The Anti-Deprivation Rule in Practice – Examples from comparative law and legal history

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A Thesis

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Abstract

This thesis is a comparative study of insolvency transactions avoidance laws in Canada, England and the United States. This work mainly concerns the anti-deprivation rule which, although not explicit in statute, is an implicit prohibition which emanates from the long history of the development of common law bankruptcy and insolvency statutes. The anti-deprivation rule has been interpreted differently by both the United Kingdom Supreme Court and the Supreme Court of Canada. This thesis attempts to explain this discrepancy while also attempting a better understanding of the anti-deprivation rule itself alongside principles of insolvency law more generally. Inspired by the Legal Traditions Approach of H. Patrick Glenn, it is proposed here that some degree of legal historical analysis is essential to one's understanding of both the origins and modern applications of the anti-deprivation rule and how such has diverged across national boundaries. Alongside legal development, this thesis also relies upon case law in all three studied jurisdictions to uncover not only biases in anti-deprivation case law but to understand similar principles which exist in American law. While the anti-deprivation rule itself does not exist in the United States, it is postulated here that similar principles, which emanate from the *Statute of Elizabeth 1571,* also manifest themselves within the *Bankruptcy Code.* Alongside the anti-deprivation rule, the thesis will also examine the related *pari passu* rule and statutory provisions across all three jurisdictions to attempt a greater understanding of both the former and transactions avoidance in insolvency more generally.

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CHAPTER 1 – Research Questions and Conceptual Frameworks

In a reported case from 1768, Lord Mansfield extended the then 200-year-old *Statute of Elizabeth 1571* to supress fraud on the part of a creditor. This extended the statute to cover what is now known as a fraudulent preference.[1] Such an extension, based upon a simple notion that all acts to defraud creditors should be void, was but one example of judicial extension of the laws around transactions avoidance.

Bankruptcy's prohibition on avoidance transactions is "…about defining the insolvent estate and facilitating its distribution in a way that is fair."[2] What is fair has been interpreted differently by different jurisdictions and each's conception of fairness has ultimately influenced how they have implemented avoidance measures in bankruptcy law. These avoidance measures derive from broad insolvency law principles which are still reflected in application of the anti-deprivation rule. The anti-deprivation rule is a rule of public policy which prevents the taking of assets from the estate upon an entity's insolvency[3] which, although not explicit in statute, is an implicit prohibition which emanates from the long history of the development of common law bankruptcy and insolvency statutes.[4]

In October 2020, in the midst of the coronavirus pandemic, the Supreme Court of Canada [SCC] issued a landmark decision recognizing the anti-deprivation rule.[5] Interesting in this SCC decision was an overt differentiation from the United Kingdom Supreme Court [UKSC] regarding

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[1] *Alderson v. Temple,* (1768) 96 ER 384, 8 George III, B.R. (1768).
[2] Hamish Anderson, *The Framework of Corporate Insolvency Law,* (Oxford University Press 2017), [15.59].
[3] *Lomas & Ors v JFB Firth Rixson Inc & Ors* [2012] EWCA Civ 419.
[4] *Chandos Construction Ltd. v. Deloitte Restructuring Inc.,* 2020 SCC 25, [33].
[5] *Chandos Construction Ltd. v. Deloitte Restructuring Inc.,* 2020 SCC 25

how and when the rule should apply. Whereas the UKSC takes a purpose-based approach, the SCC has rejected this in favour of an effects-based approach.[6] Perhaps the greatest difference in opinion between the Canadian and English approaches lay in the latter's recognition that the rule should do its best to give effect to contractual terms, even when such terms may otherwise offend an effects-based rule.[7] This has yielded a differing rule in Canada and England. While the former jurisdiction suggests that business purpose is irrelevant when applying the anti-deprivation rule, and the latter sees business purpose as essential to that analysis.

The reasons for this discrepancy are, at its core, what this thesis is setting out to discover. Proposed here is a study of three separate jurisdictions, namely England, the United States and Canada all of whom have influenced each other's conceptions around bankruptcy and insolvency laws. This thesis is particularly interested in points of divergence to show how common law's evolution has been necessitated by changes in historical circumstance.

This thesis seeks to understand this discrepancy and, in doing so, will challenge traditional assumptions around the anti-deprivation rule. While this is not a legal history piece, it is proposed here that scholarship around legal history can help one to understand this legal divergence in anti-deprivation rule case law. This thesis will use a multitude of approaches to understand reasons for this discrepancy. In using the approaches of comparative law, history and case law, this thesis will attempt to uncover biases within each jurisdiction's application of avoidance laws. It is argued here that, in the Canadian and English contexts, the anti-deprivation rule is, in its application, a reflection of the jurisprudential attitudes each jurisdiction attaches to avoidance law. As such, the

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[6] Ibid [11], [39].
[7] *Belmont Park Investments PTY Limited v BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing Inc* [2011] UKSC 38, [103].

study of the anti-deprivation rule is a study which exceeds the rule itself – it is a reflection of the principles which underpin entire avoidance systems of both jurisdictions. The United States will be used here to illustrate Canadian divergence from the English system. A comparison of English, American and Canadian laws will garner insight into similarities and differences of each, ultimately exploring how the Canadian system developed through both British and American influence. Beyond this, this thesis will attempt to ask questions around codification of the anti-deprivation rule and attempt to discover, from a practical standpoint, where it fits into national respective bankruptcy and insolvency systems.

This thesis, for reasons argued below, challenges the typical functional approach to comparative law by utilising aspects of the legal traditions approach to comparative law. While functionalism ultimately focuses on the law's effect, at present, legal traditions is based firmly on the notion that law is ultimately based upon a society's norms developed over time. In this sense, while this thesis is not a legal history piece, it will attempt to engage in legal historical scholarship to better understand the norms and circumstances through which the law of insolvency and transactions avoidance developed. These, in turn, will aid to better understand not only the origins but applications of the anti-deprivation rule in the modern context.

1.1. Overall Structure and Research Questions

The thesis attempts to address five broad questions:

1. What is the origin of the anti-deprivation rule and what effect does that origin have on how the rule is applied today?
2. What is the relationship between the anti-deprivation rule and the *pari passu* rule?
3. What is the relationship between the anti-deprivation rule and statutory provisions?

   a. Sub-question: What is the relationship between the anti-deprivation rule and *ipso facto* clause prohibitions?
4. Why has the anti-deprivation rule been interpreted differently in England and Canada?
5. Why does the United States not have an anti-deprivation rule and do similar principles underpin American law as do Canadian and English?

While the current chapter serves as an introductory chapter, introducing the project alongside methodologies, and definitions, chapter 2 is a historical discussion of both the development of insolvency and avoidance laws within England, the United States and Canada which will set the framework for further discussion. The chapter will then attempt to connect concepts contained within early 17th century case law, and 16th century statute law, to the development of the anti-deprivation rule in both the English and Canadian contexts as well as the United States *Bankruptcy Code*. This chapter will be used to not only answer the first research question but will also serve as the foundation for further discussion based upon the legal traditions comparative approach and inform the rest of the thesis. It will also be particularly useful in informing the discussion around the third research question as well and will specifically discuss fraudulent conveyancing provisions and their similarities to the anti-deprivation rule. As will be seen, the anti-deprivation and *pari passu* rules and fraudulent conveyancing legislation are complementary to insolvency statutes as they all attempt to apply principles of shared origin. Chapter 2 will also provide the necessary context to answer question 5 – namely why United States bankruptcy does not have an anti-deprivation rule and whether there are common principles which underpin US law.

Chapter 3 will examine the highly related *pari passu* rule and its connection to the anti-deprivation rule. By surveying leading case law, judicial decision-making will be utilised to frame

the context upon which both these related, yet distinct rules have developed. Analysis of the *pari passu* rule is essential in any discussion of the anti-deprivation rule as both rules were not well defined in England prior to the *Belmont Park* decision. Judicial decisions from both England and Canada will be utilised and compared with the United States' statutory "*pro rata"* approach. This chapter will serve to answer the second research question, namely the relationship between the *pari passu* and anti-deprivation rules. It will also inform the greater context of chapter 5 in showing that the system of *pro rata* distribution in the United States is essentially the same articulation, by both function and origin, of principle as the *pari passu* rule.

Chapter 4 will discuss leading anti-deprivation rule decisions in both England and Canada. In doing so, points of divergence will be observed. These points of divergence will be contrasted and theories as to why the anti-deprivation rules in Canada and England have been applied differently will be explored. Recent court decisions from Ontario, Canada will also be examined to demonstrate something of a limiting of the Canadian rule since the SCC decision. This chapter will also ask why the United States did not develop an anti-deprivation rule while exploring similar approaches to provisions in the *Bankruptcy Code.* Current scholarly research into the anti-deprivation rule will also be discussed here. This chapter is designed to largely answer research question 4 – namely how and why the anti-deprivation rules have been applied differently in Canada and England. It will also serve as an answer to question 5, concluding that while an anti-deprivation rule does not exist in the United States, similar legal principles inform many aspects of the *Bankruptcy Code.*

Chapter 5 will explore the relationship between the anti-deprivation rule and prohibitions against *ipso facto* clauses. The chapter will offer some criticisms of the functional equivalency that has been suggested between the anti-deprivation rule and *ipso facto* clause prohibitions. This

chapter will also shed light on some of the difficulties in using such devices for codification of the anti-deprivation rule. It is argued that *ipso facto* clause prohibitions are meant merely to ensure the proper functioning of executory contracts whereas the anti-deprivation rule is a much broader rule of transactional avoidance. Both these concepts will be thoroughly discussed with respect to all three jurisdictions in turn. Chapter 5 is designed to answer sub-question 3a – namely how the anti-deprivation rule is related to *ipso facto* clause prohibitions. This chapter challenges conventional understanding around equivalency between the anti-deprivation rule and *ipso facto* clause prohibitions. While *Belmont Park* does indeed utilise the anti-deprivation rule to set aside executory contracts, it is but one example of where the two sets of rules overlap. Some proposals for reform, particularly in the English context, will be suggested but this is by no means the purpose of this chapter nor thesis.

Chapter 6 will attempt to contextualise the anti-deprivation rule within broader avoidance regimes. In looking at avoidance provisions contained within English, Canadian and American law, a purposive understanding of the anti-deprivation rule will be possible. The focus of this chapter will be on ascertaining intent in statutory devices regarding purpose-based avoidance standards. The anti-deprivation rule's application in both England and Canada will be compared against the application of statutory provisions as well as the earlier *Statute of Elizabeth 1571.* This chapter will hopefully shed light on why the UKSC adopted a purpose-based standard and the SCC held that the anti-deprivation rule should be applied on an effects-based one. This chapter's purpose is largely to answer the main part of research question 3, namely the relationship between the anti-deprivation rule and statutory provisions. Chapter 6 also contains a continuation of the brief discussion of the relationship between the anti-deprivation rule and fraudulent conveyancing provisions which began in chapter 2.

Chapter 7 will serve as a conclusion summarising the findings of this entire thesis attempting to bring together the questions and expound upon major themes. These themes will be discussed with an eye to future scholarly research in this vastly understudied area.

1.2. Methodologies

In conducting this research, legal as well as interdisciplinary methodologies will be utilised. Namely, this thesis will focus upon comparative law, legal history and the jurisprudential theories of legal realism and positivism. Each of these methodologies shall be discussed in turn.

1.2.1. Comparative Law

In conducting comparative law, this author will attempt to take a balanced view relating to theoretical frameworks. The default option in comparative law has generally been to take the functionalist approach. This method contextualises modern legal norms in each jurisdiction's laws alongside some social and cultural factors. It has been termed "functionalism" as it examines the law's actual function in such an environment.[8] Functional comparative law is based upon three main premises: Firstly, that the law is an instrument for channelling human behaviour. This means that lawmakers generally take a problem-solving approach when designing legal solutions. Secondly, that law's real function is reflective of sociological concern, meaning that it assumes that the problems needing to be solved across national boundaries are the same or similar. Thirdly, that legal systems tend to resolve practical questions in a similar way.[9] While some have very

[8] Uwe Kischel, *Comparative Law* (OUP 2019), 7-8.
[9] Oliver Brand, 'Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies' 32 BJIL 405, 409-410.

recently attempted a broader approach to comparative legal study,[10] functionalism has maintained something of a dominance in Europe.[11] Although functional legal theory does maintain certain advantages, as discussed within this section, this thesis will be influenced by the legal traditions approach of H. Patrick Glenn and others.[12] This approach, historically more common in North America than Europe,[13] suggests that law is part of a society's fabric and, in order to fully understand a country's legal system one must look to aspects of society beyond the law. The legal traditions approach argues that law is more than just a series of rules, but a set of coexisting legal cultures which account for a society's entire legal mechanism.[14] Under the legal traditions approach, the comparatist will oftentimes engage in a certain degree of interdisciplinary study, looking at not only law sources but sources from history, economics, sociology, etc. In doing so, the legal traditions comparatist will attempt to understand not only the legal frameworks but the economic, religious and/or social frameworks as well. Legal traditions, under such an approach, are understood as the historical underpinnings of modern laws and legal systems.[15] The legal traditions approach employs a historical narrative, of the development of legislation, and the factors which shaped that development, to understand a process of cultural reproduction.[16] This approach aids in our understanding of modern laws as it attempts to draw a linkage between the

[10] See for example Mathias Siems and P Jen Yap, 'A New Handbook for Comparative Law in a Global Context' in *The Cambridge Handbook of Comparative Law,* Mathias Siems and Po Jen Yap eds. (Cambridge 2024).
[11] Oliver Brand, 'Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies,' *Brooklyn Journal of International Law* (2007) 32:2, 409, Uwe Kischel, *Comparative Law,* (OUP 2019), 7-8.
[12] See H. Patrick Glenn, *Legal Traditions of the World: Sustainable diversity in law,* (5th ed. OUP 2015); H. Patrick Glenn, 'The Concept of a Legal Tradition,' (2008) 34 *Queen's Law Journal* 427.
[13] Mathias Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century,' (2002) 50 American Journal of Comparative Law 671, 677-678.
[14] Mathias Reiman, ibid; Edward J. Eberle, 'The Methodology of Comparative Law,' (2011) 16 *Symposium: Methodological Approaches to Comparative Law* 51, 59.
[15] Thomas Duve, 'Legal Traditions: A dialogue between comparative law and comparative legal history,' (2018) 6 *Comparative Legal History* 15, 21.
[16] Ibid, 22.

law and the norms of a legal society.[17] In this author's view, such norms are expressed in current law as principles. While functionalism can also consider sociological circumstances,[18] such is utilised only to understand how the law operates in the present. Since laws could have had different functions in the past, it is perhaps not the best approach for studying legal divergence.[19]

The legal traditions approach, on the other hand, can also focus on the question of rights. By looking at both the socio-political context which led to the protection of certain rights, and the differences and similarities in the regulation of said rights in differing jurisdictions,[20] a comparative study is possible using this approach. Through this methodology, one is able to both garner insight into a foreign legal culture and, perhaps, apply such insights to one's own legal system enabling a deeper understanding.[21] The legal traditions comparatist postulates that law cannot be fully understood without the culture in which it sits.[22] In other words, such an approach sees the law not as a closed discipline, independent of culture, but a reflection of both a society's history and values. This approach is especially useful when studying the common law as, in case-made law, norms eventually become the law. As will be seen in the example of bankruptcy and insolvency, discussed in chapter 2, the development of the normative courts of law merchant would eventually go on to modify the common law.

This is not to say that this thesis will be fully reliant upon an orthodox interpretation of the legal traditions approach as it is oftentimes advisable to take a balanced view. Although the

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[17] Sean Patrick Donlan, 'Comparative Law and Hybrid Legal Traditions – An Introduction,' *Comparative Law and Hybrid Legal Traditions,* (Eleanor Cashin-Ritaine, Sean Patrick Donlan and Martin Sychold, eds. Swiss Institute of Comparative Law 2010), 3.
[18] Uwe Kischel, *Comparative Law* (OUP 2019), 8.
[19] Oliver Brand, 'Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies' 32 BJIL 405, 420.
[20] Ioanna Tourkochoriti, 'Comparative Rights Jurisprudence: An Essay on Methodologies,' (2017) *Law and Method* 1, 2.
[21] Eberle, supra note 14, 51-52.
[22] Eberle, supra note 14, 59.

functionalist approach has been accused of being rather "positivist" and "formalist" in its application,[23] it does have many useful theoretical aspects.

Firstly, functionalism generally attempts to utilise legal terminology as it appears in each nation's system.[24] This is generally a good idea as although concepts may be similar across different jurisdictions, the use of specific terminology likely represents a conscious categorisation of law which is useful to the legal scholar. For example, the use of the terms bankruptcy and insolvency in the United Kingdom do not correspond with its usage in Canada and the United States. This is important as the importation of one country's terminology onto another may interfere with one's full and complete understanding of the latter's system.

Secondly, functionalism, although it has been criticized as imposing practical formalism, in theory at least, promotes focus on not only legal rules themselves but their effect as well.[25] This aligns the theoretical ideas which underpin functionalism with the realist school and not the formalist one. This is important as, although it appears functionalist theory has been utilised in formalist ways, it is not in fact based upon formalism at all. In theory at least, functionalists believe legal comparative analysis must be focused on concrete factual problems and must not be bound by doctrine.[26] In practice, however, this is easier said than done. Nonetheless, functional comparative law is an extremely useful starting point to any comparative study as it can indicate which laws, on their surface, appear to express similar principles.

Where there is a particular issue relating to functionalist theory's application to this study is in its assertion that a law's modern function is its most important feature. Legal divergence is

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[23] Brand supra note 19, 409-410; Pierre Legrand, 'Negative Comparative Law,' 10 JCL 406, 406; Pierre Legrand, 'Paradoxically Derrida : For a Comparative Legal Studies,' (2005) 27 *Cardozo Law Review* 631, 655.
[24] Uwe Kischel, *Comparative Law,* (Oxford 2019), 89.
[25] Ralf Michaels, 'The Functional Method of Comparative Law,' *The Oxford Handbook of Comparative Law* (Oxford 2008), 342; Kischel supra note 24, 8.
[26] Kischel supra note 24, 89.

reflective of historic changes in the law. Since a law's function may change over time, saying a law's function today is reflective of how it solved a problem in the past seems a flawed approach.[27] The functionalists propose that if two institutions, even if they are doctrinally different, serve a similar function then they are functionally equivalent.[28] This creates a tendency to glance over the "law in action" as, in practice, functionalism often relies heavily upon rules.[29] So, although functionalist theory can be useful, especially in ascertaining which national legal devices perform a similar function, Brand's and Legrand's critiques around functionalism, namely that it is nearly impossible for the domestic scholar to fully immerse themselves into the system of a foreign country,[30] make it a less than ideal approach for the current study. To fully understand and immerse oneself in the study of another country's laws, and perform comprehensive comparison, it is oftentimes important to consider constitutional, social and historical factors alongside the function of laws. So, although functionalist theory has its utility, especially in ascertaining what function laws perform in the modern context, since this study is aimed at understanding legal divergence across national boundaries, its orthodox use is less than ideal here.

This is not to say that the legal traditions methodology is perfect either. It does contain certain theoretical challenges. Firstly, it can perhaps be difficult to ascertain what a legal norm is or when such a norm indeed impacts the law. Just because something is normative does not make it relevant nor useful to a study. It is important, under said approach, to genuinely consider which norms are useful in better understanding the law as discussed. With regard to this study, which "principles" of insolvency law best explain the anti-deprivation rule. Second, the history of how a law comes into being is not necessarily due to social factors. On many occasions, legislative

[27] Brand, supra 19, 420.
[28] Michaels supra note 25, 342.
[29] Brand, supra note 19 413.
[30] Brand, supra note 19, 414, Legrand, supra note 23, 408.

change is not due to a change in sociological factors but due to a policymaker having a keen interest in a subject. In such cases, legal creation reflects societal values or culture much less than a single individual's, or group of individuals', ambitions. Although contextualisation is helpful, it is not always the answer. Despite these issues, in this author's opinion, to properly understand legal cultures and divergence, it is important to understand how such cultures developed and what led them to diverge from their common source. As such, the thesis will attempt to take a balanced approach incorporating many elements of legal traditions into this comparative study.

1.2.2. Legal History

Interestingly, the first modern study of comparative law was largely reliant upon history. Indeed, the discipline of comparative law appears to have developed in earnest at the turn of the 20th century with one of the earliest proponents, Edouard Lambert, drafting a historical-comparative report.[31]

Lambert, an academic novice, was asked by established Professor Raymond Saleilles to draft a report on comparative law for the First International Congress on Comparative Law.[32] Both Saleilles and Lambert believed comparative law to be closely related to methodology and desired a new methodology to replace what they perceived as old and outdated methodologies amongst the civil law systems of the era.[33] Practical in orientation, although highly theoretical, this new methodology was contained within Lambert's historical comparative report.[34] In his report,

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[31] Édourad Lambert, "Conception générale, définition, méthode et histoire du droit comparé. Le droit comparé et l'enseignement du droit," (1905) 1 *Extrait du Congrès international de droit comparé, tenu à Paris du 31 juillet au 4 août 1900. Procès verbaux des séances et documents.*
[32] Christophe Jamin, 'Saleilles' and Lambert's Old Dream Revisited,' (2002) 50 *The American Journal of Comparative Law* 701, 702.
[33] Ibid at 703.
[34] Lambert supra note 31.

Lambert believed that the differences in civil law approaches were more apparent than real.[35] Lambert argued that, instead of looking at the law as it was reflected in legislation, one should also consider the positive internal aspects of the law itself. This, Lambert contended, exposes greater similarities than differences amongst civil law systems as similar conditions of economic life as well as legal borrowing and transplantation encouraged many countries to incorporate similar regulations and systems.[36] Lambert and Saleilles created a new school, that of comparative law, which sought not only to understand the law as it was written but understand the social factors behind its development as well.[37] Saleilles' and Lambert's approach to comparative law was meant as a practical one. To them, their historical analysis concluded that lawyers should approach the law with a keen eye to history and take into consideration its evolutions.[38] They even believed that, when a lawyer's national law was absent of a solution to a practical problem, lawyers and judges should also consider the law of other countries.[39]

This thesis will, to some extent, rely upon a historical comparative approach. Aspects of Saleille's and Lambert's approaches can be utilised to allow the legal comparatist to see how each legal system has diverged from a common source.[40] Although Lambert's approach is based upon the now-dated notion of natural law, as espoused by David Hume[41] and William Blackstone,[42] amongst others, it is somewhat applicable to this study as all three systems under review find, as their ultimate source, the old common law of England.

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[35] Lambert supra note 31, 35-36.
[36] Lambert supra note 31, 37.
[37] Jamin supra note 32, 704.
[38] Jamin supra note 32, 704.
[39] Jamin, supra note 32, 705; Lambert, supra note 31, 37.
[40] Lambert, supra note 31, 50.
[41] David Hume & E.C. Mossner, ed. *A treatise of human nature*, (Originally Published 1739 Penguin 2005).
[42] William Blackstone, 1765 "Blackstone's Commentary on the Laws of England," *The Avalon Project,* Yale Law School Lilian Goldman Law Library: https://avalon.law.yale.edu/subject_menus/blackstone.asp, accessed March 13, 2022.

A large point of divergence between this thesis and the approaches of Saleilles and Lambert is that, in no way, is it attempting to create a new methodology upon which the common law can be studied, it simply seeks to understand differences and points of divergence. To show this divergence, aspects of Lambert and Saleilles' approaches are useful such as Lambert's differentiation of the apparent as opposed to the real. Instead of looking at what is said in the law, sometimes it is best to see how said law is applied. This is perhaps truer in the common law than in civil law as the role of judges in interpreting legislation is different. Since judges have a degree of law-making power through the use of precedent in the common law system, the difference between statute and application can sometimes be quite wide. To that end, this thesis will be highly reliant on case law, especially with regard to surveys of the anti-deprivation and *pari passu* rules.

Given that this is largely a study of common law jurisdictions, the use of legal historical study in this thesis is all the more justified. As law of precedent, the common law is rooted in historical argument. Legal historical analysis, per both former Indiana Chief Justice Randall T. Shepard and former US Supreme Court justice Benjamin Cardozo, is an essential device for common law scholarship.[43] Beyond this, legal history is important in understanding the emergence of legal institutions as well.[44] Since the common law shows an incredible ability for expansion and enlargement, it is perhaps best to look at the origins of rules and under what circumstances they came into existence.[45]

The common law is a practical system. Although it contains great complexities brought about by a long, colonial history, many rules contained therein were meant, in their earliest days to remedy observed issues. In order to understand why such rules exist, it is important to

[43] Randall T. Shepard, 'The Importance of Legal History for Modern Lawyering' (1997) 30 Ind L Rev 1, 1-2; Benjamin N. Cardozo, *The Nature of the Judicial Process* (originally published 1921 Quid Pro Quo 2010), 70.
[44] Shepard ibid, 3-5. Cardozo ibid, p. 70.
[45] Paul Vingradoff, 'The Meaning of Legal History,' (1922) 22 *Columbia Law Review* 8, 695-697

understand their origins. What this thesis seeks to accomplish, in utilising legal history, is two-fold: First, said approach will allow this thesis to understand what issues the bankruptcy, insolvency, and avoidance systems attempted to resolve and, second, it will allow for greater understanding of how such systems, developed out of the small island-nation of Britain, have diverged to form the bankruptcy and insolvency systems of England, the United States and Canada.

In utilising legal history, one can gain a better understanding of not only the laws as they exist today but the circumstances from which they emerged. In essence, this is a form of reverse engineering. The scholar begins with the law as it is today (at which stage functional approaches to comparative law are helpful) and attempts to understand the historical factors upon which said law is based (at which stage theories from legal traditions are helpful). History is an essential tool for any scholar who wants to grasp divergence.

1.2.3. Important Jurisprudential theories – legal realism and legal positivism

Alongside historical evolutions in both substantive law and legal institutions, evolutions in legal thought diverged on either side of the Atlantic as well. While the legal scholars of North America, influenced by the works of Felix Cohen and the judicial reasoning of Benjamin Cardozo, began to embrace concepts of legal realism, the legal scholars of Britain, influenced by theoreticians Jeremy Bentham and H.L.A. Hart, would be less apt to do so. It has been argued, the dominant theory around judging in Europe is legal positivism.[46] These differences in approach, explained here briefly, may indeed be a lens through which to see common law divergence in North America and England around avoidance law.

[46] Vitalis Tumonis, 'Legal Realism and Judicial Decision Making,' (2012) 19 *Jurisprudencija* 4, 1363.

Legal Realism

Legal realism, a product of post-Civil War thought in the United States,[47] is a school of jurisprudential thought which emerged during the 1920s and 1930s within the Northeastern law schools of the United States, most notably Yale and Columbia,[48] espousing a focus on studying not what the law should be but how the law is.[49] Initially a rejection of the overt formalism of then dean of Harvard Law School, Christopher Columbus Langdell,[50] its development ended up being so influential that it became part of the 20th century North American collective legal "unconscious."[51] The jurisprudential school emerged as a rejection of the Langdellian approach which sought to codify legal doctrines, simplify US law, and get rid of complexities.[52] The realist school seems to have emerged as many scholars complained that Langdell's approach limited their scholarly intellectual activity.[53] It is an empirical approach which sought interdisciplinary study. Legal realism's impact on the United States ensured that the law is no longer viewed as a self-contained field.[54] However, this is not to say that formalism was not also influential in American legal thought as it largely influenced the codification of common law in the American context through the "restatements"[55] which has even led some to argue that the US has a hybrid legal system between common and civil laws.[56] As an aside, the codification of legal concepts in the

[47] Neil Duxbury, *Patterns of American Jurisprudence* (Clarendon 1995), 94.
[48] See Laura Kalman, *Legal Realism at Yale, 1927-1960,* (The University of North Carolina Press 1986).
[49] Roscoe Pound, 'The Call for Realist Jurisprudence,' in William W. Fisher III, Morton J. Horwitz and Thomas A. Reed, eds. *American Legal Realism,* (Oxford University Press 1993), 59.
[50] Duxbury, supra note 47, 10.
[51] Duxbury, supra note 47, 94.
[52] Duxbury, supra note 47, 79.
[53] Duxbury, supra note 47, 79.
[54] Duxbury, supra note 47, 92.
[55] Duxbury, supra note 47, 78.
[56] H. Patrick Glenn, *Legal Traditions of the World: Sustainable diversity in law* (5th ed. OUP 2015), 263-267; H. Patrick Glenn, *On Common Laws* (OUP 2005), 86-88.

United States is also relevant to the discussion of why United States bankruptcy law did not develop an anti-deprivation rule – to be discussed largely in chapters 2 and 4 of this thesis.

The realists would argue for three major reforms. First, realist scholars and practitioners argued that black letter law should be replaced with working rules – rules which describe the actual behaviours of courts. Second, the realists argued for a change to extant legal concepts, largely a codification attempt by Langdell, as they had little practical utility and replacing them with elemental entitlements. Third, the realists argued that these entitlements must be applied with respect to socio-economic circumstance – the context to which legal arrangements are entered into vary and therefore utilise different entitlements.[57]

Although these reforms never fully materialised, the influence of realism on Supreme Court Justice Benjamin Cardozo cemented much of the realist ideals into American, and later Canadian, judicial thought. Cardozo would write a book, entitled *The Nature of the Judicial Process,*[58] which garnered influence not only in academic but practical circles as well. In his biography of Benjamin Cardozo, Kaufman discusses his enduring impact upon American judges in the late 1990s.[59] Cardozo is still influential today as his philosophical approach to judging is still discussed in the United States today with surprising regularity.[60] Most notably, Cardozo emphasised the judge's role as a legislator and the common law as an exercise in pragmatism.[61] Eventually legal realist ideas would spread themselves throughout American law schools.[62] Given the influence of the

[57] William W. Fisher III, Morton J. Horwitz and Thomas A. Reed, eds. *American Legal Realism,* (Oxford University Press 1993), 166-167.
[58] Cardozo supra note 43.
[59] Andrew L. Kaufman, *Cardozo,* (Harvard University Press 1998) at p. 200.
[60] Henry E. Smith, 'Cardozo and the Nature of the Equitable Process' (2023) 34 Yale J. L. & Humanities 166; Aditi Bagchi, 'Conflict, Consistency and the Role of Conventional Morality in Judicial Decision-Making' (2023) Yale J. L. & Humanities 9; Alberto Bernabe, 'Ahead of his time: Cardozo and the Current Debates on Professional Responsibility' (2018) 34 Touro L. Rev. 63.
[61] Cardozo supra note 43, 64.
[62] Duxbury, supra note 47, 95-96.

American casebook model on Canadian law schools, [63] realist notions are also present in the curriculums of Canadian law faculties as well. Although pure realism has largely been supplanted in North American legal thought, its influence remains to this day, so much so that it has been argued to have been engrained within the minds of North American legal thinkers.[64] Perhaps no idea has captured the minds of North American lawyers than seeing the law as something other than a self-contained discipline.[65]

Legal Positivism

While legal realism held much sway in North American legal circles, an Oxford professor by the name of H.L.A. Hart would immensely impact English legal education. As influential as Cardozo's *The Nature of the Judicial Process* was in the United States, Hart's *The Concept of Law*[66] was arguably more so in Britain.[67] This is not to say that Hart's work has been accepted wholesale by all British scholars, most notably his work has been criticized by Moles,[68] it is to say, however, that Hart's influence must not be understated when dealing with laws within the British context. Hart's work can be seen as a continuation of Jeremy Bentham's concept of legal positivism.[69] Bentham, who lived in the 18th and 19th centuries, rejected the prior Aristotelian notion of the necessary morality of law as espoused by William Blackstone amongst others.[70] The positivists, contrary to the realists, believe that law is a self-contained discipline with Hart

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[63] Della Stanley, 'Richard Chapman Weldon 1849-1925 Fact, Fiction, Enigma,' (1989) 12:2 Dal LJ 539
[64] Duxbury, supra note 47, 94.
[65] Duxbury, supra note 47, 92.
[66] H.L.A. Hart, *The Concept of Law,* (Oxford University Press 1961).
[67] AW Brian Simpson, *Reflections on the Concept of Law,* (Oxford University Press 2011), 20-22, 186-187
[68] Robert N. Moles, *Definition and Rule in Legal Theory: A Reassessment of HLA Hart and the Positivist Tradition* (Blackwell 1987).
[69] Hart himself indicated that his works influenced by Bentham in a response lecture to American jurist Ronald Dowrkin he delivered at the Autonomous University of Madrid in 1978 – reproduced as H.L.A. Hart 'The New Challenge to Legal Positivism (1978),' (2016) 36 *Oxford Journal of Legal Studies* 3, 459.
[70] Philip Schofield, "Jeremy Bentham (1748-1832)," in *The Oxford Handbook of Legal History,* Marcus D. Dubber and Christopher Tomlins, eds. (*Oxford University Press* 2018), p. 386. Jeremy Bentham *A Comment on Commentaries: A Criticism of William Blackstone's Commentaries on The Laws of England,* Oxford Edition, Charles Warren Everett, ed. (Oxford University Press 1928).

believing that precedent is not necessarily less certain than statute.[71] Hart's positivism further argues that rules form the basis of judicial-decision-making.[72] Unlike realism, positivism believes that, although laws can be applied inconsistently due to different fact scenarios, this is not indicative of uncertainty but rather an indication that in some instances there may be a factual dispute as to when a specific rule should be applied.[73] As such, positivists have often argued that, even when they believe the result is unjust, that it is not the role of judges in altering the law. Legal positivism, at its core, believes it is the duty of legislators to change and add to laws whereas it is the duty of judges to apply them.[74] This attitude of judicial deference, based firmly on notions of positivism, has garnered great influence upon judiciaries, especially in the United Kingdom.[75] While formalist doctrinal theory, firmly rooted in legal positivism, was the dominant legal theory of scholarship in Britain throughout the 20th century,[76] in the United States and Canada notions of legal realism are studied with a surprising degree of regularity.

While Canada has not adopted legal realism to the same extent as the United States, there are still elements of legal realism which have permeated into Canadian legal thought. This is thanks in large part to legal academics who completed their graduate degrees at American law schools.[77] The incorporation of legal realist ideas into Canadian jurisprudence began in the 1930s[78] and culminated in justices of the Supreme Court of Canada, by the 1950s, making explicit policy

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[71] Hart, supra note 67, 123.
[72] Hart, supra note 67, 137.
[73] Hart, supra note 67, 12.
[74] Hart, supra note 67, 41.
[75] Matyas Bodig, 'Legal Theory and Doctrinal Legal Scholarship,' (2010) 23 *Canadian Journal of Law and Jursiprudence* 2, 497.
[76] N.J. Duncan and T. Hutchinson 'Defining and describing what we do: Doctrinal legal research' (2017) 17 Deakin Law Review, 85.
[77] R. Blake Brown, 'The Canadian Legal Realists and Administrative Law Scholarship, 1930-1941' (2000) 9 *Dal. JLS* 36, 45; Brian Galligan and Peter Russell, 'The Politicisation of the Judiciary in Australia and Canada' (1995) 67 *The Australian Quarterly* 85, 87.
[78] For a discussion of the development of realist thought at Canadian law schools see R.C.B. Risk, 'Canadian Law Teachers in the 1930s: 'When the World Was Turned Upside Down' in *A History of Canadian Legal Thought: Collected Essays* G. Blaine Baker and Jim Phillips eds. (2006 UTP).

arguments in their decisions.[79] The academic works of the 1930s, concentrated initially in the sphere of administrative law, rallied against 19th century liberal ideas particularly relating to both individualism and the *laissez-faire* economy.[80] The gradual shift toward greater considerations of policy by Canadian courts was further influenced by eventual Chief Justice (1973-1984) Bora Laskin, a former legal academic, who, as indicated by his writings, believed law was no longer an autonomous, non-political discipline.[81] Such developments ultimately forced Canadian law in somewhere of a middle-ground between the more openly realist American law and the more doctrinal English law.

Perceptive differences of jurisprudential schools, namely realism and positivism, are proposed merely as a tool in this thesis which may enable the scholar to better understand jurisdictional divergence around bankruptcy and insolvency laws, avoidance laws and ultimately the anti-deprivation rule. Although highly theoretical, examination of these jurisprudential methodologies can serve as a potentially useful device in understanding differences in judicial perceptions around both the anti-deprivation rule and each country's bankruptcy and insolvency systems as a whole. It is argued here that one of the influences of the different approaches to the anti-deprivation rule in Canada and the United Kingdom is perhaps the influence of legal realism upon Canadian lawyers as well as the judiciary. As the next chapter will show, Canadian bankruptcy and insolvency laws draw influence from their American neighbours.

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[79] Galligan and Russell, supra note 78, 91.
[80] Brown, supra note 78, 65.
[81] Paul Horwitz, 'Bora Laskin and the Legal Process School,' (1995) 59 *Sask. L. Rev.* 77, 88; Bora Laskin, 'Tests for the Validity of Legislation: What's the "Matter"?' (1955) 11 *UTLJ* 114, 117; See also Justice Laskin's dissent in *Murdoch v. Murdoch* [1975] 1 S.C.R. 423 for an example of the use of such realism.

1.3 Federalism, Definitions and Key Terminology

Before the historical context can be examined, it is important first to lay out certain frames of reference not contained within the English system. For example, how Federalism, present in both the Canadian and American systems, has played a role in the development of both the Canadian and American insolvency and avoidance regimes. As such, it is necessary to devote time and space within this thesis to discuss the role of federalism in both countries. Beyond this, this section will also contain definitions of key concepts, such as "avoidance," "bankruptcy" and "insolvency," to correctly orient the reader. This section, as terminology and concepts differ across national boundaries, is meant to eliminate jurisdictional and terminological confusion.

1.3.1. Federalism Generally

Federalism is important whenever discussing Canadian and American law. Distinct from the legislative union, a unitary state which incorporates the constituent countries under a single authority,[82] employed most notably in the United Kingdom, which although at times resembles federalism has historically been regarded a distinct concept. Constitutional federalism, the form of which exists in both Canada and the United States, creates a formal system in which a citizen is subject to two distinct, and largely independent, levels of government.[83] Under a Federal system, power is not devolved to the federal entities but said entities govern in their own right. For example, in Canada, any constitutional amendment requires the consent of the provinces.[84] In the United States, a constitutional amendment also requires state consent[85] but, since the repatriation

[82] Peter Hogg and Wade K. Wright, *Constitutional Law of Canada,* 5 ed. Vol. 1, (2021 Thomson Reuters), 5-6.
[83] Hogg ibid, 5-4.
[84] The rather complicated amendment formula to the Canadian Constitution is contained within *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss. 38-49.
[85] U.S. Const. art. V.

of the Canadian Constitution in 1982, such amendments have been far more frequent in the United States.[86]

The Federal system is employed in many countries, including Germany, Australia, Switzerland, and most importantly for this thesis, Canada and the United States. Under a federal system, government roles are divided, and are generally qualified by a degree of decentralised power.[87] Within a federal system, there can be greater or lesser degrees of authority conferred to the decentralised units, called states in the United States and provinces in Canada, and, in the case of Canada, these powers are enumerated within the constitution. In the case of the United States, where the states were keen to limit the power of the federal government, only federal powers are enumerated with the rest defaulting to the individual states based upon the idea that the states themselves are sovereign.[88]

1.3.2. US Federalism Briefly Explained

While the Constitutional Convention considered a simple, inclusive list of federal government powers, the delegates instead elected for an enumerated powers format now contained mostly[89] within Article I, § 8 of the United States Constitution.[90] This while, the 10th Amendment of the United States Constitution grants the individual states residual power over any powers not delegated to the Federal government within the Constitution.[91] As an example, since the Constitution is silent on the licensing of motor vehicles, this responsibility falls under individual state jurisdiction.

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[86] For an example of all the amendments to the American Constitution see U.S. Const. amend. I-XXVII.
[87] Hogg supra note 83, 5-4.
[88] Laurence H. Tribe, *American Constitutional Law,* 3 ed., Vol. 1 (Foundation Press 2000), 119; Chester James Antieau and William J. Rich, *Modern Constitutional Law,* 2 ed. Vol. 3 (West 1997), 4.
[89] Other Federal powers are contained within U.S. const., Art IV, § 1, Art IV, § 3, Art V, § 1-19.
[90] Laurence H. Tribe, *American Constitutional Law,* 3 ed., Vol. 1 (Foundation Press 2000), 795-796.
[91] Tribe ibid, 796.

The 10th Amendment has also been utilised to allow individual states to enact laws in the absence of Federal exercise in an enumerated area. In one such decision, although Article I, § 8 grants the Federal government authority to enact uniform rules of bankruptcy,[92] the Federal government failed to exercise such authority leaving the Supreme Court of the United States to determine that the State of New York could legislate in the area.[93] This privilege was largely eliminated once the United States government enacted a federal bankruptcy law. Under the US system, there are also two separate court systems. As it relates to this, the Supreme Court has also decided, on different occasions, that while federal courts can interpret state laws, state courts are the ultimate authority for interpreting state laws.[94] Oftentimes, federal and state laws interact in a complementary manner. As will be seen, federal conflicts of laws have played a significant role in the development of US bankruptcy and avoidance laws.

1.3.3. Brief Overview of Canadian Federalism

Given the near century between the enactment of the United States Constitution, in 1789, and the British North America Act (later the Canadian Constitution) in 1867, Canada had the advantage of observing a neighbour's struggles with the federal division of powers. As such, the Canadian constitution, although firmly committed to federalism thanks to provincial worries of losing their distinct local traditions and institutions,[95] would lay out both enumerated federal and provincial powers as contained within the respective sections 91 and 92 thereof. While the United States Constitution created a federal government that was the delegate of the individual states, the Canadian constitution created a federal government independent of the provinces.[96] The difference

[92] U.S. Const. Art I, § 8.
[93] *Sturges v. Crowninshield,* 17 US 122 (1819).
[94] *Memphis v Murdock,* 87 US (20 Wallace) 590 (1875); *Erie RR v Tompkins* 304 US 64 (1938); MA Field 'The differing federalisms of Canada and the United States' (1992) 55 *Law and Contemporary Problems* 110, 112-114.
[95] Hogg supra note 83, 5-6.
[96] Hogg supra note 83, 5.

between these two concepts of federalism is important as, in the Canadian context, this lead to the development of the idea of federal paramountcy. In the case of Canada, the provinces were less keen to limit the powers of the federal government than were the individual, revolutionary, states. In this sense, ideas from the American revolution ultimately influenced some degree of difference between Canadian and American constitutionalism. These differences, although they do not entirely affect bankruptcy and insolvency laws in the two countries, are in the background of any discussion which compares aspects of Canadian and American Federal Laws.

Of importance here, the Canadian Constitution enables the federal government to regulate in the areas of bankruptcy and insolvency[97] and more generally in regulating trade and commerce[98] while the provinces have authority to regulate property and civil rights within their borders.[99] In the case of bankruptcy and insolvency, the Supreme Court of Canada, as well as the Judicial Committee of the Privy Council, both adopted the American "unoccupied field" doctrine. In other words, in the absence of a federal exercise of power, the provinces were granted the right to fill the void as the trade and commerce clause of the Canadian Constitution allowed the provinces to regulate debtor-creditor law directly.[100] However, when provincial and federal laws are in direct conflict, the federal law takes precedence – known as federal paramountcy.[101]

This does not, however, eliminate the ability for provincial and federal laws to work in a complementary manner. This is known as the double aspect doctrine.[102] The best example of this is a drunk driver who can both be charged under the federal Criminal Code[103] and simultaneously lose their license under provincial highway traffic legislation. As will be seen, the double aspect

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[97] *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 91(21).
[98] Canadian Constitution, ibid. s. 91(2).
[99] Canadian Constitution, ibid. s. 92(13).
[100] See Quebec (Attorney General) and the Royal Bank of Canada v Larue and others, 8 CBR 579 – [1928]
[101] See *Alberta (Attorney General) v. Maloney,* [2015] 3 SCR 327
[102] *Hodge v the Queen (Canada),* [1883] UKPC 59.
[103] *Criminal Code,* RSC 1985, c C-46, s. 320.14(1).

doctrine allows provincial fraudulent conveyance legislation to apply complementary to the avoidance system contained within the federal *Bankruptcy and Insolvency Act.*[104] This is important as it gives the insolvency trustee, monitor or administrator another tool to set aside avoidance transactions.

Finally, Canadian Federalism also allows for the unique situation of Quebec which, in accordance with the Royal Proclamation of 1763,[105] is able to maintain a unique Civil Law tradition. Although this only applies to provincial private law matters, it is nonetheless important as it influenced the development of case law in the bankruptcy and insolvency context. It is within the narrative of the preservation of the Civil Law in Quebec in which the to-be-discussed *RBC v Larue*[106] case, concerning the relationship between provincial debtor-creditor law and federal bankruptcy law, was decided.[107] Quebec was very adamant to keep its unique Civil Law and this was ultimately an important factor in *RBC v Larue.* The application of a Federal bankruptcy law was seen as offending the purity of civil law in the province.[108]

Interestingly, while Scotland, like Quebec, also has a mixed system. However, unlike in the case of Quebec, it has its own system of transactions avoidance in insolvency.[109] While outside the scope of this thesis, it should be noted that the English rules of transactions avoidance, to be discussed in chapter 6, are inapplicable in Scotland.

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[104] *Bankruptcy and Insolvency Act* R.S.C., 1985, c. B-3.
[105] George R., Proclamation, 7 October 1763, reprinted in RSC 1985, App II, No.1.
[106] Quebec (Attorney General) and the Royal Bank of Canada v Larue and others, 8 CBR 579 – [1928]
[107] Thomas G.W. Telfer and Virginia Torrie, *Debt and Federalism: Landmark Cases in Canadian Bankruptcy and Insolvency Law, 1894-1937,* (UBC Press, 2021), 44-45.
[108]Ibid., 44.
[109] As an example, there is no transfer at an undervalues provision in Scotland, instead there is a gratuitous alienation provision contained within s. 242 of the *Insolvency Act 1986.* Furthermore, Scotland has an altogether different preferences provision being s. 243 also of the *Insolvency Act 1986.* There is also no indication that the anti-deprivation rule is even applicable in Scotland. As mentioned, such a discussion is outside the scope of this thesis.

1.3.4. Insolvency

In order to properly compare jurisdictions, the terms insolvency and bankruptcy need to be properly defined. While the term insolvency and bankruptcy are often times used to describe respective corporate and personal processes in the British context, due to the corporate bankruptcy legislation in the United Kingdom being referred to as the *Insolvency Act,*[110] this is not the case in North America. In Canada and the United States, insolvency is the factual circumstance which leads a company to file under bankruptcy protection. For the purposes of this section, insolvency will be discussed not as a legal process but as the determining factor in whether a corporation is unable to remain viable.

Insolvency has indeed been discussed in each jurisdiction in question. In the English context, it is defined within s. 122(f) of the *Insolvency Act 1986.* When discussing when a court may wind up a company, the statute clearly identifies a scenario whereby "the company is unable to pay its debts."[111] Furthermore, the *Insolvency Act* also provides a standard for when a company is deemed unable to pay its debts in s. 123(1)(e). Namely, "if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due."[112] The Act also provides for a balance sheet test in s.123(2) which provides that a company can also be deemed to have the inability to pay its debts if both its contingent and prospective liabilities exceed its assets.[113]

In Canada, insolvency is not defined within the *Bankruptcy and Insolvency Act* [BIA], but an "insolvent person" is.[114] In order to be considered an insolvent person, under the BIA, one must owe a minimum of $1000 to their creditors and meet one of three standards:

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[110] *Insolvency Act* 1986 c. 45
[111] *Insolvency Act* 1986 c. 45, s. 122(f).
[112] *Insolvency Act* 1986 c. 45, s. 123(1)(e)
[113] *Insolvency Act* 1986 c. 45, s. 123(2), For an in-depth discussion of how these tests work in practice see Roy Goode, *Principles of Corporate Insolvency Law,* (3 ed. Sweet and Maxwell 2011), 104-147.
[114] *Bankruptcy and Insolvency Act* R.S.C., 1985, c. B-3, s. 2, under the same section, corporations are also deemed to be persons.

(a) Be unable to meet their obligations as they generally become due;

(b) Have ceased payment of their obligations as they generally become due; AND/OR

(c) The aggregate of their property is not, at fair value, sufficient to enable payment of their obligations due, and accruing due.[115]

Furthermore, the Canada Business Corporations Act [CBCA][116] has developed a solvency test to be applied with respect to the payment of dividends – namely, if the realizable value of the corporation's assets is less than the aggregate of its liabilities and stated capital of all classes, the company is insolvent.[117]

In American case law, there is no strict legal definition for insolvency as it can differ depending upon the situation.[118] Although Delaware's Court of Chancery has stated that "it is not always easy to determine whether a company even meets the test for solvency,"[119] it appears that two general standards have been utilised in determining insolvency. These are:

(a) If the company's liabilities far exceed its assets; AND/OR

(b) The company has been unable to pay its debts as they become due.[120]

Although these definitions are more or less consistent with practical Canadian and English definitions,[121] they are potentially problematic as there are many companies whose liabilities far exceed their assets, such as start-ups, but are nonetheless viable and, in many cases, are indeed showing no signs of failure. As such, Cornell Law School's Legal Dictionary, Wex, states:

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[115] *Bankruptcy and Insolvency Act*, s. 2; PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2021 ABQB 2, [176].
[116] *Canada Business Corporations Act,* RSC 1985, C-44
[117] CBCA, ibid. ss. 34(2), 35(3), 36(2), 38(3), 44.
[118] *Shark v Shaw,* 155 Cal. App. 2d 171.
[119] *Production Resources Group, LLC v NCT Group, Inc.,* 863 A.2d 772, [56].
[120] Ibid; Siple v. S & K Plumbing and Heating, Inc., 1982 WL 8789.
[121] David Kirk, 'What is the difference between bankruptcy and insolvency?' (*The Gazette,* 13 October 2015) < https://www.thegazette.co.uk/insolvency/content/100329> accessed 24 March 23, 2023.

"insolvency refers to situations where a debtor cannot pay the debts they owe."[122] This is more or less consistent with US case law on the matter. This definition is also consistent with Black's Law Dictionary which defines insolvency as: "…inability to pay one's debts; lack of means to pay one's debts."[123] In practice, similar approaches appear to be followed in both England and Canada.

At the root of all these national definitions is the idea that a company can no longer remain a going concern, i.e. it either owes more money than it currently has or is unable to pay its obligations as they become due. In practice then, insolvency determination is utilitarian in nature: If the company causes more financial harm than good if it remains operational in its current state, then the company is oftentimes deemed insolvent. Definitions of insolvency are important as both the anti-deprivation rule and statutory transactional avoidance mechanisms both require factual insolvency in order to apply.

1.3.5. Bankruptcy

Although in England, bankruptcy is generally used to refer only to personal proceedings,[124] under American law, all proceedings are referred to as pertaining to bankruptcy.[125] Canadian law generally takes a similar approach to its American neighbour – insolvency refers to a financial state whereas bankruptcy is a legal proceeding.[126] As such, the definition of bankruptcy has a great deal of variation in different common law jurisdictions. To avoid trans-Atlantic confusion, when referring to the proceedings under each respective country's legislation, the term "bankruptcy and

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[122] Wex, 'insolvency' (*Legal Information Institute – Cornell Law School,* June 2020) < https://www.law.cornell.edu/wex/insolvency> accessed 24 March 2023.
[123] The Law Dictionary, 'Insolvency' (*The Law Dictionary*) < https://thelawdictionary.org/insolvency/> Accessed 8 May, 2023.
[124] David Kirk supra note 123.
[125] Wex, 'bankruptcy' (*Legal Information Institute – Cornell Law School,* June 2022) https://www.law.cornell.edu/wex/bankruptcy accessed 24 March, 2023.
[126] Office of the Superintendent of Bankruptcy (Canada), 'Bankruptcy and Insolvency at a Glance' (*Government of Canada,* 1 December 2015) https://ised-isde.canada.ca/site/office-superintendent-bankruptcy/en/bankruptcy-and-insolvency-glance/bankruptcy-and-insolvency-glance accessed 24 March, 2023.

insolvency" will be used together as much as possible. On occasion, however, the British legislation will sometimes be referred to simply as "insolvency" whereas the American legislation will be referred to as "bankruptcy." In the case of Canada, the act is clear to include both the terms "bankruptcy" and "insolvency" in its title which is, given the potential for cross-border terminological confusion, an intelligent approach. Nonetheless, these terms will be used rather interchangeably as they refer to the same body of laws.

1.3.6. Avoidance Law

Although avoidance law is contained within the bankruptcy and insolvency legislation of the respective countries discussed herein, for the purposes of this thesis, it is a wholly separate topic. Avoidance laws are rules which attempt to prevent the unlawful taking from the bankrupt/insolvent estate.[127] These provisions are designed to apply a principle that assets belonging to the company at the time of insolvency must be made available to creditors.[128] As such, jurisdictions have enacted diverse means to deal with these attempts of creditors to evade insolvency law. These means are, as a collective, termed either avoidance law or transactions avoidance law – terms which will be used interchangeably throughout. In all jurisdictions, the purpose of avoidance legislation ensures that assets cannot be removed by one individual so as to circumvent fair and equitable distribution amongst creditors.[129] An avoidance, or transactions avoidance, provision can be defined as any provision or action which prevents a taking from the insolvent estate.

1.3.7. Discharge

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[127] *Belmont Park Investments PTY Limited v BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing Inc* [2011] UKSC 38, [150]
[128] Roy Goode, *Principles of Corporate Insolvency Law,* (3 ed. Sweet and Maxwell, 2011), 519.
[129] See Goode ibid, 98-100.

The concept of discharge is very important to the bankruptcy and insolvency process as it ensures that the bankrupt will receive adequate legal protections when they file for protection. Discharge, discussed more thoroughly in chapter 2 around the historical development of bankruptcy and insolvency laws across national boundaries, originated out of the desire to eliminate debt-imprisonment. In doing so, it recognized that not all bankruptcies were the result of fraud and is corollary to the concept of the honest but unfortunate debtor.[130] Discharge, in its modern form, is simply a court order which permanently releases the debtor from liability for certain debts. Although rare in the early days of insolvency practice, discharge is now the normal end result when a debtor enters bankruptcy protection. The Supreme Court of the United States has held that a creditor who seeks to collect from the debtor after they have been paid rateably can be held in civil contempt of court for violating a discharge order.[131] In sum, discharge is one of the foundational concepts in bankruptcy and insolvency law. Without discharge, debtor-protection would be practically impossible.

1.4. Different Corporate Insolvency Proceedings in England, the United States and Canada

In order to better understand the topics of discussion in this thesis, it is important to understand terminology regarding different corporate insolvency proceedings in each country. This is because, while proceedings operate relatively similarly, there are some regional differences. It is important for the reader to keep in mind that they fall into two broad categories. The first are liquidation procedures, the more traditional of the two, where the assets of the estate are first pooled together and then distributed evenly amongst creditors according to class. The second

[130] See John C. II McCoid, 'Discharge: The Most Important Development in Bankruptcy History' (1996) 70 Am Bankr LJ 163
[131] See *Taggart v Lorenzon* 139 S. Ct. 1795 (2019)

general category are restructuring proceedings where, instead of paying out the creditors through a process which winds up the company, the company remains a going concern. Thanks to various legal developments in Europe,[132] English restructuring proceedings have expanded significantly over the past half decade. Restructurings, which were already fairly common in the US and Canada, thanks to respective Chapter 11 of the *Bankruptcy Code* and the *Company Creditors Arrangement Act,* appear to be on the rise in England.[133] As will be seen, different considerations are relevant in discussions of liquidation as compared to restructuring proceedings.

1.4.1. English Corporate Insolvency Proceedings

In England, there is the winding up proceeding provided for under Part IV of the *Insolvency Act 1986.* Under this type of proceeding the company ceases trading and its assets are then sold to repay creditors.[134] While there are many sub-categories of winding ups provided for under the *Insolvency Act 1986,* two are directly relevant to understand this thesis. The first, provided for under Chapter II, Part IV, is the Creditors' Voluntary Liquidation which is initiated by company directors when a company is insolvent. To initiate this process, the shareholders must pass a resolution to liquidate[135] and give notice by advertisement in the Gazette within 14 days.[136] Under this proceeding the creditors then choose a liquidator, the directors lose control, and the company is dissolved after asset distribution. The act also provides for a compulsory liquidation under

[132] The most notable of these is Directive (EU) 2019/1023. Although the UK left the EU before this was implemented, Britain has attempted alignment with this directive. For more information on the implications of the EU Restructuring Directive on the UK see Gerard McCormack *The European Restructuring Directive* (Elgar 2021).
[133] This is suggested anecdotally. See for example, Daniel Thomas, 'Restructuring activity rises as companies feel the squeeze' Financial Times, (Feb. 27, 2025), https://www.ft.com/content/857846eb-edb0-4ea4-8483-eca6d59611e8 accessed May 8, 2025.
[134] *Insolvency Act 1986,* chapter I.
[135] *Insolvency Act 1986,* s. 84.
[136] *Insolvency Act 1986,* s. 85.

Chapter IV, Part IV. This is accomplished by court order, after which the court then appoints a liquidator[137] and the directors lose control of the company.[138]

The act also provides for a Company Voluntary Arrangement pursuant to Part I. This proceeding is designed to allow a company to reach an agreement with creditors to repay its debts over time. This procedure requires a proposal of either the directors, company or administrator,[139] and such an arrangement must be approved by 75% by value of all the creditors by a vote.[140] Since 2020, the *Companies Act 2006 has* also provided for a Restructuring Plan pursuant to Part 26A thereof. This is a binding, court-sanctioned, restructuring plan that can also be imposed on dissenting creditors. It uses a process referred to as "cross-class cramdown" whereby 75% of the value of each class of creditor can vote to approve the plan and bind a dissenting class pursuant to s. 901G of the *Companies Act 2006.* This procedure is generally more flexible than the CVA thanks to the ability granted to the court to cramdown. The 2020 amendments also amended the Scheme of Arrangement, a device that existed since 1870 and used frequently since the 1990s, which is used to facilitate a compromise between a company and its creditors or shareholders.[141] This is provided for under Part 26 of the *Companies Act 2006.* This is a court supervised process designed for use in complex restructurings and requires, the approval of 75% in value and a majority in number of creditors or shareholders in each class.[142]

1.4.2. American Business Bankruptcy Proceedings

[137] *Insolvency Act 1986,* s. 100.
[138] *Insolvency Act 1986,* s. 101.
[139] *Insolvency Act 1986,* ss. 1-3.
[140] *Insolvency Act 1986,* ss. 4-4(a).
[141] For an overview of the historical development of the Scheme of Arrangement see Jennifer Payne, *Schemes of Arrangement,* 2 ed. (Cambridge 2021), 6-14.
[142] *Companies Act 2006,* s. 899.

Under the United States *Bankruptcy Code,* there are various "Chapters" each applicable to a different fact scenario. The two main proceedings discussed in this section will be Chapter 7 and Chapter 11.

Chapter 7 is the liquidation provision under the *Bankruptcy Code.* It creates a procedure which shuts down and liquidates the business to pay creditors. The most relevant subchapters thereof are subchapter I, which deals with the administration of a Chapter 7 liquidation, and subchapter II which deals with the collection and distribution of the estate in the majority of cases. Liquidation is available to corporations, partnerships and sole proprietors, and involves a court-appointed trustee who sells all non-exempt asses. Proceeds are then generally distributed pursuant to § 726 of the *Bankruptcy Code* which will be explained in greater detail in chapter 3 of this thesis. Under a Chapter 7 liquidation, the business ceases operations and, in the case of partnerships and corporations, they are not discharged of their debts. However, sole proprietors often do receive discharge.[143]

In contrast to Chapter 7, the US *Bankruptcy Code* also contains the Chapter 11 Reorganization procedure. This is designed to restructure debts so that a business can continue operating. Chapter 11 is available to all business types, whether they be corporations, partnerships, or sole proprietors. The debtor remains in control of the company as a "debtor-in-possession" whose rights and duties are defined by § 1107 of the *Bankruptcy Code.* Under Chapter 11, the court and creditors must approve a reorganization plan according to subchapter II and a creditors committee is appointed by the trustee pursuant to § 1102. The plan can generally include renegotiating contracts, downsizing operations, selling assets or refinancing. As in the English Part 26A Restructuring Plan, Chapter 11 provides for cross-class cramdown. A plan pursuant to

[143] US Code Title 11, *Bankruptcy Code,* § 727(a).

Chapter 11 can be approved so long as 2/3 in value and half of the number of creditors in each class approves the plan.

Since the *Small Business Reorganization Act of 2019*, subchapter V of Chapter 11 also includes a streamlined reorganization process for small businesses. Such a proceeding can only be used by companies who have non-contingent debts below a specific threshold (as of 2025, $3,424,000). Under this proceeding, similar to "ordinary" Chapter 11, the debtor remains in control however the trustee does not appoint a creditors' committee and there is no need for creditor approval of a plan if certain requirements are met.[144]

1.4.3. Canadian Corporate Insolvency Proceedings

In Canada there are three proceedings that are relevant to this thesis. The first is liquidation pursuant to the *Bankruptcy and Insolvency Act (BIA),* the second is a proposal pursuant to the *BIA* and the third is a restructuring pursuant to the *Companies' Creditors Arrangement Act (CCAA).*

Initiating a liquidation procedure under the *Bankruptcy and Insolvency Act* requires either the debtor to voluntarily[145] or the creditor[146] to involuntarily seek a court petition. A licensed insolvency trustee is then appointed by the creditors,[147] the directors lose control of the company, creditors are paid in prescribed order, and the procedure generally ends in the dissolution of the company.

