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Beyond *Elizabeth*: The Current State of Fraudulent Conveyance and Fraudulent Preference Law in Canada

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I. INTRODUCTION

For decades, experts have recognized the need to reform Canada's fraudulent conveyance and fraudulent preference laws (collectively, "reviewable transactions"), which have been described as "complex, antiquated and ambiguous, producing results that are often unpredictable and sometimes indefensible."[1] Broadly speaking, a fraudulent preference occurs when a debtor effects a transfer or assignment that unfairly prefers one or some of its creditors to the detriment of others, although the precise test varies, depending on the applicable legislation.[2] In contrast, the broader concept of fraudulent conveyances does not require that the recipient of the transfer or assignment be a creditor of the debtor; common recipients are, eg, spouses or related parties.[3]

Despite years of reform efforts led by the Uniform Law Conference of Canada ("ULCC"), most provinces and territories have not implemented the ULCC's recommendations or adopted the *Uniform Reviewable Transactions Act*, which was approved in 2012.[4] The reasons for this non-adoption are beyond the scope of this article, but as a result of this inaction, the majority of provincial and territorial reviewable transactions remain fragmented and inconsistently applied.

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[1] Law Reform Commission of Saskatchewan, *Reviewable Transactions Act Report,* 2021 CanLIIDocs 14006 at para 7, online: *CanLII* <https://canlii.ca/t/7nf4v> [LRCS Final Report].

[2] Cora Madden & Sean N Zeitz, "The Law of Fraudulent Conveyances in Canada" (2024) 55:1 Adv Q 1 at 4.

[3] *Ibid*.

[4] Law Reform Commission of Saskatchewan, *Uniform Reviewable Transactions Act*, 2012 CanLIIDocs 365, online: *CanLII* <https://canlii.ca/t/2fm3> [Model Law].

Some provinces continue to supplement provincial reviewable transaction legislation with the *Statute of Fraudulent Conveyances*[5] (referred to colloquially as the *Statute of Elizabeth*), an ancient English statute enacted in 1571,[6] while others have enacted legislation to completely oust the statute.[7] Adding to the confusion, some provinces have enacted unified reviewable transactions legislation outside the Model Law,[8] some provinces have separate legislation for fraudulent conveyances and fraudulent preferences[9] and some provinces only have legislation addressing fraudulent conveyances and not fraudulent preferences.[10]

Federal reviewable transaction legislation under the *Bankruptcy and Insolvency Act*[11] creates another form of legal test that overlaps with the provincial and territorial regimes. Amendments to the *BIA* in 2009 demonstrated a shift away from an "intent-based" approach—focused on a debtor's *intent* to prefer one creditor over another—to an "effects-based" approach focused on the actual *effect* of the transfer.[12] The 2009 amendments removed the necessity to prove intent for transfers made to non–arm's-length creditors.[13] However, intent continues to form part of the necessary analysis for transfers made to arm's-

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[5] *Statute of Fraudulent Conveyances*, *1571* (UK), 13 Eliz I, c 5 [*Statute of Elizabeth*].
[6] Alberta, Manitoba and Nova Scotia still apply the *Statute of Elizabeth*, *supra* note 5, alongside provincial reviewable transactions legislation. In Ontario, British Columbia and Newfoundland and Labrador, it is unclear whether the *Statute of Elizabeth* still has any application.
[7] New Brunswick and Prince Edward Island have enacted the Model Law, *supra* note 4, which repeals the *Statute of Elizabeth, supra* note 5. Saskatchewan has passed legislation implementing the Model Law, although it has yet to be proclaimed in force.
[8] Ontario, Alberta and Nova Scotia have unified reviewable transactions legislation.
[9] British Columbia has separate legislation for fraudulent conveyances and fraudulent preferences.
[10] Manitoba and Newfoundland and Labrador have enacted fraudulent conveyance legislation but not fraudulent preference legislation.
[11] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 95 [*BIA*]. See also *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*].
[12] The term "transfer" used in this article broadly encompasses "[a] transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person", *ibid,* s 95(1).
[13] *BIA, supra* note 11, s 95(1)(b).

length creditors and is presumed when a transfer has the effect of giving a creditor a preference.[14]

In contrast, most provincial legislation makes no distinction between arm's-length and non–arm's-length creditors.[15] Given these competing tests, it is hardly surprising that some commentators have described jurisprudence interpreting reviewable transaction laws as "perplexing and contradictory".[16]

The authors observe that the Canadian reviewable transaction regime could be enhanced by provincial and territorial implementation of reform initiatives, including the adoption of uniform law such as the Model Law. However, legislative changes are not the only avenue for reform and recent case law suggests that courts have used existing legal tests in novel ways in order to provide a just result. The authors further observe that any reform efforts should be guided by the overarching policy objectives underlying reviewable transaction law: facilitating recovery of property that would otherwise be lost through the actions of the debtor and creating equality of distribution among similarly situated creditors.

These overarching policy objectives recognize the need to remedy an injustice, both in the presence of malfeasance and in the absence of ill intent. Such objectives may be achieved by moving toward an effects-based, rather than an intent-based, analysis of reviewable transactions, the latter being both difficult to prove and risking unpredictable results.

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[14] *Ibid,* s 95(1)(a) (the terms "arm's length" and "non-arm's length" are not defined in the *BIA*; however, subsection 4(5) of the *BIA* states that for the purpose of sections 95(1)(b) and 96(1)(b), "related persons", which is defined therein, are presumed to not be dealing at arm's length, unless proven to the contrary).

[15] See *Fraudulent Preferences Act*, RSA 2000, c F-24, ss 1–2 [Alberta *FPA*]. See also *Assignments and Preferences Act*, RSO 1990, c A 33, s 4 [Ontario *APA*].

[16] CRB Dunlop, "Fraudulent Conveyances and Preferences: A Feasibility Study" in *Proceedings of the 86th Annual Uniform Law Conference of Canada* (Regina, Saskatchewan: ULCC, August 2004) at para 11, online (pdf): *Uniform Law Conference of Canada* <ulcc-chlc.ca/ULCC/media/EN-Annual-Meeting-2004/Fraudulent-Conveyances-and-Preferences-Feasability-Study.pdf> [Dunlop Feasibility Study]. See the text accompanying note 63 for the full quote.

