QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2021 SKQB 107**

Date: **2021 04 08**
Docket: QBG 1195 of 2020
Judicial Centre: Saskatoon

IN BANKTUPTCY AND INSOLVENCY

BETWEEN:

BTA REAL ESTATE GROUP INC.

APPLICANT

- and -

FAMILY FITNESS INC. and SM FITNESS INC.

RESPONDENTS

Counsel:

Michael J. Russell, Kevin N. Hoy, Michelle M. Tobin and Luanne C. Schlosser	for the applicant
K. James Rose and Tristan N. Culham	for the respondents
Kyle Kashuba	for the receiver, Alvarez & Marsal Canada

JUDGMENT
April 8, 2021

ELSON J.

Introduction

[1] Family Fitness Inc. [FFI] and SM Fitness Inc. [SMI] are related companies. They have carried on business as operators of membership-based fitness centres in the City of Regina. As these centres are commonly referred to as "gyms", I

will use that same reference throughout this judgment.

[2] With the COVID-19 pandemic, gyms have fallen on hard times. In FFI's case, however, its financial difficulties began before the pandemic. BTA Real Estate Group Inc. [BTA], the landlord for one of FFI's gyms, had become one of its largest creditors and held a general security interest in respect of this indebtedness. Eventually, on October 13, 2020, this Court issued a receivership order pertaining to that security, which order was later amended on November 10, 2020.

[3] Five months before receivership proceedings were commenced, FFI and SMI concluded a short purchase and sale agreement. Under that agreement, FFI purported to transfer to SMI certain gym membership rights that FFI had previously acquired from three unrelated gyms that had earlier closed their doors.

[4] BTA contends, among other things, that the transaction is void and must be set aside. It asserts that the transfer to SMI constitutes a fraudulent conveyance, contrary to the *Fraudulent Conveyances Act, 1571* (UK), 13 Eliz 1, c 5, [*Statute of Elizabeth*]. Alternatively, BTA argues that its security had attached to the new gym membership rights and that its interest in the security had never been waived.

[5] Finally, BTA also challenges SMI's right to register a trademark for the business name "Evolution Fitness" which SMI and FFI have operated under since 2017. BTA claims that the actions in this regard are contrary to the "good faith" requirements set out in a recently included provision of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*].

[6] Originally, BTA commenced two separate proceedings, one against FFI and another against SMI. I am satisfied that this was unnecessary. As there is no issue

about the Court dealing with this application in a summary way, it makes sense for the matter to be addressed in one application on the main receivership file. To facilitate this, I am summarily adding SMI as a respondent solely for the purpose of this application.

Background Evidence

[7] FFI and SMI have operated gyms in Regina, for varying periods of time. FFI was originally incorporated in Saskatchewan in 2005. In 2013 it amalgamated with another company but retained its original name after the amalgamation. At all times material to this application, Said Kaiss, also known as "Skye Kaiss", served as FFI's sole officer and director. He also holds 100 percent of FFI's outstanding voting shares. Six other shareholders, all members of Mr. Kaiss' family, hold the outstanding non-voting shares.

[8] SMI was incorporated in Saskatchewan on December 5, 2012. While SMI is ostensibly separate from FFI, Mr. Kaiss has owned, and continues to own, 35 percent of its outstanding voting shares. Two members of his family, Wassim Kaiss and Talal Kays, each hold 15 percent of SMI's issued voting shares. The remaining 35 percent of SMI's voting shares are held by Matthew Sawa. Mr. Kaiss and Mr. Sawa have been, and remain, SMI's sole officers and directors with Mr. Kaiss serving as the company's president and Mr. Sawa serving as its secretary-treasurer.

[9] Prior to October 2020, FFI operated gyms for several years. At the time material to this application, it operated gyms at three locations in Regina, Saskatchewan. These locations were:

(a) 2121E Quance Street [East Gym];

(b) 358 McCarthy Boulevard; and

(c) 3615 Pasqua Street.

Meanwhile, SMI has, since it commenced business, operated one gym, also located in Regina, at 1846 Scarth Street [Downtown Gym].

[10] I briefly digress from the narrative at this point to describe a feature of gym memberships that will take on some minor relevance in this case. The evidence indicates that most gyms do not directly administer their own memberships or directly collect membership fees. Rather, gym operators typically open accounts with an entity that receives payment from members and then distributes payment as directed by the gym operator. In the case of FFI and SMI, each location had an account with ASF Payment Solutions [ASF]. I was given to understand that ASF, which is an American operation, provides this service for a significant number of Saskatchewan gym locations.

[11] Until 2017, both FFI and SMI operated their gyms as separate franchises from Gold's Gym International Inc. In February 2017, FFI and SMI entered into a rebranding arrangement. Under this arrangement, which Mr. Kaiss described as a "joint venture", FFI and SMI changed the name of their operations. As of February 18, 2017, the four gyms began operating under the business name "Evolution Fitness". At that same time, SMI registered the business name.

[12] BTA's involvement in this matter arises from its role as the landlord for FFI's East Gym. The lease for those premises is dated August 30, 2013. As a condition of entry into the lease, FFI granted a security interest to BTA under a General Security Agreement [GSA], signed on September 26, 2013. The "Collateral" that secures the debt is set out in Section 2 of the GSA, which reads as follows:

> 2. Description of Collateral
>
> (a) All personal property of the Debtor, now owned or hereafter acquired;
>
> (b) All property in any form derived directly or indirectly from any dealing with the property described in Subsection 2(a) or that indemnifies or compensates for such of the said property as it is destroyed or damaged;
>
> (c) If a Schedule A is attached, the personal property described in Schedule A attached to this Security Agreement.

The GSA in this case did not include a Schedule A, as contemplated by Subsection 2(c).

[13] Although not directly relevant to this application, it should also be noted that Mr. Kaiss provided BTA with a personal indemnity of FFI's obligations under the lease. He also granted BTA security for this indemnity through his own general security agreement, which was ostensibly separate from that granted by FFI.

[14] Beginning in 2017, financial difficulties had developed such that FFI had trouble meeting its lease obligations for the East Gym. The evidence discloses that, after its first rent default on August 1, 2017, FFI's outstanding debt to BTA grew to $645,116.86 by May 2019. During this period, BTA showed unusual patience. It did not formally demand the outstanding sum, from both FFI and Mr. Kaiss, until May 7, 2019.

