

CANADA / JUDGMENT

Wu v. Gu

2020 BCSC 396

COURT

Supreme Court of British Columbia

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2020 BCSC 396 Wu v. Gu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wu v. Gu,

2020 BCSC 396

Date: 20200318

Docket: S171103

Registry: Vancouver

Between:

Yunfang Wu

Plaintiff

And

Xiulong Gu (also known as Xiu Long Gu), Qiuzhen Sun (also known as Qiu Zhen Sun) and Wei Jie Gu (also known as WeiJie Gu)

Defendants

Before: The Honourable Madam Justice MacNaughton

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

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October 1-4 and 7-11, 2019

Place and Date of Judgment:

Vancouver, B.C.

March 18, 2020

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Introduction

- [1] The Plaintiff, Yunfang Wu, is a Chinese citizen and businessperson. From November 2007 to May 2014, Ms. Wu loaned a total of 150,000,000 Renminbi ("RMB"), in varying amounts, to the defendant, Xiulong Gu. In this decision, I will refer to Xiulong Gu as Gu Sr.
- [2] Ms. Wu has a judgment against Gu Sr. and his wife, the defendant Qiuzhen Sun. The defendant Wei Jie Gu is Gu Sr.'s and Ms. Sun's only child. In this decision, I will refer to Wei Jie Gu as Gu Jr.
- [3] Ms. Wu alleges that Gu Sr., Ms. Sun, and Gu Jr. have fraudulently dealt with two properties, which are now registered entirely in Gu Jr.'s name, so as to prevent or delay her from recovering on her judgment. Gu Sr. did not defend this action. Ms. Sun and Gu Jr. deny any fraudulent dealings with respect to the properties.
- [4] The allegedly fraudulent conveyances and/or preferences involve three impugned transfers of interests in two real properties in Richmond, B.C. The properties are a residential home at 3560 Semlin Drive ("3560 Semlin") and a residential condominium at 517-7338 Gollner Avenue ("Gollner").
- [5] The first transfer was on December 13, 2016. Gu Sr., who owned 100% of 3560 Semlin, transferred a 60% interest in it to Ms. Sun and a 40% interest in it to Gu Jr. (the "First Transfer").
- [6] The second transfer was on April 9, 2017. Ms. Sun transferred her 60% interest in 3560 Semlin to Gu Jr. (the "Second Transfer"). After the Second Transfer, Gu Jr. held the entire interest in 3560 Semlin.
- [7] The third transfer was also on April 9, 2017. Ms. Sun transferred her 50% interest in Gollner to Gu Jr. (the "Third Transfer"). After the Third Transfer, Gu Jr. held the entire interest in Gollner.
- [8] The land title transfer documents, with respect to all three transfers, record the consideration for the transfers as "\$1 Natural Love and Affection".

The Issue before the Court

- [9] The issue before the Court is whether the First Transfer, the Second Transfer, or the Third Transfer, or any of them, are void and of no effect pursuant to the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163 [FCA], and/or the Fraudulent Preference Act, R.S.B.C. 1996, c. 164 [FPA].
- [10] Ms. Wu alleges that the three transfers demonstrate that the defendants, through a series of transactions, acted to keep 3560 Semlin and Gollner out of the reach of Gu Sr.'s and Ms. Sun's creditors. She seeks orders that all three transfers be declared void and of no effect because they were fraudulent conveyances and/or preferences.

- [11] In response, Ms. Sun and Gu Jr. say that the transfers were for good and valuable consideration and did not constitute fraudulent conveyances and/or preferences.
- [12] Gu Sr. did not defend Ms. Wu's action and he did not appear at trial either to defend the allegations against him or as a witness in support of Ms. Sun's or Gu Jr.'s defences. There was no evidence to controvert the claims against Gu Sr. and as a result, the allegations made against him in the pleadings are deemed admitted.
- [13] At trial, I heard evidence from the plaintiff Ms. Wu. On behalf of the defendants, I heard evidence from the defendants Ms. Sun and Gu Jr.; from Gu Jr.'s wife, Yilu (Becky) Cen; and from Xijuan Xu, who was Ms. Sun's and Gu Sr.'s neighbour and from whom Gu Sr. borrowed money. All of the witnesses testified through Mandarin interpreters.

Background to the Chinese Judgment

- [14] Ms. Wu testified that she first met Gu Sr. in 2004 when, on behalf of his company, Tianfeng Iron Company, he approached her company, Aoyuan Iron Ore Company, to supply the iron concentrate powder Tianfeng needed for use in its iron and steel manufacturing process. The relationship between the two companies continued until the summer of 2007.
- [15] Ms. Wu described how, over time, her relationship with Gu Sr. grew closer and extended to include their families. The families socialized together. In about 2005, she borrowed money from Gu Sr. to expand her company's production facilities. She repaid the money approximately six months later.
- [16] Ms. Wu said that she respected Gu Sr., described him as being like a family member, and referred to him in her evidence as her "big brother". Ms. Wu attended Gu Jr.'s engagement party and marriage to Ms. Cen and gave them a gift of \$10,000 USD.
- [17] In about 2009, Gu Sr. advised Ms. Wu that he was planning to immigrate to Canada. He described Canada as being politically safe and safe for capital. Ms. Wu testified that she understood that, because there was no direct relationship between China and Canada, money moved to Canada would be safe.
- [18] Gu Sr. introduced Ms. Wu to an immigration consulting company and, in or about the summer of 2009, she also applied to immigrate to Canada and was granted residency status. Ms. Wu visited Gu Sr. in Canada on about five or six occasions between 2012 and 2013. She has since let her residency status lapse.
- [19] Ms. Wu testified that between the end of 2007 and about May 2014, she loaned Gu Sr. 150,000,000 RMB (approximately \$28,000,000 CAD). He told her that he needed the money for his real estate business. Ms. Wu was aware that Gu Sr. also had a hotel business and she understood that he owned three or four Moutai Liquor stores in China. Moutai Liquor is a national brand of Chinese alcohol.

- [20] Ms. Wu said that, initially, due to their relationship, her loans to Gu Sr. were made without terms. There was no written agreement, no agreement as to interest, and no specific repayment date.
- [21] Ms. Wu was repaid approximately 18,000,000 RMB prior to May 2014. She received 10,000,000 RMB in 2009, 5,000,000 RMB in 2012, and 3,000,000 RMB in 2013. Not all of the repayments were made by Gu Sr. She testified that Jia Qiang Wang, Luo Xiao Fei, and Gu Sr.'s younger brother repaid some of the debt on Gu Sr.'s behalf.
- [22] Ms. Wu testified that, on or about October 21, 2014, shortly after she attended Gu Jr.'s wedding celebration, Gu Sr. offered to enter into a written borrowing note with her. Gu Sr. provided her with a signed note affirming that the outstanding loan principal was 150,000,000 RMB, specifying an interest rate for the first time, and setting a repayment date. On the same date, Gu Sr. also entered into a share pledge agreement, pursuant to which he pledged her his 60% interest in a company, the Longding Company ("Longding").
- [23] Ms. Wu testified that she next communicated with Gu Sr. on March 23, 2015, when she visited him at one of the hotels he owned in Yuyao City in China to ask about the repayment of the loan. He told her that he did not have any money, but that they could continue their discussions the following day. The following day, Ms. Wu said that she unsuccessfully attempted to contact Gu Sr. She attended at his business address looking for him but said that she was unable to locate him. She testified that on March 27, 2015, she received a text message from Gu Sr. confirming that he was in Canada and asking her to keep his whereabouts confidential.
- [24] On April 3, 2015, Ms. Wu commenced a lawsuit against Gu Sr., Ms. Sun, and Longding in the Intermediate People's Court of Ningbo City of Zhejiang Province of China (the "Ningbo Court").
- [25] Ms. Wu testified that, about the time that she commenced the proceeding in the Ningbo Court, her lawyer investigated Longding's assets and learned that there were no prospects of collecting against it because its assets were already being used as collateral for a bank loan, totaling 500,000,000 RMB, and a personal loan, totaling 100,000,000 RMB.
- [26] On September 16, 2015, the Ningbo Court issued judgment against Gu Sr., Ms. Sun, and Longding (the "Chinese Judgment").
- [27] Gu Sr., Ms. Sun, and Longding were ordered to pay Ms. Wu 229,305,763 RMB, approximately \$42.5 million CAD, plus post-judgment interest from August 1, 2018, at the foreign prime rate applicable in the People's Republic of China. The judgment included the principal sum of 150,000,000 RMB, outstanding legal fees and pre-judgment interest ordered by the Ningbo Court of 3,729,600 RMB, and court ordered post-judgment interest to August 1, 2018 of 75,576,163 RMB.

[28] Ms. Wu testified that she has only been able to collect approximately 8,000,000 RMB towards the Chinese Judgment. Ms. Wu confirmed that she has been unable to collect any funds from Longding.

History of the Proceedings

- [29] These proceedings were commenced on February 6, 2017. Initially, the only relief Ms. Wu sought was the recognition and enforcement of the Chinese Judgment.
- [30] On March 15, 2017, after a without notice hearing, Ms. Wu obtained a garnishing order before judgment. On March 23, 2017, HSBC Canada filed a notice that it had paid the sum of \$19,888.16 into court pursuant to the garnishing order.
- [31] On December 12, 2017, Ms. Wu filed an amended notice of civil claim adding fraudulent conveyance and/or preference claims in respect of the First and Second Transfers of 3560 Semlin. On January 19, 2018, Ms. Wu added fraudulent conveyance and/or preference claims in respect of the Third Transfer of Gollner.
- [32] Ms. Sun and Gu Jr. filed a response to civil claim on March 13, 2018. As I have explained, Gu Sr. did not respond.
- [33] Ms. Sun and Gu Jr. denied that the First and Second Transfers of 3560 Semlin were fraudulent conveyances and/or preferences. In respect of the Third Transfer of Gollner, Ms. Sun and Gu Jr. said that Ms. Sun had never owned Gollner. Although she was registered on title as a joint owner with Gu Jr., they said that she held her 50% interest in trust for her daughter-in-law, Ms. Cen.
- [34] On Ms. Wu's application, on August 1, 2018, Master Dick granted an order recognizing the Chinese Judgment. Despite having notice of the hearing, and being represented by counsel, Ms. Sun and Gu Jr. did not appear at the hearing. The order was granted in default against Gu Sr. and as a summary judgment against Ms. Sun.
- [35] The total amount ordered payable to Ms. Wu by Gu Sr. and Ms. Sun is the amount of Canadian currency necessary to purchase the equivalent amount of 229,305,763 RMB, plus post-judgment interest from August 1, 2018. The equivalent amount in CAD is approximately \$42,800,000. The amount reflects a reduction in the amount of the funds already collected in China pursuant to the Chinese Judgment.
- [36] Since August 1, 2018, Ms. Wu has received a payment of \$19,888.16 CAD, approximately 99,440.80 RMB, out of court. She has not otherwise received any payment towards the amount owed to her.

The Defendants' Property in Canada

5780-5800 Langtree Ave., Richmond

- [37] After Gu Sr., Ms. Sun, and Gu Jr., who was then 19, immigrated to Canada in 2010, they purchased an investment property on Langtree Ave. in Richmond ("Langtree"), for \$1.195 million. The transaction closed on October 29, 2010.
- [38] Gu Jr. testified that their real estate agent advised them that they could redevelop Langtree and, if they put Langtree in his name, because he was a first time buyer, there would be a tax saving of between 30-40%.
- [39] Gu Jr. and Ms. Sun testified that Ms. Sun paid the deposit of \$50,000, took out a mortgage of \$732,500, and paid the balance due on closing. They also testified that Ms. Sun paid the ongoing mortgage. Ms. Sun said that she made the payments out of a joint HSBC account she held with Gu Jr.
- [40] Ms. Sun testified that she paid for the redevelopment of Langtree from another joint HSBC account she held with her husband.
- [41] Gu Jr. sold Langtree in May 2013 for \$2,160,000 and, after the mortgage and legal fees were paid, the net proceeds were \$1,411,049.99. Gu Jr. and Ms. Sun disagreed about whether the net proceeds were paid into their joint HSBC account or into Gu Jr.'s sole account. I need not resolve that disagreement.
- [42] Gu Jr. and Ms. Sun testified that they made approximately \$300,000 profit on the redevelopment of Langtree. As Gu Jr. was a first-time buyer, any profit from the sale was exempt from tax, and he and his mother agreed to divide the profit. He said he received \$150,000 from his mother in approximately 2015. There were no documents in evidence about what happened to the proceeds of sale of Langtree or to confirm how and when Gu Jr. received his share of the profit from his mother.
- [43] Gu Jr. testified that he then loaned the \$150,000 to Suk Ling Chan, a friend of his in Hong Kong. Ms. Chan repaid the loan by depositing the funds into Gu Jr.'s HSBC account in Hong Kong. There were no records in evidence to support the loan or the repayment.
- [44] As will be discussed below, Gu Jr. testified that, after the redevelopment of Langtree, his share of the proceeds formed part of the purchase price for Gollner.

