Law Reform Commission of Saskatchewan

Reform of the Law of Fraudulent Conveyances and Fraudulent Preferences: Adoption of the *Uniform Reviewable Transactions Act* in Saskatchewan

Consultation Report

August 2020

YOUR COMMENTS AND OPINIONS ARE WELCOME

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At present, the Commission is funded by grants from the Law Foundation of Saskatchewan and the Ministry of Justice.

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This report is addressed to the adoption in Saskatchewan of the *Uniform Reviewable Transactions Act* [URTA] promulgated in 2012 by the Uniform Law Conference of Canada [ULCC] with explanatory Commentary. It is preceded by the Alberta Law Reform Commission [ALRI] report on *Reviewable Transactions* issued in March of 2016, recommending adoption of the URTA in Alberta. Portions of the ALRI report describing the rationale for and primary features of the URTA are replicated in this report verbatim or with minor revision. We wish to thank the Institute for permission to use this material.

Professor Tamara Buckwold of the University of Alberta served as chair of the ULCC working group on whose work the URTA is based and is the primary author of the URTA and Commentary. The final draft of the URTA was refined and improved through the collaborative effort and drafting expertise of Ian Brown, Chief Legislative Crown Counsel in the Saskatchewan Ministry of Justice and the Attorney General. Professor Buckwold is also the primary author of the ALRI report and of this report.

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Call for Responses

The Law Reform Commission of Saskatchewan is interested in your response to the tentative recommendations set out in this report. Your comments and opinions on the topic are welcome and will be an important part of the Commission's deliberations on its final recommendations for reform of the law of fraudulent conveyances and fraudulent preferences.

How to Respond

Responses may be sent by November 30, 2020

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I. Introduction

[1] The law of fraudulent conveyances is often merged with the law of fraudulent preferences under the joint title "fraudulent conveyances and preferences law". The two bodies of law are distinct but linked by a central commonality. Both are adjuncts to the law of judgment enforcement and both respond to dealings with property that interfere with the rights of creditors realized through judgment enforcement measures.

[2] Judgment enforcement law is the means by which unsecured debt of any kind is satisfied if not voluntarily paid. The term "unsecured debt" sometimes refers to a financial obligation arising from a transaction of borrowing or credit in which the debtor has not given security for payment, but it has a broader meaning. A judgment debt is itself unsecured, so the term "unsecured debt" as used in this report encompasses debt arising from a money judgment or potential judgment, including a judgment to recover unsecured debt in the narrower sense of an unpaid financial obligation. This underscores the importance of an effective system of judgment enforcement law; it is the means by which monetized claims arising from any cause of action are recovered. In Saskatchewan, that law is located primarily in *The Enforcement of Money Judgments Act* [EMJA].[1] Judgment enforcement law allows a judgment creditor to seek satisfaction through seizure of the judgment debtor's assets or income through prescribed measures.[2] Since judgment enforcement entails recourse against the debtor's property, creditors' rights are prejudiced if the debtor transfers away property or otherwise gives value in a manner that materially diminishes the pool of assets against which creditors can seek satisfaction. Fraudulent conveyances law and fraudulent preferences law, respectively, allow creditors to challenge such transactions under prescribed circumstances.

[3] Fraudulent conveyances law is designed to protect creditors generally. It comes into play when a debtor transfers away property, diminishing his or her asset base and curtailing enforcement of existing or prospective judgments commensurately. In effect, the law requires the transferee to disgorge the property received in favour of the transferor's creditors. Fraudulent preferences law deals with a transfer of property to pay one of a debtor's creditors, where the result of the transfer is to reduce the debtor's asset base

[1] *The Enforcement of Money Judgments Act,* SS 2010, E-9.22 [EMJA].

[2] The EMJA empowers the sheriff to seize all tangible and intangible property of a judgment debtor to enforce a judgment (EMJA Part VI). In the rare case in which enforcement is effected by a court-appointed receiver rather than by the sheriff, property in the receiver's possession or control is deemed to have been seized by the sheriff (EMJA s 72(7)).

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such that other creditors cannot recover at all or to the same extent as the creditor who was paid. The "preferred" creditor is forced to share the property taken in payment according to a proportional satisfaction regime imposed by law.

[4] In 2006, the Uniform Law Conference of Canada [ULCC] approved a project for reform of the provincial and territorial law of fraudulent conveyances and fraudulent preferences with funding support from the Saskatchewan Law Reform Commission.[3] The ULCC project was launched through two comprehensive study papers, one addressing each of the two areas.[4] The study papers outlined the current law, identified the issues to be resolved through potential reform and canvassed solutions offered by the legislation of other jurisdictions, previous law reform reports and academic commentary. A working group was then constituted to develop recommendations for a uniform statute. The group comprised academics, government lawyers and practitioners from across Canada. It produced a series of extensive reports proposing recommendations that were adopted by the ULCC in successive years.[5] The recommendations were ultimately incorporated in the *Uniform Reviewable Transactions Act* [URTA] with Commentary, attached as an

[3] All of the documents submitted to the ULCC and noted in this report are available in English on the Law Reform Commission website. Pursuant to the bijural policy of the ULCC, only those that were translated into French are available on the ULCC website in either language. Since the reports were numerous and in some instances lengthy, some were not translated.

[4] Tamara M Buckwold, "Reform of Fraudulent Conveyances and Fraudulent Preferences Law (Transactions at Undervalue and Preferential Transfers), Introduction and Part I: Transactions at Undervalue" (2007), online at: Uniform Law Conference of Canada <www.ulcc.ca/en/2007-charlottetown-pe/216-civil-section-documents/582-reform-of-fraudulent-conveyances-and-preferences-law-introduction-and-part-i-2007>; Tamara M Buckwold, "Reform of Fraudulent Conveyances and Fraudulent Preferences Law (Transactions at Undervalue and Preferential Transfers), Part II: Preferential Transfers (2008), online at: Uniform Law Conference of Canada <www.ulcc.ca/images/stories/2008_en_pdfs/2008ulcc0010.pdf>.

[5] The recommendations developed by the working group were produced on the basis of 29 discussion papers reviewed in the course of 23 recorded meetings, on file with the Chair. Minutes of the meetings were kept by Thomas Anderson, QC of Vancouver. The recommendations adopted by the ULCC were advanced in the following reports:

- 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 (Halifax 2010), online: Uniform Law Conference of Canada <www.ulcc.ca/images/stories/2010_pdf_en/2010ulcc0032_Fraudulent_Conveyances_Transactions_Undervalue_Final_Report.pdf>;
- Reform of Fraudulent Conveyances and Fraudulent Preferences Law (Transactions at Undervalue and Preferential Transfers), Part 1: Transactions at Undervalue & Fraudulent Transactions, Supplementary Report of the Working Group (Winnipeg 2011) and Reform of Fraudulent Conveyances and Fraudulent Preferences Law, Part 2: Preferential Transfers, Final Report of the Working Group (Winnipeg 2011), online: Uniform Law Conference of Canada <www.ulcc.ca/images/stories/2011_pdf_en/2011ulcc0005.pdf>.

appendix.[6] This report recommends adoption of the URTA in Saskatchewan, with the minor amendments discussed below.

[5] The law of fraudulent conveyances and fraudulent preferences falls within the jurisdiction of the provinces and territories as a matter of property and civil rights, but provincial law overlaps with federal law when a debtor becomes subject to bankruptcy or insolvency proceedings under the federal *Bankruptcy and Insolvency Act* [BIA].[7] While the BIA employs different terminology, it includes rules under which transactions that might be described in traditional terms as fraudulent conveyances and fraudulent preferences may be challenged. The ULCC reform project did not directly address federal law but the existence and content of the BIA provisions were taken into account in the development of recommendations for reform.

[6] The URTA deals separately with the types of case that currently fall within the rubric of fraudulent conveyances and fraudulent preferences, respectively. The two branches of the Act are linked by a common underlying policy and intersect through a common definitional structure, as well as some shared provisions. The name of the statute signals the fact that it applies to a range of transactions that are subject to judicial review on the grounds that they interfere with creditors' rights and reflects the nomenclature commonly used today in relation to this area of law.

[7] Saskatchewan has been a leader in the reform of commercial law. The law governing security interests in personal property was radically reformed through proclamation of the enormously successful *Personal Property Security Act* [PPSA] in 1981,[8] a statute that became the model for the PPSAs subsequently adopted across common law Canada.[9] The enactment of the EMJA in 2010 effected a similarly dramatic change in Saskatchewan judgment enforcement law. [10] That Act introduced a comprehensive and integrated system of law designed to enhance the effectiveness and efficiency of the judgment

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[6] *Uniform Reviewable Transactions Act*, online: Uniform Law Conference of Canada <www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/615-josetta-1-en-gb/uniform-actsa/reviewable-transactions-act/1390-uniform-reviewable-transactions-act-2012>.

[7] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA]. A trustee in bankruptcy may challenge a transaction both under the BIA and under provincial law. See *Robinson v Countrywide Factors Ltd,* [1978] 1 SCR 753.

[8] *The Personal Property Security Act*, SS 1979-80, c P-6.1, revised and re-enacted as *The Personal Property Security Act 1993*, SS1993, c P-2 [PPSA].

[9] The Saskatchewan PPSA was preceded by the Ontario *Personal Property Security Act*, enacted in 1967 but not proclaimed until 1976. See *Personal Property Security Act*, RSO 1970, c 344 as amended, now RSO 1990, c P.10 as amended. The Ontario model was adopted in Manitoba in 1978. The Saskatchewan Act introduced features not found in the Ontario Act and differs from the Ontario model on a number of points of detail. See Ronald CC Cuming, *Second Generation Personal Property Security Legislation in Canada* (1981-82), 46 Sask L Rev 5.

[10] For an overview of the development of judgment enforcement law in Saskatchewan see Ronald CC Cuming and Donald H Layh, *The Saskatchewan Enforcement of Money Judgments Act: Commentary and Analysis* (Regina: Queen's Printer 2012) at 5 *et seq.*

enforcement process, drawing to a significant degree on the concepts and the registry system introduced by the PPSA. With a modern judgment enforcement regime now established, the time is ripe for reform of the supplementary law of fraudulent conveyances and fraudulent preferences.

[8] Fortunately, most of the work required to achieve reform in this area has been done through the comprehensive process culminating in the URTA. Its drafters were cognizant of the need to interface the proposed statute with modern judgment enforcement legislation and the Act could be enacted in Saskatchewan with the limited revision required to accommodate provincial drafting protocols, ensure a proper linkage with provincial legislation and implement incidental policy choices on a few points of detail. As noted in the Acknowledgements that preface this report, the Law Reform Institute of Alberta has issued a report recommending adoption of the URTA in that province.[11] While the Alberta government has yet to act on the Institute's recommendations, adoption of the Act in Saskatchewan would both achieve much-needed reform of Saskatchewan law and encourage legislative action in Alberta and elsewhere, advancing the cause of harmonization of law across the provinces and territories.[12]

II. The Case for Reform

1. Introduction

[9] The role of fraudulent conveyances and fraudulent preferences law in supplementing the law of judgment enforcement was briefly described in the introduction. Judgment enforcement is the only means by which unsecured debt that is not voluntarily paid may be recovered short of bankruptcy or insolvency proceedings under federal legislation. Judgment enforcement law is the "clout" behind a money judgment granted on any cause of action, and judgments for the payment of money are by far the most common judicial remedy. This is the law that gives effect to rights of compensation for loss or injury associated not only with debt produced by borrowing or credit, but with accidental or intentional injury to person or property, the non-fulfilment of family responsibilities, environmental violations, breach of contract, breach of fiduciary obligations or any of the

[11] Alberta Law Reform Institute, *Reviewable Transactions*, Report No 108 (2016), online at: Alberta Law Reform Institute: <www.alri.ualberta.ca/index.php/completed-projects/reviewable-transactions>.

[12] New Brunswick has adopted but not yet proclaimed the URTA as *Debtor Transactions Act*, SNB 2015, c 23.

myriad legal doctrines that impact the lives of citizens and the functioning of the economy. The property of a judgment debtor who fails to pay the amount of a judgment is the sole source of satisfaction.

[10] The law of fraudulent conveyances and fraudulent preferences is intended to safeguard the rights of judgment creditors by allowing them to recover property that would otherwise be lost through the actions of their debtors. Unfortunately, its deficiencies are such that the expectation is frequently unfulfilled. Current law is complex, antiquated and ambiguous, producing results that are often unpredictable and sometimes indefensible. These are not desirable features in a system of law that significantly impacts the ability of creditors to recover claims validated by judgment. Perversely, the very fact that this law is technically difficult and poorly understood has impeded reform in spite of repeated criticism and the attempts of other law reform bodies to address its deficiencies. [13]

2. Fraudulent Conveyances

[11] The rationale for provincial fraudulent conveyances law is obvious. A debtor should not be permitted to defeat the legal rights of creditors by the simple expedient of transferring away property that could otherwise be reached through judgment enforcement measures to satisfy their claims – a practice often referred to as "judgment proofing". English judges and legislators responded early on to the problem, and Canadian legislators and courts have further contributed to the body of principles comprising the law in this area.

[12] The current law governing fraudulent conveyances has three components. Remarkably enough, the first is the English *Fraudulent Conveyances Act, 1571*,[14] which remains in effect as received Saskatchewan law[15] and is often the basis upon which litigation challenging transfers of property that defeat creditors' claims proceeds. Secondly, and less obviously given the title, *The Fraudulent Preferences Act,*[16] includes rules distinct from but overlapping with those of the 1571 statute, under which a transfer of property

[13] In addition to the reports produced in the ULCC project, see Alberta Law Reform Institute, *supra* note 11, *Karl* Dore and Robert Kerr, *Third Report of the Consumer Protection Project: Legal Remedies of the Unsecured Creditor after Judgment* (Fredericton: Government of New Brunswick, 1976); Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters*, vol 4 (1983) at 125-245; Law Reform Commission of British Columbia, *Report on Fraudulent Conveyances and Fraudulent Preferences, LRC 94 (*1988).

[14] More fulsomely and properly titled the *Act Against Fraudulent Deeds, Gifts, Alienations, etc.* (UK), 13 Eliz 1, c 5, often called the *Statute of Elizabeth*.

[15] See e.g. *Hamm v Metz*, 2002 SKCA 11 confirming the continuing force of the Act in Saskatchewan. The Act remains in effect in most other common law provinces, either as received law or through statutory re-enactment.

[16] *The Fraudulent Preferences Act*, RSS 1978, c F-21.

that is not a preferential payment but defeats creditors' rights generally may be avoided. The pertinent sections have remained substantially unchanged since their enactment by the provincial legislature in *The Assignments Act* of 1906. [17] The third source of law lies in the centuries-long accumulation of judicial decisions interpreting and applying the two statutory enactments.

[13] In the service of interpretation, the courts have engrafted on the wording of the statutes requirements and presumptions that are not at all evident on their face, adding to rather than resolving the uncertainty resulting from the gaps, inconsistencies and anomalies in the legislation itself.[18] It has been said in reference to the case law interpreting the *Fraudulent Conveyances Act, 1571* that, "The result is a common law gloss which comes close to erasing the Act itself."[19] The picture is further complicated by the fact that the conditions of relief under the *Fraudulent Conveyances Act, 1571* are similar in some respects to those of the *Fraudulent Preferences Act* but differ in others so a challenge that might not meet the requirements of the latter may succeed under the former and, less often, *vice versa*. As a result, confusion prevails over the rules, principles and judicial authorities that govern the outcome in any given case.[20] A decision directed to an action under one statute may or may not be authoritative in relation to the corresponding provisions of the other, depending on the specific point in issue.

3. Fraudulent Preferences

[14] As its name implies, *The Fraudulent Preferences Act* is addressed primarily to the preferential payment of creditors and, supplemented by the case law, is the source of provincial law on that subject. The existence and continuing need for provincial fraudulent preferences legislation requires explanation.

[15] Fraudulent preferences legislation proceeds on the principle that unsecured creditors who are not voluntarily paid by a common debtor are entitled to recover *pari passu*

[17] *The Assignments Act*, SS 1906, c 25, ss 38, 43, 44, 45 and 46. These provisions, along with those dealing with preferential payments, were extracted from *The Assignments Act* and re-enacted in a stand-alone statute as *The Fraudulent Preferences Act*, RSS 1920, c 204. The substance as well as the title largely persists in the current version of that Act.

[18] See Law Reform Commission of British Columbia, *Report on Fraudulent Conveyances and Fraudulent Preferences, LRC 94 (*1988), *supra* note 13 at 8: "The law only becomes baffling when one considers the 400 odd years of jurisprudence surrounding this legislation."

[19] CRB Dunlop and Tamara M Buckwold, *Debt Recovery in Alberta* (Toronto: Carswell 2012) at 959 [Dunlop & Buckwold] Although this text is addressed specifically to the law of Alberta, the congruence between Saskatchewan and Alberta law in this area is such that the analysis advanced by the authors is equally applicable to Saskatchewan law where the text is cited in this report.

[20] For judicial confirmation of the point see *Moody v Ashton*, 2004 SKQB 87.

against the debtor's assets. This principle is realized most fully in bankruptcy law, under which a bankrupt debtor's trustee in bankruptcy is required to distribute the bankruptcy estate remaining after satisfaction of secured and preferred creditors *pro rata* among unsecured creditors who have proven their claims. The creditor sharing principle was incorporated in 19th century Dominion bankruptcy legislation enacted under the federal government's constitutional jurisdiction over bankruptcy and insolvency. However, the federal *Bankruptcy Act* was repealed in 1880 and not replaced until a new Act was passed in 1919. In the interstitial period, provincial legislators enacted a package of legislation designed to facilitate collective recovery by creditors through a system comparable to that ordinarily implemented through bankruptcy law. The statutory rules that provided for proportionate sharing among creditors who took enforcement action under provincial law came to be known generally as creditors' relief legislation. Like bankruptcy legislation, the provincial statutes established rules to prevent creditors from circumventing the principle of equitable sharing by taking payments from an insolvent debtor that would "prefer" the creditor so paid by leaving insufficient assets to satisfy the debts owed to others.

