UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION: COMMERCIAL LAW STRATEGY

REFORM OF FRAUDULENT CONVEYANCES AND FRAUDULENT PREFERENCES LAW (Transactions at Undervalue and Preferential Transfers)

PART 1: TRANSACTIONS AT UNDERVALUE & FRAUDULENT TRANSACTIONS

FINAL REPORT OF THE WORKING GROUP

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August 2010

FRAUDULENT CONVEYANCES AND FRAUDULENT PREFERENCES LAW

INTRODUCTION

[1] In 2004 the Conference received a feasibility study addressing the need for reform of the two related branches of provincial and territorial law generally referred to as fraudulent conveyances and fraudulent preferences.[1] The study prompted a literature review and in 2006 the Conference initiated a reform project, which was undertaken on the basis of a funding commitment advanced by the Law Reform Commission of Saskatchewan. The goal of the project is the production of a uniform Act suitable for adoption across the country, recognizing that adjustments may be required in Quebec to achieve an appropriate interface with other elements of the province's distinctive legal system. The project was divided into two parts, Part 1 addressing fraudulent conveyances and Part 2 addressing fraudulent preferences. An extensive study paper was written on each part as a foundation for the development of recommendations for reform[2] following which a working group was struck to produce a report on Part 1. The working group examined and discussed each of the issues identified in the study paper at length, drawing on an evolving series of supplementary discussion papers. This report constitutes the final report of the working group on Part 1 of the project. Although the report was written by the Chair it represents the collective opinion of the working group.[3]

[2] The report, with a revised introduction, will be published in the summer or fall of 2010 in the *Banking and Finance Law Review*[4] as part of a special symposium sponsored by the Insolvency Institute of Canada. Responses submitted to the working group Chair by readers will be reported to the Conference in a separate submission.

[3] The recommendations advanced in this report are not intended to be cast in final statutory language. However the need for precision in some instances requires that they be framed in terms that approximate those that might be adopted in the uniform Act and the words used are carefully chosen. The recommendations therefore constitute a combination of general policy statements and tentative statutory provisions. Each recommendation is accompanied by a relatively brief commentary advancing the rationale for the recommendation and explaining its intended operation. The recommendations are differentiated from the explanatory comment by bolded font.

[4] The working group has had the benefit of input from a Quebec representative, Professor Élise Charpentier, who also provided the background paper on Quebec law submitted to the Conference in 2009. While much of what we recommend is suitable for adoption in Quebec we recognize that some elements of the statute we propose may not

be required or appropriate. In particular our recommendations relating to remedies may not be pertinent in Quebec, where the current remedial regime is regarded as satisfactory.

WORKING GROUP

[5] The working group was chaired by Professor Tamara M. Buckwold of the University of Alberta. Thomas G. Anderson**,** Q.C. of Vancouver and Professor Anthony Duggan of the University of Toronto were active participants from the inception of the working group and Mr. Anderson produced admirable minutes of the proceedings of every meeting. Other members of the group have participated at varying stages as they were able to do so. All have made invaluable contributions. They include: Professor Élise Charpentier, Faculté de droit, Université de Montréal; Sarah J. Dafoe, Alberta Justice; Tim Rattenbury, Office of the Attorney General of New Brunswick and Robert A. Klotz of Toronto. The group also had the benefit of input from Uniform Law Conference delegates. Considerable efforts were made to recruit a federal government representative as a working group member. However requests for participation extended to Industry Canada and the Office of the Superintendent of Bankruptcy Canada respectively were declined.

[6] The working group met periodically by conference call from the fall of 2008 to late spring of 2009 and again from the fall of 2009 to early spring of 2010. A progress report recording the work completed in the first period was submitted to the Conference at its 2009 annual meeting. This final report includes most of the content of the progress report as well as the further recommendations reached during the second period. Some of the content of the progress report was revised or reorganized in the work on the final report.

RECOMMENDATIONS

[7] The recommendations in this report fall under the following general headings, divided in most cases into a series of subtopics:

A. Title of Act
B. Transactions at Undervalue and Fraudulent Transactions: Underlying Policies of Reformed Law
C. General Policies in the Design of a New Statute
D. Grounds for a Remedy: Definition of the Causes of Action

A. Title of Act

[8] The recommendations advanced in Parts 1 and 2 of this project will be integrated in a single uniform Act that would replace existing fraudulent preferences and conveyances statutes. The Act will empower the court to review a transaction and grant relief under a cluster of related but distinct causes of action, only some of which require proof of intention to prejudice creditors We recommend that the title of the Act reflect its operation. This title is used hereafter in the commentary accompanying our recommendations.

The Act should be called the Reviewable Transactions Act.

[9] The Reviewable Transactions Act will consist of two parts with some overlapping provisions. The part addressed in this report will provide a remedy where a debtor enters into a transaction that has the effect of depleting the amount of property available to satisfy creditors' claims or a transaction that is intentionally designed to remove property from the reach of creditors. The provisions of this part must be differentiated from those addressed to transactions constituting preferential payments to creditors.

The terms "Transactions at Undervalue and Fraudulent Transactions" and "Preferential Transfers" should be used respectively to designate the corresponding provisions of the Act.

B. Transactions at Undervalue and Fraudulent Transactions: Underlying Policies of Reformed Law

[10] Under Canadian law creditors who are not paid what they are owed, whether as a result of intentional default or inability to pay on the part of their debtors, are entitled to recover by having their debtors' property seized and liquidated under legal process. If the debt is secured by an interest in property action may be taken directly against the collateral, often without resort to the judicial system. Where debt is unsecured, the

processes available to reach the debtor's property are either bankruptcy proceedings under the federal Bankruptcy and Insolvency Act[10] (BIA) or the procurement and enforcement of a judgment under provincial or territorial law. The law of what is traditionally called fraudulent conveyances is designed to allow unsecured creditors to recover property that would have been available to satisfy their claims by these means had it not been transferred away by the debtor. Legislation governing transactions of this kind therefore exists in the form of both provincial statutes and provisions of the federal BIA.[11] Provincial legislation is supplemented in some jurisdictions by the Statute of Elizabeth of 1571 (alternatively called the Fraudulent Conveyances Act), where it remains in effect as received law.

[11] Careful consideration was given to the desirability of harmonizing provincial and federal law in this area. However the group concluded that the BIA provisions are unsatisfactory in several respects and should not be adopted as a model for reformed provincial and territorial law. Nevertheless, consistency with the BIA, including the recently proclaimed transfer at undervalue provisions, was a factor in the recommendations reached. It is our hope that new provincial legislation will influence further developments at the federal level.

[12] Fraudulent conveyances law has historically been based primarily on the complementary policies of deterring conduct intentionally designed to deprive creditors of their rights of recovery and redressing creditors' loss when conduct of that kind occurs. Overtly, the policy of deterrence is addressed primarily to debtors, in that avoidance of a transaction is based on the debtor's intention to defeat, hinder or delay creditors. So focused, the deterrence rationale entails the view that debtors will not enter into a transaction with the objective of defeating creditors if they know that the transaction may be set aside, their plans thwarted and the recipient of the property forced to disgorge the benefit conferred. In its original formulation as embodied by the Statute of Elizabeth a further and likely more powerful deterrent was provided by way of potential imprisonment and the imposition of a fine. Although the Statute remains in effect in some jurisdictions these dimensions of its operation have fallen into disuse.

[13] While the policy of deterrence is most obviously aimed at debtors current law also evidences a policy of deterring those who may deal with debtors from entering into transactions that will adversely affect creditors' rights. This policy is located both in the defences offered in provincial fraudulent conveyances legislation and in the case law interpreting that legislation and the Statute of Elizabeth. As a general rule, a transaction

may be set aside as against a transferee who knows of the debtor's improper intentions but not as against one who does not, and who has given more than nominal value for the property received. Since it is the transferee who stands to lose if a transaction is set aside this approach implicitly recognizes the need to facilitate meaningful risk assessment by those dealing with a debtor. A person who accepts the benefit of an ill-intentioned transaction without knowledge of the debtor's objective may not appreciate the risk of entering into the transaction on the terms proposed and therefore deserves an appropriate degree of protection. One who chooses to transact knowing the debtor's actual or evident intention accepts the risk of loss inherent in so doing.

[14] In spite of the explicit focus on debtor intention, current law as interpreted and implemented by the courts significantly emphasizes the policy of redress of loss suffered by creditors. If the debtor is insolvent at the time of or becomes insolvent as a result of a property transfer he or she is presumed to have intended to defeat creditors. The rationale for this presumption is that since an insolvent debtor by definition is unable to satisfy creditors an intentional disposition of property has the inevitable consequence of defeating or obstructing their rights. Where the presumption is applied a remedy is in effect offered on the basis of actual loss to creditors without regard to the debtor's subjective state of mind. However whether the presumption is absolute or rebuttable is subject to debate. If the debtor is solvent a plaintiff creditor must affirmatively prove the debtor's intention to defeat creditors.

[15] The difficulties inherent in the need to prove intention undermine the policy of redressing actual loss, since a transfer that defeats creditors' rights is immune from challenge if malicious intention cannot be established. Paradoxically, the overt policy of debtor deterrence is also undermined by the intention requirement. It is very difficult to successfully challenge a transaction that impedes creditors' rights because the debtor's intention is rarely explicit and the available evidence is often inconclusive. There is therefore little to deter either a calculating debtor or a sophisticated transferee from entering into such a transaction.

[16] The fundamental question that is obscured by current legislation and its judicial interpretation is the wrong at which the law is or should be directed. Is the wrong the *actual* interference with creditors' rights, however laudable the debtor's motives, or only the *intentional* interference with creditors' rights? The difficulty in distilling the answer to this question from the current body of statutory and case law in large part accounts for the uncertainty and inefficiency endemic to its operation.

