Law Reform Commission of Saskatchewan

Reviewable Transactions Act

Final Report

May 2021

In this Report, the Law Reform Commission of Saskatchewan recommends Saskatchewan enact The Saskatchewan Reviewable Transactions Act that would replace outdated law dealing with situations in which debtors seek to protect their assets from judgments obtained by their creditors or give preferential rights to some creditors not available to others. The Act would replace existing law based on a statute of Elizabeth I and legislation enacted over one hundred years ago by the Legislature.

ACKNOWLEDGMENTS

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

We also wish to thank Professor Tamara Buckwold of the University of Alberta who served as chair of the Uniform Law Conference of Canada working group on whose work the *Uniform Reviewable Transactions Act* is based. She is the principal author of the Uniform Act and Commentary. Professor Buckwold is also the primary author of the *Tentative Proposals for a Reviewable Transactions Act* report published by the Commission in 2020. This report draws heavily on the 2020 Report. Professor Ronald Cuming of the University of Saskatchewan acted as research coordinator for the project and participated in the preparation of this Report.

The Law Reform Commission of Saskatchewan was established by *An Act to Establish a Law Reform Commission* (proclaimed in force in November 1973) and began functioning in February 1974.

The Commission is incorporated by an Act of the Saskatchewan Legislature. Commissioners are appointed by Order in Council. The Commission's recommendations are independent and are submitted to the Minister of Justice and Attorney General of Saskatchewan for consideration.

Projects are initiated by the Commission in response to suggestions from the public and the legal community, or at the request of the Minister of Justice and Attorney General. After preliminary research, the Commission usually issues a background or consultation paper to facilitate consultation. Tentative Proposals may be issued if the legal issues involved in a project are complex. Upon completion of a project, the Commission's recommendations are formally submitted to the Minister of Justice and Attorney General as final proposals.

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

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I. Introduction

[1] 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 Personal Property Security Act* [PPSA] in 1981,[1] a statute that became the model for the PPSAs subsequently adopted across common law Canada.[2] The enactment of *The Enforcement of Money Judgments Act* [EMJA][3] in 2010 effected a similarly dramatic change in Saskatchewan judgment enforcement law.[4] That Act introduced a comprehensive and integrated system of law designed to enhance the effectiveness and efficiency of the judgment 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.

[2] 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.

[3] Fraudulent conveyances law is designed to protect creditors generally. It comes into play when a debtor transfers away property, diminishing the debtor's 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 such that other creditors cannot recover at all or to the same extent as the creditor who

[1] *The Personal Property Security Act*, SS 1979-80, c P-6.1. This statute was revised and re-enacted as *The Personal Property Security Act 1993*, SS 1993, c P-6.2, as amended by *The Personal Property Security Amendment Act, 2019* SS 2019, c 15 [*PPSA*].

[2] 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 *Personal Property Security Act,* 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.

[3] *The Enforcement of Money Judgments Act*, SS 1010, c E-14 [*EMJA*].

[4] 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.*

was paid. The "preferred" creditor is forced to share the property taken in payment according to a proportional satisfaction regime imposed by law.

[4] 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].[5] 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. Consequently, the existence and content of the BIA provisions were taken into account in the development of Uniform Law Conference of Canada (ULCC) recommendations for reform on which The Saskatchewan Reviewable Transactions Act (SRTA) proposed in this Report is based.

[5] The SRTA 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.

II. The Case for Reform

1. Introduction

[6] 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. 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 myriad legal doctrines that impact the lives of citizens and the functioning of the

[5] *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* (1977), [1978] 1 SCR 753, 1977 CanLii 175 [*Robinson*].

economy. The property of a judgment debtor who fails to pay the amount of a judgment is the sole source of satisfaction.

[7] The law of fraudulent conveyances and fraudulent preferences supplements judgment enforcement law by safeguarding the rights of judgment creditors. Its intended role is to facilitate recovery of 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. 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.[6]

2. Fraudulent Conveyances

[8] 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 or an interest in property that could otherwise be reached through judgment enforcement measures to satisfy their claims – a practice often referred to as "judgment proofing." The unacceptability of this practice was early addressed by English judges and legislators, and Canadian legislators and courts have further contributed to the body of principles comprising the law in this area.

[9] The current law governing fraudulent conveyances has three components. Remarkably enough, the first is the English *Fraudulent Conveyances Act, 1571*,[7] which remains in effect as received Saskatchewan law[8] 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,*[9] includes rules distinct from but overlapping with those of the 1571 statute, under which a transfer of property that is not

[6] In addition to the reports produced in the ULCC project, see Alberta Law Reform Institute, *Reviewable Transactions, Final Report 108,* 2016; 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) [LRCBC Report].

[7] More fulsomely and properly titled the *Act Against Fraudulent Deeds, Gifts, Alienations, etc.* (UK), 1571,13 Eliz I, c 5, often called the *Statute of Elizabeth* [*Fraudulent Conveyances Act*].

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

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

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.[10] The third source of law lies in the centuries-long accumulation of judicial decisions interpreting and applying the two statutory enactments.

[10] 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.[11] In reference to the case law interpreting the *Fraudulent Conveyances Act, 1571*, it has been said that, "[t]he result is a common law gloss which comes close to erasing the Act itself."[12] 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.[13] 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

[11] 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.

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[10] *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.

[11] See LRCBC Report, *supra* note 6 at 8: "The law only becomes baffling when one considers the 400 odd years of jurisprudence surrounding this legislation."

[12] 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.

[13] For judicial confirmation of this point see *Moody v Ashton*, 2004 SKQB 488, 248 DLR (4th) 690 [*Moody*].

[12] 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* 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 nineteenth century Dominion bankruptcy legislation enacted under the federal government's constitutional jurisdiction over bankruptcy and insolvency. However, the federal *Insolvency Act* was repealed in 1880 and not replaced until a new Act was passed in 1919. However, it was soon found that, without insolvency law, there was no convenient way to wind up insolvent companies. In 1882, the *Insolvent Banks, Insurance Companies and Trading Corporations Act,* later to be known as the *Winding-Up Act,* [and, now the *Winding-Up and Restructuring Act*] was enacted.

[13] 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.

[14] The federal government reasserted its constitutional jurisdiction over bankruptcy and insolvency with the proclamation of the 1919 *Bankruptcy Act*. Yet, 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.[14] 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.[15] The concept is now embodied in the distribution rules in Part XII of the EMJA, though in a significantly qualified form. Only creditors who have obtained and registered a judgment and

[14] 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.

[15] See *The Creditors' Relief Act*, RSS 1978, c C-46, repealed with the enactment of the *EMJA*, *supra* note 3.

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 receive a bonus payment in recognition of the effort and financial investment involved in the proceedings.

[15] 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 outside the system. While the creditor sharing rules have been updated and refined, the anti-preference rules of the early twentieth 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

[16] 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.

[17] 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 that are in "urgent need of reform."[16] As noted earlier, 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

[16] CRB Dunlop, *Creditor-Debtor Law in Canada*, 2nd ed (Toronto: Carswell, 1995) at 9.

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

[18] The primary provisions of the STRA, the policies motivating them, and their basic operation are reviewed in this Part. Since the proposed Act draws heavily on the *Uniform Reviewable Transactions Act* [URTA], many of the explanatory comments in the ULCC Report accompanying provisions of the URTA apply to their counterparts in the SRTA.

2. The Terminology

[19] 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 Hindrance 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.[17]

[20] 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

[17] *Fraudulent Conveyances Act, supra* note 7.

against the parties. Although the penal provisions are not in effect in Saskatchewan,[18] 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.[19] 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.

[21] The SRTA has a different focus-- 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. 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 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 SRTA, dealing with the first type of case is subtitled "Transactions at Undervalue and Transactions Intended to Hinder or Defeat Creditors" 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. Part III of the Act deals with transactions that disrupt the *pro rata* creditor sharing scheme and is titled "Preferential Creditor Transactions."

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[18] *Connors v Egli*, [1924] 1 WWR 1050, [1924] 2 DLR 59 (Alta CA). The Court's reasoning follows the legislative path of the *Fraudulent Conveyances Act* (*supra* note 7) 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.

[19] 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."

[22] The defined word "transaction" (s. 2(1)) 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 value on another person in a way that reduces the debtor's asset pool available to creditors. 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. "Transaction" most closely represents its subject. The term "creditor transaction" (s. 2(1)) 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. "Creditor transaction" was chosen over "preferential payment" largely as a matter of statutory drafting. A "transaction" occurs when a debtor confers 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 treated 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.

3. Balancing Competing Interests: The Central Policies

[23] 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. [20] The SRTA therefore does not provide for judgment against a debtor who has engaged in behaviour that interferes with creditors' rights. Creditors can satisfy their claims by a court order setting aside the transfer of the debtor's property or obtaining an order against the person for recovery of its value. That person is referred to in the Act generally as a "transferee" (s. 2(1)). Value gained by a transferee through the actions of a debtor represents a loss to creditors, while a statutory remedy restoring that value to

[20] "Exigible" is the term commonly used to describe property that is not sheltered from judgment enforcement measures by exemptions legislation. The definition in the *EMJA, supra* note 3, s 2(1)(u) reflects that concept. The SRTA 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 SRTA s 2(1) "exempt property."

creditors represents a loss to the transferee. The SRTA is designed to balance the interests of unpaid creditors with the interests of those who deal with a person who has unpaid creditors (transferees).