II. LEGISLATIVE HISTORY

Reviewable transaction law falls within provincial and territorial jurisdiction as a matter of property and civil rights.[17] However, provincial legislation overlaps with the federal bankruptcy and insolvency legislation when proceedings under the *BIA* or the *CCAA* are commenced. This section traces the legislative history of both provincial and federal reviewable transaction legislation in Canada and examines the intersection of these two regimes.

1. The *Statute of Elizabeth* and Provincial Legislation

Provincial reviewable transaction legislation was largely based on an English statute enacted in 1571, the *Statute of Elizabeth*.[18] The statute was itself a codification of the common law in England and contained provisions that sought to avoid "feigned, covinous and fraudulent" transfers entered into with intent "to delay, hinder or defraud" creditors.[19] At first, it was intended to be a criminal law statute, although it was later applied to private rights.[20] Notably, the *Statute of Elizabeth* was enacted to deal with "fraudulent conveyances", not preferences. Under the statute, there was no prohibition against a debtor preferring one creditor to another as long as the impugned transaction was not a "mere cloak to secure a benefit to the grantor."[21] As well, the *Statute of Elizabeth* did not require the grantor to be insolvent.[22]

The *Statute of Elizabeth*, with all its archaic language, found itself incorporated into the laws in Canada—not directly, as it is not directly adopted into any provincial laws, but indirectly, through the inherent jurisdiction of the Canadian courts as courts of equity. The *Statute of Elizabeth* was subsequently supplemented or supplanted by various provincial legislation governing

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[17] *The Constitution Act*, *1867* (UK), 30 & 31 Vict, c 3, s 92(13).
[18] *Statute of Elizabeth*, *supra* note 5.
[19] *Ibid*. See also Dunlop Feasibility Study, *supra* note 16 at para 6.
[20] Dunlop Feasibility Study, *supra* note 16 at para 6.
[21] See eg *Krumm v McKay*, 2003 ABQB 437 at para 32; *Logistec Stevedoring (Atlantic) Inc v AC Poirier & Associates Inc*, 2005 NBCA 55 at para 11.
[22] See eg *Moody v Ashton*, 2004 SKQB 488 at para 123 [*Moody*].

reviewable transactions, although such efforts were not uniform across the country. Currently, provincial reviewable transaction legislation consists of a "patchwork" of inconsistent legislation.

As outlined in Table 1, most provinces and territories enacted legislation dealing with reviewable transactions as far back as the 19th century. Some provinces enacted separate legislation for fraudulent preferences and fraudulent conveyances, while others combined the two into one piece of legislation. As well, some provinces enacted only fraudulent conveyance legislation and have no provincial legislation dealing with fraudulent preferences.[23] Some provinces' legislation requires that the debtor be either insolvent or within a zone of insolvency, or that the impugned transaction rendered the debtor insolvent. Further adding to this complexity, some provinces continue to rely on the *Statute of Elizabeth*, while others have enacted the Model Law and have officially repealed the *Statute of Elizabeth*.[24]

In provinces where provincial legislation subjects reviewable transactions to an insolvency requirement, parties still need to rely on the *Statute of Elizabeth* when attempting to impugn a conveyance made outside of insolvency.[25] As such, this statute continues to be applied by courts in certain provinces—notably Alberta, Manitoba and Nova Scotia. Additionally, while the conditions for relief under the *Statute of Elizabeth* are similar to provincial legislation, there are certain differences, which means that "a challenge that might not meet the requirements

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[23] See *Deloitte & Touche Inc v White Veal Meat Packers Ltd*, 2000 MBCA 120. See also *Inshore-Midshore Ltd (Trustee of) v Harnett, Power* (1992), 12 CBR (3d) 217, 1992 CanLII 7794 (Nfld SC). See also *Kashyap v Canadian Imperial Bank of Commerce* (1997), 148 Nfld & PEIR 200 at para 14, 1997 CanLII 14699 (CA) (where the Court cites a passage noting that Newfoundland does not have legislation prohibiting fraudulent preference and in the absence of a bankruptcy there is "nothing, in this province, to prevent a creditor from preferring one creditor over another").

[24] *Reviewable Transactions Act*, SPEI 2024, c 52 [PEI *RTA*]; *Debtor Transaction Act*, SNB 2015, c 23 [NB *DTA*]. See also *The Reviewable Transactions Act*, SS 2022, c 34 [Saskatchewan *RTA*] (which has been passed by the legislature in Saskatchewan, although it has not yet been proclaimed in force).

[25] Law Reform Commission of Saskatchewan, *Reform of Fraudulent Conveyances and Fraudulent Preferences Law: Part I Transactions at Undervalue and Fraudulent Transactions Final Report,* 2010 CanLIIDocs 349 at 4, online: *CanLII* <https://canlii.ca/t/2fm9> [2010 ULCC Report].

of the latter may succeed under the former and, less often, *vice versa*."[26] This resulting confusion "prevails over the rules, principles and judicial authorities that govern the outcome in any given case."[27]

The confusion inherent in the legislative framework in Canada is highlighted in Table 1.