[15] The demand eventually resulted in two forbearance agreements, respectively dated May 17, 2019 and June 15, 2019. The first forbearance agreement was a short-term arrangement that allowed the parties to negotiate something more long-term. The second forbearance agreement stipulated a forbearance period of more than three years, expiring July 31, 2022. It identified FFI's outstanding indebtedness at $649,924.40. It also obliged FFI to provide BTA with an executed consent receivership order which BTA's solicitors were to hold in trust pending FFI's compliance with the

lease, the GSA and the second forbearance agreement, itself. More particularly, the second forbearance included a schedule for the repayment of the above arrears. The schedule called for monthly installments, in addition to the lease payments. The annual amounts for these installments during the forbearance period was $150,265.24 in the remainder of 2019, $120,000 in 2020, $240,000 in 2021 and $139,659.16 for the first seven months of 2022, all amounting to the calculated arrears of $649,924.40.

[16] Following the breach of the second forbearance agreement, said to have occurred in September 2020, BTA applied for the receivership order on October 8, 2020. At that time, the amount FFI owed to BTA exceeded $1 million.

[17] On October 13, 2020, Scherman J., of this Court, directed the issue of a consent receivership order pursuant to the terms of the GSA. Inadvertently, the order identified FFI as the corporate operator of all four "Evolution Fitness" locations in Regina. Subsequently, on November 10, 2020, an amendment to the order was issued which deleted the reference to the Downtown Gym, owned by SMI.

[18] After its appointment, the receiver prepared a Sale and Investment Solicitation Process [SISP] for the possible sale of FFI's business and/or assets. This Court granted an order approving the SISP on November 23, 2020. Through this order, the receiver was authorized to negotiate, finalize and execute a definitive "stalking horse" bid agreement for the purchase and sale of the assets.

[19] I again digress from the narrative simply to address the nature of a "stalking horse" bid. The metaphor, which is not entirely apt, is derived from a centuries old hunting practice in which a bird hunter would hide behind a stalking horse as it ambled up to prey, allowing for a clear shot. In the sale of assets under receivership, and with some variation to suit specific circumstances, the receiver identifies a potential

buyer to serve as the "stalking horse" and negotiates an agreement with that buyer for the purchase of the assets under the receiver's control. The potential buyer is then the stalking horse bidder. The purchase price in the agreement becomes the floor price for any subsequent bidding. The underlying assumption is that the stalking horse bidder has undertaken due diligence to determine the value of the assets. If none of the subsequent bids are found to be superior to the agreement price, the stalking horse bidder becomes the purchaser. Conversely, if a superior bid is received, the stalking horse bidder receives a termination or break fee. See *Leslie & Irene Dube Foundation Inc. v P218 Enterprises Ltd.*, 2014 BCSC 1855 at para 15, [2015] 1 WWR 606.

[20] Returning to the narrative, BTA agreed to act as the "stalking horse bidder" under the SISP. It is notable that, other than the stalking horse bid from BTA, only one bid was received. That bid came from 102114304 Saskatchewan Ltd. [4304 Sask]. The bid/offer was signed by Wassim Kaiss, as 4304 Sask's officer. In this respect, BTA is quick to point out that Wassim Kaiss is related to Mr. Kaiss and presently holds voting shares in SMI.

[21] On January 12, 2021, the receiver determined that there was no reasonable prospect that the offer from 4304 Sask would become a superior offer. Consequently, the receiver determined that the SISP should be terminated and that an auction would no longer be required. After the termination of the SISP, the receiver entered into a Sale Approval and Vesting Order [SAVO] to approve an agreement for BTA to purchase the assets in question. The SAVO was also approved by this Court on February 10, 2021.

[22] It is noteworthy that, less than two weeks after the SISP was terminated and the 4304 Sask offer was essentially discarded, SMI filed its trademark application with the Canadian Intellectual Property Office [CIPO]. The application, filed on

January 25, 2021, seeks registration of a logo design containing the name "Evolution Fitness". As at the date this judgment is issued, the application is awaiting examination.

[23] Turning to the transaction that prompted this application, the narrative for this begins in October 2017. At that time, three companies, all controlled by the same principal, operated three Regina gyms under the banner "California Fitness". The principal of all the companies (collectively described as [CalFit]) decided to take them out of the fitness business. With a view to selling the businesses, the principal approached Mr. Kaiss. While not interested in acquiring the gyms outright, Mr. Kaiss was prepared to acquire CalFit's membership lists. The two men eventually negotiated an agreement, later reduced to writing in three separate asset purchase agreements, one for each CalFit corporate vendor.

[24] The asset purchase agreements are reasonably detailed documents, prepared by the parties' solicitors. They are all dated January 22, 2018. While the agreements are not identical in all respects, each agreement contains the same definition of the purchased assets, which is defined as follows:

> **"Purchased Assets"** means all the Vendor's rights, title and interest in, to and under: (i) the Memberships, (ii) the Customer Contracts, and (iv) all rights of actions and claims (and benefits therefrom) of the Vendor in respect of the Memberships Receivables or Customer Contracts whether or not an action or any other proceeding shall have been commence prior to the Closing Time;

[25] The description of the purchase price is not identical in each agreement. That said, none of the agreements identify a lump sum purchase price. Rather, each agreement stipulates that the purchase price is based on a sum of money multiplied by either prepaid, monthly or promotional memberships in effect at the closing date. The sum per membership in one agreement differs from the sum per membership in the other two. There are also differences in the maximum membership number that factor

into the calculation. I should also note that none of the agreements contain a description of the number of members in a vendor's membership list.

[26] Despite the absence of a lump sum purchase price and a description of the number of membership rights FFI acquired, Mr. Kaiss deposes that the purchased membership lists cumulatively included approximately 3,000 CalFit members, and that the total purchase price calculated out to $486,628. Although the wording of the payment terms in one agreement differs from those in the other two agreements, Mr. Kaiss deposes that the terms are such that CalFit would receive the first $120,000 of revenue generated from the former CalFit members. After that, FFI was to pay the remainder of the purchase price in successive monthly installments of $10,000, due on the 15th day of each month, commencing June 15, 2018. The agreements all stipulated that, if an installment is missed, the remaining balance of the purchase price would be due and payable. In this application, BTA does not dispute Mr. Kaiss' description of these terms.