Companies with greater than $5 million in debt[148] can also restructure pursuant to the CCAA. Once an application is made under the CCAA, pursuant to s. 11.07, a monitor is appointed. The monitors are normally licensed insolvency trustees[149] pursuant to s. 13 of the *BIA.* The monitor

[144] *Bankruptcy Code,* ibid. § 1191
[145] *Bankruptcy and Insolvency Act* , s. 49.
[146] *Bankruptcy and Insolvency Act,* s. 43(1).
[147] *Bankruptcy and Insolvency Act,* s. 14.
[148] *Companies' Creditors Arrangement Act,* RSC 1985, C-36, s. 3(1).
[149] *Companies' Creditors Arrangement Act,* ibid. s. 11.7(2).

files an initial report then, upon satisfaction of the report, the court issues an order pursuant to s. 11 of the *CCAA.* The monitor has duties, as outlined by s. 23 of the *CCAA,* and is continually supervised by the court. Under this procedure, as in the other jurisdictions, creditors vote on a Plan of Arrangement which requires a majority in number and 2/3 in value of unsecured creditors. The plan can include asset sales, layoffs, or the renegotiation of contracts and, throughout the process, as in US Chapter 11, and the CVA, Part 26 and Part 26A proceedings in the UK, the company remains a going concern.

The *BIA* also contains a Proposal proceeding under Part III. Similar to the *CCAA,* the *BIA* Proposal is meant to allow a debtor to restructure their debts and avoid a formal bankruptcy proceeding. Such is available to insolvent businesses owing at least $1000. Under this procedure, a debtor company files a proposal to creditors typically offering repayment over time and a stay of proceedings is enacted stopping creditor actions during the process. A plan is proposed and, like under the *CCAA,* a proposal requires the consent of a majority and 2/3 of the value of unsecured creditors.[150] The court can then accept the proposal.[151] If a proposal is rejected, it automatically converts to a liquidation.[152] As opposed to CCAA restructurings, proposals under the *BIA* are generally used by smaller companies.

1.5. Conclusion to the Chapter

In conducting an analysis of various methodologies, namely comparative law, legal history and legal realism and positivism, this chapter has set the stage for the foregoing analysis of this thesis inspired by the legal traditions approach. To allow the reader to have a clearer understanding

[150] *Bankruptcy and Insolvency Act,* s. 54.
[151] *Bankruptcy and Insolvency Act*, s. 58.
[152] *Bankruptcy and Insolvency Act,* s. 57.

of this cross-jurisdictional study, this chapter also clarified terminology which will be used throughout the thesis while also explaining corporate insolvency proceedings which will be discussed throughout. The main takeaway from the discussion of proceedings is that they fall into two main camps, firstly liquidation proceedings, intended to sell the remaining assets of an insolvent company to the benefit of its creditors, and, secondly, restructuring proceedings which allow a company to remain a going concern. Such a distinction will inform much of the discussion, especially in chapter 3 with regard to the *pari passu* rule.

Lastly, it should be noted that this thesis, in utilising these approaches will argue a few key points. Firstly, the historical context from which laws develop is important. Such will largely be informed by the analysis in chapter 2 which will serve to underpin the thesis going forward and will largely explain why the courts in England and Canada have taken a differing approach in anti-deprivation case law. Furthermore, it is postulated here, that is both cases, the principles which underpin the anti-deprivation rule trace their origins to the *Statute of Elizabeth 1571.* Secondly, the thesis will demonstrate that, while the *pari passu* and anti-deprivation rules are separate rules, they are in fact highly related principles which underpin the entirety of the insolvency regimes across national boundaries. Thirdly, the anti-deprivation rule, the *pari passu* rule and statutory principles are highly related as they both exist to ensure that both property remains within the estate upon insolvency and that no creditor receives more than their fair share. Lastly, the thesis will show that, although the United States does not have an anti-deprivation rule, similar principles exist and are embedded within the interpretive powers of the *Bankruptcy Code.* Such is explained by a shared early history, prior to legal divergence, in the laws of Canada, England and the United States.

With the main background points out of the way, the thesis will proceed with a historical overview of the developments of both bankruptcy systems as well as transactions avoidance across national boundaries.

Chapter 2 – The development of Bankruptcy and Insolvency laws and avoidance laws across national boundaries

2.1. Introduction

This chapter is aimed at understanding the development of both bankruptcy and insolvency law, alongside avoidance law in England, the United States and Canada. As a device of English law, transplanted into colonial law, bankruptcy was greatly impacted by the differing nature of colonial development. Although, all three systems appear to have a common ancestor, which appears to have been transplanted from Roman, and later Italian Renaissance, Civil Law,[153] they have all been shaped by the national environment in which they evolved. Within these environments, each system developed means to deal with observed problems.

Part 1 of this chapter will be a discussion of histories in the development of bankruptcy laws in the above jurisdictions, and part 2 will conduct a brief historical analysis of the development of avoidance laws in all three jurisdictions leading to an overview of relevant avoidance provisions of the respective modern regimes.

In part 3, the chapter will explore relationship between legislative and case history and the anti-deprivation rule. Beginning with the English context, the chapter will survey interesting

[153] The Honourable T. F. Bathurst, "The Historical Development of Insolvency Law," Lecture: Francis Forbes Society For Australian Legal History: Introduction to Australian Legal History Tutorials. September 3, 2014: Sydney, [6]; Louis Edward Levinthal 'The Early History of Bankruptcy Law' (1918) *66 U. Pa. L. Rev.* 223, 236; Gerard Glenn, *Fraudulent Conveyances and Preferences* (First Published 1940, William S. Hein and Co. 2001), 61-62; H. Patrick Glenn, *Legal Traditions of the World,* 4th ed. (Oxford 2010), 245-246.

discussions in historical anti-deprivation cases. The chapter will then investigate aspects of American bankruptcy laws, paying particular attention to recent scholarship which has uncovered similar principles to the anti-deprivation rule in the United States *Bankruptcy Code*. Finally Canadian anti-deprivation cases will be discussed and contextualised.

This analysis of the historical origins of avoidance is necessary to illustrate biases in interpretation regarding the anti-deprivation rule in the modern context. What is largely proposed here is that principles from 16th century English Statute law, likely transplanted from Continental Civil Law, have been used, whether knowingly or unknowingly, by courts and legislators throughout the last 450 years to expand the law of transactions avoidance. This expansion, in England and Canada, resulted in the anti-deprivation rule. In the United States, it has influenced the interpretation of multiple US *Bankruptcy Code* provisions. In later chapters, the divergence of views on avoidance, and how such views are reflected in different nations' approach to the anti-deprivation rule, will form the basis of further analysis. This chapter will largely cover the period from the 16th Century until the modern legislation. Legislative developments which led to the creation of modern statutes, and beyond, will be discussed in greater detail in Chapter 6.

2.2. Brief Overview of the Development of English Bankruptcy Law

Roman bankruptcy law would evolve from a system which initially sought to either execute or enslave a person for his debts to one which attempted to seize the bankrupt's property instead.[154] This was done so that the Romans could seize the bankrupt's total legal personality and universal succession to the benefit of their creditors.[155]

[154] Louis Edward Levinthal 'The Early History of Bankruptcy Law' (1918) *66 U. Pa. L. Rev.* 223, 232.
[155] Ibid, 233.

Roman Bankruptcy Law would eventually make its way into Medieval Italian Law as the Roman *cessio bonorum* was rediscovered following the works of the glossators in the twelfth and thirteenth centuries.[156] The modern term for bankruptcy itself is of likely Italian origin.[157] The compatibility of Roman law with the English common law in this context is unsurprising given the influence on older forms of Roman law upon the laws of property following the conquests of William the Conqueror.[158]

Prior to the emergence of the merchant class, bankruptcy laws in England appear to have been the purview of the ecclesiastical courts.[159] Once the Merchant class developed, new transactions in Continental Europe began to be conducted which fell outside the traditional common law.[160] These transactions necessitated a new body of law, that of the court of Law Merchant,[161] which existed parallel to the common law.[162] As a result of this practical court system, three separate statutes were eventually passed in the 13th and 14th centuries, by Edward I and Edward III's governments respectively, which sought to safeguard the new emerging foreign merchant class.[163] These laws, albeit limited in application, allowed the common law to be altered for the merchant to secure payment of his debts.[164] Alongside these laws, three 13th century statutes

[156] Ibid, 486-488; Gerard Glenn, *Fraudulent Conveyances and Preferences* (First Published 1940, William S. Hein and Co. 2001), 61-62.
[157] The Honourable T. F. Bathurst, "The Historical Development of Insolvency Law," Lecture: Francis Forbes Society For Australian Legal History: Introduction to Australian Legal History Tutorials. September 3, 2014: Sydney, [6]; Levinthal, supra note 155, 236; Glenn, supra note 158, 61-62.
[158] H. Patrick Glenn, *Legal Traditions of the World,* 4th ed. (Oxford 2010), 245-246.
[159] Ibid, 272.
[160] Louis Edward Levinthal, 'The Early History of English Bankruptcy,' (1919) 67 *University of Pennsylvania Law Review* 1, 3.
[161] Levinthal, ibid., 4. Emily Kadens, 'The Last Bankrupt Hanged: Balancing Incentives in The Development of Bankruptcy Law' (2010) 59 Duke Law Review 7, 1237-1244.
[162] Levinthal, supra note 163, 3-5. Kadens, ibid., 1237-1244
[163] Levinthal, supra note 163, 9.
[164] Levinthal, supra note 163, 9.

were also enacted, the *Statute of Marlbridge* of 1267,[165] the *Statute of Acton Burnel* of 1283,[166] and the *Statute of Merchants* of 1285,[167] which enabled imprisonment of debtors by creditors.[168] The statutory development of the law of bankruptcy would eventually yield the 1542 Acts of 34 and 35 Henry VIII[169] which introduced the *pari passu* principle into English insolvency law.[170] This was followed by the *Statute of Elizabeth I* 1570[171] which was enacted out of a perceived increase in the number of fraudulent bankrupts.[172] The statute, which applied only to merchants,[173] gave the Lord Chancellor the power to appoint commissioners who were responsible to ensure proper payment of the debtor's estate to his creditors. It has also been argued that the origin of a unique body of Common Law Bankruptcy dates to the passing of the *Statute of Elizabeth* 1570.[174]

These were followed by the *Act of James*[175] which, as well as punishing the debtor with pillory and the loss of an ear, introduced the formal examination.[176] In the 18th Century, English bankruptcy law would go through major changes as the *Statutes of Anne*[177] made bankruptcy more debtor friendly. [178] Discharge was formally made part of English bankruptcy law during the period largely out of a realization that some bankrupts suffered misfortune,[179] with one commentator of

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[165] 52 Henry III, c. 12.
[166] 11 Edward I
[167] 13 Edward I, c. 1.
[168] V. Markham Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-up in Nineteenth-Century England,* (OUP 1995), 102.
[169] 34 & 35 Henry VIII c 8.
[170]Ibid, 14.
[171] 13 Elizabeth I, c. 7
[172] Levinthal supra note 158, 16.
[173] V. Markham Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-up in Nineteenth-Century England,* (OUP 1995), 88.
[174] Ian Duffy, *Bankruptcy in London During the Industrial Revolution* (First Published 1985, Routledge 2018), 7; Ann M. Carlos, Edward Kosack and Luis Castro Panarieta, 'Bankruptcy, Discharge and the Emergence of Debtor Rights in Eighteenth Century England' (2018) *Cambridge University Press: Business History Conference,* 482-483.
[175] *Act of 21 Jac. I, c. 19 (1623).*
[176] Levinthal supra note 163, 17-18.
[177] *4 Anne c. 17 (1705), 10 Anne, c. 15 (1711)*
[178] John C. II McCoid, 'Discharge: The Most Important Development in Bankruptcy History' (1996) 70 Am Bankr LJ 163, 164.
[179] Levinthal supra note 163, 18

the late 17th century even stating that prior bankruptcy laws left "…the debtor no way to show himself honest."[180] With the absence of continued legislative change following the *Statutes of Anne*, the law of bankruptcy had begun to be clarified by Court of King's Bench judge Lord Mansfield.[181]

Despite this gradual judicial modernisation of bankruptcy law, legislative developments would remain relatively static until the 19th Century. By the 19th century, English debtor-creditor law had three separate processes. The first, Bankruptcy Laws, were meant to apply only to Merchants and Capital trades, the second, Insolvency laws, were meant to apply to tradesmen, mechanics and artificers, while the third, small debt laws, were meant to apply to the "lower orders" that being journeymen, labourers and domestics.[182] By the 19th century, divisions between classes became far less clear.[183] Nonetheless, imprisonment for debt remained a key feature of English bankruptcy law during the first half of the 19th century.

One major issue in the pre-Victorian Bankruptcy legislation was the potential for fraud.[184] In keeping with this mentality, many argued that imprisonment was necessary as debtor's were assumed to be, by default, dishonest people. However things began to change as many began to see the difference between the honest and dishonest debtor. [185] Of note, the aforementioned Jeremy Bentham was an advocate for debt imprisonment reform as he felt that the debtor should only be punished for that which was in his own control.[186] Such shifts in attitude would lead a reform

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[180] Daniel Defoe, *The Project Gutenberg eBook, An Essay upon Projects,* Henry Morley ed. (Originally published 1696, The Project Guttenberg, 2014), 54.
[181] Duffy, supra note 177, 13.
[182] Duffy, supra note 177, 56.
[183] Duffy, supra note 177, 56.
[184] Duffy, supra note 177, 33.
[185] Lester, supra note 171, 101.
[186] Jeremy Bentham, *The Works of Jeremy Bentham,* ed. John Bowring (1843 Edinburgh), vi., 182 cited in Lester, supra note 171, 101.

movement resulting in the abolishment of creditors' commissions, a private means of debt collection often wrought by fraud, in 1842.[187] This was the result of a meeting of the minds between two camps of policymakers, namely the reactionaries and reformers, and would lead legislators to finally enact reforms with the passing of the 1842 Bankruptcy Act.[188] The 1842 Act, although expanded upon greatly, forms the basis for the modern English system. Nonetheless, resistance to reforming debt imprisonment remained as there was tension between creditors, who perceived imprisonment as a means to ensure they could extend credit to marginal debtors at great profit, and reformers who argued the power to arrest for debts was overbroad and inequitable.[189] This meant that the abolishment of imprisonment for debt by parliament did not fully materialise until 1869.[190] This did not end the saga, however, as debtors continued to be imprisoned, albeit for contempt of court rather than insolvency itself,[191] until Parliament finally eliminated the vast majority of forms of imprisonment for debt in 1970.[192]

Following the enactment of the 1842 Bankruptcy Act, British policymakers would again make gradual reforms which would distinguish Corporate and Personal insolvency. First was the enactment of the *Joint Stock Companies Winding Up Act*[193] of 1844 which allowed companies to be made bankrupt in the same way as a natural person.[194] As a result, remedies could only be made against the property of a company. This was followed by the 1855 *Limited Liability Act*[195] which established the notion of limited liability for corporations. In other words, an individual could only

[187] Bathurst supra note 150, [50].
[188] Duffy, supra note 177, 162.
[189] Lester, supra note 171, 102.
[190] Duffy, supra note 177, 102-104. Bathurst, supra note 106, [48]-[49], Lester supra note 170, 117.
[191] Lester, supra note 171, 120; Paul Johnson, 'Creditors, Debtors and The Law in Victorian and Edwardian England,' (1996) *LSE Working Papers in Economic History* 31/96, 10.
[192] *Administration of Justice Act 1970,* s. 11.
[193] 1844 c. 111 7 & 8 Vict.
[194] Ibid s. 1.
[195] 18 & 19 Vict. c. 133

be liable for their initial investment in the corporation. This was followed by the 1856 *Joint Stock Companies Act*[196] which formed the basis for modern English Company law.[197] The affirmation of the separate legal person was eventually fully recognized in 1896 by the United Kingdom's highest court of appeal, the House of Lords, now the modern UK Supreme Court,[198] in *Solomon v. Solomon.*[199] This legislation, as a whole, laid the framework for a distinct modern corporate insolvency regime. Alongside the development of English Corporate Insolvency Law, the *Bankruptcy Act 1869*[200] finally allowed all individuals, not only merchants and traders, to file for bankruptcy protection eventually forming the basis for the modern personal bankruptcy law.

Both the personal and corporate regimes underwent changes with the enactment of both the *Bankruptcy Act 1914,*[201] initially applicable only to personal bankrupts but largely expanded to companies by s. 317 of the *Companies Act, 1948,*[202] and, finally, major changes, reflected most notably for this thesis, in the avoidance regime, with the *Cork Report*[203] inspiring the enactment of the *Insolvency Act* 1986.[204] Alongside changes to the avoidance regime, discussed later in this chapter, the 1986 Act would introduce two very important procedures – Individual Voluntary Arrangement and Company Voluntary Arrangement alongside the already established Scheme of Arrangement (used quite frequently since the 1990s).[205] The historical shift in England has been correctly described as a liberalisation of bankruptcy law.[206]

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[196] 19 & 20 Vict. c. 47
[197] See B.C. Hunt, *The Development of the Business Corporation in England, 1860-1867,* (Harvard University Press 1936); Derek French, *Mayson, French & Ryan on Company Law,* 37th ed. (Oxford University Press, 2021), Part One and Part Five.
[198] Made possible thanks to the *Constitutional Reform Act 2005,* Part 3, Section 23(1).
[199] [1896] UKHL 1.
[200] 32 & 33 Vict. c. 71.
[201] 1914 c. 59
[202] 11 & 12 Geo.6 c.38
[203] *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558 [*Cork Report*]
[204] 1986 c. 46.
[205] See note 142.
[206] David Milman, 'The liberalisation of bankruptcy law,' in Emilie Ghio, John Wood and Jennifer LL Gant *Re-examining insolvency law and theory: perspectives for the 21st Century* (2023: Edward Elgar).

2.3. A Brief History of American Bankruptcy Law

Prior to the enactment of the United States Constitution, bankruptcy law was regulated by individual states and contained rules which were very similar to English laws of the time. A telling example of this system, Pennsylvania, the colony which best adopted the English Statutes, provided relief by insolvent debtor's petition throughout the 18th century with an early case dating to 1724.[207] Bankruptcy, however, would be enumerated as a Federal undertaking under the United States Constitution.[208]

The Bankruptcy Clause of the United States' Constitution has been credited to Charles Pinckney of South Carolina.[209] As James Madison, highly influential in the enactment of the Constitutional provision, would write in a January 1788 *Federalist Paper:*

> "The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question."[210]

Madison would be proven wrong as, in spite of this enumerated constitutional power, it would take over a century for the Federal Government of the United States to enact such permanent legislation. This would yield some very interesting Constitutional Law developments as it relates to US Bankruptcy Law.

Even though most states enacted provisions against the imprisonment of citizen debtors, out of state debtors were not always afforded the same protections. In *James v Allen,* for instance, a Pennsylvania resident debtor appealed an imprisonment in New Jersey for a debt he had

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[207] Chester County Pennsylvania Civil Court and Debt Related Records "Insolvent Debtor's Petitions, 1724-1850" Chester County, Pennsylvania website, https://www.chesco.org/1392/Insolvent-Debtors-Petitions-1724-1850 (accessed December 11, 2024).
[208] *The Constitution of the United States as Amended,* Article 1, Section 8, Clause 4.
[209] Charles Jordan Tabb 'The History of Bankruptcy Laws in The United States' (1995) 3 *American Bankruptcy Institute Law Review* 5, 13.
[210] James Madison 'The Powers Conferred by the Constitution Further Considered From the New York Packet,' (1788) *The Federalist Papers* no. 42

previously been arrested for, and that was already discharged, in Pennsylvania. He was denied having the same upheld in New Jersey. The US Supreme Court, giving deference to the individual States, decided that a discharge in one state does not grant a debtor a discharge in another.[211] The Supreme Court then decided, in *Sturges v. Crowninshield,* following the enactment of the US Constitution,[212] that although the Federal Government had Constitutional authority to enact a Federal Bankruptcy Law, in the absence of the exercise of said power, the States could legislate to fill the void.[213] In Federal Constitutionalism, this is referred to as the unoccupied field doctrine.

One of the key factors in the development of the need for a Federal US bankruptcy law was the emergence of an industrial economy.[214] In light of this new, less-agrarian economy, the United States would pass the first of its Federal Bankruptcy laws in 1800. The 1800 Act was a temporary act enacted by creditor-pressures during the period which was also aimed at helping debtors but only gave a discharge to those who engaged in commerce. However, the 1800 Bankruptcy Law was repealed within three years. The ensuing legislative development of the years to come was largely in response to various economic crises – crises which greatly impacted a changing American workforce.

In the interim between the repeal of the 1800 Act and the enactment of a new statute, the individual States would again pick up the slack. In the case of Massachusetts, upon repeal, the State bolstered the law of creditors' composition – a common law device. Under the creditors' composition, a debtor could assign their property, either in whole or part, to a trust payable to their

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[211] James v. Allen, 1 U.S. 188 (1786).
[212] The United States Constitution was not enacted until 1789 leaving a 13 year gap between the Declaration of Independence and the Constitution.
[213] *Sturges v. Crowninshield,* 17 US 122 (1819).
[214] See William E. Nelson *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830,* (Harvard University Press 1975) [Nelson] at 148.

creditors.[215] The system did the job in the absence of bankruptcy law but was flawed as the creditors' composition was ultimately unable to deal with preferences.[216]

The aftermath of the War of 1812, between Britain and the United States, would exploit the inadequacies of the existing bankruptcy structure in the United States. As the war ensured an embargo upon the import of British goods, the United States was then spurred to develop its own industry, shifting the country from an agrarian to industrial nation. Thanks to trade embargos imposed both during and before the war, the United States became less reliant on imports from Britain and Europe and began producing their own cotton and textiles. [217] The emergence of a greater number of corporations in New England, Pennsylvania and New York was indicative of this newfound domestic growth.[218] However, despite this growth, the war had a great effect upon the monetary systems of the United States. What would ensue, due to numerous factors including ineffective credit systems and an increasing demand for foreign imports in the post-war years,[219] was the United States' first major financial crisis – the Panic of 1819.[220]

The Panic of 1819 stimulated an era of law-making on the part of individual States but did not result in any permanent Federal Bankruptcy Statute. This period, however, did see the abolition of debt imprisonment on the Federal level, in 1833, and in the remainder of States during the 1830s and 1840s.[221] Although, during the 1820s, many attempts were made at bills providing for voluntary bankruptcy, at this time only a creditor-initiated procedure, there was far too much opposition mostly from Southerners and those who believed doing so would violate the

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[215] Ibid, 152.
[216] Ibid, 153.
[217] Murray N. Rothbard, *The Panic of 1819: Reactions and Policies,* (Columbia University Press 1962), 2-3.
[218] Ibid.
[219] Ibid.
[220] Ibid.
[221] William E. Nelson *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830,* (Harvard University Press 1975); S. Laurence Shaiman, 'The History of Imprisonment for Debt an Insolvency Laws in Pennsylvania as They Evolved from the Common Law' (1960) 4 Am J Legal Hist 205.

Constitution. Yet, having not learnt lessons from 1819, 1837 saw the emergence of a second panic. The 1837 panic largely had similar causes as the 1819 one –notably, the lack of a sound monetary system far too reliant on credit coupled with a lull in the previously steady economic growth.[222]

In response to the 1837 Panic, the United States would pass its first modern Federal Bankruptcy Statute, based on the Massachusetts Act of 1838, in 1841. The 1841 Act excluded corporations but did allow for both voluntary and involuntary bankruptcy, not limited to merchant debtors, for the first time in history.[223] While the 1841 Act would be deemed too radical for its time as the act was repealed in early 1843, it did end the debate on the constitutionality of voluntary bankruptcy.[224]

Following the next Panic, in 1857, caused largely by the overexpansion of US currency, there was again pressure to enact a new Federal Bankruptcy Law in the United States. Yet, due to the US Civil War (1861-1865), it would take ten years for Congress to agree on its content. So, in 1867, the United States enacted its third Federal Bankruptcy Act. The 1867 Bankruptcy Act allowed both voluntary and involuntary bankruptcy while also, this time, including corporations. The 1867 Act also created a much more sophisticated system for dealing with bankruptcy cases by utilising District Courts' original jurisdiction to appoint registers in bankruptcy who would assist bankruptcy judges. This law would also allow for, and modernise, the Massachusetts creditors' composition creating the precursor to what is now Chapter 11 of the modern Bankruptcy Code. The 1867 Act, like its predecessors, was short-lived and repealed in 1878 due in large part

[222] See Jessica M. Lepler *The Many Panics of 1837: People, Politics, and The Creation of a Transatlantic Financial Crisis,* (Cambridge University Press 2014)
[223] Charles Jordan Tabb 'The History of Bankruptcy Laws in The United States' (1995) 3 *American Bankruptcy Institute Law Review* 5, 17.
[224] Ibid.

to the high costs and delays of the District Court system.[225] Despite its short lifespan, the 1867 Act influenced future Federal Bankruptcy Laws.

The agricultural lobby still remained opposed to a federal bankruptcy law as such would allow for fixed assets to be more vulnerable to creditors' levy. However, as the United States continued its industrialisation throughout the 19th century, the lobby's influenced waned.[226] While this was occurring, many American lawyers saw the need for a Federal bankruptcy law as the United States was, throughout the century, riddled with perpetual financial crises. American lawyer Jay L. Torrey drafted a model bankruptcy bill in 1890. Although opposition to Torrey's bill remained, particularly by Southern and Western debtors,[227] following another economic crisis, the Panic of 1893, Congress relented, and the Bankruptcy Act of 1898 was born. Since then, the United States has always had a Federal Bankruptcy Law of force and effect.

The 1898 Act was limited in two ways. First, the 1898 Act decided not to regulate debtor property exemptions, which served as a problem in the 1867 Act, by continuing to allow the State exempt property laws to apply (which is still a feature of American Bankruptcy Law). Second, the 1898 Act streamlined bankruptcy administration. Most cases no longer needed a complex court system. Only a referee was now required who would act both as judge, and bankruptcy trustee.[228]

Although the 1898 Act inevitably made bankruptcy a permanent fixture of American Federal law, it would be superseded twice, first, by the 1938 Bankruptcy Act, which would expand voluntary access to the system, increasing avoidance powers within the act, made voluntary petitions more attractive to debtors. Out of response to the Great Depression, Securities Exchange

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[225] Ibid, 20-21; Lawrence M. Friedman, *A History of American Law* 3rd ed. (Touchstone 2005), 416.
[226] Nelson, supra note 224, 148; R.C. Sauer 'Bankruptcy law and the maturing of American capitalism.' (1994) *Ohio St. LJ*, *55*
[227] Friedman, supra note 228, 417.
[228] David A. Skeel Jr. 'Bankruptcy Lawyers and The Shape of American Bankruptcy Law,' (1998) 67 *Fordham Law Review* 497, 504-505.

Commission were given greater authority in the administration of bankruptcy filings.[229] This act would be replaced by the 1978 Bankruptcy Act, still in force today, now referred to as the *Bankruptcy Code,* which would cement and modernise the modern "Chapters" system, originating from the 1938 Act,[230] which apply to different bankruptcy fact scenarios.[231] Of importance here, are that, like its predecessors, both the 1938 Act, enacted out of pressures of the Great Depression, and the 1978 Act, enacted out of pressures of the 1973-1975 Recession, were, like the 19th century acts, the direct result of financial crises. Nonetheless, the American system, perhaps due to the concessions which led to its eventual enactment, is arguably one of the most complex and sophisticated bankruptcy systems in the world and, perhaps, a model system for its balancing of the rights of creditors and debtors, its forgiving nature, and its sophisticated system for restructuring.

2.4. A Brief History of Canadian Bankruptcy and Insolvency Law

Canadian bankruptcy and insolvency law seems to have a history like the United States, resulting from both successive financial issues that plagued the country and issues in understanding the novel concept of federalism. As a general rule, Canadian policymakers, in ideological terms, have historically wanted to maintain British concepts and, as such, were somewhat weary of adopting "Americanisations" into their law.[232] Such weariness likely also manifested itself in the insolvency context, resulting in less codification of principles into the statute than in the United States.

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[229] Bankruptcy Act of 1938 Pub.-L. 75-696, 52 Stat. 840.
[230] The different "Chapters" were created throughout the 1930s with Chapters 11, 12 and 13 tracing their origins to 1938 – Vern Countryman, 'Executory Contracts in Bankruptcy: Part I' (1973) 57 Minn L Rev 439, 447.
[231] *Bankruptcy Code,* US Code Title 11.
[232] See Samuel V. LaSelva, 'The Canadian Charter, the British Connection, and the Americanization Thesis: Toward a Montesquieuean Analysis of Rights and Their Protections,' (2017) 50 *Canadian Journal of Political Science* 4, 1064-1068.

Canada is interesting as the nation urbanizes relatively late in comparison with both Britain and the United States. This inevitably leads to a unique timeline of events that eventually result in two very distinct yet related pieces of legislation – The *Bankruptcy Act* of 1919 and the *Companies' Creditors Arrangement Act* of 1933. The Canadian story is, like the United States, one of increased urbanization which spurred an increase in desire for bankruptcy legislation.

Prior to 1867, Canada was a series of direct-governed colonies of the British Empire and its bankruptcy and insolvency laws resembled those of Britain. However, in 1867, due both to internal and external factors, the British government would pass the British North America Act (BNA)[233] which, in Canada, would, over the years, morph itself into a constitution. The BNA provided for a federal system with a division of power between the federal government and the provinces. Similar to the United States, under s. 91,[234] bankruptcy and insolvency powers were granted to the federal government largely to make investment in the new Dominion of Canada more appealing.[235] Despite the bankruptcy and insolvency powers being exclusively federal, the BNA did allow for the provinces to have authority in property and civil rights under section 92.[236] This would allow the provinces to regulate debtor-creditor relations more directly.

Similar to the American example, shortly following confederation, no federal bankruptcy act was enacted – suggesting perhaps a discrepancy between Canadian and British attitudes on the subject.[237] Echoing American history once again, Canadian parliament would pass two national bankruptcy laws during the 19th century, in 1869 and 1875, only to have them both repealed by 1880. Indeed, from 1898 to 1919, Canadian debtors would often flee to the United States to obtain

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[233] The Constitution Act 1867, 30 & 31 Vict. c. 3 https://canlii.ca/t/ldsw Retrieved on February 6, 2023 [BNA]
[234] *British North America Act 1867,* s. 91.
[235] Thomas GW Telfer *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919* (The Osgoode Society for Legal History 2014), 22.
[236] *British North America Act 1867*, s. 92.
[237] Telfer supra note 239, 22.

a discharge under the previously discussed US *Bankruptcy Act of 1898*.[238] Discharge was a contentious subject, seemingly because early Canadian society believed all debts needed to be honoured.[239] The last point is indicative of similar attitudes in Canada and England.

One of the major factors which led to repeal was that the Canadian law did not apply to farmers. Given that Canada had a largely rural population in the mid to late 19th century, farmers represented a strong lobbying group. This, in 19th century Canada, was bolstered by a weak state and political divisions alongside an economy that had not yet fully developed. This lent to the decline in the newly minted federal statutory bankruptcy laws.[240] In the absence of such power being exercised, the Canadian provinces began to fill the void left by the Federal government. Although the Federal government would finally relent and pass the *Bankruptcy Act of 1919,* this act was inevitably unsuccessfully challenged on its constitutional validity.[241] Nonetheless the context of Canada in the early 20th century, likely informed Canadians' greater acceptance of a federal bankruptcy law.

Post-First World War Canada saw immense economic growth, a period often referred to as the "Laurier boom," so named after then prime minister Wilfrid Laurier, which saw the country emerge from a rural agrarian economy to one which fostered increased urbanization and global trade. At the end of the Great War, Canada's ability to produce vast amounts of wheat led agricultural exports to increase. This sector would not only continue expansion but would, thanks to increased capital in Canada, usher in a new Canadian economy which fostered increased industrialisation. For the first time in Canadian history, the 1921 Census showed that Canada had

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[238] Telfer Supra note 239, 3.
[239] Telfer Supra note 239, 59.
[240] See Thomas G.W. Telfer 'A Canadian "World Without Bankruptcy": The Failure of Bankruptcy Reform at The End of The Nineteenth Century,' (2004) AJLH 4
[241] Thomas G.W. Telfer "Rediscovering the Bankruptcy and Insolvency Power: Political and Constitutional Challenges to the Bankruptcy Act, 1919-1929" (2017) 80:1 *Saskatchewan Law Review* 5. Challenged most notably in Quebec (Attorney General) and the Royal Bank of Canada v Larue and others, 8 CBR 579 – [1928]

a larger urban than rural population.[242] Coupled with the emergence of Capital markets in Canada,[243] which led to a more sophisticated and concentrated financial class, the Canadian Economy was becoming more diversified. Although it occurred in Canada much later than the United States, increased urbanisation was similarly a major factor in Canadian openness to a bankruptcy act at the federal level.

Until 1949, the final court of appeal for Canada was the Judicial Committee of the Privy Council (JCPC) in London. A case from Quebec would ultimately see the Federal Bankruptcy Power of the British North America Act trumping that of Property and Civil Rights so held by the provinces. *RBC v Larue*[244] of 1928, was a Quebec appeal to the JCPC from the Supreme Court of Canada (SCC). The case concerned an April 1922 claim registered by a claimant, the Royal Bank of Canada (RBC), which attempted to place a judicial hypothec, pursuant to the *Quebec Civil Code,* upon the property of one Belanger who had become insolvent. A hypothec, under civil law is similar to a lien on property.[245] Regarding the validity of the exercise of Federal and Provincial authority in this case, the JCPC responded succinctly:

> No doubt it was within the competence of the provincial Legislature to give a judicial hypothec the quality of a real right; but if and so soon as that enactment comes into conflict with a Dominion statute duly passed under the authority of section 91 of the Act of 1867, then the Dominion statute prevails over the provincial legislation and takes effect according to its tenor. [246]

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[242] Doug Owran, "8.6 The New Economy," in *Canadian History: Post Confederation* John Douglas Belshaw ed. 2016 *British Columbia Open Textbook Collection*. Available at: https://opentextbc.ca/postconfederation/chapter/8-6-the-new-economy/

[243] See Robert Sweeney, "8.3 Capital Markets," in *Canadian History: Post Confederation* John Douglas Belshaw ed. 2016 *British Columbia Open Textbook Collection*. Available at: https://opentextbc.ca/postconfederation/chapter/8-3-capital-markets/

[244] Quebec (Attorney General) and the Royal Bank of Canada v Larue and others, 8 CBR 579 – [1928]

[245] *The Quebec Act 1774* 14 Geo. III c. 83 gave Quebec the right to use French Civil Law in all matters of private law. As a result of this legislation, Quebec was allowed, following the enactment of the British North America Act, to maintain Civil Law in its provincial laws. As an aside, both the JCPC and SCC rulings in *RBC v. Larue* uphold the right of Quebec to maintain a Civil Code so long as it does not interfere with Canadian Federal Law.

[246] Quebec (Attorney General) and the Royal Bank of Canada v Larue and others, 8 CBR 579 – [1928], 6.

The JCPC's logic is similar to the Supreme Court of the United States in *Sturges v. Crowninshield.* When the Federal Government chooses not to enact bankruptcy and insolvency legislation, the provincial law is valid – a recognition of the unoccupied field doctrine in Canada.[247] Once the Federal government chose to exercise its authority, the provincial law was no longer valid due to the conflict of laws between it and the Federal statute. However, both the JCPC and the Supreme Court of Canada suggest that, absent a direct conflict, the provincial law is valid. This logic represents a unique quality of Canadian Federalism not present in the English system – the necessity of the balancing of rights between provinces and the federal government. The development of Canadian bankruptcy law would diverge further from Britain as, shortly thereafter, Canada, like the United States, experienced its largest financial crisis in history during the Great Depression. From there, Canada made some very important legislative developments on the bankruptcy and insolvency front.

In 1933, an era characterized by the pressures of the Great Depression on the economies of North America, Canada enacted the *Companies' Creditor Arrangement Act* (CCAA). This act, which is still of force and effect, was the first formal codification of a Canadian restructuring regime. Although informal reorganizations did exist in Canada, similar to English trust deeds,[248] the enactment of the CCAA, in the history of Canadian bankruptcy and insolvency law, is a significant event. The act was implemented hastily and with limited debate to deal with the very real financial issues of the period.[249] Although the CCAA was enacted to the benefit of large

[247] ibid, 7.
[248] See Virginia Torrie, *Reinventing Bankruptcy Law: a History of the Company Creditors Arrangement Act,* (Toronto: 2020), 34-38, 41-54.
[249] Ibid, 34-36.

bondholders with life insurance, trust and loan companies being the beneficiaries,[250] its application, in the 90 years it has been on the books, has expanded far beyond these intentions.

In the Canadian Context, neither the *Bankruptcy Act of 1919* nor the CCAA were ever repealed although the former has been substantially amended. The *Bankruptcy Act* was most notably amended by gradual process, which began in 1970, following the *Tassé* Report, which ultimately led to a long reform process that culminated in significant amendments. The new 1992 act underwent a name change to the *Bankruptcy and Insolvency Act.*[251] Further amendments were then made, in the first decade of the 21st century, importantly, for the purposes here, to clarify Canadian avoidance rules and add prohibitions against *ipso facto* clauses into the modern Canadian *Bankruptcy and Insolvency Act*.[252]

Canadian Bankruptcy and Insolvency Law developed with both English and American influence. Although the Canadian views toward discharge resemble English attitudes, the role of federalism, absent in the British context, ultimately affected the ways in which Canadian bankruptcy and insolvency law developed, as illustrated in the *RBC v Larue* decision. This unique situation, of being "British North America," led to a hybridization of laws in Canada between American and English. This leads to interesting legal developments that can be described as nothing other than "Canadian." These Canadian developments, as will be seen, occur both in case law and policymaking in the Canadian context.

2.5. The History of English Avoidance Law

[250] Ibid, 43.
[251] Margaret Smith, *Bankruptcy Law Update,* Law and Government Division 88-16E, 1999.
[252] See Adrienne Ho 'The Treatment of *Ipso Facto* Clauses in Canada,' (2015) 61:1 McGill LJ 139. Legislative amendment was accomplished by R.S.C 1985, c. 47, ss. 71-72.

Assuming the already established concept of English bankruptcy law being an Italian civil law transplant, it is perhaps the law of fraudulent transfers of Rome, later codified into Italian law by the glossators, upon which modern avoidance regimes are based.[253] In Ancient Rome, an act through which a debtor diminished the size of his estate was deemed a fraud to his creditors.[254] As a result of this, the creditor initiated remedy of the *actio Pauliana in personam* developed.[255] This is not only a prominent feature of modern Continental European systems,[256] but present in both the modern Quebec Civil Code[257] and Scottish law as well.[258] While this is likely the most ancient of transactions avoidance provisions, it is unclear what impact it had, if any, on the law in England.[259] In looking at policymaking which began in the 16th century, developments in a new common law avoidance regime began ultimately forging the path for a unique common law system.

In 1542, English parliament would pass the Statutes of Henry VIII[260] which provided not only for creditors to be paid rateably,[261] or *pari passu,* but also provided that any person who "…shall willingly aid, imbezil, or convey…" any person or goods outside the realm would be liable for imprisonment.[262] It also provided that individuals who "…intend to delay or defraud their creditors…" would forfeit not only the proceeds but his body as well.[263] These were followed,

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[253] Glenn, supra note 158, 60-61.
[254] Levinthal supra note 155, 239.
[255] Levinthal supra note 155, 239; *El-Husseiny and another v Invest Bank PSC* [2025] UKSC 4, [21].
[256] See, for example, Jan Ciaptacz, 'Actio Pauliana under the Brussels Ia Regulation – a challenge for principles, objectives and policies of EU private international law' (2021) 17 Journal of Private International Law 497; *El-Husseiny and another v Invest Bank PSC* [2025] UKSC 4. [21].
[257] Arts 1626-1636 Code Civil du Québec.
[258] See Antoni Vaquer, 'From revocation to non-opposability: modern developments of the Paulian action' in Hector MacQueen, Antoni Vaquer and Santiago Espiau Espiau (eds). *Regional Private Laws Codification in Europe* (OUP 2003), 215-216; Currently appearing as *Bankruptcy (Scotland) Act 2016,* ss. 34-36F.
[259] The most similar provision in England would likely be s. 127 of the *Insolvency Act 1986.* However, there is nothing to suggest that actio pauliana has any connection to this provision.
[260] 34 & 35 Henry VIII c 8.
[261] Ibid, "Proclamation"
[262] Ibid, "Aiders".
[263] Ibid, "Collusions"

some thirty years later by more in-depth pieces of avoidance legislation. The Statute of Elizabeth I of 1570, also provided for a provision against "detaining the goods of bankrupts,"[264] a provision similar to that of the Statutes of Henry VIII, while the Statute of Elizabeth I of 1571[265] provided for a prohibition against fraudulent conveyances. The 1570 Statute, like its predecessor of 1542, provided for a specific remedy to what was likely a very specific problem, the 1571 Statute, titled "an act against fraudulent deeds, alienations, &c." and largely considered applicable to insolvency since its enactment,[266] was enacted broadly, and created a general prohibition against:

> All and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods and chattels, or any of them, or any lease, rent, common or other profit or charge out of the same lands, tenements, hereditaments, leases, or other things before mentioned, to him or them conveyed as is aforesaid, or any part thereof; shall incur the penalty and forfeiture of one year's value of the said lands, tenements, hereditaments, leases, rents commons, or other profits of or out of the same; and the whole value of the said goods and chattels; and also so much money as are or shall be contained in any such covinous and feigned bond…[267]

The penalty for a violation of said act was the return of the property in question and an additional half-year in prison. This statute effected an expanded power to void fraudulent payments emanating from the bankrupt estate.[268] Within 30 years of enactment, the statute was expanded to include transfers which were beyond just mere fraud but included transfers which had the markings, or badges, of fraud.[269]

The *Statute of Elizabeth 1571* was applied in 1601's *Twyne's Case,*[270] involving a bankrupt Pierce transferring his chattels in secret, by way of "gift," to one Twyne. In this case, the transaction was voided, using a test that invoked "badges of fraud" factors. In doing so, while not

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[264] 13 Elizabeth I, c. 7.
[265] 13 Elizabeth I, c. 5.
[266] See Paul J. Hartman, 'A Survey of the Fraudulent Conveyance in Bankruptcy,' (1964) 17 Vanderbilt Law Review 2. Also in Rich. and Edw. Atkins for J. Walthoe, *All the Statutes of Force and Effect Concerning Bankrupts,* (1695), the authors explicitly mention the *Statute of Elizabeth 1571* as a bankruptcy statute.
[267] Ibid, s. 4.
[268] Hamish Anderson, 'The Nature and Purpose of Transaction Avoidance in English Corporate Insolvency Law,' (2014) 2 NIBLeJ 2, 4.
[269] Douglas Baird, *The Unwritten law of Corporate Reorganizations,* (Cambridge 2022), 11.
[270] 3 Co. Rep. 80.

out and out fraud on its surface, the court determined the act should be invoked and the transaction set aside. The badges of fraud from *Twyne's Case* were as follows:

1. The gift had the signs and marks of fraud;
2. The donor continued in possession, used the chattels as his own, traded and trafficked with others ultimately defrauding them;
3. The gift was made in secret;
4. The gift was made pending a writ;
5. A trust was created between the parties whereby the donor (transferor) possessed the chattels as his own and used them as if they were his own with the court explicitly stating that "…fraud is always apparelled and clad with a trust, and a trust is the cover of fraud."
6. The deed contains that the gift was made honestly, truthfully and in *bona fides*.[271]

This would lead the court to show the factors had been met:

> "And because fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole Court, that all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud."[272]

As will be seen, the badges of fraud would go onto play a major role in later years and particularly inform the courts of Canada and the United States to this day.

The conceptions around an increase in "fraud" and "deceit" in *Twyne's Case* are likely a reflection of the merchant class' role in the development of avoidance law – a role which cannot be understated. With the merchant class came an introduction of credit, and with this introduction, English culture struggled to understand the role of each.[273] The view of the merchant in English

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[271] *Twyne's Case,* 3 Co. Rep. 80.
[272] Ibid.
[273] Robert Weisberg, 'Morality, the Merchant Character, and the History of the Voidable Preference,' (1986) 39 *Stanford Law Review,* 113.

society was even reflected in literature of the time with Shakespeare's *The Merchant of Venice*[274] being perhaps the most noteworthy example. The concept of the merchant flew in the face of the older land-based society of England.[275] The English government, keen to exert greater global power, saw the merchant and credit as necessary to fund its new, expanding, imperial ambitions.[276] As such, the law developed in interesting ways to respond to these competing views culminating with the Statute of Anne of 1705.[277] Although this legislation faced a difficult journey to Royal Assent, thanks largely to the aforementioned conflict, [278] the *Statute of Anne 1705* granted greater avoidance powers. Specifically, the Act provided:

> "That all and every person and persons, who shall have accepted any trust or trusts, and conceal or protect any estate, either real or personal of any person becoming bankrupt, as aforesaid, from his or her creditors… shall forfeit the sum of one hundred pounds, and double the value of the estate…"[279]

This provided the estate with a statutory method, through the use of "any of her Majesty's courts of record," to prevent such a fraudulent preference as achieved through the use of trusts.[280] The use of trusts to conceal a transaction, as shown above, was one of the badges of fraud from *Twyne's Case.*[281] By the early 18th century, there were at least two methods of holding a debtor accountable for an avoidance transaction. The first was the fraudulent conveyance, emanating from the *Statute of Elizabeth I* 1571, and the second was a more specific device, of the Statute of Anne *1705*, which appears to have sought to regulate the specific issue of bankruptcy avoidance through trusts.

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[274] See William Shakespeare, *The Merchant of Venice,* (Originally Published 1598, 1994 Longman)
[275] Weisberg supra note 277, 13.
[276] Weisberg supra note 277, 17.
[277] 4 Anne c. 17 (1705).
[278] See John C. II McCoid, 'Discharge: The Most Important Development in Bankruptcy History' (1996) 70 Am Bankr LJ 163
[279] 4 Anne c. 17 (1705) at s. IX
[280] Ibid. at s. IX
[281] *Twyne's Case* 3 Co. Rep. 80.

In the middle part of the 18th century, these protections were expanded with judicial advocacy by Lord Mansfield who would expand the *Act of Elizabeth 1571* to include a fraudulent preference.[282] Speaking for the court in *Alderson v Temple*, Lord Mansfield stated:

> "Other acts that are fraudulent are not made acts of bankruptcy: but they are attended with consequences of fraud, at law; which is, 'that fraud renders every act void.'"[283]

Lord Mansfield utilised the principles of case law, following the nearly two hundred years of application of the *Statute of Elizabeth I 1571,* to innovate the fraudulent conveyance. In reading *Alderson v Temple,*[284] it becomes clear that the fraudulent preference was not a judicial creation but a principled expansion of the fraudulent conveyance – that any stripping from the insolvent estate infringes the purpose of bankruptcy. This makes sense as the original 1571 act was meant to prevent fraud.

By the 19th century, the 1705 provisions became ill-equipped to deal with the perceived risk of fraud in the bankruptcy context[285] resulting in the Bankruptcy Act of 1842 including a punishment for concealing the value of the estate.[286] These fraud prevention powers seem to have gone too far leading Parliament to pass the 1869 Act which included an exception for any bona fide purchaser for value without notice.[287] These Acts were eventually repealed and replaced by the Bankruptcy Act 1914, which applied to personal bankrupts but was largely extended to corporate ones as well.[288] This was accomplished by the *Companies Act 1948,* containing a broader Fraudulent Preferences provision that also broadened the protections for bona fide purchasers for value without notice.[289]

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[282] 8 George III, B.R. (1768)
[283] 8 George III, B.R. (1768)
[284] 8 George III, B.R. (1768) – the case utilised the Statute of Elizabeth 1571 to set aside the transaction.
[285] See Duffy supra note 177.
[286] 5 & 6 Victoria c. 122 (1842): s. 32
[287] 32 & 33 Victoria c. 71: s. 92.
[288] Pursuant to *Companies Act 1948,* s. 317.
[289] *Bankruptcy Act* 1914 c. 59, s.44(1),(2).

The 1914 Act was not always adequate at dealing with avoidance measures. This is especially apparent when looking at s. 332 of the 1948 Companies Act's inclusion of a fraudulent trading provision.[290] This provision, enacted out of inadequacies in the existing bankruptcy laws, appears, on its surface, to have enacted effective complementary corporate law avoidance measures. However, this was not the case as s. 332 would come under heavy scrutiny in the *Cork Report,* where they criticized it for imposing criminal liability, which forced the courts to limit their use of the provision due to the mere perception of stricter standards of proof.[291] The *Cork Report* would recommend the greatest advancement in avoidance law to date.

Suggestions contained in the *Cork Report* would go onto inspire the 1986 Insolvency Act which would enact a series of specific avoidance measures still of force and effect in the United Kingdom today. The provisions contained within the 1986 Act were aimed at addressing specific, practically observed issues with English insolvency law.[292] The newly contained provisions within the 1986 version of the UK *Insolvency Act* created specific obligations. Although not eliminating the common law anti-deprivation and *pari passu* rules, the 1986 Act enacted the following:[293]

1. s. 245 creates prohibitions against floating charges created within 12 months of insolvency.[294]
2. s. 239 expands the prohibitions against preferences from earlier legislation while also both eliminating their need for fraudulent conduct and creating brightline rules for their timing. The general rule is that any preference made within 6 months of the beginning

[290] *Companies Act 1948,* 11 & 12 Geo.6 c. 38, s. 332.
[291] *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558, [1776].
[292] See Rebecca Parry et al., *Transaction Avoidance in Insolvencies,* (3 ed. Oxford University Press 2018), chapter 2.
[293] For an in-depth discussion of the specific avoidance provisions contained with the *Insolvency Act 1986* see Hamish Anderson, 'The Nature and Purpose of Transaction Avoidance in English Corporate Insolvency Law,' (2014) *2 NIBLeJ 2.*
[294] *Insolvency Act 1986* s. 245

of insolvency proceedings will be deemed a fraudulent preference whereas any preference made to a connected party must have been made within 2 years from the date of insolvency.[295]

3. s. 238 is aimed at protecting against transactions at an undervalue. In other words, it prevents an insolvent company from granting a gift or entering into a transaction where value-received is far less than the fair market value for the goods received. This transaction must have occurred within 2 years of the onset of insolvency proceedings.[296]
4. s. 423 which is aimed at transfers which put assets beyond the reach of creditors.[297]

Alongside these provisions contained within the *Insolvency Act 1986,* the *Companies Act 2006* also contains a provision against unregistered charges.[298] Although the *Cork Report's* effect upon English law-making enabled the creation of many specific avoidance provisions, it did not eliminate the need for both the *pari passu* and anti-deprivation rules. Whereas, in the American context, Congress chose to enact comprehensive rules around distribution, in § 507 and § 726 of the *Bankruptcy Code,* British Parliament chose to leave some of this to the common law. Even though both English and Canadian authorities did enact rules of distribution, as will be seen in Chapter 3, such were not as complete a codification as those contained within the US *Bankruptcy Code.*[299] In not abolishing the need for common law principles, but only adding to them, the anti-deprivation and *pari passu* rules would continue to exist until the modern day in English bankruptcy and insolvency laws.

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[295] *Insolvency Act 1986,* ss. 239, 240, 241.
[296] *Insolvency Act 1986,* ss. 238, 240, 241.
[297] *Insolvency Act 1986,* s. 423.
[298] *Companies Act 2006,* s. 895H.
[299] See subchapters 3.4.1 and 3.5 for a discussion of both priorities and the *pari passu* rules in England and subchapters 3.4.3 and 3.7 for the same in Canada.

So, while the statutory regime is designed to remedy specific, practically observed, issues present during bankruptcy proceedings, the principles upon which they are based, derived from the longstanding interpretation of 16th century bankruptcy statutes, can still be invoked if the Act fails. The legislators intentionally left the common law intact as it relates to certain aspects of insolvency law – most notably the anti-deprivation and *pari passu* rules.[300] As such, the reforms contained within the *Insolvency Act* 1986 were not meant to be a complete codification of English law in this area. While modern English judges have attempted clarification of these uncoded principles by labelling them the *pari passu* and anti-deprivation rules,[301] such are based upon principles which predated this nomenclature and are generally a reflection of the notion that one cannot defraud the insolvent estate.

2.6. The Development of the American Avoidance Regime

Following the American Revolution, the United States adopted much of pre-revolutionary English law into their legal system, with the laws of bankruptcy and avoidance being no exception. In one example, from 1793, the courts of North Carolina cited case law from England and applied the *Statute of Elizabeth I* 1571.[302] Later, the short-lived *Bankruptcy Act of 1841,* contained a provision voiding "…all future payments, securities, conveyances, or transfers of property, or agreements made or given by any bankrupt, in contemplation of bankruptcy," with these being deemed "…a fraud upon this act."[303] Such a provision was deemed to include the fraudulent

[300] *Belmont Park Investments PTY Limited v BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing Inc* [2011] UKSC 38 [7]-[8]; *Insolvency Act 1986* s. 107
[301] See *Belmont Park,* ibid. [88] for the relationship between statute and the anti-deprivation rule.
[302] *Palmer v Litherland,* 1 N.C. 160, 1 Mart. 160 (1793).
[303] *Bankruptcy Act of 1841,* 5 Stat. 440, § 2.

preference.[304] Although the 1841 Act is repealed only a few short years later,[305] provisions of general avoidance, based upon the principles contained within the *Statute of Elizabeth I* 1571, would continue to apply into the 20th Century.[306]

Interestingly, the principles from 17th and 18th century case law, regarding the application of the *Statute of Elizabeth I* 1571, seem to have been very influential in the construction of American avoidance law. Indeed, the Statute was applied in articulated fashion leading many States, in the 1920s and 1930s, to codify the normative application of fraudulent conveyances law into their respective State legislation.[307] There was also much scholarship during the period, with many legal academics explicitly connecting the earlier English *Statute of Elizabeth I* 1571 to the law of every state.[308]

Although the first permanent federal bankruptcy act, the *Bankruptcy Act of 1898,*[309] did provide some remedies to void preferences under § 60b and § 3, it appears, from the academic literature of the 1920s and 1930s, that much of the avoidance powers lay within the individual States.[310] The States, with the absence of any overtly strong avoidance methods in the Federal *Bankruptcy Act of 1898,*[311] would apply principles of Fraudulent Conveyances law. This was consistent with the

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[304] *Arnold et al. v Maynard,* 2 Story, 349, 5 Law. Rep. 296.
[305] Charles Jordan Tabb 'The History of Bankruptcy Laws in The United States' (1995) 3 *American Bankruptcy Institute Law Review* 5
[306] Alan N. Resnick and Henry J. Sommer eds. *2017 Collier Pamphlet Edition Bankruptcy Code,* (Lexis Nexus 2017), 611.
[307] Donald E. Bridgman, 'Uniform Fraudulent Conveyance Act in Minnesota' (1923). Minnesota Law Review. 1146; Max Radin, Fraudulent Conveyances in California and the Uniform Fraudulent Conveyance Act, (1938) 27 CALIF. L. REV. 1.; Garrard Glenn, 'The Uniform Fraudulent Conveyance Act; Rights of Creditor without Judgment,' (1930) 30 COLUM. L. REV 202
[308] Bridgman, Donald E., 'Uniform Fraudulent Conveyance Act in Minnesota' (1923). Minnesota Law Review. 1146, at 455.
[309] Pub. L. 55-541, 30 Stat. 544.
[310] See subchapter 2.3 above
[311] In U.S. Const. art. 1, § 8, Bankruptcy and Insolvency are Federal Undertakings. For more information as to why it was included as such see: James Madison "The Powers Conferred by the Constitution Further Considered From the New York Packet," *The Federalist Papers* no. 42 (1788).

overall nature of the 1898 *Act* which, for political reasons, needed to balance both state and federal interests. The most notable instance of this balancing occurs with regard to state property exemptions, briefly discussed above.[312] By the early 20th century, there was a Federal Bankruptcy Statute, but avoidance was largely governed at the State level. This would begin to change as, although State Property exemptions still remain a prominent feature of US bankruptcy law, the Great Depression would encourage the Federal Government to enact tighter protections with regards to avoidance powers.

These changes were expressed in the *Bankruptcy Act of 1938,* often nicknamed the *Chandler Act* for the Tennessee Congressman Walter "Clift" Chandler who introduced the Bill, which, as a throwback to earlier 19th Century legislation, included broad avoidance protection. The Bill, proposed in 1937, was a response to changing conditions during the Great Depression.[313] Of interest here, was a provision which was inspired by the *Statute of Elizabeth I* 1571[314] prohibiting liens and fraudulent transfers made within four months prior to the filing of a bankruptcy.[315] The provision also allowed state fraudulent conveyance laws to still apply in instances where the application of the Act was exhausted.

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[312] David A. Skeel Jr. 'Bankruptcy Lawyers and The Shape of American Bankruptcy Law," (1998) 67 *Fordham Law Review* 497, 504-505.
[313] Congress, Volume 81, Part 2 (February 15, 1937 to March 17, 1937), govinfo, (March 17, 1937), https://www.govinfo.gov/app/details/GPO-CRECB-1937-pt2-v81/;
Congress, Volume 81, Part 3 (March 18, 1937 to April 15, 1937), govinfo, (April 15, 1937), https://www.govinfo.gov/app/details/GPO-CRECB-1937-pt3-v81/
[314] See Resnick and Sommer supra note 310. The editors explicitly mention that § 548 of the *Bankruptcy Act of 1978* was "derived in large part" from § 67 of the *Bankruptcy Act of 1938* which itself has history which dates to 13 Eliz. c. 5 i.e. the *Statute of Elizabeth I* 1571.
[315] *Bankruptcy Act of 1938,* Pub. L. 73-696, 52 Stat. 840.

This provision would eventually inspire the modern § 548 of the *US Bankruptcy Code*,[316] enacted in 1978 and of force and effect today. The modern § 548 of the *Bankruptcy Code,* similar to previous provisions and the spirit of the *Statute of Elizabeth* 1571, attempts to regulate avoidance in a broad rather than specific way. § 548 does the following:

1. § 548(a) makes all transfers by a debtor whose intent were to hinder, delay or defraud creditors invalid as well as those transfers made by an insolvent debtor for less than reasonably equivalent value. Essentially there are two parts here, one for constructive fraudulent transfers and one similar to, although broader than, the English transfers at an undervalue provision.
2. § 548 (c) provides an exemption for good faith transfers for value while § 548(d) provides definitions.
3. § 548(e), in perhaps a carry-over from older English principles, provides specific provisions for avoidance transactions involving self-settled trusts.[317]

Alongside this, the US Bankruptcy Code also contains a complimentary provision invalidating specific preferences under § 547.[318] The 1978 Act would also enact the most radical innovation, the *ipso facto* clause prohibition as contained in §365(e) of the modern *Bankruptcy Code.*[319] Such devices are meant to ensure that contractual obligations are neither modified nor voided simply due to one party's insolvency. Also, like in earlier legislation, under § 544(b) of the *Bankruptcy Code,* the Trustee can also invoke State Fraudulent Conveyance Law, creating a

[316] BANKRUPTCY, 11 U.S. Code §§ 101-1532 (2012), https://www.govinfo.gov/app/details/USCODE-2012-title11
[317] US Bankruptcy Code, § 548
[318] US Bankruptcy Code, § 547.
[319] To be discussed in Chapter 5.

similar state property exemption as contained within the 1938 Act.[320] This allows fraudulent conveyances law to have a dual aspect. As will be seen in Chapter 6, State laws can sometimes be easier to enforce than Federal laws in the United States.

With § 548, to be discussed at greater length in chapter 6, and the *ipso facto* regime, to be discussed in chapter 5, US avoidance law has managed to largely avoid the need, in the modern context at least, of applying principled rules of "common law." This is not to say that common law principles are never utilised in American law, it is to say that the *Bankruptcy Code'*s broad avoidance powers, supplemented by State fraudulent conveyances laws, have made the application of a broad common law rule of avoidance law, such as the anti-deprivation rule, unnecessary. The American approach has tended to favour codification rather than leaving much to the common law. This means that, unlike in England and Canada, there is no anti-deprivation rule, as all challenges in transactions avoidance must be tied to a specific provision of the *Bankruptcy Code.* Nonetheless, as in Canada and England, the notion of preventing fraud, originating with the *Statute of Elizabeth 1571,* is still present in American bankruptcy law.