Table 1: Reviewable transaction legislation

Jurisdiction	***Statute of Elizabeth***	**Fraudulent preference legislation**	**Fraudulent conveyance legislation**	**Combined legislation**	**Model law**
Alberta	Yes	Yes	Yes	Yes[28]	No
British Columbia	Unclear[29]	Yes[30]	Yes[31]	No	No
Manitoba	Yes[32]	No	Yes[33]	No	No
New Brunswick	No[34]	Yes	Yes	Yes	Yes

[26] LRCS Final Report, *supra* note 1 at para 10.
[27] *Ibid.* See also *Moody*, *supra* note 22 at para 119.
[28] Alberta *FPA*, *supra* note 15 (although Alberta's legislation only references "preferences" in its name, the Alberta *FPA* in fact deals with both fraudulent preferences and fraudulent conveyances).
[29] Although the *Statute of Elizabeth*, *supra* note 5 has not formally been repealed in British Columbia, British Columbia's *Fraudulent Conveyance Act* adopted the language of the *Statute of Elizabeth.* See eg *Abakhan & Associates Inc v Braydon Investments Ltd*, 2009 BCCA 521 at paras 36–38. As such, it is perhaps unsurprising that there are no British Columbia cases on CanLII where the *Statute of Elizabeth* is relied on to grant relief (based on a search using the search terms "Statute of Elizabeth" and "fraudulent").
[30] *Fraudulent Preference Act*, RSBC 1996, c 164.
[31] *Fraudulent Conveyance Act*, RSBC 1996, c 163.
[32] The *Statute of Elizabeth*, *supra* note 5 has not been repealed in Manitoba, and it appears that parties still plead reliance on the *Statute of Elizabeth.* See eg *Meyers Norris Penny et al v Kryshewsky*, 2011 MBQB 321 at para 5.
[33] *The Fraudulent Conveyances Act*, RSM 1987, c F160.
[34] Repealed by the NB *DTA*, *supra* note 24.

Newfoundland and Labrador	Unclear[35]	No	Yes[36]	No	No
Nova Scotia	Yes[37]	Yes	Yes	Yes[38]	No
Ontario	Unclear[39]	Yes	Yes	Yes[40]	No
Prince Edward Island	No[41]	Yes	Yes	Yes	Yes
Saskatchewan	No[42]	Yes	Yes	Yes	Yes

2. Federal Legislation

The first federal bankruptcy legislation enacted in Canada was *The Insolvent Act of 1869*, which contained provisions invalidating reviewable transactions.[43] This act was repealed in 1880 and was not replaced until 1919, when *The Bankruptcy Act of 1919* was enacted.[44] During this interim period, certain provincial legislation governing reviewable transactions was enacted, which remained in

[35] Although the *Statute of Elizabeth, supra* note 5 has not formally been repealed in Newfoundland and Labrador, Newfoundland and Labrador's *Fraudulent Conveyance Act* was modeled on the *Statute of Elizabeth.* See eg Madden & Zeitz, *supra* note 2 at 3. Similar to British Columbia, there are no Newfoundland and Labrador cases on CanLII where the *Statute of Elizabeth* is relied on to grant relief (based on a search using the search terms "Statute of Elizabeth" and "fraudulent").
[36] *Fraudulent Conveyances Act*, RSNL 1990, c F-24.
[37] The *Statute of Elizabeth*, *supra* note 5 is still commonly cited in Nova Scotia. See eg *Rockstone Investments Ltd v 3095810 Nova Scotia Limited*, 2021 NSSC 243 at paras 4, 40–42.
[38] *Assignments and Preferences Act*, RSNS 1989, c 25.
[39] Although the *Statute of Elizabeth*, *supra* note 5 has not formally been repealed in Ontario, the Ontario *APA*, *supra* note 15, adopted the language of the *Statute of Elizabeth.* See eg *Cambone v Okoakih*, 2016 ONSC 792 at para 170. There are no cases on CanLII from within at least the last 50 years where the *Statute of Elizabeth* is relied on to grant relief in Ontario (based on a search using the search terms "Statute of Elizabeth" and "fraudulent").
[40] Ontario *APA*, *supra* note 15.
[41] Repealed by the PEI *RTA*, *supra* note 24.
[42] Will be repealed by the Saskatchewan *RTA*, *supra* note 24, once that statute is proclaimed in force.
[43] *The Insolvent Act of 1869*, SC 32 & 33 Vic, c XVI.
[44] *An Act to Repeal the Acts Respecting Insolvency Now in Force in Canada*, SC 43 Vic, c I; *The Bankruptcy Act of 1919*, 9 & 10 Geo V, SC 1919, c 36 [*The Bankruptcy Act*].

force following the enactment of *The Bankruptcy Act*.[45] *The Bankruptcy Act* contained provisions that voided certain kinds of transactions which had the effect of preferring one creditor over another or removing property from a debtor's estate in a manner unfair to creditors.[46] *The Bankruptcy Act* was amended and modernized over time and was eventually renamed the *Bankruptcy and Insolvency Act* in 1992.[47]

Currently, the sections of the *BIA* dealing with reviewable transactions are section 95 on fraudulent preferences and section 96 on fraudulent conveyances.

Section 95 can be reframed as a two-part analysis. First, in order to void a transaction as a fraudulent preference, the trustee must establish that:

1. The debtor made a transfer;
2. The debtor was insolvent at the time of the transfer; and
3. The transfer was in favour of the creditor.

The second step depends on whether the creditor is dealing at arm's length with the debtor:

- For arm's-length creditors, the trustee must establish that (1) the transfer occurred between the date that is three months before the date of the initial bankruptcy event and the date of the bankruptcy and (2) the transfer was made with a view to giving the creditor a preference over another creditor.[48] If the transfer has the effect of giving the arm's-length creditor a preference, absent evidence to the contrary, it is presumed to have been made with a view to giving the creditor a preference.[49] This creates a

[45] Law Reform Commission of Saskatchewan, *Reform of Fraudulent Conveyances and Fraudulent Preferences Law: Part II Preferential Transfers*, 2008 CanLIIDocs 285 at 2, online: *CanLII* <https://canlii.ca/t/2fmk> [2008 ULCC Report]. See also LRCS Final Report, *supra* note 1 at para 13.
[46] *The Bankruptcy Act*, *supra* note 44, ss 29–35.
[47] *Bankruptcy and Insolvency Act*, SC 1992, c 27.
[48] *BIA*, *supra* note 11, s 95(1)(a).
[49] *Ibid*, s 95(2).

rebuttable presumption on the creditor to prove that, in the circumstances, the debtor's intent was something other than to prefer the creditor. For example, the presumption has been rebutted in cases where the transaction was done in the ordinary course or it was necessary in order to allow the debtor to remain in business, or where there was a pre-existing agreement to transfer that pre-dates the lookback period.[50] The debtor's intent is determined based on an objective analysis of the circumstances, not the subjective intent of the bankrupt or the intent of the creditor.[51]

