumstances. That being said, the common law has developed certain rebuttable presumptions of law over the years. A resulting trust is one such presumption, albeit the courts now appear to be hesitant in accepting such a presumption out of hand. Instead, the judicial direction supports a weighing of all of the evidence in order to determine what was intended by the parties.

[97] Where it can be determined that the intent to establish a "trust" is to defeat personal creditors, the requisite intent to establish a valid trust is lacking and the trust is void. A person who declares themselves the trustee of the property, rather than making a transfer of assets to another as trustee, lends itself to this misrepresenting behaviour. The establishment of "sham" trusts is canvassed extensively in *Waters' Law of Trust in Canada,* 3rd ed., M.R. Gillen, D.W.M. Waters, L.D. Smith, eds (Toronto: Thomson Carswell, 2005).

Plaintiff's Position

[98] Caplan submits that the definition of "property" under s. 2 of the ***BIA*** is wide enough to include 613. As a result, Caplan argues that the Defendants bear the burden of rebutting the presumption that s. 96(2) of the ***BIA*** applies as the necessary elements to establish a transfer undervalue are present in this case. Caplan highlights that no consideration was received by Tom or that the consideration received by Tom was conspicuously less that the fair market value; Bobbi was not dealing at arm's length with Tom; and the events in question 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.

[99] Caplan argues that fraudulent intent need not be established to find a transaction undervalue void as against a trustee in bankruptcy (see ***Lee, Re***).

[100] Caplan submits that the Defendants have produced no evidence of consideration received by Tom in return for Bobbi receiving and/or benefiting from over $1,800,000 that was paid for the Cottage. As a result, Caplan argues that the Defendants have not rebutted the presumption in favour of Caplan. Caplan submits that the relationship of husband and wife is *prima facie* recognized to be a "non-arm's length" relationship pursuant to s. 4(5) of the ***BIA***. With regards to the final element under s. 96(2) of the ***BIA***, Caplan submits that the Defendants have not provided evidence of sufficient detail to demonstrate that they intended to create a trust in 2010. On the contrary, Caplan contends that the evidence establishes that the intention to create a trust for Bobbi arose

in March of 2021 due to Tom's financial difficulties and his realization that a trust could possibly protect 613 and the Cottage from his creditors.

[101] Caplan argues that the Defendants have not met their onus to demonstrate that a valid trust was in existence at the date of bankruptcy and, in this respect, have not established any of the three certainties required to prove a valid trust. Caplan submits that it has met its burden in establishing that section 96(2) of the ***BIA*** applies in this matter.

The Defendants' Position

[102] The Defendants argue that the cases submitted by Caplan are distinguishable on their facts, *inter alia*, there is no evidence that the incorporation of 613 in 2010 was done for any fraudulent or improper purpose; there is no reason to believe that the documents in this case that purport to have been executed on a particular date were not executed on the dates they were purported to have been executed, in other words, there does not appear to be any falsifying of documentation as was found in other cases; and, the Family Trust was created in 2010, approximately 11 years prior to Tom's bankruptcy, at the time there was no evidence of any need to attempt to shield assets from creditors.

[103] The Defendants argue that the benefits of incorporation are well known to lawyers and professionals, and that 613 was accordingly incorporated for legitimate purposes instead of for the purposes of defeating any creditors that might materialize in the future.

[104] The Defendants argue that all of the circumstances surrounding the Cottage should be taken into consideration by the court in determining whether the issuance of the Shares to Bobbi was inappropriate. The Defendants submit that Bobbi was already a

beneficial owner of the Cottage at the time of the issuance of the Shares. The Defendants argue that Caplan has not demonstrated that Tom owned 613 to some extent and, as a result, Caplan has failed to demonstrate that the issuance of the Shares to Bobbi in 2021 was a transfer undervalue with the intent of defeating Tom or his corporation's creditors.

Analysis

[105] The broad definition of "property" under s. 2 of the ***BIA*** is wide enough to include 613. The Defendants, therefore, bear the burden of rebutting the presumption that s. 96(2) of the ***BIA*** applies as the necessary elements to establish a transfer undervalue are present in this situation. I note that no consideration was received by Tom or the consideration received by Tom was less than the fair market value; Bobbi was not dealing at arm's length with Tom; and the events in issue 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 (see ***PricewaterhouseCoopers Inc***).

[106] I agree with Caplan's assertion that the transaction may be avoided without any proof of an intention to defraud, to prefer, or any other fact other than the simple existence of the transaction at an undervalue. Fraudulent intent need not be established to find a transaction undervalue void as against a trustee in bankruptcy (see ***Lee, Re***).

[107] The Defendants have not provided sufficient evidence to show that they intended to create a trust in 2010. On the contrary, and in considering the totality of the evidence before the court, the intention to create a trust for Bobbi and their children almost certainly arose in March of 2021 as a result of Tom's financial duress and realization that a trust might protect 613 and the Cottage from his creditors.

