Legislation

Législation

STATUTES—ONTARIO—THE CONSOLIDATED HEARINGS ACT, 1981.— As many members of the public and the profession are by now aware, the Province of Ontario recently enacted legislation designed to streamline the hearing process by providing for the consolidation of the hearings required under several specific statutes. Although it may be too early to render any kind of definitive assessment of the merits of the Consolidated Hearings Act, 1981,[1] there is little doubt that this statute will exert a profound influence on the future course of the approval processes.

In this province, the Environmental Assessment Board conducts public hearings involving the approval of applications for waste disposal under the Environmental Protection Act;[2] sewage and waterworks projects under the Ontario Water Resources Act;[3] matters relating to environmental assessment under the provisions of the Environmental Assessment Act, 1975,[4] and other matters by Order-in-Council.

Public hearings are not mandatory in all cases under the above-mentioned legislation and in several instances the Environmental Assessment Board is required to hold a hearing only after being directed to do so by the Director of Environmental Approvals Branch of the Ministry of the Environment, or by the Minister.[5]

Since most undertakings which have an environmental impact and as such are subject to environmental legislation also involve to a greater or lesser extent land use control, the approval process had become somewhat repetitive, expensive, complex and time-consuming. To illustrate, by example, the approval for a municipality to establish, maintain and operate a new waste disposal site in Ontario would, in the normal case, require a full public hearing under the provisions of the Environmental Assessment

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[1] S.O. 1981, c. 20.

[2] R.S.O. 1980, c. 141.

[3] R.S.O. 1980, c. 361 (formerly the Ontario Water Resources Commission Act).

[4] R.S.O. 1980, c. 140.

[5] See Ontario Water Resources Act, *supra*, footnote 3, ss 25(1), 43(2)(4); Environmental Protection Act, *supra*, footnote 2, ss 30(1), 32(1), 35(1); Environmental Assessment Act, *ibid.*, ss 12(2), 13.

Act before the Environmental Assessment Board.[6] In addition, however, the municipality might well have to re-zone the subject lands; expropriate those lands; obtain approval of relevant sections of an Official Plan; and raise the funds to carry out the project through debenture financing, all of which could require one or more hearings before the Ontario Municipal Board or an inquiry officer under the Expropriations Act, or both.[7]

Much of the same evidence would be presented to both tribunals and the delay to the proponents in securing the necessary approvals in some cases has proved to be costly in terms of both time and expense.

The Consolidated Hearings Act was enacted in response to this and other concerns.

Purpose of the Act

The Consolidated Hearings Act applies with respect to an undertaking in relation to which more than one hearing is required or may be required or held by more than one tribunal under one or more of the Acts set out in the Schedule to the Act or prescribed by the regulations.[8]

The Schedule to the Act lists twelve statutes under which separate hearings might have been required, the significant ones being the Environmental Assessment Act;[9] the Environmental Protection Act;[10] the Expropriations Act,[11] sections 6, 7 and 8; the Municipal Act;[12] the Planning Act;[13] the Ontario Water Resources Act;[14] and the Ontario Municipal Board Act.[15] It should be noted, however, that the application of the Act may be extended by regulation.[16]

The broad general purpose of the Consolidated Hearings Act is to establish a joint board comprised of one or more members of either or both the Environmental Assessment Board and the Ontario Municipal Board to hold one hearing to deal with matters referred to in the statutes listed in the Schedule to the Act.[17] The new Act is designed to apply whenever a

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[6] At the time of writing the Environmental Assessment Act provides for the assessment of only major provincial and municipal projects.

[7] See The Planning Act, R.S.O. 1980, c. 379, ss 15, 39, 50, 51; The Ontario Municipal Board Act, R.S.O. 1980, c. 347, ss 62, 63; The Expropriations Act, R.S.O. 1980, c. 148, ss 6, 7, 8.

[8] See O. Reg. 200/82—This regulation amends O. Reg. 688/81 and removes certain hearings from the scope of The Consolidated Hearings Act.

