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Backgrounder

LRC 94—Report on Fraudulent Conveyances and Preferences

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There are two provincial Acts that are primarily aimed at preventing debtors from dealing with their property in a manner that will prejudice creditors. These are the *Fraudulent Conveyance Act* and the *Fraudulent Preference Act*. The federal *Bankruptcy and Insolvency Act* also contains provisions that have the same purpose.

The *Fraudulent Conveyance Act* provides a claimant with a means of setting aside a disposition of property made with the intention of delaying, hindering, or defeating creditors and others of their just and lawful remedies. The report provides a general summary of the Act, outlining the core elements of transactions that are fraudulent conveyances, discussing evidentiary issues, and explaining who can make an application under the Act.

A fraudulent preference under the *Fraudulent Preference Act* is essentially a transfer of property by a debtor to a creditor with the intent that the creditor who receives it will be in a position to use it to satisfy obligations owed to him, and thereby steal a march on other creditors. The application of this Act is more limited as it contains a number of preconditions to the avoiding of a transaction and also introduces a number of statutory defences and limitations. The report includes an overview of these preconditions and statutory defences together with an analysis of how they have been applied in practice.

For the most part the remedies available under either piece of legislation are the same whether a fraudulent conveyance or preference is involved. The report looks in detail at the remedies, both to prevent property being transferred to a third party and where property has already been conveyed to a third party. It also considers the remedies available where a fraudulent third party has divested themselves of the property or asset.

The *Bankruptcy and Insolvency Act* provides a number of remedies to creditors faced with a fraudulent conveyance or preference, which parallel those remedies available under the *Fraudulent Conveyance Act* and the *Fraudulent Preference Act*. There are, however, significant differences in both the preconditions to relief and the extent to which a transaction maybe avoided. Furthermore, these remedies are only available once the transferor is

placed in bankruptcy. The report focuses on the nature of the remedies provided by the *Bankruptcy and Insolvency Act* and the manner in which these remedies may be invoked.

The second half of the report goes on to consider the need for reform of the provincial legislation. The report sets out some of the defects with the current legislation and examines the similarities and differences between the provincial Acts and the federal legislation. The conclusion reached is that both the *Fraudulent Conveyance Act* and the *Fraudulent Preference Act* still retain an important role but are out of date. One of the most notable defects is that neither act can be properly understood without a close study of the cases decided under them. The report recommends that both statutes should be repealed and replaced by a single new act to provide uniformity and consistency. It is suggested that the new legislation should be enacted as part of the *Court Order Enforcement Act*. The report contains draft legislation and also a chapter with examples of how the new legislation would operate by reference to a number of fact patterns.

Further Developments

The report's recommendations have not been implemented by legislation.