- For non–arm's-length creditors, the trustee must establish that (1) the transfer occurred between the date that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy and (2) the transfer simply had the *effect* of giving the creditor a preference over the debtor's other creditors.[52]

Similarly, section 96 includes different tests that must be met for a trustee to set aside a fraudulent transfer, depending on whether the transferee was arm's length or non-arm's length:

- For arm's-length transfers, the transfer must have occurred within one year before the initial bankruptcy event, the debtor must have been insolvent at the time of the transfer or rendered insolvent by the transfer and the debtor must have intended to defraud, defeat or delay its creditors.[53]
- For non–arm's-length transfers, there are two distinct lookback periods. Within one year before the initial bankruptcy event, any transfer to non–arm's-length parties may be voided on application by the trustee, regardless of the debtor's intention or solvency at the time. Within the period that begins five years before the initial bankruptcy event and ends

[50] Clayton Bangsund, "'But I Didn't Mean To': The Role of Intent in American and Canadian Anti-Preference Law" (2013) 50:4 ALR 815 at 830–31.
[51] *Re Holt Motors Ltd* (1966), 57 DLR (2d) 180, 1966 CanLII 437 (Man QB).
[52] *BIA*, *supra* note 11, s 95(1)(b).
[53] *Ibid*, s 96(1)(a).

one year prior to the initial bankruptcy event, the debtor must have been insolvent at the time of the transfer or rendered insolvent by the transfer and must have intended to defraud, defeat or delay its creditors.[54]

3. Interplay between Provincial and Federal Legislation

In the appropriate circumstances, reviewable transaction challenges may be brought under both federal and provincial legislation.[55]

Provincial legislation was designed to be creditors' relief legislation aimed at providing proportionate sharing among creditors, preventing preferential payments to some creditors over others and facilitating recovery.[56] In some ways, provincial judgment-enforcement systems create a similar creditor-sharing scheme, where judgment creditors share *pro rata* on funds paid into court, pursuant to writs and garnishee summons.[57] The judgment-enforcement system "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."[58] Therefore, the system works "hand in hand" with provincial reviewable transaction legislation in order to provide redress to unsecured creditors.[59]

A creditor seeking redress may have the option of proceeding under both federal and provincial legislation.[60] However, the provincial legislative regime may be preferable in certain situations, including where bankruptcy or insolvency

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[54] *Ibid*, s 96(1)(b).
[55] *Robinson v Countrywide Factors Ltd* (1977), 72 DLR (3d) 500, 1977 CanLII 175 (SCC) [*Robinson*].
[56] LRCS Final Report, *supra* note 1 at para 9.
[57] *Ibid*.
[58] *Ibid* at para 6.
[59] *Ibid* at para 10.
[60] See eg *Robinson*, *supra* note 55.

proceedings are not available or are not a viable means to challenge a reviewable transaction.[61]

III. LAW-REFORM INITIATIVES

The patchwork of provincial legislation, combined with the continued use of the *Statute of Elizabeth* in certain jurisdictions, renders the law of reviewable transactions confusing and disjointed across the country. Indeed, the need to reform Canada's reviewable transaction law has been recognized for decades.[62] In a report presented to the ULCC in 2004, CRB Dunlop noted the following with respect to the state of Canadian reviewable transaction law:

> Texts and essays on the law are full of criticisms of confused rules, redundant statutory provisions, perplexing and contradictory decisions, antiquated rules and ideas, and opaque policy. Fraudulent conveyances and preferences problems have not produced far-reaching and imaginative judicial decisions. The vast majority of the cases say little or nothing about the law, simply copying passages from leading decisions. The cases which do address the law have often caused more trouble than they should have.[63]

The next section reviews and explains Canadian law-review initiatives to date, both at the federal and provincial levels.

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[61] See eg 2008 ULCC Report, *supra* note 45 at 19–20 (where the ULCC identifies several reasons why the provincial legislation may be preferable in some circumstances, including, *inter alia*, the fact that the *BIA, supra* note 11, s 48 restricts creditors from applying for bankruptcy orders against debtors whose principal occupation and means of livelihood is "fishing, farming or the tillage of the soil").

[62] See eg Karl Dore & 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 (Toronto: Ministry of the Attorney General, 1983) at 125–245, online: *Osgoode Digital Commons* <archive.org/details/reportonenforcem04onta>; Law Reform Commission of British Columbia, *Report on Fraudulent Conveyances and Fraudulent Preferences*, LRC 94 (Vancouver, BC: Law Reform Commission of British Columbia, 1988), online (pdf): *British Columbia Law Institute* <bcli.org/sites/default/files/LRC94-Fraudulent_Conveyances_and_Preferences.pdf>.

[63] Dunlop Feasibility Study, *supra* note 16 at para 11.

1. Federal Legislative Reform

On 15 March 2002, a joint task force (the "task force") of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals released a report (the "task force report") that made 86 business insolvency law–reform recommendations.[64] The task force report included certain recommendations regarding the fraudulent preference provisions under the *BIA*. It recommended, among other things, that:

1. Uniform rules under the *CCAA* and the *BIA* for challenging fraudulent preferences be made, with a *CCAA* monitor or a trustee under a proposal being authorized to exercise the same powers as a trustee in bankruptcy;[65] and
2. The English subjective intention test for transactions be made "with a view" to preferring one creditor over others to "protect good faith transactions where there was no intention to defeat the claims of creditors" continue.[66]

In 2005, the task force released a supplemental report (the "supplemental report") that clarified and advanced several of its earlier recommendations.[67] The supplemental report included certain additional recommendations regarding fraudulent preferences under the *CCAA* and the *BIA*, including that non–arm's-length creditors should not be allowed to rebut the presumption of debtor intent with respect to preferential transfers occurring within the one-year period before the date of the initial bankruptcy event or initial *CCAA* order.[68]

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[64] Restructuring Professionals Joint Task Force on Business Insolvency Law Reform, *Report to Industry Canada* (March 2002), online (pdf): *The Insolvency Institute of Canada* <scc-csc.ca/cso-dce/2010SCC-CSC60_eng.pdf>.
[65] *Ibid* at 21.
[66] *Ibid* at 22.
[67] Restructuring Professionals Joint Task Force on Business Insolvency Law Reform, *Supplemental Report to Industry Canada* (June 2005).
[68] *Ibid* at 8–9.

