

Court File No: 32-2783327

**ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)**

IN THE MATTER OF THE BANKRUPTCY OF
IAN ROSS MCSEVNEY, an individual residing in the
Town of Ancaster in the Province of Ontario

FACTUM OF THE RESPONDENT
(motion returnable June 2, 2023)

May 12, 2023

MARLER LAW FIRM
102 Lakeshore Road East
Oakville, ON L6J 6N2

JONATHAN H. MARLER
SHERIDAN SMITH
Tel: 905-338-2300
Fax: 905-338-6413

jmarler@marler.ca
ssmith@marler.ca

Counsel for the respondent

TO: SERVICE LIST

SERVICE LIST
(as of April 28, 2023)

TO: MILLER THOMSON LLP
Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto, ON M5H 3S1

Gregory Azeff (LSO: 45324C)
Email: gazeff@millerthomson.com
Tel: 416-595-2660

Monica Faheim (LSO: 82213R)
Email: mfaheim@millerthomson.com
Tel: 416-597-6087

Lawyers for the Trustee, BDO Canada Limited

AND TO: BDO CANADA LIMITED
25 Main Street West, Suite 805
Hamilton, Ontario L8P1H1

Peter Crawley
pcrawley@bdo.ca
Tel: 289.678.0243 / Fax: 905.570.0249

Clark Lonergan
clonergan@bdo.ca
Tel: 647 730 0934 / Fax: 416 865 0904

Trustee

AND TO: CARLSON & KOCIPER
10 King Street East, 14th Floor
Toronto, Ontario M5C 1C3

Michael Carlson LSO#: 47325U
Email: Michael@carlsonkociper.com
Tel: 647.244.5118

Lawyers for Monica Matta and Mark Amello

AND TO: **MARLER LAW FIRM**
102 Lakeshore Road East
Oakville, ON L6J 6N2
Tel: 905-338-2300

Jonathan Marler
Email: jmarler@marler.ca

Sheridan Smith
ssmith@marler.ca

Lawyers for Ian McSevney and Elaine McSevney

Email Service List: gazeff@millertomson.com; mfaheim@millertomson.com;
pcrawley@bdo.ca; clonergan@bdo.ca; Michael@carlsonkociper.com;
jmarler@marler.ca; ssmith@marler.ca

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IN THE MATTER OF THE BANKRUPTCY OF
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Town of Ancaster in the Province of Ontario

FACTUM OF THE RESPONDENT
(motion returnable June 2, 2023)

PART I: OVERVIEW

1. This factum is produced pursuant to the endorsement of the Honourable Madam Justice Kimmel dated March 12, 2023, concerning the application wherein:

[1] The Trustee seeks a declaration that the sale of certain property located at Unit 9 at 81 Valridge Drive (the "Unit 9 Property") by the Debtor, Ian Ross McSevney, to a company owned by his sister Elaine McSevney on August 4, 2020 was a transfer at undervalue within the meaning of s. 96 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA"), and an order for payment of the purchase price differential among other relief.¹

2. The Honourable Madam Justice Kimmel ("Justice Kimmel") identified the primary point of dispute on this application as being the value of the property municipally known as Unit 9 – 81 Valridge Drive, Ancaster, ON (the "Unit 9 Property") as at the date of its transfer on August 4, 2020, to 12195585 Canada Inc. (the "Company").²

3. Elaine McSevney ("Elaine") being the sole shareholder, officer and director of the Company, has obtained and delivered to BDO Canada Limited, in its capacity as Trustee in Bankruptcy of Altmore Mortgage Investment Corporation and Ian Ross McSevney (the "Trustee"), an appraisal from a Certified Residential Appraiser ("C.R.A.") reflecting that

¹Reference: Endorsement of the Honourable Madam Justice Kimmel dated March 12, 2023 ("Endorsement"), at para 1

²Reference: *Ibid*, at para 4

the fair market value of the Unit 9 Property as at the time of the transfer from Ian Ross McSevney, the bankrupt ("Ian"), to the Company on August 4, 2020, was \$430,000 - \$450,000.³

4. The Trustee has adduced **no** evidence as to the value of the Property as at the time of the transfer from Ian to the Company on August 4, 2020.

5. In its notice of motion, the Trustee seeks to obtain an order and declaration that the sale of the Unit 9 Property on August 4, 2020 (the date of purchase by the Company), was a "transfer at undervalue" as contemplated in section 96 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "Act").⁴ In its factum, the Trustee asserts that the issue on motion is whether the sale on December 20, 2021 (the date of sale by the Company), was a "transfer at undervalue" as contemplated by section 96 of the Act.⁵

6. One can assume that the Trustee has chosen to rely on the value of the Unit 9 Property on December 20, 2021, to show the profit made by the Company after 16 months as owner. To permit the Trustee to rely on the value of the Unit 9 Property at a later date would be contrary to the intent and purpose of s.96 of the Act.