2.7. Development of Canadian Avoidance Rules

As has been shown in the discussion of the development of the Canadian bankruptcy regime, prior to 1919, the lack of federal legislation on the subject allowed the provinces to fill the unoccupied void. Similar to the United States, where States used powers to void fraudulent conveyances, based upon the *Statute of Elizabeth 1571,* Canadian provinces appear to have done the same.[321] Given the early reluctant history to enact a Federal Canadian bankruptcy statute during

[320] US Bankruptcy Code, § 544(b).
[321] Law Reform Commission of British Columbia, *Report on Fraudulent Conveyances and Preferences,* (1988) LRC 94, 3.

the 19th and 20th centuries,[322] it is perhaps not surprising the provinces played such an important role in the regulation of transactions avoidance prior to the enactment of the Federal Bankruptcy Act in 1919. As an example, in 1880, following the repeal of the Federal Bankruptcy Acts of 1869 and 1875, the provincial government of British Columbia enacted a Fraudulent Preferences Act to fill the void left by repeal.[323] Similarly, the government of New Brunswick would pass the same in 1895.[324] These provincial fraudulent conveyancing rules, similar to US State legislation, are largely still of force and effect today with every province, except Alberta which still applies the original *Statute of Elizabeth 1571,* having a fraudulent conveyances statute.

Nonetheless, with the enactment of the 1919 Statute, although provincial fraudulent preferences and conveyances laws could be used in a complementary manner, there was still conflict between them and the fraudulent preferences provision then contained within s. 64 of the *Bankruptcy Act.* The British Columbia Supreme Court determined in 1965 that the *Bankruptcy Act* had precedence over the provincial act.[325] Nonetheless, the British Columbia Court did also conclude that "…the Fraudulent Preferences Act is intra vires and provides another ground for declaring these transactions void"[326] meaning the provinces could still play a role, absent direct conflict with the federal law, in setting aside fraudulent preferences. Such a ruling is consistent

[322] See Thomas GW Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919,* (The Osgoode Society for Legal History 2014) in which Prof. Telfer describes the unwillingness of Canadian legislators to enact a Federal Bankruptcy Act. Although there was a short period where there was federal law, namely between 1869-1880, the subject was largely vacated to the provinces until the enactment of permanent legislation in 1919. Nonetheless, as already shown, the federal implementation of sound devices to regulate avoidance does not occur in earnest until 1966.
[323] Supra note 325, 8.
[324] Office of the Attorney General of New Brunswick, (2014) 35 *Law Reform Notes,* 5.
[325] Allison & Burnham Concrete Ltd. v. Mountain View Construction Ltd., 1965 CanLII 530 (BC SC), 72-75.
[326] Ibid, 75

with the JCPC's conclusion in *RBC v. Larue.*[327] The operation of how these apply in a complementary manner will be discussed further in Chapter 6.

A year later, in 1966, the Federal government would enact *An Act to Amend the Bankruptcy Act*[328] which created stricter rules relating to fraudulent preferences,[329] to strengthen federal avoidance powers under the *Bankruptcy Act*. This would eventually culminate in a more modern Canadian statutory avoidance regime contained in the renamed and amended *Bankruptcy and Insolvency Act*[330] of 1992.[331] Although the current Canadian statutory avoidance regime shows some differences from that of England, Canadian and English laws, especially prior to the English *Insolvency Act 1986*, appear very similar, with provisions from s. 44 of the 1914 English Act and s. 332 of the English *Companies Act 1948* perhaps influencing those contained within the Canadian Act or vice versa. The last major amendments made to the *Bankruptcy and Insolvency Act* were enacted in 2009 to enact avoidance provisions similar to those contained within both American and English avoidance provisions. The first of these were the enactment of prohibitions against *ipso facto* clauses, an American innovation, whereas the second was to replace the "settlements" and "redemption of shares" provisions with a transfers at an undervalue provision quite similar to the English rule.[332] The prohibitions against *ipso facto* clauses will be discussed further in chapter 5 whereas the undervalue transfers provisions will be discussed in chapter 6.

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[327] See the discussion in subchapter 2.4 above.
[328] 14 & 15 Eliz. 2, S.C. 1966-1967, c. 32.
[329] Margaret Smith, *Bankruptcy Law Update,* Law and Government Division 88-16E, 1999.
[330] S.C. 1992, c. 27 contained within R.S.C., 1985, c. B-3.
[331] Ibid.
[332] Jassmine Girgis, 'Review of Pre-Bankruptcy Transactions' in *Bankruptcy and Insolvency Law in Canada: Cases, Materials and Problems,* 2 ed., Jassmine Girgis, Alfonso Nocilla and Virginia Torrie eds. (CANLII 2024), 5:22; Janis Sarra and Ronald B. Davis, *Director & Officer Liability in Corporate Insolvency,* 3 ed. (LexisNexis 2015) [4.27]-[4.29].

The current Canadian avoidance regime provides for two broad avoidance powers, namely s. 95, which deals with preferences, and s. 96 which deals with transactions at an undervalue. s. 95 applies to a property transfer in favour of a creditor and creates an important distinction between dealings of arm's length, related parties, and non-arm's length, unrelated, parties. The suspect period for arm's length transactions is three months before the initial bankruptcy event and is 12 months for a non-arm's length transaction.[333] This, like in the case of English legislation, is a clearly articulated preferences provision. There is also some history as relates to its enactment as the provision was clarified by amendment of the Federal government in 2005.[334] Section 96 provides for a transfer at an undervalue provision which applies to a transaction a year from the initial bankruptcy proceeding.[335] Although prohibitions against transactions at an undervalue did not formally make their way into the Canadian Statute until 2009, the Manitoba Court of Appeal utilised the term in 1927.[336]

2.8. Application of the Anti-Deprivation Rule in England and its relationship to *Twyne's Case*

It is argued here that the anti-deprivation rule comes from a long line of cases whose intent were to protect fraud against creditors. To show how these protections manifested themselves, and therefore how the rule came into existence, it is important to conduct a survey of case law around extension of the rules of statutory bankruptcy and insolvency laws to void transactions that were viewed as fraudulent.

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[333] *Bankruptcy and Insolvency Act* R.S.C., 1985, c. B-3, s. 95(1)
[334] See Adrienne Ho 'The Treatment of *Ipso Facto* Clauses in Canada,' (2015) 61 McGill LJ 139, Legislative amendment was accomplished by R.S.C 1985, c. 47, s. 71-72.
[335] *Bankruptcy and Insolvency Act,* s. 96(1)
[336] McLennan v. Newton, 1927 CanLII 638 (MB CA)

As was mentioned previously, 1601's *Twyne's Case* broadened the *Statute of Elizabeth 1571* to apply to all types of fraud in the bankruptcy context. While the rule was also applied, earlier, in a similar vein in 1585's *Packman's Case,*[337] it is perhaps the later decisions, beginning with the court of Lord Mansfield in the 18th century, to the cases of the present day which trace the development of the anti-deprivation rule.

Interestingly, in *Alderson v. Temple,* as well as other cases,[338] *Lord* Mansfield ostensibly extended the law of avoidance by using similar logic to *Twyne's Case* to create rules that stipulate that if it "…is a fraudulent act, it is void."[339] In doing so, as is well established,[340] Mansfield innovated the *Statute of Elizabeth 1571* to include a fraudulent preference. Lord Mansfield articulated a principle into law, that the principles from *Twyne's Case,* namely that badges of fraud, should be used to determine whether a transaction offends bankruptcy law. These principles appear to be used when existing specific provisions are exhausted. This extension of bankruptcy law, to protect the rights of creditors, does not end here.

In 1812, Lord Eldon made a contractual provision null and void when it was "…adopted with the express object of taking the case out of reach of the Bankrupt Laws."[341] In doing so, he did not use the term "anti-deprivation" but referred to the transaction instead as "…a direct fraud upon the Bankrupt Laws."[342] This principle, per the leading modern United Kingdom Supreme Court decision of *Belmont Park*, was applied to illustrate the existence of an anti-deprivation rule.[343]

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[337] 6 Co. Rep. 18b [1585].
[338] See Duffy, supra note 177, 13.
[339] *Alderson v. Temple*, 1 Black W 690, 96 ER 384.
[340] Duffy, supra note 177, 13.
[341] *Higinbothan v Holme* (1812) 19 Ves Jun 88, 92.
[342] Ibid.
[343] *Belmont Park Investments PTY Limited v BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing Inc* [2011] UKSC 38 at para. 2

Although the nomenclature of the principle would move beyond fraud in favour of a "…violation of the policy of the bankrupt law,"[344] its application remained the same, to extend creditor protections when the current act, of force and effect, was exhausted. *Re Stephenson,* from 1897, stated that its application requires "…evidence of an intention to defraud his creditors."[345] Although the terminology of the rule has changed in history, even the UKSC in *Belmont Park* contends: "From the earliest days of the rule, it has been based on the notion of fraud,"[346] meaning that, in the absence of some sort of fraud, the rule has never applied. Given the wording in the case law from the 19th century onwards, the anti-deprivation rule developed to prevent forms of fraudulent conduct against the insolvent estate.

This wording of the courts in England, from the 19th century onwards, shows much similarity to the principle laid out in *Twyne's Case* of 1601, namely "…that all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud."[347] Given that the judiciary in *Twyne's Case* was directly applying the *Statute of Elizabeth 1571,* and that this is one of the first recorded iterations of said principle, it is argued here that the anti-deprivation rule, although not a direct application of the 16th century rules around fraudulent conveyances, clearly expresses principles which originated in case law around its direct application. As such, the ancestry of the anti-deprivation rule likely dates back much longer than the 18th century as presupposed by the UKSC in *Belmont Park.*[348] Although the rule was applied far less frequently from the 20th century, as specific avoidance provisions were enacted for practicality's sake, it was never fully

[344] *Ex p Jay; In re Harrison* (1880) 14 Ch D 19, 25.
[345] *Re Stephenson; Ex p Brown* [1897] 1 QB 368, 640.
[346] *Belmont Park Investments PTY Limited v BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing Inc* [2011] UKSC 38 [75].
[347] *Twyne's Case*, 3 Co. Rep. 80.
[348] *Belmont Park*, supra note 7, per Lord Collins [2].

extinguished as although "…the avoidance provisions go some way to dealing with the mischief… they cover different ground and contain time limitations which do not constrain the common law rule."[349] The anti-deprivation rule case law also shows that the definition of fraud in the insolvency context is dynamic rather than static and, as will be seen in the comparison with Canada, has even evolved differently in different jurisdictions.

The relationship between the anti-deprivation rule and the *Statute of Elizabeth 1571* is even more interesting given that UK Parliament also included an overt provision which deals with transfers which put assets beyond the reach of creditors in s. 423 of the *Insolvency Act 1986.* The purpose of s. 423 was discussed by the United Kingdom Supreme Court in *El-Husseiny v Invest Bank PSC*[350] where it was discussed as a direct descendant of the *Statute of Elizabeth 1571* through s. 172 of the *Law of Property 1925.* [351] As will be discussed in chapter 6, s. 423 can actually apply, in some contexts, more broadly than the anti-deprivation rule as, unlike the latter, it does not require there to be any insolvency.[352] The anti-deprivation rule and s. 423 are obviously similar as they all emanate from the same principle that maximum value must remain within the insolvent estate. Such a principle was also expressed by the *Statute of Elizabeth 1571* as the prevention of fraudulent conveyances in insolvency.

[349] *Belmont Park*, supra note 7, [88].
[350] *El-Husseiny and another v Invest Bank PSC* [2025] UKSC 4.
[351] Ibid, [22].
[352] Ibid, [19], [35].

2.9. Unwritten principles of the US Bankruptcy Code and their similarities to the anti-deprivation rule

An 1807 Massachusetts case, *Locke v Winning* applied a device which, on its face, appears quite similar to modern iterations the anti-deprivation rule. In that case, which involved a debtor transferring promissory notes on the eve of insolvency to a creditor, the court stated that such a transfer was "a fraud against the law, and therefore void."[353] This means that, prior to the implementation of a federal bankruptcy law, Massachusetts at least appears to have had an early version of the anti-deprivation rule. Skeel notes that such concepts, although they were not formally included within the *Bankruptcy Code,* encouraged the United States Supreme Court[354] to adopt a principal of "equality of creditors" which was, in the early part of the 20th century, considered the main aim of the bankruptcy system as a whole.[355] Such broad conceptions of fairness and equality continue to appear throughout the *Bankruptcy Code* today. The shared history of English, Canadian and American bankruptcy laws does not end here. As an example, in their annotated volume of the *Bankruptcy Code 2017,*[356] Resnick and Sommer rightly conclude that both the *Kelly v Armstrong*[357] and *Max Sugarman*[358] cases, are indicative of courts using the "badges of fraud" to determine whether § 548(a) was triggered.[359] Furthermore, Resnick and Sommer argue that "Once a trustee establishes the existence of several badges of fraud, there is a

[353] *Locke v Winning,* 3 Mass. (1 Tyng.) 325, 326 (Mass. 1807).
[354] *Clarke v. Rogers,* 226 U.S. 534.
[355] David A Skeel Jr., 'The Empty Idea of "Equality of Creditors"' (2017) 166 *U Penn. LR* 699, 704-709.
[356] Alan N. Resnick and Henry J. Sommer eds. *2017 Collier Pamphlet Edition Bankruptcy Code,* (Part 1 Lexis Nexus 2017)
[357] *Kelly v Armstrong,* 206 F. 3d 794 (8th Cir. 2000)
[358] *Max Sugarman Funeral Home, Inc. v. A.D.B. Investors,* 926 F.2d 1248, 24 C.B.C.2d 1414 (1st Cir. 1991)
[359] Resnick and Sommer, supra note 360, 615.

presumption of fraudulent intent."[360] Given this wording, it is not a stretch to assume that § 548 continues to be influenced by earlier English decisions such as *Twyne's Case*.

The similarities between the anti-deprivation rule and applications of US statutory provisions are no accident. Baird has noted that principles from the *Statute of Elizabeth 1571* went onto to create a principle whereby courts could strike down transfers made to the benefit of creditors without any actual fraud in a US Supreme Court decision from 1868.[361] Per Baird, the courts were encouraged by principles from case law regarding the *Statute of Elizabeth 1571* to look at transactional avoidance in a "holistic" manner.[362] Throughout his book, Baird notes cases where judges were inspired by the *Statute of Elizabeth 1571* to prevent transactions which involved some deal of "mischief on the side."[363] Such principles, akin to the anti-deprivation rule in both England and Canada, are present in judicial applications of many of the transactions avoidance provisions in the *Bankruptcy Code.* These are, to use the Baird's terminology, "unwritten rules" which ultimately underpin the entire US bankruptcy system.

In the United States, direct descendants of the *Statute of Elizabeth 1571* still exist in both the *Bankruptcy Code,* as § 548, and in state law. The application of such provisions largely require the courts to consider a test akin to the badges of fraud from *Twyne's Case.* These will be discussed in greater detail in chapter 6. Nonetheless, the notion of the preventing fraud in bankruptcy still equally exists in the United States as it does in Canada and England.

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[360] Resnick and Sommer, supra note 360, 615.
[361] Chicago, Rock Island & Pacific Railroad Co. v. Howard, 74 U.S. 392 (1868).
[362] Douglas G. Baird, *The Unwritten Law of Corporate Reorganizations* (2022: Cambridge), 21.
[363] Ibid.

2.10. From "Fraud Upon Bankruptcy" to "Anti-Deprivation" – The Canadian application of the rule

Since the Canadian federal avoidance regime was historically limited, the anti-deprivation rule, which was known as the "Fraud Upon Bankruptcy" principle prior to the UKSC's *Belmont Park* decision,[364] has been applied a fair number of times in the Canadian context to create an articulated principle different from that as applied in the English context. An overview in the development in application of this rule will show the beginnings of divergence from the English application. As will be seen in Chapter 4, the Canadian rule is theoretically broader than its English counterpart in the modern context.

The first known application of the anti-deprivation rule, then referred to as the "fraud upon bankruptcy" principle, in Canada was in 1887 with *Re Hoskins and Hawkey.*[365] The rule would be heard more frequently once the Federal government finally assumed its Constitutional jurisdiction over bankruptcy law with the enactment of the *Bankruptcy Act 1919.*[366]

The New Brunswick Superior Court would hear *Re Wetmore*[367] in 1924 and apply an early version of the anti-deprivation rule. In a decision which cited a series of English cases,[368] the court determined that a transaction which stripped value out of the insolvent estate made the Bankruptcy Act "…wholly ineffectual…" and that such a provision "…was against the general policy of the

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[364] In *Chandos Construction v. Deloitte Restructuring Inc.,* 2020 SCC 25 (CanLII), 449 DLR (4th) 293, the Supreme Court of Canada (SCC) affirmed what was previously known as the "Fraud Upon The Bankruptcy Law" principle was indeed the same as the UKSC's determination of the Anti-deprivation rule in *Belmont Park.* The SCC renamed the rule the anti-deprivation rule likely to have greater semantic consistency with UK case law on the subject.
[365] *Re Hoskins and Hawkey, Insolvents* (1887), 1 O.A.R. 379.
[366] 9 & 10 Geo. V, S.C. 1919, c. 36
[367] [1924] 4 D.L.R. 66.
[368] Namely *Higginbottom v Holme* (1812) 34 E.R. 451; *Ex Parte McKay* (1873) L.R., 8 ch. app. 643; *Ex Parte Jay* (1880) 14 ch. D. 19; *Ex Parte Baxter* (1884) 26 ch. D. 510; *Borland's Trustee v. Steele Brothers* [1901] 1 ch. 279; *In re Johnson Johnson* [1904] 1 K.B. 134.

law, and a fraud upon the Bankruptcy Act."[369] Similar reasoning, based upon the transaction in question affecting distribution, and therefore against the policy desires of the act, was later discussed in many subsequent decisions. The Ontario Superior Court in *Bramalea*[370] formulated a well-articulated standard of application of the fraud upon bankruptcy principle in 1995. This opinion would eventually be upheld 25 years later by the Supreme Court of Canada in *Chandos Construction.*[371] Therein, the SCC made two interesting observations regarding the anti-deprivation rule first, the rule has a "…long history… in Canadian jurisprudence"[372] and secondly this rule, alongside the *pari passu* rule, whose origins lay in the *Acts of Henry VIII 1542,* "…do not stand on their own, but rather exist to give effect to an implicit prohibition in the bankruptcy legislation."[373]

Given the wording of fraud, similar to the English examples above, the Canadian anti-deprivation rule is likely also the by-product of 450 years of jurisprudence which began with the early interpretation of the *Statute of Elizabeth 1571.* Like the English example, the Canadian anti-deprivation rule's development, being first referred to as the "fraud upon bankruptcy" principle, is deeply rooted in the notion of fraud – a notion which the court in *Twyne's Case* was also keen to supress. The principles contained within the *Statute of Elizabeth 1571*, as expressed in 1601's *Twyne's Case,* as Chapter 4 will show, seem to have survived in a different form with regard to the Canadian anti-deprivation rule as compared to the English.

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[369] [1924] 4 D.L.R. 66 at p. 459.
[370] *Canadian Imperial Bank of Commerce et al. v Bramalea Inc. et al.* 33 O.R. (3d) 692 [1995] O.J. No. 4884
[371] *Chandos Construction Ltd. v. Deloitte Restructuring Inc.,* 2020 SCC 25
[372] Ibid [11].
[373] Ibid [12].

Unique in the Canadian context is that, with the exception of one province,[374] the *Statute of Elizabeth 1571* itself was never fully repealed in Canada.[375] While the 1571 rarely applies thanks to more effective provincial acts, it still exists as received law in Alberta.[376] Outside Alberta, each province maintains its own fraudulent conveyances statute all based upon the original version. These statutes, like s. 423 of the *Insolvency Act* in England, apply complementary to the anti-deprivation rule in the insolvency context as both are meant to ensure maximum value remains within the estate – thereby preventing modern iterations of "fraud" in insolvency. As will be seen in the discussion in chapter 6, that although there have been efforts to adopt a Uniform Fraudulent Conveyances Law,[377] there is a degree of variety amongst these statutes.

2.11. Conclusion to the chapter

There are four important themes around the history of bankruptcy law which will serve the rest of this thesis:

Firstly, early English bankruptcy law was very likely a civil law transplant most likely Italian in origin. This is important as concepts from Roman and Renaissance Italian law ultimately influence the ways in which the English law of bankruptcy has developed and are especially important as they relate to the law of avoidance. The influences of the English merchant law, which originated thanks to further relationship with Continental Europe, eventually branched off into two separate processes, what is now referred to as personal bankruptcy law and corporate insolvency law.

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[374] This occurred in New Brunswick with the *Debtor Transaction Act,* SNB 2015, C23, s. 28.
[375] Jassmine Girgis, 'Review of Pre-Bankruptcy Transactions' in *Bankruptcy and Insolvency Law in Canada: Cases, Materials and Problems,* 2 ed., Jassmine Girgis, Alfonso Nocilla and Virginia Torrie eds. (2024:CANLII), 5:23.
[376] Alberta Law Reform Institute, *Reviewable Transactions: Final Report 108* (2018 Alberta Law Reform Institute), [11]; *Condominium Corporation No 0421647 v MacEwan Village Ltd,* 2021 ABQB 75.
[377] Uniform Law Conference of Canada, *Uniform Reviewable Transactions Act* (ULCC 2012). To date legislation inspired by this act has been enacted in Saskatchewan, New Brunswick and Prince Edward Island.

Secondly, the constitutional issues around bankruptcy and insolvency laws, present in the federal jurisdictions of Canada and the United States, played a significant role in the development of bankruptcy and insolvency laws in those jurisdictions. This culminated in a necessary divergence from the laws of England.

Thirdly, the perception of bankrupts underwent a very important shift. This shift, from the bankrupt being presumed fraudulent to one where he was presumed unfortunate, is very important as it relates to avoidance law. The law of bankruptcy and insolvency, which initially developed as a creditors collection remedy, has ultimately influenced the law of avoidance. Avoidance law, tracing its origins back to the Roman collective proceedings, is a protection method for the creditor and not the debtor. This is important as, although bankruptcy law has evolved to recognize the honest but unfortunate debtor, this right needed to be limited, ultimately creating transactions avoidance law. So, if bankruptcy law evolved to recognize the emergence of an honest bankrupt, modern avoidance law emerged to protect the newly dwindling rights of creditors. This protection was enacted to supress the newly noted fraud inherent in the system.

Fourthly, there is a likely connection between the avoidance provisions, the anti-deprivation rule, and the *Statute of Elizabeth I 1571.* This statute's focus on fraud, like the earlier "fraud upon bankruptcy law" principle, renamed the anti-deprivation rule, shows far too much similarity to be ignored. This is especially apparent in *Twyne's Case.* The principles contained therein have seemingly survived in all three common law jurisdictions. Of importance to the rest of this thesis is how this principle, which originates from the same 16th century English source, has diverged to suit the needs of each jurisdiction. The beauty of the common law lay in its flexibility and the development of the anti-deprivation rule is perhaps reflective of how courts have attempted to prevent fraud in insolvency.

With the historical context out of the way, the next chapter the thesis will focus more on substantive law by attempting to understand the relationship between the anti-deprivation rule, which applies to ensure value remains within the estate, and the *pari passu* rule, which ensures creditors are paid rateably. Prior to UKSC's decision in *Belmont Park,* these two concepts were in a relatively confused state. While the court in that case did not really create a distinction out of nothing, it did greatly clarify the law in this area. To better understand how and why the anti-deprivation and *pari passu* rules were confused, it is important to understand the *pari passu* rule itself and how it relates to the anti-deprivation rule. As will be seen, the applicable standard for the *pari passu* rule, the same in both England and Canada, would go onto influence the Supreme Court of Canada in determining the applicable standard for the anti-deprivation rule.[378] In order to understand how this influence manifested itself, it is important to have a nuanced understanding of how the *pari passu* rule and equality of creditors is understood across common law jurisdictions.

[378] This will be discussed in chapter 4, particularly in subchapter 4.8.2.

CHAPTER 3 – The Pari Passu Rule

3.1 – Introduction to the chapter

Both the Supreme Court of Canada[379] and the United Kingdom Supreme Court[380] consider the anti-deprivation and *pari passu* rules to be part of a larger principle that give rise to implicit prohibitions as contained within their respective national statutory regimes. In both cases, the anti-deprivation rule and the *pari passu* rules are highly related. In the United States, the *pari passu* rule has, consistent with the American penchant for codification, been replaced with a statutory provision that ensures *pro rata* distribution.[381] Although the anti-deprivation and *pari passu* rules overlap, they are in fact distinct rules which apply to distinct factual scenarios. It is imperative that this thesis both explain the *pari passu* rule and separate it from the anti-deprivation rule. This will ensure not only a better understanding of the *pari passu* rule but also the anti-deprivation rule.

To understand the *pari passu* rule, part 1 of this chapter will utilise both academic and judicial commentary alongside statutory provisions to give a brief overview. Part 2 will discuss two specific examples where the *pari passu* rule does not apply – namely secured credit and set-off. Part 3 will provide a brief discussion of statutory priority rules, in all three jurisdictions, to better understand the operation of the *pari passu* rule and rules of *pro rata* distribution in practice. In part 4 selected case law from each jurisdiction will be utilised to attempt a practical understanding of the *pari passu* rule, or in the American case *pro rata* distribution, in each jurisdiction. This will form the core analysis of the chapter. Part 5 will then attempt to answer whether the *pari passu* rule is still applicable given the priorities regimes in each respective

[379] *Chandos Construction Ltd. v. Deloitte Restructuring Inc.,* 2020 SCC 25, [12].
[380] *Belmont Park v BNY,* [2011] UKSC 38, [1].
[381] BANKRUPTCY, US Code Title 11, § 726.

country. In part 6, the relationship between the *pari passu* and anti-deprivation rules will be discussed. Such an analysis will be conducted to better understand the relationship between the *pari passu* and anti-deprivation rules while also fostering an understanding of the former more generally.

3.2. The *Pari Passu* Rule Generally

The *pari passu* rule is a rule of public policy,[382] emanating, alongside the anti-deprivation rule, from the general principle that one cannot contract out of bankruptcy and insolvency legislation.[383] The *pari passu* rule was contained within England's first bankruptcy statute of 1542,[384] and remains a foundational principle of common law bankruptcy and insolvency to this day.[385] In the Canadian context, both rules are said to emanate from the general "fraud upon the bankruptcy law principle."[386] Prior to the UKSC decision in *Belmont Park,* English courts did not specifically recognise the existence of both the *pari passu* and anti-deprivation rules separately.[387] Instead, as was the case in *British Eagle,*[388] one of the leading cases on the *pari passu* rule, the UKSC's predecessor, the House of Lords, simply applied the rule to the facts without distinction.[389] In the Canadian context, the situation appeared different, with the courts applying the *pari passu* rule[390] and the fraud upon the bankruptcy law principle,[391] later recognised as the

[382] *Belmont Park,* supra note 7 [1].
[383] Peter Niven, 'The Anti-deprivation rule and the Pari Passu Rule in Insolvency,' (2017) 25 Insolv LJ 5, 5.
[384] 34 & 35 Henry VIII c 8; *Bond Co PLC v Strategic Value Capital Solutions,* [2024] EWCA CIV 24, [184] also agrees with the contention that the *pari passu* rule emanates from the *Statute of Henry VIII 1542.*
[385] Roderick J Wood, *Bankruptcy and Insolvency Law,* (2 ed Irwin 2015), 11, 44.
[386] *Chandos,* supra note 4 [12].
[387] Niven, supra note 389, 6.
[388] *British Eagle International Airlines Ltd v. Compagnie Nationale Air France* [1975] UKHL J0416-1.
[389] Niven, supra note 389, 6.
[390] See Manning (Re), 2011 ABQB 566, at para. 21, Re Milad, 1984 CanLII 2152 (On CA) for examples of application of the pari passu rule in the Canadian Context.
[391] See Canadian Imperial Bank of Commerce v. Bramalea, 1995 CanLII 7262 (ON SC) and Frechette (Re), 1982 CanLII 2967 (QC CS) as examples which apply what is now known as the anti-deprivation rule in the Canadian Context.

underlying rule from which the anti-deprivation rule derived, separately. Although this separation was not formally recognised until the SCC's 2020 *Chandos* decision,[392] such a distinction effectively already existed in Canadian law.[393] Nonetheless, in both contexts, the *pari passu* and anti-deprivation rules are applied to different fact scenarios.

Whereas the anti-deprivation rule applies to attempts to remove an asset upon insolvency, the *pari passu* rule provides that parties must submit to *pari passu,* or rateable, distribution of the assets of the insolvent estate.[394] So while the *pari passu* rule "…forbids contractual provisions that would allow certain creditors to receive more than their fair share,"[395] the anti-deprivation rule prevents parties from taking property from the insolvent estate that would otherwise vest in the trustee. Lord Mance wrote a summary of this distinction in *Belmont Park* – the anti-deprivation rule pertains to transactions that happen <u>on</u> bankruptcy whereas the *pari passu* rule pertains to transactions that happen <u>in</u> bankruptcy.[396]

The *pari passu* rule is contained within legislation of all three studied jurisdictions in one form or another. Section 107 of the UK *Insolvency Act,* 1986 states that "the company's property in a voluntary winding up [should] on the winding up be applied in satisfaction of the company's liabilities pari passu"[397] while the Canadian *Bankruptcy and Insolvency Act* states that "…all claims proved in bankruptcy shall be paid rateably."[398] Even the United States Bankruptcy Code,

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[392]Rowbotham J.A.'s Court of Appeal decision in *Capital Steel Inc. v. Chandos Construction,* 2019 ABCA 32 is actually where the courts recognise the subdivision of the fraud upon the bankruptcy law principle into two separate rules.
[393] *Canadian Imperial Bank of Commerce et al. v Bramalea Inc. et al.* 33 O.R. (3d) 692 [1995] O.J. No. 4884 which applied what the SCC, in *Chandos,* determined to be the anti-deprivation rule.
[394] Niven, supra note 389, 5; *Belmont Park,* supra note 7, [1]; *Chandos Construction,* supra note 4, [12].
[395] *Chandos Construction,* supra note 4, [12].
[396] *Belmont Park,* supra note 7, [149].
[397] *Insolvency Act 1986,* s. 107.
[398] Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 141.

where the *pari passu* rule is not formally discussed, provides a similar provision whereby all claims are to be paid "pro rata."[399] Even under a Chapter 11 restructuring, pursuant to § 1123(a)(4), a restructuring plan is required to "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest."[400] The American provisions, given the United States' history as a former British Colony, likely come from the same historical principle. Whether the terms "*pari passu,"* "rateably" or "pro rata" are used, they all essentially mean the same thing – creditors are to be paid rateably within each class.

Of note here is that the *pari passu* principal does not provide for absolute rateable distribution but rateable distribution based on creditor class. This is important as the *pari passu* rule, itself a rule of public policy, has been superseded by other rules of statutory public policy. These statutory priority rules, which will be discussed in greater detail later in this chapter, ultimately have an impact upon *pari passu* distribution and have even led some to critique it as a concept altogether.[401]

Although in prior case law English courts have deemed the *pari passu* rule inapplicable in restructuring proceedings, [402] the recent *Adler Restructuring*[403] calls this into question.[404] Within a restructuring, because assets are not liquidated and the company remains a going concern, each

[399] *Bankruptcy Code,* § 726(b).
[400] *Bankruptcy Code* § 1123(a)(4).
[401] See subchapter 3.8.
[402] *HMRC v. The Football League,* [2012] EWHC 1372 (Ch), 87.
[403] Re AGPS BondCo PLC [2023] EWHC 916 (Ch); *Bond Co PLC v Strategic Value Capital Solutions,* [2024] EWCA CIV 24.
[404] The *Football League* and *Adler Restructuring* cases can be differentiated in that the former was a Company Voluntary Arrangement and the latter a Part 26A proceeding under the *Companies Act 2006.* Nonetheless, it appears, in this author's opinion, that the High Court was incorrect to say that the *pari passu* rule is inapplicable in the case of a restructuring. In fact, in *Bond Co PLC v Strategic Value Capital Solutions,* [2024] EWCA CIV 24, [166], the UKCA discusses instances exemptions to *pari passu* in the cases of restructurings.

creditor's recovery is based upon the terms of an arrangement as approved by the various classes of creditors.[405] Since restructuring has, as its objective, the avoidance of ceasing business operations, the focal point of the process is ultimately modified. The differences in objective during a restructuring vs a liquidation were discussed in both recent Canadian[406] and English[407] case law. Restructurings generally have two goals: First, to keep the business a going concern so as to cause the least amount of harm to employees and the communities in which it operates. Second, to maximize the recovery of creditors by maintaining a high going-concern value.[408] Overall these two objectives work to allow a debtor company who maintains a higher value as a going concern than upon liquidation to continue operations in that way.[409] Restructurings ultimately necessitate the granting of the supervising court broad discretionary powers. This discretionary power is not absolute. It is utilised, in all three jurisdictions, as needed, to better effectuate the restructuring.[410] In *Adler*,[411] the English High Court indicated that, in restructurings, a plan will be approved if there is equal treatment of all creditors. The court need not assess whether such a plan is the best plan available, only that such a plan treats creditors equally.[412] While this ruling was subsequently overturned by the Court of Appeal, which held that sequential payments from a dwindling pool of assets did not properly reflect *pari passu,*[413] the idea that in restructurings some attention must be paid to the *pari passu* rule was affirmed.[414] However, the Court of Appeal

[405] Tamara Buckwold and Roderick Wood, 'Chapter 5: Priorities' in *Canadian Bankruptcy & Insolvency Law* (Lexis Nexis 2007), 107-108.
[406] *Canada v. Canada North Group Inc.,* 2021 SCC 30. [*Canada v Canada North*]
[407] Re AGPS BondCo PLC [2023] EWHC 916 (Ch).
[408] Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act,* 2nd ed. (2013: Carswell), 13-14.
[409] *Canada v Canada North,* supra note 412, [20].
[410] *Canada v Canada North,* supra note 412, [21], *Re Johns-Manville Corp.,* 68 B.R. 618 (Bankr. S.D.N.Y. 1986), 625.
[411] Re AGPS BondCo PLC [2023] EWHC 916 (Ch).
[412] Ibid [74]-[75]; *Bond Co PLC v Strategic Value Capital Solutions,* [2024] EWCA CIV 24, [179].
[413] *Bond Co PLC v Strategic Value Capital Solutions,* [2024] EWCA CIV 24, [193].
[414] Ibid, [166]-[167].

also stated that departures from *pari passu* can be made in a restructuring so long as there is a good and proper reason for this departure.[415]

Under the new English restructuring plan, unlike in American chapter 11 proceedings, the courts can even modify priorities so long as this ensures equal treatment of creditors.[416] In the United States, under § 1129 of the *Bankruptcy Code,* it is necessary that each class of claims either accepts the restructuring plan or is not impaired by it, and that all members of a specific class be treated equally.[417] In the Canadian context, courts are also able to alter the priority and can even grant super-priority over deemed trusts so long as the granting of said priority is to enable the debtor company remaining a going concern.[418] In all three jurisdictions, some modification of *pari passu,* or in American terms *pro rata* distribution, occurs in a restructuring as compared to a liquidation. This is due, in large part, to the desire of maintaining the debtor company a going concern. Of further note, in restructurings, priority rules play a crucial role in the proposal voting process as each class of creditors' votes are determined by their legal entitlements based on said priority.[419]

3.3. Notable Exceptions to the *pari passu* rule

3.3.1. Secured Credit

One notable area where *pari passu* distribution does not apply is in relation to secured credit. The idea that a secured creditor has priority in common law largely relates to the ideas of

[415] Ibid, [166].
[416] Ibid [80].
[417] *Re Johns-Manville* supra note 416 [629]-[630].
[418] *Canada v Canada North,* supra note 412 [24]-[26].
[419] Stephanie Ben-Ishai and Anthony Duggan, *Canadian Bankruptcy and Insolvency Law* (LexisNexis 2007), 107-108.

privity of contract and the protection of property rights.[420] So long as the contracting party was not insolvent at the time it granted a security interest, and such an interest does not offend any avoidance rules, including the anti-deprivation rule, then such secured credit is allowed to exist upon insolvency.[421] However, what is defined as a security interest has often depended upon fact scenarios. As an example, under Canadian law, a security interest, per s. 2(1) of the *Bankruptcy and Insolvency Act,* must be against property belonging to the debtor. If said property does not belong to the debtor, then a security interest will not be recognized.[422] Exemptions to the collective proceeding by secured credit holders have been justified by the notable advantages to secured financing, by reason that secured credit holders have less of a share in the growth of the business, and by the fact that a secured creditor has paid for the prior entitlement of having a higher probability of being repaid.[423]

Secured debts create an inherent tension with the *pari passu* rule. On the one hand, secured debt recognizes the principle of freedom of contract, and the recognition of individual property rights, whereas the *pari passu* principle speaks to the collectivity principle of insolvency.[424] This is even more apparent in both the United States and Canada where property is a state or provincial undertaking and bankruptcy is a federal one. As has been discussed in the previous chapter, this was a historical factor in allowing state property exemptions to still apply within the US Bankruptcy Code[425] and was one of the main objections to the *Bankruptcy Act of 1867*. Given that

[420] Gerard McCormack, *Secured Credit Under English and American Law,* (2004 Cambridge), 13.
[421] Moritz Brinkmann, 'The Position of Secured Creditors in Insolvency' (2008) 5 ECFR 248, 254.
[422] John D. Honsberger and Vern W. Dare, *Honsberger's Bankruptcy in Canada,* (5 ed. Thompson Reuters 2017), 409.
[423] Thomas H. Jackson, 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain' (1982) 91 *Yale LJ* 857, 871.
[424] Rizwaan Jameel Mokal, 'Priority as Pathology: The pari passu myth,' (2001) 60 *Cambridge Law Journal* 581, 581.
[425] Personal property exemptions are also covered by provincial law in Canada.

secured creditors are exempted from *pari passu* distribution, they are not allowed to vote or participate in a distribution unless they surrender their security.[426] As will be seen, with regard to anti-deprivation rule cases, the same tension between contract and insolvency law exists.

3.3.2. Rights of set-off

Another area of non-applicability of the *pari passu* rule is with regard to set-off. Set-off is an old and well-established principal of bankruptcy law which is meant to settle mutual debts owing between a debtor and creditor.[427] As an example, say a creditor owes $4,000 to a debtor, and the debtor owes $10,000 to the creditor, the net amount available for claim by the debtor is $6,000. In other words, the $4,000 owing to the creditor via the debtor is extinguished. Rights of set-off are contained within the legislation of all 3 jurisdictions. In England, such rules are contained within R14.25 of *The Insolvency (England and Wales) Rules 2016* where, in the case of mutual pre-insolvency debts owing between the debtor and creditor, "…only the balance is provable in a winding up."[428] Similarly, the Canadian *Bankruptcy and Insolvency Act* provides, in s. 97(3),[429] that set-off applies "…to all claims made against the estate of the bankrupt…" and the US *Bankruptcy Code,* under § 553 explicitly does not limit "…any right of a creditor to offset a mutual debt owing by such creditor to the debtor…" so long as that claim arose before the commencement of bankruptcy proceedings.[430] A similar set-off provision is also contained within s. 18.1 of the Canadian *Companies' Creditors Arrangement Act.* There is a notable distinction in rights of set-off under English law thanks to the wording in the statute, particularly with regard to

[426] Roy Goode, *Principles of Corporate Insolvency Law,* 4th ed. (2011:Sweet and Maxwell), 81.
[427] Vanessa Finch, *Corporate Insolvency Law, Perspectives and Principles,* 2nd ed., (2009: Cambridge), 614.
[428] *The Insolvency (England and Wales) Rules 2016,* R14.25
[429] Bankruptcy and Insolvency Act*,* s. 97(3).
[430] *US Bankruptcy Code,* § 553(a).

the terminology of "provable upon winding up." Under American[431] and Canadian[432] laws, set-off rights are not created in bankruptcy whereas English rules of set-off do not require that debts be free from uncertainty at the cut-off point.[433] This allows for a subtle degree of flexibility in the English context as compared with the American.

Irrespective of these subtle differences, in all three jurisdictions, set-off requires that both mutual debts be owed and that such debts arose, or in the English case be "provable," before the commencement of bankruptcy or insolvency proceedings. Set-off can also cause a scenario whereby a debtor is owed nothing, or even has a negative balance in a proceeding. Such a scenario informed the factual circumstances in *British Eagle.*[434] Obviously, under such a circumstance, set-off can bar a debtor from recovering anything from the estate. Although a case originating from the British Virgin Islands, in *Hague v. Nam Tai Electronics,* the Judicial Committee of the Privy Council rightly iterated two important points, firstly that set-off is a limited remedy which can only apply to pre-insolvency mutual debts and, secondly, attempting to apply it to debts created post-insolvency violates the *pari passu* rule.[435] In *Cooper-Jarrett v. Central Transport,* the US Court of Appeal for the Third Circuit decided that § 553 is clear in not allowing set-offs which came about after the filing of the bankruptcy petition.[436] The rule appears to operate similarly in Canada.[437] The ability to set-off does appear wider in England than elsewhere as, under the *Insolvency Act,* it is not required that debts be matured or certain by the cut-off date.[438] However,

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[431] *Cooper Jarrett, Inc. v. Central Transport, Inc.* 726 F.2d 93 (3d. Cir. 1984), [96].
[432] *Air Canada (Re),* 2003 CanLII 64234 (ONSC), [14].
[433] Citizens Bank of Maryland v Strumpf (1995) 516 US 16 See Gerard McCormack, 'Set-off under the European insolvency regulation (and English law)' (2020) 29 *Int Insol Rev* 100, fn. 35
[434] *British Eagle International Airlines Ltd v. Compagnie Nationale Air France* [1975] UKHL J0416-1.
[435] *Hague v Nam Tai Electronics Inc.* [2006] UKPC 52, [8].
[436] *Cooper Jarrett, Inc. v. Central Transport, Inc.* 726 F.2d 93 (3d. Cir. 1984), [96].
[437] *Air Canada (Re),* 2003 CanLII 64234 (ONSC), [14].
[438] Gerard McCormack, 'Set-off under the European insolvency regulation (and English law)' 29 *Int Insolv Rev* (2020) 100, 106.

in all three jurisdictions, it appears the right of set-off cannot be extended past their respective statutory regimes even by express mutual agreement of the parties.[439] As will be seen in the next chapter, the right of set-off was also argued unsuccessfully in *Chandos,*[440] the leading Canadian anti-deprivation rule case.

Beyond secured creditors and the rights of set-off, there are numerous other exceptions to the *pari passu* rule. These exceptions are based upon the idea that bankruptcy and insolvency laws operate within the realm of public policy. As such, the rules around distribution have to consider both whether certain assets should be made available to creditors and what exceptions should be made to *pari passu* distribution.[441] This has resulted in a modification of equality rules to fulfil a policy objective. As such, preferred, ordinary and deferred classes of creditors have emerged with the last two generally receiving much less upon liquidation.[442] The *pari passu* rule, although it is a fundamental policy which ensures that creditors are to be treated equally, has many exceptions in practice.[443] To better understand the *pari passu* rule, or rules around *pro rata* distribution, in its operation, it is imperative to understand the framework for priorities in each jurisdiction. The following, albeit brief, outline is meant to serve that purpose. Following subchapter 3.4, the thesis will discuss relevant *pari passu* rule decisions in each jurisdiction.

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[439] Rebecca Parry, Sharif Shivji, and Guy Olliff-Cooper, 'The Anti-Deprivation Rule and The *Pari Passu* Principle' in *Transaction Avoidance in Insolvencies,* Rebecca Parry, James Ayliffe and Sharif Shivji eds., (3 ed. OUP 2018), 312.
[440] See subchapter 4.8.1.
[441] Finch, supra note 433, 600.
[442] Sarah Wothington and Grainne Mellon, 'Statutory Rules, Common Law Rules and Public Policy in the Global Financial Crisis,' (2011) 29 *Penn State International Law Review* 613, 615. Gerard McCormack, 'Swelling Corporate Assets: Changing What is on the Menu,' (2006) 6 Journal of Corporate Law Studies 39, 42.
[443] Peter Walton, 'Execution Creditors – (Almost) the Last Rights in Insolvency' (2003) 32 Comm L World Rev 179, 179.

3.4. Priority in common law distribution

To understand how the *pari passu* rule operates, the statutory priority rules for each jurisdiction will be utilised. This analysis will also serve to illustrate how the *pari passu* rule is a dynamic rule, one which is continually modified by statute to protect groups each respective nation deems important. Through a brief discussion of each country's priority rules, one can see that the *pari passu* rule, being itself, a rule of public policy can be modified by other rules of public policy. Where each jurisdiction places emphasis says much not only about which classes of creditors they deem as worthy of special protection but of their views of the role of the system as a whole. Although analysis of priority rules will be brief and rather technical here, this is a subject which is deserving of greater scholarly attention and could be the subject of a major project in its own right.

3.4.1. Priority in English Insolvency

Under s. 328 of the *Insolvency Act, 1986,* the bankrupt's preferential debts are to be paid in priority to others. The categories of these debts are contained within Schedule 6 of the *Insolvency Act* by virtue of s. 386 thereof. Such preferential debts do not include secured debts as these are not covered by the scheme of distribution in the *Insolvency Act.* Considered "super-priority" creditors, these groups are not bound by *pari passu* distribution as, because of some proprietary interest, they may take money out of the insolvent estate.[444] Included in this category are secured creditors, title finance creditors, creditors with set-off,[445] beneficiaries under trusts and others such as owners wrongfully deprived of their property.[446] What is common to all these groups is that

[444] Philip R. Wood, 'The Bankruptcy Ladder of Priorities' (2013) 14 Bus L Int'l 209, 215; Gerard McCormack, *Secured Credit Under English and American Law,* (Cambridge 2004), 1-18.
[445] See Rory Derham, *Derham on The Law of Set-Off,* (4th ed. OUP 2010), 260-271.
[446] Philip Wood, supra note 450, 215-219.

they have either a right of set-off, security interest or a right as a beneficiary under a trust.[447] Accordingly, such creditors are able to circumvent insolvency laws. In practical, general, terms, creditors are paid in the following order:

1. Fixed charge holders,
2. Liquidator's fees and expenses,
3. Preferred creditors,
4. Floating charge holders,
5. Unsecured creditors
6. Interest incurred on all unsecured debts post-liquidation,
7. Shareholders.[448]

Under Schedule 6 of the *Insolvency Act 1986*, the following are considered preferred creditors:

- Category 4 – Contributions to occupational pension schemes.[449]
- Category 5 – Employee Renumeration.[450]
- Category 6 – Levies on Coal and Steel Production.[451]
- Category 7 – Deposits Owed by Financial Services Compensation Scheme.[452]

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[447] Philip Wood, supra note 450, 215.
[448] Practical Law, 'Order of creditor ranking on a debtor's insolvency' (*Thompson Reuters*, 1 December 2020) https://uk.practicallaw.thomsonreuters.com/9-518-5211?transitionType=Default&contextData=(sc.Default)&firstPage=true accessed 24 May 2023; Philip Wood supra note 450. The rules of priority can also depend upon whether a company is going through voluntary or compulsory liquidation. For a creditors' voluntary liquidation, the specific rules are contained within: *The Insolvency (England and Wales) Rules, 2016,* rules 6.42 (4)(a)-(k). For a compulsory liquidation, the specific rules are contained within: *The Insolvency (England and Wales) Rules, 2016,* rules 7.108 (4)(a)-(r). See also Andrew Keay, Andre Boraine & David Burdette, 'Preferential debts in corporate insolvency: a comparative study' (2001) 10 Int'l Insolvency Rev 167, 169-180.
[449] *Insolvency Act 1986,* Schedule 6, para. 8.
[450] *Insolvency Act 1986,* Schedule 6, paras. 9-15.
[451] *Insolvency Act 1986,* Schedule 6, paras. 15A-15AA
[452] *Insolvency Act 1986,* Schedule 6, para. 15B

- Category 8 – Other deposits that would have otherwise been an eligible deposit.
- Category 9 – Certain HMRC debts owed in respect of value added tax or a relevant deduction.[453]

As mentioned previously, the *pari passu* rule will apply to ensure equal distribution within each of these classes pursuant to s. 107 of the *Insolvency Act* 1986 and the principles of common law.

3.4.2. Priority in US bankruptcy

In U.S. bankruptcy proceedings, like in England, secured creditors have super priority. In the United States, this is provided not under the common law but in § 725 of the *Bankruptcy Code* and can only be granted following notice and a hearing.[454] After secured creditors have removed their security interest, the following claims are given priority as provided in § 507:

1. Administrative expenses[455] (defined as: "the actual necessary costs and expenses in preserving the estate"[456] – this most notably includes professional fees[457])
2. Involuntary case gap claims,[458]
3. Wages, salaries, or commissions,[459]

[453] These were recently added with the introduction of the *Finance Bill,* 2020. This provision was also implemented after HMRC was removed as a preferential creditor by the *Enterprise Act,* 2002.
[454] See *Bankruptcy Code* § 725.
[455] *Bankruptcy Code* § 507(a)(1). The rules for the compensation of professional fees, including when the court can disgorge them are contained within §§ 330 and 331 of the US *Bankruptcy Code.*
[456] *Bankruptcy Code,* § 503(b)(1)(A).
[457] American Bankruptcy Institute 'Chapter 11-101' *ABI Journal* (Jul/Aug 2004).
[458] *Bankruptcy Code* § 507(a)(2). See *Bankruptcy Code* § 507(f) – a claim that is made by a creditor after an involuntary petition has been filed but before the appointment of a trustee. The claim arises in an involuntary case only and must occur during the ordinary course of a debtor's business or financial affairs. It is given priority to encourage the creditor to continue doing business with the debtor until the bankruptcy case is resolved.
[459] *Bankruptcy Code* § 507(a)(3).

4. Contributions of employee benefit plans,[460]
5. Claims of grain farmers and United States fishermen,[461]
6. Consumer lay-away claims,[462]
7. Unsecured pro-petition taxes,[463]
8. Capital requirements of an insured depository institution.[464]

Once these claims are paid, the *Bankruptcy Code* provides, under § 726, that all general unsecured claims are paid next *pro rata.* There is then a question in US bankruptcy law regarding the timing of claims. If a claim is filed late, in an inexcusable manner, i.e. the creditor had knowledge of the case and did not file in time,[465] then they are paid after the general body of unsecured creditors under § 726(a)(3). Following unsecured creditors, § 726(a)(4) provides that both secured and unsecured claims for damages are to be paid next followed by interest per § 726(a)(5) pursuant to claims made under § 726(a)(1)-(4). Finally, anything left in the estate is payable to the debtor under § 726(a)(6) (this almost never occurs in practice).

All classes of claims are paid *pro rata* amongst each class.[466] This is similar but not entirely the same as the *pari passu* rule as, in the American case, the application of this principle can change based upon equitable circumstances as provided for in § 105(a) of the *Bankruptcy Code*. These powers, however, are limited to serving the purpose of the statute[467] are to only be exercised when

[460] *Bankruptcy Code* § 507(a)(4).
[461] *Bankruptcy Code* § 507(a)(5).
[462] *Bankruptcy Code* § 507(a)(6).
[463] *Bankruptcy Code* § 507(a)(7).
[464] *Bankruptcy Code* § 507(a)(8).
[465] See In re Columbia Ribbon & Carbon Manufacturing Co., 13 Bankr. Ct. Dec. 962 (Bankr. S.D.N.Y. 1985) and *Bankruptcy Code* § 726(a)(2)(C) for instances when a creditor was unaware of the firm's bankruptcy. The general rule is so long as the unaware creditor filed in time for distribution, their claim will be paid with other unsecured creditors.
[466] *Specker Motor Sales Co. v. Eisen,* 393 F.3d 659 (2004).
[467] Laura N. Coordes, 'Narrowing Equity in Bankruptcy,' (2020) 94 Am Bankr LJ 303, 316.

there are multiple meanings within the *Bankruptcy Code.*[468] Such equitable powers must be seen as limited, Coordes notes, since they are meant only to ensure the equity necessary to guarantee proper operation of the *Bankruptcy Code.*[469]

3.4.3. Priority in Canadian Bankruptcy and Insolvency

Unlike England and the United States, in Canadian law, secured creditors are not themselves considered, and are to be paid after, super-priority claims.[470] Super priority claims do not need to be provided for in the *Bankruptcy and Insolvency Act* but are also found in other Federal Acts of parliament. For example, in *RBC v. Sparrow,*[471] the Supreme Court of Canada determined that s. 227 of the *Income Tax Act,*[472] which created a deemed statutory trust for monies deducted from wages but not remitted to the government, enabled a super-priority over even secured claims. From a historical perspective, priority, on the part of the Crown, emanates from the common law doctrine of the "royal prerogative" and has since been limited to debts arising out of a government function such as direct taxation. As such, the Crown's priority generally does not apply in cases of ordinary business transactions carried out by the government and a private person or corporation.[473] Modern super-priority is established through deemed trusts via s. 67(3) of the *Bankruptcy and Insolvency Act* which creates an exception to the general principal that deemed trusts are to be avoided in favour of statutory trusts in respect of tax source deductions.[474] This allows trusts created from other areas of law to supersede those created in insolvency. In *Canada v Canada North,*[475] the

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[468] Ibid, 317.
[469] Ibid, 325; see also *Law v Siegel* 571 US 415 (2014).
[470] See *Toronto Dominion Bank v Canada,* 2020 FCA 80 (CanLII).
[471] *Royal Bank v Sparrow Electric Corp.,* 1997 CanLII 377 (SCC).
[472] RSC, 1985, c. 1 (5th Supp.).
[473] Anne E. Healy, *Crown Priority In Insolvency,* (Carswell 1986), 1-3.
[474] Buckwold and Wood, supra note 411, 111.
[475] *Canada v Canada North Group Inc,* 2021 SCC 30, [2021] 2 SCR 571.

SCC deemed that super-priorities can also be created by the courts in restructurings. These super-priorities effectively make the Canadian scheme of distribution operate in the following manner:

1. Super Priority Claims:

    a. Valid Trust Claims,

    b. Real property claims,

    c. Certain deemed trusts and super-priority pension wage claims,

    d. Claims pursuant to the *Wage Earners Act,*

    e. Qualified unpaid supplier claims,

    f. Unremitted payroll deductions,[476]

    g. Court-ordered charges in bankruptcy proceedings,[477]

    h. Unremitted Sales Tax (in Canada referred to as GST and HST) claims.[478]

    i. Environmental clean-up costs.[479]

2. Once super-priority claims are paid, payment is made in the following order pursuant to the *Bankruptcy and Insolvency Act* s. 136:

    a. Secured claims,[480]

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[476] *Sparrow,* supra note 477.
[477] Practical Law, 'Order of creditor ranking on a debtor's insolvency' (*Thompson Reuters*, 1 December 2020) https://uk.practicallaw.thomsonreuters.com/9-518-5211?transitionType=Default&contextData=(sc.Default)&firstPage=true accessed 26 May 2023.
[478] *Toronto Dominion Bank v Canada,* 2020 FCA 80 (CanLII).
[479] *Bankruptcy and Insolvency Act* s. 14.06(7); *Orphan Wells v. Grant Thornton Ltd.*, 2019 SCC (CanLII), [2019] 1 SCR 150; *Re Mantle Materials Group Ltd,* 2023 ABKB 488 (CanLII); *Travelers Capital Corp v Mantle Materials Group Ltd et al,* 2024 CanLII 48151 (SCC); Scott Birse, Dufferin Harper and Jordan Prestie, 'Extending the *Redwater* Super Priority Principle Beyond the Oil and Gas Industry' *Blakes Bulletins,* June 17, 2024 (accessed April 8, 2025) https://www.blakes.com/insights/extending-the-redwater-super-priority-principle-beyond-the-oil-and-gas-industry/
[480] *Bankruptcy and Insolvency Act,* s. 136(1)

b. Funeral expenses of a deceased bankrupt (less applicable in the corporate context),[481]
c. The cost of administration[482] (legal fees,[483] expenses and fees of the trustee,[484] and the expenses and fees of any person acting under s. 14.03(1)(a) of the *BIA*[485]),
d. Levies on dividends paid to secured, preferred and unsecured creditors,[486]
e. Wages, disbursements, salaries and commissions,[487]
f. Municipal taxes owing,[488]
g. Arrears for rent,[489]
h. Fees for land registration,[490]
i. Any tax amounts withheld and owing to the Canada Revenue Agency (Referred to as "His Majesty" in the Act),[491]
j. Claims for injuries or loss of work to employees in which the *Workers Compensation Act* claims are not eligible,[492]
k. Any Crown claims not already mentioned (this can be either Federal or Provincial).[493]

Following these priority claims, unsecured creditors are paid *pari passu.* All claims within each class are paid rateably according to the *pari passu* rule.[494]

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[481] *Bankruptcy and Insolvency Act,* s. 136(1)(a).
[482] *Bankruptcy and Insolvency Act,* s. 136(1)(b)
[483] *Bankruptcy and Insolvency Act,* s. 136(1)(b)(iii)
[484] *Bankruptcy and Insolvency Act,* s. 136(1)(b)(ii)
[485] *Bankruptcy and Insolvency Act,* s. 136(1)(b)(i)
[486] *Bankruptcy and Insolvency Act,* s. 136(1)(c), s. 147.
[487] *Bankruptcy and Insolvency Act,* s. 136(1)(d)-(d.1).
[488] *Bankruptcy and Insolvency Act,* s. 136(1)(e).
[489] *Bankruptcy and Insolvency Act,* s. 136(1)(f).
[490] *Bankruptcy and Insolvency Act,* s. 136(1)(g).
[491] *Bankruptcy and Insolvency Act,* s. 136(1)(h).
[492] *Bankruptcy and Insolvency Act,* s. 136(1)(i).
[493] *Bankruptcy and Insolvency Act,* s. 136(1)(j).
[494] *Chandos Construction Ltd. v. Deloitte Restructuring Inc.,* 2020 SCC 25.

3.5. *British Eagle* and the *pari passu* rule in England

Perhaps the most important case regarding the application of the English *pari passu* rule is *British Eagle*[495] which concerned a clearing house system, provided by the International Air Transport Association [IATA], designed to allow a customer to purchase an international airline ticket which involved multiple carriers.[496] The clearing house system was a generally smart idea as it allowed airlines to avoid making numerous payments to each other.[497] Essentially, the IATA Clearing House would hold monies in trust for the overall services rendered and such monies would appear on monthly statements as debits or credits owed to the other respective airline.[498] This was devised so that airlines would not owe individual debits and credits to one another. Debits and credits would be held in trust by the clearing house. Airlines were then either paid out or invoiced by the clearing house monthly. Under the clearing house system, all members were required to make all settlements of amounts payable pursuant to the applicable rules and regulations of the IATA Clearing House.[499]

British Eagle International Airlines Inc. would go insolvent, owing an overall debt to the clearing house but an overall credit to Air France on the IATA balance sheet. This created what is legally known as a set-off, summarised already in subchapter 3.3.2. In this case, IATA argued that the clearing house should be used to set aside cross claims against one another in favour of a balance.[500] Air France took its payment from the clearing house pursuant to the clearing house

[495] *British Eagle*, supra note 440.
[496] *British Eagle,* supra note 440*,* 2.
[497] *British Eagle,* supra note 440, 2.
[498] *British Eagle,* supra note 440, 3.
[499] *British Eagle,* supra note 440, 4.
[500] Rory Derham, *Derham on The Law of Set-Off,* 4th ed. (2010: Oxford), 1.

rules while the liquidator argued that this represented a privileged payment to Air France in contravention of the *pari passu* rule.

The liquidator, suing in the name of British Eagle, sought to have the amount owed by Air France returned to the insolvent estate. Air France believed the clearing house rules, of which there was a sub-rule in relation to default of one of its members should be applied. Such a rule provided that debts were only receivable and payable through the clearing house and that this should take precedence as all members of the clearing house were required to follow its rules as a precondition for membership.[501] In other words, while the liquidator argued that it should be possible to reach through the clearing house, Air France and IATA, believed that the clearing house itself should be able to act as either a debtor or a creditor in an insolvency proceeding. If such were the case, then the clearing house would not be a violation of the *pari passu* rule and Air France could keep the payment made to it on behalf of the clearing house. However, if the clearing house was not covered under the law of set-off then it would be considered a violation of the law of preference as such arrangements were not noted exemptions to the *pari passu* rule. *British Eagle,* although it involves an international element as Air France is a French company and the IATA was incorporated as a federal Canadian corporation,[502] is a case concerning the tension between the privity of contract and the *pari passu* rule under the applicable English law as British Eagle was an English Company. The question posed to the House of Lords was whether an arrangement, which serves a very real and justifiable purpose, violated the *pari passu* rule.

[501] *British Eagle,* supra note 440, 2.
[502] *British Eagle,* supra note 440, 2. Also of note here is that Quebec Civil Law would not apply in this case as it was a federally incorporated company and air transportation has been deemed a federal undertaking under s. 91 of the Canadian Constitution.