[27] The CalFit gyms closed their doors on February 14, 2018. In the meantime, FFI established a new account with ASF to cover the added CalFit members. The CalFit members were not obliged to remain with FFI. They could terminate their memberships at any time, subject to whatever notice requirements were set out in the membership agreements. According to Mr. Kaiss' affidavit evidence, some members terminated their memberships and were provided refunds.

[28] FFI remained in good standing on its debt to CalFit until April 2020. According to Mr. Kaiss, this was entirely attributable to the lockdown imposed after the COVID-19 pandemic took hold. All gyms in the province closed as of March 18, 2020. On April 28, 2020, CalFit issued a formal written demand for payment of the remaining balance, which then amounted to $146,628.

[29] Mr. Kaiss deposes that, after receiving the demand for payment, he decided that FFI should transfer the CalFit membership list to SMI, which would then assume liability for the remaining debt to CalFit. A written agreement, dated May 12, 2020, was prepared to cover the arrangement. The agreement is very brief. Unlike the asset purchase agreements with CalFit, the agreement with SMI was clearly not prepared by solicitors. It contained only five terms, including stipulations that SMI would assume liability for the debt to CalFit and would resume the instalment payments despite the closure of all Saskatchewan gyms. It also stipulated that SMI would be entitled to the revenue generated by the CalFit memberships.

[30] It is noteworthy that the agreement between FFI and SMI did not contain any valuation of the CalFit memberships, nor did it set out a specific purchase price for the memberships.

The Application and Related Issues

[31] In its application, BTA seeks an order voiding the transfer of the CalFit memberships between FFI and SMI on the grounds that it is a fraudulent conveyance, contrary to the *Statute of Elizabeth*. It also seeks an order, pursuant to the relevant provisions of *The Personal Property Security Act, 1993*, SS 1993, c P-6.2 [*PPSA*], declaring that the disputed memberships and the disputed funds derived from those memberships form part of the receivership estate of FFI and, as such, shall be transferred to and vested in FFI as part of the purchased assets defined in the SAVO. BTA also seeks an order declaring that SMI acted in bad faith and in contravention of s. 4.2(1) of the *BIA* by making an application, dated January 25, 2021 for the registration of "Evolution Fitness" as a trademark.

[32] The parties do not dispute this Court's jurisdiction to hear this application

in the context of ongoing receivership proceedings. As counsel for BTA pointed out, this is a recognized process having recently been observed by the Ontario Superior Court of Justice in *Bridging Income Fund LP v 3886727 Canada Inc.*, 2020 ONSC 602 at paras 1-2.

[33] Given the acceptance of the Court's jurisdiction to this matter, the application, in my view, should be confined to two issues. They are as follows:

(a) Did the transfer of the CalFit memberships from FFI to SMI, on May 12, 2020, constitute a fraudulent conveyance?

(b) Did BTA's security interest, under the GSA, attach to the CalFit membership it had acquired, or was the acquisition excepted pursuant to s. 4(d) of the *PPSA*?

[34] I have deliberately omitted from this list the matter of SMI's CIPO application for a trademark in respect of the name "Evolution Fitness". As I will explain later in this judgment, I do not believe the Court's jurisdiction should extend to ruling on the propriety of an application to the CIPO.

Law and Analysis

A. Fraudulent Conveyance – *Statute of Elizabeth*

Law

[35] There remains some controversy whether the *Statute of Elizabeth* is in force in all common law provinces. The view has been expressed that, in some jurisdictions, application of the statute has been overtaken by provincial fraudulent conveyance legislation. See *Royal Bank of Canada v North American Life Assurance*

Co., [1996] 1 SCR 325 at para 84 (WL) [*Ramgotra*]. In Saskatchewan, however, it seems doubtful that this controversy ever existed. If it did, it was largely put to rest in *Moody v Ashton*, 2004 SKQB 488, 258 Sask R 1 [*Moody*], where, at para. 125, Baynton J. acknowledged the case law that recognized the statute's application. As I will note later in this decision, Baynton J. also observed a substantive difference between the *Statute of Elizabeth* and the provincial fraudulent conveyance legislation that exists in this province, namely, *The Fraudulent Preferences Act*, RSS 1978, c F-21.

[36] The judgment in *Moody* has now been regarded as a leading Saskatchewan authority of this Court on the application of the *Statute of Elizabeth*. At para. 114 of *Moody*, Baynton J. recited the preamble and s. 1 of the statute. Despite its rather archaic language, typical of 16th-century English legislation, its meaning is discernible. Para. 114 reads as follows:

> [114] *The Fraudulent Conveyances Act*, 1571, (U.K.), 13 Eliz. I, c. 5 (the "*Statute of Elizabeth*"):
>
> Preamble:
>
> "For the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, as well of lands and tenements, as of goods and chattels, more commonly used and 12racticed in these days than hath been seen or heard of heretofore: which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, have been and are devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent, to delay (a), hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures (b), heriots, mortuaries, and reliefs, not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining, and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued."
>
> 1 (a). BE IT THEREFORE DECLARED, ORDAINED, AND ENACTED, That all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements,

> hereditaments, goods and chattels, or of any of them (b), or of any lease, rent, common, or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution at any time had or made sithence the beginning of the queen's majesty's reign that now is, or at any time hereafter to be had or made, to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every of them, whose, actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, by such guileful, covinous, or fraudulent devices and practices as is aforesaid, are, shall or might be in anywise disturbed, hindered, delayed or defrauded) to be clearly and utterly void, frustrate, and of none effect (c): any pretence, colour, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding. . . .

[37] As I earlier intimated, Baynton J. drew a brief comparison between the *Statute of Elizabeth* and *The Fraudulent Preferences Act*, which BTA does not rely on in this case. The most significant provisions of *The Fraudulent Preferences Act* are ss. 3 and 8, which read as follows:

> **Transfers to defeat creditors**
> **3** Subject to sections 8, 9, 10 and 11 every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in a bank, company or corporation, or of any other property real or personal, made by a person at a time when he is in insolvent circumstances or is unable to pay his debts in full or knows that he is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice his creditors or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced.
>
> ...
>
> ***Bona fide* sales protected**
> **8** Nothing in sections 3, 4, 5, 6 and 7 applies to a bona fide sale or payment made in the ordinary course of trade or calling to innocent purchasers or parties, nor to a payment of money to a creditor, nor to a bona fide conveyance, assignment, transfer or delivery over of any goods, securities or property of any kind as above mentioned that is made in consideration of a present actual bona fide payment in money or by way of security for a present actual bona fide advance of money,

> or that is made in consideration of a present actual bona fide sale or delivery of goods or other property: Provided that the money paid or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration therefor.