[16] The federal government reasserted its constitutional jurisdiction over bankruptcy and insolvency with the proclamation of the 1919 *Bankruptcy Act* but many provinces, including Saskatchewan, retained a modified version of the creditor sharing principle in their judgment enforcement systems, along with anti-preference legislation designed to protect that principle.[21] The creditor sharing principle as manifested in provincial law required judgment creditors who took enforcement measures through execution to share the proceeds *pari passu* with other unsecured creditors who had filed with the sheriff a writ of execution or a certificate proving a liquidated debt.[22] The concept is now embodied in the distribution rules in Part XII of the EMJA, though in significantly qualified form. Only creditors who have obtained and registered a judgment and delivered an enforcement instruction to the sheriff are entitled to share in a distribution, and the creditor or creditors who gave the instructions that produced the fund receives a bonus payment in recognition of the effort and financial investment involved in the proceedings.

[17] So long as judgment enforcement law retains a legally prescribed creditor sharing scheme, the need for some form of anti-preference legislation continues: creditors should not be permitted to evade the sharing rules by taking payments that would otherwise fall

[21] Retention of the creditor sharing principle in provincial judgment enforcement law makes the Canadian common law jurisdictions unique among jurisdictions that otherwise share our English legal heritage. At common law, judgment creditors are entitled to satisfaction on a first-in-time basis; a creditor who takes steps to enforce a judgment is not obliged to share with others, regardless of whether they remain unpaid. Any claim to share proportionately can be realized only through the invocation of bankruptcy proceedings.

[22] See *The Creditors' Relief Act*, RSS 1978, c C-46, repealed with the enactment of the EMJA.

outside the system. While the creditor sharing rules have been updated and refined, the anti-preference rules of the early 20th century remain in effect and largely unchanged in *The Fraudulent Preferences Act.* Existing law lacks a clear interface with the creditors' relief legislation it is intended to support, is ambiguous in its terms, limited in scope and largely ineffective.

4. Conclusion

[18] This brief account of the history and sources of law demonstrates the need for modern legislation implementing coherent policies and clear principles designed to produce appropriate and predictable outcomes for creditors, debtors and those who deal with debtors. Law based on legislation enacted more than 100 years ago, in the case of fraudulent preferences, and 450 years ago, in the case of fraudulent conveyances, is overdue for systematic reform. This assessment of the current law, offered in the paper that prompted the ULCC to launch its project, is pertinent: [23]

> Texts and essays on the law are full of criticism of confused rules, redundant statutory provisions, perplexing and contradictory decisions, antiquated rules and ideas, and opaque policy. Fraudulent conveyances and preferences problems have not produced far-reaching and imaginative judicial decisions. The vast majority of cases say little or nothing about the law, simply copying passages from leading decisions.

[19] The passage quoted underlines the primary deficiencies that should be addressed through statutory reform; lack of clarity in the rules and principles comprising the law and the absence of a clear and deliberate policy foundation informing it.

[20] There is another reason to engage reform in this area, and that is the need to integrate fraudulent conveyances and fraudulent preferences law with the modern and efficient system of law governing creditors' rights that has been established through the reform of its other primary branches. The EMJA modernized, clarified and rationalized the law governing recovery of unsecured debt through judgment enforcement, an area that previously suffered from many of the problems manifest in fraudulent conveyances and preferences law. The pre-reform law was described, in terms that could equally be applied to the law of fraudulent conveyances and preferences, as "a patchwork of English and Canadian legislation and judge-made rules which do not fit together into a comprehensible or workable pattern," and in "urgent need of reform."[24] As noted earlier,

[23] CRB Dunlop, "Fraudulent Conveyances and Preferences: A Feasibility Study" (Paper presented to the Uniform Law Conference of Canada, August 23-26, 2004), online: Uniform Law Conference of Canada <www.ulcc.ca/en/2004-regina-sk/272-civil-section-documents/964-fraudulent-conveyances-and-preferences>.
[24] CRB Dunlop, *Creditor-Debtor Law in Canada*, 2nd ed (Toronto: Carswell 1995) at 9.

the EMJA drew much from PPSA, which replaced a fragmented and inefficient system of law governing the recovery of debt secured by an interest in personal property of the debtor. The current law of fraudulent conveyances and fraudulent preferences is oblivious to the policies, concepts and procedures incorporated in these enormously successful statutes, a fact that further militates for its reform. The law in this area is an anachronism and an anomaly in a modern system of creditor-debtor law.

III. Concepts in Reformed Legislation

1. Introduction

[21] This report surveys the central features of the Uniform Law Conference of Canada URTA. The primary provisions of the Act, the policies motivating them and their basic operation are reviewed in this Part. The comprehensive section-by-section explanation provided in the Commentary to the Act is not reproduced; readers are encouraged to consult the URTA and Commentary published with this report.

[22] The approach adopted by the Commission in addressing the ULC Report was to implicitly but tentatively recommend most, but not all, of the provisions of the draft ULC UTRA. Where changes necessary to accommodate features of Saskatchewan law were thought necessary, tentative recommendations with respect to these changes are included.

2. The Terminology

[23] Provincial law and legal commentary addressing transfers of property that undermine the rights of the transferor's creditors use the historically entrenched terminology of "fraudulent conveyances" and "fraudulent preferences". The language derives from the wording of the *Fraudulent Conveyances Act, 1571*, which elaborately and resoundingly condemns transfers,

> …devised and contrived of Malice, Fraud, Covin, Collusion or Guile to the End, Purpose and Intent to delay, hinder or defraud Creditors and others of their just and lawful Actions, Suits, Debts, Accounts, Damages, Penalties, Forfeitures, Heriots, Mortuaries and Reliefs, not only to the Let or Hinderance of the due Course and Execution of Law and Justice, but also to the Overthrow of all true and plain Dealing, Bargaining and Chevisance between Man and

> Man, without the which no Common wealth or civil Society can be maintained or continued.

[24] The statute in its complete iteration both provides a civil remedy to creditors through avoidance of the transfer and imposes the penal sanctions of fine and imprisonment against the parties. Although the penal provisions are not in effect in Saskatchewan,[25] the language of fraud reflects the central requirement of the grounds for civil recovery; namely, proof that the transferor-debtor intended in making the transfer to defeat, hinder or delay creditors. While the word "fraud" ordinarily connotes malicious intent, it has long been established that a transfer of property that will necessarily have an adverse effect on creditors may be set aside even though it might be intended to achieve a laudable goal, such as providing for family or supporting a charitable cause.[26] The word fraud and derivations thereof are interpreted today in the quite diluted sense that relief is available when a debtor knows that a transfer of property will put the property beyond the reach of creditors, but not necessarily in the sense that the transfer is maliciously motivated or even knowingly wrong either legally or morally.

[25] Reformed legislation in other jurisdictions and the reforms that would be implemented under the URTA focus on the effect of a transaction in defeating creditors' rights as the basis for relief. The debtor's intention may be relevant in some contexts but proof of intention to interfere with creditors' rights is not always required and, when it is, the relevant intention is only "fraudulent" in the limited sense just described; terminology referring to a fraudulent conveyance or preference is misleading and accordingly abandoned in the proposed Act.[27] The generic term "reviewable transaction" is adopted in the title of the Act and is used in this report to refer generally to transactions that

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[25] *Connors v Egli*, [1924] 1 WWR 1050 (Alta CA). The Court's reasoning follows the legislative path of the *Statute of Elizabeth* from the introduction of English law under the *North-West Territories Amendment Act*, 1886 (Can), c 25, s 3 through subsequent criminal enactments of the government of Canada effectively supplanting the penal provisions of the Statute. Though directed to the law of Alberta, the reasoning applies equally in Saskatchewan.

[26] The judgment in the leading case of *Freeman v Pope* (1870), 18 WR 906, LR 5 Ch 538 is the source of the aphorism that "persons must be just before they are generous".

[27] Since the early 20th century, American state law has been modeled on uniform legislation that offers a remedy without proof that the debtor actively intended to defraud or otherwise defeat creditors' rights. The first iteration was the *Uniform Fraudulent Conveyance Act*, promulgated by the National Conference of Commissioners on Uniform State Laws (now also known as the Uniform Law Commission) in 1918. That Act remains in effect in two states but has otherwise been supplanted by the *Uniform Fraudulent Transfer Act*, approved by the Conference in 1984. In 2014, the Conference issued a slightly modified revision of the Act, retitled the *Uniform Voidable Transactions Act*. All versions of the statute are available online: Uniform Law Commission <www.uniformlaw.org>. As explained in a recent article by Kenneth C. Kettering, Reporter for the 2014 Act, "The main purpose of the renaming is to replace the long-used but misleading word "fraudulent" with terminology that will not mislead." Kettering goes on to explain that "[F]raud, in the modern sense of that word, is not, and never has been, a necessary element of a claim for relief under the act. The misleading suggestion to the contrary in the act's original title has led to misunderstandings…" See Kenneth C Kettering, "The Uniform Voidable Transactions Act; or, the 2014 Amendments to the Uniform Fraudulent Transfer Act" (2014-15), 70 Bus Law 777 at 806.

interfere with creditors' rights in a manner that justifies relief. Transactions that deplete the pool of assets available to satisfy a judgment in the sense now described as a fraudulent conveyance are differentiated from those that disrupt a creditor's right to be paid according to a pro rata or modified pro rata sharing scheme, now described as a fraudulent preference. Part II of the URTA, dealing with the first type of case is subtitled "Transactions at Undervalue and Fraudulent Transactions" to signify that it applies both to transactions that have the effect of defeating creditors' rights through diminution of their debtor's asset base regardless of the debtor's intention and transactions that are "fraudulent" in the limited sense that they are intended to and do obstruct creditors by other means. A different subtitle is recommended later in this report, since the word "fraudulent" may be misleading if understood to indicate something more. The title "Transactions at Undervalue and Transactions Intended to Hinder or Defeat Creditors" would be wordier but more accurate. Part III of the Act deals with transactions that disrupt the *pro rata* creditor sharing scheme and is titled "Preferential Creditor Transactions".

[26] The defined word "transaction" is used throughout rather than conveyance, transfer or something to similar effect because the Act is not limited to transfers of property by a debtor but includes almost any action that has the effect of conferring a benefit on another person in a way that reduces the value of the asset pool available to creditors.[28] For example, a transaction may be the assumption of an obligation or the provision of unremunerated or under-remunerated services by a debtor. Fulfilment of an obligation diminishes the pool of assets that would have been available to satisfy creditors' claims if it were not assumed. The gratuitous provision of services precludes the accretion to the asset pool that would have occurred if the services were compensated. The choice of "transaction" might be criticized on the grounds that it may be taken to imply reciprocal exchange between the debtor and the person benefited, although the Act encompasses the conferral of value by a debtor with no recompense at all. However, no single word can capture the full scope of the Act. "Transaction" is suggested on the grounds that it most closely represents its subject.[29] The term "creditor transaction", also defined, differentiates a transaction that satisfies a debt in violation of the creditor sharing principle from one in which the benefit conferred reduces the asset pool available to creditors collectively.[30] "Creditor transaction" was chosen over "preferential payment" largely as a matter of statutory drafting. A "transaction" occurs when a debtor confers

[28] URTA, s 1 "transaction".

[29] It is worth noting that the title to the US counterpart of the URTA has evolved from "Uniform Fraudulent Conveyance Act" through "Uniform Fraudulent Transfer Act" to the current "Uniform Voidable Transactions Act". See Kettering, *supra* note 27.

[30] URTA, s 1 "creditor transaction".

value on another person. A "creditor transaction" is carved out as a transaction in which a debtor confers value on a creditor in satisfaction of a claim. Provisions of the Act that apply to all cases can therefore be drafted as speaking to a "transaction". The fact that a creditor transaction is objectionable to the extent that it has preferential effect is signaled in the title to Part III of the Act.

[27] The rest of this report generally follows the terminology employed in the URTA but uses the current terminology to refer to current law and in some cases juxtaposes the two in order to flag the correspondence between current law and the proposed reforms.

3. Balancing Competing Interests: The Central Policies

[28] Creditors have no need for a remedy as long as the value of their debtor's property is sufficient to satisfy all creditors' claims. Conversely, if the debtor does not have enough exigible property to satisfy creditors acting through the judgment enforcement system, nothing is gained by the declaration of a further unenforceable judgment against the debtor. [31] The URTA therefore does not provide for judgment against a debtor who has engaged in behaviour that interferes with creditors' rights. Creditors can satisfy their claims only by recovering property or value from the person who has received it from the debtor. That person is referred to in the URTA and generally as a "transferee".[32] Value gained by a transferee through the actions of a debtor represents a loss to creditors, while a statutory remedy restoring that value to creditors represents a loss to the transferee. The URTA is consciously designed to balance the interests of unpaid creditors with the interests of those who deal with a person who has unpaid creditors (transferees).

[29] That balance involves the convergence of two policies. The URTA proceeds on the foundational premise that creditors are entitled to be paid. The primary policy advanced by the Act is that voluntary action taken by debtors should not be allowed to impede their creditors' entitlement to satisfaction of their claims through the means offered by the judgment enforcement system. The Act qualifies that creditor-protection policy through recognition of the competing policy that the law should respect the reasonable expectations of those who deal with a person who has creditors. The transferee-

[31] "Exigible" is the term commonly used to describe property that is not sheltered from judgment enforcement measures by exemptions legislation. The definition in EMJA s 2(1)(u) reflects that concept. The URTA does not differentiate "exigible" property from property generally, but a few provisions are specifically addressed to exempt property. The term "exempt property" is defined for purposes of those provisions. See URTA s 1(1) "exempt property"

[32] URTA s 1(1) "transferee".

protection policy reflects the need to preserve the finality of legitimate commercial transactions.

[30] The Act employs a combination of strategies to balance the interests of creditors and transferees. Most importantly, the grounds for an order in favour of a creditor are defined in a manner that allows potential transferees to recognize and assess the risk of dealing with a person who may have unpaid creditors. Other features of the Act, including the flexible order for relief and the limitation of action period, circumscribe the risk that does exist within reasonable bounds. These points will be elaborated in the discussion that follows.

4. Principal Features of the Act

(i) Scope of the Act: Transfers of Value

[31] The current provincial law of fraudulent conveyances allows the court to avoid transfers of property by a debtor that hinder or defeat creditors' rights. While transfers of property may have been the primary concern of creditors in Elizabethan England, many other voluntary actions taken by a debtor confer a quantifiable benefit on another person and correspondingly deplete the asset base that would otherwise have been available to his or her creditors. This is recognized to a limited extent in the BIA provisions under which a "transfer at undervalue" subject to attack by a trustee in bankruptcy includes the provision of services for which no consideration is received by the debtor or for which the consideration received is of conspicuously incommensurate value.[33] The financial worth of a debtor who provides services for free is depleted to the extent of the amount by which it would have increased had they been provided at market rates. The URTA takes a similar approach but goes further through a definition of "transaction" that includes the conferral of a benefit of any kind on another person. Implicitly, the benefit must have a quantifiable monetary value; a non-exclusive list of transactions is provided. For example, a debtor who forgives a debt owed to her or him by another person will have diminished her or his asset base to the extent that it would have been augmented were the debt paid. The net result is the same as if the debtor were paid and then gifted the amount received back to the person who paid it, or to someone else. Release of the debt is a transaction under the statutory definition.

[33] BIA, s 2 "transfer at undervalue".

[32] Current fraudulent preferences law is even more limited in scope than is the law of fraudulent conveyances. *The Fraudulent Preferences Act* allows creditors to challenge only a transfer of property *other than money* in satisfaction of a debt.[34] This restriction may have been intended to shelter the ordinary course payment of routine debt from attack, but it produces anomalous and indefensible results. The scope of the cause of action should be defined in terms that reflect the conditions under which the payment is made, not the medium through which it is effected. The URTA permits creditors to challenge a payment made to another through the conferral of a benefit by any means that directly or indirectly diminishes the paying debtor's asset base if the grounds for relief are established.

(ii) The Order for Relief

[33] The *Fraudulent Conveyances Act, 1571* provides that a transfer of property subject to sanction is deemed to be "utterly void, frustrate and of none Effect" but only as against a person "disturbed, hindered, delayed or defrauded". *The Fraudulent Preferences Act* adopts the same approach in relation to both fraudulent preferences actions and fraudulent conveyances actions falling within its scope. The impugned transaction is "void as against any creditor or creditors injured, delayed or prejudiced."

[34] This language raises a number of problems of interpretation. It is not clear whether the transaction in question is void from the outset or merely voidable as declared by the court, or what the precise implications of either interpretation might be, especially taking into account the clear intention that the transaction is void as against some people but not necessarily as against the world at large. The language suggests that the transaction is not void in the literal sense that it either does not exist in law or is to be completely reversed through judicial avoidance. The court is left to the uncertain task of how the statutory language should be given effect through the order granted. What is clear is that the transferee is forced to relinquish in whole or in part the property received from the debtor, or perhaps its value, in favour of the transferor's creditors.[35]

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[34] See *The Fraudulent Preferences Act*, s 8. For commentary on the effect of the equivalent provision of the Alberta statute, see Dunlop & Buckwold, *supra* note 19 at 1150-52.

[35] See Dunlop and Buckwold, *ibid*, at 1061-64. See an examination of this issue in *Guthrie v.Abakhan* [2017] BCJ No. 405 (BCCA) by Madam Justice Newbury at para 18:

> I agree that the better view is that the Act does *not* operate so as to "re-vest" the conveyed property in the grantor, nor to allow the grantor to set up his or her fraudulent act as a basis on which to re-claim it from the grantee. Rather, as stated by Anglin J. in *McGuire v. Ottawa Wine Vaults Co.* (1913) 48 S.C.R. 44, "... the relief granted is properly confined to setting aside the impeached conveyance, thus removing it

[35] The URTA implements a nuanced and carefully detailed approach to the order for relief. The primary elements of the remedial scheme established by Part IV are threefold. First, the statute states the objective to be attained by the court through the order granted in relation to a Part II or a Part III action, respectively. Second, the court is offered a list of types of order that might be granted alone or in combination to achieve the stated objective. Third, the court is directed to have regard to qualifying factors that will affect the specific terms in which the order is framed.

[36] In the case of a transaction under Part II (transaction at undervalue or one intended to defeat creditors generally), section 16 states that the object of the order is to make available to the applicant creditor the value conferred on the transferee under the transaction to the extent of the applicant's claim, taking into account the types of orders and the qualifying factors indicated in section 18. The idea is to restore to the applicant creditor the value lost through the transaction. In the case of a creditor transaction under Part III (a preferential payment), section 17 states that the court shall make an order that effectively sets aside the transaction, taking into account the qualifying factors. The idea here is to simply reverse the payment and consequently channel the amount received by the paid creditor into the creditor sharing scheme that was circumvented.[36]

[37] The court may achieve the stated objectives through a range of orders listed in section 18(2), including through a transfer of property or payment of a sum of money by the transferee, a sale of property, the authorization of direct creditor action against property in the hands of the transferee, and various others, some of which are directed to particular types of transaction. The orders contemplated respond to questions for which there are no answers under current law, such as whether a transferee must reimburse creditors for income earned on property received from the debtor that would otherwise have been available to creditors as income of the debtor.