[24] That balance involves the convergence of two policies. The SRTA 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-protection policy reflects the need to preserve the finality of legitimate commercial transactions.

[25] 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 on in the discussion that follows.

IV. Principal Features of the Act

1. Scope of the Act: Transfers of Value

[26] 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 the debtor's 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.[21] 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 SRTA takes a similar approach but goes further through a definition of "transaction" (s. 2(1)) that includes the conferral of a benefit having a quantifiable value on another person. The definition includes a non-exclusive list of transactions. For example, a debtor who forgives a debt owed to the debtor by another person will have diminished the debtor's 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.

[27] 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.[22] 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 SRTA permits creditors to challenge a payment made to another through the conferral of value by any means that directly or indirectly diminishes the paying debtor's asset base if the grounds for relief are established.

2. The Order for Relief

[28] The *Fraudulent Conveyances Act, 1571* provides that a transfer of property subject to sanction is deemed to be "utterly void, frustrate and of no 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."

[29] 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

[21] *BIA*, *supra* note 5, s 2 "transfer at undervalue".
[22] See *The Fraudulent Preferences Act*, *supra* note 9, s 8. For commentary on the effect of the equivalent provision of the Alberta statute, see Dunlop & Buckwold, *supra* note 12 at 1150-52.

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.[23]

[30] The SRTA 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 orders 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.

[31] The court may achieve the stated objectives through a range of orders listed in subsection 17(1), including through a transfer of property or payment of a sum of money by the transferee, a sale of property, the authorization of direct seizure and sale of 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.

[32] The qualifying factors specified in subsection 17(2)-(20) 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.

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[23] See Dunlop and Buckwold, *ibid*, at 1061-64. See an examination of this issue in *Guthrie v Abakhan*, 2017 BCCA 102 by Justice Newbury at para 18, 411 DLR (4th) 639:

> 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 SCR 44, "... the relief granted is properly confined to setting aside the impeached conveyance, thus removing it 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

[32] Subsection 17(15) applies to an order granted under Part II of the Act; that is, an application challenging a transaction at undervalue or a transaction intended to obstruct creditors generally. The court is given power to adjust the order in favour of the transferee in recognition of the amount of value given by the transferee, if any, or enter a judgment against the debtor in favour of the creditor for a specified sum. Where the order divests the transferee of the property or includes an amount compensating for income earned on the property, the order may 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; but the transferee loses the benefit only to the extent it was gained gratuitously. When the order results in the transferred value revesting in the debtor, subsection 17(18) empowers the court to require the debtor to grant a security interest to the transferee securing expenditures and non-monetary investments made by the transferee that have increased the value of the property or proceeds, to the extent of the expenditures made or the amount invested.

[33] Subsection 17(17) applies to an order for relief under Part III involving a preferential creditor transaction. 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. It may also order the entry of a judgment against the debtor in favour of the creditor for this amount. As is the case in the context of Part II orders, when the order under Part III results in the transferred value revesting in the debtor, subsection 17(18) empowers the court to require the debtor to grant a security interest to the transferee securing expenditures and non-monetary investments made by the transferee that have increased the value of the property or proceeds, to the extent of the expenditures made or the amount invested.

3. The Grounds for Relief: Transactions at Undervalue and Transactions Intended to Defeat Creditors

(i) The Requirement of Intention to Hinder or Defeat Creditors

[34] Section 3 of the *Fraudulent Preferences Act* applies to fraudulent *conveyances* and requires as a preliminary condition of relief 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.[24] The requirement is objectionable for at least three reasons.

[35] 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 does not pay a creditor is obliged through the mechanism of judgment enforcement law to give up the debtor's 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 subject to challenge provided that the law takes into account the legitimate interests of the person who has benefitted under it.

[36] The second problem with the 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 an 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 the person's 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.[25] 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.

[24] For an extensive examination of this requirement, see *Moody, supra* note 13.
[25] See Dunlop & Buckwold, *supra* note 12 at 1026-39.

[37] The problem of uncertain outcomes is particularly great where the debtor has transferred property or value 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.[26] To complicate matters further, it is not clear where the burden of proof lies in relation to the transferee's state of mind. Must 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?

[38] 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.

[39] 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 SRTA 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 clauses 7(1)(a), 7(1)(b) and 7(1)(c).

[26] See e.g., *Ferguson v Lastewka*, [1946] 4 DLR 531, [1946] OR 577 (Ont SC). 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.

(ii) The Debtor is Insolvent and Receives No Consideration or Consideration Worth Conspicuously Less Than the Value Given: Clause 7(1)(a)

[40] Creditors seeking redress under the SRTA would undoubtedly rely most often on clause 7(1)(a) as grounds for relief. That provision 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 the debtor's asset base will have an adverse effect on creditors.

[41] On the surface, SRTA clause 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 3 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 clause 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.

[42] The SRTA does not contain a definition of 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 prevailing circumstances 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 was 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 is 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."[27] Following the approach of the ULCC working group, the Commission has chosen not to include a reference to "fair market value" in the formulation on the view that it may 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.

(iii) The Debtor Intends to Obstruct Creditors: Clauses 7(1)(b) and 7(1)(c)

[43] The SRTA 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 clause 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 clauses 7(1)(b) and 7(1)(c), respectively.

[27] 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.

[44] Clause 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 clause 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.

[45] Clause 7(1)(c) offers relief where the 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 subsection 18(15). 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.[28]

[46] Clauses 7(1)(b) and 7(1)(c) both require proof that the challenged transaction materially hindered creditors' ability to recover. 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] Proof of intention is addressed in subsection 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.

(iv) Special Cases

[48] 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

[28] SRTA, s 17(9).

property settlement void or valid according to whether a debtor-transferor was or was not conscious of its effect on the transferor's 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?

[49] The SRTA 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" (s. 2(1)), may only be challenged under the grounds prescribed by clause 7(1)(c); that is, only where the parties collusively intended to defeat the creditors of one of them. 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.

[50] Subsections 8(1)-(4) of the SRTA restrict 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 clause 7(1)(c). In the case of non-spousal transactions effected by court order, creditors are entitled to relief on the grounds established in either clause 7(1)(b) or 7(1)(c). Both require proof that the transferor intended to hinder or defeat creditors by means of the transaction and achieved that result.

[51] 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 corporations legislation[29] that apply to the authorization of such payments by corporations that are insolvent or rendered insolvent by the payment. The SRTA provisions differ from those of the corporation statutes. Corporations legislation provide for recovery *by the corporation*

[29] *Canada Business Corporations Act*, RSC 1985, c C-44 [*CBCA*]; *The Business Corporations Act*, RSS 1978, c B-10 [*SKBCA*]; *The Co-operatives Act,* 1996.SS 1966, c. C-37.3 and *The New Generation Cooperatives Act* SS 1999, N-4.001.

from directors who have authorized the payment.[30] 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 from the payment.[31] The SRTA allows creditors to recover from the shareholder who was paid and potentially from a director who authorized the payment (s 9(2)). Directors and shareholders are shielded from "double jeopardy" through the stipulation that a person against whom an order is granted under a corporation statute is not subject to an order under the SRTA (ss 9(3) - (7)). The Commission recommends that the *SKBCA* be amended to reciprocally provide that a person against whom an order is granted under the SRTA is not subject to an order under the *SKBCA*.

4. The Grounds for Relief: Creditor Transactions

(i) The Requirement of Intention to Defeat Creditors

[52] 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.

[53] 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. 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

[30] See, e.g., *CBCA, ibid,* ss 34(2), 36(2), 42 and 118(2); *SKBCA, ibid* ss 32(2), 34(2), 40 and 113(2).

[31] The *CBCA, supra* note 29, s 38(4) and *SKBCA, supra* note 29, s 36(4) 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.

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 EMJA. 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.

[54] 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 creditors if it has the effect of giving the paid creditor a preference and is challenged within six months of its date.[32] 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.[33] The debtor-intention requirement prevails when the effects-based rule cannot be applied.

[55] 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.[34] 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.

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[32] *The Fraudulent Preferences Act*, *supra* note 9, s 5.

[33] See Dunlop & Buckwold, *supra* note 12 at 1121 – 37 for a full discussion of the problems associated with application of the effects-based rule as it appears in the corresponding provision of Alberta's *Fraudulent Preferences Act*, RSA 2000, c F-24.

[34] The problems outlined here are discussed in detail in Dunlop & Buckwold, *ibid* at 1096 - 1120.

[56] 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.[35]

(ii) Grounds for Relief

[57] The SRTA 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 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 more 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.

[58] 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. The solution adopted by the SRTA is

[35] *The Fraudulent Preferences Act*, *supra* note 9, 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.

relatively simple, produces predictable outcomes, is consistent with the BIA and is defensible as a matter of policy.

[59] Under subsection 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 dealing 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 twelve months preceding bankruptcy.

[60] This extract from the ULCC working group report explains the rationale for section 13:

> [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. [36]

[61] 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.

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[36] *Reform of Fraudulent Conveyances and Fraudulent Preferences Law (Transactions at Undervalue and Preferential Transfers),* submitted by Tamara M. Buckwold (Winnipeg: 2011) at Part 1: Transactions at Undervalue & Fraudulent Transactions: Supplementary Report of the Working Group and at Reform of Fraudulent Conveyances and Fraudulent Preferences Law, Part 2: Preferential Transfers: Final Report of the Working Group, online: Uniform Law Conference of Canada: Uniform Law Conference of Canada <www.ulcc.ca/images/stories/2011_pdf_en/2011ulcc0005.pdf> [ULCC Reform].