PART II: SUMMARY OF FACTS

7. In the summer of 2020, Ian was experiencing headwinds in the development of his start-up company, Altmore Mortgage Investment Corporation ("Altmore"), which Elaine had supported for many years, by way of personal loans to him and, as a result, Elaine offered to buy the Unit 9 Property, refinance it, and thereby provide indirect support to

³ **Reference:** Affidavit of Elaine McSevney, sworn April 28, 2023 ("April 28 Affidavit"), at Exhibit "A"

⁴ **Reference:** Trustee's Notice of Motion dated February 10, 2023, at para 1(b)

⁵ **Reference:** Factum of the Trustee dated March 21, 2023, at para 8

Altmore. This offer allowed Ian to limit his personal expenses and to focus on the development of Altmore.⁶

8. At the time Elaine offered to buy the Unit 9 Property, Ian was not insolvent.⁷

9. Elaine's motivation for making the offer was to secure the advances already made to Ian and to put herself into the real estate investment market.⁸

10. On August 4, 2020, the Company purchased the Unit 9 Property from Ian for a notional fair market value of \$530,000. After the required adjustments made on closing, the Company paid approximately \$398,469.10 for the Unit 9 Property.⁹

11. Ian and his family continued to live at the Unit 9 Property after August 4, 2020, as tenants and were required to pay rent on a monthly basis to Elaine.¹⁰

12. On December 20, 2021, the Company sold the Unit 9 Property for \$700,000 to an unrelated third party,¹¹ and the net proceeds from the sale were solely retained by Elaine and not Ian.¹²

PART III: ISSUE ON MOTION

13. Was the transfer of the Unit 9 Property from Ian to the Company on August 4, 2020, a “transfer at undervalue” within the meaning of s. 2 of the Act?

⁶ **Reference:** April 11 Affidavit, at para 5

⁷ **Reference:** *Ibid*, at para 6

⁸ **Reference:** *Ibid*

⁹ **Reference:** *Ibid*, at para 10

¹⁰ **Reference:** Examination of Elaine McSevney dated January 24, 2022, (“McSevney Examination”), at pages 27 - 29

¹¹ **Reference:** April 11 Affidavit, at para 13

¹² **Reference:** McSevney Examination, at pgs. 30 – 31

14. Should the value of the Unit 9 Property on December 20, 2021, be relied upon instead of the value on August 4, 2020?

15. If this Honourable Court deems the transfer to be a "transfer at undervalue", can the transfer be remedied by the court as permitted under s. 96 of the Act?

PART IV: THE LAW

16. This application was brought in accordance with s. 96 of the Act, which states:

96 (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

(a) the party was dealing at arm's length with the debtor and

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

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

(iii) the debtor intended to defraud, defeat or delay a creditor; or

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

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

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

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

(B) the debtor intended to defraud, defeat or delay a creditor.¹³

¹³ [Bankruptcy and Insolvency Act R.S.C., 1985, c. B-3, s. 96](#)

17. Elements that must be considered by the Court to declare a transfer void pursuant to s. 96 of the Act, therefore, include:

- i. A disposition of property;
- ii. A transfer that satisfies the definition of a transfer at undervalue as set out in s. 2 of the Act;
- iii. The relationship between the parties;
- iv. The timing of the transfer in relation to the initial bankruptcy event;
- v. The insolvency of the debtor; and
- vi. The intention of the debtor.

18. It is understood that when parties agree and enter a real estate contract, the purchaser in the transaction becomes the beneficial owner of the property as soon as the contract is executed.¹⁴

19. In *Montor Business Corp. (Trustee of) v. Goldfinger*, [2016] O.J. No. 2782, the Honourable Madam Justice S.E. Pepall, identifies the first step in a s. 96 application is to determine if the transfer was a “transfer at undervalue”.¹⁵

20. A “transfer at undervalue” is defined in s. 2 of the Act as being “a disposition of property or provision of services for which no consideration is received by Ian or for which the consideration received by Ian is conspicuously less than the fair market value of the consideration given by Ian”.¹⁶

¹⁴ [Mercaso Capital Corp. v. Qureshi](#), [2018] O.J. No. 4468, at para 31

¹⁵ *Montor Business Corp. (Trustee of) v. Goldfinger*, [2016] O.J. No.2782, at para 33

¹⁶ [Bankruptcy and Insolvency Act R.S.C., 1985, c. B-3, s. 2](#)

21. S. 96(2) of the Act states:

96(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.¹⁷

22. At Paragraphs 85 and 86 in *Peoples Department Store Inc (Trustee of) v. Wise*, [2004] S.C.J. No.64, Justices Major and Deschamps state:

[85] In *Skalbania (Trustee of) v. Wedgewood Village Estates Ltd.* (1989), 37 B.C.L.R. (2d) 88 (C.A.), the test for determining whether the difference in consideration is "conspicuously greater or less" was held to be not whether it is conspicuous to the parties at the time of the transaction, but whether it is conspicuous to the court having regard to all the relevant factors. This is a sound approach.