Many of the task force's recommendations were subsequently incorporated into Bill C-55, *An Act to Establish the Wage Earner Protection Program Act, to Amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to Make Consequential Amendments to Other Acts*,[69] which included certain proposed amendments to the fraudulent preference provisions. Most notably, Bill C-55 adopted the task force's recommendation to extend the look-back period from three months to one year in circumstances where the transaction has the effect of giving a non–arm's-length creditor a preference. Bill C-55 received royal assent on 25 November 2005.[70]

2. Provincial Legislative Reform

In 2006, the ULCC approved a project to reform the provincial and territorial reviewable transactions law.[71] Two comprehensive articles were published in 2007 and 2008. They outlined the current law, identified issues to be resolved through reform and considered potential solutions offered by other jurisdictions' legislation, prior law-reform reports and academic commentary.[72]

The ULCC subsequently tasked a working group with developing recommendations for a uniform statute. The working group's recommendations were outlined in two reports, published in 2008 and 2010 and a supplementary report published in 2011.[73]

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[69] Bill C-55, *An Act to Establish the Wage Earner Protection Program Act, to Amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to Make Consequential Amendments to Other Acts*, 1st Sess, 38th Parl, 2005 (assented to on 25 November 2005) SC 2005, c 47 [Bill c-55].
[70] *Ibid*.
[71] The authors note that the ULCC reform project did not directly address federal bankruptcy and insolvency legislation; however, the existence and content of the *BIA, supra* note 11 provisions were taken into account in the development of recommendations for reform.
[72] Law Reform Commission of Saskatchewan, *Reform of Fraudulent Conveyances and Fraudulent Preferences Law: Part I Transactions at Undervalue*, 2007 CanLIIDocs 221, online: *CanLII* <https://canlii.ca/t/2fmq> [2007 ULCC Report]; 2008 ULCC Report, *supra* note 45.
[73] 2010 ULCC Report, *supra* note 25; Law Reform Commission of Saskatchewan, *Reform of Fraudulent Conveyances and Fraudulent Preferences Law: Part I Transactions at Undervalue Supplementary Report*, 2011 CanLIIDocs 338, online: *CanLII* <https://canlii.ca/t/2fm6>; 2008 ULCC Report, *supra* note 45.

i. Highlights of the Model Law

The ULCC's recommendations in its 2010 and 2011 reports were ultimately incorporated into the Model Law, which was approved in 2012.[74]

The Model Law proposes to replace existing provincial legislation and includes the following key changes, among others:

- **Name of the statute.** The statute (the *Reviewable Transactions Act*) is intentionally named to encompass a broad range of transactions that would be subject to judicial review on the basis that they interfere with creditors' rights.[75] This contrasts with often confusingly named provincial legislation, such as Saskatchewan's former *Fraudulent Preferences Act*, which, despite its name, dealt with both fraudulent preferences and fraudulent conveyances.[76]
- **Creation of distinct causes of action.** The Model Law empowers courts to review a transaction and grant relief under several distinct causes of action, only some of which require proof of preferential intent.[77]
- **Consistency with the *BIA*.** Under the Model Law, preferential payment-avoidance provisions would not apply to payments made to arm's-length creditors.[78] Although the *BIA* does allow for the avoidance of preferential transactions to arm's-length creditors, such transactions, in effect, can rarely be challenged under the *BIA* as they are void only if made by an insolvent debtor within the three-month period prior to bankruptcy, provided the debtor intended to give the recipient a preference over other creditors.[79] As such, there is little meaningful benefit in adding similar provisions to the Model Law. The Model Law further eliminates the role of preferential intent in determining

[74] *Model Law*, *supra* note 4.
[75] LRCS Final Report, *supra* note 1 at para 6.
[76] *Fraudulent Preferences Act*, RSS 1978, c F-21, ss 3–6.
[77] *Model Law*, *supra* note 4 at Parts II–III.
[78] *Ibid*, s 13.
[79] LRCS Final Report, *supra* note 1 at para 62.

the outcomes of challenges to non–arm's-length payments,[80] aligning provincial law with section 95(1)(b) of the *BIA*.[81] The Model Law also incorporates an insolvency element for transfers made when the debtor was insolvent or verging on insolvency and adopts the *BIA*'s look-back periods for such transactions.[82]

- **Repeal of the *Statute of Elizabeth*.** The Model Law includes an explicit declaration that the *Statute of Elizabeth* is repealed.[83]
- **Expanded scope for payments of money.** The Model Law removes the distinction in provincial legislation between (1) payments of money that are not subject to challenge and (2) payments effected by a transfer of property of another kind.[84]

ii. Provincial reform-implementation efforts

As of 20 May 2025, only four provinces have adopted the Model Law:[85] New Brunswick, Prince Edward Island, Saskatchewan and Québec.[86]

It is not clear whether there are currently any efforts underway to advance the Model Law in other provinces. In March 2016, the Alberta Law Reform Institute published *Reviewable Transactions: Final Report 108*.[87] The report recommended that Alberta enact the Model Law with certain minor revisions, as may be required. However, the report has not appeared to lead to legislative change, as the Model Law has not yet been adopted in Alberta. As well, there do

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[80] *Model Law*, *supra* note 4, s 13.
[81] LRCS Final Report, *supra* note 1 at para 62; *BIA*, *supra* note 11, s 95(1)(b).
[82] *Model Law*, *supra* note 4, s 13.
[83] *Ibid*, s 25.
[84] LRCS Final Report, *supra* note 1 at paras 26–27.
[85] Uniform Law Conference of Canada, "Implementation by Jurisdiction of Uniform Acts, Uniform Rules, Model Acts or other Recommendations Recommended by the ULCC 2000 – Present" (20 May 2025) at 14, online: *Uniform Law Conference of Canada* <ulcc-chlc.ca/Civil-Section/Implementation>.
[86] NB *DTA*, *supra* note 24; PEI *RTA*, *supra* note 24; Saskatchewan *RTA*, *supra* note 24 (note that the Saskatchewan *RTA* has been passed by the legislature but not yet proclaimed in force); *Civil Code of Québec*, arts 1631–36.
[87] Alberta Law Reform Institute, *Reviewable Transactions: Final Report 108* (Edmonton: ALRI, 1 March 2016), online (pdf): *Alberta Law Reform Institute* <https://www.alri.ualberta.ca/wp-content/uploads/2020/03/fr108.pdf>.

not appear to be any reports from other non-adopting provinces' law-reform commissions.