The House of Lords narrowly decided 3-2 that, although the clearing house system was created for good commercial purposes, it still effectively served as a method to avoid distribution under the *pari passu* rule. In Lord Cross' opinion, the clearing house created a "mini liquidation" which was ultimately subservient to the "general liquidation" of the entire estate.[503] This means that, although the clearing house was not a device used in bad faith, intended to grant one creditor preference over the other, it effectively created an environment where it objectively violated the *pari passu* rule. The dissenting opinions, however, believed that under a bona fide commercial purpose, so long as the device was not a deliberate attempt to give a preference upon liquidation, the clearing house system should be allowed.[504] In fact, dissenting judge Lord Simon went as far as saying that the liquidator "…has no higher claim than the company has before liquidation."[505]

A noted commentator, Dr Rory Derham has argued that the difference in opinion between the minority and dissent was whether each Law Lord believed debts remained owing between airlines. Essentially, the dissenting Lords believed that, as result of the clearing house rules, the clearing house itself was the debtor or creditor and not Air France as debts had already been paid from one airline to another. The majority, however, believed that the clearing house system, because the IATA regulations had described the rights of the members as debts, allowed each member of the clearing house to enforce the debt against the other member separately in liquidation.[506] In other words, the narrow majority believed the debts had not yet been satisfied.

[503] *British Eagle,* supra note 440, 20.
[504] *British Eagle,* supra note 440, 11.
[505] *British Eagle,* supra note 440, 11.
[506] Derham, supra note 506, 756.

Mokal argues that the decision in *British Eagle* was not as much about equitable distribution as it was about avoiding the collective liquidation regime.[507]

Interestingly, the Australian High Court determined in *IATA v. Ansett*[508] that a modification of the IATA clearing house rules, to disallow any liability nor right to recover payment between individual airlines,[509] effectively made the clearing house system not in contravention of the *pari passu* rule.[510] Gleeson, CJ, in his concurring judgement, went as far as saying that a clearing house system was a commercially practical device[511] and that public policy should not be used to invalidate the specific IATA Clearing House arrangement.[512] The *Ansett* case also followed direct Australian parliamentary intervention with *Payment Systems and Netting Act 1998 (Ch)* which recognizes the importance of netting in the prevention of systemic risk.[513] Perhaps, given the *pari passu* modifications under restructuring rules, as well as the rules for set-off as contained with rule 4.90 of the *Insolvency Rules* 1986, and rules 14.25 and 14.26 of the *Insolvency (England and Wales) Rules 2016,* this case may have been decided differently under the modern act. While this perhaps creates a different scenario in Australia, the effects-based rule from *British Eagle* is very strong precedent on the matter in respect of both English and Canadian[514] law.

The differences in opinion between the majority and dissent in *British Eagle* were regarding whether the *pari passu* rule should take on an effects-based or purpose-based test. This

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[507] Mokal, supra note 430.
[508] *International Air Transport Association v Ansett Australia Holdings Limited* [2008] HCA 3.
[509] *IATA v. Ansett,* ibid. [57].
[510] *IATA v. Ansett,* ibid, [94].
[511] *IATA v. Ansett,* ibid, [17].
[512] *IATA v. Ansett,* ibid, [28].
[513] See Rhys Bollen, '*British Eagle* revisited – airlines 'jumping the queue' in insolvency' Journal of International Banking Law and Regulation, p. 354, 2008, Journal of Banking and Finance Law and Practice, Vol. 19, No. 35, 2008, Available at SSRN: https://ssrn.com/abstract=1756687
[514] A.N. Bail Co. v. Gingras, [1982] 2 S.C.R. 475, 487; *Chandos,* supra note 4, [35].

standard would alter the way both this rule and the anti-deprivation rule were to be applied in future cases. While the majority argued that the purpose of the clearing house arrangement was irrelevant in determining applicability of the *pari passu* rule, the dissent argued that a valid commercial purpose, lacking deliberate attempt to evade a liquidation preference, was adequate. As such, the majority rejected the notion that the clearing house, itself, could serve as debtor or creditor in an insolvency proceeding.[515] Whether intentionally or not, the courts adopted an effects-based test over one which considered the purpose of the arrangement. As will be seen, this effects-based test for determining whether a transaction can be set aside by way of violating the *pari passu* rule was discussed in both *Belmont Park,* the leading English anti-deprivation rule case, and *Chandos,* the leading Canadian anti-deprivation rule case.

While the majority focused on the effect of the provision, the dissent focused on the purpose. Since the purpose of the clearing house arrangement was not specifically aimed at evading a preference upon liquidation, such an arrangement would have been justified under a purpose-basef standard. Nonetheless, the majority opinion has largely become the law on this matter in England and Canada.[516] So long as the effect is to circumvent the *pari passu* rule, a provision or mechanism is invalidated says *British Eagle.* While the UKSC adopted a purpose-based test for the anti-deprivation rule, the effects-based test for the *pari passu* rule was confirmed in *Belmont Park.* Therein, the UKSC adopted the reiterated application of *British Eagle* from *Carreras Rothmans:*

> "where the effect of a contract is that an asset which is actually owned by a company at the commencement of its liquidation would be dealt with in a way other than in

[515] Derham, supra note 506, 756.
[516] See Derham, supra note 506, 756-757, A.N. Bail Co. v. Gingras, [1982] 2 S.C.R. 475, 487.

> accordance with [the statutory pari passu rule] ... then to that extent the contract as a matter of public policy is avoided."[517]

The effects-based definition of the *pari passu* rule was also affirmed by the Supreme Court of Canada.[518]

3.6. U.S. pro rata distribution generally

Although the United States pro rata distribution mechanism is largely statutory in nature, the Supreme Court of the United States has iterated, similar to the *pari passu* rule in England and Canada, that:

> "Equality of distribution among creditors is a central policy of the Bankruptcy Code. According to that policy, creditors of equal priority should receive pro rata shares of the debtor's property."[519]

In other words, like the *pari passu* rule, which is applied to ensure equal distribution, so too are the American rules of *pro rata* distribution as contained within § 726 of the *Bankruptcy Code.* The similarities within these rules are likely no coincidence as much of the *Bankruptcy Code* is a codification of earlier practice.[520] Also, similar to how neither Canada nor England defines the term *pari passu* in their legislation, neither does the *Bankruptcy Code* define *pro rata.*[521] While it is currently unclear whether they are indeed descended from the same concept ultimately emanating from the *Statute of Henry VIII 1542,* such is a question for future research.[522]

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[517] *Belmont Park* supra note 7 [8], citing *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch 207, 226.
[518] A.N. Bail Co. v. Gingras, [1982] 2 S.C.R. 475.
[519] *Bergier v. Internal Revenue Service,* 496 U.S. 53 (1990), 110 S. Ct. 2258, [58].
[520] Coordes, supra note 473, 315; American Bankruptcy Institute supra note 463; see also the argument of Douglas Baird, *The Unwritten Law of Corporate Reorganizations,* (Cambridge 2022).
[521] American Bankruptcy Institute supra note 463.
[522] An in-progress project by myself and Laura N. Coordes is currently exploring this question.

Nonetheless, the method of payment of creditors thereunder operates in the following general manner pursuant to the *Bankruptcy Code.*

First, the property of the estate is reduced to money and vested in the trustee under § 704(1). Next, the property is distributed amongst priority claimants pursuant to § 507. What is left is distributed under § 726. The overlap between § 507 and § 726 has produced interesting results in the case law. The procedure for approval of equity under a restructuring plan is more complex and was discussed in great detail in *Re Johns Manville,*[523] a case dealing with the validity of a trust fund to pay future claimants of asbestos-related claims under § 1123(a)(4) of the *Bankruptcy Code*.

As a general rule, § 726 is meant to ensure that "…holders of claims at the same priority or distribution level be treated equally, so that one does not benefit at the expense of the other."[524] This rule, very similar to the English *pari passu* rule, is meant to ensure rateable distribution amongst each class of creditor. However, unlike the Canadian and English *pari passu* rule, the American rule is not entirely effects based. One area where § 726 *pro rata* distribution violations have been found is in respect to disgorgement of attorney retainer fees. As noted above, professional fees are given preferential treatment under the specific provisions contained within §§ 330 and 331 of the *Bankruptcy Code.*

In *Specker Motor Sales v. Eisen,*[525] the Court of Appeal for the 6th Circuit determined that an attorney's prior retainer fee, paid upon retention of the attorney during a bankruptcy proceeding, granted priority under § 507, was required to be returned to the trustee for equitable *pro rata* distribution. The reasoning of the court, who determined the question was entirely one of statutory

[523] *Matter of Johns-Manville Corp.* 69 B.R. 618 (Bankr. S.D.N.Y. 1986)
[524] *In re Leonard,* 132 B.R. 226 (Bankr. D. Conn. 1991), 229.
[525] *Specker Motor Sales Co. v. Eisen,* 393 F.3d 659 (2004)

interpretation, was that the required pro rata distribution, as provided under § 726(b), is a non-discretionary statutory requirement.[526] The court further concluded that § 726(b) does not simply apply to remaining, unsecured, non-priority, creditors but the pro rata requirements also apply to those with priority under § 507.[527] In deciding the case, the court made the following observation:

> "It is undisputed that, upon Chapter 7 dissolution, each of these administrative claimants receives only a pro rata share of the estate's remaining assets."[528]

In *Re Kearing,* in a conversion of a procedure from Chapter 11 reorganization to Chapter 7 liquidation, the court made it clear that the trustee needs to show an administrative deficiency in Chapter 7 liquidation and that the lawyer in question had received more than their fair share in relation to other Chapter 11 administrative claimants.[529] Of note, although Chapter 11 administrative expenses are not considered the same as the unsecured pool of creditors, they rank below Chapter 7 expenses following a conversion.[530]

However, since U.S. Bankruptcy Courts consider themselves to be courts of equity,[531] pro rata distribution, in the case of disgorgement of professional fees, is not necessarily absolute under U.S. law. The role of equity in U.S. Bankruptcy Court stems from the Judiciary Act of 1789 which gives federal courts broad authority to devise judicial remedies based upon the English Court of Chancery at the time of separation of the United States from Britain.[532] These equitable powers, in

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[526] Ibid [662].
[527] Ibid [662].
[528] Ibid [662].
[529] *In re Kearing* 170 B.R. 1 (Bankr. D.D.C. 1994), 8.
[530] *In re Headlee Mgmt. Corp.* 519 B.R. 452 (Bankr. S.D.N.Y. 2014), [456].
[531] *Re Johns-Manville* at 625, *Grupo Mexicano de Desarrollo, S.A. Et Al. v. Alliance Bond Fund, Inc., Et Al.,* 527 U.S. 308 (1999); 318, Laura N. Coordes, 'Narrowing Equity in Bankruptcy' (2020) 94 Am Bankr LJ 303.
[532] GRUPO MEXICANO DE DESARROLLO, S. A. V. ALLIANCE BOND FUND, INC. (98-231) 527 U.S. 308 (1999), [318].

the case of the federal system, are limited to "…the broad boundaries of traditional equitable relief."[533]

Such equitable powers, introduced briefly above, and meant to ensure the act operates as intended, are often used to grant relief that is not explicitly found within the Bankruptcy Code.[534] Utilising these traditional equitable powers, Bankruptcy Courts have found that the disgorgement of a lawyer's fees was held to not apply in the case of an attorney retained by the estate for non-bankruptcy litigation.[535] The Court of Appeals for the 6th Circuit has even stated that disgorgement of professional fees is not mandatory in all cases but is merely a tool at the disposal of a bankruptcy judge – a tool to be used in an equitable manner.[536]

As a result, the American use of equity appears to allow occasional modification of *pro rata* distribution in a way the test from *British Eagle* does not. As the example of disgorgement of professional fees demonstrates, the powers of the US courts appear more discretionary with regard to violations of § 726 *pro rata* distribution. This is in contrast to the purely effects-based standard of *British Eagle.* So, although pro rata distribution is the default position, U.S. Bankruptcy courts will, on occasion, impute principles of equity.[537] The equitable powers of the court will once again be relevant in Chapter 4 during the discussion of why the United States does not have an anti-deprivation rule.

[533] *ibid* [322].
[534] Coordes, supra note 473, 310.
[535] *In Re Chute,* 235 B.R. 700 (1990).
[536] *In re Unitcast, Inc.* 219 B.R. 741 (B.A.P. 6th Cir. 1998), 753.
[537] Coordes, supra note 473, 310.

3.7. The *pari passu* rule applied in Canada – the example of *Shoppers Trust*

The standard from *British Eagle* has been upheld by the Supreme Court of Canada on more than one occasion.[538] As an example, while on the Ontario Court of Appeal, future Canadian Supreme Court Justice Michael Moldaver had the opportunity to apply the *pari passu* rule in *Shoppers Trust.*[539] *Shoppers Trust* concerned a loan and trust corporation,[540] Shoppers Trust Corp., who, at the time of its insolvency, was the second largest such corporation in Canada.[541] The company, having gone insolvent, was granted an order to wind-up pursuant to Ontario's Winding-Up Act on August 19, 1992 with an effective winding up date of July 31, 1992.[542] At the time of winding up, it was apparent that Shoppers Trust had insufficient funds to pay all its creditors upon liquidation. However, due to unforeseen delays in the administration of the estate, and a good allocation of funds on the part of the liquidator, the liquidated assets accrued interest in the amount of $6 million.[543] The liquidator would seek instructions from an Ontario motions judge to determine how this $6 million in excess should be distributed. This scenario was quite similar to the well-known Lehman Brothers insolvency, which forms a major part of the analysis in forthcoming chapters, which resulted in an eventual surplus in the Lehman Brothers estate.

Shoppers Trust largely concerned whether motion for directions was correctly decided at the court of first instance. The liquidation utilised two separate funds, the Guaranteed Fund, which

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[538] *Canada Deposit Insurance Corp. v Canadian Commercial Bank,* 1992 CanLII 49 (SCC), [1992] 3 SCR 558; A.N. Bail Co. v. Gingras, [1982] 2 S.C.R. 475.
[539] *Shoppers Trust Corp. (Liquidator of) v. Shoppers Trust Co.* 74 O.R. (3d) 652 [2005], 2005 CanLII 7878 (ON CA).
[540] A loan and trust corporation is one which is incorporated under a provincial loan and trust corporations act (in this case the Ontario Loan and Trust Corporations Act, RSO 1990 c L25) and is a corporation which can accept deposits, lend money and perform trust functions but is not a bank. For the purposes of this thesis, it is subject to the same insolvency legislation of a corporation.
[541] Ibid [1].
[542] Ibid, [2].
[543] Ibid [3].

was meant to pay out the corporation's depositors, and the Company Fund, consisting of the company's assets, subject to the claims of all creditors.[544] Although the Guaranteed Fund had been effectively paid out, the Company Fund was still vested with the Liquidator by December 31, 2002. When arguing the motion, the liquidator presented a memorandum dated March 10, 1993. The memorandum contained a note that Canada Deposit Insurance Corporation [CDIC], who, through the right of subrogation, accounted for 99% of the claims against the Shoppers Trust estate,[545] agreed to accept April 24, 1992 as the interest calculation date for distributions from the Company Fund.[546] If such a memo were accepted as an agreement between the parties, it would mean CDIC waived its ability to collect any excess pursuant to the *Bankruptcy and Insolvency Act.* The motions judge accepted this as an indication that the Liquidator would not be paying any more interest to the Deposit and Ordinary Creditors unless there was a surplus remaining after the Company fund had satisfied all other claims.[547] In other words, the motions judge believed that the memorandum evidenced a waiver by CDIC for any further interest claims on the Company Fund.

Disagreeing with the proposed distribution plan, an appeal was filed by CDIC whose shortfall claim amounted to $40,250,000.[548] The Court of Appeal believed the motions judge erred and instead of viewing the claim for full amount of the principal plus interest as a practical procedural matter, it needed to be viewed in terms of "…the governing principle of insolvency

[544] Ibid. [9].
[545] Ibid [11].
[546] Ibid. [15].
[547] Ibid. [16].
[548] Ibid. [10].

law."[549] As a result, the Ontario of Court of Appeal viewed any potential waiver by CDIC as a violation of the *pari passu* rule and allowed the CDIC claims of principal plus interest:

> To interpret the order otherwise would be to prevent creditors with interest-bearing claims from proving their full entitlement to pre-winding-up interest and to benefit the subordinate noteholders (whose claims are inferior to all other claims) unfairly, thus contravening the pari passu principle that is fundamental to insolvency law."[550]

Shoppers Trust is a practical application of the principle affirmed again by the SCC in *Chandos,* namely, that "…the *pari passu* rule forbids contractual provisions that would allow certain creditors to receive more than their fair share."[551] In the Canadian context, similar to the English, the *pari passu* rule was shown to be an effects-based rule, applied using the same standard as *British Eagle,* by the SCC in *Gingras*[552] – an approach affirmed by the same court in *Chandos.*[553]

Important in *Shoppers Trust* is that the *pari passu* rule is shown to be very difficult to contract out of. Although there appeared to be a waiver of priority, as shown by the Liquidator's 1993 Memorandum, the *pari passu* rule ended up trumping its application. The court in *Shoppers Trust* allowed CDIC to be paid from the accruing interest as, not doing so, would have created an effective *pari passu* violation. Although the liquidator's memorandum appeared to be a waiver of this right, the change in circumstances caused by the delay in winding-up the estate inevitably granted CDIC to more available monies than they otherwise would have been if the liquidation had occurred according to the original schedule. As was the case in *British Eagle, Shoppers Trust* shows that, even with an indication of agreement to the contrary, the *pari passu* rule still applies

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[549] Ibid [19].
[550] Ibid. [29].
[551] *Chandos,* supra note 4 [12].
[552] A.N. Bail Co. v. Gingras, [1982] 2 S.C.R. 475, 487.
[553] *Chandos,* supra note 4 [35].

so long as any transaction's effect is to allow a creditor, or group thereof, to receive more than their fair share. As in England, fairness or justifiable commercial purpose are both irrelevant in determining whether the *pari passu* rule has been violated in Canada.

Two important observations can be made from the application of the *pari passu* rule in *Shoppers Trust*. First, it shows a circumstance whereby the *pari passu* rule can and will apply in Canadian law (i.e. where there is a significant delay in administrating the insolvent estate and more interest had accrued on the monies held in trust). Second, the case shows that the *pari passu* rule is determined on an effects-based standard. Once the rule is triggered, a justifiable business purpose, in this case an indication that a creditor has waived its right to be paid rateably, is irrelevant in deciding whether the *pari passu* rule applies or not. This is not surprising given the SCC has affirmed the rule in *British Eagle* on more than one occasion.

Although the *pari passu* rule is largely extant in both Canada and England, and appears to have found its way into the statute in the United States, it still begs the question of whether, given the priority provisions outlined in subchapter 3.4, the concept is still relevant in common law insolvency. The next section will look into arguments against the relevance of the *pari passu* rule and the erosion of such by statutory priority rules.

3.8. Is the *pari passu* rule still relevant?

Rizwaan Mokal delivers some criticisms regarding the *pari passu* rule as a default rule in insolvency law. He believes that it is merely theoretical and that it has been severely eroded by statutory preferences. So much so that, as a general rule, nothing is distributed to the unsecured

creditors to whom the *pari passu* rule mostly applies.[554] Mokal argues that *pari passu* distribution is virtually non-existent and, in spite of this realisation, scholars still hang onto this idea even though, in practical terms, it is a myth.[555] He further argues, based upon oft-cited case law regarding the *pari passu* rule, that these cases were not about opting out of *pari passu* distribution but opting out of the winding-up system as a whole.[556] According to Mokal, the *pari passu* rule was never really implemented in practice, by virtue initially of the Crown's statutory liens, pursuant to s. 32 of the *Bankruptcy Act 1869*,[557] and continues to not be implemented by virtue of the priority rules contained within the modern *Insolvency Act* 1986.[558] The main argument advanced by Mokal is that, given that it has never really applied in practice, the *pari passu* rule is not necessary to ensure fairness in liquidation.[559] Look Chan Ho argues similarly that the courts' application of the *pari passu* principle is oftentimes confused with the related collectivity principle which is concerned not with distribution but the conservation of the estate.[560]

David Milman, believes that, although the *pari passu* rule has been significantly eroded, it has significant practical applications.[561] Vanessa Finch argues that corporate insolvency law is not merely a device to ensure the maximisation of creditor wealth but to also further public policy interests.[562] As an example, in *British Eagle,* the *pari passu* rule was applied to prevent individual, incomplete, debt enforcement and execution from continuing parallel to a formal insolvency

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[554] Rizwaan Jameel Mokal, 'Priority as Pathology: The *Pari Passu* Myth' (2001) 60 *Cambridge Law Journal* 581, 588.
[555] Ibid, 589.
[556] Ibid, 596-597.
[557] Ibid, 596.
[558] Ibid, 585-586.
[559] Ibid, 620.
[560] Look Chan Ho 'The principle against divestiture and the pari passu fallacy' (2010) 25:1 Buttersworth Journal of International Banking and Financial Law 3, 5 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1541203> accessed 13 June 2023.
[561] David Milman, 'Promoting distributional justice on corporate insolvency in the 21st century,' in *Mass Justice,* Jenny Steele and William H. van Boom eds., (Elgar 2011), 172.
[562] Finch, supra note 433, 601.

proceeding.[563] Similarly, in the Canadian context, in *Shoppers Trust,* the *pari passu* rule was utilised to fulfil a genuine, important, policy objective. CDIC encourages investment and savings in Canadian financial institutions and, without the court's ability to apply the common law *pari passu* rule, its ability to fulfil that function could have been seriously eroded.

Similar criticisms have been advanced by David Skeel in the United States where *pro rata* distribution is generally regarded as being part of the "equality of creditors" principle as affirmed in an 1807 Massachusetts bankruptcy case.[564] Skeel notes that this principle has been eroded through various means[565] and is, in his opinion, no longer practically applicable in the bankruptcy context.[566] Skeel believes that the concept of equality has three dimensions: First, it has a moral dimension regarding the relationship of people to one another. Second, it creates a beneficial presumption against differential treatment. Third, the language of equality, in and of itself, has emotional resonance which shapes a particular emotive response in people.[567] Skeel believes that first the boundaries of those who are favoured is far less clear in bankruptcy than elsewhere while also recognizing that courts have accepted the notion that equality is unfair in certain circumstances. Second, he contends that the advocates for equality have historically been strong out-of-state creditors and not vulnerable individuals and that creditors, such as bondholders, are now in a position of strength, not weakness. Third, he now believes that equality language no

[563] Milman, supra note 567, 173.
[564] Locke v. Winning, 3 Mass. (1 Tyng.) 325, 326; David A. Skeel Jr., 'The Empty Idea of "Equality of Creditors"' (2017) 166 *U Penn LR* 699, 705.
[565] Skeel, ibid. 714-720.
[566] Skeel ibid, 742-743.
[567] Skeel, ibid. 741.

longer has any real "rhetorical value."[568] As a result, Skeel believes that equality of creditors should no longer be viewed as "the central principle of bankruptcy."[569]

Despite some of these criticisms, the *pari passu* rule might be better seen not as an objective statement of fact but a device, of the courts, to set aside a transaction that would otherwise result in an unjust result. It is a device which ensures that creditors within a certain class are paid rateably within that class. Since it has been determined as a rule inherent in statute,[570] it can also be modified by statute. Since bankruptcy law is inherently statute law, then it should follow that the *pari passu* rule is merely an expression of policy, as are priority rules. Furthermore, Australian Commentator Nishad Kulkarni notes that the collectivity principle referenced by Ho is that which underpins the anti-deprivation rule.[571] Since the courts in Canada and the UK have expressed that both the *pari passu* and anti-deprivation rules are two sub-rules of singular purpose,[572] perhaps the *pari passu* principle is also an expression of collectivity. Such confusion around terminology and categorisation of the rules further underlines the importance of studying the *pari passu* rule alongside the anti-deprivation rule. Keay has argued that the objectives of any bankruptcy or insolvency regime are not to ensure creditor wealth maximization but to balance the interests of creditors, debtors and the public interest.[573]

With this in mind, perhaps the distinctions between the anti-deprivation rule, the *pari passu* rule and the collectivity principle are artificial creations, based upon judicial attempts to clarify the objectives either inherent within the statutes or to promote a societal goal. As a result, while the

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[568] Skeel, ibid, 742-743.
[569] Skeel, ibid, 744.
[570] *Belmont Park,* para. 7, *Chandos* para. 12
[571] Nishad Kulkarni, 'A Statutory Basis for the Anti-Deprivation Rule' (2014) 23 International Insolvency Review 73, 96.
[572] *Belmont Park,* supra note 7 [9]-[15], *Chandos,* supra note 4, [12].
[573] Andrew Keay, 'Balancing Interests in Bankruptcy Law' (2001) 30 Comm L World Rev 206.

principle of equality, and the *pari passu* rule, no longer apply as they once did in the early days of bankruptcy practice, perhaps it would be rather haste to eliminate these concepts altogether. However, certain devices, such as the super priorities contained in Canadian law, a direct descendant of the statutory liens mentioned by Mokal above, seem to be a much more severe violation of creditor equality. These are particularly problematic as they allow certain creditors, in particular the Canada Revenue Agency, the ability to hold the estate hostage. Surprisingly, the drawbacks of super priority have been discussed sparingly in Canadian academic discourse.

In any event, the courts in all three jurisdictions ultimately rely on the general concepts of *pari passu* distribution and the equality of creditors in their reasoning. This means that irrespective of how much it has been eroded by the priorities provisions in all three countries, the ideas are still foundational to common law insolvency systems and should not be eliminated wholesale. While perhaps practically not as relevant as in older times, the *pari passu* rule is still foundational to our understanding of insolvency. This is especially true as it relates to understanding the anti-deprivation rule.

3.9. The *pari passu* rule and the anti-deprivation rule

The overlap between the *pari passu* and anti-deprivation rules was discussed extensively in both *Belmont Park* and *Chandos* yet the summary from the "Carlton" Appeal in *Lomas v. JFB Firth Rixson*[574] is probably the most clearly expressed clarifications of these two highly related principles. This appeal, which followed the *Belmont Park* decision, concerned derivatives, specifically credit swap agreements between Lehman Brothers Special Financing Incorporated (LBSF) and Carlton Communications Limited, which allowed the latter to hedge its fixed rate

[574] Lomas & Ors v JFB Firth Rixson Inc & Ors [2012] EWCA Civ 419

interest exposure.[575] LBSF, as a subsidiary of Lehman Brothers Holdings Inc (LBHI), entered into US Chapter 11 proceedings on October 3, 2008 while the parent did so in the previous month on September 15, 2008. Under the swap agreements March 2, 2009, was deemed the last payment date. By that date, LBSF was entitled to a payment from Carlton of over £2.5 million. Under s. 2(a)(i) of the International Swaps Dealers Association's Master Agreement, there is an obligation for each party to make payments as specified in the Confirmation (a device which enables the transactions to be confirmed and paid) while s. 2(a)(ii) stipulates that such a payment is due on the date specified within the Confirmation. Section 2(a)(iii), however, sets a condition precedent that "…no event of Default or Potential Event of Default with respect to the other party has occurred and is continuing…"[576] The question on this appeal was whether the operation of s. 2(a)(iii) engaged either the *pari passu* or anti-deprivation rules. The court dismissed the appeal concluding that, unlike in *British Eagle,* s. 2(a)(iii) operated merely to prevent a relevant debt from becoming payable, and as such, no such challengeable property existed.[577] While this case illustrates a limit placed upon the effects-based *pari passu* rule, the case also clearly delineates the *pari passu* and anti-deprivation rules.

In its reasoning, the Court of Appeal made interesting observations regarding the relationship between the *pari passu* and anti-deprivation rules:

> The relationship between the anti-deprivation principle and the *pari passu* rule is both dependant and autonomous. The former is concerned with contractual arrangements which have the effect of depriving the bankrupt estate of property which would otherwise have formed part of it. The *pari passu* rule governs the distribution of assets within the estate following the event of bankruptcy. It therefore invalidates arrangements under which a creditor receives more than his proper share of the

[575] Ibid, [64].
[576] Ibid, [5].
[577] Ibid, [97]-[98].

> available assets or where (as in British Eagle) debts due to the company on liquidation were to be dealt with other than in accordance with the statutory scheme.
>
> The anti-deprivation therefore protects the value of the estate from attempts to evade the insolvency laws and, as a consequence, facilitates the application of the *pari passu* rule.[578]

Both rules, of mixed statute and common law,[579] are implicit prohibitions contained within respective national bankruptcy and insolvency legislation. Given that the anti-deprivation rule serves to ensure distribution *pari passu,* the application of both rules can often overlap. Indeed, when *Belmont Park* was decided*,* the UK Supreme Court was tasked with parsing through many cases to ascertain when and how the anti-deprivation rule should be applied. The court even indicated that many cases which sought to apply the anti-deprivation rule also contained attempts to disrupt *pari passu* distribution.[580] This, in the English context, led to some degree of confusion in the application of both rules.[581] The UKSC's determination regarding the separation of the *pari passu* and anti-deprivation rules was followed by the SCC in *Chandos* where it was determined that both rules formed different branches of the "fraud upon the bankruptcy law" principle.[582]

It is important to note then that the two rules are not mutually exclusive but exist, as a group, to holistically prevent activity which is offensive to the statute. While the anti-deprivation rule applies to invalidate transactions which deprive the estate of value, the *pari passu* rule applies to ensure that creditors are not paid more than their fair share. For distribution to occur *pari passu*, there must be value within the insolvent estate. Therefore, as in the contention above*,* the anti-

[578] Ibid, [96]-[97].
[579] *Chandos* supra note 4 [12].
[580] *Belmont Park* supra note 7 [9]-[12].
[581] Eugenio Vaccari, 'The Normative and Jural meanings of the anti-deprivation principle vis-à-vis freedom of contract,' (2022) 31 *International Insolvency Review* 235, 236-237*; Belmont Park,* supra note 7 [58].
[582] *Chandos* supra note 4, [12].

deprivation rule, by ensuring value remains within the insolvent estate, ensures *pari passu* distribution.

As noted above, the Supreme Court of Canada has stated that both the anti-deprivation and *pari passu* rules are sub-rules of a broader "fraud upon the bankruptcy law" principle. These rules "…both invalidate contracts that affect the distribution of proceeds in bankruptcy."[583] This "fraud upon the bankruptcy law" principle is part of a residual common law, based upon early English bankruptcy acts, never fully eradicated by modern statute.[584] These sub-rules of that principle are available for use by nature of the courts' inherent jurisdiction to fill in gaps within the statutory rules.[585] In England, although the term "fraud upon the bankruptcy law" is not expressly used to underpin the underlying principle from which both rules emanate, its applicability to the English context is nonetheless similar as in *Belmont Park* the UKSC explicitly separates the anti-deprivation and *pari passu* rules as two sub-rules.[586] This notion of a "fraud upon bankruptcy law" principle is reminiscent of the language used both in the title of the *Statute of Elizabeth 1571* as well as the nomenclature of the "badges of fraud" from *Twyne's Case.*[587] As the overview of case law in *Belmont Park* indicated, two distinct rules appear to have existed under English law – this author's opinion is that they were simply not flushed-out. Such was also illustrated by subchapter 2.8 in the discussion of the origins of the anti-deprivation rule. Nevertheless, since both rules are inherently court-extensions of statute, both rules can also be modified by statute. Such is the case with respect to statutory avoidance measures as well as the statutory priority distribution rules as

[583] *Chandos* supra note 4 [12].
[584] Roderick Wood, supra note 391, 11.
[585] Roderick Wood, supra note 391, 11.
[586] *Belmont Park* supra note 7, [9].
[587] See the analysis in subchapter 2.5.

outlined above. Examples of statutory rules, and how they interact with both the anti-deprivation and *pari passu* rules will be discussed in greater detail in chapter 6.

As established devices emanating from the court's inherent jurisdiction to fill in gaps within the statute, how the court applies these rules is also relevant. The courts in both Canada and England have utilised an effects-based standard in ascertaining whether a provision offends the *pari passu* rule. However, as indicated above, in the United States, the broad equitable powers appear to allow some degree of subjective analysis. This is likely due to the *British Eagle* decision not forming part of the American common law as well as the inclusion of a broad equitable powers in the *Bankruptcy Code*. It is important to note here that *British Eagle* was a narrow 3-2 decision of the House of Lords indicating that, prior to this decision, the applicable effects-based standard was hardly a developed concept. It is perhaps imperative then, when each jurisdiction was tasked at developing a standard for the anti-deprivation rule, the question of whether to adopt an effects or purpose based standard similarly required an answer. Perhaps it is less than surprising that the courts in Canada and England have taken differing views on which standard to use with regard to the anti-deprivation rule. While case law on both the *pari passu* and anti-deprivation rules is perhaps indicative of how courts deem the notion of fraud in the insolvency context, from a practical standpoint, the distinction between an effects-based and purpose-based rule, has led to an interesting development in case law post-*Belmont.* Since the *pari passu* rule applies the more objective effects-based test, plaintiffs have often sought to utilise it over the anti-deprivation rule.[588] This was the case in both *Lomas v JFB Firth Rixson* and *HMRC v The Football League.*[589] As will be seen in the next chapter, the SCC in *Chandos* actually discussed such concerns, relating

[588] Niven supra note 400, 16.
[589] *Her Majesty's Revenue and Customs Commissioners v The Football League Ltd* [2012] EWHC 1372 (Ch).

to consistency of application between the anti-deprivation and *pari passu* rules, in deciding upon an effects-based standard for both.[590]

3.10. Conclusion to the Chapter

In conducting this brief overview of the *pari passu* rule, alongside selected case law from each of the jurisdictions, it is clear the anti-deprivation and *pari passu* rules share a cooperative existence. While the discussed statutory priority rules can modify the *pari passu* rule, just as avoidance rules can the anti-deprivation rule, neither rule has been eliminated in the bankruptcy and insolvency context. While both the anti-deprivation and *pari passu* rules are related, they also exist as unique, separate, rules of principled application based upon notions of the prevention of fraud inherent in the *Statute of Elizabeth 1571* and, to a lesser extent, the *Statute of Henry VIII 1542*. These principles, having survived a more than 450-year history, are foundational concepts emanating from the courts filling in gaps within ever-evolving national statutory regimes. Although the *pari passu* and anti-deprivation rules are related, it is perhaps areas of differentiation which are of greater interest to the scholar. Of these differences in application, the most important is perhaps timing. While the anti-deprivation rule applies to invalidate transactions which remove assets from the insolvent estate, thereby applying once the entity goes insolvent, the *pari passu* rule is meant to ensure that every creditor, within their class, is paid rateably thereby applying once the proceeding has already commenced. While the next chapter will discuss the application of the anti-deprivation rule, alongside similar US legal principles, these cases must be read with an understanding of the scheme of distribution which is ultimately bound by necessary *pari passu*

[590] *Chandos,* supra note 4, [35].

distribution. As per the dictum in *Lomas* in sub-chapter 3.9 above – the anti-deprivation rule ultimately serves to ensure *pari passu* distribution.

Chapter 4 – The Anti-deprivation Rule

4.1. Introduction

While the *pari passu* rule is the underlying rule which ensures the equal distribution of creditors, the anti-deprivation rule underpins any fraudulent taking from the insolvent estate. The anti-deprivation rule, as has been alluded to, was debated in the highly influential *Belmont Park*[591] decision. In that decision, as has been discussed, the United Kingdom Supreme Court (UKSC) differentiated the *pari passu* and anti-deprivation rules. In doing so, the UKSC created two distinct standards of application, one for the anti-deprivation rule and another for the *pari passu* rule. In the United States, where, as chapter 2 illustrates, similar principles which underpin the anti-deprivation rule seem to have led to codification of these principles within the *Bankruptcy Code*. In Canada, the anti-deprivation rule has taken a different interpretation to that of England in that both it and the *pari passu* rule are applied using the same effects-based standard. All three jurisdictions will be discussed, with particular emphasis on Canada and England, whose approaches will be compared so to illustrate this pertinent example of common law divergence.

Part 1 will discuss the English anti-deprivation rule. This discussion will largely utilise *Belmont Park* while supplementing this decision with subsequent case law. Part 2 will then proceed with an analysis of scholarly discussions around the rule from *Belmont Park*. Part 3 will be a discussion of the statutory rule in the United States relying upon recent scholarship to illustrate how similar principles have made their way into the *Bankruptcy Code*. Part 4 is a discussion of the Canadian rule. This discussion will begin with earlier case law which led to the *Chandos* decision.

[591] *Belmont Park Investments PTY Limited v BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing Inc* [2011] UKSC 38.

Part 5 will discuss *Chandos* and subsequent decisions. Such will be utilised to illustrate the divergence of the rule in Canada from that of England. Finally, part 6 of this chapter will attempt a brief comparison, utilising the conceptual methodologies from Chapter 1 and Chapter 2, to help orient the reader in understanding the reasons for this divergence.

By the end of this chapter, the reader should have a thorough understanding of the practical application of the anti-deprivation rule in both England and Canada, how it differs from the similar *pari passu* rule, and why there is no anti-deprivation rule applicable to proceedings under the U.S. *Bankruptcy Code.* This should be read with an eye to differences and similarities so as to compare and contrast the laws of all three countries.

4.2. *Belmont Park* and the English anti-deprivation rule

4.2.1. Facts of the Appeal

Belmont Park is a United Kingdom Supreme Court (UKSC) case that resulted from the impact of the 2008 financial crisis on a globalised world. The case involves the now infamous Lehman Brothers Group which, at the time of its parent company, Lehman Brothers Holdings Inc. (LBHI)'s *US Bankruptcy Code*[592] Chapter 11 filing, was the fourth largest investment bank in the United States.[593] *Belmont Park* concerned the effect of a complex series of securities arrangements involving credit default swap (CDS) derivatives which were utilised to create a synthetic collateralized debt obligation (synthetic CDO).

A CDS works by allowing one investor to offset their credit risk with that of another investor. A lender buys a CDS from another investor and they agree to reimburse the first investor if the borrower defaults. In *Belmont Park,* Lehman Brothers initiated the "Dante Programme" with

[592] BANKRUPTCY, US Code Title 11
[593] *Belmont Park,* supra note 7, [18].

various incorporated entities, Lehman Brothers Special Financing Inc. (LBSF) and a number of special purpose vehicles (SPVs), to create what they called a "synthetic debt repackaged note issuance programme"[594] known, in colloquial investing terms, as a synthetic CDO.

Synthetic CDOs, following the 2008 global financial crisis, came under much scrutiny[595] with their eventual decline, alongside other credit default swaps, in the decade that followed.[596] This decline came about largely thanks to the Volcker Rule,[597] which forbade banks from owning, investing or sponsoring hedge funds, private equity funds or proprietary trading operations, for profit, which were unrelated to serving their customers.[598]

A synthetic CDO, is a highly complex securities arrangement. Put simply, a regular CDO is a structured asset-backed security which contains different levels of debt, or tranches, with various credit-risk attributed to each. It is backed by collateral which are made of property or assets offered in exchange for securing a loan or other credit. The most common type of CDO is the Mortgage-Backed Security (MBS). The CDO operates by dividing up the credit risk between the multiple tranches. Any loss that affects the first tranche ("equity" tranche) will then affect the next tranche ("mezzanine tranche") and lastly the "senior tranches." All such tranches bear differing percentages of gains or losses and are all independently rated by a rating agency – typically Moody's.[599]

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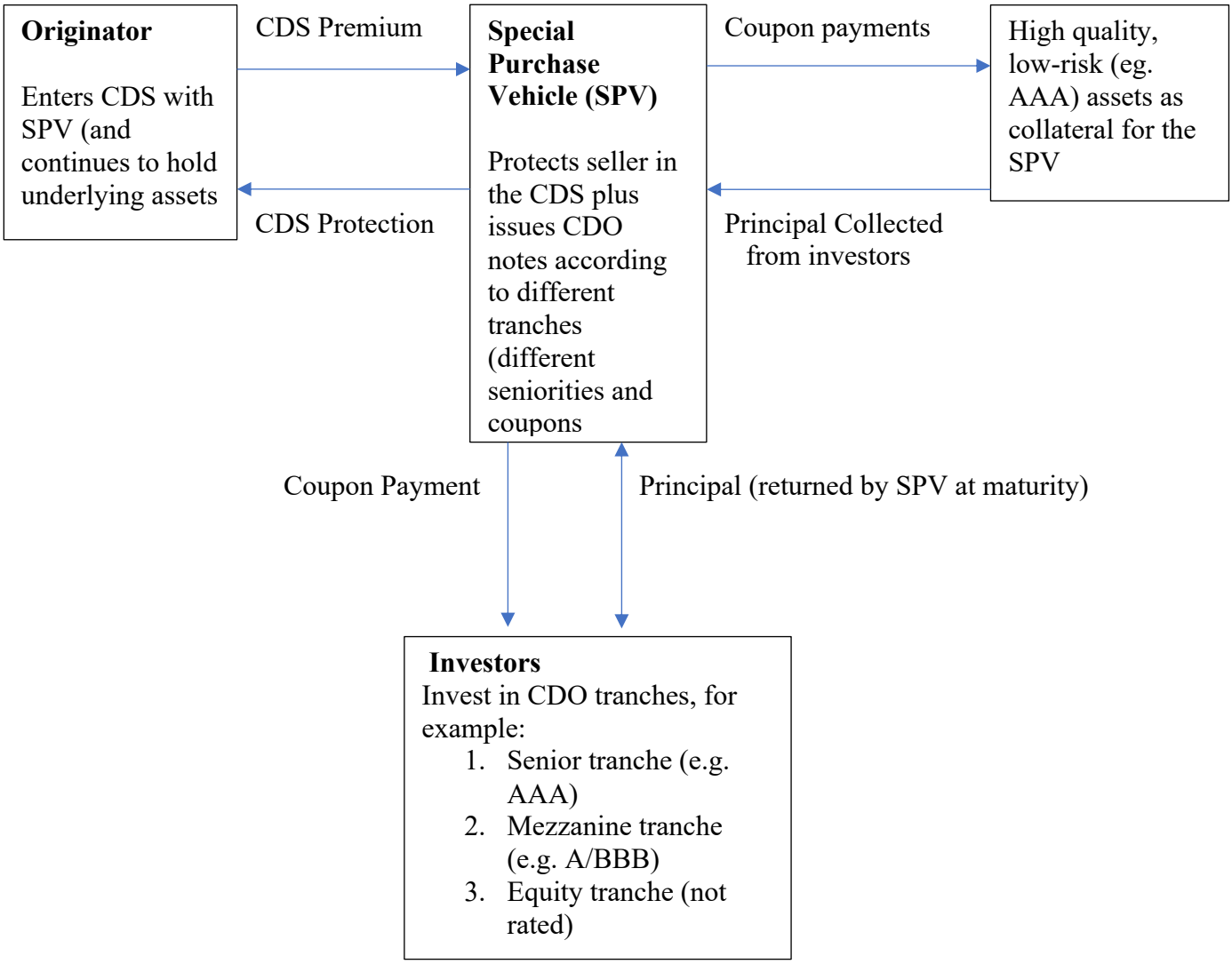
[594] *Belmont Park,* supra note 7, [20].
[595] See Neal Deckant 'Criticisms of Collateralized Debt Obligations in the Wake of the Goldman Sachs Scandal,' 30 Rev. Banking & Fin. Law (2010-2011) 407 for a detailed analysis of criticisms levelled at synthetic CDOS.
[596] In Iñaki Aldasoro and Torsten Ehlers, 'The credit default swap market: what a difference a decade makes,' (2018) 2 *BIS Quarterly Review*, the authors showcase that the credit default swap market was reduced from $61.4 Trillion to $9.4 Trillion from 2007-2017.
[597] Officially Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 1851, § 619.
[598] Elizabeth Holowecky, Ashely Murry, Violeta Staneva, and Jayne Fuglister, 'Bank Regulatory Reform in the United States: The Case of Goldman and the Volcker Rule,' (2010) 6 *Journal of Business Case Studies* 6 63.
[599] Franklin M. Lartey, 'Ethical Challenges of Complex Products: Case of Goldman Sachs and the Synthetic Collateralized Debt Obligations,' (2020) 13 *International Business Research* 6, 117.

What is unique about synthetic CDOs is they are not backed by any asset but by Credit Default Swaps which are agreements between two different parties – one party bets that the CDO with its pool of MBSs will pay off as scheduled, while the other bets on the failure of the underlying mortgages.[600] Basically, in a synthetic CDO, the result is that one party, the short-party, makes periodic payments to the other, the long-party, until a trigger of events occur in the form of credit default, at which point the long party must pay the short party.[601] This means that the short-party makes periodic payments to protect itself against credit risk while the long party receives payments for assuming that risk.[602] Although synthetic CDOs began as a very small part of the CDO market, by 2007, synthetic CDO transactions were valued at more than $1.5 trillion annually.[603]

The *Belmont Park* case involves a synthetic CDO, known as the "Dante Programme," created by Lehman Brothers involving an SPV in a favourable jurisdiction, in this case the Cayman Islands. Investors would then subscribe to notes of the SPV and the SPV would then use the subscription monies to purchase mainly debt securities (Collateral) vesting in the trustee – BNY Corporate Trustee Services Limited. LBSF would then enter a CDS agreement with the SPV, paying the SPV amounts due by the SPV to the investors exchanging this for payments by the SPV to LBSF with amounts equal to the interest received on the Collateral. Under the CDS agreement, upon maturity of the Notes, the amount payable by LBSF to the SPV was the principal amount minus amounts as calculated with reference to the provisions around Credit Events. This allowed for payments due from LBSF at maturity of the CDS agreement to be reduced during the term thereof. This would occur if Credit Events occurred and were notified according to the terms of

[600] Ibid.
[601] Deckant, supra note 601, 415.
[602] Deckant, supra note 601, 415.
[603] Deckant, supra note 601, 411; See also Rizwaan J. Mokal, 'Liquidity, Systemic Risk and the Bankruptcy Treatment of Financial Contracts, (2015) 10 Brooklyn Journal of Financial and Commercial Law 17, 40-45.

the CDS agreement. If such Credit Events occurred, amounts payable to LBSF and the principal amount due on the notes were to be reduced periodically.[604] This type of synthetic CDO is illustrated by the following diagram:[605]



As with any security, the performance of the Notes was linked to the performance of the obligations of the reference entities. As such, LBSF speculated that Credit Events would occur so

[604] *Belmont Park Investments PTY Limited v BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing Inc* [2011] UKSC 38, [22 (1)]-[22 (13)].
[605] Canadian Securities Institute, *Derivatives and Fundamentals Course Textbook,* (CSI Global Education 2008), [21:10].

that they would be required to pay less than the Noteholders had invested. This would allow LBSF to net a substantial part of the Collateral. The Noteholders speculated that the portfolio was a safe investment and that Credit Events would not substantially reduce the net amount.[606] Under the terms of the CDS agreement, the claims of LBSF and the Noteholders were limited to the Collateral and, as such, claims against the SPV were not allowed.[607] The CDS agreement also contained provisions for priority upon an "Event of Default" which included proceedings in insolvency or bankruptcy[608] whereby the Noteholders were given priority over LBSF.[609] LBHI entered Chapter 11 protection under the *US Bankruptcy Code* on 15 September 2008 thus triggering an Event of Default as provided under the CDS agreement.[610] Although the respondents were 29 Australian entities being Noteholders in 9 series of Notes totalling $91.1 million AUD,[611] English law was applicable thanks to a choice of laws clause in the contract.[612] The court would go onto consider whether this synthetic CDO offended the anti-deprivation rule.[613]

4.1.2. The English anti-deprivation rule in Belmont Park

Lord Collins, in rendering the decision in *Belmont Park,* described the anti-deprivation rule as being "…aimed at attempts to withdraw an asset on bankruptcy or liquidation or administration, thereby reducing the value of the insolvent estate to the detriment of the creditors."[614] The English anti-deprivation rule has a long history,[615] and as noted in the previous chapter[616] is, alongside the *pari passu* rule, one of two sub-rules which seeks to apply "…the general principle that parties

[606] *Belmont Park,* supra note 608, [22(13)].
[607] *Belmont Park,* supra note 608, [22(15)].
[608] *Belmont Park,* supra note 608 [22(17)].
[609] *Belmont Park,* supra note 608 [22(18)].
[610] *Belmont Park,* supra note 608 [18].
[611] *Belmont Park,* supra note 608 [25]-[26].
[612] *Belmont Park,* supra note 608, [36].
[613] *Belmont Park,* supra note 608, [23].
[614] *Belmont Park,* supra note 608 [1].
[615] See the analysis in subchapter 2.8.
[616] See in particular subchapter 3.9.

cannot contract out of insolvency legislation."[617] This rule has not been eliminated by the implementation of various avoidance provisions within the *Insolvency Act 1986*[618] and must be triggered by bankruptcy or insolvency.[619]

In deciding whether the rule applied in *Belmont Park,* Lord Collins identified historic cases where the anti-deprivation rule was held to invalidate contractual provisions, contrasting these with cases where the provisions were allowed.[620] He deduced that, in such cases where the rule had previously applied, there was a deliberate attempt to evade the insolvency laws by the party seeking to take advantage of the deprivation.[621] In cases where the rule was determined not to apply,[622] "…good faith and the commercial sense of the transaction have been important factors."[623] Lord Collins, supported by all but Lord Mance, believed that this indicated that freedom of contract, for a justifiable business purpose, prevailed in the absence of any deliberate attempt to evade the insolvency laws.[624] Although Lord Mance also agreed that in order for the anti-deprivation rule to apply there needs to be a deliberate attempt to evade the insolvency laws,[625] he was weary in stating that to be the dominant, overriding, applicable standard. Lord Mance rightfully notes thar sometimes the effects of contractual provision are not according to their clear meaning.[626] For one to not be caught by the anti-deprivation rule, the majority stated that a commercial transaction need only be entered into in good faith and for good commercial

[617] *Belmont Park,* supra note 608 [1].
[618] *Belmont Park,* supra note 608 [150].
[619] *Belmont Park,* supra note 608 [14].
[620] *Belmont Park,* supra note 608 [60].
[621] *Belmont Park,* supra note 608 [75].
[622] *Belmont Park,* supra note 608 [65]-[73].
[623] *Belmont Park,* supra note 608 [77].
[624] *Belmont Park,* supra note 608 [109].
[625] *Belmont Park,* supra note 608 [152].
[626] *Belmont Park,* supra note 608 [159].

reasons.[627] The UKSC unanimously decided that the provisions of the CDS agreement did not violate the anti-deprivation rule.[628]

In rendering this decision, the UKSC explicitly separated the anti-deprivation rule from the *pari passu* rule. While the latter remains an effects-based rule, the former is now a purpose-based rule. The UKSC disagreed with the Court of Appeal (EWCA) in *Perpetual,*[629] which was the case to be appealed as *Belmont Park* to the UKSC, regarding its position of the anti-deprivation and *pari passu* rules not being distinct. However, at the previous court level, the EWCA did make some interesting observations regarding the general approach in the anti-deprivation rule's application.

Therein, the court placed six qualifications on the anti-deprivation rule. These qualifications likely informed the court's decision in *Belmont Park*:

1. The anti-deprivation rule is based upon the policy that one cannot contract out of the insolvency legislation;[630]
2. The Court is required to look at the statutory avoidance provisions before applying the anti-deprivation rule;[631]
3. There is no difference between cases where the rule was meant to apply during insolvency or where it was not;[632]
4. The anti-deprivation rule should not extend beyond its present limits except where logic or practicality require;[633]

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[627] *Belmont Park,* supra note 608 [104], [108], [133].
[628] *Belmont Park,* supra note 608 [120], [134], [184], [185].
[629] *Perpetual Trustee Company Ltd & Anor v BNY Corporate Trustee Sevices Ltd & Ors* [2009] EWCA 1160.
[630] *Perpetual* ibid. [54].
[631] *Perpetual* ibid [55].
[632] *Perpetual* ibid [56].
[633] *Perpetual* ibid [57].

5. It is important, when possible, that judicial insolvency decisions are clear and consistent;[634]
6. If possible, the court should give effect to contractual terms to which the parties have agreed.[635]

These qualifications ultimately created the applicable legal test in *Belmont Park.* This legal test can be surmised as follows: If, upon insolvency, whether intentionally or not, a transaction removes value from the estate, and such a transaction is not caught within an existing statutory provision, then the anti-deprivation rule will apply unless the transaction was entered into in good faith and for good commercial reasons. Furthermore, pursuant to both the rulings of the EWCA and UKSC, time limitations do not apply to the anti-deprivation rule as they do to the, to be discussed in chapter 6, statutory provisions.

4.3. Post-*Belmont* anti-deprivation cases

Within a year of the *Belmont Park* decision, two cases were heard by the courts in England. One, the "*Carlton Appeal"* in *JFB Firth Rixson,* heard at the EWCA*,* concerned a similar arrangement to the swap agreements in *Belmont Park.* The other, *HMRC v The Football League* was a challenge by Her Majesty's Revenue Commissioner around specific rules which allowed for "football creditors" to be paid before others in a restructuring. Both these cases, which apply the new anti-deprivation rule from *Belmont Park* will be discussed in turn to paint a broader canvas regarding the operation of the rule in the English context.

[634] *Perpetual,* ibid [58].
[635] *Perpetual,* ibid [58].

4.3.1. The "Carlton Appeal" in Lomas

Lomas v JFB Firth Rixson, as briefly discussed in the previous chapter,[636] was an appeal concerning the validity of provisions under a synthetic CDO between Lehman Brothers Special Financing Incorporated (LBSF) and Carlton Communications Limited, which allowed the latter to hedge its fixed rate interest exposure.[637] Under 2(a)(iii) of this agreement, payments would cease to be owed between one party and the other in the event of one party's insolvency. This was inevitably challenged as violating the anti-deprivation rule. In utilising the reasoning from *Belmont Park,* the Court of Appeal determined that it would be inconsistent to apply the anti-deprivation rule to s. 2(a)(iii) given that the provision serves merely to suspend a payment for the duration of an insolvency. This prevented Carlton from having to make payments under a hedging agreement with a bankrupt counterparty therefore the court determined there was no intention to evade the insolvency laws.[638] Furthermore, the court believed that the purpose of s. 2(a)(iii) is the protection of the non-defaulting party from additional credit risk in performing its obligations.[639] In its reasoning, the court made three important observations:

First, the application of the anti-deprivation rule is case specific. The factors which are to be considered are not pre-defined and depend upon the specific circumstances of the arrangement.[640] Second, the judge must distinguish between whether the provision was meant as a commercial re-arrangement to reflect the economic consequences of insolvency or whether it was a deliberate attempt to evade insolvency laws.[641] This is arguably the most difficult step in the analysis and the focus of much of the *Belmont Park* decision. Third, the actual effect of the

[636] See subchapter 3.9 for a more in-depth look at the facts of the case.
[637] Ibid, [64].
[638] *Lomas v. JFB Firth Rixson,* [2012] EWCA Civ 419, [87].
[639] *Lomas,* ibid. [92].
[640] *Lomas,* ibid. [91].
[641] *Lomas,* ibid. [91].

transaction can aid in determining the provision's intention.[642] So although the analysis of the applicability of the anti-deprivation rule itself is a purposive analysis, the analysis of the applicability of the good commercial standard imports some degree of an effects-based analysis. This is consistent with the understanding that the justifiable business purpose creates merely a defence to the rule and is not, in and of itself, the initially applicable standard. Nonetheless, the willingness of the court to uphold a synthetic CDO arrangement is again as apparent in this case as it was in *Belmont Park.*

4.3.2. HMRC v The Football League

The other anti-deprivation case, *HMRC v The Football League* was a case concerning a voluntary arrangement between two classes of corporate entities: The Football League Limited (FL), the governing body of the Football League, and each individual club, all of which were English Limited Companies. Under this structure, the clubs would hold shares in the FL that simply allowed said clubs to participate in Football League competition.[643] Such shares did not generate any direct dividends or allow the sharing in growth of the league.

Under article 4.5 of the FL's articles of association, upon an insolvency event, the FL could give the concerned member club written notice to transfer its shares at the price of 5p per share.[644] The transfer notice could be withdrawn if the club paid the so-called "football creditors" in full.[645] The football creditors were an enumerated group of entities, contained within article 80 of the FL's articles of association and directly affiliated with the Football League competitions.[646] Under the FL regulations, the FL executive could also suspend a team from acquiring players if it was in

[642] *Lomas,* ibid. [91].
[643] *HMRC v. The Football League,* [2012] EWHC 1372 (Ch), [12].
[644] *The Football League,* ibid. [16].
[645] *The Football League,* ibid. [18].
[646] For the full list of "football creditors" see *The Football League* ibid. [19].

default of making payments to Her Majesty's Revenue Commission (HMRC).[647] Pursuant to this, the FL enacted an insolvency policy which allowed them to serve a notice of withdrawal to any such team who entered a CVA or scheme of arrangement. The notice of withdrawal could be cancelled if "football creditors" were paid in full first.[648] The main issue was whether the requirement, under either a CVA or scheme of arrangement that football creditors be paid in full, violated either the *pari passu* or anti-deprivation rules. As the normal practice of member club insolvency was either a CVA or scheme of arrangement,[649] the court needed to apply the new standards from *Belmont Park* to English restructuring proceedings.

This case did not occur in a vacuum as the football creditors' rule was contentious. Leading up to the case, football clubs had gone insolvent more than 50 times.[650] In both 2011 and 2013, the House of Commons Department of Culture, Media and Sport select committee argued that legislation should be introduced to eliminate the football creditors' rule as it contributed to financial recklessness amongst football clubs.[651] HMRC's challenge was likely the result of two insolvencies of member clubs, in 2010 and 2011, from which HMRC collected only 2 and 0.77 pence on the pound respectively.[652] As such, HMRC challenged the rule as repugnant to both the *pari passu* and anti-deprivation rules.

The court determined, quite succinctly, that the *pari passu* rule could not apply if there was no *pari passu* distribution.[653] *Pari passu* distribution requires actual distribution and, since this case was a restructuring, such rule could not apply. This line of reasoning may be drawn into

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[647] *The Football League,* ibid. [31].
[648] *The Football League,* ibid. [34]-[36].
[649] *The Football League,* ibid. [48].
[650] Tom Serby, 'British Football Club Insolvency: Regulatory Reform Inevitable?' 14 Int Sports Law J 12, 22.
[651] Ibid, 12.
[652] Ibid, 13; *The Football League,* supra note 653, [8].
[653] *The Football League,* supra note 653 [87].

question thanks to the recent *Adler Restructuring*[654] case where the court stated that, under a Part 26A proceeding, the court must consider the *pari passu* rule when sanctioning a restructuring plan.[655] In that case, the Court of Appeal further clarified that a departure from *pari passu* can be justified in the case of a restructuring, provided there is good basis or reasoning for such a departure.[656] The *Adler* case also noted that there is no requirement for the court to consider whether the plan was the fairest available.[657]

As for the application of the anti-deprivation rule in the *Football League* case*,* the court accepted the FL's argument that the shares, themselves, had no inherent value.[658] As such, it was determined that, since no value was actually removed from the estate, the anti-deprivation rule should not apply. Since the shares themselves only gave the teams a right to participate in the league, removing such shares took no value from the estate.[659] The court determined that the loss of membership, without proper consideration, is an appropriate response to the event of default on the part of the insolvent member club.[660]

The court rejected HMRC's submission that the provisions prevented the anti-deprivation rule from applying as the member club had not completed its fixture obligations for the season.[661] Per the court, the anti-deprivation and *pari passu* rules apply only to an asset of the company at the relevant date, not at some time in the future and neither is meant as a broader avoidance rule.[662]

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[654] Re AGPS BondCo PLC [2023] EWHC 916 (Ch), parts of the case were affirmed by the EWCA in *Bond Co PLC v Strategic Value Capital Solutions,* [2024] EWCA CIV 24. Also see the analysis in subchapter 3.2 regarding the *pari passu* rule in restructurings.
[655] Ibid [74].
[656] *Bond Co PLC v Strategic Value Capital Solutions,* [2024] EWCA CIV 24, [166].
[657] Ibid, [179].
[658] *The Football League,* supra note 653 [110].
[659] *The Football League,* supra note 653 [162].
[660] *The Football League,* supra note 653 [173].
[661] *The Football League,* supra note 653 [136].
[662] *The Football League,* supra note 653, [137].