[17] In our view the law should be based on the premise that actual interference with creditors' rights of recovery is wrong, except to the extent that countervailing considerations mandate the protection of other legitimate interests. This view does not deny but rather subsumes the proposition that intentional interference with creditors' rights is wrong. Therefore the related policies advanced by our recommendations are the redress of loss occasioned by transactions interfering with creditors' rights of recovery and the deterrence of such transactions so as to forestall the need for redress. This approach is consistent with that adopted in other countries and in particular would align Canadian law more closely with that of the United States.

[18] The policy of deterrence may be approached in two ways. One view is that the law should be designed to deter debtors from engaging in transactions that have the effect of impeding their creditors' rights of recovery. The other is that it should be designed to deter those who deal with debtors from participating in such transactions. Some members of the working group subscribe to the first view, others to the second. However, we are in agreement as to the way in which deterrence of transactions that improperly interfere with creditors' rights is best achieved.

[19] No single cause of action can properly address the range of circumstances in which a remedy is justified. We therefore propose three related but distinct causes of action designed both to redress loss to creditors and to deter debtors and those who deal with them from entering into transactions that defeat or obstruct creditors' rights of recovery. While protection of creditors is a primary focus the rules we advance are designed to appropriately shelter those who deal with debtors by ensuring that they are able to assess and respond to the risk of transacting on the terms proposed or at all.

[20] Any law that subjects a transaction to *ex post facto* challenge necessarily interferes with the finality of transactions to some degree but the potential disruption of settled transactions should be subject to sensible limits. The need to accommodate reasonable reliance on the finality of transactions is recognized as a countervailing policy through various features of the legislation we propose operating in combination; in particular, in the design of the causes of action, the recognition of qualifying factors in the remedial regime, the protection of secondary transferees who have not dealt directly with the debtor and the imposition of a short limitation period.

[21] Our recommendations do not represent a complete departure from the policies that underlie existing law. Rather, we seek to define and implement those policies more

clearly through a set of rules that will guide commercial and individual behaviour and the judicial decisions through which that behavior is assessed. Fair treatment is best achieved by the adoption of unambiguous rules that, to the extent possible, produce predictable results.

C. General Policies in the Design of a New Statute

[22] Our recommendations for a new statute are guided by two general structural policies. The general policy of conforming with federal legislation where possible and appropriate was mentioned above. We also sought to avoid creating an unduly complex or prolix statute. We have therefore avoided definitional or explanatory provisions where the meaning of the language used is well established, the application of the provision in question requires the court to weigh evidentiary factors that need not be articulated or the scope of a provision is not amenable to precise definition and inherently requires contextual judicial interpretation.

D. Grounds for a Remedy: Definition of the Causes of Action

[23] Creditors will be entitled to a remedy where a transaction falls within the terms of the recommendation that follows subject to the limitations imposed in relation to particular types of transaction by recommendations advanced later in our report. This dimension of the legislation was subjected to extensive discussion and refinement by the working group, since it effectuates the core policy and structure of the reformed system of law.

(1) An order for relief will be available where:

(a) A debtor enters into a transaction for no consideration or for consideration worth conspicuously less than the value transferred or conferred by the debtor under the transaction and

(b) the debtor

(i) is insolvent at the time of the transaction,
(ii) becomes insolvent as a result of the transaction or

(iii) enters into the transaction in circumstances in which the debtor is demonstrably at risk of insolvency and the debtor does become insolvent within 6 months of the date of the transaction.

(2) An order for relief will be available where:

(a) A debtor enters into a transaction with the primary objective of hindering or defeating the enforcement of the rights of a creditor or creditors,

(b) the ability of a creditor or creditors of the debtor to recover satisfaction of their claim or claims was materially hindered as a result of the transaction, and

(c) the transferee

(i) gave no consideration or gave consideration worth conspicuously less than the value received from the debtor, or

(ii) knew of the debtor's intention and intended to assist the debtor by entering into the transaction.

[24] The recommendation incorporates three distinct causes of action. The first is defined by paragraph (1), the second by paragraphs (2)(a),(b) and (c)(i) and the third by 2(a),(b) and (c)(ii). The elements of each cause of action are explained below. To avoid confusion we refer to these in the remainder of our report as causes of action #1, #2 and #3 respectively.

[25] The first and second causes of action do not require proof that the person who dealt with the debtor (the "transferee") deliberately participated in a scheme to defeat creditors. However they are designed to ensure that a creditor may only obtain a remedy where the circumstances are such that the transferee is in a position to recognize that the transaction may undercut creditors' rights and therefore be subject to challenge. The approach represented by this recommendation is closely aligned though not identical with

that of the state and bankruptcy law of the United States, as well as with the law of other common law jurisdictions.

Cause of action #1 *(insolvency + conspicuously inadequate consideration/asset depletion)*

[26] Cause of action #1 is defined by paragraphs 1(a) and (b) above:

> **1(a):** Debtor receives no consideration for value given or receives consideration that is worth **conspicuously** less than the value given by Debtor.
>
> **1(b):** Debtor is insolvent at the time of the transaction, becomes insolvent as result of the transaction or enters into the transaction when insolvency is a foreseeable risk, if insolvency in fact ensues within 6 months of the transaction.

[27] An insolvent person by definition is unable to satisfy the claims of all creditors. Therefore any transfer that has the effect of diminishing the extent or value of his or her exigible estate further reduces creditors' ability to recover their claims. The debtor has knowingly entered into a transaction that will impede the satisfaction of creditors claims, whether or not with malicious intention. The effect of this cause of action is to deprive a transferee of gratuitously received value in favour of the transferor's creditors without regard to the debtor's subjective ethical culpability or the transferee's knowledge or state of mind. The remedy awarded need not entail setting aside the transaction in its entirety but may be designed to restore to creditors the value transferred away or conferred by the debtor to the extent that it exceeds the consideration given in exchange, while protecting the transferee's investment. This cause of action implements the primary policy of redressing loss suffered by creditors through the alienation of assets or value that would otherwise be available to satisfy their claims. It also gives effect to the policy that transferees should be protected if they are not in a position to recognize the risk of dealing with the debtor on the terms in question. A person who is offered property or another benefit for *conspicuously* less than the consideration paid should be alerted by that fact alone to the likelihood that the debtor is willing to deal on these terms in order to alleviate a pressing need for funds due to his or her financially impaired circumstances. He or she may be deterred from doing so by the provision of a clear rule precluding the retention of a gratuitous gain at the expense of others. If not, he or she is properly subject to the risk of losing it.

Cause of action #2 *(debtor intention to hinder + conspicuously inadequate consideration/asset depletion)*

[28] Cause of action #2 is defined by paragraphs 2(a), (b) and (c)(i) above:

> **2(a):** Debtor enters into transaction with the **primary** intention of hindering or defeating a creditor or creditors.
>
> **2(b):** The transaction in fact materially hinders creditors' ability to recover.
>
> **2(c)(i):** The transferee gave no consideration for value received or gave consideration worth **conspicuously** less than the value received from Debtor.

[29] This cause of action offers a remedy where the debtor is not insolvent but has entered into a transaction with the objective of denying or significantly impeding creditors' right to payment. In theory a solvent debtor has assets available to satisfy creditors' claims, so no remedy is required to protect them. However as a practical matter a debtor's assets may be difficult or impossible to reach through judgment enforcement measures due to their nature or location. A remedy is therefore available if the transaction materially hinders recovery, notwithstanding that recovery over time may not be absolutely precluded. As in cause of action #1, a person who accepts a gift or an extraordinarily "good deal" from the debtor should recognize the potential risk involved in so doing. This cause of action is also justified by the view that, as against creditors who have by definition given full value for the obligation incurred by the debtor, a gratuitous transferee has a less compelling claim.

Cause of action #3 (shared intention or "conspiracy" to hinder creditors)

[30] Cause of action #3 is defined by paragraphs 2(a), (b) and (c)(ii) above:

> **2(a):** Debtor enters into transaction with the **primary** intention of hindering or defeating a creditor or creditors.
>
> **2(b):** The transaction in fact materially hinders creditors' ability to recover (whether or not any or adequate consideration is received by Debtor).

2(c)(ii): The transferee knew of Debtor's intention and intended to assist in its achievement.

[31] This cause of action offers a remedy in the rare cases in which it can be established that the debtor and the person dealing with him or her in effect conspired to defeat or materially obstruct creditors, whether or not the debtor is insolvent and regardless of whether the consideration given by the transferee is commensurate with the value conferred by the debtor. As noted above, the transaction may have the effect of leaving the debtor with assets of little or no realizable value to creditors, or the consideration received may have been dissipated. Although a conspiracy to defeat creditors clearly justifies redress the fact that a transferee who has given full value may be subjected to a remedial order requires that a challenging creditor meet a relatively steep onus of proof before relief is granted.

Definition of insolvency

[32] A definition of insolvency is required for purposes of cause of action #1. The recommended definition largely tracks the BIA definition of insolvency, adding the clarification that only exigible property is to be taken into account in determining a debtor's solvency. The meaning of the term "exigible" requires no definition. The proposed definition of "insolvency" is:

A person is insolvent if;

(a) the person is for any reason unable to meet obligations as they generally become due,

(b) the person has ceased paying current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of the person's exigible property is not, at a fair valuation, sufficient to enable payment of all obligations, due and accruing due.

Intention to obstruct existing and anticipated creditors

[33] One of the troublesome issues associated with application of the intention test embodied in current law is the question of whether a transaction may be set aside if the debtor did not have creditors at the date of the transaction but was in circumstances such that it was reasonably foreseeable that he or she would have creditors in the future. The new statute should overcome the uncertainty on this point by providing explicitly that;

> **For purposes of determining whether the debtor intended to hinder or defeat a creditor or creditors, a creditor is a person who holds a claim that existed or was reasonably foreseeable at the date of the transaction.**

The result is that a remedy is available if the debtor intentionally diminishes the asset base available to anticipated creditors by making a gratuitous or largely gratuitous transfer or by conspiring with the transferee to defeat their potential claims.

