Manitoba

Law Reform Commission

Commission de réforme du droit

REPORT

ON

THE BULK SALES ACT

December 21, 1988

Report #71

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The Commission offices are located at 521 Woodsworth Building, 405 Broadway, Winnipeg, Manitoba R3C 3L6. Tel. (204) 945-2896; Fax (204) 945-8981

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CHAPTER 1

INTRODUCTION

A. THE REFERENCE

The Bulk Sales Act[1] is a statute which attempts to protect certain creditors from the possible dishonesty of the merchants to whom they extend credit. It has long been a standard part of commercial law and practice in Manitoba, familiar to all lawyers practising in that area. However, the concern was expressed to the Commission by local practitioners that *The Bulk Sales Act* is irrational, fails to achieve its purpose and is obsolete. Accordingly, we decided to undertake this review of the Act.

Although we will, in this Report, describe and evaluate in some detail the provisions of *The Bulk Sales Act*, it is useful to summarize it briefly at this early stage. The Act's purpose is to deter and prevent business people from selling off their businesses and absconding with the proceeds, leaving their creditors unpaid and victimized. Accordingly, the Act provides that no bulk sale may be completed in Manitoba unless the parties comply with certain formalities set out in the Act. A bulk sale is a sale by a retailer, manufacturer, commission merchant or other person in the business of buying and selling goods which takes place outside the ordinary course of business of that person or which involves the sale of substantially all the inventory or equipment of that person. Such sales by owners of hotels, restaurants, gasoline stations and machine shops are also specifically covered. Such sales by wholesalers are expressly excluded from the Act.

A person making a bulk sale must provide to the purchaser a sworn statement naming all of his creditors and the amounts owing to them. The sale may not be completed unless and until the vendor has either paid all the

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[1] *The Bulk Sales Act*, C.C.S.M. c. B100 [hereinafter referred to as *The Bulk Sales Act (Man.)*]. *See* Appendix A for the full text of the Act.

creditors named by him in full or obtained the consent (or waiver) to the sale from at least 60% in number and value of those creditors. Where a bulk sale is completed without compliance with these requirements, any creditor of the vendor may, for six months following that sale, take steps to declare that sale void.

The reasons for the concerns expressed by practitioners become immediately apparent, even from the above brief summary of the Act. Why are bulk sales by some vendors covered, while others are not? Why are bulk sales involving inventory and equipment covered, while those involving other assets (such as land or accounts receivable) are not? Perhaps most significantly, why does a statute aimed at deterring and preventing the fraudulent conduct of certain merchants rely on the statements of those same merchants for that deterrence and prevention?

In this Report, we seek the answers to these questions, with a view to deciding whether *The Bulk Sales Act* is effective and, more fundamentally, whether there is any need at all in modern times for legislation governing bulk sales.

B. BACKGROUND TO THE REPORT

In undertaking this project, we recognized that any reform of bulk sales law would have an important impact on the conduct of business and the practice of law in Manitoba. For this reason, we published a Discussion Paper in July 1987, setting out our preliminary findings, and circulated it to interested persons and organizations for their comments. We also published notification of the availability of the Discussion Paper in the Manitoba legal profession's newsletter *Headnotes and Footnotes*. Numerous thoughtful responses were received and we take this opportunity to thank all those who responded for their valuable contributions; their names are set out in Appendix B. We would particularly like to acknowlege and thank Professor E. Arthur Braid, Q.C., for his thoughtful contributions and Donald J. Rapson and Stephen L. Harris for their assistance in advising us of the progress of the National Conference of Commissioners on Uniform State Laws in their review of Article Six of the Uniform Commercial Code dealing with bulk transfers. A Drafting Committee, established by the Commissioners in conjunction with the

American Law Institute, has continued the work undertaken by a subcommittee of the Uniform Commercial Code Committee of the American Bar Association's Section of Corporation, Banking and Business Law; we refer to the subcommittee's work in our Discussion Paper and this Report. Special mention should also be made of the earlier work done by the Law Reform Commission of British Columbia in the area of reform of bulk sales law. Their *Report on Bulk Sales Legislation*, published in 1983, recommending repeal of the legislation, was implemented by that province in 1985. The Commission's Report and Working Paper, in addition to the British Columbia experience with repeal, were valuable aids in our deliberations.