[9] *Supra*, footnote 4.

[10] *Supra*, footnote 2.

[11] Ss 6, 7, 8.

[12] R.S.O. 1980, c. 302.

[13] *Supra*, footnote 7.

[14] *Supra*, footnote 3.

[15] *Supra*, footnote 7.

[16] The Consolidated Hearings Act, *supra*, footnote 1, ss 2, 19.

[17] *Ibid.*, s. 4(4).

multiplicity of hearings may arise before different tribunals. The use of the word "may" in section 2 underscores the fact that only the possibility of more than one hearing need exist in order for the Act to apply. Thus, under this legislation the joint board is empowered to hold a hearing and consider the matters that could be considered at the hearings authorized by the statutes named in the Schedule and to issue its decision in respect of those matters.[18]

In addition, the joint board may defer in whole or in part any of the matters to be decided by itself later; to be decided by another joint board; or to be decided by the tribunal or persons who would normally have the power, right or duty to deal with the matter or part under any statute set out in the Schedule or prescribed by the regulations.[19]

As of June, 1983, there has been a total of ten hearings held under the Consolidated Hearings Act, of which one is ongoing and it is interesting to note that the deferral power has been exercised in four of those hearings.[20]

Application of the Act in Practical Terms

In most cases the proponent of an undertaking will have little difficulty in determining that his particular project requires the approval of more than one tribunal or person who is or may be required under the scheduled statutes to hold a hearing prior to rendering a decision with respect thereto. Assuming that the proponent meets the criteria set out in section 2 of the Act,[21] the requisite "Notice" referred to in section 3(1) is then given to the Hearings Registrar setting out the general nature of the undertaking, the hearings that are required or that may be required or held.[22] Does this mean, however, that a proponent *must* proceed under the Consolidated Hearings Act if more than one hearing under any of the scheduled statutes is required or may be required? Although there is some degree of uncertainty at the present time, I submit that until the proclamation date mentioned in section 3(4) allowing an application by any person affected by the proposed undertaking to the Divisional Court for an order requiring the proponent to proceed under the Act, the answer is quite probably no.[23]

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[18] *Ibid.*, s. 4(11).

[19] *Ibid.*, s. 5(3).

[20] Some form of phasing occurred in each of the hearings listed below through exercise of the deferral powers.

Ontario Hydro — Southeastern Ontario Bulk Transmission System Expansion Program—CH-81-01.

Ontario Hydro — Southwestern Ontario Bulk Transmission System Expansion Program—CH-81-04.

Horton Street Extension—London—CH-81-03.

Twp. of South-West Oxford Landfill—CH-81-05.

[21] *Supra*, footnote 1, s. 2.

[22] *Ibid.*, s. 3.

[23] Ss 3 and 24 must be read in conjunction with each other.

It is my view that the practical effect of sections 3 and 24 is as follows:

1. Prior to the proclamation date referred to in section 3 a proponent *may*, provided the Act applies, (and by that I mean more than one hearing under the scheduled statutes are or may be required) either give notice under the Consolidated Hearings Act *or* proceed before one or more of the other tribunals.
2. If the proponent, prior to the date of proclamation, elects to proceed before another tribunal, a party to the proceedings may apply to that tribunal for an order requiring the proponent to proceed under the Consolidated Hearings Act. The tribunal may or may not issue such an order.
3. After the date of proclamation a proponent of an undertaking to which the Consolidated Hearings Act applies *must* proceed under this Act; if he fails to do so any person who is or may be affected by the undertaking may apply to the Divisional Court for an order requiring the proponent to proceed under the Act. It appears, however, that the Divisional Court could refuse to issue such an order.
4. If a proponent, during the transitional period or, for that matter, after the transitional period, gives notice under section 3 of the Act, no other person or tribunal acting under any statute specified in the Schedule or regulations shall hold a hearing in respect of the undertaking.[24]