Proof of intention

[34] An order for relief under causes of action #2 and #3 depends upon proof that the debtor entered into the transaction with the primary objective of hindering or defeating the enforcement of creditors' rights. Relief under cause of action #3 requires, in addition, proof that the transferee intended to assist the debtor in achieving that objective by entering into the transaction. Failure to explicitly address the basis upon which a finding of intention may be made leaves open the possibility that the confounding body of judicial authority addressing proof of intention to delay, hinder, defraud, defeat or prejudice creditors under current law will be applied under the new statute. In order to forestall that approach we recommend a non-exclusive list of factors that may be considered by the court. The factors identified are to be regarded only as indications of intention to which the court may attach such weight as may be appropriate in the circumstances. We recognize that the evidentiary issues associated with onus of proof are complex and not amenable to resolution by statutory prescription. However the language suggested is designed to signal that no presumption of intention, whether conclusive or rebuttable, should be regarded as arising from proof of one or more of the facts listed. The court is asked to make a finding based on consideration of the totality of the evidence presented, having regard to facts that are commonly accepted as relevant to an inference regarding the intention of parties to a transaction.

Where grounds for relief require proof that

(a) the debtor entered into a transaction with the primary objective of hindering or defeating the enforcement of creditors' rights, or

(b) the transferee knew that the debtor entered into a transaction with the primary objective of hindering or defeating the enforcement of creditors' rights and intended to assist the debtor by entering into the transaction

the court may treat the following factors, among others, as indications of the intention of the debtor, the transferee or both, assigning such weight to any factor or factors as may be appropriate in the circumstances:

(i) in the case of the debtor, the debtor was insolvent at the date of the transaction or became insolvent as a result of the transaction and, in the case of the transferee, the transferee knew that the debtor was insolvent at the date of the transaction or would become insolvent as a result of the transaction,

(ii) the transaction occurred at a time when the debtor or the transferee, as the case may be, knew of the existence of a claim against the debtor or had reasonable grounds to anticipate that a claim would arise in the foreseeable future,

(iii) where the transaction was effected by a court order, failure by the debtor to disclose the existence and extent of a claim or claims that may be prejudiced by the order or, in the case of the transferee, failure to disclose the existence and extent of such claim or claims known to the transferee,

(iv) the value of consideration received by the debtor was substantially inadequate in relation to the benefit conferred,

(v) the parties to the transaction were related or closely affiliated,

(vi) the debtor retained the possession, use or benefit of property or value transferred under the transaction,

(vii) the transaction was entered into in haste,

(viii) one or both of the parties attempted to keep the transaction or circumstances material to the availability of relief under this Act hidden from creditors or others,

(ix) the transaction was not documented in the manner that would ordinarily be expected in relation to a transaction of that kind.

[35] The role of insolvency and substantial inadequacy of consideration as potential evidence of intention to hinder creditors for purposes of causes of action #2 and #3 must not be confused with their role as the substantive basis for relief under cause of action #1. Under cause of action #1, proof that the debtor was insolvent at the time of the transaction or shortly thereafter and that the transferee gave conspicuously inadequate consideration in exchange for the value received creates a right to relief. Intention is not a factor and there is no question of assessing the relevance or weight to be attached to the fact of insolvency or the insufficiency of the consideration given. However if the transaction is not one falling within the scope of cause of action #1, for example, because full consideration was given by the transferee, the fact that the debtor was insolvent at the time of the transaction may be a material indicator of intention for purposes of establishing a claim to relief under cause of action #3.

[36] The recommendations deliberately omit provisions that would establish the basis for finding the intention of a corporation or other artificial legal person. The courts have had little difficulty determining the intention of a corporation using existing common law principles under which the intention of an authorized individual who participates in the acts constituting a transaction is ascribed to the corporation if the person is the "directing mind" of the corporation in that context. An attempt to provide a statutory formulation is therefore unwarranted, given that such a formulation would itself raise issues of interpretation and application.

Meaning of consideration

[37] Consideration is a well-understood concept and need not be defined in generic terms. The existence and valuation of consideration for purposes of causes of action #1 (insolvency + conspicuously inadequate consideration) and #2 (debtor intention to hinder + conspicuously inadequate consideration) will fall to be determined by the courts. However in order to ensure that a remedy is available in relation to certain types of transaction it will be necessary to explicitly state that what might be regarded as a contribution made by a person receiving value from a debtor-transferor is *not* consideration. Among the categories of such transaction are a corporation's repurchase or redemption of its own shares. A share redemption or repurchase adds nothing to the capital of the corporation and does not constitute the release of a debt owed by the corporation. Since payments of this kind inherently diminish the asset base of the corporation they should fall within the scope of the statute. In order to avoid any uncertainty in this context the statue should state that:

> **Where a debtor corporation repurchases or redeems shares issued by the corporation, a transfer of the redeemed or repurchased shares to the corporation or the relinquishment of shares by their holder does not constitute consideration received by the corporation.**

E. Scope of the Statute: Transactions Falling Subject to the Proposed Act

General definition

[38] The definition of "transaction" will determine the circumstances that fall within the scope of the statute. That is, creditors will be entitled to a remedy by way of compensation for the obstruction or infringement of their rights where a "transaction" falls within the terms of one of the causes of action. Subject to the qualifications discussed below, the definition should include all types of transaction that have the direct or indirect effect of reducing the asset base against which creditors may seek to enforce their claims. Although the range of transactions subject to challenge would be increased under the proposed statute it is important to keep in mind that the remedial regime would offer a range of options short of avoiding or setting aside the transaction in its entirety.

> **"Transaction" means: the transfer, creation or conferral of a benefit and includes:**

(a) A transfer or disposition of an interest in existing property or property to be acquired in the future

(b) A payment of money

(c) The release of an interest or obligation

(d) The conferral or creation of a security interest, charge, lien or encumbrance

(e) A transfer, grant or conferral of a license, quota, right to use or right to payment

(f) The designation of a beneficiary

(g) The assumption of an obligation to do or to bring about any of the foregoing events in the future.

[39] Under current provincial and territorial law only a transfer of property gives rise to a remedy. However it is now recognized that many other types of transaction have the direct or indirect result of transferring to a third party value that would otherwise have been available to satisfy creditors' claims. The proposed definition ensures that a remedy is available if an insolvent debtor enters into such a transaction for no consideration or substantially no consideration or with the proven intention to defeat creditors' claims. Clause (g) recognizes that a remedy should also be available where a debtor assumes a present obligation to confer value in the future, keeping in mind that the remedial regime proposed will offer a range of options including the issuance of an injunction.

Share redemptions and the payment of dividends by a corporation

[40] As noted in relation to the causes of action, payments of this kind inherently diminish the asset base of a corporation to the extent of the payment. If the corporation is insolvent at the time of the payment (cause of action #1) or the payment is intended to defeat creditors (causes of action #2 and #3) a remedy should be available. We therefore recommend that:

"Transaction" includes a voluntary act by which a corporation purchases or redeems shares of the corporation or pays a dividend, other than a dividend in the form of shares.

[41] The remedies offered by the proposed Act, like those under current law, will operate to deprive the person who has dealt with a debtor of the benefit of the transaction. However we recommend that in relation to transactions of this kind an ancillary remedy

should be made available against directors of the corporation who authorized the offending payment unless they were not in a position to reasonably recognize that it would constitute a violation of the Act. This is discussed further under the remedies section of this report.

Exempt property

[42] The Reviewable Transactions Act will intersect with provincial exemptions law in two contexts. A debtor may transfer exempt property (i.e. property that is not exigible under judgment enforcement measures) to a transferee in circumstances that fall within the parameters of a cause of action; for example, the debtor is insolvent and receives no consideration (cause of action #1). Alternatively a debtor may transfer non-exempt property to a transferee in exchange for property that is exempt in the debtor's hands. Our recommendations address the manner in which these respective scenarios should be affected by the proposed Act as follows:

(1) "Transaction" does not include a transfer or disposition of property that is exempt before the transfer or disposition is made.

(2) The statute should not make special provision for transactions that have the effect of converting non-exempt into exempt property in the debtor's hands. However such a transaction may give rise to a remedy if it falls within one of the causes of action.

The competing considerations associated with exempt property present difficult policy choices. Consensus was reached on the recommendations advanced only after full and vigorous debate.

[43] The first recommendation is consistent with current law and is the less controversial of the two. It reflects the fact that there are few cases in which creditors are materially hindered by a transfer of exempt property since they will not have lost property that could have been reached to satisfy their claims if the transfer had not occurred.[12]

[44] The second recommendation reflects the need to respect the policies embodied in exemptions legislation. Property declared by statute to be exempt in the hands of a debtor is protected on the grounds of the function that property is perceived to have in

relation to the ability of the debtor to maintain him or herself and his or her family. There is little distinction between the conduct of a debtor who purchases such property using non-exempt assets in the knowledge that creditors will be denied their recovery and that of a debtor who holds exempt assets previously acquired in the knowledge that he or she could by relinquishing them satisfy creditors' claims. The shades of distinction that exist will often be too subtle to legitimately subject one circumstance to legal penalty while sheltering another.

