

COURT OF KING'S BENCH OF MANITOBA

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO
SECTION 243 OF THE *BANKRUPTCY AND*
INSOLVENCY ACT, R.S.C. 1985, C. B-3 AS
AMENDED, AND SECTION 55 OF *THE COURT OF*
KING'S BENCH ACT, C.C.S.M. C. C280

B E T W E E N:

BANK OF MONTREAL,	)	<u>Richard W. Schwartz</u>
	)	for Sea Air International
applicant,	)	Forwarders Ltd.
	)	
- and -	)	<u>Catherine E. Howden</u>
	)	for Bank of Montreal
GENESUS INC., CAN-AM GENETICS INC.	)	
and GENESUS GENETICS INC.,	)	<u>Kalev A. Anniko</u>
	)	for Genesis Inc.
respondents.	)	
	)	<u>J.J. Burnell</u>
	)	for the Receiver BDO Canada Ltd.
	)	
	)	Judgment Delivered:
	)	June 19, 2026

CHARTIER J.

INTRODUCTION

[1] This motion was filed in the context of receivership proceedings wherein the Bank of Montreal ("BMO") made an application to have BDO Canada Limited ("BDO") appointed receiver and manager of the assets of Genesis Inc. ("Genesis"), Can-Am

Genetics Inc. ("Can-Am") and Genesis Genetics Inc. ("the debtors") which order was granted on June 11, 2024.

[2] This is a motion by Sea Air International Forwarders Limited ("Sea Air"), seeking a declaration that a mortgage granted by Genesis and Can-Am to BMO against certain property owned by Genesis is void or otherwise unenforceable, and alternatively a declaration that the mortgage is subordinate to the certificate of judgment registered by Sea Air against certain property owned by Genesis. The issue is whether BMO's mortgage registered on Genesis' real property on October 12, 2023 is valid and has priority over the certificate of judgment registered by Sea Air against title to Genesis' real property on December 15, 2023.

FACTS

[3] The following evidence was relied by the parties in this motion. Ed Barrington, a senior account manager with BMO, swore three affidavits and he was also cross-examined on his affidavits. Allan Herman, counsel of record for Sea Air, also swore an affidavit and James Long, a former officer and director of Genesis, was examined under oath.

[4] Sea Air is an Ontario corporation having its registered office in Mississauga, Ontario, and carries on business throughout Canada as an international freight forwarder. Genesis and Can-Am are incorporated pursuant to the laws of Manitoba carrying on the business of breeding and selling swine. BMO is the primary secured creditor of the debtors.

[5] Sea Air provided services and invoiced one of the debtors, Genesis, for same on May 23, May 30, June 6 and June 26 of 2023. As those invoices were not paid, Sea Air

obtained default judgment in the Ontario Superior Court of Justice against Genesis on October 3, 2023, in the amount of \$319,796.33 plus costs. The judgment was eventually registered against title to three parcels of land owned by Genesis on December 15, 2023.

[6] BMO initiated the within proceedings pursuant to s. 243 of the ***Bankruptcy and Insolvency Act*** ("***BIA***"), R.S.C., 1985, c. B-3. On June 11, 2024, BDO was appointed as receiver of all of the debtors' assets, property, and undertakings.

[7] BMO's special accounts management unit first became involved in the debtors' account in the beginning of 2023, due to the debtors' financial difficulties and the resulting default under certain loans and security. Between February 10 and May 23, 2023, the debtors' BMO account was often in an unauthorized overdraft position and BMO was required to return cheques written by the debtors in order to cure the debtors' overdraft position.

[8] BMO became increasingly concerned about the debtors' cashflow projections and continued breaches of the loans and security. As a result, BMO ultimately made demand and served Notices of Intention to Enforce Security ("***NIES***") pursuant to the ***BIA*** and Notices of Intent by Secured Creditor pursuant to the ***Farm Debt Mediation Act***, S.C. 1997, c. 21, upon the debtors on June 16 and July 6, 2023.

[9] It was a term of each of the debtors' general security agreements with BMO, which were executed in or around 2011, that the debtors granted a charge in favour of BMO with respect to all of the debtors' property, both real and personal, moveable or immovable, both present and future, of whatsoever nature and kind.