[38] The qualifying factors specified in sections 18(4) and (6) are among the elements of the legislation designed to provide reasonable protection to the interests of transferees who are not complicit in any overt wrongdoing. These are factors that the court is directed to consider in defining the terms of its order.

[39] Section 18(4) applies to an order granted under Part II of the Act; that is, in an application challenging a transaction at undervalue or a transaction intended to obstruct creditors

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as an obstacle to the creditor's recovery under executions against their [*sic*] debtor." (At 56.) It is then open to the creditor to pursue such additional remedies as may be necessary, including (as we have seen) the registration of a judgment against land, a declaration of trust, etc.

[36] The Commission suggests in Part IV under heading B.2.b. that the wording of section 17 be slightly revised.

generally as distinguished from an application challenging a preferential creditor transaction. The court is directed to adjust the order in favour of the transferee in recognition of the amount of value given by the transferee, if any. Where the order divests the transferee of the property or includes an amount compensating for income earned on the property, the order should be adjusted in recognition of expenditures that increased the value of property received or were invested in generating income. In effect, a transferee will be required to disgorge value received from the debtor without consideration given in exchange: the transferee loses the benefit only to the extent it was gained gratuitously. To use a simple example, if the transferee paid the debtor $40,000 for an asset worth $100,000, the terms of the order would enable the applicant creditor to recover property or money equivalent to $60,000. The transferee does not lose both the value of the asset and the amount invested in acquiring it. If the property generated revenues of $2,000 in the hands of the transferee through an investment of $1,000, creditors would recover only the $1,000 profit.

[40] Section 18(4) also directs the court to take into account actions taken by the transferee in reasonable reliance on the finality of the transaction under which a benefit was received. This provision is designed to allow the court to refuse or limit the extent of an order where a transferee has acted reasonably on a gratuitously received benefit in circumstances such that it would be unfair to order him or her to disgorge its value. While the provision leaves scope for interpretation, it should be applied in a manner that does not undermine the more specific provisions of the Act defining the grounds for relief. The court should not refuse relief merely to protect a sympathetic transferee. The Commentary to the Act illustrates the kind of case in which a transferee may not be required to pay for gratuitous value received; for example, when an insolvent debtor pays a reasonable living allowance or provides unremunerated domestic services such as childcare to a family member. Although the case would fall strictly within section 7(1)(a), discussed below, the recipient should not be forced to repay the amount of the allowance or reimburse creditors for the value of the services.

[41] Section 18(6) applies to an order for relief under Part III in relation to a preferential creditor payment. The court may adjust the terms of an order to take into account expenditures or investments made by a paid creditor that have increased the value of property received under a creditor transaction if the transferee is divested of the property under the order for relief.

[42] Part IV also includes a provision designed to bring enforcement of an order for relief within the distributions rules of the judgment enforcement law of an enacting jurisdiction. The interface between an order under the URTA and the EMJA distribution rules raises

issues of policy and administration that are not addressed in the ULCC report. These issues are extensively explored further in later in this report.[37] The remedial provisions of the Act also resolve any uncertainty about how property or money recovered from a transferee is to be divided among creditors, where there is more than one. Section 18(3) is designed to refer distribution to the rules that would have applied were the property or money recovered in judgment enforcement action against the debtor. The reference in Saskatchewan would be to the distribution scheme applied by the EMJA to the proceeds of judgment enforcement proceedings taken against property of a debtor. This point is addressed further in Part IV.

(iii) The Grounds for Relief: Transactions at Undervalue and Transactions Intended to Defeat Creditors (Fraudulent Conveyances)

a. The requirement of intention to hinder or defeat creditors

[43] Section 3 of the *Fraudulent Preferences Act* applies to fraudulent *conveyances* and requires as a preliminary condition of relief that that the debtor was insolvent or imminently insolvent when he or she undertook the transaction subject to attack. A creditor who seeks to challenge a transfer of property by a solvent debtor, or a debtor who cannot be proven insolvent at the relevant time, can sue under the *Fraudulent Conveyances Act, 1571,* which contains no similar requirement. A more formidable obstacle to success and the most problematic feature of the current law of fraudulent conveyances is that creditors who seek relief under either statute must prove that the debtor intended to hinder or defeat creditors by transferring away the property in question. The requirement is objectionable for at least three reasons.

[44] The first problem with the intention test is that it lacks a defensible policy foundation. The law generally assumes that debtors are required to pay their debts regardless of whether they subjectively wish to do so. A debtor who simply doesn't pay a creditor is obliged through the mechanism of judgment enforcement law to give up his or her property to satisfy the debt, regardless of whether non-payment was maliciously motivated. State of mind is not relevant. Similarly, the question of whether a debtor has transferred away property or other value with the intention of defeating creditors is immaterial. What matters is the effect of the transaction on creditors' ability to recover satisfaction. An effects-based test should be the foundation of grounds for relief; a transaction that has the effect of defeating or materially obstructing creditors should be

[37] Part IV heading B.3.c.

subject to challenge provided that the law takes into account the legitimate interests of the person who has benefitted under it.

[45] The second problem with current law is that the need to prove intention makes litigation highly unpredictable. The courts have adopted and debated a list of evidentiary propositions, some of which are described as "presumptions" and some as "badges of fraud", any of which may or may not be applied to determine the debtor's intention in a given case. Most notable is the persistent debate over whether intention to defeat creditors may be inferred from the fact that a transaction had the necessary effect of defeating creditors. Some courts say that intention to defeat creditors irrefutably flows from the proposition that a person must intend the natural consequences of his or her actions: a transaction that in fact hinders or defeats creditors must have been so intended. Others suggest that a transaction may be valid if undertaken for a motive other than to do creditors harm, even though it may have had that undesirable result.[38] This uncertainty over the principles to be applied is exacerbated by the uncertainty produced by their actual application to a given set of facts. What one judge views as compelling circumstantial evidence of intention to defeat creditors may be regarded by another as legitimate financial planning. A lawyer asked by a client whether a particular transaction is or is not afoul of the law will generally be forced to offer a highly conditional answer.

[46] The problem of uncertain outcomes is particularly great where the debtor has transferred property in a transaction prejudicial to creditors in exchange for some amount of consideration. A creditor who can prove that the debtor intended to hinder or delay creditors can have the transaction avoided only if the transferee knew of the debtor's intent in the sense deemed material. The courts have struggled both to determine what amount of consideration makes a transfer one for value within the scope of this principle, and to define the degree of knowledge on the part of a transferee that justifies avoidance. Notice or knowledge that the transaction would harm the transferor's creditors is not necessarily sufficient; some courts have held that the transferee must be in some way complicit in the debtor's intention to obstruct them.[39] To complicate matters further, it is not clear where the burden of proof lies in relation to the transferee's state of mind. Must

[38] See Dunlop & Buckwold, *supra* note 19 at 1026-39.

[39] The state of the law is described by Dunlop & Buckwold, *ibid.* at 1054:

> "Puzzling" is a fair description of the courts' continuing struggle to decide what evidence regarding the transferee is need to prevent the conveyance for consideration from being safe from a creditor's fraudulent conveyance action…. The courts have developed a smorgasbord of inconsistent and conflicting tests for deciding whether the transferee's state of mind deprives them of the defence. Commentators and law reform commissions have underlined the lack of one dominant test and the resulting confusion and muddle.

the plaintiff prove that the transferee has the proscribed degree of knowledge of the debtor's intention, or must the transferee prove lack of knowledge by way of defence?

[47] Finally, the factual and evidentiary burden of proving state of mind means that creditors will rarely undertake the daunting and expensive project of seeking to recover property lost to them through their debtor's activities, regardless of the merits of their claim.

[48] To summarize, the intention test as the foundation of current law represents unsound policy, produces unpredictable outcomes and operates as a disincentive to creditor action; the law is highly ineffective as a device for protecting creditors' rights under the judgment enforcement regime. The solution adopted by the URTA is to offer three grounds for relief, all of which depend on the effect of the transaction on creditors' rights of recovery and the most significant of which has no regard to the intention prompting the transaction in question. The three grounds for relief are defined respectively by sections 7(1)(a), 7(1)(b) and 7(1)(c).

b. Grounds for relief under the URTA

i. The debtor is insolvent and receives no consideration or consideration worth conspicuously less than the value given: section 7(1)(a)

[49] Creditors seeking redress under the URTA would undoubtedly rely most often on section 7(1)(a) as grounds for relief. That section offers a remedy if the debtor is presently or imminently insolvent at the date of a transaction and the transferee receives property or other economic benefit from the debtor for no consideration or for consideration worth conspicuously less than the value received; that is, the transaction is wholly or substantially a gift. Since an insolvent debtor is by definition unable to satisfy creditors' claims, a transfer of value that diminishes the debtor's asset base correspondingly diminishes the ability of creditors to recover and necessarily hinders or defeats their rights. While the debtor's intention is not a factor in the cause of action, one may assume that an insolvent or nearly insolvent debtor is or should be aware that a course of action depleting his or her asset base will have an adverse effect on creditors.

[50] On the surface, URTA section 7(1)(a) proceeds entirely on the basis of the creditor-protection policy. However, it implicitly embodies the balancing of interests discussed in Part III under heading C above. A transferee stands to lose the benefit received from the debtor only if he or she gave no consideration at all in exchange, or the consideration given was "conspicuously less" than the value given by the debtor. This approach gives

effect to the policy that a person who deals with a debtor should be vulnerable only if they are in a position to recognize the risk inherent in the transaction presented. The term "conspicuously less" denotes that it would be obvious to a reasonable person dealing with the debtor under the circumstances in question that they are getting a deal that might be described in non-legal terms as "too good to be true", or that fails the "smell test". A person who is offered property or another benefit for conspicuously less than the consideration paid should be alert to the likelihood that the debtor is in serious financial straits or otherwise prompted by motives that may be legally suspect. A transferee who does deal with a debtor on terms falling within section 7(1)(a) is offered significant protection by the remedial scheme of the Act, discussed further below. One who is not privy to a deliberate scheme to defeat creditors stands to lose the value received in excess of the consideration given but will be allowed to retain or recover the amount actually paid.

[51] The approach represented by section 7(1)(a) is not novel. It was introduced in the United States under the *Uniform Fraudulent Conveyances Act* proposed in 1918 by the National Conference of Commissioners on Uniform State Laws, and has been a feature of the law of most states for many decades.[40] Creditors could challenge a transfer of property under that Act if a debtor did not receive "fair consideration" from the transferee and the debtor was insolvent or would be rendered insolvent by the transaction.[41] The test as revised in 1984 in the re-named *Uniform Fraudulent Transfers Act* required creditors to prove only that the debtor did not receive "reasonably equivalent value".[42] The change in wording was designed to establish that the transferee's good faith is not a factor in determining the adequacy of the consideration given.[43] American law was and is grounded on our shared English legal heritage as represented by the *Fraudulent Conveyances Act, 1571* and, like the URTA, it provides alternative grounds for relief where a transaction is intended to defeat creditors, regardless of the consideration exchanged.[44] The lack of an intention requirement when the challenged transaction involves an insolvent debtor who

[40] *Supra* note 27.

[41] The statute does not refer to the debtor's state as "insolvent" but describes circumstances that amount to insolvency as it is generally understood, being either insufficient assets to satisfy debts or inability to pay debts as they become due. See the *Uniform Fraudulent Transfer Act*, Uniform Law Commission, 1984, §4(a)(2).

[42] As at the date of writing, either the *Uniform Fraudulent Transfer Act* or its replacement, the *Uniform Voidable Transactions* Act, was enacted or introduced in 46 states, the US Virgin Islands and the District of Columbia. One state (Maryland) retains the *Fraudulent Conveyances Act.* (See data posted by the Uniform Law Commission online: <www.uniformlaws.org> and Kettering, *supra* note 27 at note 11.)

[43] See the *Uniform Fraudulent Transfer Act*, Uniform Law Commission, 1984, (renamed the *Uniform Voidable Transactions Act*, Uniform Law Commission, 2014), Official Comment, §3.

[44] For a short history of United States law and a review of the correspondence between state law and federal bankruptcy law, see Kettering, *supra* note 27.

receives less than the value given to the transferee has clearly proven to be a satisfactory approach, even though the test of less than "reasonably equivalent value" given for the benefit received from the debtor is significantly less protective of transferees than the URTA test of consideration "conspicuously less than" the benefit received. There was no movement to revise this part of the Act when it was amended in 2014 to add a choice of law provision and make other relatively minor adjustments, including a further change in title to the *Uniform Voidable Transactions Act*.[45]

[52] The ULCC working group did not attempt to define what is "conspicuously less" than value received from the debtor. Its meaning is self-evident and further elaboration is as likely to obfuscate as to clarify. The question is one of judgment. Is it obvious that the transferee paid far too little for what he or she got from the debtor? Would a reasonable person dealing with the debtor under the circumstances prevailing at the time have regarded the amount paid as obviously and substantially less than the value received? Any kind of mathematical test would be potentially over-inclusive or under-inclusive in any given case and its application would depend on the court's ability to precisely and accurately value the benefits exchanged. For example, if conspicuously less than commensurate value were defined as 40% or less, the court would be required to determine if the value given by a transfer was 39% or 41% of what was received, and the test would discriminate between transactions on the basis of a 1 or 2 percentage difference in value. Furthermore, a difference of 20% in values exchanged might be a conspicuous discrepancy in a multi-million dollar transaction but nothing more than a good sale price in a $500 transaction. Even an 80% discount might not constitute a conspicuously low price in the context of a retail sale of relatively low value consumer goods; it depends on the circumstances. The BIA adopts a similar test in the provisions addressing a transfer at undervalue, which are defined as "a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor."[46] The ULCC working group chose not to include a reference to "fair market value" in its formulation on the view that it could confuse the issue of whether valuation is to be based on ordinary market rates or on the circumstances of the actual transaction, which might be such that market rates are inappropriate.

[45] *Uniform Voidable Transactions Act,* Uniform Law Conference 2014.

[46] The BIA provisions differ from those of the URTA in other respects, most notably in retention of an intention requirement as grounds for attacking a transaction.

ii. The debtor intends to and does obstruct creditors: sections 7(1)(b) and 7(1)(c)

[53] The URTA overcomes the primary source of difficulty under current law by abandoning proof that the debtor intended to hinder creditors as the basis for relief under the grounds defined by section 7(1)(a). However, it recognizes that relief should be available where a debtor does intend to defeat or obstruct creditors by means of a transaction and succeeds in that objective, if the circumstances are such that the transferee is in a position to recognize the risk of losing the benefit received. This is accomplished by the provision of two intention-based grounds for relief, represented by sections 7(1)(b) and 7(1)(c), respectively.

[54] Section 7(1)(b) offers relief when the debtor's primary intention is to hinder or defeat recovery by creditors if in fact the transaction has that effect and the debtor receives no consideration from the transferee or consideration worth conspicuously less than the value of the benefit conferred by the debtor. As under section 7(1)(a), the transferee who receives a gratuitous benefit or gives "conspicuously less" than what he or she received from the debtor is in a position to recognize that the transaction may be suspect and to decide accordingly whether or not to proceed.

[55] Section 7(1)(c) offers relief where debtor and transferee were complicit in a plan to defeat or obstruct the debtor's creditors. The risk of the transaction is clearly apparent to the transferee in such a case. A transferee who knows that the transaction was intended by the debtor to obstruct creditors cannot claim the benefit of the factors that would otherwise qualify an order for relief under section 18(4). In other words, the transferee will not be permitted to retain or recover any value invested in the transaction or in property received under it.[47]

[56] Sections 7(1)(b) and (c) both require proof that the challenged transaction materially hindered creditors' ability to recover. As pointed out in the Commentary to section 7, this requirement will rarely be met where the debtor is solvent, since solvency generally means that the debtor has property or an income stream against which a judgment may be enforced. However, a solvent debtor may successfully hinder creditors by removing property from the jurisdiction or converting it into a form that is otherwise difficult to reach under judgment enforcement measures.

[47] URTA, s 18(5).

[57] Proof of intention is addressed in section 7(3), which offers a non-exclusive list of factors that the court may consider in determining the intention of the parties to a transaction.

iii. Special cases

[58] Current law offers one set of rules for attacking all transfers of property that have the effect of hindering or defeating creditors. This produces uncertain and unfair results in some cases, the most significant of which are those involving payments of money and transfers of property in satisfaction of legally recognized spousal claims to support and division of property. Questions abound. Is a transfer of property pursuant to a spousal property settlement void or valid according to whether a debtor-transferor was or was not conscious of its effect on his or her creditors' rights of recovery? Can a transfer of property under a bona fide separation agreement or court order be undone if it is subsequently challenged by creditors of the transferring spouse? How can a lawyer properly advise a client with respect to such an agreement or order without delving into the mind of the other spouse or former spouse?

[59] The URTA includes provisions dealing specifically with transactions between spouses whose relationship is no longer intact where the transaction is effected by a separation agreement, as defined, or a court order for division of property or support. Such transactions, designated “spousal transactions”, may only be challenged under the grounds prescribed by section 7(1)(c); that is, only where the parties collusively intended to defeat the creditors of one of them. The rationale for this approach is discussed in the commentary to section 8(1). The essential question is whether the transaction is jointly intended by the parties as a creditor avoidance device or as a legitimate settlement of spousal and family affairs necessitated by the breakdown of their relationship. A failure to fully disclose creditors’ claims in an action for support or division of property or an attempt by either or both parties to hide facts material to relief under the Act are among the factors that the court is invited to consider as evidence of intention to avoid creditors.

[60] Section 8 of the URTA also restricts the grounds for relief in relation to three other categories of transaction; a transaction under which a debtor refuses to act under a power of appointment, a transaction involving the provision of a guarantee or indemnity, and a transaction other than a spousal transaction that is effected by an order of the court. The first two cases are treated in the same way as spousal transactions; creditors are entitled

to relief only under section 7(1)(c).[48] In the case of non-spousal transactions effected by court order, creditors are entitled to relief on the grounds established in either section 7(1)(b) or (c).[49] Both require proof that the transferor intended to hinder or defeat creditors by means of the transaction and achieved that result. The commentary to section 8 sets out the rationale for and operation of the provisions governing these exceptional cases.