[45] The result of making no special provision for the acquisition of exempt property is that in the majority of cases no remedy will be available where the transaction involves the exchange of reasonably commensurate consideration, since such a transaction will not invoke a remedy under cause of action #1 (insolvency + conspicuously inadequate consideration) or #2 (debtor intention to hinder + conspicuously inadequate consideration). However it is important to note that if the parties to a transaction by which a debtor acquires exempt property have conspired together to defeat creditors by means of the transaction a remedy will be available under cause of action #3, even if the transaction was one for full consideration. It is recommended that the remedial provisions explicitly authorize the court to declare property that is exempt in the hands of the debtor available to satisfy creditors' claims where the transaction does give rise to a remedy under the ordinary causes of action.

[46] The position of the working group is also justified by the fact that a remedy could only be made available in relation to a transaction under which a debtor has in effect converted non-exempt into exempt property by way of a transaction involving the exchange of full or reasonably commensurate consideration by creating a special cause of action that would be limited in application to such transactions. On the view that it is generally undesirable to complicate the statute by attempting to legislate for specific cases, such an approach would not be warranted unless a clear and compelling policy objective exists. The recommendation reflects the fact that the policy rationale justifying an approach that would undermine exemptions law is at least debatable.

[47] The extent to which this approach affects creditors will depend upon the generosity of provincial exemptions law. The working group was cognizant in particular of its implications in the case of a transfer of non-exempt funds into an RRSP that enjoys a full or very liberal exemption. If, for example, a Saskatchewan debtor invests a substantial amount of money in an RRSP in order to shelter assets from creditors the transaction will not give rise to a remedy under the proposed statute because the

transaction between the debtor and the financial institution issuing the investment is by definition for full consideration (neither cause of action #1 nor #2 applies), and the institution will not have knowingly participated in a plan to defeat the investor's creditors (cause of action #3 is not available).

[48] The general policy in favour of sheltering RRSPs from creditors is explicitly perpetuated in section 67(1)(b.3) of the BIA except with respect to contributions made during the 12 month period prior to bankruptcy, which may be recovered by the trustee. A roughly similar outcome could be achieved under provincial exemptions law by providing that a debtor may not claim an exemption with respect to funds invested in an RRSP if the debtor was insolvent at the time of the investment, was rendered insolvent by it, or became insolvent within a specified number of days or months after it was made, insolvency being determined on the basis of the value of the debtor's non-exempt assets. The same approach could be applied to any category of exempt property, or exempt property generally. However it was the view of the majority of the working group that any such provision should be considered as a question of exemptions law reform rather than as an aspect of the reform of the general law of fraudulent conveyances.[13]

[49] A final point should be made about the implications of recommendation 2 in relation to a transaction under which a debtor designates a qualifying beneficiary under a policy of insurance with the result that the policy becomes exempt under the provincial Insurance Acts.[14] The definition of transaction gives effect to current case law under which the designation is recognized as the transfer of a property interest to the beneficiary, with the result that such a designation may give rise to a remedy if it falls within any of the causes of action. Most significantly, this means that if the beneficiary has not given consideration, as is usually the case, a remedy will be available if the debtor was insolvent at the time of the designation or made it with the intention of defeating creditors. The remedy granted would in most cases be to set aside the designation, which would avoid the exemption created by the designation and render the policy available to creditors. If this is thought to be objectionable under the exemptions policy effectuated by the Insurance Act legislators may wish to amend those statutes to preclude this result. The working group felt it to be beyond the scope of our mandate to determine exemptions policy by attempting to define a special exception for this unique type of transaction.

Guarantees and other contingent obligations

[50] A cause of action that requires as one of its elements the valuation of consideration received gives rise to intractable problems in relation to transactions involving a guarantee or similar promise of indemnification contingent on the non-performance of a third party. Consider, for example, the common case of an inter-corporate guarantee given to procure financing designed to benefit a company related to the guarantor corporation. It is difficult if not impossible to determine whether the value received by the guarantor is conspicuously less than that conferred on the lender or creditor taking the guarantee, since it cannot be equated with the amount of the loan or credit extended to the third party for whose benefit the guarantee was given. Given that a valuation of consideration is required under both causes of action #1 and #2, we accordingly recommend that a remedy be available in relation to transactions of this kind only under cause of action #3. The same approach is applied to all forms of transaction involving the assumption of a contingent obligation, as follows:

> **An order for relief will be available in relation to a transaction under which a debtor assumes a contingent obligation to transfer property, pay money or satisfy an obligation, including under a guarantee or an agreement to indemnify against loss occasioned by the default or non-performance of a third party, only where the conditions of liability comprising cause of action #3 are satisfied; namely,**
>
> **(a) the debtor entered into the transaction with the primary objective of hindering or defeating the enforcement of the rights of a creditor or creditors,**
>
> **(b) the ability of a creditor or creditors of the debtor to recover satisfaction of their claim or claims was materially hindered as a result of the transaction, and**
>
> **(c) the transferee knew of the debtor's intention and intended to assist the debtor by entering into the transaction.**

Disclaimer of interest and refusal of power of appointment

[51] After full consideration of competing views on the treatment of disclaimers of interest and the refusal of a power of appointment, we recommend that;

> **The statute should not explicitly address the disclaimer of an interest or the refusal to exercise a power of appointment.**

The implicit result of this recommendation is that such circumstances will generally not qualify as a "transaction" and will not fall within the scope of the statute.[15]

[52] If the debtor's interest has vested the disclaimer would constitute a transfer of property falling within the general definition of "transaction" and would be subject to challenge on that basis. However where the interest is purely prospective the debtor's refusal to accept it may constitute a failure to advance creditors' rights but not interference in the usual sense. Additional problems of policy and statutory structure would be raised by inclusion of such circumstances within the scope of the statute, particularly in relation to the remedial consequences that would flow from a successful challenge. We are not aware of any statutory scheme that explicitly offers a remedy in circumstances of this kind.

Transactions effected by court order or operation of law

[53] It is generally inappropriate to subject transfers and payments made by order of the court to collateral challenge under a separate body of law. In many cases the transferring or paying debtor will not have received value, or value that can be readily quantified, in exchange for the property or benefit transferred under a court order. If such transfers fall within the general scope of the Act an order could potentially be set aside simply because the debtor was insolvent at the time the order was made, thereby undermining the substantive basis of the order (i.e., under cause of action #1). However in some instances a court order may be sought in order to avoid creditors rather than for legitimate legal reasons. A debtor should not be permitted to subvert reviewable transactions law by the device of substituting a transfer by court order for a voluntary transfer. This is particularly likely to be accomplished by way of a consent order, though it might also occur when the material facts are not disclosed in the hearing of a case.

[54] Fraud on the court constitutes grounds for overturning a judgment under a recognized exception to the doctrines of *res judicata*. However these principles are apparently available only to parties to the proceeding and do not respond to the transactional effect of the judgment on third parties. The grounds for relief where a reviewable transaction is effected by court order must therefore be explicitly addressed by the Act.

[55] While a transaction effected by court order should not be completely immune from challenge the Act must respect the importance of finality of decisions. We therefore recommend that such a transaction may be challenged only where it can be proven that the order or judgment was procured for the primary purpose of hindering or defeating creditors. In conjunction with other features of the Act designed to protect reasonable reliance on the finality of a transaction, this approach strikes a balance between protecting the beneficiaries of a court order and preventing use of the court as a vehicle to defeat creditors.

[56] Transfers by operation of law should also be subject to the rules that apply to transfers effected by court order. In such a case the debtor's intention to defeat creditors and, in relation to cause of action #3, the transferee's intention to assist in that result would not be directly relevant to the transfer but rather to creation of the circumstances that produce the legal result in question.

[57] We recommend that transactions effected by order of the court or by operation of law fall within the scope of the Act on the following basis:

> **Where the events constituting a transaction are effected by court order or by operation of law, an order for relief will be available only when the conditions of liability comprising cause of action #2 or #3 are satisfied; namely,**
>
> **(a) the debtor entered into the transaction with the primary objective of hindering or defeating the enforcement of the rights of a creditor or creditors,**
>
> **(b) the ability of a creditor or creditors of the debtor to recover satisfaction of their claim or claims was materially hindered as a result of the transaction, and**

(c) the transferee

(i) gave no consideration or gave consideration worth conspicuously less than the value received from the debtor, or

(ii) knew of the debtor's intention and intended to assist the debtor by entering into the transaction.

Transactions associated with the breakdown of a spousal relationship

[58] Generally speaking, inter-spousal transactions are properly subject to challenge under all of the causes of action established by the Act. Transfers of property to a spouse or other family member and other forms of transaction involving related persons are common devices for sheltering an individual's assets from the existing or anticipated claims of creditors. However transfers resulting from a genuine separation agreement or a court order for support or division of family property give rise to special considerations. The recommendations adopted in relation to such transactions were arrived at only after exhaustive discussion and debate by the working group and with the assistance of input from Uniform Law Conference delegates.

[59] The proposed provisions would make inter-spousal transactions effected by separation agreement or court order subject to challenge only under the conditions constituting cause of action #3; that is, where the debtor entered into the agreement or procured the order for the primary purpose of hindering or defeating creditors and the debtor's spouse knowingly facilitated that objective. This means that honest efforts to divide family property and provide for support will not be subject to challenge by creditors. Although credible arguments may be advanced for subjecting separation agreements and court orders to the ordinary rules, the application of causes of action #1 (insolvency + conspicuously inadequate consideration) and #2 (debtor intention to hinder + conspicuously inadequate consideration) to separation agreements and cause of action #2 to court orders was rejected for two primary reasons.

[60] First, the award of relief under causes of action #1 and #2 requires an assessment of the value of consideration provided by the transferee in exchange for the benefit received from the debtor. This would entail valuation of the compromise of present and future claims to property and support; an almost impossible exercise both due to the difficulty of monetizing the financial claims released and due to the presence of non-

financial but legitimate and critically important personal factors that often influence the terms of an agreement or order.