3580 Semlin Dr., Richmond

- [45] Shortly after the purchase of Langtree, on December 14, 2010, Ms. Sun purchased a property at 3580 Semlin Dr. in Richmond for \$1,390,000. As will be discussed below, Ms. Sun testified that when she sold 3580 Semlin, she used part of the proceeds to pay Gu Sr.'s debts in China.

Blueberry Farm

- [46] During his evidence, Mr. Xu testified that he understood that Gu Sr. owned a blueberry farm. I heard no other evidence about the blueberry farm, including when it was bought and/or sold.

3560 Semlin

- [47] Gu Sr. purchased 3560 Semlin on September 29, 2011 and the transfer was registered on October 3. The consideration recorded was \$1,688,000. At the time of the purchase, a mortgage in favour of the Bank of Montreal ("BMO") was registered on title in the principal amount of \$1,181,600. The family lived in 3560 Semlin.
- [48] As set out above, on December 13, 2016, in the First Transfer, Gu Sr. transferred 60% of his interest in 3560 Semlin to Ms. Sun and his remaining 40% interest to Gu Jr. Four months later, on April 9, 2017, in the Second Transfer, Ms. Sun transferred her 60% interest to Gu Jr. The circumstances that led to these transfers are discussed in more detail below.
- [49] Nine days after the Second Transfer, on April 18, 2017, a mortgage in favour of a Hong Kong company called Trendspark (Far East) Limited was registered on title (the "Trendspark Mortgage"). The principal amount of the mortgage is \$1,010,000.

Gu Jr.'s Return to China and Back to Canada

- [50] In mid-2013, Gu Jr. returned to Ningbo and remained there until October 2016. While in China, Gu Jr. married Ms. Cen. Gu Jr. testified that he received wedding gifts of about 1 million RMB from the 300-400 guests who attended his engagement ceremony and about 1.5 million RMB from the approximately 800 guests who attended his wedding. Gu Jr. testified that Ms. Cen also received engagement and wedding gifts of cash but he did not know how much.
- [51] While in China, and in about March 2014, Gu Jr. testified that he and Ms. Cen purchased a Moutai Liquor dealership from two of his father's brothers for 2 million RMB. He said that he and Ms. Cen each paid half of the purchase price. Gu Jr. purchased the original liquor inventory from his uncles. Thereafter, inventory was replaced with profits from sales.
- [52] Gu Jr. and Ms. Cen ran the dealership together until December 2015, when they sold it. Gu Jr. testified that he received 2 million RMB for the sale, including the liquor inventory, and that Ms. Cen received approximately the same amount. They transferred the proceeds of sale into Gu Jr.'s HSBC bank account in Hong Kong.
- [53] Gu Jr. and Ms. Cen had a daughter on June 7, 2016. Gu Jr. testified that his maple leaf card (Canadian Residency Card) was expiring at the end of 2016, after which he would be unable to return to Canada to live. They discussed moving to Canada and agreed that it would be better for their child. Ms. Cen was wary about immigrating, as she was concerned that she would not have a place to live in Canada and she discussed those concerns with both of their families.
- [54] Gu Jr. testified that, in the second half of 2016, Wanxian Ni, his paternal grandmother, decided to finance his move to Canada by giving Gu Jr. 2.8 million RMB so that he and Ms. Cen could buy a property.

- [55] Gu Jr. described how, on October 11, 2016, he accompanied his grandmother to three different Chinese banks, on the same day, and she transferred money from her bank accounts into his accounts at the same banks. The withdrawal/deposit slips are in evidence and, as translated, they indicate that on October 11, 2016, the following amounts were transferred from Wanxian Ni's accounts in the named banks into Gu Jr.'s accounts in the same banks:
- (a) 1 million RMB at the China Construction Bank,
 - (b) 800,000 RMB at the Bank of Communications, and
 - (c) 1 million RMB at the Industrial and Commercial Bank of China.
- [56] After the funds went into Gu Jr.'s accounts, he testified that he transferred them to his cousin Wenjuan Chen, who lived in Ningbo, and who agreed to deposit the equivalent amount of Hong Kong dollars into Gu Jr.'s HSBC account in Hong Kong. He testified that, "in China we cannot transfer funds to Hong Kong or other countries". He did not explain why his cousin was able to do so and this evidence was difficult to reconcile with his earlier evidence that the proceeds of sale from the Moutai Liquor distributorship were transferred into his HSBC account in Hong Kong.
- [57] The withdrawal/deposit slips for the transfers to Ms. Chen are also in evidence and, as translated, they indicate that on October 24, 2016, the following amounts were transferred from Gu Jr.'s accounts into Ms. Chen's accounts in the same banks:
- (a) 1 million RMB at the China Construction Bank,
 - (b) 800,000 RMB at the Bank of Communications, and
 - (c) 1 million RMB at the Industrial and Commercial Bank of China.
- [58] Gu Jr. testified that, between October 24 and October 28, 2016, Ms. Chen deposited 4.2 million HKD into his Hong Kong HSBC account. Of that amount, 3.2 million HKD was the equivalent of the 2.8 million RMB he had received from his grandmother and transferred to Ms. Chen, and the additional 1 million HKD was money he borrowed from Ms. Chen.
- [59] Gu Jr. testified that he then exchanged the 4.2 million HKD into \$550,000 CDN at the HSBC in Hong Kong. Once exchanged, Gu Jr. transferred \$450,000 into the joint HSBC account he held with his mother in Canada and \$100,000 into his own Canadian HSBC account.
- [60] Mr. Gu testified that he also transferred \$150,000 from his Hong Kong HSBC account to his friend Suk Ling Chan in Hong Kong. On October 31, 2016, Ms. Chan then transferred \$149,958 into Gu Jr.'s and his mother's joint Canadian HSBC account. Ms. Chan is the same friend to whom Gu Jr. lent the \$150,000 in profit he earned from the Langtree redevelopment. Ms. Chan repaid this \$150,000 loan to Gu Jr.'s Hong Kong bank account before these transactions occurred in 2016.

- [61] When asked in his evidence to explain the reason for these transfers with Ms. Chan, Gu Jr. explained that when he had loaned Ms. Chan \$150,000, he had transferred the money from his and his mother's joint Canadian HSBC account into her Hong Kong account and now that he wanted to buy a property, he wanted her to use the same routing. He explained (through his translator) that "at that time HSBC asked a lot of questions about the money coming in. If the money comes from other people they would ask a lot of questions." He said that he had heard of others having their accounts frozen because of such transfers but, if the money went out to Ms. Chan, and then came back from her, the bank would not question the transaction.
- [62] In sum, in October 2016, about \$700,000 CAD was transferred from Gu Jr.'s Hong Kong HSBC account into his Canadian HSBC accounts.

The Purchase of and Registered Title of Gollner

- [63] Gu Jr. testified that, after his grandmother offered to advance the funds to buy a property in Canada, he and Ms. Cen researched where they wanted to live in Richmond and asked his mother to look at properties for them in certain neighbourhoods.
- [64] Over about a month, Ms. Sun viewed and sent them pictures of different properties. They decided to purchase Gollner and Ms. Sun paid the \$30,000 deposit on their behalf. Gu Jr. testified that Ms. Sun was later reimbursed for the deposit.
- [65] The balance of the Gollner purchase price was paid out of Gu Jr.'s and Ms. Sun's joint HSBC account. Gu Jr. testified that, when his grandmother gave him the money to buy a property in Canada, she said the property was for both him and Ms. Cen. As a result, he testified that Gollner was "shared" by them.
- [66] Ms. Cen's name is not recorded on title to Gollner. The transfer date was November 3, 2016 and it is registered jointly in Gu Jr.'s and Ms. Sun's names. The consideration declared on the land title transfer document was \$658,000.
- [67] Gu Jr., Ms. Cen, and Ms. Sun all testified that Ms. Sun held her 50% interest in Gollner in trust for Ms. Cen.

The Evidence about the Trust

- [68] Gu Jr. testified that a document called a Trust Declaration was drawn up on November 3, 2016, and signed on November 5, indicating that Ms. Sun held her interest in Gollner in trust for Ms. Cen, the beneficial owner. He said that his mother and his wife entered into the trust arrangement because when he and Ms. Cen came to Canada, Ms. Cen's permanent residence status was still in process. Their real estate agent told them that if Gollner was registered in Ms. Cen's name, they would be required to pay a 15% foreign buyer's tax. To avoid the tax, Ms. Cen asked Ms. Sun to hold the property on her behalf.

- [69] Ms. Cen's and Ms. Sun's signatures on the Trust Declaration were not witnessed and it was not registered on title to Gollner.
- [70] Gu Jr. testified that when Ms. Cen later learned that Gu Sr. was involved in this law suit, she strongly urged Ms. Sun to transfer the 50% she held in trust for Ms. Cen to Gu Jr. to hold on her behalf.
- [71] On April 9, 2017, the same day Ms. Sun transferred her 60% interest in 3560 Semlin to Gu Jr., Ms. Sun also transferred her 50% interest in Gollner to him. The land title transfer document lists the market value of the property at \$700,000.
- [72] Still on April 9, 2017, Gu Jr. and Ms. Cen signed a Trust Declaration confirming that Gu Jr. held 50% of his 100% interest in Gollner for the benefit of Ms. Cen. Mr. Gu testified that a lawyer, Xia Feng Zheng, witnessed their signatures on April 9, 2017. Their signatures are not witnessed on the document itself and it was not registered on title to Gollner.
- [73] On April 18, 2017, the same day the Trendspark Mortgage was registered against title to 3560 Semlin, a mortgage in favour of Gu Jr.'s mother-in-law, Yaqing Cen, was registered on title to Gollner (the "Cen Mortgage"). The principal amount of the Cen Mortgage is \$700,000.
- [74] The Trendspark Mortgage and the Cen Mortgage are the subject of separate proceedings brought by Ms. Wu claiming that they are fraudulent conveyances and/or preferences.
- [75] Gu Jr. testified that, at the beginning of 2018, he repaid the amount owing to his mother-in-law on the Cen Mortgage. When asked in cross-examination why the mortgage had still not been discharged, he testified that his mother-in-law needed to be in Canada for that to happen and that she had not been in Canada since the mortgage was paid off. He testified that he has not sought any legal advice about removing the mortgage from title. In contradiction, Ms. Cen testified in cross-examination that her mother had visited Canada on two occasions since the beginning of 2018: the first in February 2018 and the second in February 2019.
- [76] Ms. Sun testified that she has been residing in Gollner since 2017. Her daughter-in-law, Ms. Cen, testified that Ms. Sun is not paying rent.
- [77] Ms. Cen testified that she, Gu Jr., and their daughter moved into Gollner at the end of December 2016 or in January 2017. They then moved into 3560 Semlin around the end of 2017, and lived there for about a year. Ms. Cen also testified that in February or March 2019, they moved to an apartment at 7333 Murdoch Avenue in Richmond, a property purchased in her name by her mother in January 2018.

The Applicable Law

Fraudulent Conveyances and the FCA

- [78] For the purposes of this case, the relevant sections of the FCA provide, in part:

1. If made to delay, hinder or defraud creditors and others of their just and lawful remedies
 - (a) a disposition of property, by writing or otherwise,

is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.

2. This Act does not apply to a disposition of property for good consideration and in good faith lawfully transferred to a person who, at the time of the transfer, has no notice or knowledge of collusion or fraud.

Section 1 of the FCA

[79] In summary, s. 1 of the FCA requires a disposition of property and that the transferor have the requisite intent to delay, hinder, or defraud creditors and others of their remedies.

