Project on Reform of the law of Fraudulent Conveyances and Preferences

Submitted to the annual meeting of the Uniform Law Conference of Canada
Edmonton, Alberta
August 2006

by Tamara M. Buckwold
Professor, Faculty of Law, University of Alberta

Introduction

The case for reform of fraudulent conveyances and preferences law has been compellingly advanced by many expert bodies and individuals, all of whom share the view that this area of law should and can be rehabilitated through the enactment of modern provincial and territorial legislation. Given that a significant body of material examining the policy and doctrinal issues raised by this area of law already exists and little would be gained by the production of yet another study, the objective of this project should be the preparation of a draft uniform Act.

Process

The process contemplated for this project would have four primary phases: (1) research, (2) preparation of a working paper, (3) consultation and (4) final report, including draft Act. Three fundamental questions arise in that context:

1. How should the scope of the research phase of the project be defined?

The feasibility study provided to the Uniform Law Conference of Canada (the "Conference") by Richard Dunlop in 2004, like other writings addressing the area of fraudulent conveyances and preferences, points out that the law in this area is comprised of relatively sparse legislation overlaid with a heavy miasma of often vague and sometimes contradictory case law. This raises the question of how extensive the case law research to be undertaken in support of the formulation of recommendations for reform must be. Should extensive effort be devoted to an attempt to define what the law is in each provincial and territorial jurisdiction, as represented by the judicial interpretation and application of extant legislation? Or should the research goal be to identify the issues and policies raised by current statutory and case law in aid of the design of an appropriate and effective legislative solution? If the latter is chosen, significant reliance would be placed on the research and synthesis that is already available in the texts and existing studies. These materials offer comprehensive reviews of the seminal case authorities as well as critical commentary on our current statutory regimes. It is my view that, while some case study is necessary for purposes of identifying and elaborating the doctrinal and policy factors that must be taken into consideration, exhaustive case law research would be an unnecessary and inordinately time consuming effort. Under this approach, the research plan would review the following material:

Canada

- Canadian statutory law, including the relevant provisions of the Bankruptcy & Insolvency Act.

- Reports written or commissioned by Canadian law reform agencies, government task forces and similar bodies.

- Secondary sources: texts, law review articles and other commentary.

- Case law: as required to update the foregoing material and elaborate on issues and policies identified.

Other jurisdictions: United Kingdom, Australia, New Zealand and the United States

- Relevant statute law

- Reports written or commissioned by law reform agencies, government task forces and similar bodies.

- Secondary sources: texts, law review articles and other commentary

2. Can and should the project be bijural in nature?

The production of a draft Act that responds to the unique juridical regime of Quebec is a worthy goal to the extent that there is a perceived need for reform or a potential interest in national harmonization in that province. Assuming that either or both conditions exist, the production of a report and draft legislation that is relevant to Quebec as well as to the common law jurisdictions demands that Quebec law be taken into account. However, the fulfillment of that need is seriously challenged by (a) the limitations of the project leader's expertise and linguistic facility (b) the timeline and budget for this project, and (c) the desirability of designing legislation that interfaces with reformed judgment enforcement law legislation as represented by, ***inter alia***, the ULCC Uniform Civil Enforcement of Money Judgments Act. Notably, the Civil Enforcement of Money Judgments Act is, both conceptually and procedurally, a product of the Canadian common law tradition.