[61] Section 9 deals with the special case of transactions that consist of the purchase or redemption of its own shares by a debtor corporation or the payment of dividends. These rules are designed to supplement and interface with provisions of the *Canada Business Corporations Act* [CBCA] and *The Business Corporations Act* of Saskatchewan [SKBCA] that apply to the authorization of such payments by corporations that are insolvent or rendered insolvent by the payment.[50] The URTA provisions differ from those of the corporations statutes. Both the CBCA and the SKBCA provide for recovery *by the corporation* from directors who have authorized the payment.[51] A director who is liable under those provisions may recover from a shareholder who benefited.[52] However, there is no provision that allows creditors to recover either from the director who authorized a payment that adversely affected their ability to recover from the corporation or from the shareholder who benefitted by the payment.[53] The URTA allows creditors to recover from the shareholder who was paid and potentially from a director who authorized the payment. Directors and shareholders are shielded from "double jeopardy" through the stipulation that a person against whom an order is granted under a corporations statute is not subject to an order under the URTA. If the URTA is enacted, the SKBCA should be amended to reciprocally provide that a person against whom an order is granted under the URTA is not subject to an order under the SKBCA.

(iv) The Grounds for Relief: Creditor Transactions (Fraudulent Preferences)

a. The requirement of intention to defeat creditors

[48] URTA ss 8(2)(b) and (c).
[49] URTA s 8(3).
[50] *Canada Business Corporations Act*, RSC 1985, c C-44 [CBCA]; *The Business Corporations Act*, RSS 1978, c B-10 [SKBCA].
[51] See CBCA ss 34(2), 36(2), 42 and 118(2) and corresponding SKBCA ss 32(2), 34(2), 40 and 113(2).
[52] CBCA s 118(4), SKBCA s 113(4).
[53] Both statutes allow creditors to recover from a shareholder who benefited under a special resolution authorizing a reduction in the corporation's stated capital when the corporation was insolvent or became insolvent as a result. See CBCA s 38(4), SKBCA s 36(4).

[62] Like the law of fraudulent conveyances, the current law of fraudulent preferences provides a remedy where a debtor intends to harm creditors; in this case, where the debtor transfers property to a creditor "with intent to give that creditor a preference" over another creditor or creditors. The problems associated with the intention requirement as it applies here are essentially the same as those that accompany the intention requirement of fraudulent conveyances law. It advances the wrong policy, creates uncertain outcomes and presents evidentiary obstacles that make it very difficult for creditors to successfully challenge a payment that violates their right to share.

[63] Anti-preference law interferes with the payment of debt by requiring the paid creditor to disgorge a payment received so it may be allocated proportionally among the creditors of the paying debtor.[54] As noted in Part II - 3, this is justified by the need to protect the creditor sharing regime established by law. The creditor sharing principle is recognized and implemented to the fullest extent under the law of bankruptcy. The property of a bankrupt debtor is liquidated by the trustee and divided among creditors in accordance with the distribution scheme imposed by the BIA. Subject to the prior right of payment granted to secured and preferred creditors, unsecured creditors are to be paid through allocation of the bankrupt's estate *pro rata* in proportion to the amount of their claims. The BIA includes provisions designed to prevent debtors and creditors from circumventing the distribution scheme through pre-bankruptcy payments made to select creditors. A paid creditor is preferred over others to the extent that he or she recovers more than would have been recovered under a bankruptcy distribution. Outside of bankruptcy, the right of debtors to pay creditors as they wish is qualified by the creditors' relief legislation described in Part II - 3. Provincial anti-preference law is justified by the need to protect the creditor sharing rules embodied in judgment enforcement law through the provisions of Part XII of the EMJA.

[64] The payment of one creditor harms others in a legally materially sense only if it interferes with their existing or potential right to share under a law that implements the creditor sharing principle. As a matter of policy, there is no good reason to differentiate between payments that may be challenged and those that may not on the basis of whether the debtor intended to give a preference. The harm does not flow from the debtor's intention in making the payment, for good or ill. It flows from the effect of the payment. In spite of its apparent deference to intention as the foundation of relief, the *Fraudulent Preferences Act* recognizes this through an effects-based rule that supplements the intention requirement. A payment made by an insolvent or nearly insolvent debtor is void as against

[54] The question of whether all creditors of the debtor should share in property recovered through a remedial order is discussed below under heading IV.B.3.c.

creditors if it has the effect of giving the paid creditor a preference and is challenged within six months of its date.[55] Unfortunately, it is not at all clear when a payment has the effect of giving a preference. While section 6 purports to define a transaction that is deemed to do so, the meaning of the provision is obscure.[56] The debtor-intention requirement prevails when the effects-based rule cannot be applied.

[65] Aside from its dubious foundation in policy, the debtor intention requirement makes for great uncertainty in any advising lawyer's attempt to predict the outcome of potential litigation.[57] Judges have decided that a payment cannot be set aside if the debtor's *dominant* motive was something other than the conferral of a preference, even though the debtor may have recognized that the payment would have preferential effect. A payment stands if it was made in response to pressure exerted by the paid creditor or in the hope of remaining in business, or if prompted by various other motives regarded as legitimate. Furthermore, the courts may require a creditor who challenges a fraudulent preference to establish at least that the paid creditor knew that the paying debtor intended to confer a preference and, in some cases, that the paid creditor actively participated in that objective, even though the statute makes no reference to the paid creditor`s state of mind.

[66] The need to prove intention to prefer by the debtor along with culpable knowledge or intention on the part of the paid creditor imposes an extremely challenging evidentiary burden on creditors who might seek to invoke *The Fraudulent Preferences Act*. Other obstacles include the limited scope of the *Act*, which allows creditors to challenge only payments made through the transfer of property other than money.[58]

b. Grounds for relief under the URTA

[67] The URTA implements the foundational policy that payments to creditors may be challenged if they undermine the right of creditors to recover satisfaction through resort to the property of their joint debtor according to a sharing scheme imposed by law. What

[55] *The Fraudulent Preferences Act*, s 5.
[56] See Dunlop & Buckwold, *supra* note 19 at 1121 – 37 for a full discussion of the problems associated with application of the effects-based rule as it appears in the corresponding Alberta *Fraudulent Preferences Act* provision.
[57] The problems outlined here are discussed in detail in Dunlop & Buckwold, *ibid.*, at 1096 - 1120.
[58] *The Fraudulent Preferences Act*, s 8 provides that a payment of money to a creditor for fair consideration cannot be attacked. Since the debt paid will have arisen from a transaction in which the debtor received consideration equivalent to the value of the debt (e.g. in the form of goods or services), satisfaction of a debt by payment of money is effectively immune from challenge.

matters is not whether the debtor intended to prefer one creditor over others, but whether the effect of a payment is that the recipient is paid proportionately more. However, that policy operates with less force under provincial law than it does in bankruptcy, where it is most fully implemented. Provincial law does not impose a general rule under which creditors are entitled to be paid proportionately. It requires a creditor to share only if he or she takes steps to recover payment through enforcement of a judgment, and even then the distribution rules of the EMJA require sharing of the proceeds of enforcement action only among judgment creditors who have registered a judgment and delivered an enforcement instruction to the sheriff, not among unpaid creditors generally. The limited operation of the creditor sharing principle under provincial law suggests that provincial preferences law should be limited in scope and, to the extent possible, should be consistent with the anti-preference rules of the BIA.[59]

[68] The restricted application of the sharing principle as implemented in the EMJA presents a technical challenge in determining when a payment has preferential effect. In principle, a definitional rule would require valuation of the debtor's assets available for the satisfaction of creditors' claims relative to the individual and cumulative amounts owed to creditors who qualify to share in those assets, which in turn would require identification of the class of creditors whose claims count under the sharing principle and the date at which their claims must be assessed.[60] The solution adopted by the URTA is relatively simple, produces predictable outcomes, is consistent with the BIA and is defensible as a matter of policy.

[69] Under section 13(1), a creditor transaction may be set aside if the creditor receiving payment was not dealing at arm's length with the debtor in relation to the payment and the debtor was insolvent or verging on insolvency when the payment was made. The remaining subsections of section 13 are designed to incorporate by reference the provisions of the BIA that determine when people are at arm's length. This aligns the anti-preference rules of the URTA with the BIA rules that apply to a payment by an insolvent person to a non-arm's length creditor during the 12 months preceding bankruptcy.

[70] This extract from the working group report explains the rationale for section 13:[61]

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[59] See Reform of Fraudulent Conveyances and Fraudulent Preferences Law, Part 2: Preferential Transfers, Final Report of the Working Group (Winnipeg 2011), *supra* note 5 at 3 – 5.

[60] For example, should the calculation take into account only amounts owed to those who have obtained and registered a judgment when the payment is made, or should it include the claims of all those who were creditors at the time and who therefore might obtain and register a judgment? How would those claims be identified?

[61] Reform of Fraudulent Conveyances and Fraudulent Preferences Law, Part 2: Preferential Transfers, Final Report of the Working Group (Winnipeg 2011), *supra* note 5.

> [11] A payment by a debtor who is insolvent or becomes insolvent shortly thereafter will almost invariably constitute a preference in fact. Since the state of insolvency means that the debtor is by definition unable to satisfy all creditors in full, the creditor who is paid voluntarily will receive a proportionately greater recovery than those creditors who are not…. [T]he payment of one of two or more creditors by an insolvent debtor in itself produces a preference in the vast majority of cases. In the result, the circumstances that constitute a voidable preference under the BIA are substantially the same as those that constitute a preferential payment under the proposed legislation, though the rules are formulated differently.

[71] This approach both adopts a clear effects-based rule and balances the interests of a transferee-creditor who receives payment with those of creditors generally. A creditor who is not dealing at arm's length with the debtor in relation to the payment in question is in a position to know or at least strongly suspect that the debtor is insolvent or in precarious financial circumstances and that anti-preference law may be invoked by the payment. As in the case of transactions at undervalue, the grounds for relief are defined in terms that facilitate a reasonable assessment of risk on the part of a person who receives property from a debtor.

[72] The decision to restrict the application of the Act to non-arm's length payments is explained by the working group as follows:[62]

> [14] The recommendations of the working group allow only payments to non-arm's length creditors of an insolvent or nearly insolvent debtor to be recovered by other creditors. Payments to arm's length creditors are not vulnerable. This approach is supported by the general policies of limited interference with the payment of creditors and substantial consistency with the BIA, outlined above. Payments to arm's length creditors can rarely be challenged under the BIA; they are void only if made [by an insolvent debtor][63] within the 3 month period prior to bankruptcy and the debtor intended to give the recipient creditor a preference over another creditor. Although a presumption of intention to prefer arises from the preferential effect of a payment, the presumption is readily rebutted (e.g. the payment is made in the "ordinary course", the debtor's dominant intention was to remain in business or the payment was elicited by a "diligent creditor" through ordinary collection measures). The creation of a provincial cause of action designed to maintain the desired consistency of approach with the BIA would require the imposition of a 3 month limitation period and retention of the intention to prefer test that is a primary factor in the dysfunctional state of existing law. Such an approach would serve only to create uncertainty without offering creditors any meaningful protection against disproportionate voluntary payments.

[62] Reform of Fraudulent Conveyances and Fraudulent Preferences Law, Part 2: Preferential Transfers, Final Report of the Working Group (Winnipeg 2011), *supra* note 5.

[63] The words in square brackets are added to the text of the report for clarification.

> [15] The decision to exempt arm's length payments from challenge is inferentially supported by the approach taken in other countries and by existing law, all of which implement a policy of limited intervention. The preference rules that apply under the bankruptcy law of other jurisdictions protect arm's length payments by various means, whether by requiring proof of intention to prefer, exempting "ordinary course" payments or sheltering recipients who were unaware of the debtor's fragile financial circumstances. All are plagued by uncertainty and none have proven entirely satisfactory. Although payments to arm's length creditors can in theory be challenged as preferences under current provincial law, the substantial restrictions imposed and defences offered by the legislation mean that the theory rarely bears out in practice. Successful preference actions almost always involve payments to non-arm's length creditors and in practice arm's length creditors are rarely party to a calculated attempt to avoid the creditors' relief law that would otherwise limit their recovery to a proportionate share of the debtor's non-exempt assets. In short, the law generally does not permit interference with arm's length payments. Little is to be gained by attempting to devise rules that will separate legitimate from wrongful arm's length payments and whatever modest benefits might be achieved would be outweighed by the costs flowing from the uncertain outcomes produced by ambiguous rules.

[73] The URTA abandons the distinction made in *The Fraudulent Preferences Act* between payments of money, which are not subject to challenge, and payments effected by a transfer of property of another kind. As the foregoing extract suggests, the need to leave payments that might be regarded as routine or "ordinary course" untouched is met by restricting the anti-preference rules to non-arm's length payments. Payments of money by an insolvent debtor to a person who is not at arm's length in relation to the payment are not ordinary course in the sense that the recipient would not anticipate a claim for relief by other creditors.

(v) Standing to Seek Relief

[74] The question of who may challenge a fraudulent conveyance under current law is remarkably perplexing. Section 3 of *The Fraudulent Preferences Act*, which addresses fraudulent conveyances rather than fraudulent preferences, provides that a transfer of property by an insolvent or nearly insolvent person with intent to defeat "his creditors or any one or more of them, is void as against the creditor or creditors injured…." This is taken to mean that only a person who is a creditor at the date of the transaction in question has standing to seek redress under the Act. In contrast, the *Fraudulent Conveyances Act, 1571* is addressed to transfers intended to harm "creditors and others". As interpreted by the courts, the word "others" allows a person whose claim arose after the date of the impugned transaction to sue. Substantial case law exists on the question

of who is a "creditor" under either statute, and likely more on the difficult question of who qualifies as an "other" under the *Fraudulent Conveyances Act, 1571*. It suffices here to say that the rules of standing are complex, uncertain and greatly in need of clarification.[64]

[75] The URTA resolves the uncertainties of current law on the related questions of who has standing to challenge a transaction and when a person who has standing may commence proceedings under the Act. Standing under Parts II (transactions at undervalue and transactions intended to hinder or defeat creditors) and III (preferential payments) respectively will be discussed separately.

[76] The first condition of standing under Part II is that a person seeking relief must hold a "claim" against the debtor as defined in section 1, which is a claim in law that may result in a money judgment. Section 6 speaks to the date at which the claim must have arisen. A person who has a claim at the date of the transaction in question may challenge it under any of the grounds for relief; that is, on the grounds that the debtor was insolvent or imminently insolvent and the transaction depleted his or her asset base because no consideration or conspicuously little consideration was received from the transferee in exchange for the value given, or on the intention-based grounds. Section 6(2) ensures that a person who has commenced an action on a claim that has not yet been proven by judgment before the transaction occurred has standing under that rule.

[77] A transaction that falls within the grounds for relief inherently prejudices creditors who hold claims at the time it occurs. Those whose claims arise after the transaction are in a different position. While they may not recover what they are owed in full or at all, that result flows from the debtor's financial circumstances at the time the claim arose, not from a transaction that predated it. They are in the same position they would have been in if the debtor had never had the property lost. A person whose claim arose after the date of a transaction may therefore challenge it only under the intention-based grounds for relief; that is, only when the transaction was intended by the debtor to impede existing or anticipated creditors and it in fact had that consequence. This ensures that a debtor cannot intentionally avoid an anticipated future claim by transferring away assets before the claim materializes.

[78] The rules of standing in an application under Part III are defined in section 12 and are relatively simple. Only a person who has a claim at the date of a creditor transaction may

[64] On meaning of "other" under the *Fraudulent Conveyances Act, 1572*, see *Hamm v Metz*, 2002 SKCA 11. For a full discussion of the question of standing, see Dunlop & Buckwold, *supra* note 5 at 991 – 1005.

seek an order for relief. This follows from the fact that a payment can only have preferential effect relative to the claims of existing creditors. Future creditors have no right to share.

[79] Sections 6 (Part II) and 12 (Part III) confer standing on the substantive basis that a person has a claim against a debtor the enforcement of which is prejudiced by a transaction between the debtor and a transferee. Section 5 determines when a person who has such a claim may commence an action under the URTA for relief against the transferee who has benefited by the debtor's action. A person who has a claim against the debtor need not have judgment on the claim as a condition of proceeding under the URTA. However, an order cannot be obtained against the transferee-defendant until the claim has been proven by judgment, either in a separate proceeding or through joinder of the debtor in the URTA action. The transferee is liable only to a person whose claim against the debtor is demonstrably valid and enforceable through judgment enforcement proceedings. A person who does not have judgment against the debtor must therefore commence an application under the URTA in time to avoid foreclosure of relief against the transferee by the limitation of actions period and seek a stay of proceedings if necessary to accommodate whatever steps may be required to obtain judgment on the claim against the debtor.

(vi) Transactions Involving Exempt Property

a. The function of exempt property

[80] The term "exempt" here refers to property that is legislatively exempted from judgment enforcement measures against its owner. Conversely, "exigible" property is property that is not exempt so is subject to judgment enforcement measures. Exemptions law is generally designed to ensure that a judgment debtor is permitted to retain sufficient property and income to live and to support his or her family at a basic level of existence, presently and in the future.

[81] The design of a law governing a debtor's dealings with exempt property raises two questions of policy. First, should relief be available against a transferee who receives property that was exempt in the hands of a transferor-debtor? Second, should the law allow creditors to claim exempt property procured by a debtor in exchange for exigible property?

b. Transfers of exempt property

[82] The legislation that now governs fraudulent conveyances and fraudulent preferences does not address the question of whether creditors are entitled to claim exempt property transferred by a debtor to another person and the courts have generally concluded that they are not. That conclusion is based on the view that the transfer does not represent a loss to creditors. If creditors could not enforce against the property in the hands of the debtor, they lose nothing when the debtor disposes of it. The ULCC working group was initially persuaded by that view and recommended that it be incorporated in reformed legislation. However, reaction to that recommendation prompted reconsideration resulting in the revised recommendation implemented by the URTA. Creditors may recover property transferred away by the debtor if the transfer falls within the grounds for relief, regardless of whether the property was exempt in the hands of the debtor. The approach taken in the URTA is consistent with, though broader in effect than, the approach embodied in Saskatchewan judgment enforcement legislation.