[80] With respect to the burden of proving the requisite intent in the FCA analysis, in *Jennings v. Chow*, 2008 BCSC 110 at para. 18, Justice Bernard said:

[18] The circumstances in this case raise a question as to whether the transfer was made in good faith. In relation to who bears the onus of proof that the transfer was done in good faith, I refer to *CIBC Mortgage Corp. v. Pender*, 1999 CanLII 2616, in which Sinclair-Prowse J, adopts the following passage from *Frimer v. Lercher*, [1984] B.C.J. No. 728 (B.C.S.C.):

[13] It is established that where suspicion touches a transaction made between near relatives, the burden of establishing the bona fides of the transaction shifts from the plaintiff to the parties to the transaction. Furthermore, in these circumstances the testimony of the parties must be scrutinized with care and suspicion; it is seldom that such evidence can safely be acted upon without corroboration. These rules, which are rules of practice rather than of absolute law, are well established. [Citations omitted.]

[81] In *Abakhan & Associates Inc. v. Braydon Investments Ltd.*, 2009 BCCA 521 at para. 73, the court explained that, although the requisite intent in the FCA has often been described as fraudulent intent:

[73] The only intent now necessary to avoid a transaction under the modern version of the [FCA] is the intent to "put one's assets out of the reach of one's creditors" (per *RBC v. Clarke*). No further dishonest or morally blameworthy intent is required.

[82] Thus, the question is not whether the transferor had dishonest or morally blameworthy intent. Similarly, a sham transfer is not required. As the Court of Appeal said in *Chan v. Stanwood*, 2002 BCCA 474 at para. 24, there is no "comprehensive definition of fraudulent conveyances - [they] may be as varied as the imagination of a creative debtor allows".

- [83] The effect of a transfer is a key factor when determining fraudulent intention: *Cabaniss v. Cabaniss*, 2009 BCSC 1478 at para. 53. In this regard, the intent to put assets out of the reach of creditors is persuasively shown where the transfer has the effect of putting assets out of reach of creditors. In *Abakhan*, the court held:
- [74] Intent is a state of mind and a question of fact.
- [75] For example, in *Mackay v. Douglas* (supra), Malins, V.C. said (at p. 120) that where a disposition had the effect of hindering or delaying or defeating creditors, "the Court presumes the intention and will attribute it to the settlor". That was held to be sufficient proof of the intent even though Mr. Douglas apparently gave evidence and "had no fraudulent intention". Mr. Douglas thought he had made a settlement of property as "a prudent thing to protect his wife and children" (p. 120). Despite this, it was held to be a fraudulent conveyance.
- [84] The intent to put assets out of the reach of creditors must often be inferred from the "badges of fraud". The cases repeatedly consider the following indicia or badges of fraud:
- (a) the state of the debtor's financial affairs;
 - (b) the relationship between the parties to the transfer;
 - (c) whether the disposition effectively divests the debtor of assets;
 - (d) evidence of haste in making the disposition;
 - (e) timing of the transfer relative to notice of the debts;
 - (f) the presence of valuable consideration; and
 - (g) whether the transferor continued in possession after the transfer.

See, for example, *Cabaniss* at paras. 49-51; *B. (L.A.) v. M. (L.)*, 2004 BCSC 512 at para. 19; and *Pacific Wagondepot Ltd. v. Hudson West Development Ltd.*, 2019 BCSC 909 at para. 15

- [85] In addition, the transferor's intent to put assets out of the reach of creditors need not be their only intent. In *Cabaniss*, Justice Masuhara held that the fact that Mr. Cabaniss wished to purchase a new house for his new spouse did not negate the fact that he also wished to structure the transaction to avoid a claim from his previous spouse. He explained at para. 56, "fraudulent intent can exist concurrently with a bona fide motive, and the latter does not negate the former."

Section 2 of the FCA

- [86] Section 2 of the FCA provides a form of defence aimed at protecting a bona fide purchaser for value without notice. It has three elements. The disposition must be made: (1) for good consideration, (2) in good faith, and (3) to a person who had no notice or knowledge of the fraud: *Pacific Wagondepot* at para. 17; *Abakhan* at para. 89.

[87] Chan is a leading case with respect to the necessary findings and burdens within the analysis under s. 2 of the FCA. The Court of Appeal said:

[20] Where the consideration is inadequate or nominal, a creditor need only show that the transferor intended to delay, hinder or defraud the creditor of his remedies. Where on the other hand valuable consideration has passed, the creditor must also show that the transferee actively participated in the fraud. As stated by this court [citation omitted]:

it is clear as a matter of interpretation of the statute as a whole and upon authority that where a sale is made for good and valuable consideration the transaction will not be void by reason of the purchaser's having notice or knowledge of the vendor's intent to delay, hinder or defraud creditors and others unless it be proved that the purchaser was actually privy to the fraud, i.e., a party to carrying out the fraudulent intention and purpose.

[Emphasis in original.]

[88] Courts have applied different approaches to determining whether a transferee was privy to the fraud. Where the transferor and the transferee do not have the same controlling mind, the court has consistently applied the badges of fraud, set out above, to inform its s. 2 determination.

[89] Ms. Wu relies on Jennings as an example of the analysis in a case similar to this. In Jennings, Mr. Chow transferred his half-interest in a home to his spouse. The registered transfer document showed consideration of \$1.00. The Chows were facing an order for partition and sale under a mortgage on which Mr. Chow had defaulted. After the transfer from Mr. Chow to Ms. Chow, Ms. Chow took out a new mortgage and paid off the old one.

[90] In applying the s. 2 analysis, Justice Bernard focused on whether the transfer was made in good faith. Mr. Chow did not testify, which Justice Bernard noted as being "particularly troubling". He applied the badges of fraud analysis and concluded that the circumstances were sufficiently suspicious that the onus had shifted to the defendants to show that Ms. Chow had received the property in good faith. He found that Ms. Chow's evidence was wanting since, among other things, her claim of continuing ignorance about her husband's financial troubles suggested "willful blindness on her part, at the very least." He concluded that the defendants had not discharged the s. 2 onus of showing that the transfer was made in good faith: at paras. 19-20, 23-25.

[91] The case of *Bailie v. Bailie*, 2010 BCSC 946, aff'd 2011 BCCA 176, also involved a transfer in circumstances factually similar to this case. Mr. Bailie transferred the former matrimonial home in which his ex-wife claimed an interest to the defendants, Ms. Stock and her son. Ms. Stock made various payments in consideration. However, Justice Pearlman said at para. 148:

[148] Even where a transfer is for good consideration, evidence of fraudulent intent on the part of the transferor and transferee will impeach the transfer despite good consideration.
[Citation omitted.]

[92] In determining Ms. Stock's intention, Justice Pearlman applied the badges of fraud analysis and concluded that both Ms. Stock and Mr. Bailie intended to defraud the plaintiff by delaying her claim to the home. The timing of events was particularly material in that case, where the transfer occurred shortly after separation and Ms. Stock, who was aware of the potential claim, initiated an acceleration of the transfer date: at paras. 147-49.

Fraudulent Preferences and the FPA

[93] For the purposes of this case, the relevant sections of the FPA provide, in part:

Transfers which prejudice creditors

3 Subject to section 6, a disposition of property by a person at a time when the person is in insolvent circumstances, is unable to pay the person's debts in full, or knows that he or she is on the eve of insolvency, is void as against an injured creditor, if made

- (a) with intent to defeat, hinder, delay or prejudice creditors or some of them, and
- (b) to or for a creditor with intent to give the creditor preference over other creditors or some of them.

Sales and transfers in good faith

6 (1) Nothing in sections 3, 4 and 5 applies, if the money paid, or the property disposed of bears a fair and reasonable relative value to the consideration, to a sale in good faith, to a payment made in the ordinary course of business to innocent persons, to a payment to a creditor, or to a disposition in good faith of property of any kind made in any of the following circumstances:

- (a) in consideration of a present actual payment in good faith in money;
- (b) by way of security for a present actual advance of money in good faith;
- (c) in consideration of a present actual disposition in good faith of any property.

[94] Unlike the FPA, the FCA applies only to transfers to creditors. Its aim is to ensure fair treatment of creditors of equal priority: *Trans Canada Insurance Marketing Inc. v. Fransen Insurance Services Ltd.*, 2019 BCSC 1250 at para. 103 [Trans Canada]. Section 1 of the FPA defines "creditor" for the purposes of ss. 3, 4, and 5 as including:

- (a) a surety and the endorser of a promissory note or bill of exchange who would, on payment by that person of the debt, promissory note or bill of exchange for which the suretyship was entered into or endorsement was given, become a creditor of the person giving the preference within the meaning of the sections, and
- (b) the beneficiary of a trust or other person to whom liability is equitable only.

Section 3 of the FPA

- [95] Section 3 of the FPA requires proof that the debtor: (1) was in insolvent circumstances; (2) had an intent to defeat, hinder, delay or prejudice creditors; and (3) had an intent to give a creditor a preference: *Trans Canada* at para. 109.
- [96] In *Pacific Wagondepot* at paras. 11 and 18, Justice Macintosh said that proof of the requisite intent to defeat, hinder, delay or prejudice creditors under s. 3 of the FPA may be established in the same manner as under the analysis under s. 2 of the FCA. As with the FCA analysis, evidence of presumptively fraudulent actions has the effect of shifting the burden to the defendants to explain, "why their conduct is not caught by the legislation."
- [97] With respect to the intent to give a creditor a preference, Justice Macintosh considered the factual matrix of the case, in the context of the need for caution in receiving uncorroborated evidence. He said:
- [18] The applicable fraudulent preference analysis, as distinct from fraudulent conveyance is slightly different, because the [FPA] requires the transferor to be on the eve of insolvency, and to intend to give the transferee preference over others. As an alternate approach to deciding this case, I believe those two requirements are satisfied on the evidence before me. Mr. Chang stated he did not have the required intent, which ironically in this case compels him to be speaking for the transferor on the other side of the impugned transactions. In any event, an express statement of intent, found in an affidavit, must give way to the facts found in the factual matrix of the case, from which intent can be inferred, notwithstanding inherently self-serving statements to the contrary made in a litigation context.
- [19] In this analysis, there is a need for caution, and even suspicion, in receiving the uncorroborated evidence of related defendant parties.

Section 6 of the FPA

- [98] Section 6(a) of the FPA shields a transfer where it is made to a creditor: (1) in good faith, and (2) for a present actual payment. The effect of s. 6 of the FPA is similar to that of s. 2 of the FCA in that it has the effect of protecting good faith dispositions for good consideration: *Trustees of the IWA - Forest Industry Pension Plan v. Leroy*, 2017 BCSC 158 at para. 25.

Credibility

- [99] Special emphasis is placed on the assessment of credibility in the context of the FCA and the FPA. The cases repeatedly stress the need for extra care in scrutinizing the testimony of the parties to a *prima facie* fraudulent transaction. For example:
- (a) In *Cabaniss*, Justice Masuhara noted that, "care in scrutinizing the testimony of the parties to the transaction is required" (para. 52);

- (b) In *Jennings*, Justice Bernard, again citing *CIBC Mortgage Corp.*, emphasized that, "the testimony of the parties must be scrutinized with care and suspicion; it is seldom that such evidence can be safely acted upon without corroboration" (para. 18);
- (c) In *B. (L.A.)*, Justice Holmes cited case law affirming that, "where there is a conveyance between close relatives, under suspicious circumstances, the plaintiff has established a *prima facie* case of fraud. It is then up to the defendants to produce credible evidence to substantiate the transaction. Some corroborative evidence of the bona fides of the transaction should be given" (para. 18); and
- (d) In *Pacific Wagondepot*, a case involving promissory notes between related corporations, Justice Macintosh held that, "there is a need for caution, and even suspicion, in receiving the uncorroborated evidence of related defendant parties" (para. 19).
- [100] The assessment of credibility has been discussed in a number of cases. In *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal ref'd [2012] S.C.C.A. No. 392, Justice Dillon said:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally. Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).
- [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions"
- [101] In particular, when dealing with the credibility of interested witnesses, in *Farnya v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), the Court of Appeal said at p. 357:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

Credibility of Interpreted Evidence

- [102] As I have said, all of the witnesses in this trial testified through an interpreter, which presents particular challenges for assessing the credibility of a witness' evidence.
- [103] The words used by the witnesses in the Chinese language may not translate precisely into the English language and an interpreter may paraphrase what the witness has said. Two different interpreters might paraphrase differently.
- [104] In these circumstances, the court must be cautious in making adverse credibility findings based solely on translated testimony and in comparing sworn testimony given on one occasion, through one interpreter, with sworn testimony given on another, through a different interpreter.
- [105] Nonetheless, and even proceeding cautiously, I had concerns about the witnesses' credibility in this case. I will explain these concerns in detail in my analysis section. I conclude that, in the circumstances of this case, the evidence of Gu Jr., Ms. Sun, Mr. Xu, and Ms. Cen should be treated with particular care, caution, and suspicion, particularly where it is uncorroborated by independent evidence, and must be subjected to an examination of its consistency with the probabilities in this case.