C. STRUCTURE OF THE REPORT

We begin our discussion in Chapter 2 with a brief look at the historical context in which bulk sales laws arose. In the next Chapter, we set out the provisions of *The Bulk Sales Act* in detail, including judicial interpretation of similar provisions of bulk sales legislation in other provinces. Critical evaluation of the Act follows in Chapter 4, wherein we conclude that the problems with the legislation are so overwhelming as to call for repeal. The rest of the Report is devoted to the question of whether the present *Bulk Sales Act* can and should be replaced by new legislation to govern bulk sales. In Chapter 5, we consider the impact on bulk sales of other laws and factors which were not present when bulk sales laws were first introduced. We then consider other ways of devising an effective and commercially viable legislative scheme, and outline the broad parameters of a scheme designed for this purpose. In the final Chapter of the Report, we evaluate this scheme and, in light of the comments received in response to our Discusson Paper as well as the economic and legal considerations, recommend that *The Bulk Sales Act* be repealed and not be replaced with an alternate scheme.

CHAPTER 2

THE HISTORICAL PERSPECTIVE TO *THE BULK SALES ACT*

The Bulk Sales Act has been a part of Manitoba law for nearly eighty years; it was first enacted in Manitoba in 1909.[1] The introduction into Manitoba, and indeed into Canada, of legislation governing the sale of goods in bulk can only be understood in relation to the American experience. Not only did our laws follow temporally the enactment of bulk sales laws in most of the American states between 1900 and 1910, but the very existence of such legislation is strictly a North American phenomenon; no other Commonwealth country has enacted bulk sales statutes.

A. THE INTRODUCTION OF BULK SALES LAW INTO THE UNITED STATES

The enactment of bulk sales law in the United States at the turn of the century was in response to the difficulties which many states were experiencing with fraudulent merchants. In an age of limited communication and transportation facilities, unscrupulous merchants were able to set up shop in a town, fill it with stock obtained on credit, sell off the stock, and leave town without paying their suppliers the money owed to them. These unscrupulous merchants were then free to move on to the next town, undetectable to their former suppliers and unsullied and unknown to their new suppliers. And indeed,

> [t]he state reports from 1890 to 1903 - the period of greatest agitation for bulk sales laws - are filled with decisions which involve the transfer by a tradesman of his entire stock in gross, without making proper provision for his creditors.[2]

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[1] *The Bulk Sales Act, 1909*, S.M. 1909, c. 60.

[2] Thomas C. Billig, "Bulk Sales Laws: A Study in Economic Adjustment", (1928) 77 U. Pa. L. Rev. 72, 76, quoting an address of Alexis C. Foster, President of the Denver Association of Credit Men (October 14, 1902), *reported in Bulletin National Association of Credit Men* (Nov. 5, 1902).

The common law afforded no relief to creditors in this situation and although the *Statute of 13 Elizabeth*[3] had been adopted in most states, it offered relief to the unpaid creditor only where the purchaser had acquired the goods with knowledge of the vendor's fraudulent intent. A national bankruptcy law was not in place until 1898 and the state by state administration of insolvency laws simply "placed another stumbling block in the path of creditors."[4] Even bankruptcy legislation, when introduced, was viewed as only ancillary relief to bulk sales legislation itself. As was stated at the time:

> What the credit man desires most is not a legal remedy to be administered subsequent to the sale of the debtor's assets, but notice *in advance*, of the proposed transfer, such as a bulk sales statute provides. If this notice is afforded him, the credit man is, from a business standpoint at least, in a vastly better position than if the sale already has taken place, although his debtor at the time of the transfer may even have been technically insolvent under the *Bankruptcy Act*.[5]

In response to this situation, a well organized national campaign and a lobbying drive were begun by the National Association of Creditmen, advocating the enactment of the state legislation to combat this "great public evil".[6] As evidenced by the following address, their plea was, at times, impassioned:

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[3] *An Act against fraudulent Deeds, Alienations, &c., 1571*, 13 Eliz. 1, c. 5 (U.K.).

[4] Billig, *supra* n. 2, at 80.