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

> [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][37] 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.
>
> [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

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

> would be outweighed by the costs flowing from the uncertain outcomes produced by ambiguous rules. [38]

[63] The SRTA 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 dealing 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.

5. Standing to Seek Relief

[64] 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 exists 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.[39]

[65] The SRTA 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.

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[38] ULCC Reform, *supra* note 36.

[39] On meaning of "other" under the *Fraudulent Conveyances Act, supra* note 7, see *Hamm, supra* note 8. For a full discussion of the question of standing, see Dunlop & Buckwold, *supra* note 12 at 991 – 1005.

[66] 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 2, which is a claim in law that may result in a money judgment. Section 6 addresses 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 the debtor's 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. Subsection 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.

[67] 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.

[68] 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 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.

[69] 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 SRTA for relief against the transferee who has benefited from 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 SRTA. 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 SRTA 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 SRTA 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.

6. Transactions Involving Exempt Property

(i) The function of exempt property

[70] The term "exempt" as used in this report 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 the debtor's family at a basic level of existence, presently and in the future.

[71] 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?

(ii) Transfers of exempt property

[72] 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. This approach has not been adopted in the SRTA. 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 SRTA is consistent with, though broader in effect than, the approach embodied in Saskatchewan judgment enforcement legislation although not pre-EMJA case law.

[73] 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. However, where exempt property is involved there may be a difference in treatment depending upon whether the property is land or personal property.

[74] 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,[40] 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. On one interpretation of this feature, transferred exempt property becomes exigible in the hands of the transferee. An enforcement charge can only arise through registration of a judgment against the judgment debtor's property. When that property is transferred, it is subject to a charge in the hands of a transferee from the debtor. But the transferee cannot claim the exemption. In other words, the charge arises and is enforceable when exempt property is transferred by the debtor to the transferee. 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.

[75] *The Land Titles Act* dictates a similar result with respect to land, though by different means. As a result of clause 173.3(1)(b), 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. An interest in the land acquired after registration of the judgment takes subject to the judgment. Furthermore, subsection 173(6) provides:

> 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

[40] *EMJA, supra* note 3, s 22(1).

> procure the discharge of an enforcement charge affecting the land on receipt of the net proceeds of the purchase money [emphasis added].

[76] The provision implies that 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 the interpretation of the EMJA provisions affecting personal property described above. 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.

[77] The approach described above 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. If a different asset of the same kind is acquired in substitution, the exemption will attach to the new asset. 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.

[78] The SRTA'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. 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.

[79] The SRTA extends that protection to those whose legal claims have not been reduced to judgment at the time of the transaction. Under current law, 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.[41] This result is reversed through the definition of "transaction" in clause 2(1)(a): the conferral of an interest in existing property or property to be acquired in the future,

[41] See *Hamm, supra* note 8.

whether or not the property is exempt property in the hands of the transferor, including a settlement on the transferor as a trustee under a trust.

[80] The SRTA approach 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*.[42] 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.

(iii) Transfer of exempt property retained by the debtor

[81] 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 the debtor's farm residence to a daughter or son but continue to farm and continue to reside in the house. Subsection 17(13) of the SRTA 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 an enforcement charge be registered against the transferee or the property. This provision reflects an approach that has been taken by Saskatchewan courts under current law.[43] The result is to protect the property as long as it continues to be used by the debtor for the exempt purpose.

(iv) Transfer of non-exempt property in exchange for property that is exempt

[82] Under the SRTA, 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

[42] *EMJA*, *supra* note 3, s 93(1)(e); *The Enforcement of Money Judgments Regul*ations, RSS c E-99.22 Reg 1 s 23(3) [*EMJA Regulations*].
[43] See *Petryshyn v Kochan*, [1940] 2 WWR 353, [1940] 3 DLR 796 (Sask QB).

exchanged are reasonably equivalent, unless the parties to the transaction are complicit in an attempt to hinder or defeat the transferor's creditors.[44] This is in line with the approach taken under judgment enforcement law and bankruptcy law. The use of non-exempt property by a debtor to acquire exempt property does not result in the newly acquired property being exigible or vesting in the debtor's trustee.

(v) Transfer of non-exempt interest that becomes exempt in hands of the transferee

[83] When a debtor transfers non-exempt property that, in the hands of the transferee, would normally be exempt, the property is exempt from an order as a result of subsection 17(9). For example, when a debtor uses non-exempt property to acquire an insurance interest and designates a qualified beneficiary, the policy becomes exempt under *The Insurance Act.*[45] The definition of "transaction" gives effect to current case law under which the designation is recognized as the transfer of a property interest to the beneficiary, with the result that such a designation may give rise to a remedy under Part II.

7. Limitation of Actions

[84] 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*.[46] 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.[47] 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, willfully conceals the injury or loss or the act or omission causing it, or willfully misleads the claimant as to the appropriateness of proceeding.[48] If these rules were applied to an action under the URTA,

[44] The case would fall within clause 7(1)(c).
[45] 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 Insurance Act*, SS 2015, c I-9.11 , s 2(1) "beneficiary," "insurance money," and s 8-127.
[46] *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.
[47] Under s 6(2) of *The Limitations Act*, *ibid,* 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.
[48] *Ibid*, s 17.

the one year period proposed in the ULC Report 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 willfully concealed the transaction or willfully misled the creditor as to their potential legal remedy. This means that a person who has received value from a debtor under a transaction within the scope of the URTA 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.

[85] One of the central motivating policies of the SRTA 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. Section 22 of the SRTA therefore imposes a limitation period 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 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.

[86] 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, "[t]he 1 year limitation period in effect circumscribes the cause of action and the risk imposed by the law on transferees."[49]

[49] ULCC Reform, *supra* note 36.

[87] While this view is persuasive, the reasons for the application of the standard two year period provided in section 22 of the SERTA are more persuasive.[50] The working group report notes that creditors may be expected to be reasonably diligent in monitoring debtors' affairs and in pursuing claims. 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.

V. The Interface Between a SRTA and *The Enforcement of Money Judgments Act*

1. Context

[88] Saskatchewan legislators of the early twentieth century implemented a 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 were not repealed when federal bankruptcy law was revived in 1919. 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 prevalent in non-Canadian common law jurisdictions under which some creditors recover fully or in material part while others recover little or nothing. The EMJA retains this philosophy in a refined form.

[89] The Commission has concluded that the principles of the EMJA should apply in the context of the remedies under the SRTA. This involves rejecting the policy of section 16 of the URTA. Under this provision, remedial court orders under URTA section 18 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*…" (emphasis added). Standing alone, the first italicized passage requires 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, these fruits need not be shared with creditors who are not party to the proceedings. Under the EMJA, the value recovered

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

through the SRTA action would be available not only to creditors who had obtained judgments against the debtor at the time of the challenged transaction but also to creditors who obtained judgments before the date for distribution of the EMJA fund created by an order under section 17.

2. The Types of Orders

[90] The Commission has concluded that the decision to provide an effective interface between the SRTA and the EMJA necessitates, in part, a different approach to orders made by the court than that of the URTA. The approach contained in the SRTA has been designed to provide: (i) remedies that minimize enforcement costs; (ii) appropriate integration between the orders granted under the Act and the EMJA; and (iii) orders that cannot be easily thwarted.

[91] The approach contained in Part IV of the SRTA assumes that, as much as possible, the principal role of an order under the SRTA should be to create an EMJA fund by requiring the transferee to make payment directly to the sheriff or by having the sheriff seize and sell transferred property held by the transferee. This approach avoids the costs and delay associated with separate enforcement of judgments obtained by the applicant and other judgment creditors of the debtor through seizure and sale of transferred property that has re-vested in the transferor. Consequently, the principal type of order under section 17 would not revest the transferred property in the transferor but would provide for the recovery of its value directly from the transferee. However, there will be circumstances in which the most effective approach is for the court to cancel a transferred economic benefit, such as a security interest or licence, rather than having to quantify its value and make a payment order against the transferee. In such cases, the judgments against the transferor are enforced as provided in the EMJA.

3. Quantification of the Value Conferred

[92] A central feature of the EMJA is that all judgment creditors who have registered judgments in the Judgment Registry before the date for distribution of a fund resulting from judgment enforcement are entitled to share in the fund. An order under section 17 of the SRTA requiring recovery from the transferee is limited to the value conferred on the transferee and the proceeds of that value. In most situations, the total of registered

judgments will exceed this value. However, where this is not the case, section 17 requires that the court take into account the total amount of judgments against the transferor registered in the Judgment Registry by the date of the order. Section 109 of the EMJA provides that any judgment creditor who issues an enforcement instruction after the date of the order but before the sheriff issues a distribution statement under sections 108 and 111 would share in the fund.

4. The Value Conferred and Costs

[93] An order under Part IV will relate to the value conferred on the transferee, and where appropriate, costs ordered by the court. This feature is embodied in the concept of "relevant amount" as defined in section 16(1).