Adverse Inferences

- [106] Neither Gu Jr. nor Ms. Sun called Gu Sr. as a witness. In the circumstances of this case, Ms. Wu asks that I draw an adverse inference from their failure to do so.
- [107] Recently, in *Rohl v. British Columbia (Superintendent of Motor Vehicles)*, 2018 BCCA 316 at para. 1, the Court of Appeal explained the circumstances in which an adverse inference is appropriately drawn where a witness is not called without explanation, citing Donald Brown, Civil Appeals (looseleaf):

An adverse inference may be drawn when, without explanation, a party does not give evidence or fails to call a witness who in the circumstances would be expected to favour the party and the witness would have knowledge of the facts in dispute. In such circumstances, the failure to call the witness or give testimony is seen as akin to an admission that the evidence would have been contrary to the party's case, or at least would not support it. [At §13.2131.]

[108] In deciding whether to draw such an adverse inference, in Rohl at para. 4, the court outlined the following factors set out by Alan W. Mewett and Peter J. Sankoff in *Witnesses* (looseleaf):

the question of whether to make such an inference seems to depend upon the specific circumstances, in particular whether:

- There is a legitimate explanation for the failure to call the witness;
- The witness is within the "exclusive control" of the party, and is not "equally available to both parties"; and
- The witness has material evidence to provide; and
- The witness is the only person or the best person who can provide the evidence.

[109] The Court of Appeal made comments to similar effect in *Singh v. Reddy*, 2019 BCCA 79 at paras. 8-9.

[110] In *Bailie*, the court considered whether to draw an adverse inference against Mr. Bailie, who had transferred a former matrimonial home to the defendants. Ms. Bailie sought an order requiring the transfer of the home to her pursuant to either the FCA or the FPA.

[111] The defendants defended the action on the basis that they had advanced funds to Mr. Bailie to pay mortgage and other expenses, and were good faith purchasers for the value of the home. Mr. Bailie did not testify.

[112] Justice Pearlman drew adverse inferences with respect to the amount owing on the mortgage and the bona fides of the transfer (at para. 138). In particular, Justice Pearlman concluded that Mr. Bailie, as the other party to the transfer, would have had material evidence to give. Justice Pearlman also noted the Mr. Bailie's testimony was not equally available to the parties, since while Ms. Bailie had to obtain an order for alternate service on Mr. Bailie, Mr. Bailie had remained in communication with Ms. Stock to the time of trial.

[113] In this case, Gu Jr. and Ms. Sun did not call Gu Sr. although he was listed as a witness in their trial brief filed for the Trial Management Conference. He was one of the parties to the First Transfer and had material evidence to give with respect to it.

[114] The materiality of his evidence was made clear during the cross-examination of Gu Jr. When Gu Jr. was asked if one of the reasons for the transfer of interest in 3560 Semlin was so that Gu Sr.'s creditors would not take the house, Gu Jr. responded, "My father might think in that way, but I cannot know what is in his mind".

[115] I am satisfied that, applying the factors cited in Rohl, it is appropriate for me to draw an adverse inference as a result of Gu Jr.'s and Ms. Sun's failure to call Gu Sr. as a witness. In particular:

- (a) I was not given an explanation for Gu Jr.'s and Ms. Sun's failure to call Gu Sr. as a witness;

- (b) Gu Sr. is not equally available to Ms. Wu. He was served alternatively, and I was advised that, despite an indication in Gu Jr.'s and Ms. Sun's trial brief that an address would be provided for him, an address was never provided. On the other hand, Gu Jr. and Ms. Sun are Gu Sr.'s son and wife. There was no evidence that they did not know his whereabouts;
 - (c) Gu Sr. has material evidence to provide about, among other things, the bona fides of the First Transfer and only he could give evidence about the extent of his debts and the number of his creditors; and
 - (d) Gu Sr. is the only person who could have testified to, among other things, his intention regarding the transfer of 3560 Semlin to his wife and son.
- [116] As a result, I conclude that the failure to call Gu Sr. to give evidence respecting the First Transfer leads to an inference that his evidence on the bona fides of the First Transfer would have been contrary to Gu Jr.'s and Ms. Sun's case, or at least would not have supported their defence.

Deemed Admissions

- [117] Gu Sr. did not respond to Ms. Wu's claim; nor did he appear at trial. On the first day of trial, Ms. Wu sought, and the Court granted, deemed admissions as against Gu Sr. of the facts alleged in the Further Amended Notice of Civil Claim with respect to him. No evidence was called by Gu Sr. to controvert the facts alleged against him in the pleadings. These facts include that:
- (a) in or around February 2015, and at all times subsequent to that date, Gu Sr. was insolvent, unable to pay his debts in full, or on the eve of insolvency (para. 29);
 - (b) the First Transfer was a disposition of property made voluntarily and with the intent to defeat, delay, hinder, prejudice or defraud the creditors of Gu Sr., including Ms. Wu, of their just and lawful remedies against Gu Sr. and his property (para. 30); and
 - (c) the First Transfer was granted in order to give Gu Jr. a preference over Gu Sr.'s other creditors (para. 33).

[118] Of course, these admissions are not proof against Gu Jr. or Ms. Sun.

Analysis

Was the First Transfer a Fraudulent Conveyance?

- [119] As set out above, the First Transfer of 3560 Semlin actually consisted of two transfers. On December 21, 2016, Gu Sr. transferred a 60% interest in 3560 Semlin to his wife and the remaining 40% to his son.

- [120] The documents registered in the land title office provide that the consideration paid was "\$1.00 Natural Love and Affection" for both transfers. Because Gu Sr. did not respond to Ms. Wu's claim and did not attend the trial, the allegation that he disposed of 3560 Semlin voluntarily, and with the intent to defeat, hinder, prejudice, or defraud his creditors of their just and lawful remedies against him and his property, is unchallenged. Gu Jr. and Ms. Sun could not give any evidence about Gu Sr.'s intent.
- [121] As I have said, the failure of Gu Jr. and Ms. Sun to call Gu Sr. as a witness leads to an adverse inference that his evidence would have been contrary to Gu Jr.'s and Ms. Sun's case, or at least would not have supported their evidence.
- [122] These facts alone are sufficient to draw suspicion and demonstrate that Gu Sr. *prima facie* made the First Transfer with the requisite intent. As a result, the onus shifts to Gu Jr. and Ms. Sun to demonstrate that the First Transfer was made in good faith and for good consideration without notice of fraud or collusion.
- [123] Ms. Wu submits that Gu Jr. and Ms. Sun have been unable to demonstrate good faith and good consideration. Ms. Wu further submits that, even if the First Transfer is found to have been effected in good faith and for good consideration, Gu Jr. and Ms. Sun were privy to the fraud, such that the First Transaction should be rendered void.

Was the 60% Transfer to Ms. Sun made for Good Consideration and in Good Faith?

- [124] Ms. Sun testified that she provided consideration for the 60% interest in 3560 Semlin by repaying money owing by Gu Sr. to creditors in China. The repayment was arranged through Mr. Xu, who testified as part of the defendants' case.

Gu Sr.'s Guarantee of the Loan Agreement

- [125] Mr. Xu was a neighbour of the Gu family when they resided on Semlin Drive. He testified that he came to know Gu Sr. in 2010. He said that he and Gu Sr. belong to the same golf club and he sees him almost daily. Mr. Xu also testified that he played golf and had dinners with both Gu Sr. and Gu Jr. Ms. Sun testified that she met Mr. Xu in around 2011. In cross-examination, Gu Jr. agreed that it was fair to describe Mr. Xu as a family friend.
- [126] Mr. Xu testified about some of the circumstances leading to Gu Sr.'s financial difficulties. One such circumstance was Gu Sr.'s decision to act as a guarantor of a \$3,000,000 USD loan that Mr. Xu gave to a Mr. Wei Huang and his company.
- [127] Gu Sr. introduced Mr. Xu to Mr. Huang, and they came to the loan agreement on July 25, 2012. Gu Sr. pledged all of his personal assets, including all of his assets in Canada, as security for the loan. The loan had a two-year term and quarterly interest payments of 1.2% per month. The interest was payable to a bank account in Macau which was not in Mr. Xu's name.

- [128] Mr. Xu testified that Mr. Huang and his company defaulted on the loan and that he sought payment on the guarantee from Gu Sr. He did not testify about what steps he took, if any, to pursue Mr. Huang or his company for repayment of the loan. Mr. Xu testified that Gu Sr. had repaid him approximately 14 million RMB by February 2015, the last payment being by way of a February 3, 2015 bank draft for \$1.2 million.
- [129] Ms. Sun also gave evidence about this bank draft. She testified that while she was in China, Gu Sr. asked her to arrange for a \$1.2 million bank draft from their joint HSBC account in Canada to be made available for pick up by Mr. Xu.
- [130] In cross-examination, Ms. Sun said that she knew that the bank draft was a payment to Mr. Xu on a debt owing to him by her husband. She confirmed that by February 2015, Gu Sr. had told her about Mr. Huang's loan from Mr. Xu, and that Gu Sr. had guaranteed it. She also confirmed that she understood that the loan was for \$3 million USD.
- [131] Of course, because Gu Sr. did not testify, I have no information about his relationship with Mr. Huang, or Mr. Huang's company, and no information about why there was a default in the loan. I also have no information about why Gu Sr. would guarantee the debts of a company with which he had no apparent connection.
- [132] In his evidence, Mr. Xu said that Gu Sr. had previously owned a blueberry farm and that he thought that Gu Sr. used the proceeds from the sale of that farm to pay back the amounts owed to Mr. Xu under the guarantee. There was no other evidence about Gu Sr.'s ownership and/or sale of a blueberry farm.
- [133] Mr. Xu testified that, after the February 3, 2015 payment of \$1.2 million, Gu Sr. still owed him a little over 6 million RMB.

Use of Sale Proceeds of 3580 Semlin

- [134] Ms. Sun testified that she listed her property, at 3580 Semlin, for sale at the end of March or beginning of April 2015. She testified that she decided to sell it because she had initially expected Gu Jr. to move into it, but "in the end he did not" and the cost of continued upkeep was quite high. There was no evidence about whether 3580 Semlin was rented between its purchase in October 2010 and its sale on May 6, 2015.
- [135] Ms. Sun testified that Gu Sr. asked her to use the proceeds of sale from 3580 Semlin to pay off debts he owed in China. In cross-examination, she initially said that this request was made by Gu Sr. on the day that the property was listed, then that the request was made after the listing, and finally that it was made at the end of March or beginning of April 2015.
- [136] Ms. Sun testified that she was unhappy about Gu Sr.'s request but told him that if she used her money to pay his debts, he needed to give her "some kind of compensation". She only agreed to pay his debts after he promised in April 2015 to transfer her all of his interest in 3560 Semlin.

[137] She agreed that she did not have a written agreement with Gu Sr. about his promise to transfer 3560 Semlin to her. When asked in cross-examination why she did not have a written agreement, at first she said that it was because "we are husband and wife - whatever he has promised he would make true". When asked if that meant that she did not think they needed a written agreement, Ms. Sun said that she had asked for a written agreement, but her husband said he would carry out his promise, and so she let it go. This contradicted her evidence on examination for discovery, where she had not indicated that she asked her husband for a written agreement. When impeached, she responded that the following answer at line 166 from her examination for discovery was true:

Q: And I'm asking you, is there anything in writing evidencing that agreement?