IV. JURISPRUDENCE

Certain recent cases from the Supreme Court of Canada suggest that Canadian courts may be moving away from focusing primarily on intent and toward looking at the actual *effect* of the transaction. In this section, the authors explore and summarize two recent Supreme Court of Canada decisions, *Chandos Construction Ltd v Deloitte Restructuring Inc*[88] and *Aquino v Bondfield Construction Co*,[89] both of which appear to favour an effects-based approach. As further detailed below, although *Chandos* is a case dealing with the anti-deprivation rule, and not reviewable transactions, the underlying policy rationale in the decision is the same: equality between creditors. As such, the authors posit that the guidance coming out of decisions such as *Chandos* is equally applicable to the reviewable transaction regime.

iii. Chandos

In *Chandos*, a majority of the Supreme Court of Canada adopted an effects-based test and rejected an analysis of the parties' intentions in the context of the anti-deprivation rule.[90] The anti-deprivation rule "operates to prevent contracts from frustrating statutory insolvency schemes",[91] and covers situations where a contract dictates that a party is required to pay its counterparty a sum of money in the event of its insolvency. This is very similar to fraudulent conveyance and fraudulent preference legislation in that it is designed to prevent value from being moved out of the estate to the detriment of the debtor's creditors.[92]

Chandos involved a subcontract between Chandos Construction Ltd ("Chandos") and its subcontractor, Capital Steel Inc ("Capital"). The subcontract contained a

[88] *Chandos Construction Ltd v Deloitte Restructuring Inc*, 2020 SCC 25 [*Chandos*].
[89] *Aquino v Bondfield Construction Co*, 2024 SCC 31 [*Aquino*].
[90] *Chandos*, *supra* note 88.
[91] *Ibid* at para 1.
[92] *Ibid* at para 12.

provision requiring Capital to pay Chandos 10% of the subcontract price in the event of Capital's bankruptcy or insolvency (the "inconvenience fee").[93] Capital filed an assignment into bankruptcy prior to completing its subcontract with Chandos.[94] In response, Chandos sought to set off the remaining amounts owed to Capital by the amount of the inconvenience fee.[95] As a result of the set-off, Chandos would hold a claim provable in Capital's bankruptcy, rather than a debt owing to Capital.[96]

The trustee sought advice and directions from the Alberta Court of Queen's Bench, as it then was, as to whether Chandos was entitled to rely on the inconvenience fee.[97] The applications judge applied a purpose-based test and found the provision to be a valid liquidated-damages clause and not a penalty, as Chandos' intent was not to avoid the effect of bankruptcy laws.[98] Accordingly, the Court upheld Chandos' set-off of the inconvenience fee. The decision was reversed on appeal by a majority of the Alberta Court of Appeal, which applied an effects-based test to determine whether the anti-deprivation rule was engaged.[99]

The effects-based test does not consider intent, and consists of two parts: (1) the clause must be triggered by an event of insolvency or bankruptcy and (2) the effect of the clause must be to remove value from the debtor's estate.[100] The Alberta Court of Appeal's decision was then appealed to the Supreme Court of Canada.

The majority of the Supreme Court of Canada upheld the Court of Appeal's decision, including the effects-based test for the anti-deprivation rule. The Supreme Court found that such an approach strengthens certainty of contract, while a purpose- or intent-based test would, instead, frustrate such certainty, as

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[93] *Ibid* at paras 3–4.
[94] *Ibid* at para 5.
[95] *Ibid* at para 6.
[96] *Ibid*.
[97] *Capital Steel Inc v Chandos Construction Ltd*, 2019 ABCA 32 at para 10.
[98] *Ibid* at para 13.
[99] *Ibid* at paras 53–56.
[100] *Chandos*, *supra* note 88 at para 31.

"[p]arties cannot know at the time of contracting whether a court, possibly years later, will find [that] their contract had been entered into for *bona fide* commercial reasons."[101] The Supreme Court further noted that an effects-based test was consistent with existing effects-based tests in other sections of the *BIA*.[102]

In rejecting an intent-based analysis, the Court noted that the adoption of an intent-based approach would effectively neuter the anti-deprivation rule, as it would only be applied in flagrant cases of deliberate misconduct and would "threaten to undermine the statutory scheme of the *BIA*."[103]

Notably, the anti-deprivation rule does not exist in any legislation: it is wholly judge-made law, derived from common law principles.

Although the above-noted commentary from the Court is with respect to the anti-deprivation rule, the same rationale could be applied to reviewable transaction law, given the common policy objective—the equality of creditors ensuring that assets are not removed from the estate to the detriment of the estate's other creditors.

iv. Aquino

In *Aquino*, the Supreme Court of Canada considered whether section 96 of the *BIA*—the transfer-at-undervalue provision—could be used to recover money that a corporate officer and his associates transferred through an alleged fraudulent invoicing scheme.