[94] Clauses 7(1)(a) and (b) address transactions that are essentially gifts to the transferees when the transferors are on the verge of insolvency or are insolvent. Even though the transferor may intend to hinder or defeat the transferor's creditors, the transferee is not privy to this intent and, as a result, is not required to pay costs of the enforcement other than ordinary party/party costs ordered by the court. However, in cases under clause 7(1)(c), section 8, or Part III, in addition to having the value received from the transferor surrendered, the transferee may be ordered by the court to pay the regular costs of enforcement and costs referred to in EMJA clause 110(3)(a) designed to compensate the applicant for the unusual expenditures generally associated with an application for a remedy under the Act. The justification for this separate treatment is that, in cases other than those involving clauses 7(1)(a) and 7(1)(b), an element of culpability on the part of the transferee is likely to be involved. However, whether or not the order for additional costs is made is a matter within the discretion of the court.

5. The Types of Orders under Section 17

[95] There are four types of substantive orders referred to in section 17: (1) an order directed to the transferee to pay to the sheriff the value transferred; (2) an order empowering the sheriff to seize and sell assets of the transferee not exceeding the relevant amount; (3) an order setting aside a transaction or reviving any obligation or security released; and (4) an order creating a statutory security interest in property of the transferee that secures an obligation arising under another order. The Act also provides for ancillary

orders including the appointment of a receiver of the transferee's property and an injunction against a debtor or transferee.

[96] There is an important difference between orders (1) and (2) on the one hand, and (3) on the other. When complied with, the former two orders result in the acquisition by the sheriff of money that becomes a fund under the EMJA. An order setting aside a transfer of value to the transferee or reviving any obligation or security released results in the value again becoming the property of the transferor, property that may be exempt for enforcement. This value, if exigible, becomes a fund under the EMJA only when a judgment against the transferor is enforced as provided in the EMJA. It is expected that this type of order will be made only in unusual circumstances. Subsection 17(11) provides that a type (3) order be made when the court determines that a type (1) or (2) order may be less effective.

[97] An order made pursuant to clause 17(1)(c) providing for property of the transferee to be seized and sold is to be executed by the sheriff who is given by subsection 17(5) many of the powers the sheriff has under *The Enforcement of Money Judgments Act.*

6. A Statutory Security Interest

[98] In most cases, the statutory security interest a court may order under clause 17(1)(g) is likely to be the most intrusive of the remedies available. Subsection 17(12) provides that this remedy is to be employed when the court determines that an order made under another clause may be totally or partially ineffective. The order will generally be made as a backup to another order. It can be made any time it is demonstrated that another order may be ineffective.

[99] The Commission concluded that this remedy should be available to address a range of enforcement problems associated with the other remedies. The principal remedy provided in section 17 is an order of the court requiring the transferee to pay to the sheriff the value transferred to the transferee. An issue of enforceability arises in the context of this type of order should the transferee fail to comply with it. One approach is to bring contempt proceedings against the transferee. However, this remedy is lengthy and cumbersome and one that courts are very reluctant to employ because of its quasi-criminal nature. An alternative is for the court to make an order entering a judgment against the transferee. However, this may be unsatisfactory. Enforcement of the

judgment would lead to an enforcement charge that, of necessity, would be treated as an enforcement charge affecting the transferee's property. When the charge is enforced by the sheriff, the proceeds become a fund shared by the transferee's judgment creditors as provided in the EMJA.

[100] Another problem addressed by an order creating a statutory security interest is the possibility that the transferee will dispose of the transferred value or grant a security interest in it after an order for the payment of money or seizure of the transferee's property has been made by the court.

[101] While the matter is not free from doubt, a statutory security interest made before the transferee becomes a bankrupt may be enforceable against the transferee's trustee. This would not be the case with respect to most of the other types of orders.

7. Features of a Statutory Security Interest

[102] A statutory security interest in personal property as provided in SRTA section 18, in most respects, is the direct equivalent of a security interest under *The Personal Property Security Act, 1993.* The provisions of the PPSA and *The Land Titles Act, 2000* applicable to registration of a statutory security interest are enumerated in ss. 20(1)-(6).

[103] With two exceptions, a statutory security interest in personal property is subject to the priority rules of the PPSA and the EMJA. The one exception is that it is subject to a future advance priority rule similar to subsection 25(5) of the EMJA rather than the equivalent rule under subsection 35(5) of the PPSA. The second is that the statutory security interest would have priority over a prior enforcement charge under the EMJA.

[104] A statutory security interest in land would be an "interest" under Part IX of *The Land Titles Act, 2000* and, as such, subject to the registration and priority rules of that Act as provided in ss. 20(5)-(6).

[105] A statutory security interest would be enforced only upon order of the court and enforced as an enforcement charge under Part XI of the EMJA. However, when land is involved, section 104 of the EMJA would not apply.

VI. The Standing of the Trustee in Bankruptcy to Seek Relief

[106] 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 the SRTA regime. The Supreme Court of Canada, in *Robinson v Countrywide Factors Ltd*,[51] 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 SRTA. 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 SRTA.

[107] 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…".[52] *The Fraudulent Conveyances Act, 1571* states as its purpose the "avoiding 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 no effect".[53] 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 Conveyance Act, 1571*. At least one court has noted the lack of a 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

[51] *Robinson, supra* note 5.
[52] *The Fraudulent Preferences Act, supra* note 9, ss 1 and 2.
[53] *Th Fraudulent Conveyances Act, supra* note 7, ss II and III.

> 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.[54]

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).[55]

[108] The short decision of the English Court of Appeal in *Ex parte Butters*[56] 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 principle advanced should not be taken out of context.[57]

[109] The proposition that "bankruptcy law" gives the trustee standing to challenge a transaction under the Elizabethan *Fraudulent Conveyances Act* 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 lost.[58] It should also be noted 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

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[54] *Re Rinn* (1923), 33 Man R 153, [1923] 3 DLR 986 (Man CA) at 157.

[55] *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.

[56] (1880), 14 Ch D 265 (CA).

[57] 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 that 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.

[58] 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 12 at 1061 – 64.

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.

[110] The rationalization of the trustee's standing under current law does not apply to the SRTA system. The SRTA 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.[59] The term "claim" is defined in subsection 2(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.

[111] Further, the outcome of a successful action under the SRTA is not a declaration that a transfer of property is "void," but rather an order setting aside the transaction under which the value was transferred to the transferee or an order for compensation from 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.

[112] 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.

[59] See Uniform Law Conference of Canada, *Uniform Reviewable Transactions Act*, s 6, with respect to applications under Part II, and s 12, with respect to applications under Part III.

VII. Other Matters

1. The Position of Secured Creditors

[113] 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. Fully 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. Presumably, this includes creditors who, at the date of the action, have security for only part of the debts owing to them. They are unsecured creditors for the balance.

[114] The SRTA 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.

[115] Section 4 includes technical rules designed to resolve the complex issues that may arise as a result of the interface between the SRTA and the priority rules of the PPSA governing security interests. It addresses situations when creditors 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 SRTA 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.

2. Secondary Transferees

[116] 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."[60] 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.

[117] Section 11 of the SRTA 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.[61]

3. Injunctive Relief

[118] Section 21 of the SRTA 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. This is in addition to the general power given to the court by section 23. The objective of section 21 is to prevent a transaction that would give rise to relief under the Act from 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.

[119] In Saskatchewan, the 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 a fraudulent conveyance or preference action is obtained and can be

[60] *The Fraudulent Preferences Act*, *supra* note 9, s 13(1).

[61] *BIA*, *supra* note 5, s 98 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.

enforced. The focus of these provisions is on the transferee of the property by the debtor. The Commission has concluded that EMJA Part II should be revised so as to apply in an application for an order against any transferee under the SRTA.

[120] While that approach would integrate the EMJA with the SRTA with respect to proceedings challenging a transaction that has allegedly occurred, it would not fully accomplish the objectives of section 21 of the SRTA. Section 21 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.

[121] The approach taken in the SRTA 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 SRTA 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. This policy is implemented by section 21 of the SRTA.

[122] Minor amendments to Part II of the EMJA governing preservation orders are required to facilitate the interface between the EMJA and the SRTA.

VIII. Orders for Relief in Relation to Corporate Transactions

[123] Section 9 of the SRTA 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.

[124] Section 234 of *The Business Corporations Act*, section 190 of *The Co-operatives Act, 1996* and section 291 of *The New Co-operatives Act* allow 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*]. A very similar 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.[62] 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.

[125] The grounds on which an order for relief may be granted against an incorporated debtor under the corporation legislation are much less specific than those that must be established to obtain relief under the SRTA, 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 it thinks fit.[63] 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

[62] See e.g. *Builders' Floor Centre Ltd v Thiessen*, 2013 ABQB 23, *1007374 Alberta Ltd v Ruggieri*, 2015 ABCA 205 [*Ruggieri*].
[63] *SKBCA, supra* note 29, s 234.

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.[64]

[126] This raises the question of whether creditors should be permitted to proceed under either or both the SRTA and a corporation statute in relation to a transaction involving an incorporated debtor. The Commission has concluded that the SRTA should be the sole source of remedies to deal with situations where conduct has reduced or may reduce the amount or value of property of the corporation available to satisfy creditors' claims. The grounds for relief under the SRTA, together with the provisions governing the award of a remedy, have been carefully tailored to balance the interests of creditors against those who may deal with a debtor. In contrast, the 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 SRTA, or if available would be more limited than what the corporate legislation permits. A system that allows creditors to resort to the oppression remedy as well as to reviewable transactions law would reinstate much of the legal uncertainty that the SRTA 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. Elimination of the relief available to creditors under the corporations law 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 Saskatchewan law. 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 current corporations provisions remain in place.

