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A Case for Reform: The Law of Fraudulent Preferences and Conveyances

Written by: Maria Lavelle

Case Commented On: *1007374 Alberta Ltd v Ruggieri*, [2013 ABQB 420](#)

The case of *1007374 Alberta Ltd v Ruggieri*, [2013 ABQB 420](#), is not significant in and of itself, but rather because it highlights some (but not all) of the shortcomings of the current state of the law regarding fraudulent preferences and conveyances. This is an area of law that has been described as “notoriously antiquated and long overdue for reform” (see Tamara M. Buckwold’s article: “Reforming the Law of Fraudulent Conveyances and Fraudulent Preferences” (2012) 52 Canadian Business Law Journal 333, at 333).

In recognition of these shortcomings, the Uniform Law Conference of Canada (ULCC) has just completed a project to replace the existing legislation (in Alberta, the *Fraudulent Preferences Act*, [RSA 2000, c F-24](#) (*FPA*) and *Fraudulent Conveyances Act*, 1571, 13 Eliz 1, c 5, (*FCA*)) with a single statute – the [Uniform Reviewable Transactions Act \(URTA\)](#). The [ULCC](#) is a body that considers areas in which provincial and territorial laws would benefit from harmonization. The *URTA* is the result of over eight years of work and review by a working group of the ULCC. The [Alberta Law Reform Institute](#) is currently reviewing the possible implementation of the *URTA* in Alberta.

Case Summary

In brief, 1007374 Alberta Ltd. (1007 Alberta) entered into an agreement with A Ruggieri Engineering Ltd. (“Engineering”), where 1007 Alberta would refer and transition its clients to Engineering. In return, Engineering agreed to pay quarterly payments of up to \$80,000 per annum. 1007 Alberta did not receive those payments in 2004 and commenced a lawsuit against Engineering (the “first action”). Following a trial in the [first action](#), 1007 Alberta obtained a judgment against Engineering for just over \$475,000 inclusive of costs and interest.

When 1007 Alberta tried to enforce its judgment, however, it learned that three days before the first action commenced, Engineering had changed its name to 857508 Alberta Ltd (“Alberta Engineering”). On May 16, 2011, Engineering granted general security agreements of \$500,000 in favour of the defendants, Mr. Ruggieri and GMR Management Corporation. On June 1, 2011, Engineering also issued promissory notes in favour of the defendants. In March 2013, 1007 Alberta commenced a second action alleging, amongst other things, that there was a fraudulent conveyance of Engineering’s assets to Alberta Engineering and that the granting of general security agreements to Mr. Ruggieri and GMR Management Corporation was a fraudulent preference under subsections 2, 4 and 11 of the *FPA*.

In the interim, 1007 Alberta sought an interlocutory attachment order/*Mareva* injunction to secure the amount of the Judgment plus the anticipated costs of the action. As neither the *FCA* nor the *FPA* contemplate remedies other than a declaration that the impugned transaction is void, the attachment order was brought under section 17 of the *Civil Enforcement Act*, RSA 2000, c C-15 and the *Mareva* injunction derived from the Court's equitable jurisdiction to grant injunctive relief. Hawco J. granted those forms of relief in *1007374 Alberta Ltd v Ruggieri*, [2013 ABQB 278](#). 1007 Alberta subsequently requested an extension of Hawco J's order until the conclusion of the second action. In the case under consideration Yamauchi J. granted 1007 Alberta's request for extension.

Commentary

While the case commented on concerns an application for an attachment order and injunctive relief, as part of that application 1007 Alberta had to demonstrate a *prima facie case* on the merits. Accordingly, for the purposes of this comment, the judgment contains considerable discussion about the current law of fraudulent preferences and conveyances.

In keeping with the current law, in order to challenge a transfer as a fraudulent conveyance, 1007 Alberta based its action under two separate statutes: the *Fraudulent Conveyances Act, 1571 (FCA)*, an act that is dated to say the least, and section 1 of the more limited and less obviously named *Fraudulent Preferences Act (FPA)*.