[86] As for the factors that would be relevant to this determination, the court might consider, inter alia: evidence of the margin of error in valuing the types of assets in question; any appraisals made of the assets in question and evidence of the parties' honestly held beliefs regarding the value of the assets in question; and other circumstances adduced in evidence by the parties to explain the difference between the consideration received and fair market value: see L. W. Houlden and G. B. Morawetz, *Bankruptcy and Insolvency Law of Canada* (3rd ed. (loose-leaf)), vol. 2, at p. 4-114.1.¹⁸

23. As stated by Justice J.T. Eamon in *Royal Bank of Canada v Racher*, [2017] A.J. No. 254, "Section 96 of the *BIA* does not explicitly require appraisal evidence, though such evidence would normally be expected and provided".¹⁹

24. In s. 96 applications concerning real estate, the courts emphasize the importance of obtaining evidence as to the approximate fair market value at the time of the transfer

¹⁷ [Bankruptcy and Insolvency Act R.S.C., 1985, c. B-3, s. 96 \(2\)](#)

¹⁸ [Peoples Department Store Inc \(Trustee of\) v. Wise, \[2004\] S.C.J. No.64, at paras 85 & 86](#)

¹⁹ [Royal Bank of Canada v. Racher, \[2017\] A.J. No. 254, at para 118](#)

and not at any other time. The emphasis is attributable to the potentially drastic, and often unexpected, changes in the real estate market that can occur at any given time.²⁰

25. At paragraph 4 of her endorsement, Justice Kimmel states:

[4] ... It is anticipated that the Trustee may include some additional evidence as to the value of the Unit 9 Property as at the date of its transfer to Ms. McSevney in the Trustee's Supplemental Report/Reply Motion Record.²¹

26. Guidance on determining of whether the difference in value was "conspicuously less" is provided by Master W.S. Schlosser in *Indarsingh (Re)*, [2015] A.J. No. 259 ("*Indarsingh*") at paragraph 15, as follows:

[15] Though it is impossible to come up with an exact range, the decided cases seem to suggest that 17% below fair market value is 'conspicuously less' and therefore undervalue: Wood (following) citing *Henfrey Samson Belair Limited v Wedgewood Village Estates Limited* (1987), 65 CBR (NS) 48 (BCCA); but that 6% might not be: *People's Department Store* (above) at para. 88. (See Wood, *Bankruptcy and Insolvency Law*, Irwin Law, page 210-211).²²

27. Further, at paragraph 18 of *Indarsingh*, Master W.S. Schlosser states:

[18] In my view, the starting point is that the transferee is not obliged to rebut the presumption on a balance of probabilities. Rather, once some contrary evidence is adduced, the presumption has 'no more than its own weight' (Sopinka, p. 152, para 4.46). The effect of the contrary evidence in effect, makes the presumption vanish: *Circle Silm Ent. Incorpor. V CBC*, [1959] SCR 602 at 606, per Judson J., writing for the court. In a manner of speaking, the contrary evidence is the wand that makes the magician's assistant disappear. The evidence from both sides then competes on equal terms and the question becomes, 'what value is proved on the balance of probabilities?' To this end, the court is obliged to weigh competing factors and consider expert

²⁰ [Royal Bank of Canada v. Racher, \[2017\] A.J. No. 254, at para 118, at para 117](#): "The other evidence is not particularly material to the value of the lands at February 10, 2014. The market can fluctuate over time."

²¹ **Reference**: Endorsement, at para 4

²² *Ibid*, at para 15

opinion in order to gauge the extent of the disparity between fair market value and value received.²³

PART V: APPLYING THE LAW TO THE EVIDENCE

28. Elaine and the Trustee agree that Ian disposed of the Unit 9 Property on or around August 4, 2020, when Ian received approximately \$398,469.10 as consideration from the Company for the Unit 9 Property.²⁴

29. Thus, when Ian received adequate consideration from the Company for the Unit 9 Property, Ian's relationship to the property shifted from "owner" to "tenant".²⁵

30. Even after receiving Justice Kimmel's endorsement, the Trustee has elected not to provide supporting evidence as to the value of the Unit 9 Property as at the time of the transfer from Ian to the Company in its Supplementary Second Report dated April 14, 2023.²⁶

31. The Trustee's explanation for relying on the December 20, 2021, sale price at paragraph 21 of its Supplementary Second Report dated April 14, 2023, is an indication of its misapplication of the requirements set out in s. 96 of the Act.