[83] Under the EMJA and *The Land Titles Act*, registration of a judgment creates an enforcement charge against property of a judgment debtor. The judgment underpinning the charge may therefore be enforced against the property in the hands of a transferee from the judgment debtor, unless the transferee takes free of or has priority over the charge under a priority rule. It seems reasonably clear that an enforcement charge may be enforced against property acquired by a transferee even though the property was exempt and accordingly not subject to judgment enforcement measures in the debtor's hands, though that conclusion depends on a somewhat convoluted reading of the legislation. The provisions that apply to land differ from those that apply to personal property.

[84] The EMJA states that registration of a judgment in the Personal Property Registry creates an enforcement charge on "exigible" personal property of the judgment debtor,[65] but the definition of "exigible property" indicates that the term includes property owned by a person other than the judgment debtor that is subject to an enforcement charge. Since an enforcement charge could only arise through registration of a judgment against the judgment debtor, this must mean that if a judgment is registered, property that was exempt in the hands of the judgment debtor is subject to a charge in the hands of a transferee from the debtor and accordingly available to satisfy the judgment, subject to any priority rule operating in favour of the transferee. In other words, the charge arises

[65] EMJA s 22(1).

and is enforceable when exempt property is transferred by the debtor to someone else. Since a registered judgment will be disclosed by a search of the Personal Property Registry, a person who elects to acquire personal property from a judgment debtor is in a position to recognize the risk of losing it to judgment enforcement measures.

[85] *The Land Titles Act* dictates a similar result with respect to land, though by different means. Registration of an interest based on a judgment gives rise to an enforcement charge on the judgment debtor's interest in land, without regard to whether the land is or is not exempt.[66] Although a charge generally has priority over an interest acquired by a transferee, special provision is made for land that is exempt. Subsection 173(6) provides:

> 173(6) When land that is exempt from judgment enforcement pursuant to *The Enforcement of Money Judgments Act* or any other Act is sold to a purchaser for value *pursuant to a transaction that is not a fraudulent conveyance*, the sheriff shall procure the discharge of an enforcement charge affecting the land on receipt of the net proceeds of the purchase money (emphasis added).

[86] The implication of the provision is clear. A transferee who acquires exempt land from a judgment debtor under a transaction that *is* a fraudulent conveyance takes subject to an enforcement charge affecting the land. Although the judgment could not have been enforced against the land while it was exempt in the hands of the judgment debtor, it can be enforced as against a transferee if the transaction is a fraudulent conveyance. The policy embedded in the legislation governing land supports our interpretation of the EMJA provisions affecting personal property. If the legislature intended that a judgment can be enforced against exempt land of a judgment debtor when the land has been transferred to a transferee, the same intention presumably applies to enforcement against exempt personal property.

[87] The approach recommended by the ULCC working group and reflected in Saskatchewan judgment enforcement legislation is consistent with the rationale for exemptions law. Property is exempt only while it serves the function protected by exemptions legislation. Once it no longer serves that purpose, the grounds for the exemption fall away. For example, a person who ceases to be a farmer can no longer claim an exemption for agricultural equipment that he or she is no longer using to earn farm income. Similarly, a farm debtor who transfers exempt agricultural equipment to someone else has implicitly decided that the equipment is no longer required for the purpose protected by the

[66] *The Land Titles Act*, SS 2000, Part XVIIII Division 3.

exemption; the exemption is abandoned with respect to that item for that debtor. If a different asset of the same kind is acquired in substitution, the exemption will attach to the new asset. In short, there is no reason to protect the property in question from creditors once it is no longer being used by the debtor for the purpose the exemption is designed to serve.

[88] The URTA's approach to exempt property also avoids the inconsistent outcomes that would result if a transfer of exempt property could not be challenged. Judgment enforcement law operates only when a judgment has been obtained. As we have seen, registration of a judgment against the judgment debtor protects judgment creditors from loss of a debtor's exempt property to third party transferees, provided the property remains identifiable and can be located after the transfer. The URTA extends that protection to those whose legal claims have not been reduced to judgment. A creditor who obtains and registers a judgment the day before the debtor transfers away exempt property is protected by the enforcement charge arising under judgment enforcement legislation while a creditor who obtains judgment against the same debtor the day after the transfer has no recourse under that law and can only look to reviewable transactions law to recover.

[89] The URTA also avoids the potential doubling of an exemption. Assume that a debtor owns a truck worth $10,000, which is currently the amount of the motor vehicle exemption under the EMJA and *The Enforcement of Money Judgments Regulations*.[67] If the debtor gives the truck to her son and then purchases a car, the debtor will be entitled to claim a $10,000 exemption with respect to the car. If creditors are not allowed to recover the truck from the debtor's son, $20,000 worth of property belonging to the debtor will be effectively lost to creditors.

[90] The decision to allow creditors to seek relief against a transferee of exempt property creates a potential problem if the debtor continues to use the property post-transfer for the function attracting the exemption. This is most likely to occur in relation to the debtor's home. For example, a farm debtor might convey title to his or her farm residence to a daughter or son but continue to farm and continue to reside in the house. Section 20 of the URTA responds to the problem by allowing the court to suspend the enforcement of an order for relief against the transferee until the debtor ceases to use the property in the manner attracting the exemption and, if such an order is granted, to order that a judgment be registered against the transferee or the property. This provision reflects an

[67] EMJA, s 93(1)(e); *The Enforcement of Money Judgments Regul*ations, RSS c E-99.22 Reg 1 s 23(3) [EMJA Regulations].

approach that has been taken by Saskatchewan courts under current law.[68] The result is to protect the property as long as it continues to be used by the debtor for the exempt purpose. We address section 20 in Part IV under heading 2(ii)b While we suggest that the provision not be retained precisely as drafted in the URTA, our recommendations produce the same result.

c. Transfers of non-exempt property in exchange for property that is exempt

[91] Under the URTA, a transaction that involves the exchange of non-exempt for exempt property may be challenged only if it falls within the ordinary grounds for relief. In practice, this means that such a transaction is not subject to challenge if the values exchanged are reasonably equivalent, unless the parties to the transaction are complicit in an attempt to hinder or defeat the transferor's creditors.[69] From a financial point of view, the loss to creditors is likely to be greatest when a debtor invests exigible funds in the purchase of a house or farm homestead, or in a registered retirement savings plan [RRSP] or other registered plan that attracts a statutory exemption.[70] While some would argue that a debtor should not be permitted to shelter assets from creditors by exchanging non-exempt for exempt property, the policies supporting the approach recommended by the ULCC working group and incorporated in the URTA are persuasive. Its implications are explained in the working group report:[71]

> [44] The … 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

[68] See *Petryshyn v Kochan*, [1940] 2 WWR 353 (Sask KB).

[69] The case would fall within URTA s 7(1)(c).

[70] EMJA ss 93(1)(l) and EMJA Regulations s 23(4) and (10) together create an exemption for an interest in one house, house trailer or equivalent facility and the land on which it is situated to the extent of $50,000 in value, if the property is maintained by the judgment debtor as an active residence. These provisions are supplemented by EMJA s 93(2), which precludes seizure of a property that falls within s 93(1)(l) so long as it is maintained by the judgment debtor as an active residence. The monetary amount of the exemption is therefore only potentially relevant with respect to the proceeds of sale of a residence claimed as exempt. Under *The Saskatchewan Farm Security* Act, SS 1988-89, c S-17.1, s 66(k), the farm homestead exemption precludes seizure of the farmer's residence and farm land on which it is situated to the extent of 160 acres. Section 66 gives farmers substantial exemptions for farm equipment, vehicles and livestock. For the exemption of registered plans, see *The Registered Plan (Retirement Income) Exemption Act*, SS 2002, c R-13.01.

[71] 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 (Halifax 2010), *supra* note 5.

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.

…

[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). *[Note: Cause of action #1 corresponds with URTA s 7(1)(a), cause of action #2 with s 7(1)(b) and cause of action #3 with s 7(1)(c).]*[72]

[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.

[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. The definition of transaction gives effect to current case law under which

[72] Note added to the text of the report for clarification.

> 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.[73]

(vii) Limitation of Actions

[92] Proceedings under fraudulent conveyances and fraudulent preferences law are presumably subject to the general limitation periods that apply to a "claim" under *The Limitations Act*.[74] Read together, sections 5, 6 and 7(1) require a claimant to commence proceedings within two years of the day on which he or she knew or ought to have known that the injury or loss complained of had occurred, and in any event not later than 15 years from the day on which the act or omission on which the claim is based took place.[75] The running of the period is suspended during any time in which the person against whom the claim is made, in this case a transferee from a debtor, wilfully conceals the injury or loss or the act or omission causing it, or wilfully misleads the claimant as to the appropriateness of proceeding.[76] If these rules were applied to an action under the URTA, the 2 year period would begin to run when the creditor seeking relief knew or should have known that the debtor had transferred property, performed services, or conferred a benefit in some other form on another person under circumstances that justify a remedy. The limitation period would be longer if the creditor could establish that the transferee wilfully concealed the transaction or wilfully misled the creditor as to their potential legal

[73] 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 Saskatchewan Insurance Act*. For the relevant provisions, see *The Saskatchewan Insurance Act*, SS 2015, c I-911 ss 1-22(1) "beneficiary", "insurance money" and s.8-27. There is a distinction between the annuity contract itself and the money that becomes payable on the happening of an event designated in the contract of annuity. With respect to the exemption of the annuity contract where a qualifying beneficiary is designated, see *Re Klatt*, 2005 ABQB 492 explaining the equivalent provisions of the *Insurance Act*, RSA 2000. See *Potter v Miller*, 2001 SKQB 244 with respect to the exemption of annuity payments that have become payable to the insured, regardless of whether a beneficiary other than the insured has been designated.

[74] *The Limitations Act*, SS 2004, c L-16.1, s 2(a) provides that "claim" means a claim to remedy an injury, loss or damage that occurred as a result of an action or omission.

[75] Under *The Limitations Act*, s 6(2), a claimant is presumed to have known of the injury or loss on the day on which the act or omission on which the claim is based took place, unless the contrary is proved.

[76] *The Limitations Act*, s 17.

remedy. This means that a person who has received property or another benefit from a debtor under a transaction within the scope of the Act could be exposed to an action seeking its recovery *in specie* or in money's worth years after the transaction was concluded, and the period of exposure would vary as among creditors, each of whom might acquire knowledge of the transaction at different times. A transaction that is safe from challenge by Creditor 1, who is well-appraised of the debtor's financial affairs, could be challenged by Creditor 2, who is not.

[93] One of the central motivating policies of the URTA, discussed earlier in Part III, is the need to preserve the finality of transactions and, within reasonable limits, to protect the interests of those who deal with a person who has creditors. A knowledge-based limitation rule would make it extremely difficult to know when a transaction may be regarded as clearly settled and beyond challenge. The URTA therefore imposes a limitation period of one year beginning at the date of a transaction rather than the time when an applicant creditor knew or should have known of the transaction, except where the transferee has concealed or assisted in the concealment of the transaction or facts material to the grounds for relief, in which case the limitation period runs one year from the date that the person applying for relief knew of the transaction or facts concealed to a maximum of 5 years from the date of the transaction.[77]

[94] While the URTA's approach to the time when the limitation period begins to run is plainly appropriate, the proper length of the period is not beyond debate. The one year limitation period recommended by the ULCC working group reflects a legitimate concern for finality of transactions. Grounds for relief that do not require proof that a debtor intended to obstruct or defeat creditors will allow them to recover more readily than they can under current law, and transferees from an insolvent debtor are commensurately more exposed to an order divesting them of property or exacting monetary compensation for value gratuitously received. The limitation of action rules of the URTA function as a substantive restriction on the grounds for relief, not merely as incentive to proceed expeditiously. The advantage offered to creditors through the terms of the grounds for relief is counterbalanced in favour of transferees by the limited period during which a transaction is subject to challenge. To quote the working group report, "The 1 year limitation period

[77] URTA s 24(3) provides a special limitation rule for proceedings launched by a trustee in bankruptcy of a transferor-debtor. The comment to the provision states that it responds to the fact that the trustee may challenge transactions at undervalue and preferential transactions under both the BIA and provincial law. While that statement is true under current law, the Commission recommends later in this report that the trustee in bankruptcy does not have standing to seek relief under the URTA. See the discussion below under heading IV.2.ii.a.v.

in effect circumscribes the cause of action and the risk imposed by the law on transferees."[78]

[95] While this view is persuasive, reasons for application of the standard two year rule in this context deserve mention.[79] The working group report notes that creditors may be expected to be reasonably diligent in monitoring debtors' affairs and in pursuing claims.[80] This is likely true of commercial lenders and credit grantors who are cognizant of the risk of non-payment but it may not be true of less sophisticated creditors and those whose claims do not arise from a lending or credit transaction. By way of comparison, the limitation of actions rules imposed by United States legislation offer considerably more scope for litigation challenging a transaction at undervalue than the rule adopted in the URTA. The *Uniform Voidable Transactions Act* allows transactions to be challenged for up to 4 years after they occur[81] and in some states the period is even longer.[82] This relatively generous limitation period is particularly significant when the debtor becomes bankrupt because the Bankruptcy Code allows the trustee to invoke state law to challenge pre-bankruptcy transactions. Those that fall outside the shorter reach-back period defined by the internal avoidance provisions of the Code may be caught.[83]

[96] A middle ground alternative would be to provide a one year limitation period where the applicant relies on URTA clause 7(1)(a) and a more extended period where litigation is based on clauses 7(1)(b) or (c), which require proof that the debtor's primary intention in entering into the transaction was to avoid existing or reasonably foreseeable claims.[84] A claimant who can prove that intention could be allowed to commence proceedings within

[78] Reform of Fraudulent Conveyances and Fraudulent Preferences Law (Transactions at Undervalue and Preferential Transfers), Part 1: Transactions at Undervalue & Fraudulent Transactions, Supplementary Report of the Working Group (Winnipeg 2011), *supra* note 5.

[79] The ALRI Report accepts the URTA limitations rules without further discussion.

[80] Reform of Fraudulent Conveyances and Fraudulent Preferences Law (Transactions at Undervalue and Preferential Transfers), Part 1: Transactions at Undervalue & Fraudulent Transactions, Supplementary Report of the Working Group (Winnipeg 2011), *supra* note 5. The group was asked by the ULCC to reconsider the recommended limitation rules when they were initially presented in the 2010 Final Report on Part I and did so. The recommendation was reaffirmed in the 2011 Supplementary Report.

[81] *Uniform Voidable Transactions Act, supra* note 27, §9. The 4 year period runs from the date of the transaction where the grounds for relief do not require proof of intention. Where the transaction is challenged on the grounds that it was intended to hinder, delay or defraud a creditor the four year period is extended. The claimant may commence proceedings beyond the 4 year limit but must do so within 1 year of the time he or she discovered or could reasonably have discovered the transfer.

[82] Charles Jordan Tabb, *The Law of Bankruptcy*, 2nd ed. (New York: Thomson Reuters/Foundation Press, 2009), at 483 and see *Uniform Voidable Transactions Act*, *ibid.*

[83] Tabb, *ibid.* Tabb discusses the trustee's right to invoke state law generally at heading "C. The Trustee as Successor to Actual Creditors: §544(b)" at 480 *et seq.* In most other respects, the transaction at undervalue rules of the Bankruptcy Code resemble those of the UFTA. See generally Tabb, "F. Fraudulent Transfers".

[84] The *Uniform Voidable Transactions Act* takes a middle-ground approach. See note 81, *supra*.

two years from the date of the transaction, or perhaps within one year of the time she or he should reasonably have known it had occurred. A bifurcated limitation rule along these lines was considered in plenary ULCC discussions but was rejected on the basis that it would largely undermine the goal of litigation certainty. Claimants who do not commence proceedings within a year of the transaction would simply allege that the debtor intended to defeat her or his creditors, thereby reigniting the expensive, protracted and uncertain litigation associated with the intention-based test under current law. As already noted, a discovery rule is undesirable due to the different limitation periods that would result as among creditors with different degrees of knowledge of the debtor's affairs.

[97] To be clear, the Commission's support for the URTA approach to commencement of the limitation period is unqualified. However, the Commission is open to other views on its length. While a one-year rule may be appropriate, a two-year rule is not plainly untenable. This may be a point on which input elicited through consultation will influence the approach eventually adopted if the URTA is enacted in Saskatchewan. It is worth noting that the four year limitation period that applies in the United States to litigation attacking transactions at undervalue, including in cases in cases in which relief is offered on the basis of the effect of the transaction without proof of the debtor's state of mind, does not seem to have attracted criticism. The limitation period was not changed when the *Uniform Fraudulent Transfer Act* was reviewed and renamed in 2014 as the *Uniform Voidable Transactions Act*. While we do not advocate extension of the limitation period beyond *The Limitations Act* standard of two years, the U.S. experience suggests that an extremely short period is not essential as protection for transferees in a system that eschews proof of intention as a requirement of relief.

(viii) Choice of Law

[98] The URTA offers a remedy to creditors of a debtor as against a transferee who has received a benefit from the debtor under circumstances that prejudice the creditors' right to enforce their claims against the debtor's property. The Act does not provide a choice of law rule that would determine whether and to what extent the Act applies in a proceeding challenging such a transaction. This is likely to produce significant uncertainty when one or more of the elements of a transaction or dispute are located outside provincial boundaries. A choice of law rule would identify the criterion that determines the application of the URTA, as opposed to the law of another jurisdiction. The question, then, is what criterion should be selected. The range of potentially tenable possibilities

includes the location of the debtor at the time of the transaction, the law governing the agreement under which the transaction occurred (where an agreement is involved) or the situs of the property or other benefit that was transferred under the transaction.[85]

[99] Although the problem of choice of law may arise under current law, there are no statutory rules or developed jurisprudence guiding its resolution.[86] The approach adopted must therefore be based on an analysis of the relevant factors. Those factors suggest that the location of the debtor at the time of the transaction giving rise to an application for relief is the appropriate criterion.

[100] The first factor to be considered is the nature of the proceeding. The law that permits creditors to seek relief in relation to a transaction that has the effect of defeating or impeding their rights of enforcement against property of a debtor is intimately related to the judgment enforcement system and may be considered an aspect of that system. The claim for relief is based on interference with creditors' existing or prospective right to enforce a judgment. Since any such judgment is a judgment against the defendant-debtor, the focus of enforcement action is the debtor. Once obtained, a judgment will be recognized throughout Canada and, on the authority of the Supreme Court of Canada, may not be challenged on its merits in the jurisdiction in which enforcement is sought.[87] An order made under the URTA by a Saskatchewan court should be respected and enforced by the courts of other provinces and territories under the principles governing the recognition of Canadian judgments.

