

LexisNexis® Agricultural Law *NetLetter*

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Issue 370

Issues added on the 7th and 21st of every month.

HIGHLIGHTS

- * A Justice of the Alberta Court of Queen's Bench has concluded that a transfer of two quarters of farmland owned jointly by a husband and wife to a wife were "at under value" and were therefore void against the bankruptcy trustee's assignee. The transfer occurred in February of 2014. The husband made an assignment into bankruptcy in March of 2014. The Court held that it was not necessary to establish the transfer was fraudulent, as it was not made at arm's length. The Court directed an oral hearing with respect to whether or not the farmer was entitled to claim an exemption in the transferred farmland. (Royal Bank of Canada v. Racher, [CALN/2017-042](#), [\[2017\] A.J. No. 254](#), Alberta Court of Queen's Bench)

NEW CASE LAW

Royal Bank of Canada v. Racher;

[CALN/2017-042](#),

Full text: [\[2017\] A.J. No. 254](#);

[2017 ABQB 181](#),

Alberta Court of Queen's Bench,

J.T. Eamon J.,

March 16, 2017.

Bankruptcy and Insolvency -- Validity of Under Valued Transfer of Farmland.

The Royal Bank of Canada ("RBC") applied for a Court Order to set aside a transfer of Alberta farmland from James Racher and Audrey Racher (the "Rachers") jointly to Audrey Racher. RBC alleged that the transfer was at under value under s. 96 of the Bankruptcy and Insolvency Act, RSC 1985, c B-3 as amended (the "BIA"), or a fraudulent transfer or conveyance under the Fraudulent Preferences Act, [RSA 2000, c F-24](#), or the Statute of Fraudulent Conveyances, 1571, 13 Eliz a, c 5 (the "Statute of Elizabeth").

The Rachers contested RBC's claim on several grounds, including the ground that the transfer was at under value. They argued that Mr. Racher was not insolvent or on the eve of insolvency, that there was a legitimate reason for the transaction, and there was no fraud or dishonesty on the part of Mr. Racher.

The Rachers also argued that no creditor was prejudiced by the transaction because his joint interest in the property would have been exempt under the Civil Enforcement Act, [RSA 2000, c C-15](#) and the regulations thereunder. Mr. Racher maintained his primary occupation was farming. He sought an exemption over 160 acres which included a residence.

The transfer was made on February 10, 2014. The lands consisted of 2 adjacent quarter sections of farmland including a residence, a shop, a hay shed, a machine shed, and shelters for livestock as well as open farmland and pasture.

The farmlands were clear of encumbrances. The transfer and an Affidavit attached to the transfer indicated that the consideration paid was "\$1.00 and transfer from husband and wife to wife".

The Rachers claimed that the transfer was not merely for the consideration described in the transfer, but for the legitimate purpose of swapping the Alberta farmlands to Mrs. Racher, for Ontario farmlands to Mr. Racher, so that Mr. Racher could obtain financing for an Ontario trucking business. The swap was based on legal advice from an Ontario lawyer who indicated it would not be fair for Mrs. Racher to mortgage her interest in the Ontario land because she did not have a significant interest in the trucking business.

The RBC was a creditor of Mr. Racher, who had provided a personal guarantee of debts due by the trucking company to RBC.

Mr. Racher made an assignment into bankruptcy on March 6, 2014. On June 25, 2014 Mr. Racher's bankruptcy trustee assigned the subject matter of the claim to RBC pursuant to s. 38 of the BIA.

The RBC debt was incurred in Ontario. Mr. Racher filed for bankruptcy in Ontario. The trucking business operated in Ontario.

Mr. Racher attributed the cause of his bankruptcy to the failure of a third party to purchase the trucking business.

A witness for RBC swore that at the time of the transfer of the farmlands, the trucking company was in serious financial difficulty and did not have sufficient assets to pay RBC.