The court thoroughly rejected the contention that the anti-deprivation rule is a general avoidance principle.[663]

4.4. Criticisms of the Anti-Deprivation Rule in England

Following the decision in *Belmont Park,* numerous criticisms were levelled at the rule from academic sources. Richard Calnan suggests that the decision was flawed for three main reasons:

First, the UKSC drew an artificial distinction between conditional and determinable interests.[664] Both concepts of contract law, a conditional interest is one which can be terminated upon the occurrence or non-occurrence of an event whereas a determinable interest in one which must be terminated. The distinction between these two interests was indeed a focal point of the *Money Markets International Stockbrokers v. London Stock Exchanges*[665] case where Neuberger J. refused to invalidate a contractual provision which allowed a B share, which provided membership in the London Stock Exchange, to be taken away if a member ceases to remain a member of the Stock Exchange. Calnan disagrees with the judge's reasoning as he believes the distinction between a conditional and determinable interest is a legal fiction since the debtor only ever really obtains a limited proprietary right.[666] He believes the UKSC had an opportunity to address this issue in *Belmont Park* but declined to do so.[667]

Second, Calnan notes that the business purpose requirement in the anti-deprivation rule makes it very difficult to apply in practice and that the standard is inconsistent with the leading *pari passu* case of *British Eagle.*[668] He further argues that the UKSC drew an artificial distinction

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[663] *The Football League,* supra note 653, [188].
[664] Richard Calnan, *Proprietary Rights and Insolvency,* 2nd ed., (OUP 2016), [1.42].
[665] [2002] 1 WLR 1150.
[666] Calnan, supra note 670, [1.36].
[667] Calnan, supra note 670, [1.42].
[668] Calnan, supra note 670, [1.43].

of the two rules and that, since the anti-deprivation rule is meant to ensure assets are available for *pari passu* distribution, both rules are based upon the same principle. This distinction, he believes, was made to allow the UKSC to introduce a new standard for the anti-deprivation rule while maintaining an effects-based *pari passu* rule.[669] The logic in the *Football League* case epitomises the issues inherent with this distinction – namely that the *pari passu* rule only applies when there is a distribution whereas the anti-deprivation rule can apply as soon as a company has gone into administration.[670] In spite of all this, he argues that, given the current law on the matter, the *Belmont Park* decision was correct, as: "In a complex financial or commercial transaction, it will be difficult to show that there was the requisite deliberate intention to evade the insolvency laws."[671]

Sarah Worthington argues that deliberate intention to evade the insolvency laws from *Belmont Park* "…effectively emasculates this limb of the anti-deprivation policy."[672] This, she writes, further complicates the rule as the courts have historically had a hard time distinguishing between the anti-deprivation and *pari passu* rules.[673] She, like Calnan, believes that both the *pari passu* and anti-deprivation rules are from the same overriding principle. She also insinuates that Lord Mance's concurring decision is more reasonable, namely that party autonomy must give way to either the anti-deprivation or *pari passu* rule whenever an agreement avoids the normal operation of the statute.[674] Worthington cotends:

> "The majority in *Belmont* was more lenient than this, allowing party autonomy to prevail unless there was a deliberate intention to defeat the statutory insolvency regime."[675]

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[669] Calnan, supra note 670, [1.44].
[670] Calnan, supra note 670, [1.45].
[671] Calnan, supra note 670, [1.46].
[672] Sarah Worthington, 'Good Faith, Flawed Assets and the Emasculation of the UK Anti-Deprivation Rule,' 75:1 *The Modern Law Review* 112, 117.
[673] Ibid.
[674] Ibid, 115-116.
[675] Ibid, 116.

She also makes a very realist statement on the matter, namely, that the majority's decision likely eliminates any future application of the anti-deprivation rule especially for complex financial deals involving sophisticated parties.[676]

Timothy Cleary seems to, in principle, agree with Worthington albeit for different reasons. He believes that, because the objective of the anti-deprivation rule is to preserve value within the insolvent estate to facilitate *pari passu* distribution, the intention to avoid the insolvency laws should be deemed irrelevant.[677] As will be seen, of all the criticisms of the anti-deprivation rule in England, those of Sarah Worthington yielded the greatest influence upon the Supreme Court of Canada's *Chandos* decision.

4.5. Avoidance Principles in the US *Bankruptcy Code*

4.5.1. Are there implicit prohibitions in the US Bankruptcy Code?

As noted previously, an anti-deprivation rule, such as that applicable in Canadian or English law, did not develop in United States federal bankruptcy law. While an early 19th century Massachusetts case, briefly noted in Chapter 2, does appear to apply an early version of the anti-deprivation rule,[678] such rule no longer appears as an articulated principle in American law. According to Patrick Glenn, American legislators imported ideas of civil law into American law leading to something of a hybridization of laws.[679] Such has created, in the modern and historic context, legislation which receives a broad, interpretive context similar to the civil codes of Europe.[680] This fusion should not be overstated as, while civil law has had some influence on

[676] Ibid, 121.
[677] Timothy Cleary, 'Lehman Brothers and the anti-deprivation principle: current uncertainties and proposals for reform,' 6:4 *Capital Markets Journal* (2011) 411, 416.
[678] *Locke v Winning,* 3 Mass. (1 Tyng.) 325, 326 (Mass. 1807); Subchapter 2.9.
[679] H. Patrick Glenn, *On Common Laws* (Oxford 2005), 86-88.
[680] H. Patrick Glenn, *Legal Traditions of the World,* 4th ed. (Oxford 2014), 264.

American legal thought, the United States still very much has a common law system.[681] Nonetheless, the influence of interpretive context appears to apply to bankruptcy law and has yielded interesting principles. These principles even appear to be entrenched within provisions of the *Bankruptcy Code.* For the purposes here, thanks to the shared common law history, and a great deal of influence of English bankruptcy laws on early American colonial developments, principles which mirror the anti-deprivation rule are apparent throughout the *Bankruptcy Code*.

The most notable of these is the *Bankruptcy Code*'s explicit equity doctrine as contained in § 105(a). Such a provision allows a judge the power to "…issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[682] This principle, in light of the United States Supreme Court decision in *Law v. Siegel,*[683] can only be applied within the confines of the *Bankruptcy Code.* This equitable power is not absolute and has been described by Coordes as a recognition that courts can choose amongst multiple meanings inherent within the text of the statute.[684] Coordes further notes that the *Bankruptcy Code* was designed to offer greater flexibility than the previous law ultimately allowing bankruptcy law to fulfil two goals – the fresh start for debtors and equality of creditors.[685]

The equitable doctrine of bankruptcy likely stems from the same principles which underpin the *Statute of Elizabeth* 1571. As noted by Baird, in early American bankruptcy cases, an idea which stemmed from the *Statute of Elizabeth* 1571 emerges – that transactions which rearrange the rights of creditors contravene the laws of bankruptcy:

> This idea is not manifest on the face of the Statute of 13 Elizabeth and exists nowhere else in any statute, yet it is a principle firmly embedded in the law.[686]

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[681] Donald W. Greenberg, 'United States' in *Legal Traditions and Systems: An International Handbook* (Greenwood 1986), 415.
[682] *Bankruptcy Code,* § 105(a).
[683] *Law v. Siegel,* 571 US 415 (2014).
[684] Laura N. Coordes, 'Narrowing Equity in Bankruptcy' (2020) 94 Am Bankr LJ 303, 317.
[685] Ibid, 323.
[686] Douglas Baird, *The Unwritten Law of Corporate Reorganizations,* (Cambridge 2022), 15.

While the anti-deprivation rule does not exist as an articulated principle in United States bankruptcy law, similar principles, also dating to the prevention of fraudulent conduct in the *Statute of Elizabeth 1571,* inform many of the provisions contained within the *Bankruptcy Code*. The simple difference is that, unlike English and Canadian policymakers, American legislators preferred the explicit implementation of such principles into a law code. In Canadian and English law, parts of the common law remain intact – most notably the anti-deprivation and *pari passu* rules.

Since the United States gained independence nearly a century before Canada, it missed much of the development in the anti-deprivation rule during the 19th century. This is not to say, however, that the US lacks any sort of implicit prohibitions in the *Bankruptcy Code.* In fact, given Coordes' conception of the equitable approach contained within § 105(a) of the *Bankruptcy Code,* and Baird's survey of the principles as contained within the *Statute of Elizabeth 1571,* the opposite appears to be true. While United States bankruptcy does lack an anti-deprivation rule, the same principles as contained therein, namely the prevention of rearranging the rights of creditors or preventing the stripping of assets upon a bankruptcy filing, do exist in American law. In fact, much like England and Canada, such principles are equally foundational – they are just provided for not by the common law but by explicit prohibitions as contained within the *Bankruptcy Code.* Such provisions are then bolstered by the explicit equitable powers of the court as contained within § 105(a). Such powers, coupled with robust transactional avoidance provisions, to be discussed in the coming chapters, likely explains why United States bankruptcy does not have an anti-deprivation rule. It is not because the American law does not share the same principles, it is simply because there is both substantial enough prohibitions and enough judicial flexibility to apply them in a principled manner.

4.6. Canadian Anti-Deprivation Cases

As has been alluded to throughout, the Canadian anti-deprivation rule has been interpreted and applied differently than that of England. While the English and Canadian rules are triggered under the same circumstances, i.e., when a transaction removes value from an entity upon its insolvency, the English rule has the additional step of establishing the purpose of the transaction. This second step, as will be seen by the overview of case law, is absent within the Canadian context. This section will attempt to draw a picture of the development of the anti-deprivation rule within the Canadian context. By utilising select case law, which originated in three separate provinces, it is apparent that the Canadian anti-deprivation rule has developed along different lines than its English counterpart. The foregoing analysis will showcase these differences.

4.7. Pre-Chandos anti-deprivation case law

4.7.1. Re Frechette

Prior to the 2020 decision in *Chandos,* the anti-deprivation rule was discussed extensively in Canada. The first "modern" case, *Re Frechette,*[687] was a 1982 Quebec Superior Court decision involving the articles of a company Sani-Sport which, upon the insolvency of one of its shareholders, allowed the remaining shareholders to acquire the insolvent party's shares at a price that was 20% less than their fair market value.[688] Although the court was reluctant to intervene in the methodology utilised to calculate the fair market value of the shares,[689] it was determined that

[687] 1982 CanLII 2967 (QC CS)
[688] Ibid, 5.
[689] Ibid, 21.

the 20% discount placed upon that fair market value calculation was a violation of the anti-deprivation rule.[690] The court further insinuated that whether the agreement was made in good faith was irrelevant as, under Canadian law, it would be unconscionable for a trustee of a bankrupt shareholder to receive less than the actual balance payable.[691]

4.7.2. Bramalea

A second case, *Bramalea,*[692] was a 1995 Ontario case which concerned a partnership agreement for the development and operation of a shopping mall. The two partners were Canadian Imperial Bank of Commerce (CIBC) and Bramalea Inc. Bramalea was placed into insolvency receivership in 1995. Within the partnership agreement there was a term which provided that, upon insolvency, the non-insolvent partner can buy the other's shares at either fair market value or book value – whichever is lower. CIBC was seeking to exercise their right to purchase Bramalea's shares at book value, which was approximately $200,000, as opposed to fair market value, which was in the range of $2-3 million. The trustee, acting on behalf of Bramalea, argued that this was a violation of the anti-deprivation rule even though the purchase provision of the partnership agreement was negotiated in good faith and at arm's length.[693] The Ontario Superior Court sided with Bramalea, and determined that the right to purchase at book value violated the anti-deprivation rule.

4.7.3. Aircell

Another case, *Aircell,*[694] from the Ontario Court of Appeal in 2013, concerned an independent dealer agreement made between independent dealer Aircell Communications Inc. (Aircell) and telecommunications provider Bell Mobility Cellular Inc. (Bell).[695] Experiencing

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[690] Ibid, 18.
[691] Ibid, 17.
[692] *Canadian Imperial Bank of Commerce v. Bramalea Inc.,* 1995 CanLII 7262 (ON SC)
[693] Ibid.
[694] *Aircell Communications Inc. v. Bell Mobility Cellular Inc.,* 2013 ONCA 95.
[695] Ibid, [1].

financial difficulties, Aircell owed Bell $64,000 for inventory.[696] Aircell was subsequently deemed bankrupt and, pursuant to the independent dealer agreement, Bell exercised an option to cease business relations pursuant to Aircell's inability to remedy its default of $64,000.[697] At the time of Aircell's insolvency, Bell owed Aircell $188,981 in commissions which Bell refused to pay to the trustee since Aircell had an inability to remedy its default.[698]

The trial judge determined that the provision of the independent dealer agreement, although it did not explicitly mention insolvency, was effectively triggered upon an event of bankruptcy or insolvency and was therefore void.[699] Bell subsequently appealed and the Ontario Court of Appeal agreed with this reasoning.[700] The Ontario Court of Appeal explicitly stated that, although the clause can be triggered for any number of reasons, in this case it was triggered by insolvency. In citing Bramalea, the court of appeal determined that whether or not the clause was meant to apply during insolvency is irrelevant so long as the provision is indeed actually triggered by it.[701] As a result, the court determined that the commissions were property of Aircell's estate.

4.8. The anti-deprivation rule in *Chandos*

In 2020, the Supreme Court of Canada was faced with a dilemma whether to adopt the anti-deprivation rule as applied by the United Kingdom Supreme Court in *Belmont Park.* The UKSC's decision in *Belmont Park* was influential outside of Britain. For context, the Hong Kong Court of Appeal, who had previously applied an effects-based standard to the anti-deprivation rule prior to

[696] Ibid, [5].
[697] Ibid, [8].
[698] Ibid, [8].
[699] Ibid, [10].
[700] Ibid, [13].
[701] Ibid, [12].

Belmont Park,[702] had switched to a purpose-based standard in a post-*Belmont Park* case.[703] The question before the Supreme Court of Canada's hearing of the *Chandos* appeal[704] was whether Canada would stick with the effects-based standard or, like Hong Kong, would abandon it in favour of the purpose-based standard of the UKSC.

4.8.1. Facts of the appeal

Chandos concerned Clause VII Q(d) of a sub-contract agreement between Chandos Construction Ltd. (Chandos) and Capital Steel Inc. (Capital Steel).[705] Such a clause provided that if one of the parties to the agreement were to go insolvent, they would forfeit 10% of the subcontract price to the other party.[706] Capital Steel then filed for assignment in bankruptcy and Chandos wanted to assert its right of set-off for the 10% forfeiture penalty pursuant to their right under s. 97(3) of the *Bankruptcy and Insolvency Act.*[707] Essentially, under the circumstances, because the subcontract price was $1,373,300.47, clause VII Q(d), if applicable, would mean Chandos had a $10,511.66 claim against, rather than a $126,818.63 debt to, Capital Steel.[708]

Mirroring the ruling in *Belmont Park,* the applications judge initially found the provision to be valid, and the anti-deprivation rule inapplicable, pursuant to the idea that the provision was not an attempt to avoid the effect of bankruptcy law.[709] At the Alberta Court of Appeal (ABCA), Rowbotham, J.A. reversed the decision on the basis that the anti-deprivation rule has a long history in Canada, it was never eliminated by case law nor by statute and that the content of the rule should

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[702] See *Peregrine Invests Holdings Ltd. And Another v. Asian Infrastructure Fund Management Co. Ltd. L.D.C. and Others,* [2004] HKCA 115.
[703] See *Re Hisn Chong Construction Company Limited,* [2019] HKCA 1350.
[704] *Chandos Construction Ltd. v. Deloitte Restructuring Inc.,* 2020 SCC 25.
[705] Ibid, [3]-[6].
[706] Ibid, [4].
[707] Ibid, [5]; for a discussion of set-off, see subchapter 3.3.2.
[708] Ibid, [6].
[709] Ibid, [8].

be as articulated in Canadian rather than British jurisprudence.[710] She also further argued, specifically citing the article of Prof. Worthington above,[711] that a purpose-based anti-deprivation rule would be ineffective and, as such, undesirable.[712] In light of these conflicting opinions, the SCC was tasked with which path to take. They could either agree with the application judge, and accept the standard from *Belmont Park,* or they could follow the ABCA decision and accept that the Canadian anti-deprivation rule is divergent from the English one. A large majority of 8 out of 9 Supreme Court judges agreed with Rowbatham, J.A. while Côté J. dissented favouring the UKSC's approach. Both the majority decision and the dissent will be discussed in turn.

4.8.2. The Majority Decision

The majority decision, as delivered by Rowe, J., was based upon three points similar to those made by Rowbatham, J.A. at the ABCA, namely that (a) the anti-deprivation rule has neither been eliminated by parliament nor case law,[713] that (b) unlike in Britain the anti-deprivation rule is an effects-based rule, and (c) that Canada should not adopt the purpose-based test of *Belmont Park.*[714] Each of these reasons will be examined in turn.

(a) The Anti-deprivation rule has neither been eliminated by parliament nor case law.

Although Canadian parliament has legislated in this area, none of these regulations were enacted with the specific intent of displacing the anti-deprivation rule. Parliament, by enacting various provisions to the *Bankruptcy and Insolvency Act* which protect the executory contracts of debtors, namely ss. 65.1, 66.34 and 84.2,[715] had no intention to protect third party creditors.[716]

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[710] Ibid, [11].
[711] Referred to in subchapter 4.4.
[712] Capital Steel Inc v Chandos Construction Ltd, 2019 ABCA 32, [50].
[713] *Chandos Construction Ltd. v. Deloitte Restructuring Inc.,* 2020 SCC 25, [27]-[28].
[714] ibid, [33].
[715] The scope and nature of these provisions will be discussed in subchapter 5.9.
[716] Chandos SCC, supra note 728, [28].

Furthermore, the SCC does not believe executory contracts[717] are relevant in a determination of the anti-deprivation rule as the anti-deprivation rule applies to enforce s. 71 of the *Bankruptcy and Insolvency Act,* namely that all the bankrupt's property is vested with the trustee.[718] Lastly, the SCC acknowledges that no Canadian case has ever eliminated the application of the anti-deprivation rule.[719] The relationship between executory contracts and the anti-deprivation rule is discussed in greater detail in the next chapter.

(b) The anti-deprivation rule as an effects-based rule.

In relying mostly on the law of previous decisions, concluding with the law as outlined in *Bramalea* discussed above*,* the SCC states that the law from Canadian jurisprudence creates a two-part test. Firstly, the impugned clause or transaction must be triggered by an event of insolvency and, secondly, the effect of the clause or transaction must be to remove value from the insolvent estate.[720] Although Chandos submitted that the court should change this standard to mirror the purpose-based standard in *Belmont Park*,[721] the Supreme court rejected this argument.[722]

(c) Canadian jurisprudence should retain the effects-based standard.

The SCC states two reasons as to why the effects-based standard from *Bramalea* is the preferred standard of application. The first of these is that parliament never intended for the anti-deprivation rule to be a purpose-based rule. The anti-deprivation rule, being a prohibition that is implicit in Canadian bankruptcy legislation,[723] is ultimately bound by s. 71 of the *Bankruptcy and Insolvency Act:*[724] "…once a court ascertains that Parliament intended, by virtue of s. 71, that all

[717] Discussed in subchapters 5.3 and 5.6.
[718] Chandos SCC, supra note 728 [30].
[719] Chandos SCC, supra note 728 [27].
[720] Chandos SCC, supra note 728 [31].
[721] Chandos SCC, supra note 728 [32].
[722] Chandos SCC, supra note 728 [34].
[723] Chandos SCC, supra note 728 [12].
[724] Chandos SCC, supra note 728 [33].

of the bankrupt's property is to be collected in the trustee, it is not for the court to substitute a competing goal that would give rise to a different result."[725] In arguing this, like Rowbotham, JA at the ABCA, the SCC cited Prof. Worthington's article as a criticism to the English rule.[726]

The second reason is that a purpose-based test would create less commercial certainty. Although Chandos argued the converse, that the purpose-based standard allowed for greater commercial certainty, the court replied, in the realist vein:

> "Parties cannot know at the time of contracting whether a court, possibly years later, will find their contract had been entered into for *bona fide* commercial reasons. This will give rise to uncertainty at the time of contracting."[727]

The SCC argues that an effects-based test is clear and more easily determined.[728] If the SCC were to adopt a purpose-based test, they believe it would leave the anti-deprivation rule to be ineffectual, save for the most flagrant of cases. This would ultimately undermine the statutory purpose of the *Bankruptcy and Insolvency Act*.[729] Finally, the SCC believes that although the common law of contract does give contracting parties an immense degree of freedom to pursue individual interests, an insolvent party is inevitably stripped of that interest once they file for assignment in bankruptcy.[730]

4.8.3. Côté, J.'s dissent

Although 7 judges agreed with Rowe J.'s majority decision, puisne justice Suzanne Côté rejected this ruling and wrote a rather lengthy dissent explaining why the anti-deprivation rule in Canada should be decided under a purpose-based standard. She based this view on two separate arguments. First, Côté, J. believes that the Canadian anti-deprivation jurisprudence has always

[725] Chandos SCC, supra note 728 [33].
[726] Chandos SCC, supra note 728 [33].
[727] Chandos SCC, supra note 728 [34].
[728] Chandos SCC, supra note 728 [35].
[729] Chandos SCC, supra note 728 [36].
[730] Chandos SCC, supra note 728 [37].

imputed a purpose-based rule[731] and, second, that the anti-deprivation rule is not of implied statutory origin and serves a different purpose than the *pari passu* rule.[732]

In arguing her first point, Côté J. performs an overview of the anti-deprivation case law – most notably *Bramalea* and *Re Frechette.* She believes that, since the judges in both cases conducted further analysis as to the purpose of the contractual provisions, this is indicative of the anti-deprivation rule containing a business purpose test.[733] She further suggests that Blair J., of the ONCA, was searching for a business purpose in his reasoning in *Bramalea*.[734] She appears to believe that the problem is not the SCC majority's reliance on *Bramalea* but their interpretation of the rule from *Bramalea* as discussed in *Aircell.* In *Aircell,* Côté J. believes the ONCA was wrong in their determination that *Bramalea* imputed an effects-based approach and not a purpose-based one.[735] As such, Côté J. believes that the anti-deprivation rule in Canada does not need to change from an effects-based test to a purpose-based one. This is because she believes it always has been a purpose-based test but that such an interpretation[736] was not observed in *Aircell.*[737] Côté J. argues that it is the majority "which represents a break with the past" not her dissent.[738]

This argument is interesting as it takes a completely different interpretation than what seems to be the orthodox understanding of the previous case law. Blair J., in deciding *Bramalea* seems to make it clear that, even though there might be a legitimate commercial purpose to the arrangement, such an arrangement does not seem to matter. Similarly, in *Re Frechette,* Meyer J. appears to be making a similar argument. Both cases seem, on their surface at least, to be

[731] Chandos SCC, supra note 728 [48].
[732] Chandos SCC, supra note 728 [49].
[733] Chandos SCC, supra note 728 [84].
[734] Chandos SCC, supra note 728 [89].
[735] Chandos SCC, supra note 728 [95]-[96].
[736] Chandos SCC, supra note 728 [99].
[737] Chandos SCC, supra note 728 [96].
[738] Chandos SCC, supra note 728 [99].

insinuating that the reason the business purpose was discussed was to show that it did not justify the violation of the anti-deprivation rule. Côté J.'s argument, on the other hand, appears very similar to the logic employed by the Hong Kong Court of Appeal in *Re Hsin Chong.* Therein, the court attempted not to differentiate pre and post *Belmont Park* decisions but rather attempted to justify that previous case law was also decided correctly.[739] On its surface at least, Côté J. seems to attempt to impute the purpose-based standard of *Belmont Park* into Canadian law by aligning it with previous case law.

Côté J.'s second argument is based upon an analysis that the anti-deprivation rule and the *pari passu* rule are based upon different public policy devices. While the *pari passu* rule is based upon statutory public policy, the anti-deprivation rule is based upon common law public policy.[740] She believes, that on a reading of case law, since judges "…have routinely recited the principles and policies articulated in prior authorities with little or no regard for the wording of the relevant statutes in force" that this indicates the rule is more "…in the nature of a judicially-apprehended public policy than an implied prohibition in the various insolvency statutes which have been enacted and revised throughout the centuries of the rule's trans-Atlantic existence."[741] As such, Côté J. believes there is absolutely no connection between the standard which needs to be applied for the *pari passu* and anti-deprivation rules and that there is a principled legal basis for maintaining distinct standards for each.[742]

Côté J.'s second argument disagrees with the argument advanced in Chapter 2 of this thesis, namely that the anti-deprivation rule is an outgrowth of principles contained within the *Statute of Elizabeth I, 1571.* It further disagrees with virtually all academic commentary, including that

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[739] *Re Hsin Chong Construction,* [2019] HKCFI 1531.
[740] *Chandos SCC,* supra note 728 [101].
[741] *Chandos SCC,* supra note 728 [105].
[742] *Chandos SCC,* supra note 728 [111].

which was discussed in subchapter 4.4. As that rule became inefficient at dealing with issues within the bankruptcy context, the rule was expanded by the judiciary out of necessity. This thesis disagrees with Côté J. and argues that the anti-deprivation rule stems from the principles of fraudulent conveyancing laws first appearing within the *Statute of Elizabeth 1571*. As was argued in Chapter 2, both the *pari passu* rule and fraudulent conveyances, which became the anti-deprivation rule, are reflections of the same principles from the *Statute of Elizabeth 1571* and, to a lesser extent, the *Statute of Henry VIII 1542.*

Given how the anti-deprivation rule had developed in the Canadian context, the majority decision is likely the correct one. As useful as a business purpose could be in eliminating "unjust" applications of the anti-deprivation rule, such is not how the rule developed in Canada. However, while Côté J.'s fear of an overly broad anti-deprivation rule is understandable, post-*Chandos* caselaw quells much of this concern.

4.9. Post-*Chandos* anti-deprivation cases in Canada

In the period since *Chandos,* developments in Canadian anti-deprivation case law have been interesting as the rule has applied perhaps less broadly than initially anticipated. This evolution of the rule has largely been the result of interpretive uncertainty regarding what is meant by transfers which occur upon insolvency. How courts have interpreted this is quite interesting and has resulted in what could be termed a judicial limiting of the anti-deprivation rule in Canada.

4.9.1. Re Urbancorp Toronto Management Inc.

Re Urbancorp[743] concerned the Urbancorp Group of companies which, since 2016, have been going through a restructuring process pursuant to the *Company Creditors Arrangement Act*

[743] 2022 ONCA 181.

(CCAA).[744] In a related proceeding, an associated company, Urbancorp Renewable Power Inc. (URPI), in receivership since 2018, had already sold some geothermal heating assets.[745] This case specifically concerns one geothermal asset which was located on the Berm lands adjacent to the Bridge condominium.[746] The Berm lands, themselves owned by King Towers North Inc. (KTNI), were leased to Vestaco Homes Inc., a company related to the Urbancorp Group.[747] This resulted in an arrangement called the "Berm Lease." The parties to the Berm Lease were effectively the Saskin family. Under this agreement there was a declaration of trust, dated December 27, 2012, which declared KTNI as holding all of its interests in the Berm Lands in trust for another related company, Urbancorp Management Inc. (UMI), who has one sole shareholder – the Saskin Family Trust.[748] The use of such an arrangement, containing a family trust, is a legitimate tax planning arrangement in Canada whose details are beyond the scope of this thesis. The tenant's interest in the Berm lease was, during insolvency proceedings, subsequently sold to an arm's length party, Enwave, calculated at a value of $2.049 million.[749]

The terms of the Berm lease provided that it could not be transferred or assigned without the landlord KTNI's consent. Essentially this meant that a tenant that was not controlled or beneficially owned by the Saskin family could not benefit from rents at the expense of a Saskin-related landlord.[750] This provision also contained a condition whereby, if the lease is transferred, KTMI is entitled to the value of the lease.[751] Doreen Saskin claimed to be a secured creditor of UMI for approximately $2.8 million.[752] This was because, as she contended, the transfer

[744] Ibid, 5.
[745] Ibid, 6-7.
[746] Ibid, 10.
[747] Ibid, 10-11.
[748] Ibid, 12.
[749] Ibid, 13.
[750] Ibid, 15.
[751] Ibid, 14.
[752] Ibid, 12.

effectively created a circumstance whereby all the amounts of the proceeds of the sale to Enwave of the lease to the geothermal assets should be allocated to KTNI.[753] In December 2020, despite the objections of Doreen Saskin and KTNI, the Bankruptcy Monitor approved the sale of the Bridge geothermal asset to Enwave and determined that payment obligations to KTNI pursuant to the Berm lease were unnecessary.[754] The Bankruptcy Monitor[755] approved the sale as, in his view, the Berm lease's provision, in effect, stripped value away from Vestaco Homes and URPI for no consideration.[756] In other words, the Bankruptcy Monitor believed such a provision violated the anti-deprivation rule.

At the court of first instance, the supervising judge, Morawetz J., rejected the Bankruptcy Monitor's decision. In basing his reasoning on documentary evidence, Morawetz J. decided to apply principles of contract interpretation and not those of bankruptcy law. As a result, he accepted the submission of Doreen Saskin and ordered the transfer of the portion of funds allocated under the Berm lease to KTNI.[757] Morawetz J. decided that the anti-deprivation should not apply as the contractual provision, based upon its wording, was not intended to apply exclusively in the insolvency context.[758] Since the clause was triggered by the transfer of the lease, not insolvency, then Morawetz J. saw no reason to strike it out pursuant to the anti-deprivation rule.[759]

The moving party, Urbancorp in trust, challenged the decision of Morawetz J. by arguing that the anti-deprivation rule should apply even in circumstances whereby the impugned provision does not expressly apply upon an event of bankruptcy or insolvency. They argued that since the effect of this contractual provision stripped value from the estate, the anti-deprivation rule, being

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[753] Ibid, 17.
[754] Ibid, 18.
[755] The role of the Bankruptcy Monitor is discussed in subchapter 1.4.3.
[756] Ibid, 19.
[757] Ibid, 25.
[758] Ibid, 28.
[759] Ibid, 28.

an effects-based rule in Canada, should nonetheless apply.[760] Using similar reasoning to Morawetz J., the ONCA rejected the appeal[761] and conducted in depth analysis of the first part of the test for the anti-deprivation rule.

In the ONCA's view, the SCC's opinion from *Chandos* requires the anti-deprivation rule meet two standards: First, the provision in question must be triggered by an event of bankruptcy or insolvency and, secondly, the effect of the provision must deprive the estate of assets upon bankruptcy.[762] Citing paragraph 40 of *Chandos,* ONCA believed the SCC confirmed that the anti-deprivation rule does not apply to provisions, the effect of which, are not triggered by bankruptcy or insolvency.[763] Per the ONCA, the provision was triggered by the transfer of the lease and not Urbancorp's insolvency.[764] The ONCA's reasoning in this case is that since the transfer provision can apply in areas other than insolvency, the provision does not violate the anti-deprivation rule.[765] They further concluded that the interpretation of the anti-deprivation rule must be fact specific to each case, paying attention to the unique contractual terms.[766]

4.9.2. Validus Power Corp and Macquarie Equipment Finance Limited

Another case under the CCAA, *Validus,*[767] concerned the Validus Entities, a group of privately held companies, who owned and operated power generation plants in various localities in Ontario.[768] The case concerned motions by KSV Restructurings Inc., acting as a court appointed monitor on behalf of Validus Entities, to approve a sale and investment solicitation process (SISP)

[760] Ibid, 32.
[761] Ibid, 35.
[762] Ibid, 41.
[763] Ibid, 42.
[764] Ibid, 42.
[765] Ibid, 43-44.
[766] Ibid, 47.
[767] *Validus Power Corp. et al. and Macquarie Equipment Finance Limited,* 2023 ONSC 6367 (CanLII).
[768] Ibid, [10].

pursuant to the CCAA.[769] The SISP approval order is a court supervised process under the CCAA whereby assets of a company are allowed to be marketed to potential buyers. In April, 2022, one of the Validus Entities, Iroquois Falls Power Corp. ("IFPC"), entered into a sale-leaseback transaction with Macquarie Equipment Finance Limited, the senior secured lender of the Validus Entities. This transaction involved IFPC selling leased property to Macquarie, pursuant to a participation agreement, and the leased property was then leased back to IFPC pursuant to a lease agreement and Macquarie was granted security for the amounts owing thereto.[770] Pursuant to the lease agreement, IFPC would make monthly payments of $1.25 million plus sales tax for the first 36 months of the lease.[771] Under the terms of the participation agreement, Macquarie agreed to purchase the leased property for $45 million plus $5.85 million in sales tax. Of the $45 million, $9 million was to be paid to IFPC and other Validus Entities once certain conditions were met. Since Validus went into creditor protection, such conditions were never met and, pursuant to the participation agreement, the $9 million was applied to pre-pay rent under the lease agreement.[772] In the event of default, Macquarie, under the lease agreement, could apply for liquidated damages of any unpaid rent in arrears, the stipulated loss value for the leased property or any interest on either of these amounts.[773] Macquarie gave notice that it was exercising its right to terminate the agreement on July 24, 2023 and demanded payments, pursuant to the lease agreement, of $55,598,575 which included $40.5 million in SLV.[774] The quantum of amounts owing were deemed appropriate by the supervising judge Osborne J.[775] However, the Validus Entities

[769] Ibid, [2].
[770] Ibid, [11]-[12].
[771] Ibid, [77].
[772] Ibid, [75]-[76].
[773] Ibid, [78].
[774] Ibid, [87].
[775] Ibid, [89].

challenged the SLV payments as being contrary to the anti-deprivation rule as they claimed such would result in the unjust enrichment of Macquarie.[776]

Osbourne J. rejected this assertion as, pursuant to *Chandos,* the anti-deprivation rule only voids an agreement which provides that, upon insolvency, value is removed from the insolvent's creditors which otherwise would have been available to them.[777] Osbourne J. differentiates this case as, unlike in *Chandos,* the SLV was payable not upon bankruptcy but any event of default.[778] It was determined then that the SLV entitlements did not arise as a direct result of bankruptcy or insolvency of Validus Entities, such "…arose, as intended by the parties in making their bargain, on the default by Validus Entities of their contractual obligation to make the rent payments when due."[779] He then goes onto decide that, further, it is not relevant whether the entities were insolvent at the time of the defaults as the amounts did not arise, nor were they triggered, by the insolvency itself – they simply arose out of a breach of the lease agreement.[780] As a result, Osbourne J. extended the stay of proceedings to give the parties ample time to conduct the proposed SISP.[781]

4.9.3. Post Chandos case law – a limiting of the effects-based rule?

In *Chandos* the SCC stated that:

> An effects-based approach also provides parties with the confidence that contractual agreements, absent a provision providing for the withdrawal of assets upon bankruptcy or insolvency, will generally be upheld.[782]

What is meant by this statement was clarified by the rulings in both *Re Urbancorp* and *Validus.* Such rulings are interesting for two reasons. First, *Re Urbancorp* and *Validus* appear to

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[776] Ibid, [90].
[777] Ibid, [94].
[778] Ibid, [95].
[779] Ibid, [97].
[780] Ibid, [98].
[781] Ibid, [125].
[782] *Chandos,* supra note 728, [35]

take a liberal interpretation of this statement in *Chandos*. The SCC explicitly mentioned that although parties are free to contract while solvent, assignments in bankruptcy strip an insolvent party of its interest.[783] Furthermore, the SCC stated that attempting to determine the intentions of the parties at the time of contracting would detract from the efficient administration of corporate bankruptcies.[784] Secondly, on its face, *Re Urbancorp* appears to have similar facts to the pre-*Chandos Aircell* decision as both cases involved contractual clauses which were not necessarily applicable upon the entity's insolvency but could apply within that context. However, while the ONCA determined in the earlier *Aircell* decision, as affirmed by the SCC in *Chandos,* that the intention of the contractual terms was irrelevant in a determination of whether the anti-deprivation rule applied, in the later decision of *Re Urbancorp,* the same court decided this was a crucial part of the analysis. On its surface, the courts in both *Validus* and *Re Urbancorp* appear to have followed a different approach to both *Chandos* and *Aircell* by limiting the definition of "occurring upon insolvency" in the second part of the *Chandos* test.

This means that, while the standard of application in Canada is still an effects-based standard, the lower courts appear reluctant to extend the anti-deprivation rule too far thus limiting what is meant by a transfer occurring upon insolvency. While the ONCA in the earlier *Aircell* decision seems to adopt a broad conception of what is meant as occurring upon insolvency with respect to the anti-deprivation rule, such has evolved since the *Chandos* decision. In both *Validus* and *Re Urbancorp,* the clauses fell outside the purview of the anti-deprivation rule since they were not triggered exclusively by insolvency. It would appear *Chandos* does not represent the end of the saga of the anti-deprivation rule in Canada as lower courts appear to adopt the reasoning that insolvency must be the main, overriding, consideration for parties entering into the impugned

[783] *Chandos,* supra note 728 [37].
[784] *Chandos,* supra note 728 [34].

contractual terms. Such is an interesting and unexpected development and is a good indication that a purely effects-based standard is not applied absent context.

4.10. Canadian and English approaches compared.

The SCC's rejection of the UKSC's purpose-based test is telling of a fundamentally different approach to interpreting the anti-deprivation rule. While the English High Court later rejected the notion of the anti-deprivation rule as a rule of general avoidance in the *Football League* decision,[785] the Supreme Court of Canada seems to tacitly accept it. Even the lower courts, since *Chandos,* have not rejected this notion. While the courts in England were reluctant to extend the rule, as indicated by the *Perpetual* decision at the EWCA,[786] both the SCC and the ABCA seemed far less so. Specifically, echoing Prof. Worthington, the SCC states:

> "An intention-based test would render the rule ineffectual, save in the most flagrant of cases of deliberate circumvention of insolvency law."[787]

This indicates, on its surface, that the SCC sees this rule as one which can and should extend beyond present limits and not only be used to police obvious cases of flagrant deprivations.

The UKSC, on the other hand, was seemingly not concerned about parties drafting contractual terms to avoid the effects of the anti-deprivation rule since "…party autonomy is at the heart of English commercial law."[788] This is in stark contrast to the approach taken by the SCC. While the Canadian approach seems to give more weight to the insolvency statute,[789] the English approach seems to focus more on principles of commercial law. The difference here is between individualist and collective perceptions of the law. While insolvency is more collective, commercial law is more

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[785] *The Football League,* supra note 653, [188].
[786] *Perpetual* supra note 635, [57].
[787] *Chandos* SCC, supra note 728, [36].
[788] *Belmont Park,* supra note 608, [103].
[789] *Chandos* SCC, supra note 728, [33].

focused on the individuality of the entrepreneurial venture. While in both Canada and England, the underlying policy rationale of the anti-deprivation rule is based upon collectivity, in England such a conception is curtailed by individuality. While the Canadian courts believe that business interests must be subservient to insolvency interests, English courts seem to insist that insolvency interests must be subservient to business interests. This idea is best surmised in *Belmont Park* by Lord Collins when he concludes that "it is desirable that, so far as possible, the courts give effect to contractual terms which parties have agreed."[790] Such logic was cited repeatedly[791] in favour of a purpose-based anti-deprivation rule in England. While contractual terms are still relevant in Canada, they are only consulted for the purposes of determining whether the impugned term was meant to apply on insolvency or not.

On the flip side, the impact of legal realism is readily apparent regarding the SCC's ruling. While the UKSC seems to take a more positivist approach, namely looking at the jurisprudence around the rule and determining when it has applied and when it has not, ultimately determining that good faith and commercial intent are important factors,[792] the SCC seems far more apt to look at the rule's effect and its practicality of achieving the stated policy goal. As an example, the SCC discussed the impracticality of determining "…the intention of parties long after the fact…" as this "would detract from the efficient administration of corporate bankruptcies."[793] This is a clear indication of looking at factors beyond the law, to future impracticalities a purpose-based rule might cause. By reasoning as to why the effects-based rule is preferable in the Canadian context, the SCC engages in a policy exercise – actions that are encouraged by the legal realists. The UKSC seems less apt to engage in such reasoning at least within the text of their decision.

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[790] *Belmont Park,* supra 608 note, [103].
[791] *Belmont Park,* supra note 608, per Lord Collins [53], [70], [75], [77], [79], [88], [98], [103], [104].
[792] *Belmont Park,* supra note 608, per Lord Collins, [77]
[793] *Chandos,* supra note 728, 623 [34].

It is also clear that the SCC had the benefit of a near decade between the decision in *Belmont Park* and *Chandos* and the criticisms levelled at that decision. It nevertheless also appears that the UKSC and SCC have divergent opinions around the purpose and scope of the anti-deprivation rule. This is based upon numerous factors as discussed above. While the Canadian anti-deprivation rule appears a rule of general avoidance, the English rule is ultimately curtailed by the freedom of contract. As Lord Collins stated in *Belmont Park,* the UKSC should be weary to interfere with commercial arrangements.[794] While in Canada, the judiciary chose to place more emphasis on the collective nature of the *Bankruptcy and Insolvency Act,* the English judiciary chose party autonomy as the driving factor in terms of how and when the anti-deprivation rule should apply.

The imputation of a proper business purpose can be a daunting task. While a purpose-based rule is not inherently bad, the English one could have benefited from greater clarity on the part of the UKSC. This is not to say a purely effects-based rule is the best solution. Such a rule, as is applied in Canada, severely limits party autonomy and is rife with potential issues and has further been limited by the lower courts in Ontario. Such concerns likely loomed large in the mind of Justice Côté's dissent in *Chandos*.

Although both rules emanate from a shared origin, they have since diverged to form unique, national approaches. While there is undoubtedly cross-commonwealth dialogue, with the examples of both the SCC's consideration of Prof. Worthington's argument, and the UKSC's consideration of the Australian *Ansett* decision,[795] such dialogue is not substantial enough to allow for a harmonisation of different legal concepts. Although Canadian bankruptcy and insolvency law is

[794] *Belmont Park,* supra note 608, per Lord Collins [53], [70], [75], [77], [79], [88], [98], [103], [104].
[795] In *Belmont Park,* supra note 608, [13], *Ansett* was used as an example, alongside other case law, to illustrate the difference between the *pari passu* and anti-deprivation rules.

historically dependent upon Britain, it has matured beyond this to become a unique body of law based upon its own dominant principles and interpretations. Such diverging interpretations are not bad, however, as different countries' conceptions of the law often develop for very good reason.

4.11. Conclusion to the Chapter

This chapter, both explanatory and comparative, has examined the anti-deprivation rule in both England and Canada. While discussing English cases and criticisms to the rule as expounded upon in the leading *Belmont Park* decision, this chapter has also offered criticism of the use of the rule in England.

This chapter has attempted to explain the rule and has also offered academic criticisms thereof from multiple perspectives. The chapter has also attempted to illustrate the impact of the criticisms to the *Belmont Park* decision upon the Canadian *Chandos* decision with particular emphasis on those levelled by Prof. Sarah Worthington. In doing so, this chapter has illustrated that the Canadian anti-deprivation rule has diverged from that of England for three very distinct reasons. Firstly, the rule in Canada has a long and independent history. Secondly, the Canadian courts place greater emphasis on the collective insolvency law as opposed to the individualistic commercial law whereas the English approach does the opposite. Finally, the Canadian courts are much more apt to fully adopt overtly legal realist positions in their reasoning.

Alongside the comparison between Canadian and English law, the provisions contained within the US Bankruptcy Code, and their shared history with the anti-deprivation rule, shows how not all common law nations developed the principles contained within the *Statute of Elizabeth I, 1571* into the anti-deprivation rule. This is because the anti-deprivation rule does not develop in

earnest until the late 18th to early 19th centuries with the first recorded case being in 1812.[796] It can be determined then, that although there are American statutory devices which may operate similarly to the anti-deprivation rule, and Massachusetts law contained a similar device in the early 19th century,[797] the rule has never truly existed within the American Federal context. This must be distinguished from the *pari passu* rule which has found its way into the *pro rata* distribution provisions of the *Bankruptcy Code.* Perhaps most fascinating in this chapter is how the common law, which began as a haphazard historical development, has gone from a simple system impacting Anglo-Norman nobility to a complex system, exported globally, that has now developed a wide array of interpretations. The anti-deprivation rule, or lack thereof, is an optimal example. Similarly, as will be seen in the next chapter, the law of executory contracts, itself a product of the law of disclaimer, has diverged in both the American and Canadian contexts from England.

The next chapter will turn to the regulation of executory contracts which was discussed briefly in both the *Belmont Park*[798] and *Chandos*[799] decisions and has since caused much confusion. While less prominent in the last two chapters, in the next chapter, American law will play a prominent rule, as it is a discussion of *ipso facto* clause prohibitions – an American legal innovation. It is important to keep in mind that, while the explicit prohibitions contained within each country's respective statutes speak to practical, historically observed, issues, corrected over time, the principles which underpin the anti-deprivation rule serve a much broader purpose.

[796] *Higinbothan v Holme* (1812) 19 Ves Jun 88, [92].
[797] *Locke v Winning,* 3 Mass. (1 Tyng.) 325, 326 (Mass. 1807); See also Subchapter 2.9.
[798] *Belmont Park* supra note 608, per Lord Collins, [100]-[101], per Lord Mance, [173]-[174].
[799] Chandos SCC, supra note 723 [30].

Chapter 5 – *ipso facto* clauses and the anti-deprivation rule

5.1. Introduction

While the anti-deprivation rule is oftentimes applied to contractual terms which are meant to apply upon an entity's insolvency, American lawmakers, when drafting the 1978 *Bankruptcy Code,* decided to include provisions which invalidate *ipso facto* clauses. Put simply, an *ipso facto* clause is a clause which allows a party to either modify or void obligations under an executory contract by the very fact of the counterparty's default.[800] These prohibitions against *ipso facto* clauses, were somewhat of a revolutionary concept as transactional avoidance provisions were historically meant to apply *ex post facto. Ipso facto* clause prohibitions, on the other hand, make it much easier to strike down contractual provisions which take effect immediately upon an entity's insolvency. While there is certainly functional overlap between prohibitions against *ipso facto* clauses and the anti-deprivation rule, they are not intended to serve equal purposes. While the anti-deprivation rule is a broad and principled rule of transactional avoidance, developed organically over 450 years, the *ipso facto* clause prohibitions are devices designed to limit the non-defaulting party's ability to unilaterally cancel executory contracts. This chapter will attempt to shed light upon their interaction and how such differing devices can operate simultaneously in an insolvency system.

To demonstrate this, this chapter has altered the order of jurisdictions discussed in this chapter from the general format of the thesis; this is because the American regime for regulating

[800] Roderick J. Wood, *Bankruptcy and Insolvency Law,* 2nd ed., (Irwin 2015), 178; John AE Pottow, 'A New Approach to Executory Contracts," 96 (2018) Tex. LR 1437, 1441; Andrea Coles-Bjerre, '*Ipso Facto:* The Pattern of Assumable Contracts in Bankruptcy' 40 NM L Rev 77 (2010), 77; Emil A. Kleinhaus and Peter B. Zuckerman, 'The Enforceability of *Ipso Facto* Clauses in Financing Agreements: *American Airlines* and Beyond' 23 Norton J. Bank. L.P. 193 (2014), 193.

ipso facto clause prohibitions is not only the oldest but the most comprehensive. Following the initial discussion of the United States regime, the Canadian context will be discussed followed by the English. This ensures the reader will have a better comprehension of how the executory contracts and *ipso facto* regimes of each country operate as the American one has the highest degree of codification, England the least, with Canada being in a middle-ground.

The chapter is structured as follows. Part 1 will begin with a discussion of executory contracts in a broad and general sense. Part 2 will be a brief overview of important concepts of contract law necessary to understand the executory contract. Part 3 will discuss the operation of executory contracts in each jurisdiction alongside the powers of the debtor to disclaim and assign contracts. This discussion of executory contracts is necessary as, in all three jurisdictions, as a practical matter, *ipso facto* clauses can only apply to executory contracts.

Following this overview of executory contracts, part 5 of the chapter will discuss both *ipso facto* clause prohibitions in each jurisdiction's statutory regime, alongside legislative exemptions (referred to as "safe harbour" provisions in American parlance). The relationship between safe harbours and the *ipso facto* prohibitions will especially inform the American example. Case law will also be utilised to better understand how these provisions have applied in practice. Finally, part 6 of the chapter will discuss the relationship between *ipso facto* clause prohibitions and the anti-deprivation rule with particular emphasis on the Canadian context where both have existed together for 15 years. By the end of this chapter, the reader should have a clear understanding of both what *ipso facto* clause prohibitions are alongside an understanding of how such provisions interact with the anti-deprivation rule. This will set the stage for the next chapter which situates both sets of rules within the avoidance systems of all three countries.

5.2. A note on Legal Transplantation and *ipso facto* clause prohibitions

Since, in both Canada and England, *ipso facto* clause prohibitions are legal transplants, being borrowed from the US Bankruptcy Code § 365, it is important to understand where exactly said law originated and what purpose it was trying to fulfil. While there is some debate, notably between Watson and Legrand,[801] around whether legal transplants are even possible, it is clear, judging by the realism of policymaking, that transplantation is a common occurrence. The recent adoption of *ipso facto* clause prohibitions, to be discussed throughout this chapter, is one such example of legal transplantation.

Legal transplants, a term coined by Alan Watson, are not only possible but common and have been occurring since the beginning of recorded history.[802] One of the best examples of a legal transplant was the influence of Justinian's Code across Europe[803] or the adoption of Common Law across the British Empire.[804] Glenn has noted that transplantation of laws often results in a hybridization of laws between that of the donor and donee jurisdictions, he notes elements of Indigenous laws that still remain in Canada and Australia for example,[805] transplants inevitably carry over some aspects of the donor jurisdiction's law. It is argued here that the aspects of a donor country's law which are most likely to be carried over are those which have the greatest foundational effect on the original law. Since *ipso facto* clause prohibitions originated out of US Congress' desire to regulate executory contracts, such are fundamental to understanding *ipso facto*

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[801] For a summary of the Watson-Legrand debate see Andrew Harding 'The Legal Transplants Debate: Getting Beyond the Impasse?' in *Legal Trasnplants in East Asia and Oceania,* Vito Breda ed. (Cambridge 2019); Alan Watson, *Legal Transplants: An Approach to Comparative Law,* 2 ed. (Georgia 1994); Pierre Legrand 'The Impossibility of 'Legal Transplants'' (1997) 4 *Maastricht J of European and Comparative Law* 111.
[802] Alan Watson, *Legal Transplants: An Approach to Comparative Law,* 2 ed. (Georgia 1994), 21.
[803] Ibid, 36-56, Watson discusses the process of transplantation of Roman law into Scotland which today has what many consider a "hybrid system."
[804] Ibid, 63-74, Watson discusses the transplantation of common law in both Massachusetts and New Zealand.
[805] H. Patrick Glenn, *On Common Laws* (Oxford 2005), 67.

clause prohibitions. This view was shared by the Senate of Canada who noted the importance of understanding executory contracts within the scope of the 2005 amendments which included *ipso facto* clause prohibitions.[806] As will be seen, in the foregoing discussion, this chapter attempts an understanding of how executory contracts operate across each jurisdiction. This will be utilised to better position *ipso facto* clause prohibitions within respective avoidance legislation.

5.3. Executory Contracts – a primer

Before *ipso facto* clause prohibitions can apply, the contracts in question must be deemed to be executory in nature.[807] This is simply because a contract that no longer exists, i.e. an executed contract, does not carry continuing obligations into insolvency.[808] This is made out quite clearly in the US *Bankruptcy Code* under § 365 which is meant to apply only to executory contracts.[809] It is thus important to understand what exactly an executory contract is, how they developed, and when they are deemed to exist. The most cited definition of an executory contract comes by way of Prof. Vern Countryman:

> "…a contract under which the obligation of both the bankrupt and the other party to the contract are so far underperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other."[810]

Common examples of executory contracts can include leases, employment contracts, builders work in progress contracts and supply contracts.[811]

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[806] Senate of Canada: The Standing Committee on Banking Trade and Commerce, 'Seventeenth Report of the Committee,' *Committees (44th Parliament, 1st Session),* (Parliament of Canada 2005).
[807] Kleinhaus and Zuckerman, supra note 817, 195.
[808] Archives: US Department of Justice, '59. Executory Contracts in Bankruptcy – Introduction, Threshold Issues' *Civil Resources Manual,* https://www.justice.gov/archives/jm/civil-resource-manual-59-executory-contracts-bankruptcy Accessed April 22, 2025.
[809] *Bankruptcy Code,* § 365.
[810] Vern Countryman, 'Executory Contracts in Bankruptcy: Part I' (1973) 57 Minn L Rev 439, 460.
[811] Janis P Sarra, *Rescue! The Companies' Creditors Arrangement Act,* 2nd ed. (2013: Carswell), 424.

The term "executory contract," which is now commonplace,[812] is not necessarily well-understood, in the discussion of bankruptcy and insolvency laws in Canada and England. This is perhaps because it appears to have developed out of American academic writings in the 1920s.[813] Although these contracts were not defined in the 19th century, the 1879 English case *Ex parte Stapleton* deduced their existence in a sales contract.[814] This decision was affirmed in Canada's 1925 *Re Thomson Knitting,*[815] a decision that has been cited as recently as 2020.[816] While the Commonwealth jurisdictions of Canada and England have left the determination of an executory contract to the common law, with Canada more explicitly adopting the American term than England,[817] the American approach has been to codify the law governing said contracts into the *Bankruptcy Code.* The approach in England has historically been around the determination of whether or not a contract can be disclaimed as onerous.[818] However, with the introduction of *ipso facto* clause prohibitions into English law, attempts at a more nuanced understanding of executory contracts in the English context have begun.[819]

Even though they predate the *Bankruptcy Code*, the statutory regime governing executory contracts is, in the American context, the direct result of bankruptcy law developments which

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[812] Eugenio Vaccari 'Executory Contracts in Insolvency: The English Perspective' in *Executory Contracts in Insolvency: A Global Guide,* 2 ed., Jason Chuah and Eugenio Vaccari eds. (2023: Edward Elgar); Kristen van Zwieten *Goode on Principles of Corporate Insolvency Law,* 5th ed. (2018: Sweet & Maxwell), 6-22; Roderick J. Wood, *Bankruptcy and Insolvency Law,* 2nd ed., (2015: Irwin), 175; Kenneth Ayotte, 'Leases and Executory Contracts in Chapter 11' (2015) 12 J of Em L Stu 637; *Spyglass Media v. Bruce Cohen Prods. (In re Weinstein Co.),* 997 F.3d 497 (3d Cir. 2021), 504.

[813] James Angell McLaughlin, 'Amendment of the Bankruptcy Act,' (1927) 40 *Harvard Law Review* 583, 605-609.

[814] *Ex parte Stapleton, Re Nathan* (1879) 10 Ch D 586.

[815] *Re Thomson Knitting Co. Ltd., Ex parte Beaver & Wolf,* [1925] 2 DLR, 1925 CanLII 385 (ONCA).

[816] *Re JTL Industries Ltd.,* 2020 SKQB 225 (CanLII), 39.

[817] Although both van Zwieten and Goode, in *Principles of Corporate Insolvency Law,* supra note 829 makes extensive use of the terms "executed contract" and "executory contract" when dealing with such mechanisms in English law.

[818] Jason Chuah, 'A Thematic and Comparative Evaluation of Executory Contracts and *ipso facto* clauses,' in Jason Chuah and Eugenio Vaccari eds. (Edward Elgar 2023), 7.

[819] See Eugenio Vaccari 'Executory Contracts in Insolvency: The English Perspective' in *Executory Contracts in Insolvency: A Global Guide,* 2 ed., Jason Chuah and Eugenio Vaccari eds. (Edward Elgar 2023); Kristen van Zwieten *Goode on Principles of Corporate Insolvency Law,* 5th ed. (2018: Sweet & Maxwell), [6-22].

sought to clarify parties' abilities. This was necessary as contract law is generally a state undertaking under the Constitution.[820] Generally speaking, under US state law, since contracts are binding on both parties, neither side has the power to walk away without consent of the other party.[821] When United States Congress sought to redraft the *Bankruptcy Code,* a 1973-1974 two-part article by Vern Countryman, which sought to explain the executory contract in US bankruptcy law to that point,[822] influenced the former's codification of executory contracts into 1978's *Bankruptcy Code.*[823] As such, in the United States, executory contracts are governed by § 365 of the *Bankruptcy Code* and are generally contracts which are both bilateral and have some sort of performance not yet performed.[824] These qualifications of executory contracts appear consistent in England and Canada as well.[825] However, since these are not explicitly defined within § 365, there has been significant scholarly debate as to what is meant by the term "executory contract" with some, most notably Jay Westbrook,[826] arguing for a "functional" approach differing somewhat from that of Countryman.

Per § 365, the US *Bankruptcy Code* also provides that debtors and creditors can assume or reject both executory contracts and unexpired leases.[827] While, in Canada, neither the *Bankruptcy*

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[820] As noted in Chapter 1, bankruptcy is a federal undertaking under the US Constitution whereas general contract law is a State undertaking.
[821] Andrea Colles-Bjerre, 'IPSO Facto: The Pattern of Assumable Contracts in Bankruptcy' (2010) 40 NM L Rev 77, 81.
[822] Vern Countryman, 'Executory Contracts in Bankruptcy: Part I' (1973) 57 Minn L Rev 439, Vern Countryman, 'Executory Contracts in Bankruptcy: Part II' (1974) 58 Minn L Rev 479.
[823] David G. Epstein, 'National Bankruptcy Review Commission's Section 365 Recommendations and the Larger Conceptual Issues,' (1998) 102 *Dick. L. Rev.* 679, 682.
[824] Kenneth Ayotte, 'Leases and Executory Contracts in Chapter 11' 12 J of Em L Stu 637, 641.
[825] Janis P Sarra, *Rescue! The Companies' Creditors Arrangement Act,* 2nd ed. (2013: Carswell), 424; Roy Goode, *Principles of Corporate Insolvency Law,* 4th ed. (2011: Sweet & Maxwell), [6-22].
[826] Jay Lawrence Westbrook, 'A Functional Analysis of Executory Contracts,' (1989) 74 Minn L Rev 227.
[827] US Department of Justice, '59. Executory Contracts in Bankruptcy – Introduction, Threshold issues,' *Justice Manual – Civil Resources Manual,* retrieved Dec 27 2023 < https://www.justice.gov/jm/civil-resource-manual-59-executory-contracts-bankruptcy#:~:text=Executory%20Contracts%20in%20Bankruptcy%20%2D%2D%20Introduction%2C%20Thresh

and Insolvency Act nor the *Companies' Creditor Arrangement Act* make explicit mention of the term "executory contracts," neither does the UK *Insolvency Act, 1986.* No matter, the ability to assume or disclaim executory contracts appears far more limited in the Commonwealth jurisdictions than in the United States.

5.4. Contract Law and the Executory Contract

Before a more in-depth discussion of executory contracts can be performed, there are certain concepts from contract law which need to be understood with perhaps none being more important than the difference between a "condition" and a "warranty" in a contract. The main differentiation of these two terms is that the consequences of a breach of a condition is far more severe than the consequences of the breach of a warranty. While the breach of a condition speaks to the root of a contract, known as a material breach, a warranty is merely a violation of one of the contract's term.[828] Although the breach of all contracts gives the non-breaching party a right to damages,[829] the breach of a warranty entitles the non-breaching party to mere monetary damages.[830] The breach of a condition entitles the non-breaching party to both monetary damages and recission of the contract, i.e. the right to terminate.[831] The right to terminate has been justified as a remedy for breach of a condition because it both protects against further breach, as the law assumes that a current breach can indicate a propensity for the breaching party to breach again,[832]

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[828] Paul R Ellington, 'Termination of Contracts under English Law' (1997) 7 *Int'l Bus LJ* 857, 859.
[829] James C. Fisher, *Contract Law in England and Wales* (Kluwer: 2018), 126.
[830] Ellington, supra note 845, 860.
[831] Ellington, supra note 845, 860; David Hahn, 'The Internal Logic of Assumption of Executory Contracts,' (2011) 13 U Penn J of Bus L 723, 727; Fisher, supra note 846, 126.
[832] Hahn, ibid, 728.

and serves as an ex-ante deterrent against breaches as, without rights of termination, a potential breaching party might undertake a decision to breach on mere economic terms.[833]

According to the traditional contract doctrine, a condition must be perfectly fulfilled,[834] however, a 1961 English maritime case, *Hong Kong Fir,*[835] noted the existence of an intermediate term in a likely attempt to make contractual terms more flexible. Such terms, in scholarly discourse, have been named "innominate." The traditional bifurcated approach to contracts, namely the condition vs warranty approach above, places focus on the form of the term, grants a right of termination in the case of violation of conditions and does so quite strictly. Utilising the concept of innominate terms, the effect of the contractual breach on the whole of the contract is what is important.[836] While the traditional conception of contractual terms is far more formalistic, the incorporation of innominate terms, with their effects-based focus, indicates a more legal realist conception of contracts.