A: No, there's nothing in writing because we were husband and wife. If I asked him anything about that, he would say, don't you trust me?

[138] Ms. Sun testified that she understood that the proceeds of sale of 3580 Semlin were to be given to Mr. Xu, but that they would not be credited against the debt her husband owed to Mr. Xu under the guarantee. Rather, the funds would be used by Mr. Xu to pay some of Gu Sr.'s other creditors in China. She testified that, while her husband had provided her information about the debt owing to Mr. Xu, he did not tell her the details of the debts he owed in China.

The Xu Mortgage on 3560 Semlin

[139] On May 5, 2015, Mr. Xu registered a mortgage with a principal amount of \$1,220,000 against title to 3560 Semlin. Mr. Xu testified in direct that this amount was chosen because it corresponded to 5 million RMB, which was the amount that he had agreed to accept from Gu Sr. in payment of the remaining amount owing under Gu Sr.'s guarantee. This reflected a discount of a little over 1 million RMB.

[140] In cross-examination, Mr. Xu confirmed that he agreed to accept 5 million RMB in satisfaction of Gu Sr.'s debt and that the mortgage on 3560 Semlin reflected that agreement. However, he also agreed that the approximate conversion rate is five RMB for every Canadian dollar, and that his mortgage for \$1,220,000 was worth just over 6 million RMB. When asked to explain this discrepancy, he testified, "well [Gu Sr.] did this himself, and I don't know the exact details. For me, the higher amount does not matter that much, I would just take 5 million RMB and wouldn't ask him for more."

[141] Mr. Xu testified that on July 28, 2015, he entered into a written agreement with Gu Sr. with respect to the 5 million RMB amount and the mortgage. Mr. Xu explained the delay between the registration of the mortgage and the signing of the agreement by stating that he wanted to be sure to secure the mortgage first "because at that time [Gu Sr.] had already defaulted on me so many times that I lost my trust in him."

- [142] Ms. Sun testified that she knew about the Xu mortgage on 3560 Semlin on May 5, 2015 (the day the mortgage was registered). She confirmed that she knew about the Xu mortgage before the sale of 3580 Semlin completed on May 6, 2015.
- [143] In cross-examination, Ms. Sun testified that she knew that Mr. Xu was pressuring Gu Sr. for money and was "hotly in pursuit of us to give him money" before the May 6, 2015 completion of the sale of 3580 Semlin, and before she made the May 26, 2015 payment to Mr. Xu. She later said, Mr. Xu "kept asking us for money".
- [144] Ms. Sun testified that on May 26, 2015, she wired \$1,200,000 from the sale proceeds of 3580 Semlin to Mr. Xu so that he could pay her husband's debts to others in China. She testified that Gu Sr. did not transfer 3560 Semlin to her, as he had promised, because of Mr. Xu's mortgage.
- [145] When asked why she did not insist that the May 26, 2015 payment be applied to the outstanding debt owing to Mr. Xu, rather than to Gu Sr.'s other creditors in China, at first she first said that she did not understand the question. She then said that it was her husband's decision and she just carried out what he asked her to do.
- [146] Mr. Xu testified that he received \$1,200,000 into his Hong Kong account. He said that he did not know what was done with the amount later on. He said, "as to what they did with this amount, I don't know."
- [147] When Mr. Xu was asked why he did not insist that he receive those funds in payment of the 5 million RMB he was owed, he testified that he agreed to transfer the funds to other people because Gu Sr. had begged him to do so. Mr. Xu said he had a mortgage on 3560 Semlin that was higher than the 5 million RMB he was owed, and he knew Gu Sr. owed a lot of people in China. He said that Gu Sr. "hid here in Canada and didn't dare to go back to China" so Mr. Xu knew "he had an urgent need". Mr. Xu was not afraid of losing his money, so he did Gu Sr. a favour. At another point in his evidence, Mr. Xu said, "she told me that they were in urgent need of money in China and they cannot directly transfer money to China, but I have a Hong Kong account so they can transfer the money through me to a mutual friend's account in China." He said that Gu Sr. provided that explanation.
- [148] I have concluded that Ms. Sun's and Mr. Xu's evidence with respect to these events in 2015, and the payment that Ms. Sun alleges constituted consideration for what she then understood to be a transfer of 100% of the interest in 3560 Semlin, is inconsistent with the preponderance of probabilities. The timeline and the events do not accord with the reasonable expectations of an objective observer. In particular:
- a) Ms. Sun's evidence that she agreed to use the proceeds of sale of 3580 Semlin towards Gu Sr.'s debts only reluctantly after he promised to transfer her 100% of the interest in 3560 Semlin is inconsistent with her ultimate decision to proceed with the sale of 3580 Semlin despite knowing that the equity in 3560 Semlin was tied up in mortgages.

- b) The circumstances of the transfer of the proceeds of 3580 Semlin to Mr. Xu and to the unknown creditors in China is suspicious and inconsistent with the preponderance of probabilities. Mr. Sun made a payment of \$1.2 million to Mr. Xu a few weeks after the sale of 3580 Semlin and the registration of the Xu mortgage on 3560 Semlin, which was essentially the entire amount that was owing under the Xu mortgage. However, they say that the money was not intended to pay Mr. Xu's debt, but to pay Gu Sr.'s other creditors in China. There was no evidence before me about those creditors or that they were paid, and Mr. Xu's evidence that he did not know what happened to the money after it was transferred into his account was not credible.
- c) Despite the fact that he did not trust Gu Sr. to repay him as he had previously defaulted on his obligations, and despite knowing that Gu Sr. was fleeing from creditors, Mr. Xu agreed to pass the amount of money that was allegedly owing to him through his own account in favour of other unknown creditors. I had no explanation for why Gu Sr. needed to use Mr. Xu's account to effect the transfers to the Chinese creditors, particularly given that the evidence was clear that Gu Jr. had a Hong Kong account in 2015.
- d) Ms. Sun testified that she was concerned about and bargaining to protect her interests when she agreed to transfer the proceeds of 3580 Semlin in return for a 100% interest in 3560 Semlin. This is inconsistent with the fact that there was a year-and-a-half delay between Gu Sr.'s alleged promise to transfer 100% of the interest and the actual transfer of 60% of the interest in December 2016, and that Ms. Sun took no steps to confirm her rights during that time. Further, Ms. Sun could not explain why she did not receive more than a 60% interest in 3560 Semlin despite her alleged transfer of the proceeds of sale of 3580 Semlin to pay Gu Sr.'s creditors.
- [149] I conclude that it is reasonable to infer that in May 2015, it benefitted Gu Sr. and his family to have all of the equity in 3560 Semlin tied up in two mortgages: one to the Bank of Montreal and the other to Mr. Xu, a family friend. Creditors who might try to execute against 3560 Semlin would not be able to recover.
- [150] There is evidence that Ms. Sun and Gu Jr. have left fully discharged mortgages on title to their properties. Specifically, the BMO mortgage registered on title to 3580 Semlin was paid in full but not removed from title until April 6, 2015, just prior to its sale. Gu Jr. also testified that the mortgage registered on title to Gollner, in favour of his mother-in law, was paid off in early 2018, but it remains on title. He said it was because his mother-in-law had not been in BC to sign the discharge, but that evidence was contradicted by Ms. Cen.
- [151] As outlined above in the applicable law section of this decision, in the circumstances of this case, Ms. Sun has the onus of proving consideration for the transfer to her of 60% of 3560 Semlin. I conclude that she has not proven consideration and that the more reasonable conclusion to draw on the evidence was that there was no agreement between Gu Sr. and Ms. Sun. I conclude that the 60% transfer was without good consideration, and not in good faith, at a time when 3560 Semlin would have had equity, and was registered in the name of

Gu Sr., who was effectively bankrupt.

Was the 40% Transfer to Gu Jr. Made for Good Consideration and in Good Faith?

- [152] Gu Jr. asserts that he provided consideration for the transfer to him of a 40% interest in 3560 Semlin. The consideration was repayment of money Gu Sr. owed to Mr. Xu.
- [153] Gu Jr. testified that shortly after he returned to Canada in the late fall of 2016, and in or about November 2016, he had a discussion with Mr. Xu on a golf course. Mr. Xu demanded repayment of the 6 million RMB (roughly equivalent to \$1,200,000) that Gu Sr. owed him and threatened to take action on the mortgage on 3560 Semlin if he was not repaid. Gu Jr. said this was the first time he learned of Gu Sr.'s debt to Mr. Xu.
- [154] Gu Jr. said that Mr. Xu did not show him or give him a written demand for payment and that Mr. Xu did not specify a repayment date. When asked whether Mr. Xu had ever said that if payment was not made by a certain date, he would enforce the mortgage, Gu Jr. said that those were not Mr. Xu's exact words, but it was implied and he thought that is what Mr. Xu meant. In cross-examination, Ms. Sun confirmed that while she was very concerned, she had never discussed the issue with Mr. Xu directly, and that she did not know if there had been a written demand letter.
- [155] Mr. Xu testified that he did not take steps to enforce his mortgage against 3560 Semlin, or to register his Chinese judgment in Canada. He testified that beyond providing Gu Sr. with a copy of the judgment, he did not issue a written demand for repayment. His failure to take steps is at odds with his stated lack of trust in Gu Sr.
- [156] Gu Jr. testified that in November and December 2016, he and his father entered into negotiations with Mr. Xu, who agreed to discharge his mortgage in exchange for 2 million RMB. Mr. Xu's explanation for accepting such a steep discount on his debt--being that Gu Sr. begged him to accept it--was not credible. Gu Sr.'s negotiating room was limited by the mortgage Mr. Xu held against his property.
- [157] Mr. Xu testified that Gu Jr. never told him that he did not have sufficient funds to pay the debt in full, and he took no steps to determine whether Gu Jr. had the means to repay him.
- [158] In cross-examination, Gu Jr. confirmed that, at the time of their negotiations, there was equity of between \$1,000,000 and \$1,200,000 in 3560 Semlin if Mr. Xu had exercised his rights under the mortgage.
- [159] Gu Jr. testified that to make part of the payment to Mr. Xu, he transferred 1,140,000 HKD to Mr. Xu from his Hong Kong HSBC account. The transaction history appears to show that funds were first transferred into the account by Wenjuan Chen, Gu Jr.'s cousin, before being transferred out to Mr. Xu.

- [160] Gu Jr. further testified that he arranged for his "old friend", Guoqing Yu, to pay 1,080,000 HKD to Mr. Xu. Gu Jr. provided an excerpt of a bank statement to show the payment that was made by Guoqing Yu. The bank statement showed a transfer from "Bluewaves Shipping Services Limited" to Mr. Xu on December 12, 2016. When asked in direct what he knew about Bluewaves, Gu Jr. initially said, "I am unclear". When prompted, he said that Guoqing Yu had formed Bluewaves in order to transfer these funds.
- [161] No evidence was filed from Guoqing Yu, or otherwise, to support his connection to Bluewaves and that the Bluewaves transfer to Mr. Xu related to Gu Jr.
- [162] Gu Jr. testified that, apart from a December 11, 2016 receipt for lending that he prepared to reflect his borrowing 1,080,000 HKD from Guoqing Yu, there were no written communications or messages exchanged with respect negotiating or finalizing this loan.
- [163] Gu Jr.'s testimony with respect to how he exchanged copies of the receipt for lending with Guoqing Yu was not credible. At first, he testified that he sent the receipt for lending by mail or by asking someone to bring it to Guoqing Yu (which would presumably not have arrived prior to the December 12, 2016 payment date). Then he said that he probably faxed it, but did not have any copies showing fax confirmation. When impeached with his examination for discovery testimony, in which he said that he had faxed a draft to Guoqing Yu for his approval, Gu Jr. testified that he now remembers that he had not faxed a draft.
- [164] As set out in the above summary of the applicable law, the onus is on Gu Jr. to prove consideration for the transfer of a 40% interest in 3560 Semlin to him. There are a number of difficulties with Gu Jr.'s evidence in support of his claim of consideration. These include:
- (a) his lack of credibility surrounding the communications with respect to the loan he said he got from Guoqing Yu;
 - (b) a lack of credible confirmation about how the funds paid by Bluewaves to Mr. Xu related to Gu Jr.; and
 - (c) a lack of information about how the funds paid by Wenjuan Chen to Mr. Xu related to Gu Jr.
- [165] There is also no explanation for why the Gu family did not arrange to refinance a more modest mortgage on 3560 Semlin to pay Mr. Xu the agreed amount. Mr. Xu did not say that he asked them to do so and no evidence was led that the option was considered by Gu Jr. or Gu Sr. In the circumstances, this casts doubt on the good faith nature of the transaction.