[61] Secondly, the need for finality is particularly acute in transactions that relate to dissolution of the powerful personal bonds associated with a spousal relationship. The settlement of affairs between intimate parties involves psychological and emotional as well as financial closure. The disruption of that closure may have profound repercussions for the parties involved and their families that extend far beyond financial security. A spouse who receives property or support from a debtor spouse under an agreement or order should not be subjected to disruption of that kind unless he or she knew that the agreement or order was designed primarily to defeat the creditors of the other spouse rather than as a legitimate settlement of the parties' financial affairs.

[62] The working group also rejected the alternative approach of devising a special cause of action or causes of action applicable exclusively to separation agreements and family orders. There is some evidence that current judicial practice is to give effect to agreements and the terms advanced for consent orders if they are regarded as a good faith or *bona fide* settlement of the parties' affairs, notwithstanding that the outcome may have an adverse effect on one party's creditors. Although a cause of action using the language of good faith or *bona fides* was considered the consensus ultimately reached by the working group, with one dissenting member, was that the creation of special causes of action for special types of transaction is generally undesirable in principle and that the terms of cause of action #3 in effect constitute a good faith test.

[63] The Reviewable Transactions Act would explicitly permit the Court to determine the intention of parties to a transaction on the basis of circumstantial evidence and offers a non-exhaustive list of circumstances that may be taken into account. Given that parties to a court-ordered settlement are invariably expected to disclose their respective debts the failure to do so may be regarded as strong evidence that the order sought is designed to avoid the undisclosed liability. Therefore non-disclosure of debts that may be prejudiced by a court order is included among the factors listed as supporting an inference that the order was so intended.

[64] The recommendations relating to family transactions do not address payments to a family member to provide for ordinary family expenses, the provision of non-commercial services to a family member or modest gifts between family members. Transfers of that kind will be sheltered by provisions of the Act that authorize the Court to refuse or

modify the terms of an order in recognition of actions taken by the recipient in reasonable reliance on the finality of the transaction. These provisions are discussed in the recommendations relating to remedies in part G below under the subheading *Factors to be considered in the granting of an order (the "qualifying factors").*

(1) Where the parties to a transaction are or were in a spousal relationship and the transaction is effected by

(a) a separation agreement or

(b) a court order for the division of property and financial resources or for support arising from the breakdown of the spousal relationship,

an order for relief may be granted only where the conditions of liability comprising cause of action #3 are satisfied; namely,

(i) The debtor entered into the a transaction with the primary objective of hindering or defeating the enforcement of the rights of a creditor or creditors,

(ii) the ability of a creditor or creditors of the debtor to recover satisfaction of their claim or claims was materially hindered as a result of the transaction, and

(iii) the transferee knew of the debtor's intention and intended to assist the debtor by entering into the transaction.

(2) An order for relief may be granted in relation to a transaction referred to in clause (1)(b) by any court having jurisdiction to grant relief under this Act, whether or not that court is the court that made the order effecting the transaction.

For purposes of the foregoing:

"spousal relationship" means a marriage, civil partnership, civil union or a common law or de facto relationship recognized by law as giving rise to rights and obligations.

"spouse" means a person who is party to a spousal relationship with the debtor.

"separation agreement" means an agreement providing for the division of property and financial resources or support for a spouse or a member of the debtor's family resulting from or relating to the breakdown of a spousal relationship.

Preferential payments to creditors

[65] The payment of a debt does not diminish the net value of the debtor's estate as long as what is paid is equivalent to the value of the property or benefit received by the debtor from the creditor to whom the payment is made. Therefore payments to creditors do not fall within the harm that the legislation proposed in this report is designed to remedy. Although such payments may be subject to challenge if they offer a preferential advantage to the recipient relative to other creditors the policies underlying a system of law addressed to preferential payments differ from those that support relief under these recommendations. Preferential payments will be addressed in Part 2 of this project and dealt with in the Reviewable Transactions Act under a separate set of provisions. The Act should explicitly differentiate preferential transactions from transactions at undervalue and fraudulent transactions. The specific terms by which that distinction is implemented will depend upon the way in which the Act is structured but the following provisional recommendation is advanced in that regard.

A payment of money or the transfer of property to a creditor in full or partial satisfaction of a debt is not a transaction for purposes of the causes of action recommended in this report except to the extent that the money paid or the value of the property transferred exceeds the amount of the debt satisfied.

F. Standing to Seek a Remedy under the Act

[66] The statute would grant relief to a person who falls within the definition of "creditor." The provisions recommended are designed to offer a remedy to a person holding a legal claim capable of maturing into a right to payment or to a transfer of property enforceable by legal means against the assets of a debtor. As indicated at the outset, those means are essentially the judgment enforcement measures offered by provincial or territorial law. The principles outlined below determine the class of persons who hold the status of "creditor."

Date claim arises

[67] The following recommendation establishes the class of persons who are entitled to a remedy under the Act;

> **A "creditor" is a person who holds a claim at the date of the transaction in relation to which a remedy is sought, and for purposes of causes of action #2 (debtor intention to hinder creditors + conspicuously inadequate consideration) and #3 (conspiracy by debtor and transferee to hinder creditors) only, a person who holds a claim that arose after the date of the transaction.**

[68] Current law is ambiguous as to the circumstances in which a person whose claim arises after the date of the transaction in question is entitled to a remedy. We recommend that only creditors who hold a claim at the date of a challenged transaction are entitled to a remedy where the action is based on cause of action #1; that is, that the debtor was insolvent at the date of the transaction or shortly thereafter and the transferee gave no consideration or conspicuously less than the benefit received. Creditors whose claims exist at that date are necessarily affected by the loss of asset value inherent in the transaction. Note that the definition of "claim", advanced below, is such that a person need not have a claim that has matured into a liquidated amount at the date of the transaction to qualify. What matters is the present existence of a legal right against the debtor. Although people who deal with the debtor after a transaction of this kind has occurred may not recover the full amount of their claims that result is a product of the debtor's financial circumstances at the time of the subsequent dealing and only indirectly if at all a product of the prior transaction. Subsequent creditors would therefore not be entitled to a remedy under this cause of action.

[69] However, a person who acquires a claim against a debtor after the debtor has entered into a transaction that diminishes the value of his or her asset base or seriously impedes the ability of creditors to recover would be entitled to a remedy if it can be proven that the debtor entered into the transaction with the intention of defeating or obstructing a creditor or creditors and the secondary elements of either cause of action #2 or #3 are established. This approach ensures that relief is available where a debtor enters into such a transaction in order to defeat anticipated future claims. Note that the intention-based causes of action are so designed that it is not necessary to prove that the debtor intended to defeat the specific creditor who seeks relief, since such a requirement would often raise insurmountable problems of proof. It is enough that the debtor intended to defeat any creditor, or creditors generally. This objective is effected in part by the recommendation described under the subheading *Intention to obstruct existing and anticipated creditors* in section D above. That recommendation makes it clear that the requisite intention is an intention to defeat existing creditors or future creditors whose claims are reasonably foreseeable at the date of the transaction.

[70] An approach that allows future creditors to claim a remedy raises the possibility that a transaction may be vulnerable to challenge by an indeterminate class of claimants. However this concern would be substantially alleviated by the imposition of a short limitation period, discussed later in this report.

Definition of "claim"

[71] The recommended definition of the "claim" that qualifies a creditor for relief is comparable to that used in existing and proposed fraudulent conveyances legislation and embodies a meaning that is substantively similar to that associated with the concept of "provable claim" under the Bankruptcy and Insolvency Act:

> **"claim" means the right to enforce an obligation, whether the obligation is**
>
> **(a) liquidated or unliquidated;**
> **(b) absolute or contingent;**
> **(c) certain or disputed; or**
> **(d) payable immediately or at a future time;**

The word "obligation" implicitly refers to an obligation enforceable by law through a judgment or order for the payment of money or the transfer of property.

"Claim" does not include a secured obligation

[72] Fraudulent conveyances law functions as an aid to judgment enforcement law and bankruptcy, both of which are vehicles for the recovery of unsecured debt. Secured creditors are able to follow their collateral into the hands of a transferee from the debtor. Accordingly, they do not have to rely on fraudulent conveyances law to protect their ability to recover the secured obligation through resort to their security. However a secured debt may become effectively unsecured if the transaction involves a transfer of property that precipitates the operation of a statutory priority rule under which the transferee takes free of or has priority over the security interest. To the extent that a rule has that effect a secured creditor should be treated as unsecured for purposes of the right to relief under the Reviewable Transactions Act. This issue is discussed further in relation to remedies under the subheading *Relief not precluded by operation of statutory priority rules* in part G below.

[73] While a creditor would not be entitled to a remedy in relation to a dealing with property in which the creditor holds a security interest, secured creditors would have standing to seek a remedy to the extent that the obligation is unsecured (i.e., the security is worth less than the amount of the debt). A claim is secured for purposes of the recommended provision if the creditor holds a security interest, regardless of whether the security interest is perfected. The concept of perfection determines the priority of a security interest but not its existence.

> **A creditor is entitled to a remedy only to the extent that the creditor's claim is unsecured. This might be indicated through wording to the effect that a claim does not include an obligation the performance of which is secured by a security interest in property of the debtor, to the extent of the value of the security. Where a transaction involves a transfer of property under which the transferee has priority over or takes free of a security interest in the property due to the operation of a statutory priority rule the holder of the security interest is unsecured to the extent that the security interest is eliminated or subordinated.**

Claim need not be established by judgment as condition of standing

[74] It is important to recognize the distinction between the right to a remedy and the right to commence proceedings. A person who has not obtained a judgment or order

recognizing his or her claim is entitled to commence an action to challenge a transaction notwithstanding that a final remedy may not be granted until the claim is formally established. This would be recognized through a provision to the following effect;

> **A creditor may commence an action under this Act whether or not the creditor's claim has been reduced to judgment.**

[75] However, while a creditor should be allowed to commence proceedings without having first obtained judgment on her claim a defendant should not be forced to defend an action where the substantive basis of the plaintiff's claim is doubtful. Our recommendations include provisions addressing the potential need to determine the validity of a claim and offering injunctive or other ancillary relief as may be necessary until the claim is proven. Provisions of the kind recommended immediately below may not be required where the jurisdiction of the court to make orders and issue directions of the kind contemplated is established by the rules of court or other law of the enacting jurisdiction.