[10] After BMO made the demand and served the NIES on the debtors, the debtors retained counsel. On July 7, 2023, counsel for the debtors contacted counsel for BMO to advise that the debtors sought to enter into a forbearance agreement with BMO to allow the debtors additional time to evaluate their financial situation.

[11] At the debtors' request, counsel for the debtors and counsel for BMO began negotiating the terms of a forbearance agreement beginning on July 26, 2023, which included that the debtors would provide additional security to BMO by way of an all-obligations second mortgage against all of the land and premises owned by Genesis and Can-Am in the amount of \$8,000,000. On July 31, 2023, counsel for the debtors advised counsel for the BMO that the debtors agreed to provide the second mortgage to BMO as consideration for BMO's entering into the forbearance agreement.

[12] The terms of the forbearance agreement ultimately entered into by BMO and the debtors included, amongst other things, the following terms:

- a) The debtors acknowledged the debt, the validity of BMO's security, that default had been made thereunder, and that BMO was entitled to enforce its security;
- b) BMO would not proceed to take further steps to recover payment of the debt, or to enforce its security, until 11:59 p.m. on January 15, 2024 (the "forbearance term"), provided that all terms and conditions of the forbearance agreement are complied with;
- c) The debt shall be due and payable in full on January 15, 2024, at the end of the forbearance term;

- d) The debtors shall consent in writing to BMO's appointment of BDO as monitor and consultant, on terms and conditions acceptable to BMO in its sole discretion. The debtors shall cooperate with BDO and provide BDO with financial information upon request by BDO, including daily inflow and outflow of cash, accounts receivable, accounts payable, income and balance sheets, for BDO's review and reconciliation;
- e) The debtors shall provide to BMO monthly reporting, including, without limitation, income statements, balance sheets and account receivable/account payable statements, to be provided to BMO by the 21st day following the prior month;
- f) In consideration of the forbearance agreement and as security for the repayment of the debt owing, the debtors agree to provide the second mortgage to BMO. The second mortgage shall be a demand mortgage in the sum of \$8,000,000, subordinate only to first mortgages to the Farm Credit Corporation ("FCC"), and subject to provision of a forbearance agreement between FCC and the debtors, in a form satisfactory to BMO at its sole discretion;
- g) Can-Am intends to sell the St. Andrews Property and will provide copies of any contemplated offers to purchase the St. Andrews Property for the approval of BMO.

[13] The second mortgage was accordingly registered against title to all of Genesis' and Can-Am's real property in Manitoba on October 12, 2023.

[14] Genesus continued its operations, both throughout the forbearance term and after the expiry of the forbearance agreement and continued to use assets and the available funds in the deposit account, secured to BMO, to pay other creditors subordinate to BMO in the ordinary course of its business, without any payments being made to BMO to reduce the Genesus' debt to BMO. Interest continued to accrue on the operating line, both throughout the forbearance term and after the expiry of the forbearance agreement, without any interest payments being made by the debtors.

SUBMISSIONS

[15] Sea Air's position is that BMO's second mortgage is invalid as it constitutes a fraudulent conveyance under s. 2 of the ***Fraudulent Conveyances Act***, C.C.S.M. c. F160, (the "***FCA***"), or a fraudulent preference under s. 95 of the ***BIA***, or was in breach of the requirement of good faith under s. 4.2 of the ***BIA***, or alternatively that the granting of the mortgage constituted inequitable conduct and that therefore the doctrine of equitable subordination should apply.

[16] Sea Air says that there was no benefit to Genesus for the three-and-a-half-months' forbearance period. BMO needed to allow Genesus time to arrange a sale regardless of whether there was a forbearance agreement signed by Genesus. It was in the bank's own interest and benefit to allow Genesus time in order that the bank maximize its own realization. In exchange it was granted security in the form of a mortgage in the amount of \$8,000,000. The consideration for Genesus was totally inadequate given this significant additional security and this was all done on the eve of an insolvency.

[17] BMO's position is that there was nothing untoward or unusual in either the entering into of the forbearance agreement between the debtors and BMO or the subsequent registration of the second mortgage on the various titles of land of the debtors and that Sea Air's motion should be dismissed.