Were Ms. Sun and Gu Jr. Privy to the Fraud?

- [166] Ms. Wu submits that even if there was good consideration and good faith associated with the First Transfer, the transfer should nonetheless be voided as a fraudulent conveyance because Ms. Sun and Gu Jr. were not bona fide recipients of 3560 Semlin for value. They were privy to the intention to move 3560 Semlin beyond the reach of Gu Sr.'s creditors.

- [167] When asked on cross-examination whether one of the reasons for insisting on the transfer of 3560 Semlin to her was so that Gu Sr.'s creditors would not be able to take the house, Ms. Sun responded "no". When asked the same question, Gu Jr. responded, "my purpose at that time was not that, but now you have mentioned it, I think what you have said does make sense."
- [168] Gu Jr. testified that, since 2013, he had known that his father was in financial difficulties. He also said that, by November 2016, he knew that his father was effectively bankrupt, was unable to pay what he owed Mr. Xu, and was in a lawsuit at the time (although he did not know who had started the lawsuit). Gu Jr. testified that, in 2016, his father told him about the judgment obtained by Ms. Wu. Although Gu Jr. could not remember when he was told, he thought that it was probably when he was still in China.
- [169] Ms. Sun testified that upon her son's return to Canada in October 2016, he could tell she was upset. She testified that she and Gu Sr. discussed the matter, and she was very sad and said, "what can we do, we don't have the money" and "we are going to have to sleep on the street". She testified that she also discussed the matter with Gu Jr., telling him that Gu Sr. had borrowed money from her but there was a mortgage on 3560 Semlin and that she was "very concerned that she did not have a place to live". Ms. Sun repeatedly testified that she was concerned about losing her home in Canada and that she lost sleep over the possibility.
- [170] Gu Jr. testified that he told his father that he would pay his father's debt to Mr. Xu if, in return, Gu Sr. transferred a 40% interest in 3560 Semlin. The effect of that transfer was to move 3560 Semlin entirely out of the reach of creditors.
- [171] Nine days later, on April 18, 2017, the Trendspark Mortgage was registered on title to 3560 Semlin. The principal amount of the mortgage is \$1,010,000.
- [172] On February 15, 2019, BMO commenced foreclosure proceedings against 3560 Semlin. According to the petition filed by BMO, the amount outstanding on the mortgage, as of January 9, 2019, was \$1,002,953.
- [173] Gu Jr. testified that, after the transfer of 3560 Semlin to him, his parents continued to live in the property and were making the BMO mortgage payments. Gu Jr. testified that he learned, just prior to trial, that his parents had stopped paying the mortgage payments for 3560 Semlin and that BMO had started foreclosure proceedings. He testified that he did not start making the mortgage payments. He said that he chose not to do so because it was "not necessary". He explained that the property was at risk of "being taken away" as a result of these proceedings.
- [174] Gu Jr. testified that, after approximately January 2018, 3560 Semlin was vacant, but that it had recently been rented. He has not received any of the rent.
- [175] When considering the badges of fraud set out above, they point to a shared intention to protect 3560 Semlin from Gu Sr.'s creditors. Both Ms. Sun and Gu Jr. knew that Gu Sr. was in financial trouble. They were members of his immediate family. They knew he was unable

to pay his debts. They also knew that 3560 Semlin was Gu Sr.'s only Canadian property and that he was involved in a lawsuit in China. Finally, Gu Sr. and Ms. Sun continued to reside in 3560 Semlin and continued to pay all of the mortgage and other expenses related to it, despite the transfer to Gu Jr. Further, although 3560 Semlin has since been rented, Gu Jr. does not receive the rental income from it.

- [176] It is not credible that Gu Jr. was acting pursuant to threats made by Mr. Xu with respect to 3560 Semlin. In particular, the following facts do not support that Mr. Xu acted in a way that was consistent with someone who was acting threateningly with respect to having his debts repaid:
- (a) There was no evidence that Mr. Xu had made a written demand for payment or set a date by which he was to be repaid failing which he would take action under the mortgage against 3560 Semlin. Gu Jr. testified that he was not shown or given such a demand.
 - (b) Even though Ms. Sun was upset about a perceived threat to her home, she said that she never discussed the matter with Mr. Xu and that she had not received a written demand for payment from him.
 - (c) In his evidence, Mr. Xu confirmed that he had not sent a written demand for payment, and despite having had over a year to do so, took no action on his mortgage.
 - (d) Mr. Xu testified that he had many discussions and arguments with Gu Sr. about paying debts. The mortgage on 3560 Semlin was signed in May, but the agreement that Gu Sr. would pay 5 million RMB to satisfy his obligations under his guarantee was not signed until the end of July 2015. Mr. Xu explained that registering the mortgage was more important than signing the agreement. Mr. Xu said, "[Gu Sr.] had already defaulted on me so many times I lost trust in him and he promised to pay me back and would use his property as security".
 - (e) There is no credible explanation for why, when Gu Sr. did not pay 5 million RMB by December 31, 2015, as he had agreed, Mr. Xu did not take steps under the mortgage but started litigation against Gu Sr. in China at the beginning of January 2016. In cross-examination, he said he did not take steps under the mortgage because he knew Gu Sr. did not have much money and his whole family lived in 3560 Semlin. If Gu Sr. could pay Mr. Xu back in China, he would not have to foreclose on 3560 Semlin and leave the family without a place to live. In light of the fact that Mr. Xu was aware that Gu Sr. had creditors in China, and that he no longer trusted Gu Sr., Mr. Xu's explanation was not credible.
 - (f) In Mr. Xu's April 22, 2016 Chinese judgment, which was in evidence, Gu Sr.'s address is recorded as Sheyao City, Zhejiang Province although Mr. Xu was aware that he was living in Canada. It is not at all clear why Mr. Xu proceeded in the Chinese courts rather than suing on a guarantee apparently signed by Gu Sr. in Canada.

- (g) Mr. Xu took no steps to register his Chinese judgment against Gu Sr. in BC. Instead, he asked Gu Sr. "almost daily" to pay him back as soon as possible. He said he told Gu Sr.'s and Gu Jr.'s and his mutual friends that he "could ask to auction their property."
- (h) Despite being owed over 6,300,000 RMB under the Chinese judgment, having an agreement by Gu Sr. to repay 5 million RMB, and having a mortgage over 3560 Semlin for \$1.22 million (just over 6 million RMB), Mr. Xu agreed to accept 2 million RMB in satisfaction of the debt he was owed. Mr. Xu's evidence about why he accepted so much less than he was owed was not credible. He said he had spoken to lawyers about having the Chinese judgment recognized in Canada and was told that it would be difficult, take a long time, cost a lot of money, and the result was unpredictable. Friends also tried to mediate, suggesting to Mr. Xu that he had not suffered any loss as what remained outstanding was just the interest on his loan, and that Gu Sr. and Gu Jr. did not have the ability to pay more. However, on the evidence, there was sufficient equity in 3560 Semlin to pay the full amount of the debt and proceeding under his mortgage would not be difficult, time consuming, expensive or have an unpredictable result. Further, Mr. Xu had no information about Gu Jr.'s ability to pay more than the settled amount.

[177] In sum, the only reasonable inference to be drawn from the circumstances of the First Transfer is that Gu Jr. and Ms. Sun were actively participating in, or privy to, Gu Sr.'s intention to protect 3560 Semlin from his creditors. They had a motive to do so: if the property, the family home, was still owned by Gu Sr. after the mortgage to Mr. Xu was discharged, it was vulnerable to Gu Sr.'s other creditors.

[178] Further, Gu Jr. did not testify that, if his father had not transferred 40% of 3560 Semlin to him, he would have refused to help his father pay his debt to Mr. Xu. It is reasonable to infer that Gu Jr. would have done what was necessary to avoid his father and mother being displaced from the family home even if he had not received an interest in it in return. He allowed them to remain in 3560 Semlin after it was transferred to him and, apparently, allowed them to collect rent for 3560 Semlin after they vacated it. Finally, Ms. Sun now lives in Gollner free of charge. This does not suggest that Gu Jr. would protect his own interests over those of his parents'.

[179] Ms. Sun and Gu Jr. suggested that it was not reasonable to find that Gu Sr. and Ms. Sun intended to defraud Ms. Wu by transferring 60% of 3560 Semlin from Gu Sr. to Ms. Sun when they were both liable to Ms. Wu under the Chinese Judgment. However, Ms. Sun testified that she did not know that she was liable to Ms. Wu under the Chinese Judgment until after the garnishment of her bank account in March 2017.

[180] In all the circumstances, I conclude that the First Transfer was a fraudulent Conveyance.

Was the First Transfer also a Fraudulent Preference?

[181] I conclude that, even if consideration is shown for the transfer to Ms. Sun or Gu Jr. of Gu Sr.'s interest in 3560 Semlin, the elements of a fraudulent preference are met with respect to the First Transfer.

[182] In particular: Gu Sr. was insolvent, he had the requisite intent to put his assets out of the reach of his creditors and to give his son and wife a preference, and there was no present actual payment in good faith in money.

Was Gu Sr. Insolvent?

[183] With respect to Gu Sr.'s financial circumstances in December 2016, there appears to be no dispute that Gu Sr. was in insolvent circumstances or was unable to pay his debts in full. By failing to respond to Ms. Wu's action, that allegation against Gu Sr. is unrefuted.

[184] Ms. Wu testified that Gu Sr. asked her not to disclose his whereabouts after he abruptly left China for Canada in March 2015. Mr. Xu testified that Gu Sr. was hiding from his creditors in Canada.

[185] Gu Jr. testified that, in 2016, he knew that his father had been in financial difficulties for quite some time, was bankrupt, and was unable to repay Mr. Xu.

[186] Ms. Sun testified that she discussed with Gu Sr. the lack of options available to them when faced with Mr. Xu's demands in late 2016. As set out, she said, "what can we do, we have no money."

[187] Mr. Xu testified that he was aware that Gu Sr. was in urgent need of money in China to pay creditors and said it was because of this that he agreed to transfer \$1.2 million into his Hong Kong account in the spring of 2015.

[188] Finally, as I have set out, to the extent that there is any doubt about whether Gu Sr. was insolvent, he is deemed to have admitted that fact by failing to defend against the claim against him and adverse inferences can be drawn from his failure to testify.

Did Gu Sr. have the Requisite Intent?

[189] As I have said with respect to the analysis under the FCA, Gu Sr. intended to put his assets out of the reach of his creditors.

[190] With respect to the additional intention that Gu Sr. intended to prefer one creditor over another, the facts in this case shows an intention to keep 3560 Semlin in the family. All of Gu Sr., Ms. Sun and Gu Jr. took active steps to accomplish this goal by favouring the debts (if proven) incurred by Ms. Sun and Gu Jr. on Gu Sr.'s behalf over his other creditors.

Does Section 6 of the FPA Apply?

[191] As set out above, s. 6 does not apply unless the preference was in good faith. For all of the reasons I have previously explained, that is not the case here.

[192] Further, s. 6 does not apply unless the transfers to Ms. Sun and Gu Jr. are in consideration of a present actual payment. The payment Ms. Sun is alleged to have made in May 2015, even if found to have been consideration for the December 2016 transfer of a 60% interest to her for the purposes of the FCA, is not a "present and actual" payment as required in the FPA analysis.

[193] As a result, I conclude that the First Transfer was also a fraudulent preference.

Was the Second Transfer a Fraudulent Conveyance?

[194] As I have said, the Second Transfer occurred on April 9, 2017, the same day as the Third Transfer. It was a transfer of Ms. Sun's 60% interest in 3560 Semlin to Gu Jr.

[195] The land title transfer document listed the consideration paid as "\$1.00 Natural Love and Affection".

Was the 60% Transfer to Gu Jr. Made for Good Consideration and in Good Faith?

[196] The first question is whether Ms. Sun intended to put her assets out of reach of her creditors.