> **(1) Where a claim has not been established by judgment or an order of the court the court may grant a stay of proceedings or suspend the operation of a remedy until such time as the claim is formally proven.**
>
> **(2) Where such an order is made the court may make such supplementary orders as may be appropriate including but not limited to an order:**
>
> **(a) directing the determination of an issue by trial or otherwise,**
>
> **(b) restraining the defendant or another person from dealing with property,**
>
> **(c) giving directions as to the manner in which property is to be dealt with,**
>
> **(d) appointing a receiver of property.**

G. Remedies

General principle governing the award of a remedy

[76] The traditional approach to the remedy available for violation of fraudulent conveyances legislation is based on the notion that the offending transfer is void, either generally or as against creditors injured or prejudiced. More modern legislation and recommendations for reform generally adopt a nuanced approach designed to allow the court to fashion a remedy that operates to restore the property or value transferred to qualifying creditors, taking into account any consideration given and other investments made by the transferee in reliance on the transaction. The transaction need not be literally reversed. The Act should include a statement of the general principle guiding the formulation of an appropriate remedial order, as follows:

> **Where grounds for relief are established the court shall make such order or orders as may be necessary to make available to the creditor the property or value transferred or conferred under the transaction to the extent of the creditor's claim against the debtor, taking into account the factors identified in [the provision defining the "qualifying factors", below].**

Forms of order

[77] A non-exclusive list of the forms of order that may be granted to effectuate the general principle should be enumerated. The list proposed is as follows:

> **In granting relief under [the general principle stated above] the court may make one or a combination of the following orders:**
>
> **(a) An order vesting in the debtor, or in another person, property transferred by the debtor under the transaction, or the proceeds* of property so transferred.**
>
> **(b) An order declaring that property transferred by the debtor under the transaction or its proceeds* is subject to judgment enforcement measures in the hands of the transferee.**

(c) An order directing that property transferred by the debtor under the transaction or its proceeds* be sold and the money realized on the sale distributed to the creditor or other person as the court may direct.

(d) An order requiring the transferee to pay a sum equivalent to the value of property or other benefits received under the transaction.

(e) An order requiring the transferee to pay a sum in recognition of income earned through the use or exploitation of property, a license, quota, right to use or right to payment received under the transaction.

(f) An order directing the release or discharge of any debt incurred, or security or guarantee given, by the debtor under the transaction.

(g) An order reviving any obligation or security released by the debtor under the transaction.

(h) An order setting aside a designation in favour of a beneficiary.

(i) An order declaring that property that would otherwise be exempt as against creditors is subject to judgment enforcement measures where the property was acquired under the transaction giving rise to the entitlement to relief.

(j) An order setting aside or varying a court order where the order constitutes a transaction giving rise to the entitlement to relief.

(k) An order appointing a receiver to take possession of and deal with property in the manner directed.

(l) An order granting an injunction against the debtor or another person.

*** "proceeds" of property means identifiable or traceable property derived directly or indirectly from any dealing with the property or proceeds of the property, and includes the right to an insurance payment or any other payment as indemnity or compensation for loss of or damage to the property or proceeds of the property.**

Intersection of remedy with creditors' relief legislation

[78] Standing to seek relief will be determined under the principles described above and litigants will not be obliged to sue on behalf of creditors generally. However a remedial order granted by the court may have the effect of restoring property or its value to the debtor thereby making it available to all creditors who qualify to share in the proceeds of judgment enforcement measures under provincial creditors relief law, potentially including creditors who did not have standing to seek a remedy under the reviewable transactions law.

[79] Assume, for example, that a remedy is granted under cause of action #1 (insolvency + conspicuously inadequate consideration) to Creditor A whose claim existed at the date of the transaction. After the date of the transaction but before the remedy is awarded Creditor B acquires a claim and obtains judgment against the debtor. The remedial system gives the court wide latitude in fashioning a remedy that appropriately restores the value lost to qualifying creditors by virtue of the transaction. In this scenario, if the form of order chosen has the effect of setting aside the transaction and revesting property in the debtor that property will be subject to judgment enforcement measures at the instance of both Creditor A and Creditor B. Regardless of which creditor initiated enforcement both would be entitled to share in the proceeds notwithstanding that Creditor B did not have standing to claim a remedy under the reviewable transactions statute. The operation of creditors' relief legislation means that the benefit of the remedy awarded to Creditor A under the Reviewable Transactions Act will be shared by Creditor B.

[80] The working group concluded that it was beyond the scope of our mandate to consider whether the operation of creditors' relief law should be suspended or qualified in relation to property that becomes available to creditors by virtue of an order granted under the Reviewable Transactions Act. However it is necessary to structure the remedial regime of the Act in such a way that the form of the order granted does not produce differential outcomes in terms of creditors' ability to share under creditors' relief legislation.

[81] The recommendation below would direct the court to formulate an order in terms that will feed the proceeds of a judgment into the creditors' relief legislation of the enacting jurisdiction. This will ensure that money paid or property transferred under the order is available to creditors who have a right to share in the proceeds of judgment

enforcement measures taken against the debtor. An order directing the revesting of property in the debtor should not produce a different result in terms of the operation of creditors' relief law than would an order for payment of money by the transferee. Therefore if the remedial order is cast in terms of a money judgment against the transferee the court should direct that the sum recovered under the judgment be paid to the clerk of the court or other enforcement official for distribution among creditors of the debtor who are entitled to share under creditors' relief law. Without such a qualification the operation of creditors' relief legislation would mean that enforcement of the judgment against the transferee would result in distribution to the creditors of the transferee rather than to creditors of the debtor. This would defeat the objective of restoring the value transferred under the transaction to creditors of the debtor. Similarly, the court should not make an order vesting property directly in a plaintiff creditor where the debtor has other creditors who would be entitled to share in the value of the property if it were restored to the debtor.

> **An order under this Act shall be made in such terms or subject to such conditions as may be necessary to make money payable or the value of property to be transferred under the order available for distribution to all creditors of the debtor who are qualified under [insert name of provincial creditors' relief statute] to share in the proceeds of judgment enforcement measures taken against the debtor.**

Factors to be considered in the granting of an order (the "qualifying factors")

[82] Relief will be available under the Reviewable Transactions Act where a person who has dealt with a debtor has given no value or conspicuously less than full value for benefits received, regardless of whether that person knew of the debtor's insolvency (cause of action #1) or the debtor's intention to defeat creditors (cause of action #2). In such a case the transferee may be obliged to restore the benefits received but should be allowed to retain or recover any consideration paid and investments made to improve property transferred under the transaction. Clauses (1)(a) and (b) of the recommendation below will direct the court to take these factors into account in the design of the order for relief. The court could, for example, order that property transferred under the transaction be restored to the debtor or vested in the plaintiff creditor and that the debtor repay to the transferee the consideration received by the debtor under the transaction. The court might also impose terms to compensate the transferee for expenditures that have enhanced the value of the property. Where an order obliges the transferee to account for

income earned through property received under a transaction (see paragraph (e) under *Forms of order*) the court may deduct investments made in the generation of that income.

[83] Clause (1)(c) of the recommendation below authorizes the court to take into account other actions undertaken by the transferee in reasonable reliance on the finality of the transaction. This provision does not qualify the grounds for relief and only justifies the refusal or modification of an order where the transferee has changed position such that an award disgorging the benefit received under the transaction would be unjust. Its scope is also limited by the fact that a person who knows of the circumstances giving rise to relief will ordinarily not be able to establish that he or she reasonably relied on the finality of the transaction. Although the number of cases in which the court should exercise its discretion to refuse or qualify an order under clause (1)(c) will be relatively small it is impossible to anticipate all of the circumstances in which it might properly do so. They may include transactions in the form of charitable donations, payments of money to family members for routine expenses, the non-commercial provision of services to a family member or charitable cause and modest gifts made by an insolvent debtor. For example, a person who receives reasonable amounts of money from an insolvent parent, spouse or other close relative to meet ordinary personal and educational expenses may spend it on the assumption that the payment is not subject to challenge, even if he or she knows that the transferor is in financial difficulty. Such a person should not be obliged to repay the money received to creditors of the transferor. Similarly, a person whose insolvent parent, spouse or close relative provides personal or household services such as carpentry work or childcare that would otherwise have commercial value should not be forced to pay for them. In such a case acceptance of the services may be viewed as an action in reasonable reliance on the finality of the transaction.

[84] The final paragraph of the recommendation is designed primarily to put a transferee who is obliged to restore property but has a right of recovery against the debtor for consideration paid in the same position relative to competing claimants as a transferee who is obliged to pay a sum of money arrived at by deduction of the consideration paid from the value of property received. Assume, for example, that an insolvent debtor transfers property worth $100,000 to the transferee for $50,000. The court might (1) order that the property be revested in the debtor and that the debtor repay to the transferee the $50,000 paid for it, or (1) that that the transferee pay $50,000 to the creditors, representing the difference between the value of the property and the price paid. In the second instance the transferee's $50,000 investment is fully protected by way of retention of the property. In the first the transferee would, in the absence of further conditions,

simply be an unsecured creditor of the debtor to the extent of the $50,000 paid for the property. If the debtor is still insolvent, which is likely to be the case, the transferee will not recover the consideration at all or, at best, will recover only a small fraction of it. In such a case the court should protect the transferee's right to recover his or her investment by granting a security interest in the property restored to the debtor. A security interest so granted should have priority over other interests except for a security interest that had an established priority position in relation to the property before it was transferred away under the transaction. The provision for conferral of a security interest would also secure the transferee's right to recover expenditures other than money paid to purchase the property subject to the transaction.