[38] While Gonthier J., in *Ramgotra*, described the *Statute of Elizabeth* as the model for provincial fraudulent conveyance legislation in Canada, he also agreed with the view that their respective applications can differ. This difference was first articulated in *Nicholson v Milne* (1989), 74 CBR (NS) 263 (WL) (Alta QB) [*Nicholson*]. In *Nicholson*, Virtue J. addressed a situation where the defendants had rendered their RRSPs and neutral funds exempt under Alberta insurance legislation. Virtue J. observed that under Alberta's fraudulent conveyance legislation, it would apply to the transaction only if the debtor was insolvent, was unable to pay his or her debts in full or knew that he or she was on the eve of insolvency. This was not a requirement in cases of "conveyances" under the *Statute of Elizabeth.* In this respect, Virtue J. said the following at para. 35:

> 35 The term "Conveyance" (like the term transfer) is itself wide enough to encompass every method of disposing of, or parting with, property or an interest therein, absolutely or conditionally. The word is of general meaning and, given a liberal interpretation, includes the transactions here which resulted in the transfer of entitlement to the benefits of the R.R.S.P. property from the debtor to another in such a way as to remove it from execution by creditors. In my view, such a transaction comes within the meaning of "conveyance", as that term is used in the Statute of Elizabeth.

[39] The above passage was cited favourably in both *Ramgotra* and *Moody*. In *Moody*, Baynton J. offered his own observations on the difference between the provincial fraudulent conveyance legislation and the *Statute of Elizabeth* at para. 122:

> [122] I move on to consider the cases that distinguish the factors to be considered in determining whether a conveyance constitutes a fraudulent conveyance under the *Statute of Elizabeth* and the factors to be considered in determining whether a conveyance constitutes a fraudulent conveyance under the *Fraudulent Preferences Acts* of the

> provinces. These factors are similar but there is one principal difference. Despite the existence of a fraudulent intention to defeat creditors on the part of a transferor, a voluntary conveyance is not void under the *Fraudulent Preferences Acts* unless the transferor is, at the time of the conveyance, (a) in insolvent circumstances, (b) unable to pay his debts in full, or (c) knows that he is on the eve of insolvency.

[40] Setting aside the difference between the *Statute of Elizabeth* and provincial fraudulent conveyance legislation, it has long been held that the *Statute of Elizabeth*, as remedial legislation, is to be interpreted purposefully. In *Moody*, Baynton J. followed this approach. In particular, he adopted certain basic principles reflected in an earlier authority from Alberta. At paras. 126 and 127, Baynton J. wrote as follows:

> [126] One principle established by the early case law is that the *Statute of Elizabeth* should be interpreted purposively. Lord Mansfield in *Cadogan v. Kennett* (1776), 98 E.R. 1171 at 1172 observes that it should be construed liberally as reflecting the aversion of the common law to fraud. In a more recent decision that dealt with inter-family transactions, Furlong, C.J. in *Lewisporte Wholesalers Ltd. v. Hynes* (1980), 24 Nfld. & P.E.I.R. 252 (Nfld. S.C.) indicated at para. 13 that he would be prepared to give a liberal construction to it if he could be satisfied on which side that liberality was to be exercised.
>
> [127] Mr. Justice Clackson in *Proulx v. Proulx,* 2002 ABQB 151, (2002), 25 R.F.L. (5th) 370 at para. 14 (Alta. Q.B.), recently summarized the principles to be considered in determining whether an impugned conveyance is void pursuant to the *Statute of Elizabeth* as follows:
>
> > 14 It seems to me that the basic principles defining the remedy in *13 Elizabeth* c. 5 are now well settled.
> >
> > 1. There must be a conveyance of either real or personal property;
> >
> > 2. The transaction must have been for no or nominal consideration;
> >
> > 3. It must have been the intent of the settlor to defraud, hinder or delay his creditors;

> 4. The intent of the settlor may be inferred from his circumstances and the circumstances of the settlement or may be the result of direct evidence;
>
> 5. The fact that there was no consideration or voluntary consideration will in most cases justify the inference of the necessary intent absent evidence rebutting that inference;
>
> 6. Inference of intent will be strong if the settlor was insolvent at the time of settlement or the settlement effectively denuded him of assets sufficient to cover existing obligations;
>
> 7. The party challenging the conveyance must be a creditor or someone with a legal or equitable right to claim against the settlor;
>
> 8. The conveyance must have had the intended effect.
>
> *Fillier v. Bubley,* [1997] A.J. No. 1285 (Alta. Q.B.).
>
> *Dwyer v. Fox*, 1996 CanLII 10477 (AB QB), [1996] A.J. No. 769 (Alta. Q.B.)
>
> *Rogers Realty Ltd. v. Prysiazny* (1996), 182 A.R. 118 (Alta. Q.B.)
> *Commerce Capital Mortgage Corp. v. Jemmett*, [1981] O.J. No. 1242 (Ont. H.C.)
> *Chez Beat Restaurant Ltd. v. Beciaris*, [1991] B.C.J. No. 2459 (B.C.S.C.)

[41] Of the foregoing basic principles, items 1, 2, 3, 7 and 8 are framed in mandatory language, while items 4, 5 and 6 appear more as principles to guide a court in deciding whether to draw an inference of intent to defraud, hinder or delay creditors. Four years after these basic principles were first articulated, the Alberta Court of Appeal, quite properly in my view, described these mandatory principles as essential elements. In the *per curiam* judgment of *Palechuk v Fahrlander*, 2006 ABCA 242 at para 31, 61 Alta LR (4th) 71, the Court articulated these elements as follows:

> [31] To obtain a remedy under the *Statute of Elizabeth*, the plaintiff must establish the following:
>
> (1) there must be a conveyance of real or personal property;
>
> (2) for no or nominal consideration;
>
> (3) with intent to defraud, delay, or hinder creditors;

> (4) the party challenging the conveyance must be someone who was a creditor at the time of the conveyance or someone with a legal or equitable right to claim against the transferor; and
>
> (5) the conveyance must have had the intended effect.