The biggest difference between the traditional bifurcated conditions-warranties analysis and innominate terms is that the former looks to whether every breach of a term would actually result in substantial contractual loss, the latter looks to whether every potential breach might have this effect.[837] To justify recission of a contract, and therefore a condition rather than an innominate term, the breach must be to such a degree that it deprives the innocent party of substantially the entire benefit of the contract. As such, while a term may appear to be a condition, such a term may in fact be innominate. This was the case in *Hong Kong Fir* as, although seaworthiness appeared to

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[833] Hahn, supra note 848, 728-731.
[834] James Gordley, *Foundations of American Contract Law* (Oxford: 2023), 203; Fisher, supra note 846, 127.
[835] *Hong Kong Fir v. Kawasaki Kisen,* [1961] EWCA Civ 7.
[836] Allan C. Hutchinson and John N. Wakefield, 'Contracts – Innominate Terms: Contractual Encounters of the Third Kind' (1982) 60 Canadian Bar Review 335, 337-338; Fisher, supra note 846, 127.
[837] Allan C. Hutchinson and John N. Wakefield, 'Contracts – Innominate Terms: Contractual Encounters of the Third Kind' 60 *Can. Bar Rev.* 335 (1982), 342.

be a condition of the contract, the lack seaworthiness could be mended by repair.[838] So long as the contracting party proceeded to repair the vessel, a maintenance clause was not a condition.[839] The notion of innominate term appears to be accepted in Canada.[840] Under American law, the fulfilment of a condition has also become somewhat relaxed with exceptions being found to the strict right of termination of a contract. The innominate terms definition appears to be in line with Westbrook's functional approach to executory contracts to be discussed shortly. One such example, in contracts which concern the amount a party is to receive, a condition may be excused if a violation of a condition would create a negligible difference in value.[841]

Given that the insolvency of an entity oftentimes makes the insolvent party unable to fulfil its obligations under a contract, such a party is often in material breach of a condition.[842] However, statutes have developed the law of executory contracts to disallow recission on the part of the non-breaching party without first the consent of the insolvent party. This means the executory contracts regime in insolvency proceedings appear to run contra to the objectives of contract law.[843] This creates an inherent tension between common commercial sensibilities and the prevention of

[838] *Hong Kong Fir,* supra note 852.
[839] *Hong Kong Fir,* supra note 852.
[840] Allan C. Hutchinson and John N. Wakefield, 'Contracts – Innominate Terms: Contractual Encounters of the Third Kind' 60 *Can. Bar Rev.* 335 (1982); *Herron v Hunting Chase Inc*, 2003 ABCA 219 2003 CarswellAlta 973, [26]-[27]; *Schmidt Family Trust v Hon Towers Ltd,* 2020 ABQB 150, [9]; Canwest Pac. T.V. Inc. v. 147250 Can. Ltd., 1987 CanLII 2676 (BC SC).
[841] James Gordley, *Foundations of American Contract Law* (Oxford: 2023), 211; *Jacob & Youngs v. Kent,* 129 N.E. 889 (N.Y. 1921); Restatement (Second) of Contracs § 229 cmt. B & illus. 1 (Am. Law. Inst. 1981).
[842] Sarra, supra note 842, 424; Hahn, supra note 848.
[843] Hahn, supra note 848, 732, David Greenfield, Pat Maguire, David Spencer and Ken Lenz, 'When Insolvency and Restructuring Law Supercedes Contract' (2017) 55 Alberta Law Review 349.

economic waste.[844] This tension, as described by Jason Chuah, is between the principals of *pacta servanda,* lit. agreements to be kept, and *paritas creditorum,* lit. parity of creditor.[845]

Bankruptcy proceedings in the United States allow the insolvent party to terminate or assign contracts without the non-insolvent party's consent. In Canada and England, the extent of the insolvent party's ability to do so is more limited.[846] Such a divergence from contract law is justified in the case of executory contracts as the rules are meant to both encourage future credit transactions and ensure fairness within the entire system.[847] Executory contracts in the insolvency context therefore carve out a justified exception to general contract law.

Contracts perform two, sometimes competing, societal functions. First, the freedom of contract permits parties to arrange terms of an agreement so as to enhance the value of a promise.[848] Second, by making promises enforceable, contract law provides remedies for breach which enhance the reliability of terms of exchange and the promise itself.[849] In terms of a now insolvent firm, these objectives can conflict. Granting the counterparty the ability to rescind a contract, by reason of non-performance due to insolvency, ultimately strips value from the contract. In other words, allowing a party to sue for material breach, otherwise allowable in general contract law, is

[844] Jason Chuah, 'A Thematic and Comparative Evaluation of Executory Contracts and *ipso facto* clauses,' in *Executory Contracts in Insolvency: A Global Guide,* 2 ed. Jason Chuah and Eugenio Vaccari eds. (Edward Elgar 2023), 2-3.
[845] Ibid, 5;
[846] David Greenfield, Pat Maguire, David Spencer and Ken Lenz, 'When Insolvency and Restructuring Law Supercedes Contract' (2017) 55 Alberta Law Review 349, 359-363.
[847] Raymond T. Nimmer, 'Executory Contracts in Bankruptcy: Protecting the Fundamental Terms of the Bargain' (1983) 54 U Colo L Rev 507, 509.
[848] Raymond T. Nimmer, 'Executory Contracts in Bankruptcy: Protecting the Fundamental Terms of the Bargain' (1983) 54 U Colo L Rev 507, 516.
[849] Ibid., 516.

undesirable as it does not ensure the greatest amount of value is maintained within the insolvent estate.

Executory contracts are oftentimes important to an insolvent company. This is because, as a practical matter, the costs of entering and negotiating into a new, alternative, contract are oftentimes significant. As such, alongside the risk of a subsequent breach being relatively insignificant in the bankruptcy context,[850] there is far greater justification against recission as a remedy in the insolvency context than there is in commercial law. Executory contracts are desirable both in liquidations and restructurings as the ability of the insolvency professional to assume or reject them ultimately increases potential value remaining within the company. Nonetheless, the United States, Canada and England have sought to deal with these contractual devices differently in their respective bankruptcy and insolvency regimes.

5.5. Executory Contracts in the American Context

5.5.1. Towards a definition of an executory contract?

The executory contract is not defined within § 365 or elsewhere within the US *Bankruptcy Code*.[851] Nonetheless, over time, the accepted definition of an executory contract is that as provided by Vern Countryman above.[852] This definition was affirmed by a multitude of US court

[850] Hahn, supra note 848, 733.
[851] Thomas Hauk & Andrew Schwartz, 'In re Weinstein Company Holdings LLC: An Overly Systematic Approach to Executory Contracts Limits Much-Needed Flexibility' (2022) 67 Vil L Rev 801 at 801; *Justice Manual* supra note 844.
[852] Vern Countryman, 'Executory Contracts in Bankruptcy: Part I' (1973) 57 Minn L Rev 439 at 460.

decisions[853] and most notably by the Supreme Court in 2019.[854] The Countryman standard invokes a two-part test, whereby the court must look first to whether, under the contract, both the debtor and non-debtor have unperformed obligations and, second, if the debtor, by ceasing performance, would have no right to the non-debtor party's further performance.[855] The Federal Third Appeals Circuit attempted a more nuanced understanding of the Countryman Approach in 2021:

> "the test for an executory contract is whether, under the relevant state law governing the contract, each side has at least one material underperformed obligation as of the bankruptcy petition date."[856]

Although by far the dominant conceptual approach, the Countryman Approach has been modified by the "functional"[857] analysis.

As opposed to the Countryman approach, the functional approach, often credited to the academic work of Prof. Jay Westbrook,[858] encourages, as the name suggests, an analysis which focuses on the function of the contract.[859] This approach is meant to look backward to see whether the purposes accomplished by rejection have already occurred – if so the contract cannot be executory in nature.[860] Westbrook's definition of the functional approach appears to have been the result of an observed propensity of courts to follow such an analysis, most notably illustrated by

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[853] *In re Texascan Corp.*, 976 F.2d 1269 (9th Cir. 1992); *United States v. Floyd,* 882 F.2d 233, 235 (7th Cir. 1989); *Steel Corp. v. National Fuel Distrib. Corp.,* 872 F.2d 36, 39 (3d Cir. 1989); *In re Speck,* 798 F.2d 279, 279-280 (8th Cir. 1986); *Gloria Mfg. Corp. v. International Ladies Garment Workers' Union,* 734 F.2d 1020, 1021 (4th Cir. 1984); *In re Chateaugay Corp.,* 130 B.R. 162, 164 (S.D.N.Y. 1991); *In re Murexco Petroleum, Inc.,* 15 F.3d 60 (5th Cir. 1994), *Spyglass Media Grp. v. Bruce Cohen Prods. (In re Weinstein Co.)* 997 F.3d 497 (3d Cir. 2021).
[854] *Mission Product Holdings, Inc. v. Tempnology, LLC,* 139 S. Ct. 1652 (2019), 1658.
[855] *Justice Manual* supra note 844.
[856] *Spyglass Media Grp. v. Bruce Cohen Prods. (In re Weinstein Co.)* 997 F.3d 497 (3d Cir. 2021)*,* 504.
[857] Not to be confused with the functional approach to comparative law.
[858] See Jay Lawrence Westbrook, 'A Functional Analysis of Executory Contracts,' (1989) 74 Minn L Rev 227.
[859] Thomas Hauk & Andrew Schwartz, 'In re Weinstein Company Holdings LLC: An Overly Systematic Approach to Executory Contracts Limits Much-Needed Flexibility' (2022) 67 Vil L Rev 801, 808-809; Westbrook, ibid.
[860] Chuah, supra note 861, 7; *In re Magness,* 972 F. 2d 689 (6th Cir. 1992), 694.

the Sixth Appeals Circuit's 1978 case of *In re Jolly.*[861] The Sixth Circuit reaffirmed this approach in a 1992 case stating that:

> "…this court suggested that in determining whether the contract is executory, we should work backward from an examination of the purposes to be accomplished by rejection and, if they have already been accomplished, then the contract cannot be said to be executory."[862]

Importantly this was not a wholesale rejection of the Countryman approach but an observation that such an approach was "not controlling" in determining whether a contract is executory or not.[863] It appears, then, that over time the strict, doctrinal, Countryman approach has been relaxed to include an analysis of the actual economic benefit of the debtor.[864] The propensity of adopting the Countryman Approach makes sense given Vern Countryman's articles' influence upon the enactment of the § 365 regime into the *Bankrutpcy Code* as discussed above. While Countryman is still the dominant approach on paper, elements of the functional approach have indeed made their way into courts' analyses during their findings of executory contracts.

5.5.1 Disclaimer, Assumption and Assignment of Executory Contracts in American Bankruptcy

Once a contract is deemed executory, the debtor, usually represented by a trustee, has three options of how to treat said contract. The debtor generally has the right to deal with the contract as they choose pursuant to the business judgement rule.[865] As will be seen, this is different from

[861] Jay Lawrence Westbrook, 'A Functional Analysis of Executory Contracts,' (1989) 74 Minn L Rev 227, 230; *In re Jolly,* 574 F.2d 349 (6th Cir. 1978).
[862] *In re Magness,* 972 F.2d 689 (6th Cir. 1992), 694.
[863] Ibid.
[864] John A.E. Pottow, 'A New Approach to Executory Contracts' (2018) 96 Tex L Rev 1437, 1438.
[865] *Mission Product Holdings, Inc. v. Tempnology, LLC,* 139 S. Ct. 1652 (2019), 1658.

the recission powers in both Canada and England where the recission must be balanced against the best interests of the estate.[866] The trustee's options are as follows:

First, the debtor can assume a contract and continue to be bound by the contract. If the trustee chooses this option, then the debtor is required to cure all existing defaults under the contract. Debtors will generally only do so if the contract is a net asset.

Second, a debtor can reject a contract. Per the US Supreme Court, this is an election to breach the contract and must be treated as such, however, such a rejection does not constitute a rescission meaning that rights which ordinarily survive a contractual breach remain intact.[867] If this happens, the counterparty will have a remedy in contract law, pursuant to applicable state and/or federal law, as executory contracts are treated as they had been rejected the day prior to the bankruptcy filing.[868] With this in mind, a debtor will normally only choose to reject a contract if it constitutes a net liability to the estate. Executory contracts may not be unilaterally disclaimed, however, if they create an interest in land.[869]

Third, a debtor can elect to assign contracts. Generally, a trustee would do this if a contract is a liability to the debtor but a net benefit to a third party. A common example of this is a lease to the premises of an unprofitable business with a contract for below-market rent.[870] Assigning such a lease to someone else would allow the third party to benefit from the lease without taking on the unprofitable business.[871] The trustee may not assign contracts, pursuant to § 365(c), when the

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[866] *Re Abitibibowater inc.* (2009), 2009 CaswellQue 12167, 58 CBR (5th) 1 (Que SC), *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1996] UKHL 19.
[867] *Mission Product Holdings, Inc. v. Tempnology, LLC,* 139 S. Ct. 1652 (2019), 1657-1658.
[868] *In Re El Paso Refinery, LP,* 220 B.R. 37 (W.D. Tex. 1998), 40.
[869] Greenfield et. al., supra note 863, 360; *Sabine Oil & Gas Corp. v. HPIP Gonzales Holdings, LLC,* 550 B.R. 59 (Bankr. S.D.N.Y. 2016); *Southland Royalty Co. v. Wamsutter LLC,* 623 B.R. 64 (Bankr. D. Del. 2020).
[870] Ayotte, supra note 808, 641-642; Epstein supra note 807, 684-685.
[871] Ayotte, supra note 808, 642.

identity of the parties is essential nor when such a contract would be non-assignable pursuant to state law.[872]

The timing of assuming and rejecting executory contracts differs in liquidations and restructurings. In Chapter 7 liquidation cases, contracts unassumed or assigned are deemed rejected after 60 days whereas in restructurings, under Chapter 11, the trustee is given 120 days which can be extended another 90 days.[873]

5.5.2. Requirement to Cure Existing defaults under § 365

Unique to the American executory contracts regime is the notion that a trustee assuming or assigning obligations under an executory contract must first cure all existing defaults under the contract.[874] This effectively ensures that the counterparty to an assumed contract will receive better treatment than general unsecured creditors.[875] Obligations under a non-executory contract can be sold like any other asset or liability.[876] According to Prof. David Hahn, the curing of previous defaults is justified as a "soft alternative" to the right of termination by the non-insolvent partner.[877] Allowing the trustee to assume a contract still binds the non-insolvent, and therefore non-breaching, party to the contract. Since the contract is between one operational party and one insolvent one, the former is far more likely, under a continuation, to suffer economic loss thereunder, and as a result, is compensated for the loss.[878] So, although this regime creates a payable pre-bankruptcy entitlement, as the necessity to cure existing defaults creates a claim in

[872] Stephen Lubben, *American Business Bankruptcy: a primer,* (2021: Edward Elgar), 60.
[873] Stephen Lubben, *American Business Bankruptcy: a primer,* (2021: Edward Elgar), 59; *Bankruptcy Code* §§ 305(d)(1), 365(d)(4).
[874] *Bankruptcy Code,* § 365(b).
[875] Stephen Lubben, *American Business Bankruptcy: a primer,* (2021: Edward Elgar), 60.
[876] *Bankruptcy Code,* § 363.
[877] Hahn, supra note 846, 739.
[878] Hahn, supra note 846, 740.

contract law, such a departure from equality is justified as the non-insolvent party is compelled to continue under the contract while the debtor has the ability to affirm, reject, or assign.[879] The curing of previously incurred defaults under the contract is designed to balance the interests of contract law with those of bankruptcy law. In the United States, this goes further as, it is designed to balance state law, i.e. contract law, against the federal bankruptcy law.

5.5.3. Spyglass and the Relationship between § 363 and §365

§ 365 of the *Bankruptcy Code* oftentimes comes into conflict with § 363. Under § 363(b), the trustee may sell property of the estate so long as, pursuant to § 365(f), such property is free and clear of any interest.[880] For the purposes of the interaction between these two provisions, the trustee can sell the property so long as there is no executory contract attached to it. The standard for an executory contract, under US law, is whether such a contract has obligations remaining on both sides and that at least one of the parties has an obligation materially owing in the contract. Importantly, the contract must still contain a condition yet to be performed, if it merely contains warranties, then such a contract is not executory even though it has obligations owed on both sides.

The reason § 363 can apply when § 365 is not applicable is because it allows the trustee, following notice and hearing, to use, sell or lease property of the estate.[881] However, such a sale is only allowed if the property in question is free and clear of liens and interests.[882] As such, § 365, which creates an interest as it requires all obligations under the contract be cured before a trustee may accept, disclaim or assign, prevents the trustee from exercising power pursuant to § 363. This

[879] Hahn, supra note 846, 741-742.
[880] *Spyglass,* supra note 840, 501.
[881] *Bankruptcy Code,* § 363(b)(1).
[882] *Bankruptcy Code,* § 363(f).

means, with regard to executory contracts, § 363 only applies if either all previous obligations under a § 365 contract have been cured or when the contract has already been executed. In other words, § 365 prevents the trustee from exercising their right under § 363 in the case of an executory contract.

This relationship between § 363 and § 365, was explored in the recent Third Circuit *Spyglass*[883] decision which dealt with the determination of an executory contract.[884] The case concerned a work-made-for-hire contract between Bruce Cohen and the insolvent Weinstein Co. Holdings LLC for the production of *Silver Linings Playbook* which Spyglass Media Group LLC argued they had purchased from Cohen. Cohen, on the other hand, argued that Spyglass failed to cure its defaults pursuant to § 365. Weinstein Co.'s bankruptcy filing was a direct result of the allegations made against Harvey Weinstein following the #MeToo scandal. The contract in question was desirable as it allowed the holder thereof to receive 5% of all the Picture's future net profits.[885] Given that *Silver Linings' Playbook* was a commercial success, such an interest had potential to produce much future profitability. While Cohen argued that he was entitled to have the $400,000 previously owed under the contract cured pursuant to § 365, Spyglass argued that the contract was not executory at all and sought a declaratory judgement that the contract was already bought from Cohen and transferred pursuant to § 363.[886] The case became extremely important as many writers, producers and actors with similar "works-made-for-hire" contracts joined onto Cohen's suit alleging that their contracts were also executory. This would have meant

[883] *Spyglass Media v. Bruce Cohen Prods. (In re Weinstein Co.),* 997 F.3d 497 (3d Cir. 2021).
[884] I would like to thank Counsel for Spyglass Craig Martin for discussing this case with me.
[885] *Spyglass,* supra note 840, 502.
[886] *Spyglass,* supra note 840, 502.

Spyglass would owe millions to cure defaults pursuant to § 365.[887] The Bankruptcy Court sided with Spyglass by granting a motion for summary judgement,[888] Cohen appealed.

While Cohen believed the contract to be executory pursuant to § 365 of the *Bankruptcy Code,* Spyglass rejected this notion and sought a declaratory judgement that the contract was not executory and that the contract was lawfully sold pursuant to § 363 of the *Bankruptcy Code*.[889] Under US law, it is generally accepted that, subject to certain restrictions, property rights within the estate follow state law.[890] Since the contract was drafted pursuant to New York law,[891] the court determined that although the contract in question did meet the standard of material breach, it failed in that the contract no longer required substantial performance. In other words, since the essential nature of the contract was for Cohen to produce the film, he essentially "…contributed almost all his value when he produced the movie."[892] Since the film had already been released for six years by the time the Weinstein Company went bankrupt, Cohen no longer had any material obligations thereunder.[893] In looking at the remaining obligations under the contract, the Court determines they are all ancillary "after-thoughts"[894] and, as such, the contract was no longer deemed executory.[895]

The analysis of the court in *Spyglass* looked to the effective nature of the contract rather than the form of the contractual terms. Under the Countryman Approach, the determination of executory contracts follows the material breach standard. However, some elements of

[887] *Spyglass,* supra note 840, 503.
[888] *Spyglass,* supra note 840, 503.
[889] *Spyglass,* supra note 840, 502.
[890] *Butner v. United States,* 440 U.S. 48 (1979).
[891] *Spyglass,* supra note 840, 506.
[892] *Spyglass,* supra note 840, 507.
[893] *Spyglass,* supra note 840, 507
[894] *Spyglass,* supra note 840, 507.
[895] *Spyglass,* supra note 840, 509.

functionalism, most notably emphasis on the contract's function rather than its form, and the effect of breach, have been imported into the test for material breach under the latter standard. Jay Westbrook's conception of executory contracts was based upon observations from case law. While the Countryman Approach is still alive and well, in reading *Spyglass,* it appears that, even though the court stated they were following the Countryman approach, functionalism has been imported into their analysis. As demonstrated by *Spyglass*, although it has been modified somewhat to incorporate functional analysis, at its base, a formulation of the Countryman approach still rules the day in the analysis of executory contracts in the United States. Such an approach reflects similar developments to innominate terms in both Canada and England thanks to the above-mentioned *Hong Kong Fir* case. Again, here, what is important is to look at how the breach fundamentally alters the contract.

5.6. Executory Contracts in Canada

In Canada, executory contracts have been recognized by the courts[896] as early as 1925.[897] Like the United States, Canada appears to utilise the Countryman Approach[898] and has, in recent case law and academic writing, adopted the American terminology.[899] The executory contract, is a feature of Canadian bankruptcy and insolvency law considered to have been inherited from

[896] *New Skeena Forest Products Inc., Re v Don Hull & Sons Contracting Ltd.,* 2005 BCCA 154m 251 DLR (4th) 328; *Re JTL Industries,* 2020 SKQB 255 (CanLII), 36.
[897] *Re Thomson Knitting Co. Ltd., Ex parte Beaver & Wolf,* [1925] 2 DLR, 1925 CanLII 385 (ONCA).
[898] Roderick J. Wood, *Bankruptcy and Insolvency Law,* 2nd ed., (2015: Irwin), 175; Senate Report, supra note 790, 131.
[899] *New Skeena Forest Products Inc., Re v Don Hull & Sons Contracting Ltd.,* 2005 BCCA 154m 251 DLR (4th) 328; *Re JTL Industries,* 2020 SKQB 255 (CanLII); Roderick J. Wood, *Bankruptcy and Insolvency Law,* 2nd ed., (2015: Irwin), 175; Senate Report, supra note 790, 131.

English common law.[900] A definition of executory contracts in Canada was given in *Re JTL Industries:*

> "Unless they expire or are otherwise properly terminated, executory contracts are contracts in which both parties still have obligations to perform."[901]

Canadian law, unlike American, seems to make little distinction between a condition and a warranty when determining whether an executory contract exists. This is a different approach to the United States where it is necessary to determine whether the impugned clause is either a condition or a warranty.

5.6.1. Disclaimer, Acceptance and Assignment of Executory Contracts in Canada

Although Canada was much later to adopt the American notion of allowing the trustee to disclaim certain executory contracts, this power appeared to be granted by Canadian Courts' general authority in both *Bankruptcy and Insolvency Act*[902] as well as *Companies' Creditor Arrangement Act* restructuring proceedings.[903] Since 1992, in an effort to make restructurings more efficient, this power was explicitly given to the trustee with regard to leases on real property.[904] Under the most significant amendments to the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act,* occurring between 2005 and 2009, executory contracts can now be either disclaimed or assigned.[905] Section 65.11 of the *BIA* provides the following re disclaimer (the wording in the *CCAA* is nearly identical):

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[900] *Ex parte Stapleton, Re Nathan* (1879) 10 Ch D 586, an English case was cited in *Re Thomson Knitting Co. Ltd., Ex parte Beaver & Wolf,* [1925] 2 DLR, 1925 CanLII 385 (ONCA) which is the authority for the existence of the executory contract in Canadian law.
[901] *Re JTL Industries,* 2020 SKQB 255 (CanLII), 39.
[902] *Re Thomson Knitting Co. Ltd., Ex parte Beaver & Wolf,* [1925] 2 DLR, 1925 CanLII 385 (ONCA).
[903] Sarra, supra note 840, 424; *Re T Easton Co.* (1999), 14 CBR (4th) 288 (Ont SCJ), 7.
[904] Senate Report, supra note 790, 131; *Bankruptcy and Insolvency Act,* RSC, 1985, c. B-3, 65.2.
[905] *Bankruptcy and Insolvency Act,* ss. 65.11, 84.1; *Company Creditors Arrangement Act,* s. 32(1), 11.3.

> **65.11(1)** Subject to subsections (3) and (4), a debtor in respect of whom notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) may – on notice given in the prescribed form and manner to the other parties to the agreement and the trustee – disclaim or resiliate any agreement to which the debtor is a party on the day on which the notice of intention or proposal was filed. The debtor may not give notice unless the trustee approves the proposed disclaimer or resiliation.[906]

While this is consistent with the form provided for in other parts of the *BIA,* the cases where the right to disclaimer are not allowed, specifically ss. 65.11(3) and (4), are interesting. Pursuant thereto, a party to an agreement which the debtor wishes to disclaim may, within 15 days of notice pursuant to 65.11(1), apply to the court for an order that the agreement not be disclaimed.[907] Similarly, if the trustee does not approve the proposed disclaimer, the debtor may apply to the court for an order allowing the disclaimer.[908] The case law interpreting these sections shows the right of disclaimer is not absolute under Canadian law. In *Re Abitibibowater,*[909] the Quebec Superior Court considered numerous factors before allowing the disclaimer. Such factors included the current economic crisis and its factors upon the debtor's industry, the CCAA's objectives, the prejudicial nature of the contracts upon the debtor's business, the fair and equitable treatment of stakeholders and the effect of the termination upon the debtor's restructuring.[910] Contracts may not be disclaimed if they create an interest in land.[911] In the case of assignment, a contract may only be assigned if the party to whom the contractual right is being assigned is able to perform the obligations.[912] Furthermore, under Canadian law, disclaiming property appears to have no effect on environmental liabilities of the insolvent estate.[913] In Canadian law, disclaimer and assignment

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[906] *BIA,* s. 65.11(1).
[907] *BIA,* 65.11(3).
[908] *BIA,* s. 65.11(4)
[909] *Re Abitibibowater inc.* (2009), 2009 CaswellQue 12167, 58 CBR (5th) 1 (Que SC).
[910] The Honourable LW Houlden, The Honourable Jeffrey B Morrawetz and Janis P Sarra, *The 2021-2022 Annotated Bankruptcy and Insolvency Act,* (2022: *Thomson Reuters*), 1631.
[911] Greenfield et. al., supra note 863, 360; *Bank of Montral v. Dynex Petroleum Ltd.,* [2002] SCC 7 (CanLII).
[912] *BIA,* s. 84.1(4).
[913] *Orphan Wells Assn. v. Grant Thornton,* [2019] 1 RCS, [102].

of contracts are not guaranteed rights but ones which can only be exercised when the prejudicial nature of the contract to the debtor firm outweighs the benefit of the contract as a whole.

In any case, termination of a contract during a bankruptcy and insolvency proceeding yields a claim in contract law. From a practical standpoint, during a restructuring, a contract must be disclaimed with enough time to ensure such a claim can both be quantified and dealt with in due course; typically, within the debtor's plan of arrangement.[914] Furthermore, unlike in American law, where § 365(b) requires that all prior defaults under the contract be cured, under Canadian law, executory contract disclaimer gives rise to a mere right of contractual damages to be proven in bankruptcy.[915]

Pursuant to the above qualifications, under both the CCAA and BIA, while the trustee may disclaim most executory contracts,[916] such disclaimers cannot be made in the case of contracts entered into after bankruptcy, collective agreements or a defined set of "eligible financial contracts."[917] Eligible financial contracts mostly consist of derivatives and other complex financial agreements as well as margin loans on securities.[918] Executory contracts can be assigned, pursuant to both the *BIA* and *CCAA* but only pursuant to a court order[919] while the same exceptions apply as above.[920] As mentioned, if a trustee disclaims a contract, the other contracting party has an action in contract law which can be proven in any insolvency proceeding of the debtor.[921]

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[914] Sarra, supra note 842, 425.
[915] Roderick J. Wood, *Bankruptcy and Insolvency Law,* 2nd ed., (2015:Irwin),177.
[916] *Bankruptcy and Insolvency Act,* RSC, 1985, c. B-3, 65.11(1); *Companies' Creditors Arrangement Act,* RSC, 1985, c. C-36, 32(1).
[917] *BIA,* 65.11(10);
[918] *Eligible Financial Contract Regulations (Companies' Creditors Arrangement Act),* SOR/2007-257, 2(a)-(i); *Eligible Financial Contract Regulations (Bankruptcy and Insolvency Act),* SOR/2007-256, 2(a)-(i).
[919] *BIA,* 84.1(1); *CCAA* 11.3(1).
[920] *BIA,* 84.1(3); *CCAA,* 11.3(2).
[921] Roderick J. Wood, *Bankruptcy and Insolvency Law,* 2nd ed., (2015:Irwin), 176-177.

Prof. Wood notes two exceptions from case law which prevent a trustee from affirming executory contracts, the first is a contract with an artist for a portrait, where the courts determined that the artist's specific performance was owed only to the bankrupt.[922] Secondly, a contracting party who agrees to supply goods on credit may no longer required to do so once the buyer becomes insolvent.[923] In any event, such are very limited exceptions and are similar to the exceptions contained within § 365 of the *US Bankruptcy Code*. Without steps to either disclaim or assign, the party is deemed to have affirmed the contract – this is especially true if the debtor continues to perform.[924]

5.7. Executory Contracts in England

Although the role of executory contracts in England has not been thoroughly flushed out,[925] certain scholars have recently attempted to understand their role in the English context.[926] Similar to Canada, the status of contracts in insolvency under English law have historically been governed by contract law. As seen when discussing the *Ex parte Stapleton*[927] case, although they are not generally defined as such, a device resembling an executory contract has been observed to have existed in England since the 19th century. This type of contract likely stems from the doctrine of abandonment whereby an assignee in bankruptcy, after taking title to the bankrupt's property, could elect to either abandon or retain both leases and yet-to-be-performed contracts.[928] It is common practice, under English commercial law, for contracts to include clauses enabling a party

[922] Ibid, 175.
[923] Ibid, 175.
[924] Ibid.
[925] Chuah, supra note 861, 7.
[926] Eugenio Vaccari 'Executory Contracts in Insolvency: The English Perspective' in *Executory Contracts in Insolvency: A Global Guide,* 2 ed., Jason Chuah and Eugenio Vaccari eds. (2023: Edward Elgar); Kristen van Zwieten *Goode on Principles of Corporate Insolvency Law,* 5th ed. (2018: Sweet & Maxwell), 6-22.
[927] *Ex parte Stapleton, Re Nathan* (1879) 10 Ch D 586.
[928] *Countryman,* supra note 869, 440.

to terminate a contract or withhold performance when a counterparty becomes insolvent.[929] Nonetheless, there are certain areas of commercial activity where executory contracts are most likely to apply. These areas include the Sale of Goods,[930] Supplier, Employment and Personal Services contracts alongside leases.[931] English executory contracts are similar to their Canadian counterparts in that executory contracts are contracts whereby obligations remain to be performed by both parties.[932]

While in the United States and, to a lesser extent, Canada, the discussion of contracts after an entity's insolvency were left to the executory contracts framework, in England there was greater focus upon the disclaimer of unprofitable contracts.[933] While English case law does not use the term executory contract, such contracts can be said to exist as, in order for a contract to be disclaimed, it must carry some obligations into insolvency. Nonetheless, as England begins the new chapter of having *ipso facto* clause prohibitions into their legislation, an American legal transplant, the role of executory contracts in England needs to be better understood.

5.7.1. Disclaimer of Unprofitable Contracts in English Insolvency

As alluded to above, of greater historical importance in the English context, the *Insolvency Act 1986,* grants the insolvency practitioner the ability to disclaim onerous property. The disclaimer rules for winding up are contained within Part IV, Chapter VIII[934] while those for

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[929] Kubianga Michael Udofia, *The impact of insolvency on corporate contracts: a comparative study of the UK and US insolvency law regimes,* PhD Thesis (2014: University of Nottingham), 21, Vaccari, 'Executory Contracts.'
[930] Rights of Unpaid Sellers Against Goods are contained within Part V of the *Sale of Goods Act 1979.*
[931] Timothy J.B. Costello, 'Executory Contracts and Leases in Bankruptcy – England and Wales' (1982) 10 Int'l Bus Law 308.
[932] Van Zwieten and Goode, supra note 943, [6-22].
[933] Chuah, supra note 861, 7.
[934] *Insolvency Act 1986,* s. 178.

administration are contained within Part IX, Chapter IV. [935] Onerous property refers to either an unprofitable contract or company property which is unsaleable, not readily saleable or property whose sale "…may give rise to a liability to pay money or perform any onerous act."[936] Just like with onerous property, an insolvency professional may only dispose of an executory contract[937] if it is unprofitable.[938] However, similar to Canada, a contract will not be deemed unprofitable simply by the fact that it is financially disadvantageous nor is a contract considered unprofitable simply by the fact that the company made or could make a better deal. Also, before a contract can be deemed unprofitable, pursuant to the *Insolvency Act 1986,* it must give rise to prospective liabilities.[939]

Executed contracts, since they do not carry obligations into insolvency, are not covered by disclaimer. While the disclaimer of a leasehold requires notice to "every person claiming under the company as underlessee or mortgagee,"[940] such can also be disclaimed by the trustee. Furthermore, a court may make an order to vest or deliver the disclaimed property for the purposes of compensating a person who incurred liability by reason of a disclaimer.[941] Generally, when dealing with the disclaimer of contracts in the English context, the main issue is whether a claim under such a contract is either proprietary or personal.[942] This is because, if there is no proprietary right, a trustee is not obliged to procure performance.[943] As a general rule, the party who sustains

[935] *Insolvency Act 1986,* s. 315
[936] *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1996] UKHL 19.
[937] Van Zwieten and Goode, supra note 943, [6-28].
[938] *Insolvency Act 1986,* ss. 178(3)(a), 315(2)(a).
[939] Hamish Anderson, *The Framework of Corporate Insolvency Law,* (OUP 2017), 194-196; *Re SSSL Realisations (2002) Ltd,* [2006] EWCA Civ 7, 36.
[940] *Insolvency Act 1986,* ss. 179(1), 317(1).
[941] *Hindcastle* supra note 951*; Insolvency Act 1986,* s. 181(2).
[942] Van Zwieten and Goode, supra note 943, [6-23].
[943] Van Zwieten and Goode, supra note 943, [6-22].

a loss thanks to a disclaimer may file a claim, but such a party will be treated as a creditor.[944] The claim will be treated the same as damages.[945] Notice is also important when dealing with disclaimer in the English context as an insolvency practitioner is expected to reply to a request for disclaimer within 28 days. Failure to respond deems the contract adopted and the right of disclaimer lost.[946] The justification of disclaimer was discussed by the House of Lords in *Hindcastle:*

> Unprofitable contracts can be ended and property burdened with onerous obligations disowned. The company is to be freed from all liabilities in respect of the property. Conversely, and hardly surprisingly, the company is no longer to have any rights in respect of the property. The company could not fairly keep the property and yet be freed from its liabilities.
>
> Disclaimer will, inevitably, have an adverse impact on others: those with whom the contracts were made, and those who have rights and liabilities in respect of the property. The rights and obligations of these other persons are to be affected as little as possible. They are to be affected only to the extent necessary to achieve the primary objective: the release of the company from all liability.[947]

Although disclaimer has been part of English personal bankruptcy statutory law since 1869,[948] and was introduced into corporate insolvency law in 1929,[949] it was a result of the common law regarding the acceptance or rejection of leasehold interests. Under said common law, the trustee in bankruptcy was required to elect whether or not to accept a leasehold interest.[950] Unlike the approach taken by American law whereby the trustee has a right to disclaim an executory contract, in the English context, a disclaimed contract must be onerous. Disclaimer of contracts in England, being unilateral repudiation, is not a right but a privilege granted by statute as, in certain cases, this right does not exist.[951] Although, as a practical matter, in the American context, usually

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[944] Van Zwieten and Goode, supra note 943, [6-22].
[945] Anderson, supra note 956, 196.
[946] Paul J. Omar, 'Disclaiming Onerous Property in Insolvency: A Comparative Study,' (2010) 19 *Int. Insolv. Rev.* 41, 44.
[947] *Hindcastle* supra note 958.
[948] *Hindcastle* supra note 958.
[949] *Christopher Moran Holdings Ltd. v. Bairstow and Another* (1999), 244 N.R.1 (HL); Omar, 43.
[950] *Hindcastle,* supra note 958.
[951] Anderson, supra note 956, 196.

only unprofitable contracts are disclaimed, the requirement that a disclaimed contract must be onerous in the English context illustrates a difference in approach. The Canadian approach, although it appears to focus mainly on whether the contract is executory, does contain elements of the unprofitability analysis inherited from England. Such was demonstrated in the Canadian *Re Abitibowater* case cited above.

While the United States, and to an extent Canada, are, thanks to their colonial development, more debtor-friendly jurisdictions, England has historically been much more creditor friendly. This, in all likelihood, has influenced their mentality toward the disclaimer of contracts. Nonetheless, with the emergence of more restructuring in the English context, the law of disclaimer in England is perhaps more important now than ever. Arguably, being forgiven for liabilities is more important in debtor-in-possession procedure than when a company is wound up as, in the former, a company must remain a going concern. If contractual parties are allowed to continue their claims, the restructuring will have a greater chance of success.

5.8. *Ipso Facto* clause prohibitions briefly explained.

An *ipso facto* clause, literally translated as a "by the very fact" clause, refers to a contractual provision which allows one or either party to void a contract upon the other's default.[952] In other words, such clauses allow the non-defaulting party to no longer be required to perform their obligations pursuant to that contract. Such an arrangement is easily accommodated for in contract law. [953] The main concern with these contractual terms in the insolvency context is that they shake up the historic balance between the system's two competing goals. On the one hand, the system is

[952] Roderick J. Wood, *Bankruptcy and Insolvency Law,* 2nd ed., (2015: Irwin), 178.
[953] Andrea Coles-Bjerre, 'Ipso Facto: The Pattern of Assumable Contracts in Bankruptcy,' 40 N.M. L. Rev. 77 (2010), 77.

meant to grant relief for overburdened debtors, while on the other, it is meant to allow creditors to maximise their claims through the collective proceeding. These goals are at odds one with the other, almost to the point where they are irreconcilable[954] and, as such, a compromise must be struck. Allowing a creditor to terminate a contractual obligation at the expense of the debtor, and therefore the insolvent estate, upsets this delicate balance.

Historically such attempts to rescind obligations upon an entity's insolvency were broadly governed, in the case of Canada and England, by the versatile anti-deprivation rule. In the United States, where there is no anti-deprivation rule, a legislative approach was preferred. With the enactment of the 1978 *Bankruptcy Code,* United States Congress chose to prohibit such contractual terms by enacting *ipso facto* clause prohibitions contained largely within § 365(e). These provisions were intended to place limits upon executory contracts by allowing a trustee to set aside a contractual term if it makes the contract unenforceable by reason of insolvency. It is important to note that *ipso facto* clause prohibitions apply only to executory contracts. Executed contracts do not carry obligations into bankruptcy. This is important as, under an orthodox understanding of these devices, if a contract is not executory, it cannot be set aside by an *ipso facto* clause prohibition.

Canada and England were also highly influenced by the ease of use of these devices, deciding to include them within their bankruptcy and insolvency legislation. Canada chose to make significant amendments to include prohibitions against *ipso facto* clauses in both the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* between 2005 and 2009.[955]

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[954] Lawrence Ponoroff, 'A Contemporary Approach to Ride-Through, *Ipso Facto* Clauses, and The Nondefaulting Debtor,' 21 Nev. L.J. 209 (2020), 213.
[955] Adrian Ho, 'The Treatment of *Ipso Facto* Clauses in Canada,' 61 *McGill Law Journal* 139 (2015), 172

UK Parliament followed suit with its more recent amendments contained within the *Corporate Insolvency and Governance Act 2020.*

5.8.1. The US *Ipso Facto* Clause Prohibitions Regime

In the United States *Bankruptcy Code,* § 365(e) prohibits *ipso facto* clauses with respect to executory contracts and unexpired leases. § 365(e) grants the trustee power to avoid a statutory lien upon the debtor's insolvency or voluntary filing allowing them to exercise the § 365 power to deal with executory contracts. Most importantly, § 365(e) provides:

> (1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on--
>
> (A) the insolvency or financial condition of the debtor at any time before the closing of the case;
>
> (B) the commencement of a case under this title; or
>
> (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.[956]

Under this provision, the trustee has immense power to invalidate a contractual provision which comes into effect upon an entity's bankruptcy filing. Under such an approach, there is no justifiable business purpose test. So long as the contractual term provides a modification or termination upon insolvency, the trustee has the power to set it aside under § 365(e). The § 365(e) trustee powers have been wrongly assumed to operate analogous to the English and Canadian anti-deprivation rule.[957]

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[956] 11 U.S.C. § 365(e).

[957] See Sarah Worthington, 'Good Faith, Flawed Assets and the Emasculation of the UK Anti-Deprivation Rule' 75 Modern Law Review 112, 114; Nishad Kulkarni, 'A Statutory Basis for the Anti-Deprivation Rule?' 23 Int. Insolv.

5.8.2. Safe Harbour Provisions in the Bankruptcy Code

Before delving into the case law, it is important to understand that US Congress intentionally carved out exceptions where *ipso facto* clause prohibitions would not apply. Included in these provisions are exemptions for securities contracts,[958] commodities contracts,[959] repurchase agreements,[960] and swap agreements.[961] Under all such provisions, the exercise of liquidation, termination or acceleration under a qualified contract is unaffected by the operation of § 365(e).[962] The parties who may exercise these rights are limited by the various safe harbour provisions, as they have become known, themselves. For securities contracts, only stockbrokers, financial institutions, "financial participants," and securities clearing agencies can rely on the safe harbour.[963] In the case of commodities contracts only commodities brokers, financial participants and forward contract merchants can rely,[964] whilst in repurchase agreements only repo or financial participants may rely.[965] Finally, to rely upon the safe harbour or swap agreements, only swap or financial participants are eligible.[966] Being the most recent addition, the swap agreements safe harbour was explicitly added to the *Bankruptcy Code* in 1990 to ensure that swap markets were not destabilised by an event of a bankruptcy.[967] The § 560 safe harbours for swap agreements came into play during the analogous US proceedings to the English *Belmont Park* case.

Rev. 73, 97; Timothy Cleary, 'Lehman Brothers and the anti-deprivation principle: current uncertainties and proposals for reform' 6 *Capital Markets Law Journal* 411, 424.

[958] *Bankruptcy Code,* § 555

[959] *Bankruptcy Code,* § 556

[960] *Bankruptcy Code,* § 559.

[961] *Bankruptcy Code,* § 560.

[962] *Bankruptcy Code,* §§ 555, 556, 559, 560; Thomas E. Plank, 'Custodian or Not: Scrivener's Error in a Bankruptcy Code Safe Harbor,' (2022) 38 Emory Bankr Dev J 51, 64.

[963] *Bankruptcy Code,* § 555.

[964] *Bankruptcy Code,* § 556.

[965] *Bankruptcy Code,* § 559.

[966] *Bankruptcy Code,* § 560.

[967] *Lehman Brothers Special Financing Inc. v. Bank of America N.A.,* No. 18-1079 (2d Cir. 2020), 15

There are also safe harbour provisions for expedited determinations for interests, abandonment or other dispositions of grain assets[968] and for contractual rights under Chapter 15 cross-border cases.[969] While there have been criticisms of this conception of safe harbours,[970] such have been justified for policy reasons given that the costs of disallowing *ipso facto* clauses in the above eligible contracts are far outweighed by the benefits of allowing the operation of financial markets and the supply of goods.[971]

5.8.3. The interaction between § 365(e) and § 560 – Re Lehman Bros. Holdings and *Lehman v. Bank of America*

While the UKSC *Belmont Park* decision of the previous chapter concerned a synthetic collateralised debt instrument under the "Dante Program," it was only one of many of such synthetic CDOs utilised by Lehman Brothers. While the instrument in *Belmont Park* was governed under English law, the majority of synthetic CDOs under the Dante Program were governed by New York law.[972] These were dealt with by Judge Peck at the Manhattan-based Southern District Court in *re Lehman Bros. Holdings Inc.* As established, the anti-deprivation rule does not exist in the United States, similar swap agreements in *Re Lehman Bros. Holdings* were challenged as violating the *ipso facto* clause prohibitions as contained within § 365(e). While Lehman Brothers Special Financing (LBSF) argued the provisions modified a debtor's right solely due to a bankruptcy filing,[973] the movants in this case, Bank of America, made an argument based off three separate points: Firstly, the priority provisions do not modify LBSF's rights and, as such, they are

[968] *Bankruptcy Code,* § 557.
[969] *Bankruptcy Code,* § 561.
[970] For a criticism of the safe harbours see Rizwaan J. Mokal, 'Liquidity, Systemic Risk and the Bankruptcy Treatment of Financial Contracts, (2015) 10 Brooklyn Journal of Financial and Commercial Law 17.
[971] Plank, supra note 979, 63-64.
[972] *In re Lehman Bros. Holdings Inc.* 553 B.R. 476 (Bankr. S.D.N.Y. 2016), 484.
[973] *Re Lehman Bros. Holdings,* ibid. 491.

not *ipso facto* clauses. Secondly, even if they were *ipso facto* clauses, the timing of the modification is not upon bankruptcy. Finally, the safe harbour provisions contained within the *Bankruptcy Code* protect the clauses from § 365(e).[974] Bank of America's second argument was ultimately the main argument considered by the court. Judge Peck analysed the types of transactions involved under the Dante Program determining that such fell into two broad categories – referred to as "Type 1" and "Type 2" transactions.

Under Type 1 transactions, LBSF held a payment priority right that was fixed at the outset as a default option. This granted LBSF an automatic right to payment priority unless conditions for an alternative priority were satisfied.[975] This meant that, so long as they were "in-the-money," LBSF held a payment priority right ahead of the noteholders throughout the entire life of the transaction.[976] However, if LBSF went into default, the priority flipped and the noteholders would then hold priority.[977] In contrast, under Type 2 transactions, there is no default priority position. Instead, the terms of this sort of agreement provide for a waterfall which was not fixed at the outset of the transaction. The term continued to remain unfixed until termination of the swap.[978] Essentially, Type 2 transactions create a range of possible waterfall scenarios. These waterfalls can become applicable following an early termination and which of these waterfalls would be applicable were unknown until the early termination actually took place.[979] The vast majority of transactions under the Dante Program were of the Type 2 variety.[980]

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[974] *Re Lehman Bros. Holdings,* ibid 491.
[975] *Re Lehman Bros. Holdings,* ibid, 492.
[976] *Re Lehman Bros. Holdings,* ibid, 493.
[977] *Re Lehman Bros. Holdings,* ibid, 493.
[978] *Re Lehman Bros. Holdings,* ibid, 493.
[979] *Re Lehman Bros. Holdings,* ibid, 493.
[980] *Re Lehman Bros. Holdings,* ibid, 496.

The court determined that, since Type 2 transactions did not affect any modification of LBSF's rights, only Type 1 transactions create an *ipso facto* modification.[981] The Court, as such, accepted the argument that Type 2 transactions occurred before LBSF's bankruptcy case and, because of this, these transactions did not violate § 365(e).[982] Per Judge Peck, this is because, in § 365(e), for a provision to violate the prohibition against *ipso facto* clauses regime, such a modification must have occurred after the commencement of the bankruptcy case.[983] This meant that the relevant date from when a transaction can be invalidated, i.e. the commencement of the bankruptcy case, is the petition date and not the date by which the entity went insolvent.[984]

There was disagreement with Judge Peck's decision at the trial level. The most notable being Judge Chapman's decision in *Lehman v. Bank of America*[985] which dealt with contracts nearly identical to the transactions in *Re Lehman Brothers Holdings.* While Judge Chapman believed both Type 1 and Type 2 transactions did constitute *ipso facto* clause prohibitions, as they both effectively apply upon an entity's bankruptcy, they were nonetheless saved by the § 560 safe harbour for swap agreements.[986] The 2nd Circuit Court of Appeal agreed with Judge Chapman in *Lehman v. Bank of America* and did not discuss the difference between Type 1 and Type 2 transactions, as they assumed both were *ipso facto* clauses. In doing so, the 2nd Circuit also determined that "…even if the Priority Provisions were *ipso facto* clauses, their enforcement was nevertheless permissible under the section 560 safe harbor."[987] No matter which analysis is used, the result of case law on the matter is that, like in the English *Belmont Park* case*,* it is permissible

[981] *Re Lehman Bros. Holdings,* ibid, 494.
[982] *Re Lehman Bros. Holdings,* ibid, 495.
[983] *Re Lehman Bros. Holdings,* ibid, 496.
[984] *Re Lehman Bros. Holdings,* ibid 498.
[985] *Lehman Bros. Holdings Inc. v. Bank of America National Assoc.,* 553 BR 476 (Bankr. SDNY 2016).
[986] Ibid, 500-501.
[987] *Lehman Brothers Special Financing Inc. v. Bank of America N.A.,* No. 18-1079 (2d Cir. 2020), 16.

for swap agreements to modify priority without infringing § 365(e). This, of course, brings one aspect of the applicability of the relationship between § 365(e) and the § 560 swap agreement safe harbour in relative alignment with the English anti-deprivation rule as applied in *Belmont Park*.

As indicated by both Nocilla, and the intervenor factum of the Canadian Association of Insolvency and Restructuring Professionals [CAIRP] during the *Chandos* decision on the anti-deprivation rule from Chapter 4, the UKSC's desire to create such an alignment was likely no coincidence.[988] While, as will be seen, under Canadian law, the competing objectives of freedom of contract and the anti-deprivation rule were balanced, thanks to Canada having implemented its *ipso facto* clause regime, such was not the case in England – as a result the UKSC likely sought alignment with the above result in the *Belmont Park* case.[989] The relatedness of these cases is the likely cause of conflation between the anti-deprivation rule and *ipso facto* clause prohibitions.[990]

5.9. The Canadian *ipso facto* clause prohibitions

The inclusion of *ipso facto* clauses into the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act,* largely occurred thanks to significant amendments in 2009.[991] Unlike under the US *Bankruptcy Code,* Canadian law provides for different *ipso facto* clause prohibitions under different circumstances. While s. 84.2 of the Act, meant to apply to individual debtors, has been argued by Prof. Wood to be a statutory anti-deprivation rule,[992] both this author and Torrie[993]

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[988] *Chandos,* supra note 4, Factum of the Intervenor, Canadian Association of Insolvency and Restructuring Professionals, [32]-[39]; Alfonso Nocilla, 'Freedom of Contract, Fairness, and the Anti-Deprivation Rule' 65 CBLJ 374, 384.
[989] Nocilla, ibid, 384.
[990] This author is currently resubmitting a paper to the Canadian Business Law Journal which attempts to explain this.
[991] Wood, *Bankruptcy and Insolvency Law,* supra note 932, 178.
[992] Wood, *Bankruptcy and Insolvency Law,* supra note 932, 178-179.
[993] Virginia Torrie, 'Chapter Six: Executory Contracts' in *Bankruptcy and Insolvency Law in Canada: Cases, Materials and Problems* Jassmine Girgis, Alfonso Nocilla and Virginia Torrie eds. 2 ed. (2024: CanLII), 45.

are less convinced. Section 66.34 of the *BIA* is applicable to consumer bankruptcies, while s. 65.1, of the *Bankruptcy and Insolvency Act,* and s. 34 of the *Company Creditors Arrangement Act,* apply to corporate bankrupts.[994] Section 84.2, says the following:

- **84.2 (1)** No person may terminate or amend — or claim an accelerated payment or forfeiture of the term under — any agreement, including a security agreement, with a bankrupt individual by reason only of the individual's bankruptcy or insolvency.

While it will be discussed in less depth than its corporate equivalents here, Prof. Torrie argues that this rule has some overlap with the anti-deprivation only in the sense that it is an effects-based provision under which party intention is irrelevant. In other ways, Torrie rightly concludes that this rule is far more limited than the anti-deprivation rule.[995]

Section 65.1 of the *BIA* provides the following:

- **65.1 (1)** If a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement, including a security agreement, with the insolvent person, or claim an accelerated payment, or a forfeiture of the term, under any agreement, including a security agreement, with the insolvent person, by reason only that
    - **(a)** the insolvent person is insolvent; or
    - **(b)** a notice of intention or a proposal has been filed in respect of the insolvent person.[996]

Section 34(1) of the *CCAA* provides:

> 34(1) No person may terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement, including a security agreement, with a debtor company by reason only that proceedings commenced under this Act or that the company is insolvent.[997]

[994] Ho, 173.
[995] Virginia Torrie, 'Chapter Six: Executory Contracts' in *Bankruptcy and Insolvency Law in Canada: Cases, Materials and Problems* Jassmine Girgis, Alfonso Nocilla and Virginia Torrie eds. 2 ed. (2024: CanLII), 45.
[996] *Bankruptcy and Insolvency Act,* RSC, 1985, c. B-3, s. 65.1(1).
[997] *Companies' Creditors Arrangement Act,* RSC, 1985, c. C-36, s. 34(1).

Similar to Judge Peck's reading of § 365(e) in *Re Lehman Bros. Holdings*, a literal interpretation of s. 65.1 would be triggered only once the debtor files a notice of intention or a proposal.[998] While the rule in s. 65.1 appears somewhat limited in application, in that it only applies once an intention or a proposal has been filed, the provisions in both s. 84.2 of the *Bankruptcy and Insolvency Act* and s. 34 of the *Company Creditors Arrangement Act* appear much broader as they can be triggered simply by the debtor's insolvency.[999] Whether this difference in wording will have a practical effect remains to be seen.

The legislative purpose of s. 65.1 was briefly discussed by the Court of Appeal for British Columbia in *Canadian Petcetra.*[1000] Therein, citing the lower court decision of Ground J., it was noted that s. 65.1 was meant to provide commercial enterprises with an opportunity to continue their operations while subsequently working toward a reorganisation. This, however, needed to be done in a way that also afforded some payments to creditors be obligated to continue in the supply of goods, services or required-use leased property. As such, s. 65.1 was drafted in a way whereby these interests were not wiped out or reduced to unsecured claims in the event of a bankruptcy filing.[1001] Both s. 65.1 of the *BIA* and s. 34 of the *CCAA* have been noted as being a legislative success as there have not been many reported cases contesting their application thanks, in all likelihood, to parties adjusting their contracts to accommodate for the *ipso facto* clause prohibitions.[1002] This lack of case law is perhaps indicative of a nuanced understanding of the connection between *ipso facto* clause prohibitions and executory contracts in the Canadian context.

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[998] Adrienne Ho, 'The Treatment of *Ipso Facto* Clauses in Canada' (2015) 61 McGill LJ 139, 175.
[999] Ibid.
[1000] *Canadian Petcetra Limited Partnership v. 2876 R Holdings Ltd.,* 2010 BCCA 469 (CanLII).
[1001] *Ibid,* 26.
[1002] Janis Sarra, Jennifer Payne and Stephan Madaus, 'The promise and perils of regulating *ipso facto* clauses,' 31 *Int Insolv Rev* 45, 53.

Interestingly, since s. 65.1 of the *BIA* has been noted as being theoretically more limited than s. 34 of the *CCAA*, Singapore was inspired by the latter when enacting *ipso facto* clause prohibitions into their legislation.[1003]

5.9.1. Exceptions to the ipso facto clause prohibitions in Canada

Both ss. 65.1 and 34 contain a safeguard provision allowing the court to disallow the operation of an *ipso facto* clause prohibition in cases where such would cause "significant financial hardship."[1004] This was discussed by the Court of Appeal of New Brunswick in *re Dynamic Transport.*[1005] Therein two cases where the safeguard would apply were noted. First, taking a literal interpretation, cases where the applicability of s. 65.1 "would likely cause significant financial hardship,"[1006] the court stated that exceptions **must** be made to the rule. Second, expanding the rule somewhat, in cases where an insolvent is required to make payments for goods, services or the use of leased or licensed property, the rule **may** also be relaxed.[1007] However, in order to rely on the second exception, a Notice of Intention to file for creditor protection is required.[1008] The case also mentions that the limitations of rights under the safeguard provisions will continue to apply during a pending appeal.[1009]

Alongside financial hardship exceptions, Canadian Parliament also included a set of exceptions for "eligible financial contracts" as well.[1010] Such exceptions, the same under both the

[1003] Chong Yi-Hao Clayton, 'Section 440 of the Insolvency, Restructuring and Dissolution Act 2018: Restrictions on *Ipso Facto* Clauses,' [2019] SAL Prac 27, 10; Meiyan Tan and Keith Han, 'A Comparative Look At The *Ipso Facto* Regime,' [2021] SAL Prac 12, 9.
[1004] *BIA,* s. 85.1(6); *CCAA,* 34(6).
[1005] *Dynamic Transport Inc. (Re),* 2016 CanLII 96984 (NB CA).
[1006] *Re Dynamic Transport,* ibid 29.
[1007] *Re Dynamic Transport,* ibid 30.
[1008] *Re Dynamic Transport,* ibid 30.
[1009] *Re Dynamic Transport,* ibid 31.
[1010] *BIA,* s. 65.1(7)(a); *CCAA,* s. 34(1)(7)(a).

BIA and *CCAA,*[1011] include derivatives, itself including contracts for differences, total return swaps, price return swaps, default swaps and basis swaps, also futures agreements and options agreements.[1012] Such were clearly inspired by the safe harbour provisions as contained within the US *Bankruptcy Code.* These exceptions for eligible financial contracts were included into both the *BIA* and *CCAA* to ensure certainty in capital markets as, without them, there would be a real and material risk to efficiency, stability and liquidity thereof.[1013] Furthermore, pursuant to another exception, under both the *BIA* and *CCAA,* the *ipso facto* clause prohibitions do not apply to clearing agents acting on behalf of the debtor.[1014]

5.10. The recent inclusion of *ipso facto* clause prohibitions in England

Although the opinion amongst legal practitioners in England was long that UK parliament would never introduce *ipso facto* clause prohibitions into English law, the COVID-19 pandemic seems to have changed this.[1015] These reforms, proposed by R3, the Association of Business Recovery Professionals in the UK, some years prior,[1016] contained within the *Corporate Insolvency and Governance Act,* seem to have been necessitated by the need to protect executory supplier contracts during the coronavirus pandemic in 2021.[1017] It has oft been argued that England, as a creditor friendly jurisdiction, intentionally refused to enact *ipso facto* prohibitions as such would

[1011] For a full list see: *Eligible Financial Contract General Rules (Bankruptcy and Insolvency Act),* SOR/2007-256, s. 2; *Eligible Financial Contract General Rules (Companies' Creditors Arrangement Act),* SOR/2007-257, s. 2.
[1012] Janis Sarra, Jennifer Payne and Stephan Madaus, 'The promise and perils of regulating *ipso facto* clauses,' 31 *Int Insolv Rev* 45, 52.
[1013] ibid, 52-53.
[1014] *BIA,* 65.1(7)(b); *CCAA,* 34(1)(7)(b).
[1015] Felicity Toube and Georgina Peters, 'Ipso Facto Reform: Why now, and does it go too far (or not far enough)?' *South Square Digest* (June 2020).
[1016] R3, *Financial Recovery: Newsletter Issue – 8* (TH Financial Recovery 2015); R3, *Holding Rescue to Ransom – success!* (2015 R3).
[1017] Toube and Peters, supra note 1032.

infringe on the contractual rights of creditors.[1018] Under English law, as alluded to in the *Belmont Park* decision, there is a fundamental principle of freedom of contract which has existed since at least the 19th century.[1019] In this sense, the requirement for the continuation of contracts in the English case ultimately outweighed the desire to remain a fully creditor-friendly jurisdiction and, thus, *ipso facto* clause prohibitions now form part of the English insolvency legislation. In any event, such provisions have brought English insolvency closer not only to other common law jurisdictions[1020] but to the European Union[1021] as well.

The reforms to the *Insolvency Act* 1986 are limited only to the aforementioned "supplier contracts" and follow a gradual process of reform which began in 2015 with the *Insolvency (Protection of Supplies) Order 2015.* This 2015 order enacted s. 233A into the *Insolvency Act 1986* which applied only to companies in an administration or those subject to a company voluntary arrangement. Section 233A was also limited in that it only applied to supplies which s. 233 deemed essential.[1022] The new 2021 provision, s. 233B applies much more broadly.

The most notable differences of s. 233B is that it applies beyond restructuring proceedings to virtually all insolvency proceeding and that it applies to any supply contract, not only essential ones. It achieves this goal by containing a blanket prohibition on termination clauses,[1023] similar

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[1018] Joanne Collett, '*Ipso facto* clauses and the anti-deprivation principle,' (2010) 5 CRI 196 at 197.
[1019] Toube and Peters supra note 1032.
[1020] This is not limited to the United States and Canada but to Australia and Singapore as well. For a further reading of legislative reform in Australia see: Jason Harris and Christopher Symes, 'Be careful what you wish for! Evaluating the ipso facto refroms,' (2019) 34 Australian Journal of Corporate Law 84. For further reading on legislative reforms in Singapore see: Chong Yi-Hao Clayton, 'Section 440 of the Insolvency, Restructuring and Dissolution Act 2018: Restrictions on *Ipso Facto* Clauses,' [2019] SAL Prac 27; Meiyan Tan and Keith Han, 'A Comparative Look At The *Ipso Facto* Regime,' [2021] SAL Prac 12.
[1021] For a better understanding of how English law has been influenced by the European Union, even beyond Brexit, see: Gerard McCormack, 'The European Restructuring Directive and stays on creditor enforcement actions,' 30 *International Insolvency Review* 67.
[1022] Toube and Peters supra note 1032.
[1023] *Insolvency Act 1986,* s, 233B(3)(a), (b).

to what § 365(e) of the US *Bankruptcy Code* accomplishes in relation to all executory contracts. Section 233B is accompanied by s. 233C which grants the Government power to amend these new provisions so as to exclude any of the insolvency procedures as mentioned in s. 233B(2). Section 233C also grants the Government power to exclude certain types of companies, suppliers, contracts, goods or services to be caught within s. 233B while also granting the Government power to remove any such exclusions in the future.[1024] The provisions, as contained within s. 233B, appear to fulfil a similar purpose as the *ipso facto* clause prohibitions in both Canada and the United States. Like their North American counterparts, the English rules contained within s. 233B are meant to give the insolvency practitioner the ability to either assume or disclaim a contract pursuant to both ss. 178 and 315 of the *Insolvency Act 1986.*

To date, only an admiralty law case has discussed the operation of the new *ipso facto* regime. This, however, was a mere supplemental argument in the case and the court dismissed the application as the litigant in question had terminated management, thereby abandoning the contract.[1025] Nonetheless, future case law relating to s. 233B will undoubtedly be interesting and should shed much light on how both *ipso facto* clause prohibitions and executory contracts are to be construed under English law.