[197] All of the badges of fraud point to a lack of bona fides with respect to the Second Transfer. First, it appears to be uncontested that Ms. Sun did not have sufficient funds to pay her creditors. Second, the parties to the transfer were Ms. Sun and Gu Jr., a parent and her child. Third, if Ms. Sun's evidence about her interest in Gollner is accepted, the transfer effectively divested Ms. Sun of her last asset. Fourth and fifth, there was evidence of haste in making the dispositions, and the timing coincided with the garnishment of Ms. Sun's bank account. Sixth, there was no consideration. Seventh, Ms. Sun continued in possession of 3560 Semlin after the transfer.

[198] As noted, the timing of the Second Transfer followed quickly on the heels of the garnishment of Ms. Sun's bank account, which occurred by no later than March 23, 2017, the date on which the HSBC Bank Canada paid the sum of \$19,888.16 into court. By that date, at the latest, Ms. Sun knew that her assets were at risk, including her 60% interest in 3560 Semlin.

[199] Ms. Sun testified that she was aware of Ms. Wu's lawsuit in April 2017, but was not aware that she was a party to this proceeding until the end of 2017. She testified that, in April 2017, she thought the lawsuit only related to Gu Sr.

[200] Ms. Sun's evidence in that regard is not credible, particularly as Gu Jr. testified that by April 9, 2017, he was aware that his mother was a party to this action and that her bank account had been garnished. It is not probable that Gu Jr. would have that information and Ms. Sun did not. This weighs strongly towards a finding that Ms. Sun's intent was to transfer her interest in 3560 Semlin to protect it from her creditors.

- [201] I accept that Ms. Sun did not know that she had been named as a party to the lawsuit until her bank account was garnished in March 2017. This is consistent with the fact that a 60% interest in 3560 Semlin was transferred into her name in the fall of 2016. It is also consistent with the haste with which the transfer occurred after her bank account was garnished.
- [202] With respect to evidence of haste, the transfer occurred a little over two weeks after Ms. Wu issued the notice of garnishment. Three days later, on April 12, 2017, Gu Jr. signed a receipt for lending, that he drafted, which purported to show the borrowing from his mother-in-law. Six days later, a mortgage was registered against title to 3560 Semlin. The reasonable inference from these events is that Ms. Sun and Gu Jr. were acting together to shield 3560 Semlin from Ms. Wu's claim once they became aware of it.
- [203] The consideration of "\$1.00 and Natural Love and Affection" is presumptively insufficient consideration passing from Gu Jr. to Ms. Sun for the transfer.
- [204] Gu Jr.'s position with respect to the transfer was that he made a payment to Ms. Sun's creditors as consideration for a 60% interest in 3560 Semlin.
- [205] Gu Jr. testified that in December 2016 and January 2017, he could not recall specifically when, he became aware that two creditors, Si Chen and Lida Xia, were seeking repayment of amounts owed to them by Ms. Sun. In his direct examination, he testified that the debtors called "multiple times" and were "harassing" his mother, who could not sleep as a result. In cross-examination, Gu Jr. testified that his knowledge of the "harassing" calls was limited to two phone calls, which he said he overheard, and other calls that were not picked up. He did not hear both sides of the calls, nor could he tell which of Ms. Chen and Mr. Xia were on the line with Ms. Sun. He confirmed that he had never seen a written demand for payment and that he had never spoken to either of the creditors. Unlike Gu Jr.'s efforts to negotiate a settlement of Gu Sr.'s debt with Mr. Xu, he did not attempt to negotiate with Ms. Sun's creditors.
- [206] Gu Jr. testified that Si Chen, one of the creditors, was his cousin. He confirmed that Si Chen is Wenjuan Chen's sister. Earlier in his evidence, when discussing a loan allegedly made to him by Wenjuan Chen in 2016, Gu Jr. described his relationship with Wenjuan Chen as a "close relationship" and that there were no set repayment terms for that loan "because my father is very good to her - our family helped her and her family a lot". In those circumstances, it is not probable that Si Chen would have harassed her aunt, Ms. Sun, for immediate repayment for a debt.
- [207] Ms. Sun testified that Si Chen and Lida Xia were asking for money in a "very aggressive way". She testified that she told Gu Jr., "your mom doesn't have the money to pay back debts" and that she did not "have anything except for the 60% interest [in 3560 Semlin]". In cross-examination, Ms. Sun confirmed that she had never received a written demand for payment, but only talked to Si Chen and Lida Xia on the phone.

- [208] Ms. Sun testified that the alleged debt to Si Chen dated back to an IOU that she had signed as a guarantor on January 8, 2013 for 1.5 million RMB. Gu Sr. also signed the IOU, although there was no explanation as to why his signature was required on an IOU between Si Chen and Ms. Sun and which did not bind him. No bank documents or other records were produced to prove the amount allegedly advanced to "Long Cheng's metal company in Yuyao" as referred to in the IOU. There was no evidence as to Gu Sr.'s connection to Long Cheng, or the metal company, and no evidence as to why Ms. Chen asked Ms. Sun to provide a "lifelong guarantee with personal assets" for what was apparently a two-year loan.
- [209] Gu Jr. and Ms. Sun testified that the other creditor was Lida Xia, who Gu Jr. identified as a person his father used to know. Ms. Sun testified that Lida Xia was a friend of her husband's. Ms. Sun testified that the alleged debt to Lida Xia dated back to an IOU that she had signed as guarantor on May 2, 2013.
- [210] The IOU is in evidence. It is also signed by Gu Sr., although there was no explanation as to why his signature was required on an IOU between Lida Xia and Ms. Sun, and which did not bind him. No bank documents or other records were produced to prove the amount allegedly advanced under this IOU.
- [211] There was no evidence as to why Mr. Xia required Ms. Sun to sign a "lifelong guarantee with her personal assets" for what was apparently a one-year loan.
- [212] The IOU signed by Ms. Sun references an interest payment of 2 million RMB (the parties agreed that the translation that referred to 1 million RMB was in error) being made by Lida Xia to Ms. Wu by deposit to Ms. Wu's designated account, which was Chongjun Gu's account in Shenyang.
- [213] Ms. Wu testified that this payment of interest, or otherwise, was never received by her or by Chongjun Gu and that Chongjun Gu did not have an account in Shenyang. Of particular note, she testified that she never received any payment of any amount of interest from Lida Xia. In fact, on May 2, 2013, the date of the IOU signed by Ms. Sun, the loans Ms. Wu had advanced to Gu Sr. were not subject to interest. Gu Sr. was not obliged to pay interest until he signed the written borrowing note for 150 million RMB in October 2014, almost eighteen months after the date of the IOU.
- [214] In light of the adverse inference I have drawn with respect to Gu Jr.'s and Ms. Sun's failure to call Gu Sr. as a witness, I find that his evidence would have been contrary to Ms. Sun's with respect to the signing of the two IOUs or at least would not have been helpful.
- [215] Ms. Sun and Gu Jr. testified that, on March 5, 2017, they signed an agreement that Gu Jr. had prepared. Unlike prior real estate documents, the agreement was not prepared or witnessed by Xiao Feng Zheng, a lawyer the defendants had used in the past with respect to their real estate transactions. Gu Jr. testified that they "probably" signed it at 3560 Semlin.

- [216] When asked why an agreement was necessary when such an agreement had not been signed by Ms. Sun and Gu Jr. with respect to the Langtree Property, Gu Jr. responded, "because at that time I was very young, still in school and didn't know we could have a written agreement. Now I still have a very good relationship with my mom, but thought we should have an agreement - so it's there." Ms. Sun testified that they entered into the written agreement because Gu Jr. requested it.
- [217] Gu Jr. testified that by April 9, 2017, the date of the Second Transfer, he was aware that Ms. Sun was involved in a lawsuit and that her bank account had been garnished. He testified that, "[his] father was in financial difficulty at that time, people asking him to repay debts at that time, so he was in a lot of trouble." In cross-examination, he agreed that his mother was also in financial trouble at that time.
- [218] Gu Jr. testified that he came up with the solution of mortgaging Gollner to his mother-in-law, Yaqing Cen, so that he could pay Ms. Sun's debts. In return, he asked Ms. Sun to transfer her 60% interest in 3560 Semlin to him.
- [219] His evidence in that regard was not credible when considered in light of all the circumstances.
- [220] Gu Jr. testified that Yaqing Cen paid Ms. Sun's debts to Si Chen and Lida Xia on April 21 and 24, 2017 and that he was provided with bank transfer slips evidencing the transfers. He testified that the transfer slips were likely sent to his cell phone, but that he has since changed cell phones, so any accompanying messages are no longer available.
- [221] Ms. Sun and Gu Jr.'s evidence of creditors harassing, or aggressively pursuing Ms. Sun in late 2016 and early 2017 is undocumented and not corroborated by evidence from Si Chen, Lida Xia or Yaqing Cen. It is not credible that Gu Jr. would have formed the intention to borrow money from his mother-in-law, in exchange for a mortgage on Gollner, in order to pay Ms. Sun's creditors, on the basis of two telephone calls he overheard from creditors who had taken no action on their respective IOUs since early 2013. It is also not credible that Gu Jr. would have gone to such lengths when one of the alleged creditors was Ms. Sun's niece, particularly in light of Gu Jr.'s earlier testimony that his cousin's family and his family were close and that his father had helped the Chen family.
- [222] Further, the evidence of the alleged payment of Ms. Sun's debts actually being made to the creditors consists of the interested parties' testimony, a mortgage registered by a family member, and photographs of bank slips purporting to show funds being transferred between third parties, none of whom were witnesses in this trial. This is not sufficient to show that funds actually passed hands, as would be required if those funds were to constitute consideration.
- [223] It is of note that, despite Gu Jr.'s evidence that he paid back the mortgage to Yaqing Cen, the mortgage remains registered against title to Gollner. Gu Jr.'s explanation for why that was the case was directly contradicted by Ms. Cen's evidence.

- [224] Finally, Ms. Wu testified that she never received an interest payment for Lida Xia on behalf of Gu Sr. and that Chongjun Gu never received an interest payment on her behalf, and did not have the bank account referenced in the IOU. It is of note that no interest was then owing from Gu Sr. to Ms. Wu with respect to the funds she advanced to him.
- [225] In light of all of the above, and the prevalence of the badges of fraud in this case, I conclude that the agreement allegedly signed by Ms. Sun and Gu Jr. on March 5, 2017, pursuant to which she conveyed her 60% interest in 3560 Semlin to him, was fabricated after Ms. Sun's bank account was garnished.

Was Gu Jr. Privy to the Fraud?

- [226] Even if Gu Jr. provided consideration for the conveyance of Ms. Sun's interest in 3560 Semlin to him, the conveyance should still be voided as a fraudulent conveyance as he was not a bona fide recipient of that interest for value. Rather, he was privy to the intention to move 3560 Semlin beyond the reach of Ms. Sun's creditors.
- [227] When Gu Jr. was asked on cross-examination whether he agreed that, by transferring 60% of 3560 Semlin to him, the property was kept safe from Ms. Sun's creditors, Gu Jr. said "What you just said makes sense; however, when I did that back then I didn't do so in order to avoid debts." His evidence in that regard must be considered in light of all the facts of the case, which includes the evidence pointing to all of the badges of fraud being engaged in the Second Transfer.
- [228] Gu Jr. actively participated in planning and coordinating the Second Transfer and drafted the agreement. Gu Jr. then took the further step of immediately mortgaging 3560 Semlin for a principal amount that matched the available equity in it.
- [229] I conclude that the most reasonable inference to be drawn is that Gu Jr. was participating in Ms. Sun's efforts, and was aware of her intention to shield 3560 Semlin from her creditors.

Was the Second Transfer a Fraudulent Preference?

- [230] I have concluded that, even if consideration was provided by Gu Jr. in the form of a debt incurred by him on behalf of Ms. Sun, the elements of a fraudulent preference are met with respect to the Second Transfer.

Was Ms. Sun Insolvent?

- [231] Ms. Sun was insolvent at the time of the Second Transfer. There appears to be no dispute that Ms. Sun was unable to pay her debts in full.

Did Ms. Sun Have the Requisite Intent?

- [232] As I have said with respect to the analysis under the FCA, Ms. Sun had the requisite intent to put her assets out of the reach of her creditors and to give Gu Jr., her son, a preference.