[101] Secondly, the debtor is the connection between the creditor who applies for relief and the transferee against whom relief is sought; both have dealt with the debtor and the rights and interests of each arise from their respective dealings. People generally are, or certainly should be, alert to the fact that their dealings with others may be affected by the law to which those others are subject by virtue of their residence or location. To put it more concretely, someone who deals with a Saskatchewan resident or a legal entity located in Saskatchewan should recognize that Saskatchewan law defining the rights of that person's creditors is relevant to any dealings with that person. The application of the

[85] The location of the transferee at the time of the transaction or the location of the applicant creditor at the time of the transaction are clearly not worthy of consideration. The rights of creditors who deal with a Saskatchewan debtor should not be determined by the location of a foreign transferee. Conversely, the rights of a transferee should not be determined by the location of unknown and unknowable creditors. Further, where a debtor has creditors located in more than one jurisdiction a rule based on location of the creditor would make a transaction potentially subject to more than one law.

[86] See MA Springman et al, *Frauds on Creditors: Fraudulent Conveyances and Preferences*, looseleaf (Toronto: Carswell, 2009) at 11-1 *ff.*

[87] *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077.

law of the debtor's location is consistent with the reasonable expectations of those who deal with the debtor, either as creditor or as transferee.

[102] Thirdly, the selection of location of the debtor as the criteria for choice of law recommends itself for lack of a better alternative. A choice of law rule based on the location of the property or other form of benefit transferred under the transaction would be problematic when a transaction involves property located in more than one jurisdiction, services provided in more than one jurisdiction, or some form of property or benefit that does not have an obvious location, such as forgiveness of a debt. A choice of law rule based on the law governing the transaction between debtor and transferee would ignore the nature of the claim as part of the enforcement process and, where the transaction is contractual in nature, may allow the debtor and transferee to thwart creditors' rights of enforcement through a contractual choice of law.

[103] Finally, it is worth noting that the Uniform Law Commission of the United States recently approved a choice of law rule in its *Voidable Transactions Act* based on the location of the debtor. The proceedings authorized by the Act are similar in many respects to those falling within Part II of the URTA, including in the definition of grounds for relief. The official comment to the enacting provision notes that it provides a simple and predictable choice of law rule applicable to claims for relief of the nature governed by the Act. The comment includes this further observation: [88]

> Basing choice of law on the location of the debtor is analogous to the rule set forth in U.C.C. § 9-301 (2014), which provides that the priority of a security interest in intangible property is generally governed by the local law of the jurisdiction in which the debtor is located. The analogy is apt, because the substantive rules of this Act are a species of priority rule, in that they determine the circumstances in which a debtor's creditors, rather than the debtor's transferee, have superior rights in property transferred by the debtor.

[104] The PPSA, the Canadian counterpart to UCC Article 9, includes the same choice of law rule for security interests in intangibles.[89]

[105] To conclude, the applicable law turns on characterization of the nature of the claim. Since the claim under the URTA relates to enforcement of a judgment, the governing law is properly the law to which the debtor is subject by virtue of his, her or its location. In this

[88] National Conference of Commissioners on Uniform State Laws, *Uniform Voidable Transactions Act* (Formerly *Uniform Fraudulent Transfer Act*, as amended in 2014), *supra* note 27, Official Comment to s 10.
[89] PPSA s 7(2).

context, dealings with a debtor located in Saskatchewan are properly governed by Saskatchewan law and, conversely, dealings with a person located in another jurisdiction are not.

(ix) Other Matters

a. Generally

[106] The URTA includes a number of provisions that are not canvassed in this report because they are either relatively minor in terms of policy or largely technical in effect. All are explained in the commentary to the URTA and, aside from the two that are briefly addressed below, warrant no further discussion.

b. The position of secured creditors

[107] The law of fraudulent conveyances and fraudulent preferences is designed to protect unsecured creditors, who have no right of recourse against their debtor's property until action is taken through the judgment enforcement system. The law allows them to recover property that would have been available to them under that system, were it not for the debtor's actions. Secured creditors do not need that protection. Their claims are secured by an interest in the debtor's property that follows the property into the hands of a transferee under the principle of *nemo dat* and can be enforced through seizure post-transfer, except where a statutory priority rule intervenes to cut off the creditor's interest or subordinate it to that of the transferee for reasons of policy. While neither the *Fraudulent Conveyances Act, 1571* nor *The Fraudulent Preferences Act* speaks expressly to the status of secured creditors, relief under both statutes is limited to creditors who are harmed by their debtors' dealings with their property. Since secured creditors are generally able to recover notwithstanding a transfer of the collateral or any other property owned by their debtor, they generally have no claim.

[108] The URTA deals explicitly with the position of secured creditors. Section 3 provides in effect that a secured creditor may only obtain relief under the Act to the extent that the debt owed is unsecured.

[109] Section 4 includes technical rules designed to resolve the complex issues that may arise as a result of the interface between the URTA and the priority rules of the PPSA governing

security interests. It resolves any debate over whether creditors may challenge a transfer of property that is subject to a security interest if the security interest is cut off or subordinated in favour of the transferee under a PPSA rule. The same question arises in connection with the priority system introduced by the EMJA. The issue in that context is whether creditors can challenge a transfer of property that is subject to an enforcement charge if the charge is cut off or subordinated in favour of the transferee under an EMJA rule. The URTA makes it clear that such a transfer can be challenged. However, where property subject to a security interest is involved, relief is available only to the extent that the property in question would have been available to unsecured creditors acting under the EMJA if the transaction had not occurred. A more comprehensive explanation of the rationale for and the operation of the provisions of section 4 is provided in the Commentary to the Act.

c. Secondary transferees

[110] Current law does not allow creditors to follow property transferred by a debtor beyond the first transferee. If the person who receives it from the debtor transfers it to a second transferee, *The Fraudulent Preferences Act* allows the creditors to recover the proceeds or their amount from the first transferee, unless that person is an "innocent purchaser".[90] The Act does not provide for recovery against the second transferee. This means that creditors may be defeated if the property is transferred more than once.

[111] Section 11 of the URTA allows creditors to recover under Part II against a second or subsequent transferee, unless the person against whom relief is sought (a) gave consideration having a value not conspicuously less than the value of the benefit he or she received through the chain of transactions starting with the debtor and (b) does not know that the initial transaction occurred in circumstances that constituted grounds for relief. Section 15 allows creditors to recover under Part III against a second transferee who was not dealing at arm's length with the first creditor or a subsequent transferee who is part of a chain of transactions, each of which was not at arm's length. The BIA similarly allows a trustee to recover property originally transferred under a transaction at undervalue or preferential payment from a secondary transferee, though under somewhat different rules.[91]

[90] *The Fraudulent Preferences Act*, s 13(1).
[91] BIA, s 98.

IV. Implementing the *Uniform Reviewable Transactions Act* in Saskatchewan

1. Enactment of the Uniform Reviewable Transactions Act

[112] The Commission has concluded that the *Uniform Act* represents good policy and, if implemented in Saskatchewan, would strengthen the judgment enforcement system and greatly clarify the rights of creditors and the corresponding liability of those who deal with a person who has creditors. It is comprehensive in scope and includes rules addressing questions that are either not addressed by current legislation or for which there are no clear answers. It can be modified to interface with Saskatchewan legislation governing creditors' rights of enforcement; in particular, with the EMJA and the PPSA. The preparation and implementation of a Saskatchewan version of the Act would require a modest investment of government resources and would have little impact on administrative practices within the civil enforcement system.

TENTATIVE RECOMMENDATION #1: Legislation based on the *Uniform Reviewable Transactions Act* should be enacted in Saskatchewan, with such modifications recommended elsewhere in this report that provide appropriate interface with existing Saskatchewan legislation.

2. Proposed Deviations from Uniform Reviewable Transactions Act

(i) Minor Wording Changes

a. Title of the Act

[113] The abbreviation URTA has been used throughout this discussion to connect the proposed legislation with the ULCC draft Act. The title to the legislation as enacted in Saskatchewan would be "*The Reviewable Transactions Act*" without the prefatory "*Uniform*". Hereinafter the proposes Saskatchewan Reviewable Transactions Act is referred to as SRTA.

b. Part II Title

[114] Part II of the URTA is titled "Transactions at Undervalue and Fraudulent Transactions". The first part of the title accurately reflects the grounds for relief in section 7(1)(a). The second part is intended as a short-hand reference to the grounds for relief in sections 7(1)(b) and (c). Those provisions require proof that the debtor's primary intention in entering into the transaction is "to hinder or defeat the right of a creditor or creditors to recover". The language does not indicate "fraud" or any variant of that word and, as noted in Part III of this report under heading B, the use of the word "fraudulent" in this context may be misleading. It is recommended that the title to Part II be amended to use the longer but more accurate description, "Transactions at Undervalue and Transactions Intended to Hinder or Defeat Creditors".

TENTATIVE RECOMMENDATION #2: The title of Part II of the SRTA should be "Transactions at Undervalue and Transactions Intended to Hinder or Defeat Creditors"

(ii) The Interface Between a *SRTA* and Saskatchewan Judgment Enforcement Legislation

a. Section 18(3): Linking the order for relief to The Enforcement of Money Judgments Act distribution rules

i. The policy of creditor sharing

[115] Section 18 of the URTA sets out rules guiding the form of the order for relief. Subsection 18(3) is designed to link an order under the Act to the distribution scheme of the judgment enforcement law of an enacting jurisdiction, whatever that law might be. It provides:

> 18(3) An order for relief must be made in those terms or subject to those conditions that the court considers necessary to make money payable or the value of property to be transferred under the order available for distribution to the persons qualified under [*insert name of province's or territory's creditors' relief statute*] to share in the proceeds of judgment enforcement measures taken against the debtor.

[116] This wording suggests two policies. First, the provision is intended to invoke judgment enforcement law distribution rules, which generally require enforcing judgment creditors

to share the proceeds of enforcement measures with other qualifying creditors. Second, it is intended to make it clear that the creditors entitled to participate in a distribution of property recovered under the Act are those of the transferor/debtor, not those of the transferee.

[117] The commentary to the URTA uses this example as a basis for explaining the thinking behind the provision.

> Debtor transfers property to Transferee. Transferee gives no consideration and the circumstances constitute grounds for relief under Part II. Applicant Creditor, whose unsecured claim is worth more than the value of the property, seeks an order against Transferee.

[118] Subsection 18(3) is based on the assumption that, if the transfer had not occurred, Applicant Creditor could have obtained judgment against the Debtor-transferor and had the property in question sold through judgment enforcement proceedings. In Saskatchewan, the proceeds of sale would be a "fund" under the EMJA and would be distributed to creditors of the debtor according to the rules in Part XII. The creditors of the Transferee should not be permitted to share in a fund produced by the URTA action since it is the creditors of the Debtor-transferor who have been harmed and who are accordingly compensated. However, the operation of UTRA subsection 18(3) in the context of section 16 of the Uniform Act raises a very difficult policy issue that must be addressed in a Saskatchewan version of the Act.

[119] While subsection 18(3) appears to apply the creditor sharing policy to property or value recovered through a URTA action, one of the central provisions describing the order for relief suggests a different result. URTA section 16, which applies to an order granted under Part II, directs the court to make "any orders that it considers necessary to make available *to the person who applies for relief* the value conferred on the transferee under the transaction *to the extent of that person's claim against the debtor*…" (emphasis added). The first italicized passage suggests that the fruits of a successful URTA action should go only to the person or persons who elected to challenge the debtor's action through litigation – in other words, need not be shared with creditors who are not party to the proceedings. However, the commentary to the Act contradicts that conclusion:

> Section 16 limits the extent of the order for relief to the amount of the applicant's claim. The applicant is not required to prove the existence or extent of other claims but others may join in the proceedings. Joint proceedings will be to the applicant's advantage if they allow for a greater recovery based the cumulative value of the applicants' claims, since whatever is recovered will be subject to the creditors' relief rules (at p. 45).

[120] Section 16 would render a paid creditor-transferee liable to disgorge the benefit of a payment received only to the extent of the claim of the person or persons who elect to challenge the payment through litigation.

[121] While sections 16, and 18(3) are collectively ambiguous, it appears on balance that the URTA is intended to respect the historical creditor-sharing principle of Canadian judgment enforcement law, described earlier in this report. However, the draft Act does not address the policy and technical issues raised by its interface with the judgment enforcement law of any given jurisdiction, and could not reasonably have done so given the enormous variation in the laws currently in place across the country. As is noted later in this report, the Commission has tentatively concluded that it is not possible to implement the policy of URTA section 16 and, at the same time, bring orders under a Saskatchewan version of the URTA within the operation of the EMJA.

[122] The general objective of the URTA is to put creditors of a person who has engaged in a creditor-avoiding transaction in the position they would have been in if the transaction had not occurred by allowing them to recover property or value lost to a person who has dealt with a debtor under the transaction. While the objective is easily stated it is difficult if not impossible to fully achieve in the context of a sharing system such as the EMJA. A series of simple scenarios illustrates the problem of achieving post-transaction results that parallel the circumstances prevailing pre-transaction.

Scenario 1: Pre-transaction

Assume that Debtor has creditors X, Y and Z. Assume that Debtor does not engage in a transaction subject to challenge under the SRTA. Creditor X obtains a judgment against Debtor and instructs the sheriff to act under the EMJA to enforce the judgment. Y and Z will be entitled to share if they have obtained judgments against Debtor and delivered an enforcement instruction to the sheriff by the time a fund is constituted, or within the period of time specified by the Act after receiving notice of the fund.[92]

Scenario 2: Post-transaction A

[92] EMJA ss 107 – 109.

Assume that Debtor has creditors X, Y and Z, as above. However, Debtor engages in a transaction subject to challenge under the SRTA before any creditor takes enforcement action. Creditor X then obtains a SRTA order against the transferee requiring the transferee to disgorge $50,000, the amount of X's claim against Debtor. Subsection 18(3) and the URTA commentary suggest that X must share with Y and Z, if they have obtained judgments against Debtor and delivered enforcement instructions to the sheriff by the time the fund created by enforcement of the order obtained by X is constituted.

Scenario 3: Post-transaction B

The facts are the same as in Scenario 2 with one additional fact. Another person, Creditor W, acquires a claim and obtains a judgment against Debtor after the transaction subject to challenge occurs but before Creditor X obtains a SRTA order against the transferee requiring the transferee to disgorge $50,000, the amount of X's claim against Debtor. If X is in principle required to share property recovered under the order with other creditors of Debtor, Creditor W, whose claim arose after the transaction occurred, is entitled to participate along with Creditors X, Y and Z, whose claim arose before the transaction.

[123] The EMJA provides some modest qualifications to the sharing principle in three ways.[93] First, the EMJA confines the class of creditors entitled to share in the proceeds of judgment enforcement to those who have not only obtained judgment but also delivered an enforcement instruction to the sheriff. Second, it offers a significant bonus to a judgment creditor who has instructed the sheriff to take the enforcement action that produces a fund. The instructing creditor bonus recognizes the money and effort committed to the enforcement process and encourages a creditor who might have a smaller claim than others to take enforcement proceedings. Third, and most significantly in this context, the EMJA provides that a fund produced by enforcement measures is to be paid out to any creditors who were parties to an interpleader proceeding that produced the fund before any other creditor is paid. Payments to interpleading creditors rank above even the instructing creditor bonus, which is next in line. Any unsatisfied portion of the claims of interpleading creditors and the instructing creditor, along with the claims of other judgment creditors, are paid on a *pro rata* basis from what remains in the fund, if anything. It is only here that the sharing principle comes into play.

[93] See EMJA s 110.

[124] An interpleader proceeding as contemplated in the EMJA is an application to court launched by a judgment creditor or creditors claiming that property owned or ostensibly owned by someone other than the judgment debtor is subject to judgment enforcement measures against the debtor. For example, a creditor might interplead to establish that property registered in the name of a debtor's child or a corporate entity is in fact beneficially owned by the debtor and therefore subject to enforcement measures against the debtor. A creditor might interplead to establish that property sold by a judgment debtor to a buyer is subject to an enforcement charge that is not cut off or subordinated by a buyer-protection priority rule, such that the property is available to judgment creditors of the debtor. In these cases and others, a judgment creditor interpleads to seek a judicial determination of whether the property claimed by someone other than the debtor may be seized to enforce a judgment against the debtor.

[125] If an interpleader succeeds, the EMJA provides in effect that the creditor or creditors who initiated and financed the proceeding are to be paid in full from the proceeds of the property subject to enforcement before general judgment creditors receive a share. That result is justified by the fact that the property recovered through the interpleader proceeding would not have been available to any of the judgment debtor's creditors if the interpleading creditors had not taken action. The interpleading creditors are entitled to the fruits of their efforts and are not required to share with those who have not participated.[94]

ii. Rejection of the sharing principle

[126] While the Commission tentatively recommends bringing an SRTA into the creditor sharing system of the EMJA, it has set out hereunder alternative views on this matter.

[127] As a matter of statutory drafting and administrative efficiency, the simplest course by far would be to allow a creditor or creditors who successfully challenge a transaction under the SRTA to keep the full benefit of the order for relief. While simplicity alone may carry relatively little weight in the choice of policy, more substantive arguments can be marshalled to support a simple approach. First, application of the sharing principle in this context may create a disincentive for creditors who would otherwise challenge creditor-avoiding action through litigation under the SRTA. This is particularly true where a debtor

[94] The interpleading creditor priority is superseded only by the claim for recovery of costs of enforcement and the claim of a creditor who enjoys a priority conferred by some other law, such as a maintenance claimant. EMJA s 110(3)(e).

has or may have other creditors claiming amounts significantly greater than the amount claimed by the creditor who elects to litigate, *i.e,.* X in scenarios on page 48-49. X will carry the financial and personal burden of the litigation but, if obliged to share the benefit of an order with Y, Z and W, X may recover only a fraction of X's claim. The potential disincentive effect of the sharing principle is a factor in favour of the view that a successful SRTA litigant should be permitted to retain the full benefit of a judgment.

[128] But, if the "no sharing" approach were adopted, it would be necessary to revise some URTA provisions to ensure consistency in outcome as among the orders granted to different URTA litigants. As currently drafted, some of the types of order contemplated by URTA subsection 18(2) would make the benefit of the order available to all creditors of the transferor-debtor because they would have the effect of restoring property to the debtor rather than making property directly available to the successful URTA claimant. This could occur if:

- the order revests in the debtor property transferred by the debtor to the transferee,
- the order sets aside a designation made by the debtor in favour of a beneficiary,
- the order releases or discharges a debt incurred or security given by the debtor,
- the order revives an obligation or security released by the debtor.