While the new *ipso facto* clause prohibitions contained within the *Insolvency Act 1986* are nowhere near as broadly applicable as those contained within both American and Canadian legislation, it is a notable erosion in the freedom of contract. While, unlike in the United States and Canada, the English prohibitions apply only to supply contracts, and not to all potential

[1024] Toube and Peters supra note 1032.
[1025] *P&O Princess Cruises International Limited v. The Demise Charters of the Vessel 'Columbus,'* [2021] EWHC 113 (Admlty), [48].

executory contracts, such a regime will likely cover many contracts that would otherwise be terminable or modifiable upon insolvency.[1026] While this reform is significant, in the case of supply contracts, it is far from an overhaul of the entire avoidance system. The reform is one that is likely necessitated by two circumstances. Firstly, the immediate need to avoid catastrophe in the face of the COVID-19 pandemic and, secondly, the inevitable change catalysed by an increase in restructuring proceedings. As with the Canadian case, one of the main drivers of this reform is likely the need for a more modern device that can be utilised to avoid contractual changes to ensure the success of a restructuring.

Given the arguments contained within the previous chapter, it would be wise for British Parliament to consider implementing more robust *ipso facto* clause prohibitions similar to those contained in both the *Bankruptcy Code* and the *Bankruptcy and Insolvency Act.* Doing so would go a long way in creating more certainty with regard to better understanding complex securities arrangements. As *Belmont Park* demonstrated, judges and lawyers oftentimes have difficulties comprehending these contracts so a process of drafting a robust *ipso facto* clause regime, with American-style safe harbours, is likely warranted. As noted above, the inclusion of such terms has been a resounding success in Canada. This would allow for greater clarity in future cases around complex securities contracts and would perhaps also allow the courts to better clarify the justifiable business purpose standard with regard to anti-deprivation cases. Nonetheless, section 233B of the *Insolvency Act 1986* does already contain some safe harbour provisions. Such exemptions, to be discussed next, are unlikely to serve as a guide for exemptions to any potential future blanket *ipso facto* clause prohibitions provision.

[1026] Toube and Peters supra note 1032.

5.10.1. Exclusions to s. 233B

As in the United States and Canada, UK Parliament carved out certain exceptions to the *ipso facto* clause prohibitions contained within s. 233B. The listed exemptions are all contained within *Schedule 4ZZA* of the *Insolvency Act 1986.* As well as contracts for essential services in part 1,[1027] the exemptions also include contracts for persons involved in financial services under part 2. The part 2 exclusions apply to insurers,[1028] banks,[1029] and other financial institutions,[1030] Part 3 makes exemptions for contracts involving financial services.[1031] Part 4 contains other exclusions, namely that the *ipso facto* clause prohibitions cannot apply to Part 7 of the *Companies Act 1989 (financial markets and insolvency),*[1032] the *Financial Markets and Insolvency Regulations 1996,*[1033] the *Financial Markets and Insolvency (Settlement Finality) Regulations 1999,*[1034] and the *Financial Collateral Arrangements (No.2) Regulations 2003.*[1035] Beyond this, Part 4 also contains exemptions for set-off and netting arrangements[1036] and aircraft equipment.[1037]

Compared with the United States and Canada, these exemptions limit the *ipso facto* clause prohibitions in s. 233B much more so than their North American counterparts. It appears that the English the *ipso facto* reforms are limited in that they are only meant to apply to trade creditors.[1038]

[1027] *Insolvency Act 1986, SCHEDULE 4ZZA,* 1.
[1028] *Insolvency Act 1986, SCHEDULE 4ZZA,* 3.
[1029] *Insolvency Act 1986, SCHEDULE 4ZZA,* 4.
[1030] *Insolvency Act 1986, SCHEDULE 4ZZA,* 5-10
[1031] *Insolvency Act 1986, SCHEDULE 4ZZA,* 13-18.
[1032] *Insolvency Act 1986, SCHEDULE 4ZZA,* 19(a).
[1033] *Insolvency Act 1986, SCHEDULE 4ZZA,* 19(b).
[1034] *Insolvency Act 1986, SCHEDULE 4ZZA,* 19(c).
[1035] *Insolvency Act 1986, SCHEDULE 4ZZA,* 19(d).
[1036] *Insolvency Act 1986, SCHEDULE 4ZZA,* 20.
[1037] *Insolvency Act 1986, SCHEDULE 4ZZA,* 21.
[1038] Toube and Peters supra note 1032.

5.11. Prohibitions against *ipso facto* clauses and the anti-deprivation rule

In discussing the relationship between *ipso facto* clause prohibitions and the anti-deprivation rule, the focus will be on Canadian law as, unlike England, Canada has a 15-year history of concurrent application of *ipso facto* clause prohibitions alongside the anti-deprivation rule.[1039]

While certain scholars[1040] were unsure whether the anti-deprivation rule would become redundant following the introduction of *ipso facto* clause restrictions into Canadian bankruptcy and insolvency legislation, with the example of the *Chandos* decision, this was clearly not the case. Although it was argued[1041] that the rule was eliminated in personal bankruptcy as well as CCAA cases, a 2022 case, *Re Urbancorp,*[1042] calls this into question. While the Ontario Court of Appeal held that the anti-deprivation rule did not apply, the court did analyse the test for application to a proceeding under the CCAA.[1043] Prof. Sarra believes that the anti-deprivation rule still applies as the *ipso facto* clause prohibitions contained in the amendments to the BIA and CCAA were enacted as incremental changes.[1044] However, this likely only tells part of the story as *ipso facto* clause prohibitions and the anti-deprivation rule are meant to fulfil different purposes.

While the anti-deprivation rule and prohibitions against *ipso facto* clauses can serve the same function, they are in fact distinct rules. *Ipso facto* clause prohibitions originate in the desire

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[1039] See Adrienne Ho, 'The Treatment of *Ipso Facto* Clauses in Canada' (2015) 61 McGill LJ 139, 141, who makes a similar argument.
[1040] Ibid, 174-176; Wood, *Bankruptcy and Insolvency Law,* supra note 932, 90.
[1041] Wood, *Bankruptcy and Insolvency Law,* supra note 932, 90.
[1042] *Urbancorp Toronto Management Inc. (Re),* 2022 ONCA 181 (CanLII).
[1043] Ibid, [35]-[47].
[1044] Janis Sarra, Jennifer Payne and Stephan Madaus, 'The promise and perils of regulating *ipso facto* clauses,' (2022) 31 *Int Insolv Rev* 45, 54.

to prevent the trustees from not being able to exercise their option to affirm executory contracts,[1045] while the anti-deprivation rule developed out of the need to ensure no value was removed from the estate upon insolvency.[1046] In general, *ipso facto* clause prohibitions apply to executory contracts only, the anti-deprivation rule applies to any provision which is triggered by an event of bankruptcy or insolvency.[1047] This means, that while the *ipso facto* clause prohibitions are limited to clauses which prevent the trustee from assuming obligations under executory contracts, the anti-deprivation rule is a catch-all rule meant to prevent takings from the insolvent estate that would otherwise have been made available to creditors upon insolvency. *Ipso facto* clause prohibitions exist to grant the trustee the ability to affirm, disclaim or assign executory contracts, the anti-deprivation rule exists to grant effectiveness to the *pari passu* rule. While there are definite overlaps in application, especially when comparing the English *Belmont Park* case with the interaction between § 365(e) and the safe harbours in the US *Bankruptcy Code,* these devices are not equivalent. This point was also iterated by Lord Mance in his concurring judgement in *Belmont Park.* Therein, he explicitly differentiates the anti-deprivation rule from § 365(e), stating that English law has never recognised any principle equivalent to § 365(e).[1048] He goes onto perhaps narrowly construe that the anti-deprivation is more in line with § 541(c) of the *Bankruptcy Code* which provides that all interests of the debtor in property become property of the estate.[1049] As was discussed in chapters 2 and 4, this is a rather limited view of the principles which underpin the anti-deprivation rule and their American counterparts.[1050] The equivalence attributed to *ipso facto*

[1045] Ho, supra note 1056, 146-147.
[1046] *Chandos Construction v. Deloitte Restructuring,* 2020 SCC 25, paras. 12, 35; *Belmont Park v. BNY,* [2011] UKSC 38, [1].
[1047] *Re Urbancorp,* supra note 1056 [41]; *Chandos* supra note 728, [40]; *Belmont Park,* supra note 608 [14].
[1048] *Belmont Park,* supra note 608, [174].
[1049] *Belmont Park,* supra note 608, [173]-[174].
[1050] See subchapters 2.9 and 4.6 where the principles which underpin the anti-deprivation rule are also discussed with relation to statutory and interpretive approaches to US bankruptcy law.

clause prohibitions[1051] and the anti-deprivation are thanks in large part to the *Belmont Park* decision as English law did not contain *ipso facto* clause prohibitions at the time.

Although attempts have been made to paint the American *ipso facto* clause prohibitions regime as equivalent to the English and Canadian anti-deprivation rule,[1052] this is not an accurate assessment. While both applied in the respective "Dante Program" contracts following the bankruptcy of Lehman Brothers, they are altogether different concepts meant to apply to different, albeit overlapping objectives.

The distinction between the anti-deprivation rule and prohibitions against *ipso facto* clauses is important as reform proposals in the wake of the *Belmont Park* decision seem to focus on utilising American-style *ipso facto* clause prohibitions.[1053] Such conceptions of reform are problematic, as indicated by the Canadian case law, as the inclusion of such prohibitions do not eliminate the applicability of the anti-deprivation rule. Furthermore, because the law on *ipso facto* clause prohibitions of all three jurisdictions contain a broad set of safe harbour exemptions, they are far more limited than the anti-deprivation rule. While *ipso facto* clause prohibitions are generally a good idea, and as noted here, they generally allow courts to better understand securities contracts for example, they do not cover nearly the same ground as the broad anti-deprivation rule. Nonetheless, as a legislative creation, all insolvency regimes could likely benefit from broadly

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[1051] See Sarah Worthington, 'Good Faith, Flawed Assets and the Emasculation of the UK Anti-Deprivation Rule' 75 Modern Law Review 112, 114; Nishad Kulkarni, 'A Statutory Basis for the Anti-Deprivation Rule?' 23 Int. Insolv. Rev. 73, 97; Timothy Cleary, 'Lehman Brothers and the anti-deprivation principle: current uncertainties and proposals for reform' 6 *Capital Markets Law Journal* 411, 424.

[1052] See Sarah Worthington, 'Good Faith, Flawed Assets and the Emasculation of the UK Anti-Deprivation Rule' 75 Modern Law Review 112, 114; Nishad Kulkarni, 'A Statutory Basis for the Anti-Deprivation Rule?' 23 Int. Insolv. Rev. 73, 97; Timothy Cleary, 'Lehman Brothers and the anti-deprivation principle: current uncertainties and proposals for reform' 6 *Capital Markets Law Journal* 411, 424.

[1053] Cleary, supra note 1068, 434-440; Kulkarni, supra note 1069, 97-99.

construed *ipso facto* clause prohibitions as they are an effective effects-based tool that can be used by the trustee upon insolvency.

Even though *ipso facto* clause prohibitions are an effective tool to void insolvency-triggered clauses in executory contracts, they cannot cover the same ground as the anti-deprivation rule. While there is overlap between the two rules, the *ipso facto* clause prohibitions are inevitably limited as they can only apply to executory contracts. When a contract does not fall into a specific outlined prohibition, such as in *Chandos,* the *ipso facto* prohibition cannot apply. Such provisions must be left to a broad principled rule such as the anti-deprivation rule. Therefore, in both England and Canada, no matter how many *ipso facto* clause prohibitions are enacted, such provisions will never eliminate the anti-deprivation rule. In the *Chandos* decision itself, Rowe J. iterates this very point: the anti-deprivation rule is one which "…operates to prevent contracts from frustrating statutory insolvency schemes."[1054] It is not a rule aimed at preventing any sort of specific abuse.

5.12. Conclusion to the chapter

In examining how *ipso facto* clause prohibitions protect the ability of the trustee to affirm executory contracts, it is obvious that such devices are meant to apply much differently than the anti-deprivation rule. While they definitely have overlapping applicability, both rules are not the same.

While the anti-deprivation rule is a blanket prohibition against the removal of property from an insolvent estate, *ipso facto* clause prohibitions are a device which are meant to ensure the trustees can exercise their right to affirm or assign executory contracts – an ability especially crucial in the modern rescue-driven insolvency culture. Although both are applicable in similar

[1054] *Chandos Construction v. Deloitte Restructuring,* 2020 SCC 25, [1].

cases in the modern day, equating the two may yield future issues. Nonetheless, as the Canadian case demonstrates, the enactment of *ipso facto* clause prohibitions in neither the *Bankruptcy and Insolvency Act* nor the *Companies' Creditors Arrangement Act* have eliminated the anti-deprivation rule. A similar result should be expected in England if she were to adopt similar, broader, *ipso facto* prohibitions.

While this chapter explored how the anti-deprivation rule interacts with *ipso facto* clause prohibitions, the next chapter will pose a similar question with regard to the remainder of the avoidance regime. Although this relationship was explored briefly in both *Belmont Park* and *Chandos,* the subject warrants a more thorough discussion.

Chapter 6: The anti-deprivation rule and statutory provisions – fraudulent conveyances, transfers at an undervalue and preferences.

6.1. Introduction

While the previous chapters contextualised the anti-deprivation rule both in historic context and modern application, this chapter is aimed at situating it alongside notable statutory rules. This chapter will attempt to demonstrate that fraudulent conveyances, expressed also as transfers at an undervalue in English and Canadian law, and fraudulent preferences are reflective of the same principles as the anti-deprivation rule which date to both the *Statute of Elizabeth* 1571 and the *Statute of Henry VIII* 1542. It is important to keep in mind here, as indicated by Rebecca Parry, that English statutory provisions were implemented to regulate observed transactional avoidance problems.[1055] This means that while transactions avoidance provisions are aimed at clear regulation in frequent areas of avoidance, the anti-deprivation rule is aimed at broad, principled transactions avoidance.

Many attempts have been made to categorise transactions avoidance legislation. As a rule, most academics seem to note two main types of transactions avoidance both of which ultimately reduce the value within the insolvent estate. The first relate to provisions which attempt to keep assets out of the reach of creditors whereas the second applies to provisions which pay creditors outside of rateable distribution.[1056] The *Cork Report* also noted two separate categories of

[1055] Rebecca Parry, 'The Rationale of The Transaction Avoidance Provisions of the Insolvency Act 1986,' in *Transaction Avoidance in Insolvencies,* 3 ed., Rebecca Parry, James Ayliffe and Sharif Shivji eds., (2018:Oxford), 2.01.

[1056] Such a contextual categorisation of transactions avoidance has been utilised most recently by Jassmine Girgis, 'Review of Pre-Bankruptcy Transactions' in *Bankruptcy and Insolvency Law in Canada: Cases, Materials and Problems,* 2 ed., Jassmine Girgis, Alfonso Nocilla and Virginia Torrie eds. (2024:CANLII), 5:1. Such a conception is also consistent with anti-deprivation case law in both England and Canada. Most notably the aforementioned

transactions avoidance rules, those which historically formed part of the general law, for example the fraudulent conveyance, and those which were meant to apply only on insolvency.[1057] As a whole, transactions avoidance devices, whether they be from the statute or common law, are meant to prevent both the swelling of the estate and distribution out of turn.[1058] While there has been non-insignificant debate regarding the categorisation of transactions avoidance provisions in insolvency, this chapter's focus lies squarely with the role of intent in the legislation of the three jurisdiction. This will be done as, from the outset, the thesis is aimed at understanding why the Supreme Court of Canada rejected an intent-based standard of application for the anti-deprivation rule whilst the United Kingdom Supreme Court accepted one. It is postulated here that statutory rules of transactions avoidance are meant to serve the same objective as both the anti-deprivation and *pari passu* rules – namely to prevent both the stripping of assets from the estate upon insolvency and to ensure the fair treatment of creditors once a proceeding begins. This means that both the common law rules, namely the anti-deprivation and *pari passu* rules, and specific transactional avoidance rules are inherently related.

This chapter will be structured similarly to chapters 2-4. Namely, the relevant rules of transactional avoidance for each jurisdiction will be discussed in its entirety and then compared with the others at the end. This will begin with England, then discuss the United States and, finally, Canada. The laws of each jurisdiction will be discussed in sequence then compared at the end. For the sake of brevity, the transactions avoidance rules discussed herein will be limited to three different categories.

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cases of *Chandos Construction Ltd v. Deloitte Restructuring Inc.,* 2020 SCC 25 and *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd,* [2011] UKSC 38.

[1057] Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558, [1201].

[1058] Eugenio Vaccari and Emilie Ghio, *English Corporate Insolvency Law: a primer* [2022: Edward Elgar], 249.

The first of these, to which part 1 of each section of this chapter will focus, are undervalue transfer rules with regard to English and Canadian Federal law, and fraudulent transfer rules with regard to American Federal law. Within this part, a second category of avoidance measures will also be discussed, the s. 423 Transactions defrauding creditors provision in England and both American fraudulent/voidable state transfers legislation and Canadian provincial fraudulent conveyancing statutes. Part 2 of this section will discuss each jurisdiction's preferences legislation and, in the case of Canada where provinces still have their own robust preferences provisions, select provincial statutes will also be examined.

In the third part of each section of this chapter, particular attention will also be paid to the role of intent – this being informed by case law. In discussing both English and Canadian law, thanks largely to two recent Supreme Court of Canada cases, both citing the same United Kingdom Supreme Court case, particular attention will be paid, albeit non-exclusively, to the rules of corporate attribution. Since the United States *Bankruptcy Code* relies mostly upon effects-based provisions, the non-exclusive focus of said discussion will be on the ordinary course of business defence as contained within § 547 of the *Bankruptcy Code.* Within the next section of the chapter, part 4 will discuss disadvantages of purpose-based approaches. Part 5 will be a discussion of why the Supreme Court of Canada, given the significant procedural advantages of a purely effects-based rule, kept the longstanding standard, as discussed in Chapter 4, for the Canadian anti-deprivation rule. Lastly, part 6 of the chapter will conclude with why, given the robust statutory protections, it is unnecessary to codify the anti-deprivation rule as an overt statutory provision.

6.2. The English transfers at an undervalue and transactions defrauding creditors provisions

Transfers at an undervalue in England are contained within section 238 of the *Insolvency Act 1986.* An English innovation, such a provision was added into English insolvency law following the *Cork Report,*[1059] and the reform initiative that followed, resulting in the *Insolvency Act 1986.* Prior to this provision, transactions could be challenged either under the narrowly construed settlement provisions or as fraudulent conveyances.[1060] Prohibitions of fraudulent conveyances were previously contained outside of insolvency legislation in section 172 of the *Law of Property Act 1925.* The Cork Report's main recommendation was to include a similar provision into insolvency legislation.[1061] Parliament was keen to change this as fraudulent conveyancing law made it difficult to prove the necessary intent to defraud creditors.[1062] While fraudulent conveyancing laws are not altogether the same as undervalue transfer prohibitions, the former ultimately influenced the latter. Interestingly, the Cork Committee did not recommend a change in name of the provision, preferring the older fraudulent conveyances title.[1063] The Cork Report also recommended that both should be contained within insolvency legislation in an amended form and replace the previous s. 172 of the *Law of Property 1925.*[1064] Parliament's solution, based upon its interpretation of recommendations from the Cork Report, [1065] was two separate sections, 238, applicable to transfers at an undervalue, and 423, applicable to transactions defrauding creditors. This approach is a noted departure from Canadian and American laws as both still have non-

[1059] Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558.
[1060] Rebecca Parry and Sharif Shivji, 'Transactions at an Undervalue' in: *Transaction Avoidance in Insolvencies,* 3 ed. Rebecca Parry, James Ayliffe QC and Sharif Shivji eds. (2018: Oxford), [4.02]-[4.03];
Law of Property Act 1925, s 172; 13 Elizabeth I, c. 5.
[1061] *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558, [1220].
[1062] Parry and Shivji supra note 1076, [4.02]-[4.03].
[1063] *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558,, [1218].
[1064] *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558, [1283].
[1065] *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558, [1283].

insolvency fraudulent conveyances prohibitions contained largely in respective provincial and state statutes (with the exception of the province of Alberta where the original *Statute of Elizabeth 1571* continues to apply[1066]).

Alongside transfers at an undervalue, English law contains a transactions defrauding creditors provision as contained within section 423 of the *Insolvency Act 1986.* This provision, which is broader in application than s. 238, requires, as an element, the transaction in question be at an undervalue. This provision, much more closely related to the *Statute of Elizabeth 1571*, is closely inspired by the pre-Cork reform *Law of Property Act 1925* section 172 provisions, itself a direct descendant of the original fraudulent conveyance. Section 423 was added into the *Insolvency Act 1986* thanks, in large part, to Parliament's response to Chapter 28 of the *Cork Report.*[1067] Such a provision is largely intended to ensure transactions which deplete assets from the estate can be voided so that such assets may be restored.[1068]

6.2.1. Section 238 of the Insolvency Act 1986 – Transactions at an undervalue

Practically speaking, transactions at an undervalue generally include transfers for no consideration, transfers in consideration of marriage and transfers well below fair market value.[1069] The most common cases which apply this provision are the last category.[1070] Three major elements must be met for section 238 to apply:

[1066] Alberta Law Reform Institute, *Reviewable Transactions: Final Report 108* (2018 Alberta Law Reform Institute), [11]; *Condominium Corporation No 0421647 v MacEwan Village Ltd,* 2021 ABQB 75.
[1067] *Invest Bank PSC v. El-Husseini et. al.,* [2023] EWCA Civ 555, [74]-[77], affirmed by *El-Husseiny and Another v. Investbank PSC* [2025] UKSC 4.
[1068] James Ayliffe QC 'Transactions Defrauding Creditors' in Rebecca Parry, James Ayliffe QC and Sharif Shivji eds. (2018: Oxford), [10.03]-[10.04]; *Westbrook Dolphin Square Lted v Friends Life Ltd (No 2),* [2014] EWHC 2433 (Ch), [401].
[1069] Alaric Watson and Stephen Baister, *Bankruptcy: Law and Practice* (2022: Edward Elgar), [13.003]; Parry and Shivji supra note 1076, [4.04].
[1070] Vaccari and Ghio, supra note 1079, 250; Hamish Anderson, *The Framework of Corporate Insolvency Law* (2017: Oxford), [15.39].

Firstly, there must be a transaction. What constitutes a transaction is defined elsewhere in the legislation as including a "gift, agreement or arrangement."[1071] There is also a requirement that such a transaction was entered into by the debtor or an agent thereof.[1072]

Secondly such a transaction must be for consideration which is below fair market value or no value at all. An outright gift will almost always be construed as an undervalue transaction and, where there is a market for the assets in question, the market value is usually the relevant figure.[1073] However, in cases where value is not easily ascertained, the onus is on the claimant to establish the asset in question had more than nominal value attached to it.[1074]

Lastly, such a transfer must have occurred within 6 months from the onset of insolvency as defined within section 240(3) of the *Insolvency Act 1986.*[1075] In this section, the onset of insolvency generally means the date of the appointment of an administrator or the date of commencement of a winding up.[1076]

There is an additional requirement, under section 240, that a company must, pursuant to section 123, be unable to pay its debts as they become due or must have been put in such a state thanks to the transaction in question.[1077] The onus is on the administrator to advance that the transaction of the debtor occurred while the company was insolvent.[1078]

Different look back rules apply to connected and unconnected parties.[1079] While the notion that connected parties are more likely to commit fraudulent acts was mentioned in *Twyne's*

[1071] *Insolvency Act 1986,* s. 436.
[1072] Parry and Shivji, supra note 1076, [4.06].
[1073] Vaccari and Ghio, supra note 1079, 251.
[1074] *Re Safe Depot Limited* [2023] EWHC 2011 (Ch) [47].
[1075] Anderson, supra note 954, [15.36].
[1076] *Insolvency Act 1986,* s. 240(3) (a)-(e).
[1077] *Insolvency Act 1986,* s. 240(2) (a)-(b).
[1078] *Manolete Partners PLC v Matta*, [2020] EWHC 2695 (Ch), [56]-[57]; *Phillips & Another v McGredor-Paterson* [2009] EWHC 2385 (Ch), [47].
[1079] *Insolvency Act 1986,* s. 240(1).

Case,[1080] the explicit differentiation between connected and unconnected parties was implemented thanks to recommendations of the Cork Committee.[1081] For connected parties, there is a lookback period of two years from the onset of insolvency[1082] whereas, for unconnected parties, such a period is reduced to six months.[1083] The list of connected parties is contained within section 435 of the *Insolvency Act 1986* and includes spouses, relatives of the debtor, employees of the debtor and companies which the debtor or their associates have control.[1084] An associated company is one where the same person has control of both, where a person and their associates or where a group of two or more people have control of a group of companies and such groups either consist of the same people or could be considered as such by replacing members of either with associates.[1085] A person can also be considered connected to a company if they are a director or shadow director thereof, an associate of a director or shadow director or an associate of the company.[1086]

There is a defence to transactions at an undervalue contained within section 238(5) whereby a transaction cannot be set aside if the company entered into the transaction in good faith, for the purposes of carrying out a business,[1087] and there were reasonable grounds for believing the transaction would benefit the company.[1088] This is to be determined by a modified objective standard meaning that a director of a company need not establish that they believed the transaction would have benefitted the company.[1089] Such a defence allows transactions even to connected

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[1080] *Twyne's Case,* 3 Co. Rep. 80; Douglas Baird, *The Unwritten Law of Corporate Reorganizations,* (Cambridge 2022), 11.
[1081] *Invest Bank PSC v. El-Husseini et. al.,* [2023] EWCA Civ 555, [76]-[77]; *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558, [1230].
[1082] *Insolvency Act 1986,* s. 240(1)(a).
[1083] *Insolvency Act 1986,* s. 240(1)(b).
[1084] *Insolvency Act 1986,* s. 435(2)-(10) see also Parry and Shivji, supra note 1066, [4.145].
[1085] *Insolvency Act 1986,* s. 453 (6); Parry and Shivji, supra note 1047, [4.145]
[1086] *Insolvency Act 1986,* s. 249; Parry and Shivji, supra note 1047, [4.146]
[1087] *Insolvency Act 1986,* s. 238(5)(a)
[1088] *Insolvency Act 1986,* s. 238(5)(b)
[1089] Parry and Shivji, supra note 1066, [4.165].

parties to be saved. Perhaps then, the differentiation between connected and unconnected party transactions is less the standard but who bears the proof of establishing intent or lack thereof.

6.2.2. Section 423 of the Insolvency Act 1986 – transactions defrauding creditors

Section 423 requires three elements be met: First, there must be a transaction,[1090] second such transactions must be a gift, in contemplation of marriage or at an undervalue[1091] and third, the transaction must have been entered into with intent to either put the assets out of reach of or prejudice creditors.[1092] The UKSC has recently determined that transfers which prejudice creditors do not, in effect, need to put the assets out of the reach of creditors.[1093] However, as will be explained shortly, the standard for proving what is meant by intent to prejudice creditors is difficult to prove compared to other provisions of the *Insolvency Act*.

Where this provision differs from section 238 is that section 423 requires neither the entering into a formal insolvency proceeding nor insolvency of the debtor at the time of the transfer.[1094] Unlike under section 238, possible actions are extended beyond the administrator or liquidator to also include victims of the transaction as potential claimants.[1095] Under the act, a victim is defined as "…a person who is, or capable of being, prejudiced…"[1096] by the impugned transaction. To be considered a victim has three requirements: a person must be prejudiced, there must also be an undervalue and there must be actual prejudice resulting from the undervalue, not potential for it.[1097] The test for undervalue under s. 423 is identical to that under s. 238[1098] and the

[1090] *Insolvency Act 1986,* s. 423(1)
[1091] *Insolvency Act 1986,* s. 423(1)(a)-(c).
[1092] *Insolvency Act 1986,* s. 423(3)(a)-(b); Ayliffe, supra note 1055, [10.05].
[1093] *El-Husseiny and Another v. Investbank PSC* [2025] UKSC 4, [36].
[1094] Watson and Baister, supra note 1056, [13.041].
[1095] Anderson, supra note 954, [15.46].
[1096] *Insolvency Act 1986,* s. 423(5).
[1097] Ayliffe, supra note 1055, [10.68].
[1098] Anderson, supra note 954, [15.48]

UKSC has also stated recently that the debtor need not own the transferred property directly to be caught under this definition.[1099] However, unlike s. 238, s. 423(3) establishes a mental element unique to that provision.[1100] As mentioned previously, this requires either the intent to put assets out of the reach of creditors, pursuant to s. 423(3)(a), or the intent to prejudice creditors pursuant to s. 423(3)(b). What is meant by an intent to prejudice creditors has been clarified by case law.

With regard to the intention to prejudice creditors, while fraud is not a necessary element in proving a claim under s. 423, the High Court has recently determined that an accusation under the provision ultimately carries "…an imputation of inherently disreputable conduct."[1101] In order to prove a case under the provision, one cannot rely upon "...inviting the court to infer the Alleged Purpose must be pleaded (and proved with cogent evidence)."[1102] The onus is on the plaintiff to establish that the transfer at an undervalue intended to prejudice creditors. Although the courts have not mentioned this explicitly, the case law insinuates that the standard to prove prejudice is relatively high. In *El Husseiny,* the UKSC determined that a transfer by a solvent company owned by the debtor for no or inadequate consideration falls within this definition and has further stated, presumably referring to the badges of fraud, that this was recognised by law long before the enactment of the *Insolvency Act 1986.*[1103]

The *El Husseiny* decision at the Court of Appeal expanded upon the connection between the *Insolvency Act 1986* and s. 423 making reference to Chapter 28 of the *Cork Report.*[1104] The court determined that the statutory provisions which are dealt with exclusively in insolvency serve a different objective to those contained within the prior s. 172 of the *Law of Property Act 1925.*

[1099] *El Husseiny* UKSC supra note 1118, [75].
[1100] *El-Husseiny and Another v. Investbank PSC* [2025] UKSC 4, [61].
[1101] *Invest Bank v. El-Husseini and others,* [2024] EWHC 2976 (Comm), [36].
[1102] Ibid, [38],
[1103] *El Husseiny* UKSC supra note 1118, [35]-[36].
[1104] *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558, [1210]-[1220].

The court stated that while "…the latter were designed to protect creditors from fraud… the bankruptcy code is directed towards achieving a *pari passu* distribution of the bankrupt's estate among his creditors."[1105] The EWCA is not entirely correct in this assertion. Both sections 423 and 238 descend from the *Statute of Elizabeth 1571* in that they are both designed to supress fraudulent conduct in and around the time of an insolvency filing. While the rule in s. 423 has correctly been construed as a broad provision, its use of an undervalue transfer in its test indicates the provision being complimentary to s. 238. This is because all the above provisions were evolutions of the fraudulent conveyance as discussed at length in the Cork Report.[1106] So while the EWCA is correct to assert that s. 423 is designed to protect creditors from fraud, much like the anti-deprivation rule, such is done to ensure *pari passu* distribution of the bankrupt estate. As mentioned in the discussion of anti-deprivation rule case law in chapter 4, these two policy objectives are not mutually exclusive but complementary to one another.

6.3. The English preferences provisions

As noted in Chapter 2, the fraudulent preference was a judicial innovation of Lord Mansfield from 18th century case law around the *Statute of Elizabeth 1571.*[1107] Mansfield's preference appeared, per the case law in *Alderson v. Temple,* to impute a largely effects-based standard.[1108] While preferences provisions made their way into English bankruptcy statutes, there were issues regarding the intention of the parties and the protection of bona fide commercial

[1105] *Invest Bank PSC v. El-Husseini et. al.,* [2023] EWCA Civ 555, [77], as affirmed by the UKSC in *El-Husseiny and Another v. Investbank PSC* [2025] UKSC 4.
[1106] *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558, [1210]-[1220].
[1107] *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558, [1245]; see also Ch. 2 of this thesis.
[1108] *Alderson v. Temple,* 1 Black W 660, (1768) ER 384.

transactions. This led the Cork Committee to make recommendations to clarify exemptions to this provision which were incorporated into the *Insolvency Act 1986.*[1109]

In determining which standard of review needed to be used, the committee looked to both effects and purpose-based standards. The committee looked to Australian law, where they had in the 1960s adopted an effects, rather than intent-based, standard.[1110] The committee, however, rejected an effects-based standard and, instead, recommended that a dominant intention to prefer was still the preferred standard in England.[1111] However, parliament seems to have disagreed somewhat as, the language for the preferences provision in the *Insolvency Act 1986* was changed from requiring the debtor to have acted with a view to prefer to requiring the debtor to merely being influenced by a desire to prefer.[1112]

To prove a preference under the modern act, the petitioner, being either an administrator or liquidator, generally must show the company was insolvent at that time; the transaction was entered into within a relevant time; the beneficiary is a creditor of the company; the transaction, in effect, gave the creditor more than they otherwise would have received in either liquidation or administration; and the debtor must have been influenced by a desire to prefer the recipient.[1113]

English courts have determined that the desire to prefer the creditor must have been a factor in the minds of those who made the decision to enter into the transaction[1114] and the desire to prefer does not need to be the dominant intention in entering into the transaction.[1115] Desire is to be

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[1109] *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558, [1287]
[1110] *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558, [1250]; Australian provision is still applicable and contained in the *Bankruptcy Act 1966,* s. 122.
[1111] *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558, [1287].
[1112] *Invest Bank v. Al-Husseini*, supra note 1123, [5.11].
[1113] Vaccari and Ghio, supra note 1079, 253-254; Parry and Shivji, supra note 1066, [5.12]; Watson and Baister, supra note 1056, [13.015]-[13.016]; *Insolvency Act 1986,* s. 239.
[1114] Parry and Shivji, supra note 1066, [5.105].
[1115] Vaccari and Ghio, supra note 1079, 254; Parry and Shivji, supra note 1066, [5.88]; *Re MC Bacon Ltd* [1990] BCC 78.

determined at the time in which the company made this decision, not at the time when the transaction took place.[1116] Unfortunately, however, since its coming into force, there has been very little case law on the standard for proving intent under s. 238.[1117] This is likely due to defendants lacking the sufficient assets necessary to merit the preferences provision being used[1118] and the required standard of proving desire.

The relevant time differs depending upon the debtor and creditor's relationship. While the general rule is that a preference must be incurred within six months from insolvency,[1119] such may be extended to 2 years in the case of associates and connected parties.[1120] Connected parties are defined as they are under the undervalues provision. Furthermore, if the creditor is deemed to be an associate or connected party, the desire to prefer is presumed.[1121] In cases of associates and connected parties, the defendant must evidence proper commercial reason for why they entered into the transaction if they do not want the provision to apply.[1122] Again, like with transfers at an undervalue, the connected/associated parties presumption appears to reverse the onus, it does not eliminate the need to conduct subjective analysis.

6.4. Ascertaining intent under English Law

Regarding both transfers at an undervalue and preferences provisions in England, it is necessary to ascertain intention of the parties. While the desire to prefer must be shown in order to prove the transfer in question was a preference, with regard to undervalue transfers defence, subjectivity is required in order to show that the debtor acted in good faith and for the purpose of

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[1116] Vaccari and Ghio, supra note 1079, 254; *Re MC Bacon* [1990] BCC 78.
[1117] Vaccari and Ghio, supra note 1079 235; Parry and Sivji, supra note 916 [5.14]
[1118] Parry and Shivji, supra note 1076 [5.14].
[1119] *Insolvency Act 1986,* s. 240(1)(b).
[1120] Parry and Shivji, supra note 1076, [5.15]; Watson and Baister supra note 1056, [13.026].
[1121] Parry and Shivji, supra note 1076, [5.93]; Vaccari and Ghio, supra note 1079, 254;
[1122] Parry and Shivji, supra note 1076, [5.93].

carrying on a business. With regard to transfers to connected/associated parties, the same reversal of onus applies as it does for undervalue transfers.

In discussing the current preferences provision, what is meant by a desire to prefer in the statute was clarified in *Re MC Bacon:*

> *"*There must have been a desire to produce the effect mentioned in the subsection, that is to say, to improve the creditor's position in the event of an insolvent liquidation."[1123]

While this appears a simple test on the surface, namely that there needs to be an intention to improve the creditor in question's position, ascertaining intent in the case of a company is far more difficult than for an individual. Since corporations are ultimately run by people, to find a corporation liable under one of these sections, one must attribute the actions of the directors to the company. The test for determining such was outlined by the UKSC in *Jetavia v Bilta.*[1124] While *Jetavia v. Bilta* dealt with fraudulent trading, contained within s. 213 of the *Insolvency Act 1986,* the observations made by the UKSC appear equally applicable to ascertaining intent with regard to both preferences and the defence to transfers at an undervalue. Therein Lord Neuberger, writing for the court, and Lord Mance, writing a concurring judgement, both agreed for attribution of actions of directors to the company, attention must be paid to "…the context and purpose in and for which attribution is invoked or disclaimed."[1125] Furthermore, while the acts, knowledge and state of mind of both the company and a director or officer can converge, they are distinctly separate as not regarding them as such would ignore the concept of separate legal personhood.[1126] As a result, the court decided on the following dictum:

> "whether or not it is appropriate to attribute an action by, or a state of mind of, a company director or agent to the company or the agent's principal in relation to a particular claim

[1123] *Re MC Bacon* [1990] BCC 78.
[1124] *Jetavia SA and another v. Bilta (UK) Limited (in liquidation) and others,* [2015] UKSC 23, 2015 WL 1786084.
[1125] Ibid, [41] per Lord Mance.
[1126] Ibid, [41] per Lord Mance.

> against the company or the principal must depend on the nature and factual context of the claim in question."[1127]

In other words, the necessary intent to violate any of the statutory provisions as contained within the *Insolvency Act 1986* requires the court to look at the relationship between the corporation and the agent of the corporation alongside the factual context of the claim. This means that, while reforms to change the wording from "intention to prefer" to "desire to prefer" merely lower the standard for a violation, they do not remove the subjectivity inherent within an intent-based standard. In fact, Lord Mance even noted cases where the rules for corporate attribution could be different – namely that the rules for establishing or negating vicarious liability are different from the rules governing the direct relationship between the corporation and its agent.[1128] Such subjectivity ultimately lends to different factual requirements for intent with regard to different sections of the *Insolvency Act 1986.* While intent is generally required to establish a preference under English law, it is also utilised to prove available defences in undervalue transfers. As will be seen, the Supreme Court of Canada recently cited the law in *Jetavia v. Bilta* to ascertain corporate attribution in two recent decisions on both preferences and undervalue transfers. While there is some guidance within specific provisions, the corporate attribution doctrine adds an extra degree of complexity when dealing with potential corporate rather than individual takings.

6.5. The American fraudulent transfers provisions

Under American law, fraudulent transfers provisions are contained in both Federal and State laws both of which are meant to apply only in the case of bankruptcy. As in the English context, both American federal and state provisions appear to trace their origins back to the *Statute*

[1127] Ibid, [9] per Lord Neuberger.
[1128] Ibid, [43] per Lord Mance.

of Elizabeth 1571.[1129] With reference to both state and federal law, the badges of fraud, originally from *Twyne's Case* but now modernized, play an important role in determining fraudulent transfers. Under the United States *Bankruptcy Code,* fraudulent transfer provisions are found within § 548.

Fraudulent transfers under state law vary somewhat from state to state but generally follow the form as found in either the Uniform Fraudulent Transfers Act (UFTA) or the newer Uniform Voluntary Transfers Act (UVTA). The example of UFTA jurisdiction is Delaware[1130] and a UVTA jurisdiction New York.[1131] These states are utilised as they are the two most common jurisdictions in which to file a bankruptcy case.[1132]

6.5.1. § 548 of the Bankruptcy Code – Federal Fraudulent Transfers Legislation

A transfer that offends § 548 effectively requires one of two factual circumstances to be met. Either there needs to be an intention to defraud or the inadequacy of consideration leads to an irrebuttable presumption of fraud.[1133] The first of these has become known as "actual fraud"[1134] whereas the second has been labelled "constructive fraud."[1135] Both of these branches of fraudulent transfers must have occurred on or within two years prior to the filing of the bankruptcy petition.[1136] To prove actual fraud, pursuant to § 548, requires circumstantial evidence pertaining to the size of the transfer in relation to the debtor's assets.[1137] The constructive fraud branch of §

[1129] See Douglas Baird, *The Unwritten Law of Corporate Reorganizations,* (Cambridge 2022).
[1130] 2023 Delaware Code, Title 6, Subtitle II, Ch. 13.
[1131] New York Debtor Creditor Law §§ 270-281A.
[1132] In the United States the debtor files in the state where either its principle place of business or its assets have been located for at least 180 days. This, while largely outside the scope of this thesis, leads to some degree of forum shopping. This has led to the bankruptcy bar creating two de facto jurisdictions for bankruptcy cases, the Southern District of New York and Delaware. For a more detailed look, see Jared A. Elias 'What Drives Bankruptcy Forum Shopping? Evidence from Market Data' (2018) 47 *J. Legal Stud.* 119.
[1133] *Madrid v. Lawyers Title Insurance,* 725 F.2d 1197 (1984), p. 1203
[1134] *Bankruptcy Code,* § 548(a)(1)(A).
[1135] *Bankruptcy Code,* § 548(a)(1)(B).
[1136] *Bankruptcy Code,* § 548(a)(1).
[1137] *Fox v. Hathaway* (In *re Chi. Mgmt. Consulting Grp., Inc.*), 929 F.3d 803 (2019).

548 may set aside a transfer when the debtor receives less than "reasonably equivalent value"[1138] and was insolvent at the time of the transfer.[1139] A transfer made to an insider, or for an employment contract not in the ordinary course of business, may also be set aside.[1140]

In one Supreme Court case, *BFP,* which dealt specifically with the constructive fraud branch, it was determined that "reasonably equivalent value" was not equivalent to "fair market value."[1141] The Supreme Court determined that any value received at a foreclosure sale so long as such a sale was conducted in accordance with state law could be deemed "reasonably equivalent value" for the sake of the constructive fraud branch of § 548.[1142] This was decided for two reasons: First, property sold at a foreclosure sale will inevitably be sold for less than fair market value,[1143] and, secondly, it is outside the scope of the Bankruptcy Code to make determinations of State law.[1144] As one can see, there is a definite degree of subjectivity in determining reasonably equivalent value.

§ 548(c) also provides an affirmative good faith defence which was discussed in the *Re Taneja* case.[1145] This is to be determined based upon the standard of what the transferee actually knew or should have known.[1146] Such, however, needs to be in accordance with routine business practices.[1147] The case specifically determined that expert testimony, in relation to what constitutes routine business practice, is required only in exceptional cases.[1148] This imparts a degree of subjectivity into disproving a fraudulent transfer under this commonly argued defence.

[1138] *Bankruptcy Code,* § 548(a)(1)(B)(i)
[1139] *Bankruptcy Code,* § 548(a)(1)(B)(ii)(I-III).
[1140] *Bankruptcy Code,* § 548(a)(1)(B)(ii)(IV).
[1141] *BFP v Resolution Trust Corp.,* 511 U.S. 531 (1994), [537].
[1142] *BFP,* 545.
[1143] *BFP,* 539.
[1144] *BFP,* 540.
[1145] No. 13-1058 (4 Circ. 2013).
[1146] Ibid, 16.
[1147] Ibid, 16.
[1148] Ibid, 18.

As noted in chapter 2, the badges of fraud from *Twyne's Case*[1149] still play a prominent role in determining whether a fraudulent transfer had indeed occurred. The badges of fraud, as discussed extensively in chapter 2, are notably far more important for actual fraudulent transfers than they are for constructive fraudulent transfers as the latter can be proven without any evidence of intent.[1150] The badges of fraud are identical under both federal and state law and are listed in the next section.

6.5.2. State fraudulent transfer legislation

The *Bankruptcy Code,* being a necessary compromise between state and federal interests, allows the trustee, under § 544(b), the power to utilise state laws to set aside transfers. While the term fraud is used regarding fraudulent transfer law, this is more a historical carry-forward than anything. As noted by Lubben, such provisions are not aimed at fraudulent conduct as per the legal standard in other branches of law.[1151]

Historically, states have conducted legal harmonisation efforts in fraudulent conveyancing laws. The first of these efforts was the Uniform Fraudulent Transfers Act [UFTA]. This was followed by a more recent reform effort known as the Uniform Voidable Transactions Act [UVTA].[1152] At present, the two major jurisdictions of choice for business bankruptcy cases have different standards with Delaware still applying the UFTA[1153] and New York having updated their law in 2020 to the UVTA.[1154] The biggest difference is that the latter Act changed the qualification

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[1149] 3 Co. Rep. 80.
[1150] Stephen J. Lubben, *American Business Bankruptcy: A Primer,* 2 ed. (2021: Edward Elgar), 75.
[1151] Ibid, 74.
[1152] Edwin E. Smith et. al., *Uniform Voidable Transactions Act* (2014 National Conference of Commissioners on Uniform State Laws), for an up to date list of which states have adopted the UVTA, and which have not, see Practical Law Commercial Litigation 'Voidable Transactions State Law Chart' Thomson Reuters Practical Law https://uk.practicallaw.thomsonreuters.com/w-016-2758?transitionType=Default&contextData=(sc.Default)&firstPage=true&OWSessionId=75160da0ed814c9b97bd81307edb3430&skipAnonymous=true accessed May 2, 2025.
[1153] 6 Deleware Code §§ 1301 to 1311
[1154] New York Debtor & Creditor Law §§ 270 to 281

of transfer from "fraudulent" to "voidable" to make state legislation more consistent with the *Bankruptcy Code*[1155] and emphasise that fraud no longer played a crucial role in a determination under the provisions.[1156]

Under § 1304 of the *Delaware Code,* a fraudulent transfer can be claimed against both present and future creditors and must be conducted "with actual intent to hinder, delay or defraud any creditor of the debtor."[1157] In determining an infringement under the first of these categories, badges of fraud, similar to those expressed in *Twyne's Case* are specifically noted as criteria and are provided for in the statute as follows:

> (1) The transfer or obligation was to an insider;
>
> (2) The debtor retained possession or control of the property transferred after the transfer;
>
> (3) The transfer or obligation was disclosed or concealed;
>
> (4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
>
> (5) The transfer was of substantially all the debtor's assets;
>
> (6) The debtor absconded;
>
> (7) The debtor removed or concealed assets;
>
> (8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
>
> (9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
>
> (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and
>
> (11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor. [1158]

The badges of fraud are the same for an analysis of § 548.[1159] Transactions can also be set aside, as in the constructive fraud branch of § 548, when reasonably equivalent value was not received

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[1155] Lubben, supra note 1175, 74.
[1156] Lubben, supra note 1175, 74.
[1157] Delaware Code, Title 6, Subtitle II, Ch. 13, § 1304(a)(1)
[1158] Delaware Code, Title 6, Subtitle II, Ch. 13, § 1304(b)(1)-(11).
[1159] *Soza v. Hill,* F.3d 1060 (5th Cir. 2008), [1067].

in exchange for a transfer or obligation. In the latter case, a debtor needs to be engaged, or about to be engaged, "in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction"[1160] or the debtor "Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due."[1161]

The model proposed by the UVTA, as contained within § 273 of *New York Debtor & Creditor Law,* contains virtually the same provisions as Delaware law with the main difference being that the language of "fraudulent" was replaced with "voidable." As noted above, this was done to ensure the standard of application was more clearly understood to be based upon the preponderance of evidence standard and not the heightened clear and convincing evidence standard.[1162] However, as alluded to previously, courts had already been applying the former standard.[1163] The biggest change from UFTA to UVTA, however, is the inclusion of a choice of laws provision which provides that the local law where the debtor is located governs claims for relief.[1164]

The main reason why a trustee would try and set aside a transaction pursuant to state rather than federal fraudulent transfer legislation is the look-back periods. While, under Federal law, the look-back period is two years from the date of a bankruptcy filing,[1165] under most state legislation, transfers can be avoided if made within four years.[1166]

[1160] Delaware Code, Title 6, Subtitle II, Ch. 13, § 1304(a)(2)(a)
[1161] Delaware Code, Title 6, Subtitle II, Ch. 13, § 1304(a)(2)(b).
[1162] N. Chris Glenos and Cathleen C. Moore, "What's in a Name (Besides Centuries of Confusion)?' (2019) *The Alabama Lawyer: Technology Issue*
[1163] Lubben, supra note 1175, 74.
[1164] New York Debtor & Creditor Law § 279; Glenos and Moore supra note 1187.
[1165] US Code, Title 11, Ch. 5, § 548(a)(1).
[1166] Lubben, supra note 1175, 76.

6.6. The American fraudulent preferences provisions

6.6.1. § 547 – the federal preferences provisions

The US preferences provision is contained within § 547 of the *Bankruptcy Code.* Unlike in England and Canada, the American provision still utilises the term "fraudulent" in the statute. While this may be the case, § 547 is supposedly determined on an effects-based standard no matter how close the transferor and transferee are dealing. However, as will be seen, exemptions to the applicability of § 547 largely mean this merely creates a reversal of onus and not a fully objective standard.

The American fraudulent preference, likely inspired by Lord Mansfield,[1167] first appeared in the *Bankruptcy Act of 1841*[1168] with a very subjective purpose-based standard. The *Bankruptcy Act of 1867* then implemented a much more explicit subjective standard of application. As has been discussed in subchapter 2.3, both acts were quickly repealed soon after being enacted. The 1978 redrafting of what became the *Bankruptcy Code* cemented an effects-based test into American preferences law. The 1978 statute contained an important innovation in that it removed the necessary conditions of both insolvency and the mental state of the creditor at the time of the transfer.[1169] These innovations are the basic framework of the provision today. The fraudulent preference also existed in State law, eventually making its way back into Federal bankruptcy legislation once this became a permanent fixture.[1170] Today, however, trustees seem to rarely utilise state fraudulent preferences rules, and many states no longer have such laws on the books.

[1167] Stefan A. Riesenfeld, 'The Evolution of Modern Bankruptcy Law' (1947) 2337 *Minnesota Law Review* 401, 423.
[1168] 5 Stat. 440.
[1169] Robert Weisberg, 'Commercial Morality, the Merchant Character, and the History of the Voidable Preference'(1986) 39 *Stanford Law Review* 3, 118.
[1170] Riesenfeld, supra note 1192, 423-425.

In order to prove a fraudulent preference pursuant to § 547, the trustee must show that the transfer in question was made by a creditor; the debt was incurred prior to insolvency; the debtor was insolvent at the time of the transfer; and the creditor must receive more than their fair share in comparison to a hypothetical Chapter 7 liquidation.[1171] The lookback period under § 547 is normally 90 days but can be extended to one year for insiders of the debtor.[1172] The *Bankruptcy Code* automatically presumes that the debtor was insolvent during the 90-day period preceding bankruptcy.[1173] Insiders of the company include directors and officers of the debtor, a person in control of the debtor, the debtor's general partner, a relative of a partner, director or person in control of the debtor and an affiliate or insider of an affiliate of the debtor.[1174]

6.6.2. State Preferences Laws

Although not as commonplace as fraudulent conveyancing, fraudulent preferences provisions also exist in the laws of some states. For example, Title 10 of the *Delaware Code* provides that any person who is contemplating insolvency prefers a creditor to others for an amount greater than what they would have received otherwise is deemed to have given a fraudulent preference.[1175] Like the Federal law, as contained within § 547, no intent is required as all transfers of this nature are deemed fraudulent. In looking at case law, state fraudulent preferences provisions appear to have been argued far less than § 547.

[1171] In re Oconee Regional Health Systems Inc., 621 B.R. 64 (Bankr. M.D. Ga 2020), [69]-[70]; Walters v. Cates, 588 B.R. 916 (B.A.P. 10th Cir. 2018), [926]; *Union Bank v. Woles* 502 US 151 (1991), [155].
[1172] 11 USC § 547(b)(4)(B).
[1173] *Union Bank v. Woles* 502 US 151 (1991), [155]
[1174] In re Oconee Regional Health Systems, supra note 1196, [78].
[1175] 2023 Delaware Code, Title 10, Ch. 73, Sub. Ch. 73, § 7387.

6.7. Proving Intent – subjectivity in different statutory provisions.

While the provisions in the US *Bankrutpcy Code* appear to apply objectively on their surface, there are certain notable exceptions which make their application much less certain. With regard to fraudulent conveyances, § 548(c), for example, provides a good faith defence. This, as discussed in *Re Taneja,*[1176] creates an affirmative defence[1177] determined based upon the standard of what the transferee actually knew or should have known.[1178] This, however, needs to be in accordance with routine business practices.[1179] The case specifically determined that expert testimony, in relation to what constitutes routine business practice, is required only in exceptional cases.[1180] This means that the evidentiary standards are not difficult to prove and imparts a very subjective element that can ensure the fraudulent transfer is inapplicable.

Similarly, while intent does not matter in raising a fraudulent preference, it can matter in one of the several defences thereto which, like the exceptions to *ipso facto* clause prohibitions, are called "safe harbours" in American parlance. One common defence are payments during the ordinary course of business.[1181] Such has become known as the "ordinary course" exception. The standard for such can be measured either subjectively or objectively pursuant to the circumstances with an eye to normal industry practices.[1182] The ordinary course exception is important as, just ten years ago, it was noted as being responsible for three quarters of all litigation regarding preference cases.[1183]

[1176] No. 13-1058 (4 Circ. 2013).
[1177] Ibid, 15.
[1178] Ibid, 16.
[1179] Ibid, 16.
[1180] Ibid, 18.
[1181] 11 USC § 547(c)(2).
[1182] Lubben, supra note 1175, 72.
[1183] Brook E. Gotberg, 'Conflicting Preferences in Business Bankruptcy: The Need for Different Rules in Different Chapters' (2014) 100 Iowa L Rev 51, 72.

While historically, the defence required proof that the transfer occurred both in the ordinary course of financial affairs AND according to ordinary business terms, it now only requires one or the other.[1184] So, today, proving the ordinary course defence requires that (1) the debtor made the preferential transfer to pay a debt incurred during the ordinary course of business and (2) such a transfer was made between the debtor and the transferee during the ordinary course of business OR that such a transfer was made according to ordinary business terms.[1185] Per the statute and, affirmed by case law, the defence requires the transfer to have been: (a) a payment of debt incurred by the debtor in the ordinary course of business of both the debtor and transferee, (b) made in the ordinary course of business or financial affairs of both the debtor and transferee, and (c) was an ordinary transaction in the relevant industry.[1186] In order to show that the payment was made in the ordinary course of business, pursuant to § 547(c)(2)(B), the creditor must establish both that it had a previous baseline of past, similar, practices with the debtor and that the payments were made according to these past practices. In order to show that such a payment was made with respect to ordinary business terms, as required under § 547(c)(2)(C), the creditor must establish both the "broad range" of business terms that would be utilised by debtors and creditors who were "similarly situated" and that the relevant payments were "ordinary in relation to [these] prevailing business terms."[1187] Such an arrangement does not have to be a common one, it just has to be an ordinary one in the context of the business relationship.[1188] While this defence originally developed from the "current expense" rule, which was meant to simply apply to payments of the debtor on the eve of bankruptcy, such a rule was expressly changed to also cover long-term debts by

[1184] Hon. John Feeney, Hon. Michael Williamson and Michael Stepan, *Bankruptcy Law Manual,* vol. 2 (5th ed. Thomson Reuters 2020), 325-326.
[1185] *Short v. Simon (In re Oakland Physicians Med. Ctr.)* No. 20-1775 (6th Cir. Sep. 8, 2021).
[1186] *In re Healthcentral.com,* 504 F. 3d 775 (9th Cir. 2007), [789]-[790]; Feeney et. al. supra note 1209, 323.
[1187] Ibid, [791].
[1188] Ibid, [791]; *In re J.P. Fyfe, Inc. of Florida v. Bradco Supply Corp.,* 891 F. 2d (3d Cir. 1989), [68].

Congress in 1984.[1189] This defence is inherently subjective and, as a result, has been criticized as being both difficult to define and potentially detrimental to the law of preferences as a whole.[1190]

The American statutory approach reveals issues inherent with an effects-based provision containing broad exceptions. While the English preferences provision, for example, promotes subjectivity in the raising of the alleged infringement of a provision, the American statutory devices merely reverse the burden of proof. Unlike in Canada and England, there appears to be little case law on attribution of corporate responsibility in proving such provisions. The statute is drafted in such a way that corporate responsible does not come up, there is still significant latitude in the defences provided under the *Bankruptcy Code.*

6.8. The Canadian transfers at an undervalue provisions

Similar to the United States, in Canada, both federal and provincial laws exist to deal with the kind of transactions considered to be transfers at an undervalue. The first, s. 96 of the *Bankruptcy and Insolvency Act,* is a transactions at an undervalue prohibition very similar to the one in English law under s. 238 of the *Insolvency Act 1986*. Second, every Canadian province, other than Alberta which still applies the original English statute,[1191] has a fraudulent conveyancing statute closely modelled after the *Statute of Elizabeth 1571.* The Canadian provisions are different form their American counterparts in that, like the *Statute of Elizabeth 1571*, and s. 423 of the *Insolvency Act 1986,* they can apply more broadly than insolvency. As noted at the outset, transactions avoidance provisions which can apply both inside and outside insolvency

[1189] *Union Bank v. Woles* 502 US 151 (1991), [154]-[158].
[1190] Brook E. Gotberg, 'Conflicting Preferences in Business Bankruptcy: The Need for Different Rules in Different Chapters' (2014) 100 Iowa L Rev 51, 73.
[1191] Alberta Law Reform Institute, *Reviewable Transactions: Final Report 108* (2018 Alberta Law Reform Institute), [11]; *Condominium Corporation No 0421647 v MacEwan Village Ltd,* 2021 ABQB 75.

were discussed in the Cork Report.[1192] As was established in Chapter 2, the Canadian provincial statutes were enacted to fill the void left by an absent federal bankruptcy law. Conversely, the modern federal law came about thanks to legislative developments in the 20th and 21st centuries. While courts had found there to be an undervalue transaction in case law from the 1920s,[1193] such a term does not appear in the statute until after 2009 amendments to the *Bankruptcy and Insolvency Act.*

Prior to the 2009 amendments, transactions falling within the current s. 96 provision could be challenged under the settlements provision in s. 91 or the s. 101 dividends and redemption of shares provision.[1194] The previous provisions appear very similar to the English law prior to the *Insolvency Act 1986.* Since the language contained within s. 96 is similar to the repealed s. 91, some older case law is useful in an analysis of the latter.[1195]

6.8.1. Section 96 of the Bankruptcy and Insolvency Act, Transfers at an Undervalue

Transfers at an undervalue are defined in s. 2 of the *Bankruptcy and Insolvency Act* as a disposition of property or provision of services for either no consideration or for consideration far less than fair market value.[1196] Transfers that fall within this definition commonly include gifts made by debtor, sales by debtor for less than fair market value and purchases by the debtor of assets for more than fair market value. They can also include being paid less than the sum of satisfaction for a claim, and entering into lease agreements, as a lessee, for rent that is greater than

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[1192] *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558, [1201].
[1193] McLennan v. Newton, 1927 CanLII 638 (MB CA).
[1194] Jassmine Girgis, 'Review of Pre-Bankruptcy Transactions' in *Bankruptcy and Insolvency Law in Canada: Cases, Materials and Problems,* 2 ed., Jassmine Girgis, Alfonso Nocilla and Virginia Torrie eds. (2024: CANLII), 5:22; Janis Sarra and Ronald B. Davis, *Director & Officer Liability in Corporate Insolvency,* 3 ed. (2015: LexisNexis) [4.27]-[4.29].
[1195] Girgis, ibid, 5:22.
[1196] *Bankruptcy and Insolvency Act,* s. 2.

rental value.[1197] Perhaps most important under the Canadian provision is the distinction between arm's length and non-arm's length transactions. The differentiation between arm's length and non-arm's length, unlike in England where the connected vs unconnected distinction dates to the Cork Report,[1198] traces its origin to the *Income Tax Act.* Canadian cases have even utilised tax precedents in determining whether a transfer was arm's length or not in the insolvency context.[1199]

Although similar to the related parties distinction in England, the Canadian arm's length distinction is somewhat different. Under Canadian law, when looking to see whether one party is dealing at arm's length with the other, one must ask the question of how closely associated the transferor and transferee are. While there is some guidance within the act, the determination is generally case dependent, and as one case explains, it is important to ask whether the individual or entity in question was either "party to the transfer" or whether they were "privy to the transfer."[1200] While a party to a transfer can be anyone, to be privy to a transfer one requires a degree of inside knowledge. For example, a transfer to a director of a company, for less than fair market value, will likely almost always fall within the definition of a non-arm's length transfer. Additionally, the act presumes that blood relatives, spouses, common law partners and adopted children are not dealing at arm's length.[1201] The Arm's length standard was recently summarised by the SCC in the *Golden Oaks* case with Jamal, J. noting three factors to determine whether those who do not fall into the related category are dealing at arm's length:

> "(i) whether there was a common mind that directed the bargaining for both parties to a transaction; (ii) whether the parties to a transaction were acting in concert without separate interests; and (iii) whether there was *de facto* control."[1202]

[1197] Roderick J. Wood, *Bankruptcy & Insolvency Law,* 2 ed. (2015: Irwin Law), 276-277.
[1198] *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558, [1230].
[1199] Girgis, supra note 1213, 5:24; *Piikani Energy Corporation (Re),* 2013 ABCA 293, [29]-[30].
[1200] Urbancorp Toronto Management Inc. (Re), 2019 ONCA 757 (CanLII), [46].
[1201] Estate of Gavin v. Gavin, 2023 PECA 8 (CanLII), [58]-[59]; *Bankruptcy and Insolvency Act* s. 4(2)(a), 4(5).
[1202] *Scott v. Golden Oaks Enterprises Inc.,* 2024 SCC 32, [127] per Jamal J.