[5] Billig, *supra* n. 2, at 101. *But see* Note, "The Application of Bulk Sales Statutes" (1920), 33 Harv. L.R. 717 at 718:

> Before the Federal Bankruptcy Act there was undoubtedly a serious evil. If an insolvent retail dealer could suddenly and secretly sell his stock in bulk, not only was it difficult for his creditors to find out what had been done with the proceeds, but the debtor could often make preferences which the remaining creditors were unable to defeat. But the National Bankruptcy Act obviates both these dangers, by providing for a speedy discovery of assets and by making a preference by an insolvent debtor an act of bankruptcy and voidable. Thus these statutes are of little use except in cases where the seller is solvent at the time of the sale, or where the purchaser acts *bona fide* and the seller absconds.

[6] Billig, *supra* n. 2, at 76, n. 19.

> I do not believe it is possible to legislate a thief into an honest man, but I do believe it is possible to frame a law that will place almost insurmountable barriers in the way of that damnable class of pirates who swoop down upon a peaceful and confiding community and levant between two suns. And what is more they take with them a clear title to their ill-gotten gains, leaving behind a broken faith in the honesty of mankind, and sometimes there also is left behind one of those creatures who sleeps in the ecstatic security of always having his fingers crossed - that rare individual, the conceited creditman.[7]

The Association's campaign for legislation proved highly successful:

> . . . in the decade from 1894 to 1904 at least a score of states passed "bulk bills" (as they were then called) which placed stringent requirements upon any retailer who would dispose of his stock of merchandise in gross, as well as upon his transferee.[8]

The passing of bulk sales legislation in the United States then was in response to three main factors: the prevalent evil of dishonest merchants selling off merchandise and absconding with the proceeds; the failure of the law to afford adequate relief from this evil; and the lobbying efforts of a highly organized association to have enacted legislation to prevent fraudulent bulk sales and thereby keep the cost of credit down.

B. THE INTRODUCTION OF BULK SALES LAW INTO CANADA

The initial bulk sales Acts in Canada were enacted in the first decade of this century. By 1920,[9] most of the provinces had such legislation and today British Columbia is the only jurisdiction without a bulk

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[7]Billig, *supra* n. 2, at 75, n. 17.

[8]Billig, *supra* n. 2, at 81.

[9]The Conference of Commissioners on Uniformity of Legislation in Canada first approved a Model *Bulk Sales Act* in 1920 and most provinces enacted it. In 1950, a Revised Model Act was adopted and also enacted by many provinces. But soon afterwards it was decided that more extensive revision was desirable. At the 1961 Conference, the present Model Act, based on the 1959 revised Ontario Act, was passed "with little enthusiasm". Since that date, no province has enacted the 1961 Act and ". . . [i]t seems likely that none will." The subject of bulk sales has not been considered by the Conference since 1967. From Conference of Commissioners on Uniformity of Legislation in Canada, *Proceedings of the Forty-Eighth Annual Meeting* (August, 1966), 165.

sales Act.[10] These early statutes were similar in scope and operation to their modern day versions with the exception that no service industries were included.

The specific reasons for the Canadian importation of bulk sales legislation are not clear as there is a dearth of literature on the subject. However, it can be presumed that some of the factors leading to the American legislation must also have been present here; namely, the problem of absconding bulk sale vendors and the failure of the existing law to deal adequately with the problem. The latter problem was definitely as acute in this country as it was in the United States as, for example, no federal bankruptcy legislation existed in Canada between 1880 and 1919.[11] During this hiatus, some of the provinces passed laws governing insolvent debtors and fraudulent conveyances and preferences.[12] But as seen from the American experience, these laws did not address directly the bulk sales evil.

In a climate where the common law and existing legislation provided no redress against absconding merchants, bulk sales legislation became a necessity. The historical context in which bulk sales laws arose accounts for their unique character, both in terms of the emphasis on inventory and the provision of advance notice to creditors of impending bulk sales. These distinguishing features of the legislation will now be considered along with the other provisions of *The Bulk Sales Act*.

