

CONSULTATION REPORT
REVIEWABLE TRANSACTIONS ACT
Summer 2022
Department of Justice and Public Safety
Government of Prince Edward Island

Invitation to Provide Comment

**The Deadline for comments on the matters discussed in
this Report is August 31, 2022.**

The purpose of this Consultation Report is to allow interested persons an opportunity to consider the proposed *Reviewable Transactions Act*. Any comments sent to the Department of Justice and Public Safety will be considered in the development of new legislation on this topic.

You can contact us to provide your comments or questions about this document by mail or e-mail to:

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This consultation is a public process. **The Department of Justice and Public Safety assumes that comments received on this Consultation Report are not confidential unless specifically indicated.** The Department may quote from or refer to your comments in whole or in part. The Department may attribute comments provided by organizations. If you would like your comments to be treated confidentially, please request confidentiality in your response or submit your comments anonymously.

Any personal information received by the Department through this consultation process is subject to the *Freedom of Information and Protection of Privacy Act*. If you have any questions or concerns, please contact the Legislative Specialist by means of the contact information indicated above.

I. INTRODUCTION

The *Frauds on Creditors Act*, originally enacted in 1939, provides for the law of fraudulent conveyances and fraudulent preferences in Prince Edward Island. The aim of this law is to provide civil remedies to creditors in circumstances where a debtor transfers assets to a third party for the purpose of avoiding repayment to a creditor (fraudulent conveyance) or where a debtor unfairly repays one or more creditors in preference over other creditors (fraudulent preference). The *Frauds on Creditors Act* is one of a number of laws enacted in Prince Edward Island to regulate the debtor-creditor relationship.

In 2012, a law reform agency known as the Uniform Law Conference of Canada (the “ULCC”) developed the *Uniform Reviewable Transactions Act* (the “Uniform Act”) to replace the existing statutory and common law that comprised the law of fraudulent conveyances and fraudulent preferences. The ULCC notes that the Uniform Act does not differ significantly in policy and function from existing provincial laws designed to protect creditors, but it does provide a comprehensive set of clear rules designed to overcome the uncertainty faced by more than a hundred years of legislative changes and judicial decisions on the subject. Predictable outcomes simplify the resolution of disputes when they arise, and decrease the likelihood that disputes will occur. Since being recommended for adoption by the ULCC, the legislation has been adopted in New Brunswick, Saskatchewan and Quebec.

The Department of Justice and Public Safety is proposing legislation, similar to the Uniform Act, to provide Islanders with a legal framework to modernize the province’s law respecting fraudulent conveyances and fraudulent preferences. Though the legislation does not differ significantly in policy and function from the *Frauds on Creditors Act* which it is intended to replace, we believe its comprehensive set of clear and up-to-date rules will add greater certainty than the *Frauds on Creditors Act* and existing judicial decisions addressed to creditor-defeating dealings.

The Department of Justice and Public Safety is pleased to present this Consultation Report and a consultation draft of the proposed *Reviewable Transactions Act* for review and comment by the public.

II. PROPOSED *REVIWABLE TRANSACTIONS ACT*

The proposed *Reviewable Transactions Act* is adapted primarily from the Uniform Act of 2012. The Act does vary from the Uniform Act to align with Prince Edward Island legislative drafting practices.

Part 1 – Interpretation and Application

1. This Part provides definitions for terms that are used in the Act [**section 1**].

Some of the definitions that are helpful to know include:

“**claim**” means the right to satisfaction of an obligation owed by a debtor, whether the obligation is liquidated or unliquidated, absolute or contingent, certain or disputed, or payable immediately or at a future time;

“**creditor**” means a person who holds a claim;

“**insolvent**”, with respect to a person, means that

(i) the person is for any reason unable to meet the person’s obligations as they generally become payable,

(ii) the person has ceased paying for the person’s obligations in the ordinary course of business as they become payable, or

(iii) the aggregate of the person’s property, other than exempt property, is not, at fair valuation, sufficient to enable payment of all 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 of the Bill, includes an interest that is a security interest under clause 1(1)(rr) of the *Personal Property Security Act*.

2. The Act provides that all applications for relief under the Act are to be made to the PEI Supreme Court [**section 2**].
3. Though the remedies available under the Act are available to all creditors, those creditors who have a security interest in a debtor’s property are able to recover only those amounts which are in excess of the value of their security [**section 3**]. For instance, a creditor with a security interest in a vehicle of \$10,000 can only claim an amount in excess of that \$10,000 value of the vehicle against which the security is registered.