[85] Where the cause of action founding the order for relief is based on the debtor's intention to hinder or defeat creditors, a transferee who knew or should reasonably have known of the debtor's intention is not entitled to a compensatory adjustment in the order.

[86] Our recommendation in relation to the qualifying factors that should be considered by the court in the award of a remedy is as follows:

(1) The court may refuse an order or adjust the terms of an order, or make an order in favour of the transferee for recovery of an identified sum against the debtor, in recognition of the following:

(a) the value given by the transferee under the transaction

(b) expenditures and non-monetary investments made by the transferee that have increased the value of property received under the transaction, or that have generated income through the use of property or of a license, quota, right to use or right to payment received under the transaction

(c) actions taken by the transferee in reasonable reliance on the finality of the transaction,

provided that these factors shall not operate in favour of a transferee who knew or should reasonably have known that the debtor entered the transaction with the primary objective of hindering or defeating the enforcement of the rights of a creditor or creditors.

(2) Where the court orders the debtor to pay money to the transferee the order may be secured against property of the debtor, including property vested in the debtor pursuant to [clause (a) in the Forms of order]. A security interest granted in favour of the transferee has priority over the rights of creditors of the debtor other than a creditor holding a perfected security interest that attached to the property before the transaction occurred.

Relief not precluded by operation of statutory priority rules

[87] Most provinces have legislation that provides for registration in a public registry of a judgment or a writ issued by the court as a judgment enforcement instrument (traditionally a "writ of execution" but now variously named). For the sake of simplicity the term judgment will be used to signify both approaches. In some jurisdictions reformed legislation provides a comprehensive system of registration affecting all forms of property of a judgment debtor. In others the registry statutes are more limited in scope. In all cases registration serves as a basis for determining the priority of the rights of enforcement associated with the judgment. The basic priority rule is that a registered judgment has priority over a subsequently acquired interest in the property subject to the registration. This means that a transfer of property by a judgment debtor *prima facie* does not prejudice the enforcement rights of judgment creditors because they are able to enforce the judgment through seizure of the property in the hands of the transferee. However where personal property is involved the law of the jurisdiction may include priority rules that enable the transferee to take free of or to have priority over the judgment in identified circumstances. Express provision should be made in the Reviewable Transactions Act to determine whether relief is available against a transferee who has priority over a judgment under such a rule.

[88] The same problem arises when a transfer of property that gives rise to relief under the Reviewable Transactions Act activates a priority rule that would cut off or subordinate a security interest in the property involved. Although a secured party does not have standing under the Act to the extent that a claim is secured the operation of the rule may render the claim unsecured in whole or in part. The Act should also clarify the availability of relief where this occurs.

Relief may be granted against a person who acquires property transferred by a debtor under a transaction whether or not the person acquires the property

free of a writ, judgment or enforcement charge (as the case may be) or a security interest under the provisions of [insert name of relevant legislation, which may include the judgment enforcement statute, Personal Property Security Act and Land Titles Act].

For purposes of this recommendation "security interest" includes any interest in property that secures payment or performance of an obligation.

[89] This approach is justified by the fact that priority rules serve a limited purpose within the confines of the statute in which they are located and are implicitly designed to address bona fide transactions that do not contravene other law. If the transaction gives rise to relief on the grounds of broader policy considerations that relief should not be preempted by a priority rule that does not take those considerations into account. This recommendation will also ensure that the liability of a transferee does not differ depending on the happenstance of whether a judgment is registered the day before or the day after the transaction. If the priority rule were conclusive the transferee would be exempt from liability in the first instance but not in the second.

[90] This recommendation will not significantly impact the operation of statutory priority rules because in practice a transaction under which the transferee has priority over a judgment or security interest will very rarely give rise to relief under the Reviewable Transactions Act. For example, there is little risk that an "ordinary course of business" sale under which the buyer takes free of a judgment or security interest in goods may be upset as a reviewable transaction. If the seller is an insolvent debtor the very fact that the sale is "ordinary course" means that the consideration paid will not have been "conspicuously less" than the value of the goods purchased and the grounds for relief under cause of action #1 will not be satisfied. This is true even if the transaction is part of a liquidation or going-out-of-business sale, since a very low price paid in such circumstances represents the market value of the goods. Conversely, while a priority rule may allow a purchaser of consumer goods to take free of a writ because the purchase price paid was less than the amount fixed by the rule[16] the transaction may give rise to relief under the Reviewable Transactions Act if the price paid was "conspicuously less" than the real value of the goods or the buyer was complicit in the seller's intention to defeat creditors. If the purchaser was innocent of wrongdoing actions taken in reasonable reliance on the transaction may be taken into account as a "qualifying factor" in the award of a remedy.

Subsequent transferees of property or a benefit

[91] It is necessary to define the extent to which relief may be granted against a person who has not dealt directly with the debtor but has received property or a benefit conveyed by the debtor under a transaction giving rise to the cause of action under the Act (i.e. "A" acquires property from Debtor under a transaction falling within one of the causes of action and subsequently transfers the property to "B"). The two factors that are regularly invoked to determine the limits of relief in other jurisdictions and under the BIA are the extent of value given by a secondary transferee or person receiving an indirect benefit and the extent of his or her knowledge that the property or benefit received derives from a transaction subject to challenge under the legislation. The provisions recommended follow the standard pattern by (1) providing for an order against a person who has received all or part of the benefit of a transaction, while (2) limiting the scope of liability by offering a defence to a person who gave more than trifling consideration and who was not in a position to know the relevant circumstances of the transaction under challenge.

(1) If grounds for relief are established, the court may make an order against a person who has received all or part of the benefit conferred under a transaction, whether

(a) from the debtor, or

(b) under a transaction with an intermediate party.

(2) In a case falling within clause (1)(b), an order shall not be made against the person receiving the benefit if that person

(a) gave consideration worth not conspicuously less than the value of the benefit received and

(b) did not know or could not reasonably have known that that the benefit derived from a transaction in which

(i) the debtor's primary objective was to hinder or defeat the enforcement of the rights of a creditor or creditors, or

(ii) the debtor received conspicuously less than adequate consideration at a time when the debtor was insolvent or became insolvent as described in (cause of action #1).

[92] The implicit result of these provisions is that an order may be made against an indirect transferee or recipient who gave conspicuously less than full value for the property or benefit received *or* who, regardless of the consideration given, should reasonably have known that the property or benefit derived from a transaction giving rise to a remedy under the act. Clause (2)(b)(i) relates to knowledge of a transaction subject to challenge under causes of action #2 and #3 while (b)(ii) addresses knowledge of facts bringing the original transaction within cause of action #1. The qualifying factors described above would be taken into account in the order for relief.

[93] Clause (1)(a) is included for the sake of completeness. However since the thrust of the provision is to define the liability of people who have not dealt directly with the debtor it may be eliminated if it becomes redundant when the recommendations relating to remedies are integrated in the draft Act.

Prejudgment orders

[94] Injunctive relief should be available to prevent a debtor or a person who has dealt with a debtor from dealing with property that would otherwise be available to satisfy creditors' claims. We therefore recommend that the court be authorized to grant an order to prevent a transaction from occurring or, if a transaction has already occurred, to prevent further action on the part of the debtor or another person that would prejudice the right of a creditor to obtain an effective remedy. The principles generally applicable to the award of injunctive relief would apply.

(1) Whether or not proceedings have otherwise been initiated under this Act, a Court may grant injunctive relief where the Court is satisfied that there is a reasonable likelihood that a transaction giving rise to a right to relief under this Act has occurred or is about to occur.

(2) In granting an application the Court may make such order against the debtor or another person as may be required to

(a) preserve the benefit of any final order for relief that may be granted or allow an appropriate order to be made, or

(b) prevent a transaction from occurring.

(3) Any interested person may apply to the Court to vary or terminate an order.

Secondary remedy against directors who have authorized repurchase or redemption of shares or the payment of a dividend

[95] The recognition of a repurchase or redemption of shares or the payment of a dividend by a corporation as a transaction that may be challenged under the new Act entails the award of a remedy against the shareholders who received payment. However in circumstances of this kind a supplementary remedy should also be available against a corporate director who participated in the authorization of the payment, unless that director approved it on the reasonably held view that it was not subject to challenge under the Act. The recommended approach roughly parallels the remedy offered by the BIA in relation to payments of this kind made by insolvent corporations, with the notable difference that the BIA makes directors primarily liable and offers a secondary remedy only against shareholders who are related to a director or to the corporation. The qualifying factors laid out above that apply generally to the fashioning of an order for relief do not come into play in relation to an order against a director, since a director is not a transferee.

(1) Where a transaction involving the purchase or redemption of shares by a corporation or the declaration of dividends gives rise to an order against the shareholder or shareholders who are party to the transaction, the court may grant relief against a director or directors of the corporation, jointly and severally, or solidarily, to take effect if and to the extent that an order against a shareholder is not satisfied within a prescribed period of time.

(2) An order may not be made against a director who

(a) in accordance with any applicable law governing the operation of the corporation, protested against the payment of the

dividend or the redemption or purchase of shares and had thereby exonerated himself or herself under that law from any liability, or

(b) had reasonable grounds to believe that the circumstances of the transaction were such that the transaction did not give rise to a remedy under the statute, either due to the existing or anticipated state of solvency of the corporation or the intention of the corporation in entering into the transaction.