[42] In the present application, there are only two essential elements in dispute. They are: (1) whether there was an intent to defraud, delay or hinder creditors; and (2) whether the conveyance of the CalFit membership lists to SMI was for no or nominal consideration. In the next several paragraphs, I will address the legal issues pertaining to these elements.

(a) Intent to Defraud, Delay or Hinder Creditors

[43] In fraudulent conveyance allegations, it is invariably the rule that the most contentious element is the intent to defraud, hinder or delay creditors – a state of mind loosely described in the case law as fraudulent intent. The present application is not an exception to that rule.

[44] As in other aspects of civil and criminal litigation, the task of assessing the mental element associated with an act can occasionally prove troublesome. Without the actor's express declarations of a goal or objective, intent can only be determined by drawing an inference from the details of the act and its surrounding circumstances. In some cases, the inference is obvious – less so in others. Of course, to establish the requisite intent, the inference must have enough strength to meet the applicable standard of proof, which, in this case, is proof on the balance of probabilities.

[45] In *Moody*, Baynton J. discussed a court's approach to this task at paras. 138 and 139. In doing so, he subscribed to the comments in a passage from C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2d ed (Toronto: Carswell, 1995):

[138] I move on to consider the cases cited to me that outline how the courts should go about determining whether the allegation of a fraudulent intent to defeat creditors has been established in any given case. I find the comments at p. 601 of *Creditor-Debtor Law in Canada* to be helpful:

> The crucial problem in any fraudulent conveyance action is to establish the fraudulent intention of the debtor, a task which creates serious problems for counsel and judge alike. In an early comment in the *Law Times*, an anonymous writer speculated on the difficulties associated with the requirement of a judicial finding of fraud in a similar provision in the English Bankruptcy Act:
>
> The court must therefore proceed to ascertain the state of mind of the debtor. Judicial inquiry into motive is a difficult and delicate matter, and hitherto has not in any branch of jurisprudence been attended with very happy results. It is not disrespectful to say that metaphysical excursions of this sort are responsible for some fine confused pages in our English law reports; the conditions of inquiry are such that it could hardly be otherwise. With regard to the section, it is not merely the object intended to be affected by the deed, which, according to decisions, is to be ascertained. That — as in the case under consideration — would ordinarily present few features of difficulty. It is the dominant motive at the back of the debtor's mind which is to be searched for; an inquiry into the working of human nature affording scope for the display of every eccentricity of speculation.

[139] Although determining the intent of a person is usually a difficult task, judges and juries are routinely required to do it. The difficulty of the task does not relieve the court from making the determination. Nor do the criminal law principles of presumption of innocence and proof beyond a reasonable doubt apply to this determination. A civil court should not hesitate to conclude, on a balance of probabilities, that fraudulent intent has been proved in circumstances where there is no credible and cogent evidence to counter the strong inferences of fraudulent intent that are raised by the factual circumstances of the case. Sometimes there is direct evidence of intent, but most often there is only indirect or circumstantial evidence of intent. The intent or motive of a person usually has to be inferred from the time-tested common sense presumption that he or she intended the natural consequences of his or her actions considered in the light of the circumstances of the particular case before the court.

[46] From these comments, Baynton J. went on to discuss the "badges of

fraud" in the context of fraudulent conveyances. In this respect, he wrote the following at paras. 142 and 143.

> [142] Many cases observe that upon proof of a voluntary conveyance in suspicious circumstances or where the parties did not deal at arm's length, the evidentiary burden of proof respecting the *bona fides* of the conveyance shifts to the transferor. In my view, this is simply a different way of describing an evidentiary presumption of fraud that arises once certain suspicious facts are established by the creditor. These suspicious facts are often termed "badges of fraud". Where suspicious circumstances call for an explanation, such as where at least one or more "badges of fraud" are established, an inference of fraudulent intent arises that is sufficient to shift the evidentiary burden to the transferor to prove that the conveyance was *bona fide*.
>
> [143] Badges of fraud are simply a collection of diverse suspicious circumstances that have been identified by the case law. The more badges of fraud that are proven, the stronger the *prima facie* case of fraudulent intent will be. But again, badges of fraud simply invoke an evidentiary presumption which will not apply where there is cogent and credible evidence to show that the conveyance is *bona fide*. See *Koop v. Smith* (1915), 51 S.C.R. 554; *Goertz (Trustee of) v. Goertz* (1994), 122 Sask. R. 93 (Q.B.); *Wagner v. Hartows,* [1922] 3 W.W.R. 1050 (Sask. C.A.); *Dondee Stock Farms Ltd. (Bankrupt), Re* (1993), 117 Sask. R. 1 (Q.B.). In the latter case at pp. 10-11, I enumerated the badges of fraud as follows:
>
> > [42] . . . The badges of fraud, as are set out in Dunlop **Creditor-Debtor Law in Canada,** p. 526, and in **Dougmoor Realty Holdings Ltd., Re** (1967), 10 C.B.R. (N.S.) 141 (Ont. H.C.), vary from case to case and writer to writer, and the ones applicable to this case include:
> >
> > 1. the transfer was made pending the writ;
> > 2. secrecy respecting the transaction;
> > 3. the retention by the grantor of some benefit in the property;
> > 4. the consideration was grossly inadequate;
> > 5. the grantor continued in possession following the conveyance;
> > 6. the transfer amounted to a trust of the property;
> > 7. the deed contained false statements as to the consideration;
> > 8. unusual haste to make the transfer.

> [43] Other similar factors might include:
>
> (a) showing the property after the transfer as an asset of the grantor,
>
> (b) the transfer substantially reduces the property of the grantor that would, but for the transfer, be available to his creditors,
>
> (c) the effect of the transfers to delay and defeat creditors.

(b) No or nominal consideration

[47] In the context of the present application, the question here is whether SMI's assumption of the CalFit liability constitutes substantive consideration that it rises above a nominal amount. Although the inadequacy of the consideration also serves as a badge of fraud, in assessing fraudulent intent, I will address it here as an essential element.