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4. An application under this Act can be made to the court in relation to any transaction that involves property that is subject to a security interest, a judgment of a court or a writ of execution even if another Act provides that the person who receives property in the transaction is supposed to have superior or free title to the property [section 4].

A writ of execution is a legal instrument issued by the court that directs the sheriff to enforce a court judgment through a process of execution such as seizure of property.

5. An application under this Act can be made to the court whether or not the person making the claim has already initiated legal proceedings or obtained a court judgment with respect to the claim [section 5]. However, the person does need to obtain a court judgment before the person is entitled to an court order for relief under the Act.

Part 2 – Transactions at Undervalue and Fraudulent Transactions

6. There are two types of transactions that give rise to a right to apply to the court for relief under Part 2 [section 7]:
- i. cases where a debtor who is unable to satisfy unsecured creditors' claims in full transfers property or otherwise gives value to another person for no consideration or for consideration worth conspicuously less than the property or value given; and
 - ii. cases where a debtor intentionally sets out to hinder or defeat the debtor's creditors by means of a dealing with property or the conferral of value on another person.
7. In determining an application under section 7 of the Act, the court considers the following factors in determining the intention of the debtor or the person to whom property is transferred:
- (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) where the transaction was effected by a court order,

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- (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 of the benefit conferred on the transferee;
 - (f) whether the parties to the transaction were related or closely affiliated;
 - (g) whether the debtor retained the possession, use or benefit of property or value transferred under the transaction;
 - (h) whether the transaction was entered into in haste;
 - (i) whether the debtor or the transferee attempted to keep 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.
8. Part 2 expressly applies to transactions that consist of the purchase or redemption of shares or declaration of a dividend by a debtor that is a corporation. Where an order for relief is made against a shareholder who is a transferred property by a debtor corporation, the court may make an order for relief against one or more directors of the corporation to take effect if and to the extent the order against the shareholder is not satisfied within 6 months [section 9]. This is to better ensure that debtor corporations do not engage in undervalue or fraudulent transactions by transferring property to the primary shareholders.
9. Where the court is satisfied that the grounds for relief under section 7 are established, the court may make an order for relief against either or both of

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- (i) a person who received a benefit from the debtor under the impugned transaction;
- (ii) a person who has received all or part of the benefit conferred under the impugned transaction from a person described in (i) or another person who subsequently is transferred the property [**subsection 11(1) and (2)**].

Where the court is satisfied that the grounds for relief under section 9 are established, the court may make an order for relief against a director of a corporation [**subsection 11(3)**].

Part 3 – Preferential Creditor Transactions

10. This Part applies specifically to creditor transactions. A creditor transaction is a transaction in which a debtor benefits a creditor by satisfying a claim in whole or part, or by providing security for the satisfaction of claim in whole or part, except for transactions described in clause 1(1)(e) of the Act.
11. An application to the court 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 [**section 12**] in the following circumstances:
 - (a) the creditor receiving the benefit 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 [**section 13**].
12. This Part does not apply to spousal transactions. A spousal transaction is a transaction in which the parties are or were spouses and that is effected by a separation agreement or a court order for (i) the division of property and financial resources or (ii) for support of the person who is or was the debtor's spouse or a member of the debtor's family.
13. Where the court is satisfied that the grounds for relief under section 7 are established, the court may make an order for relief against either or both of

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- (a) the creditor receiving the benefit conferred under the creditor transaction;
- (b) a person who has received all or part of the benefit conferred under the creditor transaction
 - (i) in a transaction with the creditor referred to in clause (a), where 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 benefit from the creditor referred to in clause (a) or a subsequent transferee, where the parties to each transaction leading to receipt of the benefit by the person against whom relief is claimed were not dealing at arm's length.