(3) In determining whether a director had reasonable grounds within the meaning of (2)(b) above the court shall consider whether the director in good faith relied upon, and a reasonable person in the director's position could be expected to rely upon:

(a) financial or other statements of the corporation presented by officers of the corporation or the auditor of the corporation, or

(b) a report relating to the corporation's affairs prepared pursuant to a contract with the corporation by a person whose profession gave credibility to the statements made in the report.

(4) Relief granted under this section shall be in the form of an order for the payment of money equivalent to the amount paid by the corporation under the transaction. [note to translators: phrase deleted]

H. Limitation Period

[96] The following series of recommendations defines the period of time during which proceedings for relief may be taken:

(1) Subject to (2) and (3) below, no proceedings for relief shall be commenced more than 1 year after the date of a transaction.

(2) Where the transferee conceals or assists in the concealment of the transaction or of the facts upon which the claim for relief is based, the 1 year period shall commence to run from the time that the claimant knew or ought reasonably to have known of the transaction or the material facts, but no proceeding for relief shall be commenced more than 5 years from the date of the transaction.

(3) When the debtor becomes bankrupt before the end of the 1 year period the trustee in bankruptcy may commence proceedings for relief if the transaction occurred during the period that begins on the day that is one year before the date of bankruptcy and ends on the date of the bankruptcy, but no proceeding shall be commenced by the trustee more than 1 year after the date of bankruptcy.

(4) The date of a transaction is the date upon which the property or benefit is transferred, created or conferred and, where the transaction involves the provision of services over time or is otherwise comprised of a series of closely related events, the date when the services or events are substantially completed.

[97] These recommendations are designed to balance the need to give creditors the opportunity to discover and challenge transactions that prejudice their rights with the important policy of protecting the finality of transactions. The need for finality is particularly acute in a system that offers a cause of action that does not require positive proof of fraudulent intent. The Act would therefore adopt a limitation period of one year, which begins to run from the date of the transaction rather than from the date the transaction is discovered. Although general limitations legislation often bases the start of the limitation period on the date that facts supporting the cause of action are or should have been known to the plaintiff that approach would potentially permit creditors to upset transactions that occurred years previously. The approach recommended gives creditors a relatively short period of time within which to learn of the transaction, seek legal advice and launch proceedings. However the running of the limitation period would be suspended if the transferee conceals or assists in the concealment of the transaction or a material fact relating to the transaction such that the transaction or the facts giving rise to a claim for relief are not readily discoverable. This qualification limits the ability of parties to a transaction to act collusively to immunize the transaction from challenge by hiding the relevant facts until the limitation period has expired, thereby advancing the

policy of ensuring that a transaction is discoverable by creditors who may wish to challenge it. Nevertheless the need for finality warrants the imposition of an absolute limitation period of 5 years regardless of whether a transaction has been concealed. Although any absolute limit is largely arbitrary the 5 year limit is recommended in part on the basis that it reflects the 5 year reach-back period during which transactions at undervalue between related parties may be challenged under the BIA.

[98] There is an important distinction between the BIA transaction at undervalue provisions and the corresponding provincial legislation in terms of the manner in which the time period during which a transaction is subject to challenge is framed. Under provincial law the period is calculated from the date of the transaction to the date upon which litigation is commenced. However the BIA allows a trustee in bankruptcy to challenge a transaction that occurs during the period of time calculated from the date of bankruptcy and reaching back the specified length of time; one year if the parties to the transaction are at arm's length and either one year or five years if they are not, depending on the grounds for challenge invoked. This means that proceedings commenced by a trustee under the BIA may well be initiated more than one year (or five years) after the transaction in question has occurred. The use of the date of bankruptcy as the pivotal point in defining the relevant period under the BIA has both a practical and a conceptual basis. A trustee must have a reasonable period of time after his or her appointment to investigate the bankrupt's financial affairs, identify suspect transactions and commence proceedings. A limitation period based on a defined period of time after the date of the transaction could well expire within days of the trustee's appointment, thereby precluding a remedy. Furthermore, the occurrence of bankruptcy stays the right of creditors to take proceedings to enforce their claims. In effect creditors' rights are merged in the trustee. It is therefore appropriate to treat the date of bankruptcy as equivalent to the date upon which enforcement action is taken by a creditor.

[99] As the law currently stands a trustee may challenge a transfer at undervalue under both the BIA and provincial law. If the right to invoke provincial law is to be meaningful in bankruptcy it is therefore appropriate to imitate the BIA's approach to limitation of actions in that context, particularly if a short limitation period is imposed. However the potential for prolonged bankruptcy proceedings means that a transaction may be subject to challenge years after it has occurred if no further limitation is imposed. Concern for the finality of transactions therefore justifies a qualifying requirement that the trustee commence proceedings within a year of the date of bankruptcy.

[100] As a general rule, the date of the transaction for purposes of calculation of the limitation period is the date that property is transferred, or a benefit in another form is transferred, created or conferred (see the definition of "transaction", above). However in some cases, as where the transaction involves the provision of services, the benefit may be transferred over a period of time. In such a case the limitation period begins to run on the date when the provision of services or the series of events constituting the transaction is completed. The stipulation that this approach applies only if the events are "closely related" is designed to ensure that when a succession of discrete transfers has occurred between the same parties each transfer will be treated as a separate transaction. Where successive transfers are not closely related the limitation period applicable to the first transfer is to be calculated from the date of that transfer, not from the date of the last.

I. Law Repealed

[101] The uniform Act that will be produced on the basis of the recommendations in this report and those contained in the report on Part 2 of this project would replace existing fraudulent preferences and conveyances legislation, which will be repealed. The new Act should explicitly declare that the English statute generally referred to as the Statute of Elizabeth is no longer in effect in those jurisdictions in which it continues to be recognized as received law. We therefore recommend that the draft Act provide that:

> **The Statute of Fraudulent Conveyances, 13 Eliz. I, c. 5, 1571 is no longer in effect and [insert name of relevant legislation] is repealed.**

NEXT STEPS

[102] The working group will be reassembled in the fall of 2010 to commence work on our recommendations in relation to Part 2 of the project, addressing preferential transfers to creditors. It is hoped that the current membership of the group will be maintained and possibly increased by the addition of one or two people to replace members who have been unable to continue their participation. We anticipate that recommendations on this part of the project will be complete in time for delivery of a final report to the Conference at its 2011 annual meeting. This will position us for the drafting of a Uniform Reviewable Transactions Act. Work on drafting may be initiated during 2010-11 and will be completed during 2011-12.

[103] The working group seeks a motion of the Conference to the effect that:

(a) The report of the working group on Part 1: Transactions at Undervalue & Fraudulent Transactions is accepted;

(b) The working group is directed to produce recommendations on Part 2: Preferential Transfers and to deliver a report to the Conference at the annual meeting of 2010;

(c) The working group is authorized to initiate work on the drafting of a Uniform Reviewable Transactions Act during 2010-11.

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[1] The study was authored by Richard C.R.B. Dunlop, University of Alberta *Professor Emeritus* and author of the widely respected *Creditor-Debtor Law in Canada*, 2nd ed. (Toronto: Carswell 1995).
[2] The study papers are titled *Part 1: Introduction and Transactions at Undervalue* and *Part 2: Preferential Transfers* respectively.
[3] Those members of the working group who participated in the various decisions included in the report reached consensus on almost all counts. The dissenting position of one working group member in relation to two of the recommendations is indicated.
[4] The *Banking and Finance Law Review* is a Canadian law journal edited by Professors Benjamin Geva (Editor-in-Chief) and Stephanie Ben-Ishai (General Editor) of Osgoode Hall Law School (York University), and published by Carswell.
[10] R.S.C. 1985, c.B-3.
[11] In the event of bankruptcy, the trustee may seek a remedy both under the BIA provisions and under provincial law. See *Robinson v. Countrywide Factors*, [1978] 1 S.CR. 753.
[12] There is case law in support of the view that a creditor may maintain the registration of a writ against a homestead in the hands of a third party transferee where the transfer would, were the property not exempt, be subject to avoidance by creditors. While the creditors may not enforce the writ so as long as the debtor remains in residence, they may do so once it ceases to be the debtor's homestead. However in other cases the courts have simply treated exempt property, including the exempt value of a homestead, as being outside the scope of fraudulent conveyances legislation. See e.g. *Hamm v. Metz* (2002), 209 D.L.R. (4th) 385 (Sask. C.A.), in which the Court drew this interpretation from the 1928 decision of the Supreme Court of Canada in *Banque Can. Nat. v. Tencha*, [1928] S.C.R. 26.
[13] The question of whether a transaction under which a debtor uses non-exempt property to acquire exempt property is a disposition subject to avoidance under current law is open to debate. Virtually all of the reported decisions in which the point has been considered involve the creation of an exemption through the designation of a beneficiary under an annuity sheltered by the Insurance Act, discussed in paragraph 49. Since these cases are based on the conferral of an interest on the beneficiary (constituting the "disposition" subject to avoidance), they are not authority for the broader proposition that the acquisition of exempt property where no third party interest is involved is subject to challenge. However some would subscribe to the broader view. A full analysis of the case law is beyond the scope of this report. It is the view of the author that the authorities generally do not support the conclusion that the purchase of exempt property using non-exempt property is subject to avoidance on the sole ground that the debtor intended by so doing to shelter his or her assets from creditors. However at least one other member of the working group holds the contrary view.
[14] A policy of insurance by definition includes an annuity contract or insurance policy convertible into an annuity issued by a life insurance company within the scope of the Insurance Act.
[15] For an argument in support of the contrary position, see in particular M.A. Springman, George R. Stewart and Michael J. MacNaughton, *Frauds on Creditors: Fraudulent Conveyances and Preferences* (Toronto, Carswell 1994) looseleaf.
[16] e.g. Civil Enforcement Act, R.S.A. 2000, c. C-15, s. 36(2).