32. The Trustee attempts to avoid the first hurdle, wherein the Act requires the trustee to provide evidence of a transfer at undervalue as defined in s. 2 of the Act, and instead focuses solely on the relationship between the parties.

²³ [Indarsingh \(Re\), \[2015\] A.J. No. 259, para 18](#)

²⁴ **Reference:** April 11 Affidavit, at para 10

²⁵ **Reference:** McSevney Examination, at pages 27 - 29

²⁶ **Reference:** Supplementary Second Report of the Trustee dated April 14, 2023

33. The only supporting evidence as to the fair market value on or around August 4, 2020, has been evidence provided by Elaine.

34. In her affidavit sworn April 11, 2023, Elaine advised that at the time of the transfer, she believed \$530,000 was the approximate value of the Unit 9 Property.²⁷ Elaine supports this belief by providing the results of an informal comparison of similar properties sold in the neighbourhood around August 4, 2020.²⁸

35. In light of the Trustee's electing not to provide appraisal evidence in its supplementary second report, Elaine provided a formal appraisal dated April 24, 2023 ("April 24 Appraisal"), as to the approximate fair market value on August 4, 2020, in her affidavit sworn April 28, 2023.

36. Relying on the April 24 Appraisal, the estimated fair market value of the Unit 9 Property on or around August 4, 2020, was \$430,000 to \$450,000. Taking the mid-point of \$440,000 and deducting a notional real estate commission of 5% and notional legal fees of \$1,500, the fair market value was \$416,500.²⁹

PART VI: CONCLUSION

37. It is clear that the consideration received by Ian on August 4, 2020, cannot be characterized as being "conspicuously less" than the appraised fair market value of the Unit 9 Property, as detailed in the April 24 Appraisal.

38. The facts of this case along with the evidence and explanation adduced by the parties, do not give rise to a "transfer at undervalue" as defined in s. 2 of the Act; thus, it

²⁷ **Reference:** April 11 Affidavit, at para 9

²⁸ **Reference:** April 28 Affidavit, at Exhibit "A"

²⁹ **Reference:** *Ibid*

is inappropriate to proceed with an examination of the remaining elements of s. 96 of the Act.

PART VII: ORDER SOUGHT

39. A declaration that the transfer of the Unit 9 Property from Ian to the Company on August 4, 2020, was not a transfer at undervalue as defined in s. 2 of the *Bankruptcy and Insolvency Act* R.S.C., 1985, c. B-3; and

40. An Order that the Trustee's Application be dismissed with costs in favour of the respondent.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of May, 2023



SHERIDAN L. SMITH
Lawyer for the respondent

SCHEDULE "A"
LIST OF AUTHORITIES

- 1) [Indarsingh \(Re\), \[2015\] A.J. No. 259](#)
- 2) [Mercaso Capital Corp. v. Qureshi, \[2018\] O.J. No. 4468](#)
- 3) *Montor Business Corp. (Trustee of) v. Goldfinger*, [2016] O.J. No.2782, at para 33:

[33] Dealing first with the BIA claim, Farber challenged the Payments as transfers at undervalue contrary to s. 96 of the BIA. In order to succeed on this ground, Farber was required to establish that:

 - (a) the Payments were transfers at undervalue;
 - (b) the transfer occurred:
 - (i) within one year before the initial bankruptcy event (May 26, 2009), if Goldfinger was at arm's length with the debtor, Annopol; or
 - (ii) within five years before the initial bankruptcy event (May 26, 2009), if Goldfinger was not at arm's length with the debtor, Annopol; and
 - (c) the debtor, Annopol, was insolvent at the time of the Payments or was rendered insolvent by the Payments; and
 - (d) the debtor, Annopol, intended to defraud, defeat or delay a creditor.
- 4) [Peoples Department Store Inc \(Trustee of\) v. Wise, \[2004\] S.C.J. No.64](#)
- 5) [Royal Bank of Canada v. Racher, \[2017\] A.J. No. 254](#)

**SCHEDULE “B”
RELEVANT STATUTES**

1. [Bankruptcy and Insolvency Act R.S.C., 1985, c. B-3](#)

Definitions

2 In this Act,

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; (*opération sous-évaluée*)

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

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

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

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.

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Proceeding commenced at Toronto

FACTUM OF THE RESPONDENT

MARLER LAW FIRM
102 Lakeshore Road East
Oakville, ON L6J 6N2

JONATHAN H. MARLER (LSO #14883D)
SHERIDAN SMITH (LSO #86087A)

Tel: 905-338-2300
Fax: 905-338-6413
jmarler@marler.ca
ssmith@marler.ca

Lawyers for the respondent