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)

Progress Report

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FRAUDULENT CONVEYANCES AND FRAUDULENT PREFERENCES LAW

INTRODUCTION

[1] This update is submitted to inform the Conference of the current status of the project on Reform of Fraudulent Conveyances and Fraudulent Preferences. Significant progress was made in the formulation of recommendations for the preparation of legislation addressing Part I of the project; namely Fraudulent Conveyances/Transfers at Undervalue. Although the limits of time precluded the completion of a complete and final report the working group was able to produce recommendations on the essential features of the proposed legislation, leaving only a few issues yet to be determined. This update presents the recommendations reached to date with explanatory commentary. The significant issues on which work remains in progress are identified.[1] The group will resume meeting in September. After completion of its work on Part I we will turn to Part II (Preferential Transfers).

WORKING GROUP

[2] The membership of the working group as reported in 2008 has changed through the recruitment of two members (identified below) and the resignation of one. The additional members are both practicing lawyers with extensive experience in this subject area. Because the demands of their practices have not allowed them to attend all working group meetings they should not be taken to have endorsed all of the recommendations advanced by the group. Nevertheless the group has benefited from the contributions they have been able to make at various stages in our process to date. Considerable efforts were also 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.

The current membership of the working group is:

Tamara M. Buckwold (Chair), Faculty of Law, University of Alberta
Thomas G. Anderson, Q.C., Anderson Pension Consulting, Vancouver
Élise Charpentier, Faculté de droit, Université de Montréal

Sarah J. Dafoe, Alberta Justice, Legislative Reform
Anthony Duggan, Faculty of Law, University of Toronto
Robert A. Klotz (new member), Klotz Associates, Toronto
Michael J. MacNaughton (new member), Borden Ladner Gervais LLP, Toronto
Tim Rattenbury, Office of the Attorney General, Government of New Brunswick

[3] The working group held 11 meetings, all by conference call. Work proceeded on the basis of the background paper on Part I delivered to the Conference in 2007 supplemented by a series of discussion papers produced by the chair to define the issues of policy and statutory structure to be decided. Minutes were maintained of all meetings and the recommendations reached by the working group.[2]

REPORT ON QUEBEC LAW

[4] A written report on the law of Quebec was completed by Professor Charpentier in the late spring of this year, and is being submitted to the Conference in conjunction with this progress report. Although the recommendations of the working group were not directly influenced by the report it is notable they are reasonably consistent with the principles established by the Civil Code as interpreted by Quebec courts. The report will be of value in the assessment of whether adoption of the draft Act in Quebec will require modification of the Act for consistency with fundamental conceptual or structural features of the C.C.Q.

RECOMMENDATIONS REACHED TO DATE

[5] This report sets out the recommendations reached by the working group as at the date of its last meeting preceding the report, held on June 22, 2009. The recommendations advanced are not intended to be cast in final statutory language. However the need for precision in some instances requires that recommendations be framed in terms that approximate those that might be adopted in the draft Act and the words used are carefully chosen. The recommendations therefore constitute a combination of general policy statements and tentative statutory provisions.

[6] While this report offers an explanation of the recommendations advanced it should be understood that the final report may in some instances include a more fully elaborated commentary. It should also be understood that the recommendations described in this report may be subject to minor revision in the work leading up to the final report. The recommendations are distinguished from the explanatory comment by bolded font.

[7] The recommendations reached to date fall under the following general headings, discussed below in turn:

A. Underlying Policies of Reformed Law
B. General Policies in the Design of a New Statute
C. Grounds for a Remedy: Definition of the Causes of Action
D. Scope of the Act: Transactions falling subject to the Act
E. Standing to Seek a Remedy under the Act
F. Remedies

A. Underlying Policies of Reformed Law

[8] 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 (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.[3] 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.

[9] Careful consideration was given to the desirability of harmonizing provincial and federal law in this area. However the group concluded that the deficiencies in the BIA provisions are such that they should not be adopted in their entirety as a model for reformed provincial and territorial law. Nevertheless, consistency with the BIA, including the recently enacted but still unproclaimed 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.

[10] 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 these dimensions of its operation have fallen into disuse.

[11] 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.

[12] 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.

[13] 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.

[14] 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.

[15] 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.

[16] 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.

[17] 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.

[18] 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. Both the ethical premise that

interference with creditors' rights is wrong and the policy of deterrence are advanced by the adoption of unambiguous rules that, to the extent possible, produce predictable results.

B. General Policies in the Design of a New Statute

[19] The working group followed some general guiding principles in our approach to the formulation of a new Act. 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.

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

[20] Creditors will be entitled to a remedy where a transaction falls within one of three causes of action, the elements of which are subsumed in the formulation that follows. 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.