One of the biggest shortcomings of the *FCA* is that it dates from the 16th Century and requires the consideration of hundreds of years of case law, much of which is contradictory. In addition, one of the more difficult and questionable requirements under the *FCA* is that of intent. Under the *FCA*, the onus is on the party challenging the transfer to demonstrate that a party intended to perpetrate a fraud against its creditors. As Yamauchi J. considered in his judgment (at paras 29-33), this is typically accomplished through consideration of the so-called "badges of fraud" where an attempt is made to glean intent from the party's actions. As Yamauchi J alludes to, under the current law, there is a debate as to whether a debtor's insolvency results in an absolute presumption of insolvency (see for example *Freeman v Pope* (1870), LR 5 Ch 538) or a rebuttable presumption of intestacy (see for example *Ex Parte Mercer In re Wise* (1886), 17 QBD 290 (CA)).

Another issue raised in the case is what amounts to "property" under the *FCA*. The *FCA* applies only to transfers of an interest in real or personal property. In the case under consideration, the Defendants argued that client lists are not property. Yamauchi J concludes that, whether or not client lists are property, the business and income that arise from client lists are property.

Moving to the claim under section 1 of the *FPA*, as the case illustrates (at paras 38 -40), in order to succeed, 1007 Alberta had the onus to prove that Engineering was in "insolvent circumstances" or that it knew that it was "on the eve of insolvency." The cases are clear that the legal burden of proof is on the creditor challenging the fraudulent conveyance. In the case under consideration, Engineering argued that it was not insolvent or on the eve of insolvency as there was no debt owing at the time of the impugned conveyances (the damage award occurred later). While the court did not decide this point, it did point to cases in the bankruptcy context where a settlor's debts have included potential damage claims. Section 1 of the *FPA* also requires that

intention be proved. Although the wording differs from that of the *FCA*, Alberta courts – including in the case under consideration – have relied on common law decisions on intent, including the badges of fraud (see C.R.B Dunlop & Tamara Buckwold’s book: *Debt Recovery in Alberta*, (Toronto: Carswell, 2012) at 1083). Like the *FCA*, the *FPA* is also limited to transfers of real or personal property.

Finally, the court considered the allegation that the general security agreements granted by Alberta Engineering in favour of Mr. Ruggieri and GMR were a fraudulent preference under subsections 2, 4 and 11 of the *FPA*. Yamauchi J concluded that a *prima facie* case of preferential treatment had been made. Accordingly, Yamauchi J. granted an extension of the attachment order/ *Mareva* injunction. In a separate part of the judgment he dealt with issue of security for costs.

The *URTA*

Were the application in the case under consideration to be brought under the *URTA*, there would be a number of advantages, including:

- The application could be brought under a single piece of legislation. The *URTA* would replace both the *FCA* and the *FPA*.
- The legislative requirements would be clearer. The *URTA* provides a comprehensive and clear set of rules that are also better harmonized with the federal [Bankruptcy and Insolvency Act](#), RSC 1985, c B-3.
- The debtor’s intention would be a consideration in some but not all the causes of action under the *URTA*. Further, where intention is relevant, the common law “badges of fraud” are easier to find as they have been codified in the legislation as factors to consider.
- The question of whether client lists are property would also be more easily resolved as the definition of “transaction” in the *URTA* includes a transfer of a benefit in any form where the direct or indirect effect of the transfer is to withdraw value from the debtor’s estate.
- The *URTA* also offers more nuanced forms of relief – not just declarations that a transaction is void. Of particular relevance to the case under consideration is section 23 which includes a provision for injunctive relief.

In short, the *URTA* would provide a comprehensive and clear set of rules to reform the law of fraudulent preferences and conveyances. While the *URTA* does not depart radically from the pre-reform law, the work of the ULCC has produced a uniform act that would modernize and clarify the law, and should be fairly straightforward to implement in Alberta.

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