[64] In *Ruggieri*, *supra* note 62, the Alberta Court of Appeal said this at para 7:

> 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.

IX. Other Consequential Amendments

1. The Land Titles Act, 2000

[127] Section 173(6) of *The Land Titles Act, 2000* refers to a sale of land to "a purchaser for value pursuant to a transaction that is not a fraudulent conveyance." The provision should 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 SRTA.

2. Costs in Successful Applications

[128] As noted earlier in this report, under the SRTA, the proceeds of an order would be treated as a "fund" under section 107 of the EMJA. Judgment creditors, in addition to the creditor who obtained the SRTA order who have obtained and registered judgments in the Judgment Registry against the debtor, are entitled to share in distribution of the funds as provided in section 110. The result is that the claim of the judgment creditor who obtained the SRTA order is likely to be only partially discharged.

[129] The Commission has concluded that this result may produce injustice. In most cases of this kind, the claimant will have incurred extraordinary legal and investigatory costs in bringing the action. These extra costs should be specifically recognized in the court order and given a high priority under EMJA section 110. It is recommended that the following new provision be added to the section.

> 110 (3) Except as otherwise provided, and subject to any entitlement of a person other than a judgment creditor to money in a fund, the fund constituted pursuant to this Part remaining after payment of the fees and costs mentioned in subsection (1) shall be distributed in the following order:
>
> *(a) the amount of costs and expenses ordered by the court, other than fees and costs described in subsection (1), to the extent that the money in the fund can be attributed to property subject to an order of the court in an application under The Reviewable Transactions Act, which amount shall be paid to the judgment creditor who brought the application;*
>
> (a.1) renumbered current (a).

X. An Act Respecting Reviewable Transactions and Repealing the Fraudulent Preferences Act and the Fraudulent Conveyances Act, 1571 and Making Consequential Amendments to Certain Acts

Preliminary Matters

Short Title

1 This Act may be cited as *The Reviewable Transactions Act*.

PART I
General Interpretation

2(1) In this Act:

"applicant" means a person who makes an application to the court for relief under this Act;

"claim" means the right to satisfaction of an obligation owed by a debtor, whether the obligation is:

(a) liquidated or unliquidated;

(b) absolute or contingent;

(c) certain or disputed; or

(d) payable immediately or at a future time;

"confer" includes to create, grant, provide or transfer;

"creditor" means, subject to section 13, a person who holds a claim;

"creditor transaction" means a transaction under which a debtor directly or indirectly benefits a creditor by satisfying a claim in whole or in part or by providing security for the satisfaction of a claim in whole or in part but does not include:

(a) a transaction under which a debtor:

(i) satisfies an obligation that is secured by a security interest in property of the debtor to the extent that the security interest has priority over the rights of unsecured creditors of the debtor;
(ii) confers an interest in property as security for new value advanced by the transferee; or
(iii) gives a security interest in property in substitution for another security interest in property that is of equivalent value and that was given to secure the same obligation; or

(b) a transaction effected:
(i) by obtaining or enforcing a court order; or
(ii) by operation of law;

"debtor" includes a person with respect to whom an application for relief under this Act has been made;

"enforcement charge" means:

(a) with respect to personal property, a charge in the personal property registry created by registration of a judgment in the registry as provided in *The Enforcement of Money Judgments Act*; and

(b) with respect to land, a charge created by registration of an interest based on a judgment against a title or against an interest in the land titles registry as provided in *The Enforcement of Money Judgments Act* and *The Land Titles Act, 2000;*

"exempt property" means property that may not be seized to enforce a money judgment;

"insolvent," with respect to a person, means that:

(a) the person is for any reason unable to meet the person's obligations as they generally become payable;

(b) the person has ceased paying the person's obligations in the ordinary course of business as they generally become payable; or

(c) the aggregate of the person's property, other than exempt property, is not, at a fair valuation, sufficient to enable payment of all of the person's obligations, whether or not those obligations are currently payable;

"security interest" means an interest in property that secures payment or performance of an obligation and, in sections 3 and 4, includes an interest that is a security interest under subsection 3(2) of *The Personal Property Security Act*, 1993 and an interest to which Part VIII of *The Land Titles Act, 2000* applies;

"separation agreement" means an agreement between a debtor and an individual who is or was the debtor's spouse that:

(a) results from or relates to the breakdown of the parties' relationship; and

(b) provides for the division of property and financial resources or for support for the individual who is or was the debtor's spouse or for a member of the debtor's family;

"spousal transaction" means a transaction in which the parties are or were spouses and that is effected by:

(a) a separation agreement;

(b) a court order for the division of property and financial resources or for support resulting from the breakdown of the parties' relationship; and

(c) an agreement made pursuant to section 38 of *The Family Property Act;*

"spouse" means an individual who, at the time of the transaction:

(a) is or was married to another individual; or

(b) is cohabiting or has cohabited as a spouse continuously for a period of not less than two years.

"transaction" means the conferral of value and includes:

(a) the conferral of an interest in value, whether or not the value is property that is exempt property in the hands of the transferor, including a settlement on the transferee as a trustee under a trust;

(b) the provision of services;

(c) the payment of money;

(d) the release of an interest or obligation;

(e) the conferral of a security interest, charge, lien or encumbrance;

(f) the conferral of a licence, quota, right to use or right to payment;

(g) the designation of a beneficiary;

(h) the voluntary purchase or redemption of its shares by a corporation or the voluntary payment of a dividend by a corporation, other than a dividend in the form of its shares;

(i) the refusal by a debtor to act under a power of appointment to confer an interest in property on the debtor;

(j) the disclaimer of an interest in value, whether before or after the interest has vested;

(k) the creation or augmentation of a security interest held by a creditor in property of a debtor as a result of the satisfaction of an obligation owed to another person that is secured by a security interest in the same property if:

(i) an unsecured claim of the creditor in that property becomes secured in whole or to a greater extent; or

(ii) a claim of the creditor in that property that was unsecured in part becomes secured in whole or to a greater extent;

(l) the satisfaction of an obligation owed by a person other than the debtor;

(m) the conferral of a benefit by a court order or by operation of law;

(n) the assumption of an obligation to do or to bring about in the future any of the events or actions mentioned in clauses (a) to (m);

"transferee" means a person who benefits under a transaction and includes a creditor who benefits under a creditor transaction;

"transferred" includes acquisition of value under a transaction;

"value" means an interest, benefit or a right and includes proceeds of value.

(2) A transaction may be a single event or may comprise a series of closely related events, including the provision of services over time.

(3) The date of a transaction is the date on which value is conferred and, if the transaction comprises a series of closely related events, the date when the events are substantially completed.

(4) For the purposes of this Act:

(a) an individual has knowledge when the relevant information is acquired by the individual under circumstances in which a reasonable person would take cognizance of it;

(b) a partnership has knowledge when the relevant information comes to the attention of one of the general partners or a person having control or management of the partnership business under circumstances in which a reasonable person would take cognizance of it;

(c) a corporation has knowledge when:

(i) the relevant information comes to the attention of

(A) a managing director or officer of the corporation under circumstances in which a reasonable person would take cognizance of it; or

(B) a senior employee of the corporation with responsibility for the matter to which the information relates under circumstances in which a reasonable person would take cognizance of it; or

(ii) the relevant information in writing is delivered to the corporation's registered office or attorney for service;

(d) the members of an association have knowledge when the relevant information comes to the attention of:

(i) a managing director or officer of the association under circumstances in which a reasonable person would take cognizance of it;

(ii) a senior employee of the association with responsibility for matters to which the information relates under circumstances in which a reasonable person would take cognizance of it; or

(iii) all members under circumstances in which a reasonable person would take cognizance of it; and

(e) a government has knowledge when the relevant information comes to the attention of a senior employee of the government with responsibility for the matter to which the information relates under circumstances in which a reasonable person would take cognizance of it.

(5) All applications for an order for relief under this Act must be made to the Court of Queen's Bench.

Rights of secured creditors

3(1) A creditor whose claim is partially secured by a security interest in property of the debtor may apply for an order for relief under this Act but only with respect to the amount of the claim that exceeds the value of the property against which the security interest may be enforced.

(2) If a debtor transfers property that is subject to a security interest and another Act provides that the security interest is subordinated to the interest of the transferee or that the transferee takes the property free of the security interest:

(a) the property is not to be considered property against which the security interest may be enforced for the purposes of subsection (1) in proceedings relating to that transfer or to another transaction; and

(b) if an order for relief is made under this Act in relation to the property transferred, whether in proceedings by the creditor or by another person, the creditor may not assert a claim to the property on the basis of the security interest.

Relief where transaction involves property subject to a security interest or enforcement charge

4(1) An application for an order for relief may be made in relation to a transaction that involves property that is subject to a security interest or an enforcement charge even if under another Act:

(a) the security interest or the enforcement charge is subordinated to the interest of the transferee; or

(b) the transferee takes the property free of the security interest or enforcement charge.

(2) If a transaction involves property that is subject to a security interest at the date of the transaction, an order for relief may be made only if the transaction reduces the amount or value of property that would have been available to unsecured creditors under judgment enforcement measures if the transaction had not occurred.

(3) In determining under subsection (2) whether or not property would have been available to unsecured creditors under judgment enforcement measures if the transaction had not occurred:

(a) no regard is to be had to whether or not the property is or was exempt property; and

(b) if the security interest is subordinated to the interest of the transferee or the transferee takes free of the security interest, the security interest is to be considered unenforceable against unsecured creditors.