[129] If the value of the debtor's estate is enhanced under a SRTA order, that enhanced value would be immediately available to *all* judgment creditors including those who obtained judgment after the transaction occurred. In contrast, an order requiring the transferee to pay an amount of money equivalent to the value received to the successful litigant would ensure that only that person reaps the benefit of the litigation.

iii. Limited Sharing

[130] An alternative to either full application of the EMJA or a no sharing policy is one under which the benefit of a SRTA order should be limited to the litigant or litigants by whom the order was obtained. However, that approach would not entirely foreclose the operation of the historical sharing principle if all known judgment creditors were given an opportunity to share in the benefit of an action by joining the litigation. This approach would be implemented through a provision in an SRTA requiring a person who has commenced an application for relief to give notice of the proceeding to all creditors who have registered a judgment against the debtor. The notice would advise creditors that

litigation has been commenced and that any order for relief obtained will benefit only those creditors who choose to join the action. Creditors would be given a reasonable period of time within which to apply to join.

[131] This approach would ensure that only creditors who have standing to apply for relief would benefit from a SRTA order. Those creditors who have obtained and registered judgments against the debtor as provided in the EMJA would receive notice of the proceeding. Creditors who have not registered a judgment against the debtor but who learn of the proceeding by other means would not be precluded from applying to join the SRTA action, though they would be required to obtain judgment against the debtor to participate in an order for relief.

iv. Adoption of the creditor sharing principle - rejection of URTA section 16

[132] Saskatchewan legislators of the early 20th century implemented the creditor sharing principle through provincial legislation in response to the absence of a federal bankruptcy system that would enable unsecured creditors to share proportionately in the property of a common debtor. The creditors' relief statutes could have been repealed when federal bankruptcy law was revived in 1919 but were not, presumably on the grounds of perceived fairness. Legislators in Saskatchewan and the other common law jurisdictions evidently believed that the proportionate satisfaction of creditors' claims was preferable to a first-in-time system that allows some creditors to recover fully or at least in material part while others cannot, whether within or outside of bankruptcy. The EMJA retains this philosophy in a somewhat diluted form.

[133] Under the EMJA, the value recovered through the SRTA action would be available not only to creditors who had obtained judgment against the debtor at the time of the challenged transaction but also to creditors who obtained judgment after the transaction occurred. The EMJA does not limit participation to those creditors who had judgment at the date of the transaction. The various forms of order contemplated by the SRTA include an order declaring that property that is the subject of a transaction or the proceeds of that property be recoverable through judgment enforcement measures against that property in the hands of the transferee. The property is effectively treated as if it were property of the debtor-transferor and, as such, available to the debtor's creditors.

[134] The decision to tentatively recommend the application of the sharing principle of the EMJA in the context of a successful SRTA action requires rejection of the policy of URTA

section 16. As noted above, this provision makes it clear that an order under the Act should make available to the person who applies for relief the value conferred on the transferee under the transaction "to the extent of that person's claim against the debtor". An order under section 16 would result in proceeds that would be shared by the judgment creditor who obtained the order with other qualifying creditors of the transferor.

[135] More troublesome is the problem that would arise when the order relates to transferred property that has a value greater than the claim of the creditor who brought the successful SRTA action. The outcome may be affected arbitrarily by the type of order made in the SRTA action. If the order involves payment of money by the transferee under clauses 18(2)(c)-(e), the amount of money specified in the order limits the amount of the fund distributed under the EMJA. This is not the case with respect to orders under clause 18(2)(a) [revesting the transferred property in the debtor], clause 18(2)(f) [discharge or release of a security or guarantee] clause 18(2) (g) [reviving an obligation or security released by the debtor], clause 18(2)(h) [setting aside a designation in favour of a beneficiary], or clause 18(2)(i) [declaration that exempt property is subject to judgment enforcement measures in the hands of the debtor]. These orders have the effect of "undoing" the transfer of the debtor's interest thereby making the transferred property subject to judgment enforcement measures taken by all creditors. The sheriff who is enforcing the order is not empowered to seize and sell only the limited value subject to the order. Furthermore, even if this were permitted it is most unlikely that the sheriff could find a buyer for the limited interest seized. The complexities as to ownership interests in the property that exist after sale by the sheriff makes this unacceptable. As practically must be the case, the order must have the effect of making the total value of the property subject to judgment enforcement. The proceeds of enforcement or the order would be treated as part of the fund divided among all creditors of the transferor entitled to share under the EMJA.

[136] The difference in result is demonstrated in the following scenario:

> *Scenario 1:*
> X succeeds in getting an order under the SRTA equivalent of URTA subsection 18(2) (c)-(e). Under URTA section 16 (if adopted in an SRTA in its present form), the order is limited to the "extent of that person's claim against the debtor". This results in money being paid into the EMJA fund. However, other creditors of the Debtor-transferor share in this limited fund along with X. But since the fund is limited in amount, a fund much smaller in amount than the cumulative value of

the creditors' claims is divided resulting in X being paid much less than the value of X's claim.

Scenario 2:
X succeeds in getting an order under 18(2)(a) [revesting the transferred property in the debtor], clause 18(2)(f) [discharge or release of a security or guarantee] clause 18(2) (g) [reviving an obligation or security released by the debtor], clause 18(2)(h) [setting aside a designation in favour of a beneficiary], or clause 18(2)(i) [declaration that exempt property is subject to judgment enforcement measures in the hands of the debtor against Y with the result that the property transferred revests in the Debtor-transferor when the order is executed]. When this property is sold by the sheriff the proceeds become a fund under the EMJA. The proceeds of sale must be shared among other creditors of the Debtor who timely deliver enforcement instructions to the sheriff pursuant to EMJA section 109.

[137] The injustice associated with including URTA section 16 in a SRTA is demonstrated in the following scenario:

Debtor transfers property having a value of $10,000 to T. X obtains an order under UTRA subsection 18(2)(b) declaring the transferred property or proceeds be subject to judgment enforcement measures in the hand of X. X's judgment against Debtor is for $8000.00.
The property is seized and sold by the sheriff pursuant to the EMJA and the proceeds in the amount of $10,000 constitute the fund.

Within the time period provided by the EMJA, another creditor of Y obtains a judgment for $10,000 and delivers an enforcement instructions to the sheriff.

When the sheriff distributes the fund comprised of the proceeds of the sale of the property (assume that there are no prior claims and the costs are ignored) the following results depend upon whether or not section 16 URTA applies.

In the absence of the URTA section 16 approach, the $10,000 in the fund would be divided between X and Y on the basis of the portion of their each of their judgments. See EMJA subsections 110(4). Under this approach X would get 8/18 x $10,000 (44%) = $440.00; Y would gets 10/18 x $10,000 (56%)=$560.00. See EMJA clause 110(3)(g).

But if, as a result of URTA section 16, X is entitled only to that portion of the $10,000 that relates to X's claims, the result would be as follows: 8/18 x $8000= $3520.00. Since X is not entitled to an amount in excess of portion of the proceeds that can be allocated to X's claim, X is not entitled to share in the "excess proceeds" of $2,000 even though X's claim of $8,000 has not been fully paid. The balance of the $10,000 ($6480.00) is paid to Y. The anomaly of this that Y would have recovered nothing had X not obtained the URTA order but Y ends up on a better position as a result of the transaction being set aside under X's action.

[138] Application of UTRA sections 16 would result in a creditor who obtained the SRTA order being in a position less advantageous than the applicant would be under current law. Under the *Fraudulent Conveyances Act, 1571*, the effect of an order is to avoid the transfer completely, not just to the extent of the creditor's claim. Consequently, the entire value of the transferred property is potentially available for sharing among all qualifying creditors. The right of the creditor who obtained an order under the 1571 Act is not placed at a disadvantage in relation to other creditors of the debtor in distribution of the fund.

TENTATIVE RECOMMENDATION #3: After weighing the factors described above, the Commission has tentatively concluded that the principle of creditor sharing under the EMJA be applied in the context of the SRTA but the Act should not contain an equivalent to section 16 of the URTA. The effect of this approach is that a successful SRTA action would result in the proceeds of property subject to an order under clause 18(2)(c) (d) or (e) being paid directly to the sheriff under section 107(2)(b) of the EMJA. The amount paid to the sheriff would represent the total value of the property transferred by the debtor to the transferee. In the context of orders under clauses 18(2)(a) or (f)-(k), the order would result in the transferred property being subject to regular judgment enforcement measures which, when successfully invoked, require application of the EMJA system. Given the automatic application of the EMJA, there would be no need to include the equivalent of URTA subsection 18(3) in the SRTA.

TENTATIVE RECOMMENDATION #4: The Commission has also tentatively concluded that, in recognition of the complexities of an RTA action, a successful plaintiff should be entitled to a first priority for all of the plaintiff costs, including "administration costs" not ordinarily recoverable by a judgment creditor.

v. The standing of the trustee in bankruptcy to seek relief

[139] A full evaluation of the policy choice to be made with respect to creditor sharing requires consideration of the potential consequences of the debtor's bankruptcy under a URTA regime. The Supreme Court of Canada, in *Robinson v Countrywide Factors Ltd*,[95] held that the trustee of a bankrupt debtor may use provincial fraudulent conveyances and preferences law to recover property for the bankrupt's estate. However, the decision is of limited authority on the question of whether a trustee in bankruptcy would or should have standing to sue under the URTA. The *Robinson* decision is addressed to the constitutional validity of the *Fraudulent Preferences Act* rather than the trustee's standing to invoke it, which was apparently assumed. Further, the assumption that the trustee has standing to invoke current provincial law does not necessarily lead to the conclusion that the trustee would have standing under the very different system of the URTA.

[140] Subsection 24(3) of the URTA provides a limitation of actions rule specifically addressed to an action commenced by a trustee. This implicitly assumes that such an action is possible. However, nothing in the Act or the report otherwise supports that view, or addresses the implications of an action by the trustee. The limitations rule may have been included on the unreflective assumption that a trustee would have standing under reformed law as under current law. It should not be regarded as conclusive on the question of whether a trustee in fact does have standing under the system proposed. In our view, the trustee should not have standing to bring a claim under a SRTA and subsection 24(3) should accordingly not be adopted.

[141] Current legislation does not explicitly address the question of who has standing to commence a proceeding under its terms. The *Fraudulent Preferences Act* states that a transaction of the kind described is "void as against any creditor or creditors injured…".[96] The *Fraudulent Conveyances Act, 1571* states as its purpose the "Avolishing and Abolishing" of prescribed transactions intended to "delay, hinder or defraud Creditors and others" and goes on declare such transactions "clearly and utterly void, frustrate and of none Effect".[97] The courts have interpreted this to mean that a person who was a creditor at the date of the impugned transaction has standing under the *Fraudulent Preferences Act*, while a person who had a legal claim at that time or, in some circumstances, whose claim arose thereafter, may sue if they are a prejudiced "other" under the *Fraudulent Conveyances Act, 1571*. At least one court has noted the lack of a

[96] *Supra* note 16, ss 1 and 2.
[97] *Supra* note 14, ss II and III.

clear substantive basis for a rule of standing that allows a trustee to sue a third party under this legislation where the debtor could not. In *Re Rinn*, Cameron JA quoted *May's Fraudulent Conveyances* as follows:

> A trustee of a bankrupt, although in right of the debtor, he only takes such interest as the debtor was beneficially entitled to, yet represents the creditors for all purposes; and if any fraud against creditors existing in a transaction to which the insolvent was a party, the trustee may take advantage of it.[98]

Cameron JA continued:

> The trustee is therefore considered a creditor within the Statute, 13 Eliz., ch. 5. *While there may be difficulty in discerning the reasoning*, this has long been settled as the law and cannot be questioned (emphasis added).[99]

[142] The short decision of the English Court of Appeal in *Ex parte Butters*[100] is typically cited as authority for the general proposition that a trustee in bankruptcy represents creditors of the debtor and can therefore take action to impeach a fraudulent conveyance on their behalf. However, the principal advanced should not be taken out of context.[101]

[143] The proposition that "bankruptcy law" gives the trustee standing to challenge a transaction under The *Fraudulent Conveyances Act, 1571* or its relatively more modern counterpart, the *Fraudulent Preferences Act*, might be conceptually justified by the nature of the remedy contemplated by those statutes. If, as the Acts declare, a transfer of property is "void", one might argue that the trustee is simply recovering property of the debtor-bankrupt for the bankruptcy estate and is entitled to do so notwithstanding that the bankrupt may not be entitled to challenge the transaction. In other words, the trustee is not seeking compensation from a person who has dealt with the debtor but is seeking a declaration of ownership of property that that debtor is regarded as never having

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[98] *Re Rinn* (1923), 33 Man R 153 at 157.

[99] *Ibid*. The Court applied this authority to the question of whether the trustee in bankruptcy had standing under provincial legislation to challenge a chattel mortgage given by the debtor, concluding in the affirmative.

[100] (1880), 14 Ch D 265 (CA).

[101] The decision was largely addressed to the question of whether the Court of Bankruptcy should exercise jurisdiction on the facts before it rather than to the representative capacity of the trustee. The statement asserting the trustee's representative capacity is advanced without supporting authority by James LJ, *ibid* at 267:

> The bankruptcy law puts the trustee in the position of the representative of all the creditors of the bankrupt, and under the statute of *Elizabeth,* creditors had a right to impeach transactions which the bankrupt himself could not impeach. The trustee, therefore, in seeking to set aside a transaction as fraudulent under the statute of Elizabeth is claiming by a higher and better title than the bankrupt himself, for the bankrupt is a party to the fraud.

lost.[102] It is also worth noting that an action under current law is considered a class action in favour of all creditors entitled to recover. That view presumably flows from the fact that the statutes do not limit the order for relief but rather provide for entire avoidance of a transfer of property by the debtor, the result being to restore the property to the debtor making it available to all creditors, not to the creditors who are entitled to share in a fund under the EMJA.

[144] The rationalization of the trustee's standing under current law does not hold under the system represented by the URTA. Unlike the current statutes, the URTA includes explicit rules of standing, and those rules are cast in terms that exclude the trustee in bankruptcy. Only a person who holds a "claim" at a specified time may apply for relief.[103] The term "claim" is defined in section 1(1) as "the right to satisfaction of an obligation owed by a debtor…" The trustee in bankruptcy of a debtor does not hold a claim against the bankrupt. The property rights of the bankrupt vest in the trustee. These are rights exercisable against other persons, not the bankrupt.

[145] Further, the outcome of a successful action under the URTA is not a declaration that a transfer of property is "void", but rather an order for compensation from or enforcement against the transferee. Several of the forms of order contemplated by the Act go beyond the recovery of property transferred away by the debtor and would allow the trustee to do much more than simply enforce the collective rights of creditors against property that was once property of the bankrupt.[104]

[146] An approach to standing that would effectively allow an individual action to be converted into a collective one through the medium of the trustee in bankruptcy would materially rewrite the Act and would undermine its carefully crafted rules of standing. If a trustee could claim standing as a representative of creditors, he or she could only pursue the claims of creditors who themselves had standing under the Act, to the extent of their claims. However, the benefit of any order obtained would flow to the bankruptcy estate and would ultimately inure to whomever is entitled to be paid under the BIA distribution rules. Perversely, if the trustee's standing were derived from that of a creditor who is not a preferred creditor under the BIA, the entire benefit of the order for relief might accrue to preferred creditors who themselves would not have standing under the SRTA.

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[102] Notwithstanding the evidently clear language of the statutes, many courts have concluded that a proscribed transaction is not literally void but rather voidable. See Dunlop and Buckwold, *supra* note 19 at 1061 – 64.

[103] See URTA s 6, with respect to applications under Part II, and s 12, with respect to applications under Part III.

[104] For example, the URTA contemplates an order against the transferee compensating for profits made by the transferee through the use of property received from the debtor. See s 18(2)(e).

[147] The conclusion that the trustee in bankruptcy does not have standing to seek relief under the URTA is not conclusive as to whether the sharing policy should be retained under a Saskatchewan iteration. However, it lends support to the view that sharing is not a necessary feature of the Act. Creditors who would not qualify to share the benefit of a SRTA order obtained by another claimant would have no incentive to put the debtor into bankruptcy to engage the distribution rules of the BIA. The provision of the URTA that suggests that the trustee does have standing should be deleted to avoid needless confusion.

TENTATIVE RECOMMENDATION #5: Subsection 23(4) of the URTA, which establishes a limitation of actions rule for proceedings by a trustee in bankruptcy, should not be included in a SRTA.

b. Section 20: Transfers of exempt property

[148] Part of section 20 of the URTA would become redundant under the approach recommended under heading 2.ii.a above. Section 20 applies when a debtor transfers ownership of exempt property to another person but continues to use it for the purpose attracting the exemption. It may be inappropriate to deprive the debtor of the use of the property as an incident of an order for relief against the transferee. The court can respond to that concern by suspending enforcement of an order for relief until such time as the property is no longer used by the debtor in the relevant manner. Section 20 contemplates an ancillary order that would prevent the transferee from disposing of the property before the order for relief becomes enforceable. It provides, in general terms designed to accommodate the processes of the enacting jurisdiction, that the court "may order that a [*writ or judgment – depending on the terminology used in provincial judgment enforcement legislation*] be registered against the transferee or the property of the transferee." That portion of the section is not required if an order under the URTA that involves sale or disposition of property of the transferee is treated as a judgment and thereby registerable under the EMJA without the court's direction. URTA section 20 should therefore be amended by deleting the relevant passage leaving the section to read as follows:

> 20 If an order for relief is granted in relation to a transaction involving exempt property and the debtor continues to use the property in the manner that attracted the exemption, the court may suspend enforcement of the order for relief until the time that the debtor ceases to use the property in that manner.

TENTATIVE RECOMMENDATION #6: Section 20 of the URTA should be amended by deletion of the words providing for registration of the order for relief.

c. Section 23: Injunctive relief

i. Relief available before and after a transaction has occurred

[149] Section 23 of the URTA empowers the court to grant an injunction to a person who is or may become entitled to apply for an order for relief under the Act. As explained in the Comment to that section, its objective is "to prevent a transaction that would give rise to relief under the Act form occurring or, if such a transaction has already occurred to prevent further action on the part of the debtor or another person that would prejudice the ability of a creditor challenging the transaction to obtain an effective remedy." The principles that govern the award of injunctions generally would apply.