[233] All of the facts of this case demonstrate beyond a reasonable doubt that Ms. Sun intended to prefer her son over her other creditors and to keep 3560 Semlin in the family. Both Ms. Sun and Gu Jr. took active steps to favour him to accomplish this goal.

Does Section 6 of the FPA Apply?

[234] Section 6 does not apply unless the preference was in good faith. For the reasons I have set out, I conclude that the preference was not in good faith and s. 6 does not apply.

Was the Third Transfer a Fraudulent Conveyance?

[235] The Third Transfer occurred on the same date as the Second Transfer. Together, the transfers resulted in Ms. Sun having no property in her name. As described, the Third Transfer involved an April 9, 2017 transfer from Ms. Sun to Gu Jr. of a 50% interest in Gollner. Prior to the transfer, Ms. Sun and Gu Jr. each held an undivided half interest in Gollner. After it, Gu Jr. held a 100% interest in the property.

[236] Ms. Sun and Gu Jr. submit that the Third Transfer could not amount to a fraudulent conveyance or preference because Ms. Sun never held a beneficial interest in Gollner. The 50% interest was held by her in trust in favour of Ms. Sen. They also submit that in April 2017, Ms. Cen requested that her beneficial interest be transferred from Ms. Sun to Gu Jr. because Ms. Sun was concerned that Gollner would be at risk from Ms. Wu's action.

[237] On all of the evidence, I find that Ms. Sun and Gu Jr. have not led credible evidence with respect to whether Ms. Cen has a beneficial interest in Gollner. In my view, the most probable inference to draw from the evidence before me is that the trust agreement was created as a way to attempt to shield Ms. Sun's property from creditors.

[238] Gu Jr. testified that he moved with Ms. Cen and his daughter to Canada on October 26, 2016. Ms. Cen testified that they arrived on October 27, 2016. Both of their answers may be correct. The family may have left China on October 26 and arrived in Canada on October 27.

[239] In any event, Gu Jr. and Ms. Sun both testified that, on October 27, 2016, they received a copy of a letter from Jeffery Lam, the notary public assisting them with the purchase of Gollner. They attended at his office on the day they arrived. Gu Jr. testified that he remembered that his mother was present at Mr. Lam's office, but could not remember if anyone else was present. Presumably, the letter was delivered to them in the office or on the same day.

[240] The October 27, 2016 letter from Mr. Lam states, in relevant part:

I confirm that you have instructed me that you wish to take title as follows:

WEI JIE Gu, Student, as to undivided 50/100 interest and Qiu Zhen SUN, Retired, as to undivided 50/100 interest, both of 517 - 7338 Gollner Avenue, Richmond, BC V6Y 0H8.

- [241] Gu Jr. testified that Ms. Cen asked Ms. Sun to hold 50% of Gollner in trust for her after she learned about the foreign buyer's tax. In cross-examination, he twice confirmed that Ms. Cen learned of the foreign buyer's tax within several days of their arrival. In fact, if Ms. Cen's evidence is correct about when she arrived in Canada, she must have learned of the foreign buyer's tax on the date of her arrival.
- [242] When cross-examined about Ms. Cen's decision to enter into the alleged trust arrangement, Gu Jr. repeatedly said he had little information about it. For example, when asked if Mr. Lam had been told about the trust, Gu Jr. responded, "I don't know, only know that my wife asked my mother to hold the interest in trust for her - all I know".
- [243] When asked if he knew how Ms. Cen found out about the foreign buyer's tax, he responded, "maybe she heard it from the real estate agent or lawyer". When he was asked whether he knew, he said, "don't know exactly". When asked what knowledge he had about Ms. Cen visiting Jeffery Lam's office, he responded, "I actually don't recall whether she did go to Lam's office or not."
- [244] Ms. Cen testified that she and her family moved to Canada on October 27, 2017, and she attended at Mr. Lam's office on the same day with Gu Jr. and Ms. Sun. She testified that on that date, she had a discussion with Mr. Lam and she asked if she would have to pay the foreign buyer's tax if she was not a permanent resident. She testified that, after Mr. Lam said she would, "at that point in time my decision was to ask my mother-in-law to hold 50% of the interest in order to avoid the foreign buyer's tax."
- [245] On cross-examination, Gu Jr. was asked why he thought Ms. Cen asked his mother to hold her interest in trust as opposed to asking him to do so. Gu Jr. said, apparently without having discussed it with his wife, that it was because his wife would feel "awkward" asking him to return the interest to her because they are a couple who live together. It would be easier to ask his mother, with whom she was less close. When asked on cross-examination, he said that he and his wife trust each other.
- [246] Ms. Sun gave similar evidence. She said that she thought that Ms. Cen had asked her to hold the property, instead of her son, because it would be uncomfortable for Ms. Cen to ask Gu Jr. to hold the property. She elaborated that it would be "uncomfortable" because it would be "hard to verbalize it" if Ms. Cen ever wanted to ask for the property back from her husband.
- [247] Ms. Cen agreed that she was "uncomfortable" with Gu Jr. holding her 50% interest because she would feel "awkward" to ask for it back. She elaborated, "because we are husband and wife, if he holds 50% on behalf of me and then I want the interest to be returned to me and add my name to title, I wonder - I worried whether my husband would have second thoughts that would affect our marriage."

- [248] If, as they testified, Ms. Sun and Gu Jr. were speculating as to Ms. Cen's reason for electing to have Ms. Sun hold her beneficial interest, it is a remarkable coincidence how all three gave the same reason in their evidence.
- [249] Ms. Cen testified that she had asked her mother-in-law to engage a lawyer to draft a trust agreement. They did not use Mr. Lam for that purpose. She testified that she told Ms. Sun what she thought should be included in the agreement. She also testified that she signed the document at Mr. Zhang's office.
- [250] The November 2016 trust agreement is identical to the trust agreement eventually signed in April 2017 between Gu Jr. and Ms. Cen with respect to him holding her interest in Gollner in trust, except for names, dates, and the description of the registered owners' interest. Ms. Cen and Ms. Sun are the signatories to the November 2016 Trust Declaration. It contains a grammatical error as follows:

WHEREAS the Trustee is one [sic] the registered owners, holding an undivided ½ interest in and to the real property described as

- [251] The April 2017 Trust Declaration was signed by Gu Jr. and Ms. Cen. It reads:

WHEREAS the Trustee is the registered owner, holding an undivided 100% interest in and to the real property described as

- [252] None of the signatures on the April 17, 2017 Trust Declaration were witnessed by Mr. Zhang or anyone else. The defendants did not call Mr. Zhang to testify about the Trust Declarations. It was open to them to do so, as any privilege was theirs to wave. I draw an adverse inference from their failure to do call Mr. Zhang.

- [253] There are a number of concerns about the existence of the trust:

- (a) Each witness testified that Ms. Cen's motivation for asking her mother-in-law to hold the property for her, instead of her husband, was because it would be less uncomfortable. It is simply not credible that a person would say that they want someone who is less close to them to hold their important property interest in trust, rather than their spouse.
- (b) Further, such trust arrangements, although not formally documented, had been in place between Gu Jr. and Ms. Cen with respect to other property. The evidence is that both spouses' funds were transferred into Gu Jr.'s Hong Kong bank account, including the proceeds of sale of their jointly owned business and the funds Gu Jr.'s grandmother had provided to them jointly to purchase a place to live in Canada.
- (c) The evidence with respect to the genesis of the decision to put the property in trust is inconsistent. Gu Jr. testified that Ms. Cen learned about the foreign buyer's tax within a few days of arriving in Canada. Ms. Cen testified that she learned about having to pay the tax on the day they arrived, which she identified as October 27, 2017, at Mr. Lam's office. On her version of the facts, Ms. Cen would have flown from China with young child, travelled to a notary's office, learned about the potential tax consequences of her non-resident status,

made the decision to have her interest in the property held in trust, and made the decision that the trustee would be her mother-in-law, all on the same day. While this is possible, it is not, in my view, probable.

- (d) The creation of the trust is corroborated by only one document: a document which is identical to the document drafted and signed, with numerous other trust related documents, in April 2017. The signatures on the trust agreement are not witnessed by the lawyer who purportedly drafted it, or by anyone in his office.

[254] In my view, there is sufficient doubt about the creation of a trust in favour of Ms. Cen with respect to the 50% interest transferred by Ms. Sun to Gu Jr. In this case, I have not been asked to grant any relief with respect to an alleged trust and I decline to do so.

[255] All of the badges of fraud, which I have earlier set out, were present in April 2017. Ms. Sun learned that her assets were at risk by virtue of the garnishment of her HSBC Canada bank account. In those circumstances, there is a strong presumption that Ms. Sun effected the Third Transfer with the requisite intent of avoiding her creditors, as I have already found with respect to the transfer of 3560 Semlin to her son on the same day.

[256] As there was no consideration for the Third Transfer, it is only Ms. Sun's intention that is relevant to the fraudulent conveyance analysis, and once that intention is established, a finding that the Third Transfer was a fraudulent conveyance follows.

The April 2017 Mortgages

[257] Gu Jr. testified that, on April 12, 2017, the same day as the transfer of Gollner to him, he signed an IOU in favour of his mother-in-law. He testified that there was no set repayment term for this loan.

[258] By mortgage registered on title to Gollner on April 18, 2017, Gu Jr. granted a mortgage in the principal amount of \$700,000 to his mother-in-law. When asked in direct evidence where the \$700,000 amount came from, he answered, "it is the value of Gollner". He did not say that it was the amount he had borrowed from her.

[259] When he was asked about other options for repaying his mother's debts instead of borrowing from his mother-in-law, Gu Jr. testified that he considered, and rejected, the option of liquidating some of his stocks. He also testified that he did not suggest the option of mortgaging 3560 Semlin to repay his mother's debts.

[260] When asked why the mortgage was placed on Gollner, Gu Jr. responded that it was because Gollner was registered in his name and Ms. Cen had agreed. When asked why his wife would agree to mortgage her alleged 50% interest in Gollner Property in order to repay his mother's debts, Gu Jr. responded, "because my wife trusts me." This evidence seems inconsistent with Ms. Cen's evidence that it have been "awkward" or "uncomfortable" to have him hold her interest in Gollner for her.

- [261] By mortgage registered on title to 3560 Semlin on April 18, 2017, Gu Jr. granted a mortgage in the principal amount of \$1,010,000 to Trendspark. In cross-examination, he acknowledged that the amount of the loan was arrived at because it was equal to the available equity in 3560 Semlin.
- [262] Gu Jr. testified that Trendspark is a company belonging to his friend Suk Ling Chan. He acknowledged that Trendspark is not a bank, nor is it in the business of lending money. He could not recall how many advances were made to him under the mortgage or the amount of each advance. He testified that his purpose for borrowing the money was because he owed a lot of money to others at the time and he wanted this money to invest for profit to pay back other monies he owed. He did not testify about the nature of his creditors.
- [263] In my view, the mortgages registered against 3560 Semlin and Gollner, nine days after the Second and Third Transfers, are further evidence of a concerted and deliberate attempt to protect those properties from execution to satisfy Ms. Wu's judgment.

Conclusion

[264] For all of the reasons given, I order and declare that:

- (a) the property transfer made pursuant to the Form A Transfer registered in the New Westminister Land Title Office under No. CA5710260 with respect to the property with civic address 3560 Semlin Drive, Richmond, British Columbia, V7C 5V7, legally described as, Lot 62, Section 10, Block 4 North, Range 7 West New Westminister District Plan LMP34903, PID 023-882-557 ("3560 Semlin") is null and void;
- (b) the property transfer made pursuant to the Form A Transfer registered in the New Westminister Land Title Office under No. CA5922367 with respect to the 3560 Semlin is null and void;
- (c) the property transfer made pursuant to the Form A Transfer registered in the New Westminister Land Title Office under No. CA5922368 with respect to the property with civic address 517 - 7338 Gollner Avenue, Richmond, British Columbia, V6Y 0H8, legally described as, Strata Lot 33, Section 8, Block 4 North, Range 6 West, New Westminister District, Strata Plan EPS2876, PID 029-608-261 ("Gollner") is null and void; and
- (d) Ms. Wu may apply to the court for such further and other orders that may be required or requested by the Land Title Office in order to effect the orders granted herein.

"MacNaughton J."

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