When applications for orders of relief may be made and claims may be established

5(1) An application for an order for relief under this Act may be made whether or not the applicant has commenced proceedings or obtained a judgment against the debtor.

(2) An applicant is entitled to an order for relief only if the applicant has obtained a money judgment against the debtor.

(3) If an applicant does not have a judgment against the debtor in relation to an application:

(a) the applicant may make the debtor a defendant in the proceedings and the court may:
(i) grant judgment against the debtor for the amount of the claim of the applicant; or
(ii) direct a separate trial to determine the validity and amount of the applicant's claim; and

(b) the court may:
(i) stay the proceedings or suspend the operation of an order for relief until a judgment is obtained either as part of the proceedings related to the application for relief or in another action; and
(ii) make any supplementary orders that the court considers appropriate.

PART II

Transactions at Undervalue and Transactions Intended to Hinder or Delay Creditors

Who may apply for order of relief under this Part

6(1) An application for an order for relief under this Part may be made by:

(a) an applicant who holds a claim that existed at the date of the transaction that is the subject of the application for relief; and

(b) in the case of an application on the grounds of relief mentioned in clause 7(1)(b) or (c), a person who holds a claim that arose after the date of the transaction that is the subject of the application for relief.

(2) For the purposes of permitting an application for relief to be made under this section:

(a) a person who has commenced legal proceedings claiming an interest in the property of a debtor or an order for the payment of money against a debtor is to be regarded as a person who holds a claim; and

(b) a person who is a defendant in the legal proceedings mentioned in clause (a) is to be regarded as a debtor whether or not a judgment has been granted against that person at the time the application is made.

Grounds for relief under this Part - transactions at undervalue or fraudulent transactions intended to hinder or defeat creditors.

7(1) Except as otherwise provided in this Act, an order for relief may be made under this Part:

(a) in relation to a transaction in which the debtor receives no consideration or consideration worth conspicuously less than the value conferred by the debtor under the transaction, if the debtor:

(i) is insolvent at the time of the transaction;

(ii) becomes insolvent as a result of the transaction; or

(iii) enters into the transaction in circumstances in which the debtor is demonstrably at risk of insolvency and the debtor becomes insolvent within 6 months after the date of the transaction;

(b) in relation to a transaction in which the debtor's primary intention is to hinder or defeat the right of a creditor or creditors to recover in whole or in part claims that, at the time of the transaction, were existing or were reasonably foreseeable, if:

(i) the ability of the creditor or creditors to recover their claims is materially hindered as a result of the transaction; and

(ii) the debtor receives no consideration or consideration worth conspicuously less than the value conferred by the debtor under the transaction; or

(c) in relation to a transaction in which the debtor's primary intention is to hinder or defeat the right of a creditor or creditors to recover in whole or in part claims that, at the time of the transaction, were existing or were reasonably foreseeable, if:

(i) the ability of the creditor or creditors to recover their claims is materially hindered as a result of the transaction; and

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

(2) For the purposes of subsection (1), if the transaction involves a corporation repurchasing or redeeming shares issued by the corporation, neither receipt of the shares by the corporation nor their surrender by the holder is to be regarded as consideration received by the corporation under the transaction.

(3) The court may consider the following factors, among others, in determining the intention of the debtor or the transferee:

(a) in the case of the debtor, whether the debtor was insolvent at the date of the transaction or became insolvent as a result of the transaction;

(b) in the case of the transferee, whether the transferee knew that the debtor was insolvent at the date of the transaction or would likely become insolvent as a result of the transaction;

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

(d) if the transaction was effected by a court order:

(i) in the case of the debtor, whether the debtor failed to disclose to the court in the proceedings under which that court order was made:

(A) an existing or reasonably foreseeable claim that may be prejudiced by the order; or

(B) the extent of an existing or reasonably foreseeable claim; or

(ii) in the case of the transferee, whether the transferee failed to disclose to the court in the proceedings under which that court order was made:

(A) an existing or reasonably foreseeable claim that may be prejudiced by the order and that was known to the transferee, or

(B) the extent of an existing or reasonably foreseeable claim that was known to the transferee;

(e) whether the value of the consideration received by the debtor was less than the value conferred on the transferee;

(f) whether the parties to the transaction were related, closely affiliated or otherwise dealing with each other at non-arm's length as provided in subsections 13(2)-(6);

(g) whether the debtor retained the possession, use or benefit of the value transferred under the transaction;

(h) whether the transaction was entered into in haste;

(i) whether the debtor or the transferee attempted to keep knowledge of the transaction or circumstances material to the availability of relief under this Act hidden from creditors or others;

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

Relief in certain cases

8(1) In this section, “contingent obligation” means an obligation to pay money, transfer property or otherwise give value, the performance of which is contingent on an event that may or may not occur, and includes an obligation under a guarantee or an agreement to indemnify against loss occasioned by the default or non-performance of another person.

(2) An order for relief may be made in relation to the following transactions only if the grounds for relief mentioned in clause 7(1)(c) are established:

(a) a spousal transaction;

(b) a transaction involving the refusal by a debtor to act under a power of appointment to confer an interest in property on the debtor or the disclaimer of an interest in property before the interest has vested; or

(c) a transaction involving the assumption of a contingent obligation by the debtor.

(3) If a transaction, other than a spousal transaction, is effected by a court order or by operation of law, an order for relief may be made only if the grounds for relief mentioned in clause 7(1)(b) or (c) are established.

(4) If a transaction is effected by a court order, an order for relief may be made whether or not that court is the court that made the order effecting the transaction.

Transactions involving corporate payments

9(1) This section applies to a transaction that consists of the purchase or redemption of its shares by a debtor corporation or the declaration of dividends by a debtor corporation.

(2) If an order for relief is made against a shareholder as transferee in a transaction, the court may make an order for relief against a director or directors of the corporation, jointly and severally, to take effect if and to the extent that the order against the shareholder is not satisfied within 6 months after the date that the order is made.

(3) An order for relief must not be made under this section against:

(a) a person who is not liable in relation to the actions constituting the transaction under any applicable Act or other law governing the corporation that provides for a remedy against a person in relation to a resolution or action authorizing the purchase or redemption of shares or the declaration of a dividend; or

(b) a person who had reasonable grounds to believe that the circumstances of the transaction were such that the transaction did not give rise to a remedy under the Act or law mentioned in clause (a).

(4) In determining whether a person had reasonable grounds within the meaning of subsection (3), the court must consider whether the person in good faith relied on, and a reasonable person in the person's position could be expected to rely on:

(a) financial statements of the corporation represented to the person by an officer of the corporation or in a written report of the auditor of the corporation to reflect fairly the financial condition of the corporation; or

(b) a report of a lawyer, accountant, engineer, appraiser or other person whose position or profession lends credibility to the person's decision.

(5) An order for relief must not be granted against a shareholder who, in proceedings taken under a statute relating to corporations by the corporation or another person, has been ordered to restore to the corporation or to a director of the corporation any amount paid or the value of property distributed under the transaction.

(6) An order for relief must not be granted against a director who, in proceedings taken under a statute relating to corporations, has been ordered:

(a) to restore to the corporation any amount paid or the value of property distributed under the transaction; or

(b) to make a payment to satisfy a right of contribution held by another director who has been ordered to restore to the corporation any amount paid or the value of property distributed under the transaction.

(7) If an order for relief is made against a person in relation to a transaction:

(a) the order is not enforceable against that person if the person is subsequently ordered in proceedings under a statute relating to corporations*:*

(i) to restore to the corporation an amount paid or the value of property distributed under the transaction; or

(ii) to satisfy an order for contribution; and

(b) the court may suspend or stay enforcement of the order for relief until proceedings referred to in (a) are concluded.

Orders for relief respecting creditor or spousal transactions

10(1) Subject to subsection (2), if a transaction is a creditor transaction, an order for relief may be made under this Part only to the extent that value conferred on the creditor exceeds the claim satisfied or secured by the creditor transaction.

(2) This Part applies to a spousal transaction, whether or not the spousal transaction is a creditor transaction in whole or in part.

Persons against whom relief may be granted under this Part

11(1) If grounds for relief mentioned in section 7 are established, the court may make an order for relief against either or both of the following:

(a) a transferee who received value from the debtor under the transaction;

(b) subject to subsection (2), a person who has received all or part of the value conferred under the transaction from a person described in clause (a) or a subsequent transferee.

(2) An order for relief must not be made against a person mentioned in clause (1)(b) if the person gave consideration that, in the opinion of the court, is worth not conspicuously less than the value received and

(a) if the grounds for relief fall within clause 7(1)(a), the person did not know that the value was derived from a transaction that occurred in the circumstances described in that clause; or

(b) if the grounds for relief fall within clause 7(1)(b) or (c), the person did not know that the value derived from a transaction in which the debtor's primary intention was to hinder or defeat the enforcement of the rights of a creditor or creditors.

(3) If grounds for relief mentioned in section 9 are established, the court may make an order for relief against a director of a corporation.

PART III
Preferential Creditor Transactions

Who may apply for order of relief under this Part

12(1) Subject to subsection (2), an application for relief under this Part may be made by a person who holds a claim that existed at the date of the creditor transaction that is the subject of the application for relief.

(2) If a claim is a right to satisfaction of an obligation that is contingent on a future uncertain event, the person who holds the claim may apply for relief only if, at the date of the creditor transaction that is the subject of the application for relief, it was reasonably foreseeable that the event would occur.