John Aquino was the directing mind of Bondfield Construction Company Limited ("Bondfield") and its affiliate Forma-Con Construction ("Forma-Con", and, collectively, the "corporations"). Mr Aquino and his associates carried out a

[101] *Ibid* at paras 34–35.
[102] *BIA*, *supra* note 11, ss 65.1, 66.34, 84.2, 141.
[103] *Chandos, supra* note 88 at para 36.

fraudulent invoicing scheme over several years, which transferred tens of millions of dollars out of both corporations for zero value to the corporations.[104]

Eventually, Bondfield commenced *CCAA* proceedings; Forma-Con commenced *BIA* proceedings in 2019. As part of the corporations' respective insolvency proceedings, the monitor of Bondfield and the trustee of Forma-Con discovered the invoicing scheme, which went back as far as 2014 for Bondfield and 2011 for Forma-Con. The monitor and the trustee subsequently brought applications to, amongst other things, void the various invoice transfers under section 96(1)(b)(ii)(B) of the *BIA*.[105]

Notably, section 96(1)(b)(ii)(B) requires the debtor to have "intended to defraud, defeat or delay a creditor",[106] unlike subsection 96(1)(b)(ii)(A), which instead requires the debtor to have been insolvent at the time of the transfer or rendered insolvent by it.[107] The monitor and trustee presumably did not proceed under section 96(1)(b)(ii)(A), as there were audited financial statements that appeared to demonstrate the corporations' solvency, although the reliability of these financial statements was subsequently questioned by the Court.[108]

As such, the case ultimately turned on whether the corporations intended to defraud their creditors.[109] Mr Aquino argued that, while he intended to defraud the corporations, neither of the corporations intended to defraud, defeat or delay their creditors and that, therefore, section 96(1)(b)(ii)(B) of the *BIA* could not apply. This argument, of course, arises from the fact that, while corporations are separate legal persons under the law, they are only capable of acting through agents. Therefore, determining the "intent" of a corporation necessarily involves examining the intent of its directors and other agents and determining whether

[104] *Aquino*, *supra* note 89 at para 2.
[105] *Ibid* at para 13.
[106] *BIA*, *supra* note 11, s 96(1)(b)(ii)(B).
[107] *Ibid*, s 96(1)(b)(ii)(A).
[108] *Ernst & Young Inc v Aquino*, 2022 ONCA 202 at paras 33–34 [*Aquino* ONCA].
[109] *Ibid* at para 26.

that intent can be attributed to the corporation.[110] Accordingly, in this case, the Court had to determine whether Mr Aquino's fraudulent intent could be imputed to the corporations as a matter of law through application of the corporate-attribution doctrine.

In this case, the applications judge concluded that the corporate attribution doctrine applied in this situation and that Mr Aquino's fraudulent intent could be attributed to the corporations.[111] On appeal, the Ontario Court of Appeal upheld the lower Court's decision, specifically noting that "[t]he underlying question here is who should bear responsibility for the fraudulent acts of a company's directing mind that are done within the scope of his or her authority – the fraudsters or the creditors?"[112]

The Court of Appeal stated that permitting fraudsters to get a benefit at the expense of creditors would be "perverse" and that the way to avoid this outcome was to attach the fraudulent intentions of Mr Aquino to the corporations to achieve the social purpose of providing proper redress to creditors—"which is the core aim of s. 96 of the *BIA*".[113] This was true despite the fact that the leading test for the corporate attribution doctrine set forth in *Canadian Dredge & Dock Co v R* would typically have granted the corporations several defences, namely the argument that there was no fraud on the corporations themselves and that the corporations did not benefit from the scheme.[114]

Mr Aquino subsequently appealed to the Supreme Court of Canada. In determining whether his fraudulent intent could be attributed to the corporations, the Supreme Court of Canada considered the purpose of section 96 of the *BIA* and ultimately held that:

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[110] *Aquino*, *supra* note 89 at paras 59–60.
[111] *Ernst & Young Inc v Aquino*, 2021 ONSC 527 at para 230.
[112] *Aquino* ONCA, *supra* note 108 at para 78.
[113] *Ibid* at para 79.
[114] *Canadian Dredge & Dock Co v R*, [1985] 1 SCR 662 at para 67, 1985 CanLII 32 (SCC).

> The remedial purpose of s. 96 of the *BIA* is served by attributing the actions, knowledge, state of mind, or intent of the directing mind to the corporation, even if the directing mind acted in fraud of the corporation, and even if the corporation did not benefit from the actions of the directing mind.
>
> …
>
> [A]pplying the fraud and no benefit exceptions under s. 96 would deny third-party creditors the benefit of a statutory remedy intended to protect them from asset stripping and would diminish the pool of assets available for their claims. This would undermine the purpose of s. 96.[115]

Accordingly, the Supreme Court of Canada upheld the Court of Appeal's formulation of the corporate attribution doctrine. Although the Supreme Court of Canada determined the case using an intent-based approach, the Court's rejection of the traditional defences under the corporate attribution doctrine appeared driven by what it saw as the effects on the third-party creditors. Essentially, it appears that the Court's ruling with respect to intent was ultimately guided by the *effect* of the impugned transactions.

V. COMMENTARY

The above-noted cases appear to demonstrate the problematic nature of an intent-based approach to reviewable transactions law. In *Chandos*, the Supreme Court of Canada favoured an effects-based approach with respect to the conceptually similar anti-deprivation rule, stating that the adoption of an intent-based approach would undermine the objectives of the *BIA*; in *Aquino*, however, the Court appeared to use what was essentially an effects-based analysis within the confines of the existing intent-based test in order to prevent what it viewed as an undermining of the legislative intent behind the *BIA*.

There are two major policy objectives involved in reviewable transaction cases. For fraudulent conveyances, the goal is maximization of creditor recovery by

[115] *Aquino*, *supra* note 89 at paras 86–87.

preventing a debtor from being able to defeat the legal rights of creditors by transferring assets out of the estate.[116] Fraudulent preference law is based in the policy objective of ensuring that similarly situated unpaid creditors recover *pari passu* against a common debtor's asserts.[117] This redistribution is the "right result" from the "wrong event". Understood through this lens, intent is not necessarily relevant. The ULCC *Reform of Fraudulent Conveyances and Fraudulent Preferences Law—Progress Report* noted the following with respect to intent:

> The fundamental question that is obscured by current legislation and its judicial interpretation is the wrong at which the law is or should be directed. Is the wrong the actual interference with creditors' rights, however laudable the debtor's motives, or only the intentional interference with creditors' rights? The difficulty in distilling the answer to this question from the current body of statutory and case law in large part accounts for the uncertainty and inefficiency endemic to its operation.[118]