[48] As I heard counsel's submissions, I discerned no serious dispute about the authorities the Court should consider on this element. One of the first authorities to address this issue is the decision of the British Columbia Supreme Court in *First Canadian Land Corp. (Trustee of) v First Canadian Plaza Ltd.* (1991), 6 CBR (3d) 308 (WL) (BCSC). In that case, the bankrupt conveyed land to the defendant in May of 1986, at a time when it owed its bank more than $20 million, payable on demand. Shortly before the conveyance, the bankrupt company had received a demand from its lender, which demand included the threat of receivership if payment was not made by May 30. The evidence disclosed that, at the time of the transfer, the transferee had no assets and the sale price of $4.5 million was paid by the assumption of existing financing.

[49] After a trial on an action pursuant to the British Columbia fraudulent conveyance legislation, the trustee's action was allowed. In his judgment, Meredith J.

acknowledged the possibility that an assumption of a remaining liability could amount to good consideration. That said, the circumstances for such possibility were limited and did not arise in the case before him. His comments in this respect appear at paras. 22 and 23.

> 22 The disposition in this case comes squarely within the section. Plaza argues, as I understand it, that the parties to the conveyance primarily intended to pave the way for commercial development free of claims of creditors and, in particular, the Toronto Dominion Bank. Doubtless that was so. But their equally dominant and necessarily concomitant intent was to put the land beyond the reach of the creditors. The disposition was anything but at arm's-length. It was anything but made in good faith and for value, as Plaza argues it was.
>
> 23 Plaza submits that the assumption of the existing charges amounted to good consideration. That might be so if
>
> > (a) the amount of the charges equaled the perceived value of the assets transferred;
> >
> > (b) the transferor was relieved of its liability to the charge holders; and
> >
> > (c) if the transferor had any expectation that the transferee would have the resources to pay the encumbrances.

[50] As observed by BTA's counsel, a similar approach was applied in a subsequent decision of the same court. In *Abakhan & Associates Inc. (Trustee of) v 554925 B.C. Ltd.*, 2004 BCSC 1612, 7 CBR (5th) 8, Burnyeat J. dealt with a case where the bankrupt made a transfer of property in exchange for the transferee's assumption of the bankrupt's debt. Burnyeat J. noted, at para. 55, that the property had been purchased for $372,208.41 in 1993 and carried an assessed value of $219,000 in 1998. The remaining debt that the transferee assumed amounted to $183,000. In the view of Burnyeat J., this was not appropriate consideration. In his view, the evidence suggested the property held a value somewhere between $219,000 and its 1993 purchase price.

[51] More recent authorities in this respect include *Xerox Canada Ltd. v Baba*

Publications Inc. (2008), 43 CBR (5th) 108 (Ont Sup Ct) and *DBDC Spadina Ltd. v Walton,* 2014 ONSC 3052. In the latter of these two cases, Brown J. relied on an earlier observation of Farley J. in *Waxman v Waxman* (2005), 10 BLR (4th) 315 (Ont Sup Ct), where the Court expressed the view that, in the context of fraudulent conveyance law, the phrase "good consideration" must be interpreted as something more than simple consideration. In the view of Farley J., the term referred to a value within an arguable range of fair market value.

Analysis

[52] Having regard to all the circumstances that existed at the time FFI transferred the CalFit memberships to SMI, I am more than satisfied that the transfer constituted a fraudulent conveyance under the *Statute of Elizabeth.* Indeed, I find the circumstances are compelling. I will explain.

[53] The evidence clearly shows that, at the time of the transfer to SMI, FFI had been in arrears in its lease payments to BTA for approximately three years. FFI was also subject to the second forbearance agreement, the repayment schedule of which suggests that the arrears were substantial at that time. While no legal proceeding had yet been commenced, such proceedings were both likely and imminent.

[54] Turning to the question of secrecy, there is no evidence that FFI disclosed to BTA any details about its acquisition of the CalFit membership rights or their subsequent transfer to SMI. While I understand that FFI now takes the position that BTA's security did not attach to the CalFit membership rights, Mr. Kaiss did not depose to this reason, or any other reason, for the non-disclosure. I am satisfied that Mr. Kaiss had no intention of disclosing any aspect of the CalFit transactions to BTA, and that this was indicative of bad faith on his part.

[55] The badge of fraud pertaining to the grantor of the conveyance retaining possession is also engaged in this case. While FFI did not formally retain possession of the CalFit rights in some way, there is no question that Mr. Kaiss, acting under the veil of SMI, did. He had a foot firmly planted on each side of this transaction. In making this finding, I am satisfied that it is fitting and appropriate to lift the corporate veil.

[56] As for the consideration for the membership transfer, I have no hesitation in finding it inadequate. In this respect, it must be remembered that, in 2018, FFI agreed to a purchase price of more that $486,000 for the membership rights. FFI must be taken to have concluded that this price represented the present value of the future income it expected from the acquired membership rights. While the balance owing to CalFit had been reduced over time, there is no evidence to suggest that the value of the memberships had correspondingly dropped to the same amount. Indeed, there is no reason to believe that it did not have approximately the same present value as it did when purchased from CalFit.

[57] Finally, I am satisfied that the pandemic and the forced closure of Saskatchewan gyms, while significant, should not be regarded as a factor in this case – at least not one that removes the taint of a fraudulent conveyance. While the lockdown may have caused FFI to default on its payments to CalFit, I am not persuaded that it forced FFI to sell the CalFit memberships for less than fair market value to a non arm's-length purchaser, which SMI clearly was. Had FFI and SMI undertaken an objective present value determination of the worth of the CalFit membership rights and incorporated that valuation in the purchase price in its transfer agreement, I may have found otherwise. In the absence of such evidence, I can only conclude that the consideration was inadequate.

B. Application of the *PPSA*

Law

[58] Having found the transfer of the CalFit memberships, from FFI to SMI, constitutes a fraudulent preference, that should be the end of the matter. The finding would result in the transfer being voided and the membership rights being returned to FFI, which is now being acquired by BTA. In the normal course, the security interest represented by those membership rights would be disputed in another setting. That, however, is not the case here. Accordingly, I will address it.

[59] FFI and SMI contend that the CalFit membership rights, which FFI acquired in 2018, never formed part of the collateral under the GSA. In this respect, FFI and SMI argue that these rights, when they were acquired from CalFit, are expressly excepted from the operation of the *PPSA* under s. 4(d). As I understand FFI's position, it is that, when it first purchased the membership rights in 2018, they were nothing more than unearned rights for payment. They could not be earned until FFI provided gym facilities for the new members in return for the payment of dues under their membership contracts. In this context, I understand FFI's argument to be that while these rights were unearned, s. 4(d) excepted them from forming any part of the collateral under the GSA.