[150] In Saskatchewan, the general jurisdiction of the court to grant an injunction has been supplanted in the context of judgment enforcement by Part II of the EMJA, empowering the court to grant a preservation order to preserve property of a defendant until such time as a judgment in the action is obtained and can be enforced. Those provisions, which currently apply in an action for an order declaring a transaction void as a fraudulent conveyance or fraudulent preference,[105] should be revised in the manner outlined below so as to apply in proceedings for an order against a transferee under the URTA. Section 23 of the URTA should be revised correspondingly to provide that the Court may grant a preservation order in accordance with the provisions of the EMJA.

[151] While that approach would integrate the EMJA with the URTA with respect to proceedings challenging a transaction that has allegedly occurred, it would not fully accomplish the objectives of section 23 of the URTA. Section 23 empowers the court to grant an injunction to *prevent* a transaction on application by a creditor who does not have and may never have grounds for relief under the Act, since grounds for relief arise only from a concluded transaction. A preservation order may be granted under the EMJA only when an action has been commenced that, if successful, would result in an order giving relief against a transaction that *has* occurred.

[105] EMJA s 5. See especially the definition of "action" in s 5(1)(a)(ii) and the provisions for an order against a "transferee", defined in s 5(1)(b).

[152] The approach taken in the URTA reflects the view that it is appropriate to block an anticipated transaction where the circumstances are such that the transaction would justify an order for relief under the Act if it happened. It is counterproductive to require a creditor to defer action until property has been transferred or some other benefit has been conferred on a transferee and then seek compensation, rather than providing legal recourse against activity by a debtor that will create the grounds for compensation. The URTA approach is consistent in this respect with the principles of injunctive relief generally, under which an injunction may be granted to prevent an anticipated legal wrong, such as a breach of contract or a tort. A preliminary injunction may be granted on application to a judge in chambers pending a final injunction granted after a full trial.

[153] The Commission is of the view that section 23 of the URTA be replaced with provisions dealing separately with orders designed to prevent a transaction from occurring and orders granted after proceedings for relief against a transaction that has occurred have been commenced. The following draft would achieve the suggested result:

> 23(1) The court may grant an injunction to prevent a transaction giving rise to a right to relief under this Act from occurring if the court is satisfied that there is a reasonable likelihood that such a transaction is about to occur.
>
> (2) An application for an injunction under subsection (1) may be made by a person who would be entitled to apply for an order for relief under this Act if the transaction did occur.
>
> (3) The court may grant a preservation order against a transferee when proceedings have been commenced under this Act.
>
> (4) An application for a preservation order under subsection (3) may be made by the person who has commenced the proceedings.
>
> (5) The provisions of *The Enforcement of Money Judgments Act* governing preservation orders shall apply to an application for a preservation order under subsection (3).

TENTATIVE RECOMMENDATION #7: A SRTA version of section 23 of the URTA should: (1) provide for general injunctive relief against an anticipated transaction and (2) make the provisions of the EMJA that apply to preservation orders applicable in a proceeding for relief under the SRTA.

ii. Amendments to *The Enforcement of Money Judgments Act*

[154] Minor amendments to Part II of the EMJA governing preservation orders would be required to facilitate the operation of the recommended replacement of subsections 23(3) through (5) of the URTA.

[155] Subsection 5(1) of the EMJA establishes the framework under which fraudulent conveyances and fraudulent preferences actions are currently brought within the scope of Part II as follows:

> 5(1) In this Part:
>
> (a) "action" means a legal action that would, if successful, result in:
>
> (i) a judgment; or
>
> (ii) an order declaring a gift, conveyance, assignment, transfer, delivery over or payment of property by the defendant void as a fraudulent conveyance or fraudulent preference;
>
> (b) "transferee" means a person who has received an interest in property from the defendant pursuant to a transaction mentioned in subclause (a)(ii).

TENTATIVE RECOMMENDATION #8: The EMJA should be revised as required to interface the Provisions of Part II with an application for a preservation order made in proceedings under the URTA. The following amendments should be made to the EMJA:

1. Subclause 5(1)(a)(ii) should be deleted and replaced with the following: (ii) a order for relief under The Reviewable Transactions Act.

Subsection 5(1) as currently framed speaks to a "defendant" and a "transferee". In this context, the defendant is implicitly a person who has conveyed property to another under a transaction subject to attack (a debtor) while the transferee is by definition the person who has received property from the defendant. Under the URTA, the transferee is the defendant – i.e., the person against whom an order for relief is sought. Clause 5(1)(b) defining "transferee" as a person distinct from a defendant should therefore be deleted along with specific references to a "transferee" that appear in other provisions of Part II. The following definition clauses should be added to subsection 5(1) in order to bring an application for preservation order within the provisions that apply generally to the parties to an action:

(b) "defendant" includes a person against whom an order for relief is sought under The Reviewable Transactions Act;

(c) "plaintiff" includes a person who has commenced proceedings for relief under The Reviewable Transactions Act;

(d) "judgment" includes an order for relief under The Reviewable Transactions Act;

(e) "judgment creditor" includes a person in whose favour an order for relief has been made under The Reviewable Transactions Act.

Since these definitions would make Part II apply generally to the parties to a Reviewable Transactions Act proceeding, subclause 5(5)(a)(ii) and clause 5(9)(b), speaking specifically to fraudulent conveyances and fraudulent preferences actions should be deleted.

2. The special rules applied to fraudulent conveyances and fraudulent preferences actions in subsection 6(4) should be retained but revised as follows:

6(4) Unless the court orders otherwise:

(a) property affected by a preservation order, ~~other than a preservation order granted against a transferee under pursuant to subclause 5(5)(a)(ii)~~ other than a preservation order granted in a proceeding under The Reviewable Transactions Act, shall be subject to enforcement measures as if the preservation order had not been granted; and

(b) if an enforcement instruction has been given to the sheriff with respect to a defendant, money received by the sheriff pursuant to a preservation order affecting the property of the defendant, other than money received as a result of a preservation order granted ~~pursuant to subclause 5(5)(a)(ii)~~ in a proceeding under The Reviewable Transactions Act, shall be allocated to the fund constituted in connection with that defendant pursuant to section 107.

3. Clause 7(1)(f) is designed to ensure that a preservation order terminates if the debt owed to the creditor who has commenced proceedings to challenge a fraudulent conveyance or fraudulent preference is satisfied. The provision should be revised as follows to achieve the same result in a proceeding under the URTA:

7(1)(f) in the case of a proceeding under The Reviewable Transactions Act, on satisfaction of the claim held by the creditor who has commenced the proceeding.

(iii) Orders for Relief in Relation to Corporate Transactions

[156] The rationale behind section 9 of the URTA is explained in Part III under heading D.3.b.iii. The provision allows creditors to recover payments made by an incorporated debtor to a shareholder under circumstances that constitute grounds for relief under the Act. The section includes rules designed to ensure that a director or shareholder of a debtor company is not liable under both the URTA and provisions of business corporations legislation relating to payments by insolvent corporations.

[157] There is another point of potential overlap between the URTA and the business corporations legislation that the URTA does not address. Section 234 of *The Business Corporations Act* of Saskatchewan (SKBCA) allows a "complainant" to apply for an order to rectify conduct that is "oppressive or unfairly prejudicial to" the creditor's interest. A similar provision appears in the *Canada Business Corporations Act* [CBCA] and in the corresponding legislation of other provinces. The provision has been used by creditors in recent Alberta cases to set aside transfers of property by incorporated debtors where the transfer denudes the corporation of assets and thereby prevents its creditors from recovering.[106] The Saskatchewan and Alberta Acts define "complainant" differently but to similar effect. The Alberta Act explicitly recognizes that a creditor is a complainant if the Court, in exercise of its discretion, finds that the creditor is a proper person to make an application for relief. The Saskatchewan Act, like the CBCA, simply provides that any person who in the discretion of the Court is recognized as a proper person to make an application for relief is a "complainant". While creditors are not explicitly identified as potential complainants the grounds for relief make it clear that they may qualify as such.

[158] The grounds on which an order for relief may be granted against an incorporated debtor under the SKBCA are much less specific than those that must be established to obtain relief under the URTA, leaving considerable scope for judicial discretion both as to the granting of the order and as to the nature of the remedy responding to conduct viewed as objectionable. An order may be made if the court is satisfied that something has been done by the corporation, those conducting the business or affairs of the corporation or the directors of the corporation in the exercise of their powers "that is oppressive or unfairly prejudicial to or that unfairly disregards the interest of any…creditor." On so finding "the court may make an order to rectify the matter complained of" in any terms

[106] e.g. *Builders' Floor Centre Ltd v Thiessen*, 2013 ABQB 23, *1007374 Alberta Ltd v Ruggieri*, 2015 ABCA 205.

it thinks fit.[107] Alberta courts have imposed liability under the corresponding Alberta provision on the basis of their characterization of the reasonable expectations of creditors with respect to the actions of a debtor corporation and its directors in relation to the satisfaction of debts, and the Alberta Court of Appeal has confirmed a substantial punitive damages award designed to condemn actions viewed by the Court as a deliberate strategy to strip the corporate debtor of its exigible assets.[108]

[159] This raises the question of whether creditors should be permitted to proceed under either or both the URTA and the SKBCA in relation to a transaction involving an incorporated debtor. The fact that the issue it is not addressed in the URTA or in any of the ULCC working group reports does not represent a deliberate choice to allow creditors of incorporated debtors to challenge a transaction under either or both the URTA and the oppression provisions of business corporations legislation. The point simply was not considered by the working group, no doubt because the cases in which it the oppression remedy has been invoked for this purpose by creditors are relatively few and recent. One approach would be to simply allow both statutes to function on their own terms, leaving it to the courts to define the principles guiding the award of a SKBCA oppression remedy. However, a clear legislated response to the issue is to be preferred. Two alternatives may be considered.

[160] One approach would be to include provisions in the URTA and the SKBCA that would preclude the award of relief under both statutes in relation to the same transaction. The approach would be similar to that taken by the URTA in relation to share redemptions and the declaration of corporate dividends, as described earlier.

[161] The alternative is to limit proceedings in relation to a transaction that impedes creditors' rights of enforcement under judgment enforcement law to the URTA. That approach could be implemented by adding a subsection to SKBCA section 234 to the effect that an order may not be made in favour of a creditor to rectify conduct on the part of a corporation, or an officer or director of the corporation, that is alleged to be oppressive

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[107] SKBCA s 234.

[108] In *1007374 Alberta Ltd v Ruggieri*, *supra* note at para 7 the Alberta Court of Appeal said this:

> In relation to creditors, the focus is on whether the effect of the corporation's conduct is unfairly prejudicial or unfairly disregards the interest of the creditor. The court must determine the reasonable expectations of the creditor. Those reasonable expectations include the expectation that the debtor will: (i) not convey away for no consideration exigible assets which will leave the creditor unpaid; and (ii) honour the understanding and expectation that the debtor has created and encouraged.

The Court upheld a trial decision that included an award of $100,000 in punitive damages.

or unfairly prejudicial on the grounds that the conduct reduces the amount or value of property of the corporation available to satisfy creditors' claims.

[162] While the policy choice to be made on this point may be influenced by input received in consultations, the second alternative recommends itself as a matter of principle. The grounds for relief under the URTA, together with the provisions governing award of a remedy, were carefully tailored to balance the interests of creditors against those who may deal with a debtor. In contrast, the SKBCA oppression remedy potentially offers an indeterminate form of relief to creditors of a debtor corporation on the basis of the court's sense of fairness in circumstances in which an order would not be available under the URTA, or if available would be more limited than what the SKBCA permits. A system that allows creditors to resort to the oppression remedy as well as to reviewable transactions law would therefore reinstate much of the legal uncertainty that the URTA is designed to remedy. Further, there is no obvious justification for offering creditors of incorporated debtors rights greater than those available to the creditors of natural persons. We acknowledge that elimination of the relief available to creditors under the SKBCA oppression remedy may create a discrepancy between the law of Saskatchewan and that of other jurisdictions, and would put the creditors of a federally incorporated debtor in a potentially better position than those of a debtor incorporated under the SKBCA. However on balance, the likelihood of divergent outcomes between federally and provincially incorporated debtors under this approach is relatively small in comparison with the likelihood of divergent outcomes as between incorporated and individual debtors if the SKBCA provisions remain in place.

TENTATIVE RECOMMENDATION #9: *The Business Corporations Act* should be amended to provide that an order may not be made in favour of a creditor to rectify conduct on the part of a corporation, or an officer or director of the corporation, that is alleged to be oppressive or unfairly prejudicial on the grounds that the conduct reduces the amount or value of property of the corporation available to satisfy creditors' claims.

3. Consequential Amendments

(i) *The Business Corporations Act*

[163] The relief contemplated in relation to a payment of dividends or redemption of its own shares by a corporation is outlined in Part III under heading 3.b.iii. As suggested there, consideration should be given to amending *The Business Corporations Act* to include provision that would exempt a corporate director or shareholder from potential liability under both that Act and the URTA in relation to the same payment.

[164] Note also the recommendation in this Part under heading 2.iii. Section 234 of *The Business Corporations Act* be amended to preclude creditors from using that provision to challenge a transaction that could otherwise be subject to challenge only under the URTA.

(ii) *The Land Titles Act, 2000*

[165] Section 173(6) of *The Land Titles Act, 2000* was discussed in Part III under heading 4.vi. It refers to a sale of land to "a purchaser for value pursuant to a transaction that is not a fraudulent conveyance". That provision must be amended to refer to a purchaser for value pursuant to a transaction that is not a transaction giving rise to grounds for relief under *The Reviewable Transactions Act*.

(iii) Registration Requirements Under the *PPSA* and *The Land Titles Act, 2000*

a. SRTA orders registered as a judgment

[166] The recommendation advanced in Part IV under heading 2.ii.a suggests that a section should be included in a SRTA providing that the provisions of *The Enforcement of Money Judgments Act* and *The Land Titles Act, 2000* that apply to enforcement of a money judgment apply to an order granted under the SRTA. If adopted, the recommendation would allow creditors to register a SRTA order in the Personal Property Registry and the Land Titles Registry in the same way a money judgment is registered. Amendment of the legislation governing use of the respective registries and required registration forms will be required.

TENTATIVE RECOMMENDATION #10: An order granted under a SRTA that directs the sale or disposition of property of a transferee should be registerable and enforced under *The Enforcement of Money Judgments Act* and *The Land Titles Act* with respect to the property specified in the order as a judgment against the transferor and the transferee.

b. Registration of security interests granted under an order for relief

[167] As noted earlier, a court may frame an order for relief in various ways including by revesting property in the debtor, in effect reversing the transfer of that property so as to make it available to the debtor's creditors through judgment enforcement proceedings. This form of order is less likely to be made where the revesting of ownership in the debtor may precipitate the attachment or reattachment of property interests giving rise to difficult questions of priority. The court is more likely to grant a money judgment against the transferee or, if enforcement against the property transferred under the challenged transaction is a better alternative, to order that it be sold in proceedings against the transferee. However, there may be cases in which an order revesting the property in the debtor is the best course of action. In an action under Part II (a transaction at undervalue or a transaction intended to hinder or defeat creditors), the order may include a provision granting the transferee a security interest in the property to secure the transferee's entitlement to recover the amount of consideration paid for it, or investments made by the transferee that have increased the value of the property.[109] In an action under Part III, the court may grant a security interest to the creditor who received the property in payment of a debt, securing the creditor's recovery of investments that have increased the value of the property.[110]

[168] Section 19(3) provides for registration of a security interest granted under this type of order; in the Personal Property Registry with respect to personal property and in the Land Titles registry with respect to land. Amendment of the registry rules and forms will be required to accommodate registration of a security interest granted under a SRTA.

[109] URTA, s 18(4)(b).
[110] URTA, s 18(6).

(iv) *The Queen's Bench Rules*

[169] Rule 13-9(1) provides that, "In all cases in which the party pleading relies on…fraud…, full particulars must be stated in the pleading." The grounds for relief under the SRTA do not involve proof of fraud, but the historical legacy of the terminology in this area of law may linger. The defendant in an action under the Act might attack the pleadings on the grounds of non-compliance with rule 13-9(1), obliging the court to undertake an unproductive and unnecessary exercise of interpretation in aid of determining whether it applies to a SRTA action. That eventuality may be avoided by an amendment to the rule explicitly excluding an action under the SRTA from its application.

Tentative Recommendations

The Commission is interested in your views on the following set of tentative recommendations for reform of the law of fraudulent transactions and fraudulent conveyances in Saskatchewan and adoption of the *Uniform Reviewable Transactions Act*:

1. Legislation based on the *Uniform Reviewable Transactions Act* should be enacted in Saskatchewan, with such modifications recommended elsewhere in this report that provide appropriate interface with existing Saskatchewan legislation.

2. The title of Part II of the *SRTA* should be "Transactions at Undervalue and Transactions Intended to Hinder or Defeat Creditors".

3. The principle of creditor sharing under the EMJA be applied in the context of the SRTA but the Act should not contain an equivalent to section 16 of the URTA.

4. In recognition of the complexities of an RTA action, a successful plaintiff should be entitled to a first priority for all of the plaintiff costs, including "administration costs" not ordinarily recoverable by a judgment creditor.

5. Subsection 23(4) of the URTA, which establishes a limitation of actions rule for proceedings by a trustee in bankruptcy, should not be included in a SRTA.

6. Section 20 of the URTA should be amended by deletion of the words providing for registration of the order for relief.

7. A SRTA version of section 23 of the URTA should: (1) provide for general injunctive relief against an anticipated transaction and (2) make the provisions of the EMJA that apply to preservation orders applicable in a proceeding for relief under the SRTA.

8. The EMJA should be revised as required to interface the Provisions of Part II with an application for a preservation order made in proceedings under the URTA.

9. *The Business Corporations Act* should be amended to provide that an order may not be made in favour of a creditor to rectify conduct on the part of a corporation, or an officer or director of the corporation, that is alleged to be oppressive or unfairly prejudicial on

the grounds that the conduct reduces the amount or value of property of the corporation available to satisfy creditors' claims.

10. An order granted under a SRTA that directs the sale or disposition of property of a transferee should be registerable and enforced under *The Enforcement of Money Judgments Act* and *The Land Titles Act, 2000* with respect to the property specified in the order as a judgment against the transferor and the transferee.