[108] In my view, the timing of the transfer of ownership of 613 and the Sale of the Cottage establish that they were done with a view towards insolvency. The Defendants' submission that the bare trust agreement had retroactive effect is simply not credible based on the totality of evidence before the court, including the hasty manner in which events transpired. Rather, the issuance of the Shares was intended to shield the proceeds of the Sale of the Cottage from Tom's creditors.

[109] In this case, there is no credible evidence to establish certainty of intent in the minds of the Defendants in 2010 without any documentary proof. I do not accept that the 2021 bare trust agreement provides sufficient evidence of an intention to create a trust in 2010.

[110] I have considered the evidence to support a trust or a resulting trust at the date of purchase or transfer. In my view, the case law supports a weighing of contemporaneous evidence in order to determine what was intended by the parties. As a result, and in this case, the bare trust agreement does not provide evidence of the Defendants' intention to create or document a retroactive trust (see ***Campbell et al***; ***Ehrmantraut***).

[111] I am mindful that Tom maintained full control of 613 for the entire 11-year period after incorporation before issuing the Shares to Bobbi on the eve of bankruptcy. Tom could not provide any documentation during the 11-year period that evidenced the intention of the beneficial ownership arrangement as claimed.

[112] I have considered the evidence provided at the time of transfer and do not find that the Defendants have produced contemporaneous documentation to demonstrate

certainty of intent, object or subject in 2010. The Defendants simply rely on the testimony of Damian, whose recollection of his conversation with Tom more than a decade ago, was vague and of little probative value in establishing the "three certainties" (see ***Tong (Re)***, 2006 BCSC 962 at paras 24-27). In my view, Damian did not provide credible certainty of object. There is no other reliable evidence establishing the object of the trust, except the bare trust agreement itself, which purports to establish only Bobbi as the beneficiary (which is contrary to Damian's testimony that Tom told him that 613 was a trust for his wife and children, and that the payee with respect to his contract work on the Cottage was "a family trust").

[113] The creation of the Family Trust by the Defendants is *prima facie* suspicious. I have considered the Defendants' position that the trust was created in 2010 and that Bobbi has been the beneficial owner since that time. However, Bobbi stated during examinations for discovery on January 31, 2024, that she did not know who the beneficial owner of the Cottage was before or after the bare trust agreement was executed. I find considerable conflicting evidence during testimony by Tom, Bobbi and Damian in relation to the contents of the bare trust agreement itself. As a result, there is a lack of certainty with respect to the object of the alleged trust and intention of the Defendants. Given that I do not find the Defendants to be credible, and based on the foregoing, I find that it is far more probable that the intention to transfer ownership of 613 was formed in March of 2021.

[114] I do not find there is any reliable evidence of an intention to create the Family Trust. I do not find reliable evidence to establish with certainty the object of the trust. I do not find the three certainties have been established.

[115] I find that Caplan has met its burden in establishing that s. 96(2) of the ***BIA*** applies in this case. Furthermore, I find that the Defendants have not met their burden of rebutting the presumption in favour of the Trustee as the Defendants have not shown that the Sale and issuance of the Shares transferred to Bobbi were made with appropriate consideration, in the normal course of business and with no view to insolvency.

HAVE TOM AND BOBBI COMMITTED THE TORT OF CONSPIRACY?

Applicable Law

[116] There are two forms of the tort of conspiracy. One form requires either an agreement between two or more parties to do something wrongful that is harmful to another person, and the other is where unlawful means are used to carry out an object that is otherwise lawful that cause harm to another person.

[117] In ***Hall-Chem Inc v. Vulcan Packaging Inc***, [1994] OJ No 817 (ONCJ), a claim for conspiracy was successful at the same time as a claim for fraudulent conveyance. The decision in ***Hall-Chem Inc*** cited Estey J.'s definition of the two forms of conspiracy (at p 37):

> In *Canada Cement LaFarge Ltd. et al. v. British Columbia Lightweight Aggregate Ltd. et al.* (1983) 145 D.L.R. (3rd) 385 (S.C.C.), Estey J. made the following statement about the law of torts in respect of conspiracy:
>
> > Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law

> of torts does recognize a claim against them in combination as the tort of conspiracy if:
>
> > (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
> >
> > (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.
>
> In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff.

The Plaintiff's Position

[118] Caplan argues that both forms of conspiracy as articulated by Justice Estey and cited in ***Hall-Chem Inc*** have been demonstrated in this matter. In respect of the first form of conspiracy, Caplan submits that the transfer of the Shares was unlawful, under either the ***FCA*** or the ***BIA***, for reasons articulated above. Caplan cites ***Hall-Chem Inc***, wherein the court states: "Since the conduct in which [the defendant] was engaged . . . amounted to a fraudulent conveyance, the requirements of the second test set out by Estey J. are satisfied" (at p 39). Caplan contends that the same should apply in this case insofar as I should infer from the actions of the Defendants that they knowingly took steps to deprive Tom's creditors of the ability to collect on accounts.

The Defendants' Position

[119] The Defendants argue that the Tom and Bobbi have not committed the tort of conspiracy. The Defendants argue that the transfer of the Shares was lawful and did not contravene either the ***FCA*** or the ***BIA***.