This interpretation of the transitional provisions is by no means settled, however, and may have to be ultimately decided by the courts or clarified by regulation.[25]

Notice and Procedure under the Act

Assuming that a proponent chooses to proceed under the Consolidated Hearings Act what steps should be taken prior to a matter being set down for a hearing and what "Notice" requirements must be met? The Act itself does not provide the answer and each matter will have to be dealt with on a case by case basis. There is, however, one section which does appear to set certain standards and criteria. Section 7(1)[26] of the Act provides that notices and documents that would normally be required to be given or filed in respect of a hearing under any of the scheduled statutes shall be given "in the same manner" in respect of the joint board hearings by the joint board, unless under section 7(2)[27] the joint board elects upon application to change these requirements upon being satisfied that any such change will facilitate the joint board hearing and will not be unfair to any person entitled to be

[24] *Ibid.*, s. 20.

[25] Part of the difficulty in arriving at an accepted interpretation arises from the use of the world "shall" in s.3(1), *ibid.*

[26] *Ibid.*

[27] *Ibid.*

heard or to attend the joint board hearing. Although the legislative authority is there to allow the joint board to vary the notice provisions set out in the scheduled statutes, it is anticipated that any decision by a joint board to vary any notice provisions required under the scheduled statutes will be made only in compelling circumstances in order to prevent undue hardship and expedite the hearing process.[28]

It seems apparent that the procedures or issues raised by some of the scheduled statutes cannot always be dealt with simultaneously and a certain "incompatibility" may develop. The deferral powers set out in section 5(3) of the Act are designed to overcome this difficulty.[29]

The Hearings Registrar will endeavour to ascertain from the proponent upon receiving a Notice under the Act whether the requirements of the scheduled statutes have been met and if not, in appropriate cases, refer the matter to the joint board which will then deal with any deficiencies and issue the requisite directions or orders or both.[30]

The practice and procedure before the joint board under the Consolidated Hearings Act is in the process of being developed, refined and hopefully improved. Section 7(3) of the Act allows a joint board to determine its own practice and procedure, subject of course to the Act and the regulations.[31] It must be emphasized, however, that under this section the panel comprising a specific joint board may determine the practice and procedure applicable to a particular hearing and this may vary from panel to panel.[32]

It must also be remembered that in most cases the joint board is comprised of members of both the Environmental Assessment Board and the Ontario Municipal Board and the practice and procedure before each of these boards may differ in certain respects. At the present time any differences must be resolved and agreed upon by the panel members comprising a particular joint board. Thus, in four of the ten hearings under the Act to date, the use of witness statements and interrogatories has been

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[28] See also, s. 22(3), *ibid.*

[29] For example, the Twp. of South-West Oxford Landfill Hearing, CH-81-05. Official Plan matters applicable to the entire County were dealt with in a separate phase of the hearing prior to consideration of site specific evidence.

[30] The Hearings Registrar in re: Jackson and The Niagara Escarpment Commission, CH-82-07, after receiving a Notice under s. 3 of the Act advised the proponent to first apply for the issuance of a development permit under s. 23(1) of The Niagara Escarpment Planning and Development Act, R.S.O. 1980, c. 316. In the event that the issuance of a permit was refused, the proponent could then apply under The Consolidated Hearings Act, *supra*, footnote 1. The proponent thereupon withdrew his original notice.

[31] *Ibid.*

[32] For example, a preliminary meeting was held with respect to the Southwestern Ontario Hydro matter and preliminary hearings were held with respect to the Southeastern Ontario Hydro and the Twp. of South-West Oxford Landfill matters, at which time procedural concerns were addressed.

ordered and the designation of interested persons as either parties or participants has taken place.[33] As of this writing, I have found that the use of witness statements and interrogatories has proven to be of value both to counsel and the joint board, and in my opinion, their use should be encouraged especially in the more lengthy and complex hearings.[34] Hopefully it may be possible at some time in the future to codify rules of procedure applicable to proceedings under the Consolidated Hearings Act. This would be of considerable assistance to counsel and members of the public appearing before the joint board.