Part 4 – Orders and Remedies

- 14. Where the court is granting relief under Part 2 of the Act dealing with undervalue and fraudulent transactions, the court is to make any order that it considers necessary to make available to the applicant creditor the value conferred on a person to whom property was transferred to the extent of the creditor's claim against the debtor **[section 16]**.
- 15. Where the court is granting relief under Part 3 of the Act dealing with creditor transactions, the court is to make any order it considers necessary to set aside the impugned creditor transaction **[section 17]**. This Part clarifies that if the impugned creditor transaction had the effect of discharging the debtor's obligation that is under or secured by a guarantee or indemnity, that obligation is revived to the extent that the payment is set aside by the court.
- 16. The Act provides the court with authority to make an additional order or orders that may be required to achieve the results of the main application for relief, including
 - (a) an order vesting in the debtor, or in another person, property that is the subject of the transaction or the proceeds of the property;
 - (b) an order declaring that property that is the subject of the transaction or the proceeds of that property be subject to judgment enforcement measures in the hands of the transferee;
 - (c) an order directing that property that is the subject of the transaction or the proceeds of the property be sold and the money realized on the sale distributed as the court may direct;
 - (d) an order requiring the transferee to pay a sum equivalent to the value of property or other benefits received under the transaction;

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- (e) except in the case of an order made under Part 3, an order requiring the transferee to pay a sum 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;
 - (f) an order directing the release or discharge of any debt incurred, or security or guarantee given, by the debtor under the transaction;
 - (g) an order reviving any obligation or security released by the debtor under the transaction;
 - (h) an order setting aside a designation in favour of a beneficiary;
 - (i) an order declaring that property that would otherwise be exempt as against creditors is subject to judgment enforcement measures;
 - (j) an order setting aside or varying a court order if the order constitutes a transaction giving rise to the entitlement to relief;
 - (k) an order appointing a receiver to take possession of and deal with property in the manner directed;
 - (l) an order granting an injunction against the debtor or another person **[section 18]**.
17. This Part clarifies what happens when the property that is the subject of the impugned transaction is exempt property **[section 20]**. Exempt property is property of a debtor that is exempt by law from being seized, attached or otherwise subject to legal enforcement of a money judgment. For instance, under section 24 of the *Judgment and Execution Act*, certain property is exempt from seizure including: necessary and ordinary clothing of the debtor, the debtor’s motor vehicle (not exceeding \$3,000 in value), household items in the debtor’s home (not exceeding \$2,000 in value).
- Where the court orders relief in relation to a transaction involving exempt property and the debtor continues to use the property in the manner that attracted the exemption, the court may suspend enforcement of the order until the debtor ceases to use the property in that manner and order that a writ of execution be registered against the person who received the party or that person’s property.
18. This Part also provides the court with the authority to grant an injunction to a person who is, or may become, entitled to apply to the court for an order for relief under the Act if the court is satisfied that there is a reasonable likelihood that a transaction giving rise to creditor rights under the Act has occurred or is likely to occur **[section 23]**. An injunction is a type of court order by which the court may order someone to do something or order someone not do something.
19. As with PEI’s *Frauds on Creditors Act*, this Act requires a creditor to make an application to the court within one year of the transaction that is being challenged. If the person who received property

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in an impugned transaction concealed or helped to conceal the transaction, the period of one year starts at the time the creditor knew of the transaction or material facts but cannot be more than five years from the date of the impugned transaction. The Act also addresses the impact of a bankruptcy of a debtor before the end of the one year period **[section 24]**.

20. This Act is intended to replace the existing legislation in force in Prince Edward Island dealing with fraudulent and undervalue transactions, and fraudulent preferences. Accordingly, the Act repeals (revokes or annuls) the *Frauds on Creditors Act* so that it no longer operates **[section 26]**.

The Act also repeals a 1571 statute from England that applies to fraudulent and undervalue transactions and fraudulent preferences, to the extent that it applies to subject matters within the legislative jurisdiction of the PEI Legislature. This clarifies that the 1571 statute no longer operates within Prince Edward Island **[section 25]**.

III. INVITATION FOR COMMENT

We hope that this Consultation Report is useful in providing a summary of the background to the proposed *Reviewable Transactions Act*.

- A copy of the proposed text of the Bill entitled *Reviewable Transaction Act* is available for review on the Justice and Public Safety website at <https://www.princeedwardisland.ca/en/topic/justice-and-public-safety>.
- The ULCC's 2012 *Uniform Reviewable Transactions Act* is available at <https://ulcc-chlc.ca/ULCC/media/EN-Uniform-Acts/Uniform-Reviewable-Transactions-Act.pdf>.
- The *Frauds on Creditors Act* (the legislation which is being replaced) is available at <https://www.princeedwardisland.ca/sites/default/files/legislation/F-15-Frauds%20On%20Creditors%20Act.pdf>.

We encourage you to provide comments on this Bill by **August 31, 2022** so that Government has an opportunity to consider all feedback prior to finalizing the Bill for consideration by the Legislative Assembly of Prince Edward Island. Comments may be provided as described in page 2 of this Consultation Report.