[21] The three causes of action embodied in this formulation are generally referred to hereafter as causes of action #1, #2 and # 3 respectively, and are comprised of the elements outlined below. It is worth noting that 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.

[22] **Cause of action #1:** Defined by paragraphs 1(a) and (b) above (insolvency + conspicuously inadequate consideration/asset depletion)

- Debtor receives no consideration for value given or receives consideration that is worth **conspicuously** less than the value given by debtor.
- 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.

[23] 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 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 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 pays *conspicuously* less than the value of property received 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.

[24] **Cause of action #2:** Defined by paragraphs 2(a), (b) and (c)(i) above (debtor intention to hinder + conspicuously inadequate consideration/asset depletion)

- Debtor enters into transaction with the intention of hindering or defeating a creditor or creditors.
- The transaction in fact materially hinders creditors' ability to recover.
- The transferee gave no consideration for value received or gave consideration worth **conspicuously** less than the value received from Debtor.

[25] 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.

[26] **Cause of action #3:** Defined by paragraphs 2(a), (b) and (c)(ii) above (shared intention or "conspiracy" to hinder)

- Debtor enters into transaction with the intention of hindering or defeating a creditor or creditors.
- The transaction in fact materially hinders creditors' ability to recover (whether or not any or adequate consideration is received by Debtor).
- The transferee knew of Debtor's intention and intended to assist in its achievement.

[27] 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

[28] 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

[29] 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 it occurred 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.

Presumptions applicable to proof of intention under causes of action #2 and #3

[30] The statute need not include explicit provisions relating to the inferences to be drawn from the facts presented. These are matters of evidence to be weighed by the court in determining the intention of the debtor and, in relation to cause of action #3, the other party to the transaction. A listing of the suspicious circumstances that might be recognized as "badges of fraud" or indicia of intention to obstruct creditors may unduly constrain the court's recognition and weighting of the potentially relevant facts. This point will be addressed by way of commentary in the final report. Note that the problem of whether a rebuttable or conclusive presumption of intention arises from the debtor's insolvency is implicitly overcome by the introduction of cause of action #1, since there will be no need to prove intention where the debtor is insolvent and the consideration received by the debtor is conspicuously inadequate.

Meaning of consideration

[31] 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.

D. Scope of the Statute: Transactions falling subject to the proposed Act

[32] 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 minor qualifications noted 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 proposed remedial regime would offer a range of options short of avoiding or setting aside the transaction in its entirety. The proposed content of the definition is outlined under the headings that follow.

General definition

[33] **"Transaction" means: the transfer, creation or conferral of a benefit and includes;**

- **A transfer or disposition of an interest in existing property or property to be acquired in the future**
- **A payment of money**
- **The release of an interest or obligation**
- **The conferral or creation of a security interest, charge, lien or encumbrance**
- **A transfer, grant or conferral of a license, quota, right to use or right to payment**
- **The designation of a beneficiary**

- **The assumption of an obligation to do or to bring about any of the foregoing events in the future.**

[34] 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. The final bulleted point 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

[35] 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.**

[36] 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

[37] Two recommendations are advanced in relation to exempt property. These are:

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.**

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

[39] Recommendation 1 above 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.[4]

[40] Recommendation 2 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.

[41] 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.

[42] 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.

[43] 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).

[44] The general policy in favour of sheltering RRSPs from creditors is explicitly perpetuated in the BIA except with respect to contributions made during the 12 month period prior to bankruptcy, which may be recovered by the trustee.[5] 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.[6]

[45] A final point should be made in relation to 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.[7] 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

[46] 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;

> **A transaction under which a debtor assumes a contingent obligation to transfer property, pay money or satisfy an obligation, including a guarantee or an agreement to indemnify against loss occasioned by the default or non-performance of a third party, is a transaction only for purposes of those provisions of the statute offering a remedy on the ground that the transferor intended by means of the transaction to hinder or defeat the enforcement of creditors' rights and the transferee knew of the debtor's intention and intended to assist the debtor by entering into the transaction (i.e. cause of action #3).**

Transactions effected by court order or operation of law

[47] 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 avoid fraudulent conveyances 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. We therefore recommend that a transfer effected by court order may be challenged under the intention-based causes of action, as follows;

> **A court order effecting any of the events otherwise constituting a transaction or the occurrence of such events by operation of law is a "transaction" only for purposes of those provisions of the statute offering a remedy on the ground that the transferor intended by means of the transaction to hinder or defeat the enforcement of creditors' rights (i.e. causes of action #2 and #3).**

[48] Among the few instances in which a transfer that occurs automatically by operation of law might be subject to challenge are transfers to a joint tenant by right of survivorship. Under our recommendation, transfers by operation of law would be subject to the rules that apply to transfers effected by court order.