Award of Costs

The issue of "costs" has arisen at most, if not all, of the joint board hearings to date and because many of the hearings will by necessity involve complex land use and environmental matters requiring the presentation of a considerable amount of technical expert evidence, this issue will be of increasing importance to all parties and participants. Statutory authority for the joint board to award costs is found in section 7(4) of the Act.[35] In addition, the joint board may also order by whom and to whom the costs are to be paid.[36] Would this allow a joint board to award costs in advance? This very question was raised in both of the Ontario Hydro hearings and the joint board dealt at length with this issue in written Reasons for Order issued in the course of the Southwest Ontario Hydro hearing.[37] Although the joint board in both Hydro cases denied all applications for an award of costs in advance it did indicate, while leaving this question open, that the award of costs in advance in the appropriate circumstances, may be possible.[38]

It is apparent, however, that a joint board will have considerably less difficulty in making an award of costs either at the end of a particular phase of a consolidated hearing or at the end of the hearing itself.[39] It may be relevant to note that inasmuch as "parties" and "participants" are not

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[33] The two Ontario Hydro hearings and the Twp. of South-West Oxford Landfill hearing; see *supra*, footnote 20, for file citations. Also the Victoria Hospital hearing, CH-82-09.

[34] At the time of this writing, the author has participated as a member of the joint board in the London P.U.C. hearing CH-81-02, the Twp. of South-West Oxford Landfill hearing CH-81-05, the County of Northumberland (Twp. of Seymour) Landfill hearing, CH-82-10 and the Town of Port Elgin Landfill hearing, CH-82-11.

[35] *Supra*, footnote 1.

[36] *Ibid.*, s. 7(5)

[37] See Southwestern Ontario Hydro written Reasons for Order dated Dec. 16th, 1981—CH-81-04.

[38] It must again be emphasized that the issue of awarding costs is in the sole discretion of the panel members comprising each joint board.

[39] The joint board in its Reasons for the Plan Stage Decision in the Southwestern Ontario Hydro hearing issued June 18th, 1982 indicated that it will make a cost award to certain parties upon proper application. Applications for an award of costs were also heard

defined under section 1 of the Act[40] one must revert to the definition of "party" under the Statutory Powers Procedure Act.[41] This distinction may be of some importance in considering an award of costs to a participant.[42]

Judicial Review

Another issue which seems to occur frequently concerns the advisability of a joint board continuing with a hearing after its jurisdiction has been challenged at the outset and before a court of competent jurisdiction has determined the question of the joint board's jurisdiction. This issue has been the subject of several court decisions, and the following is a brief summary of the leading cases.

In *Regina* v. *Ontario Labour Relations Board, ex parte Ontario Food Terminal Board*[43] Mr. Justice Laidlaw of the Ontario Court of Appeal stated:

> In my opinion, when the quesion of jurisdiction of any other question of pure law is raised in a proceeding before a tribunal constituted under provincial legislation . . . the proceedings should be stayed until such question has been finally determined by a Court of competent jurisdiction.

Mr. Justice Haines of the Supreme Court of Ontario in a later case that same year[44] after reaching the conclusion that the opinion of Mr. Justice Laidlaw in the *Ontario Food Terminal* case,[45] was *obiter* and inconsistent with other decisions, held that the Ontario Labour Relations Board had the right and duty to entertain and deal with an objection to its jurisdiction when it was raised. Having decided it had jurisdiction, it could proceed with the application before it. When the application has been dealt with, any party thinking himself aggrieved by the ruling as to jurisdiction can then apply to the court for such relief as may seem appropriate.

The Ontario Court of Appeal in *Re Cedarville Tree Services Ltd* after reviewing the cases up to that point, including both of the above-mentioned cases, affirmed that:[46]

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by the joint board at the end of both phases of the Twp. of South-West Oxford Landfill hearing. An award of costs of $75,000.00 was made in favour of the Twp. of South-West Oxford at the conclusion of the hearing.