Grounds for relief under this Part

13(1) Except as otherwise provided in this Act, an order for relief may be made under this Part in relation to a creditor transaction if:

> (a) the creditor receiving the value conferred under the creditor transaction is not dealing at arm's length with the debtor; and
>
> (b) the debtor:
>
> > (i) is insolvent at the time of the creditor transaction;
> > (ii) becomes insolvent as a result of the creditor transaction; or
> > (iii) enters into the creditor transaction in circumstances in which the debtor is demonstrably at risk of insolvency and the debtor becomes insolvent within 6 months after the date of the creditor transaction.

(2) Persons who are related to each other are presumed not to deal with each other at arm's length while so related but the presumption may be rebutted by proof that they are dealing at arm's length.

(3) It is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length.

(4) Persons are related to each other when they are related to each other for the purposes of the *Bankruptcy and Insolvency Act (Canada).*

(5) Persons are deemed to be dealing with each other at arm's length with respect to the following:

> (a) a margin deposit made by a clearing member with a clearing house; or
>
> (b) a transfer, charge or payment made in connection with financial collateral and in accordance with the provisions of an eligible financial contract.

(6) In this section,

"clearing house," means a body that acts as an intermediary for its clearing members in effecting securities transactions;

"clearing member" means a person engaged in the business of effecting securities transactions who uses a clearinghouse as an intermediary;

"creditor" includes a surety or guarantor for the debt due to the creditor;

"financial collateral" and "eligible financial contract" have the meaning ascribed by the *Bankruptcy and Insolvency Act (Canada)*;

"margin deposit" means a payment, deposit or transfer to a clearinghouse under the rules of the clearinghouse to assure the performance of the obligations of a clearing member in connection with security transactions, including, without limiting the generality of the foregoing, transactions respecting futures, options or other derivatives or to fulfil any of those obligations.

Non-application of Part to spousal transactions

14 This Part does not apply to a spousal transaction, notwithstanding that the spousal transaction may be a creditor transaction in whole or in part.

Persons against whom relief may be granted under this Part

15 If grounds for relief under this Part are established, the court may make an order for relief against either or both of the following:

(a) the creditor receiving the value conferred under the creditor transaction;

(b) a person who has received all or part of the value conferred under the creditor transaction:

(i) in a transaction with the creditor mentioned in clause (a), if the person was not dealing at arm's length with the creditor; or

(ii) in a transaction with a transferee who received all or part of the value from the creditor mentioned in clause (a) or a subsequent transferee, if the parties to each transaction leading to receipt of the value by the person against whom relief is claimed were not dealing at arm's length.

PART IV
Orders and Remedies

Orders under Parts II or III

16(1) In this section and sections 17, 18 and 19:

"proceeds" means:

(a) identifiable or traceable value that is derived directly or indirectly from any dealing with:

(i) the value that is the subject of the transaction; or

(ii) the proceeds of the value that is the subject of the transaction; and

(b) the right to an insurance payment or any other payment as indemnity or compensation for loss of or damage to:

(i) the property that is the subject of the transaction; or

(ii) the proceeds of property that is the subject of the transaction;

"relevant amount" means:

(a) in an order for relief under clauses 7(1)(a) and (b), the amount of the applicant's judgment and all judgments against the transferor registered in the Judgment Registry as provided in *The Enforcement of Money Judgments Act* at the date of the order or an amended order under this section not exceeding the value conferred by the transferor on the transferee under the transaction; and

(b) in any other order, the total of:

(i) the amount of the applicant's judgment and all judgments against the transferor registered in the Judgment Registry as provided in *The Enforcement of Money Judgments Act* at the date of the order or amended order under this section not exceeding the value conferred by the transferor on the transferee under the transaction; and

when ordered by the court,

(ii) the amount referred to in subsection 110(1) of *The Enforcement of Money Judgments Act;* and

(iii) the amount of the claimant's judgment and costs as provided in clause 110(3)(a) of *The Enforcement of Money Judgments Act;*

"statutory security interest" means a security interest ordered by the court as provided in clause 17(1)(g).

(2) In an application under Part II or Part III, the court:

(a) shall make any order referred to in section 17 that it considers necessary to recover from the transferee the relevant amount; and

(b) may decline to grant an order.

Orders

17(1) The court may make one or more of the following orders:

(a) an order requiring the transferee to deliver to the sheriff a sum equivalent to the relevant amount;

(b) except in the case of an order made under Part III, an order requiring the transferee to deliver to the sheriff a sum equivalent to the relevant amount in recognition of income earned through the use or exploitation of property or of a licence, quota, right to use or right to payment received under the transaction;

(c) an order directing that property of the transferee be seized and sold by the sheriff free from any enforcement charge affecting it and the net amount received having a value up to the relevant amount be retained by the sheriff;

(d) an order setting aside a transaction or reviving any obligation or security released;

(e) an order setting aside or varying a court order if the order constitutes a transaction giving rise to the entitlement to relief;

(f) an order appointing a receiver to take possession of and deal with property in the manner directed;

(g) an order that:

(i) an interest in an item or type of personal property or land conferred on the transferee under a transaction; or

(ii) any or all of the present and future personal property of a transferee;

is subject to a statutory security interest securing the relevant amount;

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

(2) An order under clause (1)(a) or (b) may be registered as a judgment in the Judgment Registry naming the transferee as the judgment debtor.

(3) When registered in the Judgment Registry or under *The Land Titles Act, 2000*, an order under clause 1(a), 1(b) or 1(c) has the same priority in relation to other interests in the property affected as an enforcement charge under *The Enforcement of Money Judgments Act* and *The Land Titles Act, 2000* respectively.

(4) When under an order under clause 1(c) a security, security entitlement or futures contract is seized by the sheriff as provided in sections 53 of *The Enforcement of Money Judgments Act,* the order has the same priority in relation to others interest in the security, security entitlement or futures contract as an enforcement charge perfected by the control as provided in *The Enforcement of Money Judgments Act.*

(5) When executing an order under clause 1(c), unless the court orders otherwise, the following provisions of *The Enforcement of Money Judgments Act* apply*,* with appropriate modifications, including reading "judgment debtor" as "transferee":

(a) Part I, applicable definitions, and subsections 4(1),(2) and (4);

(b) Parts VI and VII;

(c) Part VIII, subsection 72(2); and

(d) Part XI, other than section 104.

(6) When executing an order under clause (1)(c), the sheriff may require the transferee to complete a questionnaire in the form referred to in subsection 13(1) of *The Enforcement of Money Judgments Act* and attend for examination under oath as provided in section 14 of that *Act.*

(7) Section 15 of *The Enforcement of Money Judgments Act* applies with appropriate modifications, including reading "judgment debtor" as "transferee":

(8) The transferee may not claim any value transferred under a transaction as exempt from enforcement or as an interest to which Part V of *The Saskatchewan Farm Security Act* applies.

(9) Money received by a sheriff as provided in this section shall be deemed to be:

(a) money received by the sheriff pursuant to clause 107(2)(a) of *The Enforcement of Money Judgments Act*; and

(b) a fund the proceeds of which were obtained through enforcement of a judgment against the debtor.

(10) If an order is made in relation to a creditor transaction involving a guarantee or indemnity or an obligation secured by a guarantee or indemnity, the defences that the person obligated under the guarantee or indemnity may assert are not affected.

(11) A court may make an order under clause (1)(d);

(a) when the court determines that an order under any one or more of clauses (1)(a)-(c) may be less effective than an order under clause 1(d); or

(b) along with another order under subsection (1).

(12) The court may make an order under (1)(g):

(a) when the court determines that an order made under another clause of subsection (1) may be totally or partially ineffective; or

(b) along with another order.

(13) If an order is granted under clause 1(c) involving property exempt at the date of the transaction, and the debtor continues to use the property in the manner that attracted the exemption, the court:

(a) may suspend enforcement of the order for relief until the time that the debtor ceases to use the property in that manner; and

(b) if the enforcement of an order for relief is suspended under clause (a), may order that the property or other property of the transferee be subject to a statutory security interest as provided in clause 1(g).

(14) Unless otherwise ordered by the court, the applicant shall serve a copy of an order under subsection (1) on the debtor, all judgment creditors who have registered judgments in the

Judgment Registry at the date of the application for an order under this section, all persons with a registered interest in the value that is subject to the application and all persons who are known to have claims against the value that is subject to the application.

(15) When granting an order relating to a transaction referred to in Part II, subject to subsection (16), the court may adjust the order or make an order for the entry of a judgment against the debtor in favour of the transferee for a specified sum in recognition of the following:

(a) the payments or other property given by the transferee;

(b) expenditures and non-monetary investments made by the transferee that have enhanced the value transferred to the transferee under the transaction, or

(c) actions taken by the transferee in reasonable reliance on the finality of the transaction under which the value was received.

(16) Unless the court orders otherwise, subsection (15) does not apply when the transferee knew that the debtor entered the transaction with the primary intention of hindering or defeating the enforcement of the rights of a creditor or creditors.

(17) In granting relief under Part III the court may, in recognition of expenditures and non-monetary investments made by the transferee that have enhanced the value received under the creditor transaction:

(a) adjust the terms of an order; or

(b) make an order for the entry of a judgment for a specified sum against the debtor in favour of the transferee receiving the enhanced value.