Disclaimer of interest and refusal of power of appointment

[49] 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 will 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.[8]

[50] If the debtor's interest has vested the refusal 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 between family members

[51] Transactions between spouses and other immediate family members raise complex problems of policy and statutory drafting. The working group has explored various approaches but was unable to arrive at recommendations before this report was drafted. The group will return to this aspect of the project when it reconvenes in September. In the meantime input from members of the Conference is welcomed.

[52] The essential questions under discussion are:

1. Should separation agreements between spouses be dealt with (a) under all three of the ordinary causes of action, (b) under cause of action #3 alone (parties have conspired to defeat creditors) or (c) under a special stand-alone rule? The term "spouse" would be defined to incorporate the relevant provincial law recognizing the legal status of unmarried partners.

2. Correspondingly, should court orders for maintenance and division of family property be dealt with (a) under the rules applicable to court orders generally (causes of action #2 and #3 apply; debtor's primary intention is to defeat creditors and transferee gives conspicuously inadequate consideration, or parties have conspired to defeat creditors), (b) under cause of action #3 alone or (c) under a special stand-alone rule?

[53] A tentative formulation for a stand-alone rule applicable to separation agreements is:

> Where a transaction is effected by a separation agreement, relief will be available where property transferred under the agreement is held by the transferee for the use of benefit of the transferor or the agreement otherwise does not constitute a good faith settlement of spousal or family rights in relation to property or maintenance.

[54] It is more difficult to articulate a corresponding rule that would determine the availability of relief where maintenance or division of property is ordered by the court. Roughly parallel language is as follows:

> Where a transaction is effected by a court order for maintenance or division of family property, relief will be available where the parties did not seek or obtain the order for purposes of the good faith settlement of spousal rights or family rights in relation to property or maintenance.

[55] Regardless of the test adopted, the Act should make it clear that a creditor seeking relief against an improperly obtained court order is not obliged to do so before the court issuing the order but may commence proceedings in any court of competent jurisdiction.

[56] Although the limits of space preclude a full discussion of the arguments in favour of and against each of these approaches, or variations thereof, the essential points of debate are as follows: advocates of approach (a) in both instances are of the view that it is undesirable to legislate for specific types of transaction and that separation agreements and court orders can be properly addressed under the ordinary rules. Those who would adopt approach (b) and thereby limit the application of the ordinary rules to cause of action #3 are concerned that the need to assess the value of consideration exchanged under the transaction for purposes of both causes of action #1 and #2 make their application in this context problematic. Those who favour (c) believe that it appropriately reflects the current approach of family courts and that tests based on the valuation of

consideration or the "primary" intention of the parties are unworkable in this context. Others are concerned that a "good faith" or bona fides test is insufficiently clear.

E. Standing to Seek a Remedy under the Statute

[57] The statute would offer a remedy 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 the 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

[58] 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 and #3 only, a person whose claim arose after the date of the transaction.**

[59] 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.

[60] 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 in paragraph 29, which 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.

[61] 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 relatively short limitation period, discussed later in this report.

Definition of "claim"

[62] 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 BIA:

"claim" means the right to enforce an obligation, whether the obligation is

> **(i) liquidated or unliquidated;**
>
> **(ii) absolute or contingent;**
>
> **(iii) certain or disputed; or**
>
> **(iv) 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 secured obligation

[63] 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 unless a priority rule operating in favour of the transferee dictates otherwise. 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. Furthermore, where a priority rule operates to subordinate or cut off a security interest the transaction should not be subject to challenge under fraudulent conveyances law, since the rule itself represents the policy choice to protect the transferee as against the secured creditor. We therefore recommend that;

> **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.**

[64] 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.

Claim need not be established by judgment as condition of standing

[65] 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 whether or not the creditor's claim has been reduced to judgment.**

[66] 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.

> **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.**

> **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.

F. Remedies

Introduction

[67] The working group was unable to complete its work on this part of the project before this report was written, and will be finalizing its recommendations in the fall. Some of what follows is therefore subject to potential revision. However since a general understanding of the proposed approach to remedies is necessary to complete the picture of the statutory regime contemplated the recommendations reached to date are described below in tentative form.

Intersection of remedies with creditors' relief legislation

[68] 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, depending on the form in which it is cast, a remedial order granted by the court may have the inherent 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 law. In such a case the result may be that the benefit of the order will extend indirectly to creditors who did not have standing to seek a remedy.