[40] *Supra,* footnote 1.

[41] R.S.O. 1980, c. 484, s. 5.

[42] In the Southwestern Ontario Hydro hearing the redesignation of Energy Probe as a party rather than a participant was presumably made to facilitate an award of costs. See p. 49 of Reasons for Plan Stage Decision of the joint board dated June 18th, 1982. Query whether this distinction is necessary in the light of s. 7(3) of The Consolidated Hearings Act, 1981, *supra,* footnote 1.

[43] (1963), 38 D.L.R. (2d) 530, at p. 532.

[44] *Re Armstrong Transport and Ontario Labour Relations Board,* [1964] 1 O.R. 358, at p. 359.

[45] *Supra,* footnote 43.

[46] [1971] 3 O.R. 832, at p. 841.

> . . . a party affected or about to be affected by the action of an administrative tribunal is not required to wait until that tribunal has brought the particular matter to a conclusion before invoking the jurisdiction of the Supreme Court on the basis that the tribunal is acting without jurisdiction.

and further held that:[47]

> . . . a tribunal is not required to bring its proceedings to halt merely because it has been served with a notice of motion for an order of *certiorari* or prohibition. It is entitled, if it thinks fit, to carry the pending proceedings forward until such time as an order of the Court has actually been made prohibiting its further activity or quashing some order already made by which it assumed jurisdiction.

I might further add, however, that in my view section 4 of the Judicial Review Procedure Act[48] is worded widely enough to allow the Divisional Court to stay further proceedings by the decision-maker under challenge pending the determination of the application for judicial review.[49]

Conclusions

I have attempted in this comment to outline the purpose and intent of the new legislation which represents on the part of the Province of Ontario a sincere desire to improve the hearing process as it relates to land use and environmental concerns. Unfortunately any new piece of legislation will experience in practice problems involving procedure and interpretation which were to some extent unforeseen by its drafters. The ten cases heard so far have certainly raised questions which will have to be addressed in the not too distant future, either by amendment to the Act itself, the regulations, or by way of judicial review.

Nevertheless I think it is fair to say that the overwhelming majority of the parties and participants who have to date appeared before the joint board have been pleased with the way the joint boards have endeavoured to fulfil the spirit of the Act facilitating a full, fair and impartial hearing while at the same time striving to minimize the excessive time and cost so often attributed to the approval process.

Other jurisdictions will no doubt observe with interest the evolution and the anticipated benefits of this long awaited legislation.

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[47] *Ibid.*, at pp 841-842.

[48] R.S.O. 1980, c. 224, s. 4.

[49] An application for judicial review was brought before the commencement of the Twp. of South-West Oxford Landfill hearing and an order obtained staying the hearing until a decision of a full panel of the Divisional Court was rendered; however, the parties reached an accord and the applicant thereupon withdrew his application for judicial review.

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BANKRUPTCY—DEBTORS' AND CREDITORS' RIGHTS—SETTING ASIDE DEBTOR TRANSACTIONS: THE INTENTION TEST.—Given an economic situation in which defaults and bankruptcies are increasing in frequency, creditors' rights are being exercised more aggressively. Debtors, on the other hand, are also being aggressive in renegotiating terms on loans, transferring assets in lieu of payment and organizing their finances to shield assets. On the basis of some very old authority, I would argue that aggressive creditors can set aside many more debtor-instigated transactions.

Under section 2 of the Fraudulent Conveyances Act, every conveyance of real property or personal property and every judgment and execution made:[1]

> . . . *with intent to defeat, hinder, delay, or defraud* creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

Section 2 does not apply to property conveyed upon good consideration and *bona fide* to a person not having notice.[2] However, it applies:[3]

> . . . to every conveyance executed with the *intent* set forth in that section (section 2) notwithstanding that it was executed upon a valuable consideration and with the intention, as between the parties to it, of actually transferring to and for the benefit of the transferee the interest expressed to be thereby transferred, unless it was protected under section 3 by reason of *bona fides* and want of notice or knowledge on the part of the purchaser.