[18] BMO says that there is nothing unusual about the circumstances in Genesus and Can-Am offering additional security and where they were allowed to continue operations and it is not dissimilar to the actions of a debt lender in a ***Companies' Creditors Agreement Act***, R.S.C., 1985, c. C-36, proceeding. The business did not have the ability to continue without the bank's participation. BMO says that the forbearance agreement is itself consideration, Genesus and Can-Am received additional time, it was able to access the deposit account using their accounts receivable and using their inventory which was obviously to Genesus' benefit. Other creditors including Sea Air were not precluded from enforcing their own remedies. There is no intent to defeat or delay creditors. The evidence is that Genesus was thinking of selling the business, and for the company to have time to be able to claim a tax credit which would be used to pay out its creditors.

ISSUES

[19] The issues are as follows:

- a) Was the registration of BMO's second mortgage against the debtors' property a "fraudulent conveyance" within the meaning of s. 2 of the ***FCA***;
- b) Was the registration of BMO's second mortgage against the debtors' property a "fraudulent preference" within the meaning of s. 95 of the ***BIA***; and

- c) Should this Court exercise its discretion under s. 4.2 of the **BIA** in issuing a declaration that the second mortgage is void and/or unenforceable; and
- d) Should this Court apply the doctrine of equitable subordination so as to subordinate BMO's second mortgage to Sea Air's judgment?

ANALYSIS

a) Was the registration of BMO's second mortgage against the debtors' property a "fraudulent conveyance" within the meaning of s. 2 of the FCA?

[20] Section 2 of the **FCA** states:

When conveyances declared
void as against creditors

2 Every conveyance of real property or personal property and every bond, suit, judgment, and execution at any time had or made, or at any time hereafter to be had or made, with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties, or forfeitures is void as against such persons and their assigns.

Transferts déclarés nuls

2 Les transferts de biens réels ou de biens personnels et les cautionnements fournis, les poursuites engagées, les jugements obtenus et les exécutions effectuées dans l'intention de frustrer d'une façon quelconque des créanciers ou d'autres personnes de leurs actions, poursuites, créances, comptes, dommages-intérêts, pénalités ou déchéances, justes et légitimes, sont nuls à l'égard de ces personnes et de leurs ayants droit.

[21] In ***Aquino v. Bondfield Construction Co.***, 2024 SCC 31, the Supreme Court of Canada summarized what constitutes "badges of fraud" to assess the debtor's subjective intent:

[44] Because it is often difficult to adduce evidence of a debtor's subjective intent, the intent requirement is often proved through the evidentiary shortcut of badges of fraud. Badges of fraud are suspicious circumstances from which a court may infer the debtor's intent to defraud, defeat, or delay a creditor [...] The badges of fraud approach to inferring a debtor's intent to defraud

creditors is of ancient vintage, dating back to *Twyne's Case* in 1601 (caselaw omitted).

[45] Case law has recognized the following non-exhaustive examples of badges of fraud: (a) the debtor had few remaining assets after the transfer; (b) the transfer was made to a non-arm's length party; (c) the debtor was facing actual or potential liabilities, was insolvent, or was about to enter a risky undertaking; (d) the consideration for the transaction was grossly inadequate; (e) the debtor remained in possession of the property for their own use after the transfer; (f) the deed of transfer had a self-serving and unusual provision; (g) the transfer was secret; (h) the transfer was made with unusual haste; and (i) the transaction was made despite an outstanding judgment against the debtor (caselaw omitted).

[46] A badge of fraud must be considered in the context of the surrounding circumstances and in relation to the question of the debtor's intention at the time of the transfer (caselaw omitted). A court must avoid analyzing the debtor's actions with the benefit of hindsight; it "must resist the temptation to inject back into the circumstances surrounding the impugned transaction knowledge about how events unfolded after that time" (caselaw omitted). The presence of one or more badges of fraud does not require the court to infer an intent to defraud, defeat, or delay a creditor, nor does the absence of a particular badge of fraud prevent the court from inferring this intent (caselaw omitted).