[69] Assume, for example, that a remedy is granted under cause of action #1 (debtor's insolvency + lack of 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 embodied in the proposed Act gives the court wide latitude in fashioning a remedy that appropriately restores the value lost to qualifying creditors by virtue of the transaction. If in this scenario the form of order chosen has the effect of setting aside the challenged transaction and revesting property in the debtor, that property would 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 fraudulent conveyances statute.

[70] Where the court decides that the appropriate remedy is an order for the payment of money rather than a revesting of property in the debtor, the form of order should not preclude the operation of the creditors' relief system. It is therefore recommended that the provisions delineating the forms of order that may be granted by the court should be supplemented by a statement authorizing the court to direct that money payable under an order for relief be paid to the clerk of the court or other enforcement official for distribution in accordance with the applicable creditors' relief legislation (see paragraph 74 below).

[71] The working group considered the implications of the parallel operation of the new Act and creditors' relief legislation and offers this analysis for the sake of ensuring that the functioning of the proposed remedial regime is fully understood. No recommendation is advanced as to whether the benefit of an order for relief should or should not flow through the creditors' relief system to other creditors, on the view that the operation of creditors' relief legislation is beyond the scope of our mandate.

General principle governing the award of a remedy

[72] 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 more 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 take into account the consideration given and other investments made by the transferee in reliance on the transaction. The transaction need not be literally reversed. The general principle tentatively proposed to guide the court in the formulation of an appropriate remedy is:

> **When grounds for relief are established the court shall make such order or orders as may be necessary to satisfy the creditor's claim to the extent**
>
> **(a) that the claim could have been satisfied through proceedings against the debtor if the transaction had not occurred, or**
>
> **(b) of the market value of the benefits transferred or conferred under the transaction.**[9]

Forms of order

[73] The potential 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 property 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.**

Order for payment of money to enforcement official for distribution

[74] The rationale for the following provision is advanced above in paragraph 70.

Where the court grants an order for the payment of money, the court may order that the money be paid to the clerk of the court or other enforcement official for distribution in accordance with the judgment enforcement or creditors' relief legislation of the jurisdiction.

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

[75] Relief will be available under the proposed 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 other investments made in reliance on the finality of the transaction. Provisions to the following effect will direct the court to take these factors into account in the design of the order for relief. Note that 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 income, as well as investments enhancing the value of the property itself. The final paragraph is designed 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.

The court may adjust the terms of an order or make an order for recovery of an identified sum against the debtor in favour of the transferee 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) obligations incurred 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.

Where an order is made in favour of 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].

Prejudgment orders

[76] 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. A provision requiring proof that a transaction "likely" has occurred or will occur implicitly entails that the applicant creditor is likely to suffer irreparable harm, since a transaction falling within the scope of the Act would by definition defeat creditors' rights of recovery. We therefore recommend that;

On application by a creditor, whether or not proceedings have been initiated under this Act, the court may;

(a) where it is likely that a transaction giving rise a right to relief under this Act has occurred, grant an injunction against the debtor or another person as may be required to preserve the benefit of any final order for relief that may be granted or allow an appropriate order to be made,

(b) where it is likely that a transaction that would give rise to relief under this Act is about to occur, grant an injunction against the actions that would constitute the transaction.

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

[77] 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.

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.

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.

In determining whether a director had reasonable grounds within the meaning of (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.

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, and the court shall not take into consideration the qualifying factors [identified in paragraph 75].

G. Limitation Period

[78] The limitation period to be applied to the right to seek a remedy is tentatively set at 2 years following the date of the transaction in relation to which a remedy is sought. The question of whether this should be extended where the relevant facts are unknown to or have been deliberately concealed from the challenging creditor remains undetermined.

NEXT STEPS

[79] Members of the Conference are invited to offer their input in relation to the recommendations advanced in this report by communication with the Chair. The working group will complete its work on the recommendations relating to Part I of this project and begin work on recommendations relating to Part II: Preferential Transfers. As described in the 2008 Progress Report and pursuant to the direction of the Conference, the completed recommendations will be submitted to the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals (CAIRP) for their response.

[80] The final report of recommendations on Part I will undoubtedly be ready for delivery to the Conference at its 2010 annual meeting, and it is expected that the recommendations on Part II will similarly be ready by that date.

[81] The working group seeks a motion of the Conference accepting this report and directing that its work proceed in the manner indicated above.

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[1] The relatively minor points of detail that remain outstanding are not explicitly identified.

[2] Thanks are extended to Tom Anderson for his work as recording secretary to the working group.

[3] 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.

[4] 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.

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[5] s. 67(1)(b.3).

[6] 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 45. 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.

[7] 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.

[8] 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.

[9] The need for the words included in clause (b) is under discussion.