On the force of this section, where a conveyance occurs to a creditor without notice of other creditors, or knowledge of the intent of the debtor, according to section 3 of the Fraudulent Conveyances Act, the creditor is able to keep the property. Yet, this apparent gap is filled by section 4(2) of the Assignment and Preferences Act, which states:[4]

> . . . every [such] gift, conveyance, assignment or transfer, delivery over or payment made by a person being at the time in insolvent circumstances, or *unable to pay his debts in full,* or knowing himself to be on the eve of insolvency, to or for a creditor with the *intent to give* such creditor an unjust preference over his other creditors or over any one or more of them is void as against the creditor or creditors injured, delayed, prejudiced, or postponed.

Under the Assignment and Preferences Act, if a transaction is attacked within sixty days after the date of the transaction, the necessary intent is presumed. If longer than sixty days have elapsed, the transaction stands, even though the transaction was instigated by *bona fide* pressure without a

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[1] R.S.O. 1980, c. 176, italics mine. There are similar provisions in the other common law provinces.

[2] *Ibid.*, s. 3.

[3] *Ibid.*, s. 4, italics mine.

[4] R.S.O. 1980, c. 33, italics mine. There are similar provisions in the other common law provinces.

view of obtaining a preference. If the dominant intention is to secure an unjust preference, the transaction falls.[5]

Section 5 of the Assignment and Preferences Act exempts:[6]

(a) Any *bona fide* sale or payment made in the ordinary course of trade.

(b) Any payment of money to a creditor.

(c) Any *bona fide* conveyance, assignment, transfer or delivery that is made in consideration of:

  (i) a present actual *bona fide* payment in money or by way of security for a present actual *bona fide* advance of money;

  (ii) a present actual *bona fide* sale or delivery of goods or other property.

The third statutory basis available is the Bankruptcy Act.[7] Under section 69(1), transactions made within one year of bankruptcy, can be set aside. Under section 69(2), transactions or settlements made within five years can be set aside, if it can be proven that when the settlement was made, the bankrupt could not pay his debts, or the transaction can be categorized as a sham transaction. There are exceptions to the latter when the transaction is made in consideration of marriage, to a purchaser in good faith or value, or as a settlement to the bankrupt's wife and children. The focus of this analysis, will exclude these latter provisions, as they are the traditional methods of attack.

Needless to say, there have been judicial interpretations of the Fraudulent Conveyances Act and the Assignment and Preferences Act. There are some very wide statements in the judicial authorities, that have not been picked up and pursued by aggressive creditors.

In bringing suit under both Acts, a creditor must satisfy a two-fold test. The first is to prove that a debtor is unable to pay his debts. In *Re Butterworth*,[8] Jessel M.R. defines this test by stating that "unable" is to be interpreted as unable during the normal course of events in business. This is not a major obstacle, in that through a complete discovery, an approximate balance sheet can be drawn up to show liquidity.[9]

The second test and by far the most important one that must be satisfied, is the proof of "intent". In *Ottawa Wine Vaults Co.* v. *McGuire*,[10] Mr. McGuire acquired a hotel in Ottawa, and in order to equip it, ordered various trade supplies on credit, pledging as security other property he owned. Mrs. McGuire saw the possibility of creditors coming in and seizing some of their assets. In order to prevent that possibility, Mr.

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[5] *Ibid.*, ss 4(3) and 4(4). See also, *Molson Bank* v. *Halter* (1890), 18 S.C.R. 88.

[6] *Supra*, footnote 1.

[7] R.S.C. 1970, c. B-3.

[8] (1882), 19 Ch.D. 588. Appl'd *Re Mitchell, Cootes* v. *Mitchell* (1955), 1 D.L.R. (2d) 166.