[22] The circumstances surrounding the negotiation of the forbearance agreement and the registration of BMO's second mortgage in this case included that BMO and the debtors are arm's length parties. BMO is the debtors' primary secured creditor and holds real property mortgages with respect to Genesis' real property and Can-Am's real property, which are registered in priority to every other caveat and non-financial encumbrance. Since it became involved in the debtors' accounts in early February of 2023, BMO attempted to assist the debtors through their financial difficulties by allowing them to continue drawing down on their operating line and to carry on business operations and maintain the animal inventory. Genesis was contemplating the sale of the business and was hopeful of obtaining a significant tax credit. Genesis continued its operations, throughout the forbearance term and after the expiry of the forbearance agreement and

continued using assets and available funds in its deposit account, all of which were secured to BMO, to pay other creditors subordinate to BMO in the ordinary course of its business, without any payments being made to BMO to reduce its debt. Sea Air had not yet obtained default judgment against Genesis in its Ontario action at the time the forbearance agreement was executed by BMO and the debtors on September 30, 2023.

[23] BMO was not aware of Sea Air's Ontario action against Genesis, nor of the default judgment obtained by Sea Air against Genesis, at the time the second mortgage was registered against title to all of Genesis' and Can-Am's real property in Manitoba on October 12, 2023.

[24] When BMO's second mortgage was registered on October 12, 2023, Sea Air had not yet filed its default judgment against Genesis in the Manitoba Court of King's Bench. Sea Air's default judgment against Genesis was not filed in the Manitoba Court of King's Bench until December 12, 2023, and was not registered against title to Genesis' Property until December 15, 2023.

[25] The forbearance agreement and BMO's registration of the second mortgage against Genesis' and Can-Am's property as consideration for it was negotiated between the parties through counsel. I find that the purpose and intent of that transaction was to allow time for the debtors to pursue the sale of the business. There is evidence in the record from Genesis, which I accept, that at the time of negotiating the terms of the forbearance agreement, Genesis was actively contemplating selling the company. I also disagree that the transaction was conducted in haste, rather it was done deliberately and with no unusual speed. The three-and-a-half-month term of the forbearance agreement

gave Genesis an opportunity to sell the business. This was therefore not nominal or inadequate consideration, nor does it indicate an intent to delay or defeat creditors.

[26] In all of the circumstances I am not persuaded that requisite intent to defraud, delay or defeat any creditors of Genesis or Cam-Am within the meaning of s. 2 of the **FCA** has been made out by Sea Air.

[27] I am satisfied that sufficient consideration was given by BMO to the debtors with respect to BMO obtaining the second mortgage. Forbearance from a suit can be a valid consideration. The terms of the forbearance were respected by BMO which allowed Genesis to continue operating in the ordinary course of business giving Genesis an opportunity to sell the business to give it a better financial outcome than a liquidation of the assets which would come from receivership or bankruptcy proceedings.

b) Was the registration of BMO's second mortgage against the debtors' property a "fraudulent preference" within the meaning of s. 95 of the BIA?

[28] For reasons that follow I find that s. 95(1)(a) of the **BIA** does not apply to BMO's second mortgage.

[29] Section 95(1)(a) of the **BIA** provides as follows:

Preferences

95 (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

Traitements préférentiels

95 (1) Sont inopposables au syndic tout transfert de biens, toute affectation de ceux-ci à une charge et tout paiement faits par une personne insolvable de même que toute obligation contractée ou tout service rendu par une telle personne et toute instance judiciaire intentée par ou contre elle :

(a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and

...

a) en faveur d'un créancier avec qui elle n'a aucun lien de dépendance ou en faveur d'une personne en fiducie pour ce créancier, en vue de procurer à celui-ci une préférence sur un autre créancier, s'ils surviennent au cours de la période commençant à la date précédant de trois mois la date de l'ouverture de la faillite et se terminant à la date de la faillite;

...

[30] The New Brunswick Court of Appeal in ***Logistec Stevedoring (Atlantic) Inc. v. A.C. Poirier & Associates Inc.***, 2005 NBCA 55, sets out three conditions that must be met for a payment to a creditor to qualify as a "fraudulent preference" under s. 95 of the **BIA**.

[4] The law is settled with respect to the interpretation and application of s. 95 of the BIA. In order for a payment to a creditor to qualify as a fraudulent preference three conditions precedent must be met: (1) the payment must have been made within three months of bankruptcy; (2) the debtor must have been insolvent at the date of the payment; and (3) as a result of the payment the creditor must have in fact received a preference over other creditors [...]