The guidance of the Conference is sought on the importance of a bijural approach in this project. If such an approach is to be adopted, the limitations identified in points (a) and (b) preclude an exhaustive research survey of Quebec law without the recruitment of a second primary researcher, with the attendant expense and delay. That being the case, is there another way to incorporate input from Quebec in this process? The solution I would propose is that such input be provided at key points in responsive fashion by one or two individuals possessed of suitable expertise; perhaps an academic working in this area and a senior practitioner. This input might be elicited in the following manner:

i. Research phase: Following the preparation of the research report, the Quebec experts would be asked to provide observations and responses indicating the extent to which identified issues and policies inherent in the law of the common law jurisdictions are common to Quebec. The product of the research phase would, therefore, be a primary report identifying the issues and policies arising outside of Quebec, supplemented by a secondary paper or addendum outlining the correlative position in that province.

ii. Working paper phase: Prior to the launch of this phase of the project, the project leader and Quebec experts would consult with the director of the Commercial Law Strategy and the executive of the Conference to determine whether the consultation paper should be designed with a view to producing a bijurally relevant draft Act. If the conclusion is in the affirmative, preparation of the working paper would proceed in a manner analogous to that in which the research report was prepared; that is, the working paper would be written by the project leader, followed by comment and response from the Quebec experts indicating additional or contradictory points that must be considered if the consultation process and draft Act are to extend to Quebec. The product of the working paper phase would therefore be a primary working paper identifying alternative approaches to the issues and policies arising outside of Quebec, supplemented by a secondary paper or addendum outlining considerations relevant to Quebec.

iii. Consultation phase: Prior to the launch of this phase, the project leader and Quebec experts would again consult with the director of the Commercial Law Strategy and the executive of the Conference to determine whether the consultation phase should extend to Quebec with a view to producing a bijurally relevant draft Act. If the conclusion is in the affirmative, Quebec representation on the working group undertaking the consultation phase would be required. To the extent necessary, the recommendations flowing from the consultation phase would identify considerations unique to Quebec.

iv. Draft Act: The project leader would prepare a working draft of the Act based on the recommendations flowing from the consultation phase. The working group assembled for purposes of the consultation phase would review the working draft, which would be amended as necessary to achieve a final draft.

3. How should the consultation phase of the project be approached?

To a small extent, the membership of the working group responds to the need for consultation. The initial role of the group would be to work with the project leader to design consultation documents and processes. This would entail identification of the questions on which consultation should be sought, and may involve the preparation of tentative recommendations for purposes of response. It is therefore highly desirable that the working group be composed of persons representative of a range of regions and perspectives, since this work implicitly entails the making of preliminary choices.

While consultation with stakeholders must be engaged, past experience suggests that the pool of persons likely to participate is likely to be relatively small. Furthermore, although there are undoubtedly a range of competing interests and alternative policies to be considered, this is to a considerable extent "lawyers' law". In my view, therefore, a credible consultation process need not entail unduly elaborate or expensive measures. Internet-based communication devices such as appropriately targeted e-mailings and web-based surveys allow for broad consultation with potentially interested groups and individuals at a modest cost. Measures of this kind might be implemented using the technical support available to the Uniform Law Conference (much as was done in connection with the consultation undertaken by the Working Group on Reform of the Law of Secured Transactions in 2002-03). Secondary consultations could be undertaken by the project leader and members of the working group through more extensive conversations with identified individuals, largely conducted electronically and by telephone. It may be noted that the interface between provincial law and the settlements and preferences provisions of the federal ***Bankruptcy and Insolvency Act*** demands that the consultation process include the appropriate federal government officials.

The assistance of Conference members in identifying potential working group members and key participants in the consultation process would be appreciated.

Budgetary Notes

The primary costs associated with completion of this project are (i) the salary to be paid to a student research assistant, (ii) the expenses of the working group and (iii) the expenses associated with the consultation process. As to each of these, I would make the following observations:

i. The employment of one student for a period of two to four months should suffice.

ii. Meetings of the working group could be conducted primarily if not exclusively by way of telephone conference call, thereby eliminating the travel expenses associated with in-person meetings. By way of comparison with the work of the Civil Enforcement of Judgments Working Group and the Working Group on Reform of the Law of Secured Transactions, the subject of this study is of more limited scope and the extent of the meeting time required is, in my view, commensurately considerably less.

iii. Consultations could take place largely if not entirely through electronic communication and telephone.

Since my work as project leader would fall within my academic research agenda, I would not expect it to be remunerated.