[60] Counsel for the parties acknowledged that there is very little jurisprudence or commentary with respect to s. 4(d), and its counterparts in other provinces. Counsel for FFI and SMI did provide the Court with two authorities, namely, *Hughes Estate v Stuckky*, 2001 ABQB 147, 290 AR 344 [*Hughes*] and *Maximum Financial Services Inc. v 1144517 Alberta Ltd.*, 2015 ABQB 646 [*Maximum Financial*]. I will address these authorities later in this judgment.

[61] In my view, the Court's consideration of s. 4(d) is principally an exercise of statutory construction. The Supreme Court of Canada said in *Rizzo & Rizzo Shoes*

Ltd. Re, [1998] 1 SCR 27 at para 21, that a court's task in the interpretation of statutes should follow a purposive approach. As articulated by Elmer A. Driedger, *Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983) at 87, this requires a court to read the words of a statute in their entire context and in their grammatical and ordinary sense, all in a manner that is harmonious with the scheme of the statute, the object of the statute and the intention of Parliament or the Legislature. In my view, this is the approach to be taken in the construction of s. 4(d).

[62] In my view, a purposive construction of s. 4(d) requires the context of both s. 4 of the *PPSA* as well as the provision immediately before it, s. 3. Section 3 describes the transactions to which the statute's protection can apply. The operation of s. 3 is, however, subject to the exceptions set out in s. 4. Taken together, these provisions read as follows:

> **3**(1) Subject to section 4, this Act applies:
>
> (a) to ***every transaction that in substance creates a security interest***, without regard to its form and without regard to the person who has title to the collateral; and
>
> (b) without limiting the generality of clause (a), to chattel mortgage, conditional sale, floating charge, pledge, trust indenture, trust receipt, or to an assignment, consignment, lease, trust or transfer of chattel paper that secures payment or performance of an obligation.
>
> (2) Subject to section 4 and section 55, this Act applies to a transfer of an account or chattel paper, to a lease for a term of more than one year and to a commercial consignment, that does not secure payment or performance of an obligation.
>
> (3) The Crown is bound by this Act.
>
> **4** Except as otherwise provided in this Act or the regulations, this Act does not apply to:
>
> (a) a lien, charge or other interest given by statute or rule of law;
>
> (b) the creation or transfer of an interest or claim in or pursuant to

> a policy of insurance except the transfer of a right to money or other value that is payable pursuant to a policy of insurance as indemnity or compensation for loss of or damage to collateral;
>
> (b.1) a transfer of an interest in or claim in or under a contract of annuity, other than a contract of annuity held by a securities intermediary for another person in a securities account;
>
> (c) the creation or transfer of an interest in present or future wages, salary, pay, commission or any other compensation for labour or personal services, other than fees for professional services;
>
> ***(d) a transfer of an unearned right to payment pursuant to a contract to a transferee who is to perform the transferor's obligations pursuant to the contract;***
>
> (e) the creation or transfer of an interest in land, including a lease;
>
> (f) the creation or transfer of a right to payment that arises in connection with an interest in or a lease of land, other than a right to payment that is evidenced by an investment property or instrument;
>
> (g) a sale of accounts or chattel paper as part of a sale of a business out of which they arose, unless the vendor remains in apparent control of the business after the sale;
>
> (h) a transfer of accounts that is made solely to facilitate the collection of accounts for the transferor;
>
> (i) the creation or transfer of a right to damages in tort;
>
> (j) an assignment for the general benefit of creditors made pursuant to an Act of the Parliament of Canada relating to insolvency;
>
> (k) a security agreement governed by an Act of the Parliament of Canada that deals with the rights of parties to the agreement or the rights of third parties affected by a security interest created by the agreement, including an agreement governed by sections 425 to 436 of the *Bank Act* (Canada).
>
> [Emphasis added]

[63] As I earlier intimated, the exception in s. 4(d) is not confined to the Saskatchewan statute. Similar exceptions appear in personal property security legislation across Canada. Having said this, the authorities that reference the exception,

including *Hughes* and *Maximum Financial*, generally do so only in passing.

[64] One case that addressed the exception somewhat more directly is the decision of the New Brunswick Court of Queen's Bench in *Royal Bank of Canada v Canadian Commercial Corp.*, 2001 NBQB 199, 243 NBR (2d) 122 [*Canadian Commercial*]. *Canadian Commercial* involved a dispute between the bank and a Crown corporation [CCC] that assisted businesses by purchasing their invoices for certain export products. The invoices were purchased at discounts and CCC would later seek payment from the eventual purchaser of the product. One of the debtor's invoices was at the centre of the dispute. The bank argued that CCC was required to perfect its security interest in the sale proceeds from the invoice it had purchased from the debtor. CCC resisted the application, claiming that its interest in the proceeds fell within one of the exceptions in the *Personal Property Security Act*, SNB 1993, c P-7.1.

[65] Among its findings, the Court concluded that none of the exceptions applied, including the exception asserted by FFI in the present case. In the discussion about the exceptions generally, Glennie J. referenced commentary from the text by Catherine Walsh, *An Introduction to the New Brunswick Personal Property Security Act* (Fredericton: University of New Brunswick, 1995). The commentary included Professor Walsh's observations about the exception relating to an "unearned right to payment". Those observations appear in paras. 33-34, alongside one other exception. Specifically, Glennie J. wrote the following:

> 33 It is worthwhile to review the reasoning for two other exclusions contained in s. 4 of the PPSA, namely s. 4(d), an interest in an unearned right to payment under a contract and s. 4(g), the sale of accounts, chattel paper or goods as part of the sale of a business, in order to ascertain the reasoning for the PPSA's section 4 exclusions. Professor Walsh comments on each of those exceptions on pages 47 & 48 of her text as follows:

> **Interest in an unearned right to payment under a contract**
>
> *A transfer of an interest in an unearned right to payment under a contract in which it is contemplated that the transferee is to step into the shoes of the transferor for the purposes of performing the contractual obligation is excluded from the* Act *by s. 4(d). Such a transaction contemplates the substitution of the transferee for the transferor as the contracting party for the purposes of both the right to payment and the obligation to perform. In a contractual novation of this sort, there is little likelihood that a third party will be misled into the belief that the debt is still owned by the transferor and there is therefore no reason to subject the arrangement to the registration and other perfection requirements of the* Act. [Emphasis added.]
>
> **Sale of accounts, chattel paper or goods as part of a sale of a business**
>
> *S. 4(g) expressly excludes a sale of accounts, chattel paper or goods from the scope of the* Act *when transferred as part of the overall sale of a business. There is no need to require a sale in this context to be publicized by registration since third parties can be expected to appreciate that the sale of a business normally involves the transfer of all its assets to the new owner. However, if the seller remains in apparent control of the business after the sale, the need to publicize the transaction persists and s. 4(g) concludes with a proviso to cover this case.* [Emphasis added.]
>
> 34 Thus, with respect to the exclusions I have referred to, it can be seen that the reason these transactions are exempted from the application of the provisions of the PPSA is that the rights of third parties will not be adversely affected by not subjecting the transaction to the registration and other perfection requirements of the PPSA.

[66] Commentary also appears in other texts. In Ronald C.C. Cuming, Catherine Walsh & Roderick J. Wood, *Personal Property Security Law*, 2d ed (Toronto: Irwin Law, 2012), the authors discuss the exception, described as an "exclusion", at 171-172:

> All Acts exclude an assignment or transfer of an unearned right to payment under a contract to a transferee who is to perform the transferor's obligations under the contract. This exclusion addresses situations where there is little or no chance of third-party deception because the transferee steps into the shoes of the transferor who no longer is in a position to deceive third parties into thinking that he is entitled to payment under the contract.

[67] In Bruce MacDougall, *Canadian Personal Property Security Law* (Markham: LexisNexis Canada Inc., 2014) at 145, the author expresses some uncertainty as to the type of transaction that would come within the exception. He also laments the absence of a statutory definition for the phrase "unearned right to payment".

> The PPSA does not apply to the transfer of an interest in an unearned right to payment under a contract to a transferee who is to perform the transferor's obligations under the contract. It is not entirely clear what transactions come within this provision. This provision will apparently cover contract assignments or novations where there is something left to be done in order for the transferee to claim that payment is owing. It would not cover an outright assignment of an existing account. There may, however, be transactions sitting in the middle of these two situations where what is transferred is an existing entitlement with the possibility of further payment if more obligations are performed. In such a case it may be that the PPSA applies to part of the transaction and not the rest, a rather unfortunate result. It would be preferable for "unearned right to payment" to be defined.

Analysis

[68] At the outset of this analysis, I think there is merit in the argument that when FFI acquired the CalFit membership rights, they were unearned rights to payment. In this regard, they reflected rights to payment of dues which were unearned until FFI performed the obligation of providing gym facilities. Having said all this, I am also satisfied that s. 4(d) does not mean that unearned rights of payment cannot serve as security for a debt. I will explain.

[69] An understanding of s. 4(d), and the other exceptions in s. 4, is aided by recognition of the activity to which the *PPSA* does apply. In this regard, it must be remembered that, under s. 3(1), the focus of the statute's application is not on the features or characterization of the purported security interest. Rather, the focus is on the activity that may give rise to the security interest. In this regard it must be remembered that s. 3(1) stipulates that the *PPSA* applies to "every transaction that in substance

creates" a security interest.

[70] The language describing the exceptions is similarly focused. As worded, the exceptions in s. 4 are directed at transactions that create or transfer interests or rights, but do not create security interests requiring the statute's protection. In keeping with this language, it follows that the exception in s. 4(d) pertains to a transfer of an unearned right to payment, as described therein, but not to the capacity of that unearned right to be otherwise pledged as security.

[71] Applying this understanding to the present case, and assuming the CalFit membership rights are unearned rights to payment, s. 4(d) clearly excepts the transfer of those rights from CalFit to FFI. As such, the transfer cannot be said to have created a security interest as between CalFit and FFI that would require registration. Even so, the evidence shows that those rights have a marketable value and can serve as a form of security. Section 4(d) says nothing about this capacity. In my view, it follows that when FFI acquired the membership rights, the value of those rights formed part of the collateral FFI had granted to BTA.

[72] Turning to the authorities cited by counsel for FFI and SMI, I do not find that the decisions in either *Hughes* or *Maximum Financial* takes anything away from the understanding of s. 4(d), as described above. In particular, neither case stands for the proposition that unearned rights to payment cannot be pledged or granted as security for a debt.

C. Application for "Evolution Fitness" Trademark

[73] As I indicated to counsel when this matter was argued, I am not comfortable with the Court's jurisdiction to make any direction or order pertaining to SMI's CIPO application to register its business name as part of a trademark. While I

am satisfied that a fraudulent conveyance has been made out in the circumstances of this case, and I recognize the possibility that such a finding could impact the outcome of SMI's application, I think it would be questionable for the Court to go any further on this issue.

[74] Accordingly, the Court declines to make any ruling on the trademark application.

Conclusion

[75] In the result, BTA's application is allowed. Accordingly, an order shall issue as follows:

(a) The transfer between FFI and SMI of the CalFit membership rights, purported to have occurred on May 12, 2020, is found to be a fraudulent conveyance contrary to the *Fraudulent Conveyances Act, 1571* (UK), 13 Eliz 1, c 5;

(b) The transfer of the CalFit membership rights, as described above, is declared to be void in its entirety;

(c) All legal and beneficial interests to the CalFit membership rights and any funds derived therefrom, are hereby transferred to and invested in FFI free and clear of any interest of SMI; and

(d) SMI is hereby directed to execute such further documents and take such further actions as is required to give effect to the preceding subparagraph of this order.

[76] The issued order shall also include a direction that the Court affirms and

ratifies that the purchased assets, as described in the Sale Agreement referenced in the Sale Approval and Vesting Order, dated February 10, 2021, shall include:

(a) the CalFit membership rights acquired by FFI in 2018; and

(b) funds derived from those membership rights.

[77] With respect to costs, BTA shall have its costs of this application against SMI, fixed in the sum of $10,000 in fees plus taxable disbursements.

[78] Finally, I shall remain seized with this application in the event there are any issues that arise respecting the wording and form of the final order to be issued, as well as any matters pertaining to the enforcement of the order.

J.
R.W. ELSON