(18) If an order under Part II or III requires that property or its proceeds received by the transferee under the transaction or credit transaction be vested in the debtor, the court may order the debtor to grant the transferee a security interest in all or part of the property or its proceeds securing expenditures and non-monetary investments made by the transferee that have enhanced the value of the property transferred under the transaction to the extent of the enhanced value.

(19) A perfected or registered security interest granted under subsection (18) has priority over the rights and interests of creditors of the debtor that exist in relation to property that arise as a

result of the vesting, but not over rights and interests in the property that existed and had priority over the rights and interests of creditors and the debtor before the transaction.

(20) If an order for relief is made under Part III in relation to a creditor transaction that had the effect of discharging an obligation under a guarantee or indemnity or an obligation secured by a guarantee or indemnity, the obligation so discharged is revived to the extent that the payment is set aside, subject to any defences that the person who owes the obligation may otherwise be entitled to assert.

(21) An order may not be made under this section against a transferee who is subject to an order under subclauses 28(2)(b) or (c) of *The Family Property Act.*

(22) If an order for relief is made against a director under section 9, the order must require the director to pay a sum of money equivalent to the amount paid by the corporation under the transaction.

PART V
Statutory Security Interest

Priority of statutory security interest

18(1) Except as herein provided, a statutory security interest in personal property that is registered in the Personal Property Registry has the same priority as a perfected security interest, other than a purchase money security interest, to which *The Personal Property Security Act, 1993* applies.

(2) Property that is inventory or proceeds of inventory within the meaning of *The Personal Property Security Act, 1993* is deemed not to be inventory for the purposes of subsection (1).

(3) A statutory security interest has priority over an enforcement charge relating to a judgment against the transferee.

(4) A security interest created under *The Personal Property Security Act, 1993* has priority over a statutory security interest with respect to advances made after the statutory security interest is registered if:

> (a) a registration relating to the security interest was effected before the statutory security interest was registered; and

(b) the advances were made without knowledge by the secured party of registration of the statutory security interest.

(5) If the secured party has knowledge of a statutory security interest at the time an advance is made, the security interest mentioned in subsection (4) has priority with respect to:

(a) advances made pursuant to a binding legal obligation owing to a person other than the transferee incurred by the secured party before the secured party acquired knowledge of the statutory security interest;

(b) reasonable costs and expenditures made by the secured party for the protection, preservation or repair of the property subject to the security interest; and

(c) any statutory obligation.

(6) A statutory security interest relating to a security, security entitlement or futures contract of a transferee credited to a securities account:

(a) is deemed for priority purposes to be perfected by control when a copy of the order creating the security interest is delivered to the securities intermediary at which the securities account is held;

(b) has the same priority as security interest perfected by control as provided by *The Personal Property Security Act 1993.*

(7) In subsection (6), "control" means control as defined in *The Securities Transfer Act* or *The Personal Property Security Act, 1993,* as is appropriate.

Enforcing a statutory security interest

19(1) A statutory security interest may be enforced:

(a) only on order of the court; and

(c) with necessary modifications, in the same way as an enforcement charge under Part IX, other than section 104, of *The Enforcement of Money Judgments Act.*

(2) The transferee may not claim any value transferred under a transaction as exempt from enforcement or as an interest to which Part V of *The Saskatchewan Farm Security Act* applies.

(3) The proceeds of enforcement of a statutory security interest shall be be deemed to be:

(a) money received by the sheriff pursuant to subclause 107(2)(a) of *The Enforcement of Money Judgments Act;* and

(b) a fund the proceeds of which were obtained through enforcement of a judgment against the debtor transferor.

Registration of a statutory security interest

20 (1) When ordered by the court, the Registrar of the Personal Property Registry or the Registrar of Titles, as the case may be, shall effect, amend or discharge a statutory security interest in property of the transferee.

(2) Except as otherwise provided in this Act, Part IV of *The Personal Property Security Act, 1993* applies with necessary modifications to registration of a statutory security interest in personal property.

(3) Sections 43(2)-(5), 43(10-(12), 44, 45, 49 and 50-54 of *The Personal Property Security Act, 1993* do not apply to registration of a statutory security interest in personal property.

(4) A statutory security interest in land is an interest to which, with necessary modifications, Part VIII of *The Land Titles Act, 2000* applies.

(5) Except as otherwise provided in this Act or *The Land Titles Regulations*, an order of court shall be treated as an application for registration of a statutory security interest for the purposes of sections 53, 58 and 59 of *The Land Titles Act, 2000.*

(6) Sections 55-57, 60, 61, 63-68 of Part VIII of *The Land Titles Act, 2000* do not apply to registration of a statutory security interest.

PART VI
Provisions of General Application

Injunctions

21(1) Whether or not an application for an order for relief has been made, the court may grant an injunction to a person who is, or who may become, entitled to apply for an order for relief under this Act if the court is satisfied that there is a reasonable likelihood that a transaction giving rise to a right to relief has occurred or is about to occur.

(2) In granting an injunction, the court may make any orders against the debtor or another person that the court considers necessary to:

(a) preserve the value affected by any final order for relief that may be granted;

(b) allow an appropriate order for relief to be made; or

(c) prevent a transaction from occurring.

(3) Any interested person may apply to the court to vary or terminate an order made under this section.

Limitation of actions

22(1) Subject to subsections (2), no application for an order for relief may be commenced more than 2 years after the date of a transaction.

(2) If the transferee conceals or assists in the concealment of the transaction that is the subject of the application for relief or of facts material to the grounds for relief, the 2-year period mentioned in subsection (1) commences at the time that the person making the application knew of the transaction or the material facts, but no application for relief is to be commenced more than 5 years from the date of the transaction.

General court jurisdiction

23 On an application of the debtor, the transferee, the sheriff, a receiver, a trustee, a secured or unsecured creditor of the debtor or a person with an interest in property affected by an order under this Act, the court may make one or more of the following orders:

(a) any order that is necessary to ensure compliance with this Act including a binding declaration of a right;

(b) an order giving directions to any person regarding the exercise of rights or the discharge of duties or functions pursuant to this Act;

(c) an order temporarily staying exercise of rights provided in this Act;

(d) an order directing a police authority with jurisdiction in the locality where an enforcement measure is or will be carried out to take appropriate steps to protect the sheriff, or a person executing functions delegated to that person by the sheriff, while taking the enforcement measure; or

(e) an order to ensure protection of the interest of any person in property.

24 Sections 115, 116, 117 and 124 of *The Enforcement of Money Judgments Act* apply to the exercise of rights or powers under this Act.

Transition

25(1) This Act shall apply to any transaction occurring after the date it comes into effect.

(2) This Act comes into force on proclamation.

(3) The law as it existed immediately before this Act comes in effect applies to transactions occurring before the day this Act comes into effect.

PART VII
Amendments, Repeals and References

26 (1) The following subsection is added to section 234 of *The Business Corporations Act*:

(2.1) An order under this section shall 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.

(2) The following subsection is added to section 225 of *The Non-Profit Corporations Act, 1995,*

(1.1) An order under this section shall 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) The following subsection is added to section 190 of *The Co-operative Act 1996:*

(1.1) An order under this section shall 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.

(4) The following subsection is added to section 291 of *The New Generation Co-operative Act:*

(1.1) An order under this section shall 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.

27 *The Enforcement of Money Judgments Act* SS 2010, c E9.22 is amended as follows:

Subsection 5(1) is deleted and the following is substituted:

5(1) In this Part:

(a) "action" means a legal action that would, if successful, result in:

(i) a judgment;

(ii) an order for relief under *The Reviewable Transactions Act;* or

(iii) a judgment or order declaring a gift, conveyance, assignment, transfer, delivery over or payment of property void as a fraudulent conveyance or fraudulent preference or a transfer at undervalue;

(b) "defendant" includes a person against whom an order for relief is sought in an action referred to in subclause (a)(ii) or (iii);

(c) "plaintiff" includes a person who has commenced an action referred to in clause (a);

(d) "judgment creditor" includes a person in whose favour an order for relief in an action referred to in clause (a) has been made.

Subsection 5(5)(a)(ii) is amended as follows:

(ii) a judgment or order described in subclause (1)(a)(ii) or (iii);

The words "transferee" and "or transferee" are deleted from all provisions of Part 2 except clause 5(9)(b).

Subsection 6(4) is amended to add after "subclause 5(5)(a)(ii)" and after subclause 5(5)(b) the words "and (iii)."

Clause 110 (3)(a) is renumbered (3)(a.1)

The following new clause 3(a) is added to section 110:

> (a) the amount of costs and expenses ordered by the court, other than fees and costs described in subsection (1), to the extent that the money in the fund can be attributed to property subject to an order of the court in an application under *The Reviewable Transactions Act,* which amount shall be paid to the judgment creditor who brought the application;

28 When applying another enactment to a matter governed by this Act, a reference in that other enactment to *The Fraudulent Preferences Act,* or to the *Statute of Fraudulent Conveyances,* being 13 Eliz. I, c. 5 (1571) is deemed to be a reference to this Act.

29 Except as otherwise provided in subsection 25(3):

(a)The Act of the Parliament of England commonly called The Statute of Fraudulent Conveyances, being 13 Eliz. I, c. 5 (1571), to the extent that it applies to subject matters within the legislative jurisdiction of Saskatchewan is repealed; and

(b) The *Fraudulent Preferences Act* RSS 1978, c. cF-21 is repealed.