[9] For example, use of the Anton Piller order: *Anton Piller K.G.* v. *Manufacturing Processes Ltd*, [1976] 1 All E.R. 779; foll'd *Sony* v. *Anand*, [1981] F.S.R. 398.

[10] (1912), 27 P.L.R. 319. Foll'd *Bank of Montreal* v. *Stair* (1918), 44 O.L.R. 79.

McGuire conveyed to her, certain other non-pledged property. Mr. McGuire eventually yielded to his creditors and made an assignment. Several creditors sought to have the conveyance to his wife set aside under the Fraudulent Conveyances Act. Mr. McGuire argued that the petitioning creditors, who became creditors after the conveyance of the property to his wife, could not complain of the conveyance. The Ontario Court of Appeal stated that it did not matter when the creditors arose; what was important was the intent behind the transaction. Garrow J.A. remarked that when the settlement was made, the debtor had sufficient other assets to pay his debts in full. Yet notwithstanding this fact:[11]

> . . . the defendants' position is not, I think, sufficiently supported by the decisions to which counsel refers, which clearly recognize what is otherwise well established, that a voluntary *conveyance made with intent to affect future creditors* alone is within the statute and will be set aside.

In order to prove intent, one must rely on Pettit,[12] where the six badges of fraud, as noted in *Twyne's* case,[13] are set out. They are:

(1) All or substantially all of the property must be conveyed.
(2) There must be continuance in possession by the grantor of the property he has purported to convey.
(3) There must be secrecy in the conveyance.
(4) The conveyance is made after a writ has been issued.
(5) There exists a trust whereby the grantor has retained an interest.
(6) There exists a statement in the conveyance that it is made without any fraudulent intent.

If any of the above elements can be shown to exist, then one has gone a long way to prove intent.

There have been more recent developments. For instance in *Scheuerman* v. *Scheuerman,*[14] Mr. Scheuerman bought land in his own name and with his own money. He conveyed it to his wife to avoid his creditors and his wife sold the property. The husband sued his wife, to recover the property after having paid all outstanding creditors. Hence, the argument that creditors would be prejudiced, was pre-empted. The husband was unsuccessful in recovering the land. The Supreme Court of Canada stated that the intention to defraud was the key test, whether or not creditors existed. In *Tinker* v. *Tinker*,[15] on a solicitor's advice, a husband conveyed to his wife, certain property prior to going into business. Lord Denning

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[11] *Ibid.*, at p. 322, italics mine. In other words, it did not matter if the creditors existed for a transaction to be set aside. The key element is intent alone. Hence, the "unable" test is less critical, and "intent" overrides.

[12] Equity and the Law of Trust (4th ed., 1979), Ch. 5, p. 149.

[13] (1601), 3 Co. Rep. 80b. Appl'd *Meeker Cedar Products Ltd* v. *Edge* (1967), 61 D.L.R. (2d) 388.

[14] (1916), 28 D.L.R. 223, 52 S.C.R. 625.

[15] [1970] 1 All E.R. 540.

refused to allow the husband to recover the property from his wife. Again, the court focussed on the intention test alone.

In *Goodfriend* v. *Goodfriend*,[16] the facts involved a "wife-swapping" situation, where one party in fear of alimentary suits, transferred a farm to his "real wife". In an action to recover the property, Spence J., with Pigeon J. concurring, held that there was no proof that the respondent husband had creditors, or that creditors were defeated, hindered, or delayed by the transfer. The test according to Mr. Justice Spence, relying on *Taylor* v. *Bowers*,[17] is whether or not a person was actually defrauded. This statement is peculiar in light of this argument being dismissed by the Supreme Court of Canada in *Scheuerman*. It is also peculiar in that Spence J. cites *Scheuerman* for the principle that intent is irrelevant, notwithstanding the clear wording in the Fraudulent Conveyances Act. Further on in the judgment *Krys* v. *Krys*[18] is cited to the effect that intent is relevant, yet the Fraudulent Conveyances Act is not cited in that decision. It is difficult to determine what the basis of the judgment is, although it would appear to be that no creditor was prejudiced and therefore, the husband did not have the necessary intention and would be able to recover.