In other words, does intent matter if the overarching goal of reviewable transaction law is to maximize creditor recovery, treat creditors equitably and prevent or address actual interference with creditors' rights? Ronald Cumming noted that the Canadian focus on intent misses the point: "[t]he point is that the transfer, if left intact, frustrates implementation of the policy of … equitable treatment of all creditors."[119] Arguably, a debtor's actual or presumed intent is not a relevant consideration and is not important. Rather, "[w]hat is important is the effect that such a transfer has on the position of creditors".[120] Ultimately, intent requirements can add to the unpredictable nature of litigation and, as noted by the Law Reform Commission of Saskatchewan, the heavy burden of proving

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[116] LRCS Final Report, *supra* note 1 para 8.
[117] *Ibid* at para 12. See also Bangsund, *supra* note 50 at 818.
[118] Tamara M Buckwold, *Reform of Fraudulent Conveyances and Fraudulent Preferences Law—Progress Report* (Ottawa: Uniform Law Conference of Canada, August 2009) at 14, online (pdf): *Law Reform Commission of Saskatchewan* <lawreformcommission.sk.ca/ProgressReport2009.pdf> [emphasis added].
[119] Ronald CC Cuming, "Transactions at Undervalue and Preferences Under the Bankruptcy and Insolvency Act: Rethinking Outdated Approaches" (2002) 37 Can Bus LJ 5 at 23.
[120] *Ibid*.

state of mind deters creditors from undertaking 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."[121]

Due to the intent requirements baked into much of Canada's fraudulent conveyance and fraudulent preference law (including section 96(1)(b)(ii)(B) of the *BIA*), the Supreme Court of Canada in *Aquino* was required to conduct a convoluted analysis of whether Mr Aquino had the requisite intent to defraud the corporation's creditors and then determine whether that fraudulent intent could be attributed to the corporation. Indeed, due to the inherent fact that corporations can only act through their agents, as long as an intent requirement exists, this type of complicated analysis could be necessary any time a party wishes to challenge a fraudulent conveyance or preference perpetrated by a corporation where the legal framework requires proof of intent.

Each reviewable transactions case is highly fact specific and therefore difficulties in gathering evidence relating to past transactions, limitations periods and generally difficult burdens of proof relating to state of mind can produce inconsistent results.[122] If the requirement of intent is eliminated, parties seeking to act against reviewable transactions are not required to "jump through the hoops" of pointing to badges of fraud or meeting the corporate attribution test and may need only prove that the effect of the impugned transaction was to prefer certain creditors over others or remove value from the debtor's estate.

The Model Law attempts to move provincial law toward an effects-based approach by completely eliminating intent requirements with respect to fraudulent

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[121] LRCS Final Report, *supra* note 1 at paras 34–39.

[122] See Jassmine Girgis, "An Oppression Remedy v Fraudulent Conveyance Legislation: Which Legislative Regime Better Protects Creditors from Opportunistic Debtors?" in Janis P Sarra, ed, *Annual Review of Insolvency Law 2019* (Toronto: Thomson Reuters, 2019) (wherein Professor Girgis highlights *El-Hawary v Tam*, 2017 ONSC 2602, affirmed *Tam v El-Hawary*, 2018 ONCA 70, a case which demonstrated evidence of nine badges of fraud, but where the Court nonetheless held that there could potentially be alternative explanations for the impugned transfers and declined to find that there was the requisite intent to establish fraudulent transfers).

preferences.[123] The Model Law does not, however, completely eliminate the role of intent in relation to fraudulent conveyances, where intent requirements are maintained for transactions impugned when the debtor is not insolvent or on the verge of insolvency.[124] This maintenance of intent in non-insolvency scenarios in some ways appears defensible from a policy perspective, as "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",[125] thus warranting a lower bar for creditors, a monitor or a trustee in insolvency scenarios while maintaining a higher bar in non-insolvency scenarios.

In its provisions regarding fraudulent conveyances, the Model Law also introduces a new requirement that the transaction be for either no consideration or conspicuously low consideration and that the ability of creditors to recover their claims is *materially hindered* as a result.[126] Although an insolvent or near-insolvent debtor should have a heightened awareness of actions that may deplete its assets and value, can the same not be said in situations where a debtor is giving away property with value significant enough to materially hinder its creditors' ability to recover?

At the very least, there is clearly value in adopting the Model Law nationwide to provide certainty and uniformity across the country. The Model Law clarifies the law of reviewable transactions, which currently consists of a patchwork of inconsistent legislative regimes from province to province, modernizes the law by repealing the archaic *Statute of Elizabeth* and simplifies the legislative framework by unifying reviewable transactions under one statute.

[123] *Model Law*, *supra* note 4, s 13.
[124] *Ibid,* s 7.
[125] LRCS Final Report, *supra* note 1 at para 40.
[126] *Model Law*, *supra* note 4, s 7.

VI. CONCLUSION

Canadian reviewable transaction law should be guided by the overarching policy objectives of (1) maximizing creditor recovery and (2) creating equality of distribution among similarly situated creditors.[127] The reviewable transaction regime in Canada would be enhanced by the implementation of reform initiatives, including the adoption of a uniform law such as the Model Law. However, the thrust of recent case law begs the question: Does the Model Law go far enough? Is it possible and desirable to consider further amendments and move to a fully effects-based approach? Or is legislation required at all? That is, can courts apply "judge-made" law like the anti-deprivation rule to achieve the same objectives? The authors do not purport to have the answers to these complex questions but note that they will need to be examined in the coming years as further cases arise and more provinces consider the adoption of the Model Law.

In an insolvency, there is simply not enough money to go around. That fact itself causes an injustice or wrong, as some creditors are deprived of their contractual rights to full payment. In these types of collective proceedings, the effort to determine what a party's past intention might have been "misses the mark." The overarching policy goal is not to punish perceived bad behaviour, but to craft a fair and equitable solution to the present situation.

[127] LRCS Final Report, *supra* note 1 at para 8; Bangsund, *supra* note 50 at 818.

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