Analysis

[120] Considering the transfer of the Shares was, in my view, unlawful under the ***FCA*** and the ***BIA***, the first form of conspiracy has been met. In ***Hall-Chem Inc*** the court stated at paragraph 76: "Since the conduct in which [the defendant] was engaged . . . amounted to a fraudulent conveyance, the requirements of the second test set out by Estey J. are satisfied" (at p 39). In my view, the same rationale should apply here. I infer from the actions of the Tom and Bobbi that they knowingly took steps to deprive Tom's creditors of the ability to collect on their accounts.

WHAT ARE THE APPROPRIATE DAMAGES?

Applicable Law

[121] Sections 2 of the ***FCA*** and 96(1) of the ***BIA*** provide a mechanism for the court to find the transfer of the Shares and Sale as being void. Furthermore, the decision in ***Hall-Chem Inc*** is instructive. In ***Hall-Chem Inc***, the damages were calculated as the full amount owed to the plaintiff by the defendants on outstanding accounts that were found to have been affected by the fraudulent conveyance.

The Plaintiff's Position

[122] Caplan submits that similarly to ***Hall-Chem Inc***, damages ought to be calculated as to the full amount owed by the Defendants on outstanding accounts. Caplan argues that I should use the value of the debt that was avoided by the transfer of the Shares, specifically the Sale of the Cottage and the Sale proceeds, as an appropriate measure for damages.

[123] Caplan submits that even if the conduct of the Defendants is not found to be unlawful, it is clear that the predominate purpose of the transfer of the Shares to Bobbi and the payment of the Sale proceeds to or for Bobbi's benefit was to injure Tom's creditors.

[124] Caplan asks that I assess the Defendants' version of events in light of the whole of the evidence. In this respect, Caplan argues that Tom and Bobbi have been less than truthful, failed to produce relevant documents and have been contradicted by the documents that Caplan has been able to obtain from third parties.

[125] Caplan contends that Tom and Bobbi should not be believed. On a balance of probabilities, Caplan argues that Tom transferred ownership of 613 to Bobbi and sold the Cottage with the intent to defeat, hinder, delay and/or defraud his creditors. In an attempt to make the transaction appear legitimate, Caplan says that Tom fraudulently instructed his counsel to draft the bare trust agreement.

[126] Caplan argues that Tom and Bobbi acted in contravention of the ***FCA***, the ***BIA*** and committed the tort of conspiracy. As a result, Caplan maintains its claim to the entire gross proceeds paid for the Cottage, totaling $1,816,000, plus interest and costs on a solicitor-client basis.

The Defendants' Position

[127] The Defendants argue that if I find that there is no Family Trust and that Tom was either "the" or "an" owner of 613, I should determine the value of Tom's interests on the following basis. The Defendants submit that if the trust fails on the three certainties noted above, then I will need to determine the shareholdings of 613. In this respect, the

Defendants submit that such a determination should be made based on the intentions at the time of 613's incorporation, all of which demonstrates that Bobbi and their children were intended to own the Cottage. As a result, the Defendants submit that the shareholdings ought to be divided equally between Bobbi and their children. In response to Caplan's position that the entire value of the Cottage should be available to Caplan, as trustee, the Defendants argue that any amount recoverable should be restricted to Tom's proportionate share of the net proceeds of sale of the Cottage after payment of any mortgages registered against it were paid out.

Analysis

[128] In my view, the damages ought to be calculated as to the full amount owed by the Defendants on outstanding accounts. Given that I have determined that a fraudulent conveyance under the ***FCA*** has occurred, a transfer at undervalue pursuant to the ***BIA*** has taken place, and that Tom and Bobbi conspired to defeat the claims of Tom's creditors by taking these actions, the full amount owed to Caplan by the Defendants on outstanding accounts should be paid. Similarly to the decision in ***Hall-Chem Inc***, the value of the debt that was avoided by the transfer of the Shares and payment of the Cottage Sale proceeds to Bobbi is an appropriate measure for the damages. I am mindful that there is an almost complete lack of documentation regarding both the cost of construction of the new cottage and, specifically, the source of funding for such construction, and that the SCU LOC documentation does not confirm the source of funding for the construction of the new cottage.

<u>CONCLUSION</u>

[129] In consideration of the whole of the evidence on a balance of probabilities, I find following:

a) the Sale and the issuance of the Shares to Bobbi were made with the intent to defeat, hinder, delay, and/or defraud Tom's creditors within the meaning of s. 2 of the ***FCA***, and as such are void;

b) the Sale and the issuance of the Shares to Bobbi constituted a transfer at undervalue of Tom's property within the meaning of ss. 2, 95 and 96 of the ***BIA***; and

c) Tom and Bobbi conspired to defraud Tom's creditors by taking these actions, and as such committed the tort of conspiracy.

[130] I find in favour of Caplan and provide judgment to the entire gross proceeds paid for the Cottage in the amount of $1,816,000 plus interest on such amount, both before and after judgment, at a commercially reasonable rate.

[131] If costs cannot be agreed upon, counsel may seek an appearance to make submissions.

Bowman J.