[31] As there has been no "bankruptcy" of Genesus, or any of the debtors, and no "initial bankruptcy event", the first condition set out in ***Logistec*** has not been met in this case and the application of s. 95(1)(a) of the **BIA** is not triggered. Contrary to Sea Air's unsupported assertion, a receivership order does not trigger s. 95(1) of the **BIA** by a

plain reading of s. 95(1) including the BIA definitions of “date of the bankruptcy” and “date of the initial bankruptcy event.”

[32] Further, the same “badges of fraud” that have been developed by the Courts in the context of provincial preferences legislation are also relevant to the Court’s determination of whether a transfer constitutes a “fraudulent preference” within the meaning of section 95(1)(a). As previously stated, I find that there are no such indicia or badges of fraud present in this case.

c) Should this Court exercise its discretion under s. 4.2 of the BIA in issuing a declaration that the second mortgage is void and/or unenforceable?

[33] Section 4.2(1) of the **BIA** provides:

Good faith

Bonne foi

4.2 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

4.2 (1) Tout intéressé est tenu d’agir de bonne foi dans le cadre d’une procédure intentée au titre de la présente loi.

[34] The statutory requirement of good faith “requires that an interested party not bring or conduct proceedings for an oblique motive or purpose” and in relation to a secured creditor “the good-faith requirement relates to a secured creditor’s invoking and conduct of insolvency proceedings under the **BIA**.” (**CWB Maxium Financial Inc. v 2026998 Alberta Ltd.**, 2021 ABQB 137, at paras. 59 and 203).

[35] I accept BMO’s submission that s. 4.2 of the **BIA** does not apply in the circumstances of this case, as Sea Air’s challenge is to the validity of the second mortgage, and not to BMO’s commencement of the within application for the appointment of a

receiver or its conduct during these proceedings. There is no assertion, nor evidence, that BMO commenced the within proceedings for an “oblique” purpose.

[36] As previously indicated, the registration of the second mortgage cannot be said to have been an intentional, “bad faith” or fraudulent attempt to defeat Sea Air’s interest with respect to the real property owned by the debtors. The second mortgage was granted to BMO as consideration for the forbearance agreement, the intent of which was to allow the debtors time to pursue the sale of the business as a going concern. Sea Air has failed to establish any lack of good faith on the part of BMO, or any basis upon which the Court ought to exercise its remedial discretion under s. 4.2(2) of the **BIA**.

d) Should this Court apply the doctrine of equitable subordination so as to subordinate BMO’s second mortgage to Sea Air’s judgment?

[37] For reasons that follow I find that the doctrine of equitable subordination does not apply to the facts of this case.

[38] Whether the remedy of equitable subordination is available in Canadian law remains an open question before the Supreme Court of Canada. The Supreme Court considered the doctrine on two occasions but found that the underlying facts did not meet the test for equitable subordination. (See **Canada Deposit Insurance Corp. v. Canadian Commercial Bank**, 1992 CanLII 49 (SCC), [1992] 3 SCR 558, **Sun Indalex Finance, LLC v. United Steelworkers**, 2013 SCC 6). In the **Canada Deposit Insurance Corp.** decision, at pp. 609-14, the Supreme Court found that the doctrine could not be invoked absent a finding of inequitable conduct. That was a unanimous decision of the court authored by Iacobucci J. In **Sun Indalex Finance, LLC**, two judges of the Supreme Court opined in considering the doctrine “[s]uffice to say that

there is no evidence that the lenders committed a wrong or that they engaged in inequitable conduct ...” (at para. 77). Assuming equitable subordination exists as a doctrine in Canadian law, a necessary requirement is the existence of inequitable conduct.

[39] In this case, the terms of the forbearance agreement, and the registration of the second mortgage, were negotiated between counsel for the debtors and counsel for BMO, over the course of several months and at the debtors’ request. The debtors were actively considering selling the business and the forbearance agreement was therefore in their interest and constituted valuable consideration. There is no factual foundation that BMO acted inequitably.

CONCLUSION

[40] Sea Air’s motion is therefore dismissed with costs payable to BMO.

_____. J.