In *Bingeman* v. *McLaughlin*,[19] a husband promised his wife the conveyance of their property because he had an adulterous affair. The husband attempted to recover the property. The court held that the test was whether or not there was continued intention to defraud, notwithstanding the existence of creditors.[20] The court restricted *Goodfriend* to its facts.

The issues of preferences and intent were recently canvassed by Anderson J. in *Kisluk* v. *B.L. Armstrong Company*.[21] The plaintiff attempted to set aside a series of payments as being fraudulent and void pursuant to section 73 of the Bankruptcy Act[22] and section 4 of the Assignments and Preferences Act.[23] The court held that the plaintiff should be entitled to recover payments that occurred within the three months of bankruptcy. The plaintiff was unsuccessful in setting aside payments that occurred outside of the three month period.

There are several problems with the judgment. Firstly, Anderson J. omits any reference to the Bankruptcy Act provisions that allow for

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[16] [1972] S.C.R. 640, aff'ing [1971] 1 O.R. 411.

[17] (1876), 1 Q.B.D. 291.

[18] [1929] 1 D.L.R. 289.

[19] (1974), 1 O.R. (2d) 485, 12 O.R. (2d) 65; 16 N.R. 55, [1978] 1 S.C.R. 548.

[20] Though involving the trust law principle of presumption of advancement, the principle of intention stands alone.

[21] (1983), 40 O.R. (2d) 167.

[22] *Supra*, footnote 7.

[23] *Supra*, footnote 4.

transactions to be set aside outside of the three month period. Secondly, Anderson J. finds that the Assignments and Preferences Act does not apply because:[24]

> Concluded transactions are not likely to be set aside. In my view, to satisfy the onus, there must be affirmative evidence of the intent to prefer. No doubt this can be, and indeed usually is, by way of inference, but the inference must be clear and convincing. I do not find it so in this case. Suspicion is not enough.

This statement is unusual in that earlier on in the judgment, Anderson J. finds that it is beyond dispute that by the impugned payments, the defendant obtained a preference. Perhaps there was a feeling of constraint as evidenced by a hint in the judgment that legislation is required to clarify the wording of the Assignment and Preferences Act, and the court even provides a clearer version of the relevant sections.

The court rightly looks to the test of intent, and it is heartening to see the use and analysis of the Assignment and Preferences Act. However, the focus on the proof required for intention causes a problem. Firstly, Anderson J. states that the onus of establishing intent is on the plaintiff and requires affirmative evidence, not just inferences, notwithstanding the fact that there were interlocking elements of shareholdings, directorships and executive officers. Further that the defendant clearly was the principle beneficiary of liquidated accounts receivable during the critical period under review. One only has to refer to the tests noted in *Twyne's* case[25] to see that intent can easily be met.

Secondly, after reviewing two cases on the issue of fraud on creditors, the court states:[26]

> In such cases one might find in the relationship a motive for creating a preference, namely, conferring a benefit on a near relative. Nothing of that kind can be found in a relationship between (the parties).

It would appear that the court is creating a new test, that the Fraudulent Preferences Act can only be used to set aside transactions between near relatives. All other transactions would appear to be valid. This does not accord with the law on setting aside preferences.

To conclude it would appear that:

(1) The test in any transaction, is whether there was an intention to defraud.

(2) The existence of creditors, past, present or future, does not matter.

(3) Intention can be proved by relying on *Pettit*.

(4) Any one of the six badges of fraud may be easy to prove thereby rendering many transactions vulnerable.

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[24] *Supra*, footnote 21, at p. 187.

[25] *Supra*, footnote 13.

[26] *Supra*, footnote 21, at p. 187.

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