Section 96(1) of the BIA permits a trustee to apply to a Court to declare that a "transfer of under value is void" if the other party was not dealing at arm's length with the debtor and the transfer occurred within one year of the date of the bankruptcy, or within 5 years from the date of the bankruptcy if the debtor was insolvent at the time of the transfer or if the debtor intended to defraud, defeat or delay a creditor.

A transfer at under value is defined by s. 2 of the BIA as follows:

[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.

By virtue of s. 4(2)(a) and 96(1)(b) of the BIA, persons related by marriage are deemed not to be at arm's length.

Section 67(1) of the BIA incorporates exemption provisions under provincial law.

Decision: Eamon, J granted RBC's application, declared that the transaction was at under value and was void against the trustee in bankruptcy and RBC and directed an oral hearing with respect to whether Mr. Racher was entitled to an exemption on the date of bankruptcy under Alberta law [at para. 148 and 149].

Eamon, J considered a number of issues:

1. Whether a bankrupt who transfers potentially exempt property is deprived of an exemption if the transfer is later declared void.

Eamon, J concluded that Mr. Racher was not deprived of the right to claim an exemption if the transfer was declared void, relying on *Ramgotra (Trustee of) v North American Life Assurance Co.*, [\[1996\] 1 S.C.R. 325](#) (SCC), [\[1996\] 1 SCR 325](#) at paras 44-51; *Holthuyson (trustee of) v Holthuysen* (1986), 1986 ABCA 226, 49 Alta. LR (2d) (CA) at para. 8; *Re Weiss*, [2002 ABQB 783](#), 2002 ABQB 783 (Registrar in bankruptcy); *Re Melnychuk* (1997), [197 AR 62](#) (Registrar in Bankruptcy); *Re Abba* (1998), [1998 ABQB 730](#), 66 Alta LR (3d) 277 (QB).

2. What law governs the exemptions:

Eamon, J rejected RBC's contention that the law of locality where the bankrupt goes into bankruptcy governs exemptions. Eamon, J relied on s. 67(1)(b) of the BIA which provides that "laws applicable to the province within which the property is situated and within which the bankrupt resides" govern exemptions, and concluded that if Mr. Racher was found to have exempt property in Alberta, and if he resides in Alberta, then Alberta law applies.

3. Whether it is too late for Mr. Racher to claim the exemption:

Eamon, J rejected RBC's argument that Mr. Racher was a discharged bankrupt, and could not claim the exemptions. Eamon, J held [at para. 65] that there was nothing in the Civil Enforcement Act that limits the time in which an exemption claim can be made.

4. Whether an exemption claim precludes a remedy under s. 96 of the Bankruptcy Act for a transaction at under value had occurred:

Eamon, J held that if a Court should find a transfer was at under value, the onus shifts to the bankrupt to show that the property is fully exempt [at para. 76] relying on *Royal Bank v Laughlin*, [2001 ABCA 78](#) at para 33 and *Re Heinz*, [2003 ABQB 400](#) at para 10.

5. Whether the transfer was under value and void:

Eamon, J concluded that the Rachers were married and therefore related, and that they were therefore not dealing at arm's length [at para. 81 and 82]. Eamon, J further concluded that because the transfer was to a person who was not at arm's length, it was not necessary to show that Mr. Racher intended to defeat, hinder or delay creditors or that the debtor was insolvent or rendered insolvent by the transaction [at para. 83].

Eamon, J further concluded that the issue of whether the transfer was at under value could be determined on the summary record before him [at para. 91]; that the evidence with respect to the value of the Alberta farmland established that the land was "conspicuously" under valued at \$1.00 [at para. 20] having regard to evidence of (among other things) comparable land values in the range of \$1,000.00 to \$1,257.00 per acre; and that the Rachers had failed to provide any reliable evidence with respect to the value of the "swap" lands in Ontario [at para. 125 and 126]. Eamon, J held [at para. 127] that he had no hesitation of declaring the transfer void against RBC.

6. Whether there was an exemption:

Eamon, J concluded [at para. 130 to 142] that the issue of whether Mr. Racher is entitled to an exemption would have to be determined at a hearing with oral evidence.

CREDITS

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