The arm's length vs non-arm's length distinction is important as parties not dealing at arm's length undervalue transfers under s. 96 ensure the provision far easier to apply. Firstly, under a non-arm's length transfer, no proof of fraudulent intent is required nor is it necessary to prove insolvency within a year from the start of a bankruptcy filing. Additionally, there is an extended five-year lookback period with a requirement the trustee prove either the debtor was insolvent at the time of the transfer or that the debtor intended to defraud, defeat or delay a creditor.[1203] If parties are dealing at arm's length, a party must prove both that a debtor was insolvent or made insolvent by the transfer and that there was an intent to delay, defraud or defeat the creditor.[1204] In order to determine whether there was intent to delay, defraud or defeat a creditor, the "badges of fraud" from *Twyne's Case,* as discussed in chapter 2, albeit now modernised, are still used. While the "badges of fraud" are useful in determining whether fraud is present, they must also be considered within "the context of the entire record."[1205] The modern badges of fraud, expanded since *Twyne's Case,* are a non-exhaustive list and the Ontario Court of Appeal summarised them as follows:

- the transferor has few remaining assets after the transfer;
- the transfer was made to a non-arm's length person;
- the transferor was facing actual or potential liabilities, was insolvent, or about to enter a risky undertaking;
- the consideration for the transaction was grossly inadequate;
- the transferor remained in possession of the property for his own use after the transfer;
- the deed of transfer contained a self-serving and unusual provision;
- the transfer was secret;
- the transfer was effected with unusual haste; or
- the transaction was made in the face of an outstanding judgment against the debtor.[1206]

[1203] Wood, supra note 390, 228-229; *Bankruptcy and Insolvency Act,* s. 96(1)(b)(i), 96(1)(b)(ii).
[1204] Wood, supra note 390, 228; Girgis, supra note 1213, 5:23.
[1205] *Re Urbancorp,* supra 1219, [49]-[53].
[1206] *Montor Business Corporation v. Goldfinger,* 2016 ONCA 406 (CanLII), [73].

As illustrated above, the badges are different in Canada than the United States. The lookback period is also capped at one year in the case of an arm's length transfer.[1207]

6.8.2. Provincial Fraudulent Conveyances Law

Interestingly, while nine out of ten provinces and the three territories have their own fraudulent conveyancing statutes, only the province of New Brunswick has formally repealed the *Statute of Elizabeth 1571.*[1208] This means that, outside New Brunswick, the original *Statute of Elizabeth 1571* may still apply[1209] and, in Alberta, while modernised by case law, it is still the only means to clawback a fraudulent conveyance.[1210] Provincial Fraudulent Conveyancing laws were deemed to have concurrent application, absent conflict with the federal bankruptcy and insolvency laws, by the Supreme Court of Canada.[1211] As a result, they can still apply to set aside transfers which occurred on insolvency.

As a practical matter, there are two cases in which these can apply. The first are transfers made by way of gift and the second are transfers made by way of undervalue.[1212] While attempts at harmonisation of fraudulent conveyancing law have been made, most notably by the Uniform Law Conference of Canada,[1213] such reform efforts were less successful than in the United States. As a result, there is no uniformity in provincial fraudulent conveyancing legislation, however the statutes, and Alberta common law, share many similarities and are generally advantageous to s. 96 in two ways:

[1207] Wood, supra note 390, 228; Girgis, supra note 1213, 5:23.
[1208] *Debtor Transaction Act,* SNB 2015, C23, s. 28; Girgis, supra note 1213, 5:3-5:4.
[1209] For example the *Statute of Elizabeth 1571* was argued as recently as 2021 in Nova Scotia in *Rockstone Investments Ltd v 3095810 Nova Scotia Limited,* 2021 NSSC 243 (CanLII).
[1210] Alberta Law Reform Institute, *Reviewable Transactions: Final Report 108* (2018 Alberta Law Reform Institute), [11]; *Condominium Corporation No 0421647 v MacEwan Village Ltd,* 2021 ABQB 75.
[1211] *Robinson v Countrywide Factors Ltd,* [1978] 1 SCR 753.
[1212] Girgis, supra note 1213, 5:4.
[1213] Tamara M. Buckwold (chair) et al, *Reform of Fraudulent Conveyances and Fraudulent Preferences Law* (2010 Uniform Law Conference of Canada); *Uniform Reviewable Transactions Act,* 2012 CanLIIDocs 365.

Firstly, like s. 423 of the *Insolvency Act 1986* in England, there is no requirement to prove the debtor was insolvent at the time of the transfer.[1214] Secondly, provincial fraudulent conveyancing legislation can typically apply when there was intent to defraud, delay or defeat a future creditor as well.[1215]

Provincial fraudulent conveyancing statutes also generally contain exemptions for transactions conducted in good faith and for good consideration. As an example, such are contained within s. 3 of the Ontario Act[1216] where it was recently determined that someone seeking to rely on the exemption had to prove both good faith and good consideration.[1217] Finally, when there is a conflict between s. 96 of the *Bankruptcy and Insolvency Act* and a provincial fraudulent conveyancing act, the former takes precedence pursuant to the federal paramountcy doctrine.[1218]

6.9. The Canadian preferences provisions

6.9.1. Canadian Federal Preferences provisions under s. 95

The Canadian preferences provisions as contained within s. 95 of the *Bankruptcy and Insolvency Act* replaced the previous fraudulent preferences provisions thanks to amendments in 2009. Such changes were made to remove the term "fraudulent"[1219] and also removed the need to prove intent in the case of a non-arm's length transaction.[1220] The legislative change facilitated a change already observed by courts – namely that non-arm's length transfers were more likely to

[1214] Wood, supra note 390, 228.
[1215] Wood, supra note 390, 228.
[1216] Fraudulent Conveyances Act, RSO 1990, Ch. F. 29, s. 3.
[1217] Stevens v Hutchens, 2022 ONCA 771, [22]-[23].
[1218] John D. Honsberger and Vern W. Dare, *Honsberger's Bankruptcy in Canada,* 5 ed. (2017: Thomson Reuters), 403; For a brief overview of the federal paramountcy doctrine see subchapter 1.3.3.
[1219] Janis Sarra and Ronald Davis, *Director & Officer Liability in Corporate Insolvency,* 3 ed. (2015: LexisNexis), [4.44].
[1220] Kevin P. McElcheran, *Commercial Insolvency in Canada,* 3 ed. (2015: LexisNexis), [3.121].

be fraudulent.[1221] Such is also consistent with the observations of *Twyne's Case.*[1222] The difference between dealing at arm's length or non-arm's length follows the same definition as it does for the undervalue transfer provision. In the case of an arm's length transaction, the trustee is required to prove the debtor had an intention to prefer the creditor in question. While there was substantial early debate regarding whether there was required intent on the part of both debtor and creditor, it is now accepted that only the intention of the debtor is relevant in proving an intention to prefer.[1223] In the case of a non-arm's length transfer, the trustee needs only show that the transfer in question had the effect of preferring a creditor.[1224]

Under the Canadian preferences provision, the lookback period is different for arm's-length and non-arm's length transactions. In the case of an arm's length transfer, the lookback period is three months from the date of the initial bankruptcy event[1225] and, in the case of a non-arm's length transfer, such a period is extended to 12 months.[1226] These dates are important as there is another defence available in the case of pre-existing transfer agreements. To rely on this defence, it must be shown that the agreement was concluded outside such a lookback period and involves a security agreement. Such a defence appears only applicable in the case of agreements to give security and, under this defence, an actual agreement to give security must be in existence meaning parties cannot rely on negotiations or other vague expressions of willingness to grant the security.[1227]

[1221] *Re St-Anne Nackawic Pulp Co,* 2005 NBCA 55 (CanLII), [12].
[1222] See subchapter 2.5 for the discussion of *Twyne's Case.*
[1223] Wood supra note 390, 211.
[1224] Girgis, supra note 1213, 5:60-5:61.
[1225] *Bankruptcy and Insolvency Act,* s. 95(1)(a)
[1226] *Bankruptcy and Insolvency Act,* s. 95(1)(b).
[1227] Wood, supra note 390, 213.

6.9.2. Provincial Preferences Provisions

All Canadian provinces, including the province of Alberta,[1228] also have some sort of preferences legislation on the books. There is also some variety in these statutes, however, unlike fraudulent conveyancing acts, they generally all include the proviso that the preferential transfer must have occurred under insolvent circumstances.[1229] Under one example, the Alberta *Fraudulent Preferences Act,*[1230] there are two rules for preferences – an intent-based rule and an effects-based rule. Under the intent-based rule, there is a requirement that the person making the transaction be insolvent and must have intent to prefer, delay or prejudice a creditor.[1231] The creditor is also required to have knowledge of the debtor's insolvency.[1232] Under the effects-based rule, which can only be challenged from a year after the transaction, all that is required is the debtor to be insolvent and a transfer to a creditor which has a preferential effect.[1233] Under the intent-based standard, there is a requirement for fraudulent intent on both the part of the debtor and creditor, and this is a very difficult hurdle to overcome.[1234] The second of these devices appears, on its face, to be very easy to apply. However, pursuant to the legislation, there is an exception for a bonafide sale or ordinary course of trading payment.[1235] There is also an exemption contained within s. 6(b)[1236] which, per Bangsund, insulates most payments in money from having the Alberta legislation apply.[1237] This is because there are robust exemptions for money paid during the ordinary course

[1228] *Fraudulent Preferences Act,* RSA 2000, c F-24.
[1229] See for example: *Assignments and Preferences Act,* RSNB 2011, c 115, s. 1; *Assignments and Preferences Act,* RSO 1990, ch. A.33, s. 4; *Assignments and Preferences Act,* RS, c 25, s.1, s. 4(1).
[1230] RSA 2000, c F-24.
[1231] AFPA, ibid. s. 1(a)-(b).
[1232] AFPA, ibid. s. 2(a)-(b).
[1233] AFPA, ibid. s. 3(a)-(b).
[1234] Clayton Bangsund, '"But I Didn't Mean To": The Role of Intent in American and Canadian Anti-Preference Law' (2013) 50 *Alberta Law Review* 815, 833.
[1235] AFPA, supra note 1248 s. 6(a).
[1236] AFPA, supra note 1248, s. 6(b).
[1237] Bangsund, supra note 1253, 835.

of business. This is worded quite similar to the ordinary course of business safe harbour under the US *Bankruptcy Code*.[1238] While most provinces have similar legislation to this, Prince Edward Island[1239] and Saskatchewan,[1240] pursuant to recommendations by the Uniform Law Commission of Canada,[1241] recently reformed theirs to an effects-based test which only applies to debtors and creditors not dealing at arm's length. Since both the Prince Edward Island and Saskatchewan legislation is fresh, there has yet to be any reported case law. However, at present, in most provinces, the trustee generally only attempts to use provincial fraudulent preference law when s. 95 of the *Bankruptcy and Insolvency Act* is exhausted.[1242]

6.10. Difficulties in Proving Intent under Canadian Law Federal provisions

Under Canadian law, non-arm's length preferential transfers create a mere rebuttable presumption of fraudulent conduct. The creditor can raise that, in spite of the relationship, although the effect was a preference, the intention was innocent.[1243] Similar to the American provisions, the *Bankruptcy and Insolvency Act* contains various carve-outs which curtail the effects-based standard. One example is the "diligent creditor" defence. Under this defence, the creditor needs to show that the debtor made the payment to get rid of a creditor but only if not doing so would have caused an imminent crisis if not dealt with immediately.[1244] Under such a defence, it must be proven that the payment in question was required in response "…to such aggressive action such as to create an imminent business or personal crisis for the bankrupt."[1245] This is an incredibly high

[1238] AFPA, supra note 1248, s. 6(a)-6(b).
[1239] *Reviewable Transactions Act*, SPEI 2024, c 52, s. 13.
[1240] *Revieawble Transactions Act,* SS 2022, c 34, s. 4-2(2)(a).
[1241] *Uniform Reviewable Transactions Act,* 2012 CanLIIDocs 365, s. 13(1)(a).
[1242] Bangsund, supra note 1253, 835.
[1243] Girgis, supra note 1213, 6:61; Kevin P. McElcheran, *Commercial Insolvency in Canada,* 3 ed. (2015: LexisNexis), [3.122]-[3.123].
[1244] McElcheran, ibid. [3.123].
[1245] *Re Norris,* 1994 CanLII 5263 (AB KB).

bar to get over and, as McElcheran notes, pressure is not sufficient, the pressure alleged needs to be so severe as to cause an imminent harm.[1246] Another available defence is the ordinary business defence which requires one to show that the debtor needed to complete the transaction in order to stay in business. Such is generally applicable in cases where the debtor needs to pay a creditor out in order to continue their business operations and requires there to be a reasonable prospect that such a transaction would allow a debtor to continue its business.[1247] The requirement that the transfer must keep the business afloat makes this defence more limited than its American counterpart.

As in England, recent authorities in Canada have clarified the requirements for attributing intent to a corporation under Canadian law. In two 2024 cases, namely *Aquino*[1248] and *Golden Oaks,*[1249] the SCC applied the corporate attribution doctrine from the UKSC in *Jetavia v. Bilta.* In doing so, Jamal J., writing for a unanimous Supreme Court in *Aquino*, cited four guiding principles that should be utilised when applying this doctrine:

1) A person's fraudulent acts may be attributed to a corporation if two conditions are met: a) they were the directing mind of the corporation when the acts occurred and b) such acts were performed within the corporate responsibilities assigned to them.
2) Attribution is generally inappropriate when: (a) the directing mind acted in total fraud of the corporation (the fraud exemption), or (b) the actions were not partly or wholly, by design, for the benefit of the corporation (the no benefit exception).

[1246] McElcheran, supra note 1262,[3.123].
[1247] Wood, supra note 390, 212.
[1248] *Aquino v. Bondfield Construction Co.,* 2024 SCC 31.
[1249] *Scott v. Golden Oaks Enterprises Inc.,* 2024 SCC 32.

3) Courts have discretion in attributing intent of the directing mind to the corporation if this would be in the public interest (i.e. it would promote the purpose of the law under which attribution is sought).
4) The courts must apply the corporate attribution doctrine purposively, contextually and pragmatically.[1250]

Since, in cases of undervalue transactions, both the fraud and no benefit exemptions would often apply, the Supreme Court of Canada utilised its powers under the public interest exemption, read purposively, contextually and pragmatically, to state that neither exemption could be relied upon with relation to s. 96 of the *Bankruptcy and Insolvency Act.* Citing the Ontario Court of Appeal, the SCC determined that if such exemptions would be allowed, they would ultimately favour "fraudsters" to the detriment of creditors.[1251] As a result, for the purposes of the *Bankruptcy and Insolvency Act,* all that is required to prove whether a person was a the directing mind of the corporation is "…whether their actions were performed within the sector of corporate responsibility assigned to them."[1252] The court determined, further, that allowing the fraud and no benefit exceptions would be detrimental to the bankruptcy and insolvency system as a whole.[1253]

In *Golden Oaks,* the SCC utilised the same standard to apply to preferences law and that, under the corporate attribution doctrine, neither the trustee, as successor in interest,[1254] nor a one-person corporation,[1255] can rely upon either the fraud or no-benefit exemptions under the *Bankruptcy and Insolvency Act.* In determining this, Jamal J., again writing for the court, cited the UKSC's decision in *Jetavia v. Bilta,* stating that both the UK and Canada are aligned in their use

[1250] *Aquino v. Bondfield Construction Co.,* 2024 SCC 31, [82].
[1251] Ibid, [92].
[1252] Ibid, [89].
[1253] Ibid, [89]; Roderick J. Wood, *Bankruptcy & Insolvency Law,* 2 ed. (2015: Irwin Law), 260-261.
[1254] *Scott v. Golden Oaks Enterprises Inc.,* 2024 SCC 32, [56].
[1255] Ibid, [65].

of a "purposive, contextual and pragmatic" approach to determining corporate attribution.[1256] As a result, there appears to be alignment in both England and Canada on this subject. This means, in the case of both undervalues and preferences, it is unlikely that a court would allow either the fraud or no benefit exemptions to apply in the insolvency context in England either.

Nonetheless, as in the English case, the standards for application under the corporate attribution doctrine appear to create a moving target. What is meant by "purposive, contextual and pragmatic" does not really add much certainty as to when a court can and should attribute actions to a corporation.

6.10. Intent or Effects-based standards, which is better?

As in England, there is equal concern about an across-the-board effects-based standard for setting aside transfers as such would impact the finality of transactions in Canada.[1257] Such a concern has been alleviated by American legislators in their creation of "safe harbours." While transfers in the American context can be saved by the safe harbours as contained within the *Bankruptcy Code,* the presumption for all transfers, with the exemption of actual fraud under § 548, is a purely effects-based standard.[1258] It has been argued that Canadian legislators were misguided in this approach as it allows far too many transfers to be permitted ultimately violating the policy objective of the act to achieve equality amongst similarly situated creditors.[1259] Similarly, Canada's justifiable business purpose defence appears to be much narrower than the American ordinary course of business exception.

[1256] Ibid, [68].
[1257] Girgis, supra note 1213, 5:61.
[1258] Girgis, supra note 1213, 5:61.
[1259] Clayton Bangsund, '"But I Didn't Mean To": The Role of Intent in American and Canadian Anti-Preference Law' (2013) 50 *Alberta Law Review* 815, 840-842.

The requirement of intent across different statutory instruments should be revisited as it seems to allow many transactions that would appear, on their surface, which remove assets from the insolvent estate, or pay creditors out of priority, to stand thanks to either difficulties in proving intent or ease of justifying a proper business purpose. With such provisions already being quite costly and difficult to apply, in practical terms, these intent-based standards, or exemptions to effect-based ones, seem to erode the ability of these provisions to properly prevent unlawful takings from the estate. This is of even greater concern in the modern, globalised, context. With increased complexity in both securities contracts and the ease of moving money across borders, should insolvency law not make it easier for practitioners to seize assets? Such intent-based standards likely influenced both the United Kingdom Supreme Court and the Supreme Court of Canada when it came time to articulate the anti-deprivation rule.

6.11. The anti-deprivation rule, statutory provisions, and collectivity

When both *Belmont Park* and *Chandos* were decided, there was an open question whether the anti-deprivation rule had been replaced by statutory provisions as contained in the legislation of both England and Canada. This was especially true in the Canadian context where, as shown in the previous chapter, comprehensive *ipso facto* clause prohibitions were enacted. In the *Chandos* dissent at the Alberta Court of Appeal (ABCA), Wakeling J.A. used this reasoning to suggest the anti-deprivation rule was eliminated in Canadian law by such *ipso facto* clause prohibitions.[1260] While, as this thesis has shown, this was not the case, as the majority in *Chandos* at the ABCA, the United Kingdom Supreme Court and Supreme Court of Canada all rightly decided that an anti-

[1260] *Capital Steel Inc v Chandos Construction Ltd,* 2019 ABCA 32, Wakeling J.A. Dissent, [116]-[120].

deprivation rule does indeed exist. Nonetheless, the relationship between statutory provisions and the anti-deprivation rule is important.

The anti-deprivation rule and the statutory provisions both relate to the principle of collectivity in insolvency law. While prior to insolvency statutes, as alluded to in Chapter 2, creditors would make claims and whoever registered first would be paid. However, as time went on, the law of insolvency evolved to accept that a collective proceeding was an advantageous model. In fact, the *Cork Report* itself recognizes one rationale that all creditors are equal victims of insolvency and that a collective process ensures that none will be treated more favourably than the other.[1261] While this equality has certainly been eroded by statutory priorities, as noted in Chapter 3[1262] and by the *Cork Report,*[1263] the collective proceeding is still an essential part of an insolvency system. Instead of creditors racing to file, they must respect the collective proceeding – now entrenched in the statutes of all three studied jurisdictions.

The collective proceeding has been noted as advantageous for two main reasons by American legal scholar Thomas Jackson. Firstly, it reduces strategic costs in that it prevents both a race to the courthouse by creditors thereby ensuring less variable recoveries.[1264] Secondly, individualistic remedies can lead to the estate being dismantled piecemeal which can remove operating assets thereby reducing the general aggregate pool of assets.[1265] Jackson contends, for these reasons, the administrative efficiency provided by a collective proceeding ensures that unsecured creditors generally prefer this system to individualistic remedies so long as the system is mandatory for all.[1266] While secured credit holders are excluded from this proceeding, the

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[1261] *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558, 205 [225].
[1262] See sub-chapter 3.8 herein.
[1263] *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558, [233].
[1264] Thomas H. Jackson, 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain' (1982) 91 *Yale LJ* 857, 861-864.
[1265] Ibid, 864-865.
[1266] Ibid, 866.

reasons for this exclusion were discussed in sub-chapter 3.3. Since a race to the courthouse approach provides that many creditors will likely get nothing, bankruptcy law "…provides a way to make these diverse individuals act as one, by imposing a *collective* and *compulsory* proceeding on them."[1267]

While there have been criticisms of Jackson's notion that creditors voluntarily prefer a collective system,[1268] the insolvency system ensures collectivity by two important processes: the collective proceeding and the stay on proceedings. The goals of each are to foster collectivity by ensuring fair distributions and maximizing global recovery for creditors.[1269] Under this model, individual rights are substituted for a collective proceeding specifically ordered to ensure these purposes.[1270] The anti-deprivation rule is squarely based upon the fundamentality of this principle. In fact, it has been noted, both by the Supreme Court of Canada[1271] and the United Kingdom Supreme Court,[1272] that the anti-deprivation rule is based upon the notion that eligible property of the estate vests in the trustee. The collectivity principle is also present in English law during the Moratorium which, alongside avoidance provisions, takes effect only after the commencement of administration.[1273] However, as noted in chapter 4, insolvency laws, being a collective process, are inevitably bound to conflict with individual laws especially within the corporate insolvency context. In fact, special considerations for corporate vs. individual debtors has been noted by both Jackson and the *Cork Report.* For Jackson, the fresh-start for corporate debtors ensures financial

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[1267] Thomas H. Jackson, *The Logic and Limits of Bankruptcy* (Harvard 1986), 12-13.
[1268] Barry E. Adler, 'The Creditors' Bargain Revisited' (2018) 166 *U Penn LR* 1853; Douglas G. Baird, 'Bankruptcy Minimalism' (2025) *Coase-Sandor Institute for Law and Economics Research Paper No. 25-10.*
[1269] Alfonso Nocilla, 'Ipso Facto Clauses and the Limits of Freedom of Contract in Insolvency: Capital Steel v. Chandos Construction' (2019) 62 Can Bus LJ 337, 346.
[1270] Nishad Kulkarni, "A Statutory Basis for the Anti-Deprivation Rule?" (2014) 23 *International Insolvency Review* 73, 90.
[1271] *Chandos* supra note 728, [30]
[1272] *Belmont Park* supra note 608, per Lord Collins, [63].
[1273] Nishad Kulkarni, 'A Statutory Basis for the Anti-Deprivation Rule?' 23 Int. Insolv. Rev. 73, 92.

failure does not lead to "inappropriate liquidation."[1274] The *Cork Report* notes that business failure affects more than just directors, shareholders and employees but other interests as well, for example supply contracts.[1275] The *Cork Report* goes as far as to suggest that enterprise failure "…which may be the lifeblood of a whole town or even a region, is a legitimate factor to which a modern law of insolvency must have regard."[1276] This means that, under the collectivity model, there are special considerations for corporate as opposed to individual debtors which creates a necessary balance between corporate and insolvency interests.

In *Belmont Park,* Lord Mance, in his concurring opinion, rightly notes that the statutory transactions avoidance provisions, as contained within the *Insolvency Act 1986,* stem from the *Statute of Elizabeth 1571.*[1277] However, in the same paragraph, he, in this author's opinion, wrongly concludes that the anti-deprivation rule has a somehow mysteriously different origin. A stronger argument would be that the notion of collectivity stems from the earliest bankruptcy practice which includes the *Statute of Elizabeth 1571.* However, Lord Mance does rightfully make a very compelling observation:

> The existence in the Insolvency Act 1986 of other provisions protecting the interests in creditor in bankruptcy does not supersede or make redundant an anti-deprivation principle. First, the 1986 Act must have been enacted against the background of the case law establishing that certain deprivations on bankruptcy are impermissible and void. Second, the statutory provisions cover different ground. Section 127 concerns dispositions after the commencement of winding up, section 238 transactions at an undervalue and section 239 preferences. Sections 238 and 239 only avoid transactions within specified periods ending with the onset of insolvency (from six months to two years). Section 423 requires proof of both a transaction at an undervalue and a specific intent to put assets beyond the reach of or prejudice a potential claimant.[1278]

[1274] Thomas H. Jackson, 'Bankruptcy's logic and limits in the 21st century: some thougths on Chapter 11's evolution and future' in Barry E. Adler ed. *Research Handbook on Corporate Bankruptcy Law* (Elgar 2020), 8.
[1275] *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558, [203].
[1276] *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558, [204].
[1277] *Belmont Park v BNY Corporate Trustess* [2011] UKSC 38, Lord Mance, [150].
[1278] Ibid.

Such a statement was in support of Lord Collins' assertion that "No doubt to some extent the avoidance provisions go some way to dealing with the mischief, but they cover different ground and contain time limitations which do not constrain the common law rule."[1279] Rowe J., writing for the majority of the SCC in *Chandos*, similarly concluded that Canadian parliament never intended to eliminate the anti-deprivation rule and that the *ipso facto* clause prohibitions, implemented in the 2009 amendments to the *Bankruptcy and Insolvency Act,* failed to do so. While the same can be said of the provisions cited in this chapter, "…the anti-deprivation rule protects third party creditors, whereas Parliament's changes [as reflected by the new *ipso facto* provisions] were directed toward protecting debtors."[1280] Such contentions go back to an assertion made by Parry at the outset; statutory transactional avoidance measures were implemented to remedy observed issues in avoidance law as they emerged.[1281] As a result, while the statutory provisions are limited to a specific purpose, the anti-deprivation rule is much broader and principled in application.

However, this is not to say that the statutory provisions, as outlined above and in the previous chapter, are not highly related to the anti-deprivation rule. In fact, the opposite appears to be the case as the anti-deprivation rule and the statutory transactions avoidance provisions are based squarely upon the same principles. Accordingly, biases in statutory drafting are related to judicial interpretations of the anti-deprivation rule. In fact, in both *Chandos* and *Belmont Park,* the respective Supreme Courts felt it necessary to explore this relationship. In both cases, while the courts determined that the statutory provisions did not eliminate the anti-deprivation rule,[1282] this

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[1279] *Belmont Park,* supra note 608, Lord Collins, [88].
[1280] *Chandos Construction Ltd v Deloitte Restructuring Inc,* 2020 SCC 25, Rowe J., [27]-[28].
[1281] Rebecca Parry, 'The Rationale of The Transaction Avoidance Provisions of the Insolvency Act 1986,' in *Transaction Avoidance in Insolvencies,* 3 ed., Rebecca Parry, James Ayliffe and Sharif Shivji eds., (2018:Oxford), 2.01.
[1282] *Chandos,* supra note 728, [36]; *Belmont Park,* supra note 608, [102].

is not to say that the respective statutes do not have an impact on the way the anti-deprivation rule has been interpreted.

It has indeed been argued that the ambit of the anti-deprivation rule is largely dependent upon the scope of the statutory provisions which underpin the collectivity principle in each jurisdiction. This fosters what has been referred to as "legitimate arguments" for a more or less expansive rule.[1283] For example, in the case of the English anti-deprivation rule, the justifiable business purpose defence is very similar to that which relates to undervalue transfers as contained within s. 238(5) of the *Insolvency Act 1986.* The ruling in English anti-deprivation rule cases impute a degree of subjective judicial interpretation.[1284] As in that provision, the bar to show that one acted with a reasonable business purpose appears to be judged objectively. This, the purpose-based test in English preferences law, and s. 423's reliance on the disruption of the function of insolvency, also likely influenced the English anti-deprivation rule. This understanding is furthered by the lack of any *ipso facto* clause prohibitions for securities contracts in the *Insolvency Act 1986.*

It is also apparent that both Justice Rowbatham, at the Alberta Court of Appeal, and the majority of the Supreme Court of Canada, were influenced by the difficulties inherent in any sort of intent-based standard and the subjectivity involved in proof thereof. This suggestion is furthered by the SCC's statement that a purpose-based anti-deprivation rule undermines the statutory scheme in Canada.[1285] To give preference to freedom of contract would create uncertainty and, as Nocilla has put it, "…undermine the key purposes of insolvency law."[1286] In *Chandos* the SCC believed an intent-based standard would be undesirable as "…it would detract from the efficient

[1283] Nishad Kulkarni, 'A Statutory Basis for the Anti-Deprivation Rule?' 23 Int. Insolv. Rev. 73, 95.
[1284] See chapter 4.
[1285] *Chandos,* supra note 728, [36].
[1286] Alfonso Nocilla, '*Ipso Facto* Clauses and the Limits of Freedom of Contract in Insolvency: Capital Steel v. Chandos Construction' (2019) 62 Can Bus LJ 337, 349.

management of corporate bankruptcies."[1287] One must assume that such a conclusion was not reached inside a vacuum. This is consistent with a point raised by Nocilla in another paper, namely that the UKSC had to adopt a purpose-based defence so as not to invalidate complex financial arrangements necessary for the global economy.[1288] The situation the SCC found itself in was obviously different as Canadian law already had a fairly robust *ipso facto* clause prohibition regime and the Canadian case dealt with an altogether different, domestic, fact scenario. This meant the SCC could apply the anti-deprivation rule more broadly. Such an argument was noted by the intervenor factum (referred to as an 'amicus brief' in the UK) of the Canadian Association of Insolvency and Restructuring Professionals [CAIRP] which one can assume influenced the court in their understanding of the case.[1289] Informed by this context, it is likely the SCC was also influenced by the inherent difficulties in subjective analysis with regard to both preference provisions and the defence contained within the undervalues provisions.

In the same factum, CAIRP notes, likely from experience attempting to recover assets under the intent-based preferences provisions, that a purpose-based anti-deprivation rule would in fact lead to greater assumed costs thereby impacting both efficiency and recoverability.[1290] While the English High Court explicitly rejected the notion of the anti-deprivation rule as a rule of general transactional avoidance in the *Football League* case,[1291] the SCC seems to suggest that it should be applied as such. Whether the *Football League* case was correct in this assertion remains to be seen, nonetheless, it does indicate a very different outlook on the part of English as compared with Canadian judges.

[1287] *Chandos,* supra note 728, [34].
[1288] Alfonso Nocilla, 'Freedom of Contract, Fairness, and The Anti-Deprivation Rule' 65 Can Bus LJ 374, 383-384.
[1289] *Chandos,* supra note 728, Factum of the Intervenor, Canadian Association of Insolvency and Restructuring Professionals, [32]-[39].
[1290] Ibid, [31].
[1291] *HMRC v. The Football League,* [2012] EWHC 1372 (Ch), [188].

6.12. Conclusion: A place for both common law and statute?

Following the decision in *Belmont Park,* many commentators suggested that the anti-deprivation rule should be codified.[1292] Many of such reform proposals, as noted in the previous chapter, were reliant upon the implementation of *ipso facto* clause prohibitions into the *Insolvency Act 1986.* However, as Canadian case law had shown, in both chapters 4 and 5, such proposals were misguided as their implementation does not eliminate the common law anti-deprivation rule. While the SCC and the UKSC both hold open a possibility that the anti-deprivation rule could theoretically be codified,[1293] it is hard to see why this would be desirable. As has been shown, the relationship between the anti-deprivation rule and the statutory provisions is one of principle vs practicality. While the statutory provisions were implemented in response to observed practical issues which violated the spirit of the act, the anti-deprivation rule exists to uphold that spirit in the absence of another applicable law. While statutory provisions have most definitely eroded the fraud upon bankruptcy law principle, being both the anti-deprivation rule and *pari passu* rule as read together, it is perhaps not desirable to fully eliminate either rule. As this chapter has shown, both England and Canada were able to adapt the anti-deprivation rule to suit their needs.

In the English context, where there is a necessity, through its mercantile history, to preserve contractual provisions, the anti-deprivation rule was able to adapt to allow the complex, necessary securities contracts in *Belmont Park.* This is why the English anti-deprivation rule necessitates a purpose-based standard as the laws of England developed in a way that encourages it. In Canada, the anti-deprivation rule evolved to set aside inequitable contractual provisions such as that

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[1292] See Sarah Worthington, 'Good Faith, Flawed Assets and the Emasculation of the UK Anti-Deprivation Rule' (2012) 75 Modern Law Review 112, 114; Nishad Kulkarni, 'A Statutory Basis for the Anti-Deprivation Rule?' 23 Int. Insolv. Rev. 73, 97; Timothy Cleary, 'Lehman Brothers and the anti-deprivation principle: current uncertainties and proposals for reform' 6 *Capital Markets Law Journal* 411, 424.
[1293] *Chandos,* supra note 728, [29]; *Belmont Park,* supra note 608, [16].

contained in the penalty clause to a contract in *Chandos*. In both cases, the anti-deprivation rule can be balanced; in England, by the justifiable business purpose defence, which will likely be flushed out in future case law and with future enactment of complementary *ipso facto* clause prohibitions. In Canada, where these robust statutory protections already exist, the anti-deprivation rule retained a purely effects-based standard to give credence to the principles of the early *Statute of Elizabeth 1571*. Furthermore, what is meant by insolvency has been further limited with regard to the Canadian anti-deprivation rule by the courts in Ontario.[1294] The rules are also complimented nicely by statutory avoidance devices which are generally applied in a more exact manner. While it is suggested here that England could benefit from a more robust *ipso facto* clause prohibitions regime with regard to securities contracts, a better understanding of the statutes and their origins is perhaps a greater necessity than any explicit amendments.

So, while statutory provisions are no doubt effective, they are simply applications of the same principles, which come from the *Statute of Elizabeth 1571,* applied to legislation. In the view of this author, the statutory provisions of all three jurisdictions are meant to merely enact consistent rules in order to ensure that insolvency principles which emanate from both the *Statute of Elizabeth 1571* and the *Statute of Henry VIII 1542* are respected. This prevents a race on the part of creditors, the result of which would be a zero-sum game and ensures that both the maximum possible amount remains within the estate upon insolvency and that such is distributed fairly during the proceeding.

It must be concluded that while statute can help with its exactitude, the benefits of common law's flexibility are apparent with regards to both the anti-deprivation and *pari passu* rules. As such, any reform efforts in either Canada or England which seek to eliminate the rule are neither necessary nor desirable.

[1294] See subchapter 4.9.

Chapter 7 – Conclusion

This thesis has engaged in an understudied are of law and has discovered, unsurprisingly, many misunderstandings. The anti-deprivation rule is, at its core, an articulated principle of law which stems from the earliest bankruptcy statutes. As such, this thesis has attempted a more holistic view. While it is oftentimes easy for insolvency scholars to attempt categorisation, admittedly the way our modern statutes are drafted encourages this, sometimes it is best to take a step back, and observe how rules and principles operate in context. It is argued here that to fully appreciate the anti-deprivation rule, one must look at it in terms of a wide-angle rather than a focused portrait.

In attempting to create this wide-angle portrait, many different perspectives were examined. In Chapter 2, the thesis attempted a historical overview of how both insolvency and avoidance laws developed across national borders. This was done to demonstrate that the anti-deprivation rule is influenced by early bankruptcy statutes – most notably the *Statute of Elizabeth 1571.* An analysis of the different developmental contexts of the laws in England and Canada were also attempted here. This part also attempted to demonstrate that the same *Statute of Elizabeth 1571* was also highly influential in the early applications and drafting of American bankruptcy laws. This means that both aspects of the US *Bankruptcy Code* and the anti-deprivation rule have similarly applicable principles – principles which were to be flushed out later.

In Chapter 3, an understanding of the difference between the anti-deprivation and *pari passu* rules was deemed relevant as the rules were oftentimes confused in historic practice. While the difference between the two rules has been repeated *ad nauseum* throughout, it is how these rules developed which is far more interesting. As noted, the *pari passu* rule itself also has a very long history, likely predating the origins of the anti-deprivation rule by 30 years. This chapter also began to shed light on the difference in approach taken by the United States, notably that Americans

preferred a statutory approach, with their pro rata distribution rules, rather than leaving interpretation to the common law. The desire to retain common law principles is essential to our understanding of English and Canadian laws and led to the creation of both the anti-deprivation and *pari passu* rules. Here it was also suggested that limitations upon the *pari passu* rule, through priority rules, is not only a reflection of modern policy decisions but also a reflection of the origins of the rule being statutory, likely dating back to the *Statute of Henry VIII 1542.* Perhaps then, the American codification of the pro rata distribution rules merely served to place the *pari passu* rule into historical context.

In Chapter 4, an analysis of anti-deprivation case law was conducted attempting to establish the applicability of the anti-deprivation rule in both Canada and England. While this analysis was somewhat critical of the justifiable business purpose standard, it also recognized that this was a natural evolution of the anti-deprivation rule's applicability so as to prevent an economic collapse. The chapter also shed light on how the anti-deprivation rule developed in Canada to adopt a different standard than that of England and how such a standard has been softened since the Supreme Court of Canada's landmark decision in *Chandos*. Within this chapter, a discussion of why there is no anti-deprivation rule in the United States was also attempted drawing on mostly ongoing scholarly literature.

Chapter 5 of this thesis attempted to explain the relationship between *ipso facto* clause prohibitions and the anti-deprivation rule. This challenged existing assumptions that the anti-deprivation rule and *ipso facto* clause prohibitions were functionally equivalent. While oftentimes applicable in similar circumstances, the rules are quite distinct. Here, American law was relied upon as there is a more nuanced understanding of *ipso facto* clause prohibitions there than in the Commonwealth. While it attempted an explanation of executory contracts, and the obligations they

carry into insolvency, it also showed that *ipso facto* clause prohibitions were meant to apply to merely ensure such executory contracts functioned properly. While the anti-deprivation rule will often apply in similar circumstances, this is more likely due to other areas of law being covered by statutory avoidance provisions than it is by anything else. The anti-deprivation rule is a broad rule of transactions avoidance, not a specific rule aimed at preventing a specific type of avoidance.

Lastly, Chapter 6 of this thesis approached the anti-deprivation rule in a way which also attempted to situate it within the statute. Here it was determined that intent-based requirements likely influenced the courts in their determinations of anti-deprivation rule case law. In England, Canada and the United States, all the statutory avoidance provisions have some sort of requisite intent. This intent can be either thanks to a subjectivity requirement in the provision itself or can be one contained within a defence to the provision. This has, in many ways, eroded the effectiveness of these provisions. Whether such erosion is justified is the purview of a future project. It is assumed that both the United Kingdom Supreme Court and the Supreme Court of Canada had an eye to these requirements when they decided their respective anti-deprivation rule cases. While the UKSC utilised a standard that much more closely resembled statutory provisions, the SCC utilised a standard which was likely a reflection of the difficulties inherent in the application of these subjective standards in specific cases on different sections of Canada's insolvency legislation. This chapter also attempted to shed light on the relationship between both statutory provisions and the anti-deprivation rule to the broad collectivity principle of insolvency law. This part also attempted to explore the difficulties inherent in determining subjective intent with regards to a corporation where corporate attribution rules apply in both countries. The American case law indicated the issues with defences to provisions which impart broad subjectivity.

7.1. Research Questions Revisited

When this project began nearly three years ago, the thesis sought to answer a few broad research questions. Before attempts at answers are made, it is important to note that such research questions were never intended to be rigid. They were instead meant to guide the research in a certain balanced and open direction. Like any worthwhile project, this has not been an attempt to answer specific questions but to both challenge biases and expand subject-matter knowledge. Nonetheless, there is still value in attempting to answer these questions – however incomplete these answers may be.

7.1.1. Research question #1 – What is the origin of the anti-deprivation rule and what effect does that origin have on how the rule is applied today?

This question is nearly impossible to answer in a direct manner as the anti-deprivation rule, or the principles which underpin it, appear to be at least as old as the common law insolvency system itself. While, in chapter 2 of this thesis, attempts were made to contextualize the rule, with the *Statute of Elizabeth 1571* being its most likely ancestor, this is impossible to know for certain. While, as demonstrated by the reflection on the early English *Twyne's Case,*[1295] which applied the original *Statute of Elizabeth 1571,* did demonstrate many similarities to it and the modern anti-deprivation rule,[1296] it is still difficult, and probably unnecessary, to say that the anti-deprivation rule is a direct descendant of the original fraudulent conveyance. While this would be a lofty goal, it is not relevant in fostering an understanding of the modern rule. What is relevant, however, is that, largely missed by previous scholarship, the anti-deprivation rule is, like all other statutory

[1295] See subchapter 2.5.
[1296] See subchapter 2.8.

provisions, clearly a direct by-product of principles expressed within the *Statute of Elizabeth 1571.* However, as will be discussed with the answers to following questions, the *Statute of Elizabeth 1571* is not the exclusive purview of the anti-deprivation rule as history, case law and academic literature, particularly expressed by Lord Mance's concurring opinion in *Belmont Park,* strongly suggests the statutory avoidance provisions are also descended from questions around the early fraudulent conveyance.[1297] What is important when discussing the history of the anti-deprivation rule, and its connection to the *Statute of Elizabeth 1571,* is the importance of the notion of fraud in the case of each. While there was disagreement by both the United Kingdom Supreme Court and the Supreme Court of Canada, such disagreement is in how insolvency law defines fraud. While the UKSC preferred a purpose-based definition of what constitutes fraud for the purposes of the anti-deprivation rule, the SCC preferred an effects-based one.[1298]

7.1.2. What is the relationship between the anti-deprivation rule and the pari passu rule?

This question is answered quite easily by the leading anti-deprivation case law in both the United Kingdom and Canada. This was discussed largely in chapter 3. While the anti-deprivation rule is meant to prevent unlawful takings from the estate upon insolvency, the *pari passu* rule is meant to ensure equitable distribution to creditors.[1299] However, in historic case law, the two rules were not fully clarified.[1300] As a result, the Supreme Courts in both countries had great difficulties in understanding how and when the anti-deprivation can and should apply. Of greater interest, perhaps, is the standard of applicability for both rules. While the Supreme Court of Canada explicitly stated that it would be desirable for the anti-deprivation and *pari passu* rules to obey the identical effects-based standard, the United Kingdom Supreme Court saw no issue in applying a

[1297] See subchapter 6.11.
[1298] See subchapter 4.10.
[1299] See subchapter 3.9.
[1300] See subchapter 4.2 for a discussion of the *Belmont Park* case where the rules were formally separated.

purpose-based standard for the former and an effects-based standard for the latter.[1301] Such a contention was justified with an eye to historic case law.[1302] It must be noted here that neither approach is wrong, both are based off both historic developments in national laws, as discussed in chapter 2, alongside differing conceptions of the collectivity principle in insolvency law, as discussed in chapter 6.

7.1.3. What is the relationship between the anti-deprivation rule and statutory provisions?

This question resulted in what might have been the two most difficult chapters of this thesis from both a technical and conceptual perspective. While chapter 6 attempted to answer this question more generally, chapter 5 attempted to answer the sub-question below – namely the relationship between the anti-deprivation rule and *ipso facto* clause prohibitions.

The answer to both these questions ultimately turns upon historical developments, legislative efforts and underlying principles of insolvency law. The most notable of these principles is the principle of collectivity which appears to underpin avoidance legislation as a whole.[1303] Both sub-sets of rules are meant to apply to prevent unlawful takings from the estate. While the anti-deprivation rule applies this principle in a more general way, the statutory provisions are meant to provide more exact guidance in enforcement. As a result, they are both highly related and are elaborations of principles contained within the earliest bankruptcy statutes – most notably the *Statute of Elizabeth 1571*[1304] and the *Statute of Henry VIII*[1305] *1542.* Of great interest though are applicable statutory standards and their influence upon the anti-deprivation rule. It is postulated here that, since both relate to the collectivity principle of insolvency, statutory

[1301] See subchapter 3.9.
[1302] See subchapter 4.2 for a discussion of the historic case law from English law as applied in *Belmont Park* and subchapter 4.7 for pre-*Chandos* case law in Canada and subchapter 4.8 for a discussion of how this case law influenced the court in the *Chandos* decision itself.
[1303] See subchapter 6.11.
[1304] See subchapter 2.5 for the context of the *Statute of Elizabeth 1571.*
[1305] See subchapter 2.2 for context regarding the development of the *Statute of Henry VIII 1542.*

rules ultimately alter the ambit of the anti-deprivation rule.[1306] Likewise, it was also argued that standards of application of statutory provisions, or difficulties inherent in their application, likely impacted the Supreme Courts of both the United Kingdom and Canada in their justifications for anti-deprivation rule standards.

7.1.3.1. Sub-question: What is the relationship between the anti-deprivation rule and *ipso facto* clause prohibitions?

This is probably the area of greatest current confusion with regard to the anti-deprivation rule. While case law around the anti-deprivation rule in *Belmont Park* was the direct result of concurrent American case law regarding *ipso facto* clause prohibitions applying § 365(e) of the United States *Bankruptcy Code,*[1307] this chapter attempted to challenge the notion that this makes these rules functionally equivalent. While both rules can and do apply in similar circumstances, the *ipso facto* clause prohibitions from § 365(e) are far more limited in their potential applicability than the anti-deprivation rule in either England or Canada.[1308] Nonetheless, there is still an open question of whether the applicable standard for the anti-deprivation rule in England was in fact influenced by § 365(e) and the American case law which applied it. With that being said, the Canadian approach to the relationship between *ipso facto* clause prohibitions and the anti-deprivation rule appears to be more sensible.[1309] To recall what was written in Chapter 5, the Supreme Court of Canada stated that the Canadian anti-deprivation rule was not in fact connected particularly closely to the Canadian equivalent *ipso facto* clause prohibitions, now contained within ss. 65.1, 66.34 and 84.2 of the *Bankruptcy and Insolvency Act,* but to s. 71 which simply

[1306] See the discussion in subchapter 6.11.
[1307] See subchapter 5.8.3. for a discussion of the relevant US case law.
[1308] See the discussion in subchapter 5.11.
[1309] Discussed in subchapter 5.11.

states that all property of the estate must vest within the trustee.[1310] Similarly, it was also implied by the United Kingdom Supreme Court that the anti-deprivation rule's main purpose is to ensure the same but, under the English model, is simply held in trust for to be used by the estate as a whole.[1311] With this in mind, the anti-deprivation rule's relationship to executory contracts, generally dealt with by *ipso facto* clause prohibitions in both Canada and the United States, and in England with regard to supply contracts, is merely coincidental. Nonetheless, just like other statutory provisions, the two sets of rules are related as both are meant to prevent the taking of assets from the estate upon insolvency thereby giving credence to the principle of collectivity in insolvency law.[1312]

7.1.4. Why has the anti-deprivation rule been interpreted differently in England and Canada?

This was the main question this thesis initially sought to answer. As a result, it is probably the most comprehensive. In this attempted answer, 4 different factors that potentially influenced interpretations of the anti-deprivation rule will be discussed.

1) The influence of history on insolvency laws

The development of insolvency laws, as illustrated by Chapter 2, in both England and Canada ultimately influenced how the Supreme Courts of each perceived avoidance laws and ultimately the anti-deprivation rule in their respective countries. The reasons for this discrepancy were largely explored in both chapters 2 and 4 of this thesis. While the law in England developed out of a small, island-nation of merchants,[1313] Canadian laws developed out of a federal frontier nation and the difficulties in its creation.[1314] While individualism dominated the English mercantile

[1310] *Chandos,* supra note 728, [30].
[1311] *Belmont Park,* supra note 608, [3]-[5].
[1312] As discussed in subchapter 6.11.
[1313] See subchapters 2.2 and 2.5.
[1314] See subchapter 2.4 and 2.7.

class, who drove insolvency law's development in England, in Canada such development was spurred by increased industrialisation and resistance from provinces. As a result, attitudes around insolvency laws as whole in Canada appear to fall much further into the collectivist mindset while in England it falls into the individualist.[1315] This appears to have been reflected in biases around the anti-deprivation rules of both countries.

While both rules emanate from a shared origin, they have since diverged to form unique, national approaches. Although Canadian bankruptcy and insolvency law is historically derived from Britain, it has matured beyond this to become a unique body of law based upon its own, albeit similar, principles and interpretations. Such divergence is not necessarily undesirable, however, as different countries' conceptions of the law often develop for very good historical reason.

2) The impact of legal realism on the Canadian judiciary

As explained in sub-section 1.2.3., legal realism, thanks largely to the tenure of Chief Justice of Canada Bora Laskin, has influenced the legal minds of Canadian lawyers, judges and academics.[1316] As discussed above in both subchapter 1.2.3. and subchapter 4.11, legal realism appears to have played a non-insignificant role in how the Supreme Court of Canada approached the applicability of the anti-deprivation rule in *Chandos.* Specifically, in subchapter 4.11, this thesis examined how policy arguments, influential in the realist framework, ultimately guided the judiciary of the Supreme Court of Canada to decide that the anti-deprivation rule's effects-based standard was indeed a desirable one. The most noted reason cited by the Supreme Court of Canada is that a purpose-based test would lead to less commercial certainty, not more, as it would force courts to engage in determining intention of the parties long after the time of contract formation.

[1315] Discussed in subchapter 4.10.
[1316] Discussed in subchapter 1.2.3.

This, the court adds, would erode the efficient administration of the estate[1317] – efficiency is yet one of many concepts advocated for by legal realists.[1318] Such a discussion was absent in the United Kingdom Supreme Court's decision in *Belmont Park* although influences of legal realism appeared present in an article written by Sarah Worthington[1319] – later cited in the Canadian *Chandos* decision in support of an effects-based anti-deprivation rule.[1320]

3) Collectivity and the relationship between the statutory provisions and the anti-deprivation rule

The collectivity principle was largely discussed in subchapter 6.11. The concept of collectivity is really best understood once the rules which apply it have been explained. Collectivity, as explained by Jackson, is fundamental to any insolvency system.[1321] While how this concept manifests itself within an insolvency system was explained, so too was its relationship to the other related concepts discussed herein. Namely the collectivity principle ensures that both as much value as possible remains within the estate and ensures that creditors are paid in turn – these concepts manifest themselves in the common law as the anti-deprivation and *pari passu* rules respectively. As noted in subchapter 6.11, the anti-deprivation and *pari passu* rules are not the exclusive purview of collectivity as such a principle also manifests itself within both automatic stay, or in English terminology moratorium, provisions as well as statutory avoidance devices.[1322] Equally, because the anti-deprivation rule and statutory provisions cover the same ground of collectivity, arguments can be made for a more or less expansive rule whose purview is ultimately

[1317] *Chandos,* supra note 728, [34].
[1318] Jerome Frank, 'Mr. Justice Holmes and Non-Eucledian Legal Thinking' (1932) 17 *Cornell LR* 568, 586.
[1319] Sarah Worthington, 'Good Faith, Flawed Assets and the Emasculation of the UK Anti-Deprivation Rule,' (2012) 75:1 *The Modern Law Review* 112.
[1320] *Chandos* supra note 728, [33].
[1321] See Thomas H. Jackson, 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain' (1982) 91 *Yale LJ* 857.
[1322] Kulkarni, supra note 1317, 92.

influenced by complementary statutory devices.[1323] This was manifested most clearly in the comparison between the English and Canadian cases. While Canadian law had *ipso facto* clause prohibitions to deal with securities contracts, English law did not, this meant that the United Kingdom Supreme Court was forced to limit the anti-deprivation rule so that it would not risk uncertainty in financial markets.[1324] This weariness to strike down a clause in an OTC securities contract was discussed in subchapters 4.11., 5.8.3., and 6.11.

4) Alignment between the *pari passu* and anti-deprivation rules

The Supreme Court of Canada explicitly noted a desire to align the standards of application for both the anti-deprivation and *pari passu* rules.[1325] This approach was based on criticisms leveled by Worthington in her paper which were cited in the *Chandos* decision.[1326] This desire to align the rules on an effects-based standard, pursuant to the *pari passu* rule in *British Eagle,*[1327] was definitely a factor which influenced the SCC in deciding a similar effects-based standard for the anti-deprivation rule as such was cited expressly within the *Chandos* decision.[1328]

Although this is likely a non-exhaustive list, as we have only reached the tip of the iceberg in research around the anti-deprivation rule, all four of the above factors likely influenced why the rule has applied differently in both England and Canada. This should be regarded as a non-exhaustive list of factors as future research in this area will hopefully add to this.

[1323] Kulkarni, supra note 1317, 95.
[1324] Alfonso Nocilla, 'Freedom of Contract, Fairness, and The Anti-Deprivation Rule' (2022) 65 Can Bus LJ 374, 383-384.
[1325] See the discussion in subchapter 4.8.2.
[1326] See the discussion of the paper in subchapter 4.4 and its implications in *Chandos* in subchapter 4.8.2.
[1327] See subchapter 3.5 for a discussion of *British Eagle.*
[1328] *Chandos* supra note 728, [35].

7.1.5. Why does the United States not have an anti-deprivation rule and do similar principles underpin American law as do Canadian and English?

Perhaps the primary reason why the United States lacks an anti-deprivation rule is historical. The anti-deprivation rule, while stemming from the *Statute of Elizabeth 1571,* was not really flushed out until the 19th century – after the American Revolution. This is not to say, however, that the United States lacks any sort of similar principles entrenched within the *Bankruptcy Code.* Quite the contrary, American bankruptcy law appears to have the same principles, they are just entrenched into legislation.

This is consistent with Glenn's conception that the United States has a hybrid legal system which imported ideas of civil law, most notably a codification of principles, into American law.[1329] As was discussed in subchapter 4.5., this has led, in the context of American bankruptcy law, to the entrenchment of an equity doctrine within the *Bankruptcy Code.* Such allows courts the powers to utilise equitable powers in service of the act as a whole. As Coordes explains, the equitable principle exists to recognize that courts can choose amongst multiple meanings inherent within the text of the statute.[1330]

It is theorised here that the equitable principle has allowed provisions of the *Bankruptcy Code* to fill in the necessary gaps an anti-deprivation rule would in both England and Canada. Since, as noted by Baird,[1331] much of the "unwritten rules" of the *Bankruptcy Code* also descend from the *Statute of Elizabeth 1571,* it is perhaps no surprise that great similarities exist between provisions of the US *Bankruptcy Code* and the anti-deprivation rule.

[1329] H. Patrick Glenn, *On Common Laws* (Oxford 2005), 86-88.
[1330] Laura N. Coordes, 'Narrowing Equity in Bankruptcy' (2020) 94 Am Bankr LJ 303, 317.
[1331] Discussed also in subchapters 2.9 and 4.5.

7.2. Themes Explored and future implications.

While the thesis began as an attempt to understand the differences between the anti-deprivation rules of Canada and England, there are certain themes that seem to have come up on multiple occasions throughout both the research and drafting thereof. These themes may ultimately be useful in informing future research into both the anti-deprivation rule and insolvency avoidance as a whole. This section will discuss each one of these themes in turn with an eye to how they have manifested themselves throughout this research.

7.2.1. The conflict between commercial and insolvency laws

It appears, from this research, that both the anti-deprivation case law and statutory drafting show a conflict that exists between commercial and insolvency laws. Said conflict was discussed, albeit briefly, in the *Cork Report.* As compared to an individual bankrupt:

> The business or commercial insolvent presents an entirely different picture. The failure of such an insolvent has wider repercussions, not only upon those intimately concerned with the conduct of the business, such as directors, shareholders and employees, but on other interests, such as suppliers, etc. The effect of the failure upon a realisable value of stock, plant and goodwill can be disastrous, and not infrequently there is a general feeling of desperation which needs to be resolved.
>
> …..
>
> We believe that a concern for the livelihood and well-being of those dependent upon an enterprise which may well be the lifeblood of a whole town or even a region, is a legitimate factor to which a modern law of insolvency must have regard. The chain reaction consequent upon any given failure can potentially be so disastrous to creditors, employees and the community that it must not be overlooked.[1332]

To this end, it has been noted here that courts and legislators have generally struggled on where to draw this line. For example, with regard to anti-deprivation case law, the UKSC was genuinely concerned that an effects-based anti-deprivation rule would disrupt this delicate balance. In fact,

[1332] *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558, [203]-[204].

Lord Collins was keen to state that both "it is desirable that, so far as possible, the courts give effect to contractual terms which parties have agreed. And there is a particularly strong case for autonomy in cases of complex financial instruments such as those involved in this appeal."[1333] Similarly, the SCC in *Chandos* held that the anti-deprivation rule should remain an effects-based rule for reasons of commercial certainty.[1334] Similarly, in both cases, as noted throughout chapter 6, many statutory avoidance provisions, including in the United States, were drafted with an eye to both the finality of transactions and commercial interests. The question, from this perspective, is whether effective or purposive avoidance provisions better serve this goal. This is an area ripe for future research.

7.2.2. The principle of collectivity

While the principle of collectivity has already been discussed at length in both this chapter and the last one, as well as in discussions around the anti-deprivation rule in chapter 4, research into this principle in both Canada and England appears to be in relative infancy. It has been argued here that the anti-deprivation rule, statutory avoidance provisions and even automatic stay and moratorium provisions contain elements of this principle of collectivity.[1335] The next question to ask is how far this principle extends. Equally, does this principle exist in non-common law jurisdictions? And what exceptions can be made to collectivity? While outside the scope of this thesis, the exploration of collectivity in insolvency has been quite interesting and is also an area ripe for future study.

[1333] *Belmont Park,* supra note 608, per Lord Collins, [103].
[1334] *Chandos,* supra note 728, [34].
[1335] See particularly the discussion in subchapters 3.8, 3.9, 4.4, 4.10, 6.10 and 6.11

7.2.3. The Statute of Elizabeth 1571 and the Statute of Henry VIII 1542

In a future work, it would be interesting to explore these statutes, and early case law around their application in greater depth. While there are many similarities between the legal rights created in these early statutes and the anti-deprivation and *pari passu* rules, the question of how exactly these developed and where else they may apply would be a very interesting future study. Having been greatly inspired by Baird's the *Unwritten Law of Corporate Reorganizations,*[1336] and how that author discovers the impacts of the *Statute of Elizabeth 1571* upon reorganizations in United States bankruptcy, a similar study regarding both English and Canadian law would be interesting. Such a study could expand to also include the *Statute of Henry VIII 1542* and how it has influenced the *pari passu* rule.

7.2.4. Conflicts between equality and fairness

While writing and researching priority provisions contained within chapter 3, there appears to be an inherent tension between principles of equality, as contained within the *pari passu* rule, and considerations of fairness which are often imparted from other areas of law.[1337] This was especially apparent in the recent *Redwater*[1338] decision in Canada where the Supreme Court determined that environmental claims have super priorities – to be paid even in advance of even secured claims. Many in Canada have praised this decision as a fair result however, it nevertheless makes one wonder if concerns around fairness have indeed gone too far as these priority claims almost definitely erode *pari passu* distribution. While arguments criticizing *pari passu* distribution were briefly discussed in subchapter 3.8, and reference was made to the collectivity principle in

[1336] Douglas G. Baird, *The Unwritten Law of Corporate Reorganizations,* (Cambridge 2022).
[1337] See the discussion of priorities in subchapter 3.4, and the criticisms of the *pari passu* rule in subchapter 3.8.
[1338] *Orphan Well Association v. Grant Thornton Ltd.,* [2019] SCC 5, [2019] 1 SCR 150.

insolvency, such concepts really should be subject to future study. It could also perhaps be postulated that priorities exist as conflicts between insolvency and other areas of law.

Beyond distribution, in the commercial context, the conflict between equality and fairness is perhaps reflected by conflicts between unlawful takings from the estate and fairness in contractual dealings. These two concepts were contrasted at length in *Belmont Park.*[1339] Similar conflicts also exist between the rights of secured credit holders, who are exempt from participating in the collective insolvency proceeding, and also to the relatively broad definitions of property in virtually all insolvency acts.[1340] These conflicts seem to all follow the equality-fairness paradigm and future study into this would likely be quite interesting.

7.3. Final Thoughts

This project initially appeared to be an overwhelming undertaking thanks, in large part, to the multitude of sources in a relatively understudied area of law. This is especially true for the Canadian context where there is a general void in research around the anti-deprivation rule. Alongside attempting to fill the void in Canada, this thesis has also attempted to showcase how principles of common law have diverged to form independent, national bodies of law. It is with hope that this study, which attempted to apply a multitude of approaches to uncover jurisdictional differences not only in the anti-deprivation rule but with regard to common law principles as well, is well received.

In the end, this has been a difficult but rewarding task. This thesis has attempted to blend diverse angles to better understand what appears on its surface to be a simple rule. While the anti-deprivation rule reflects an obvious conception in insolvency, that parties cannot run away with

[1339] See subchapter 4.1.2.
[1340] See the discussion in subchapter 3.3.

assets upon insolvency, it is reflective of a long history of the application of insolvency laws across national boundaries. While a principle of common law may be simple, application can often lead to greater complexity.

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