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[10] *Bulk Sales Act*, R.S.A. 1980, c. B-13; *The Bulk Sales Act*, R.S.S. 1978, c. B-9; *The Bulk Sales Act*, R.S.M. 1970, c. B100; *The Bulk Sales Act*, R.S.O. 1980, c. 52; *Quebec Civil Code*, Arts. 1569a-1569e; *Bulk Sales Act*, R.S.N.B. 1973, c. B-9; *Bulk Sales Act*, R.S.N.S. 1967, c. 28; *Bulk Sales Act*, R.S.P.E.I. 1974, c. B-6; *The Bulk Sales Act*, R.S.N. 1970, c. 28; *Bulk Sales Ordinance*, R.O.Y.T. 1971, c. B-4; *Bulk Sales Ordinance*, R.O.N.W.T. 1974, c. B-3. On the recommendation of the Law Reform Commission of British Columbia, the *Sale of Goods in Bulk Act*, R.S.B.C. 1979, c. 371, was repealed by the *Law Reform Amendment Act, 1985*, S.B.C. 1985, c. 10, s. 11, effective May 17, 1985 (B.C. Reg. 138/85).

[11] Enacted that year was the *Bankruptcy Act*, S.C. 1919, c. 35. *See also* S.W. Jacobs, "A Canadian Bankruptcy Act - Is It A Necessity?" (1917), 37 Can. L.T. 604.

[12] In Manitoba: *The Assignments Act*, R.S.M. 1891, c. 7; *An Act to declare the true construction of the Act passed in the thirteenth year of the Reign of Queen Elizabeth and chaptered five and intituled "An Act against fraudulent deeds, alienations, &c."*, R.S.M. 1891, c. 61.

CHAPTER 3

THE PROVISIONS OF *THE BULK SALES ACT*

The object of bulk sales legislation is to deter debtors from fraudulently disposing of assets without first making adequate provision for the payment of creditors. The mechanism designed to accomplish this object consists of three parts: the requirement of advance notice to creditors of an impending sale in bulk; the power of creditors to block a sale until the vendor has satisfied their claims; and the remedial authority given to creditors to apply to have a sale which is made in contravention of the Act set aside. These elements together make up what may be called the *operational* aspect of bulk sales legislation. A second important aspect is the *scope* of the Act, in particular, the limited application of the Act to a select group of persons and transactions.

In this Chapter we examine the provisions of Manitoba's *Bulk Sales Act* under these two broad headings: scope and operation. In doing so, we consider jurisprudence from Manitoba as well as other Canadian jurisdictions, as bulk sales legislation differs only slightly from one province to the next. We reserve our analysis of bulk sales law and legislation for the next Chapter.

A. SCOPE OF THE ACT

The Bulk Sales Act does not apply to every sale or transfer of property within the province. The scope of the Act was purposely defined narrowly to address a particular historic problem and that scope remains largely unchanged today.

Taken together, five components define the scope of *The Bulk Sales Act*:

1. The vendors subject to the Act;
2. The subject matter of a sale under the Act;
3. The transactions included in the Act;
4. The transactions excluded from the Act;
5. The creditors protected by the Act.

Although each of these factors will be examined separately, they are closely interrelated and courts generally have tended to take a comprehensive approach to questions concerning the scope and application of the Act.

1. The Bulk Sale Vendor

The Bulk Sales Act provides that four categories of vendors are subject to the Act, namely:

(a) persons who, as their ostensible occupation or part thereof, buy and sell goods, wares or merchandise ordinarily the subject of trade and commerce;

(b) commission merchants;

(c) manufacturers;

(d) proprietors of hotels, rooming houses, restaurants, motor vehicle service stations, oil or gasoline stations or machine shops.[1]

The confinement of the Act primarily to those who sell tangible assets reflects the historic view that the fraudulent dissipation of the proceeds from the sale of goods and wares was the evil to be addressed. Recognition of this view by the courts is evidenced by statements such as:

> It is a matter of common knowledge that the mischief aimed at was the disposal of their stocks in bulk by traders, merchants, retail shopkeepers, to the detriment of their creditors.[2]

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[1] *The Bulk Sales Act (Man.)*, s. 2. Clause (d) was not part of the original legislation. It was added by S.M. 1951, c. 5. This was the result of decisions such as *Barthels, Shewan & Co.* v. *Peterson* (1914), 24 Man. R. 794, 16 D.L.R. 465 at 466 (K.B.), which held that if the Act was to extend to hotelkeepers, it would have provided for them explicitly.

[2] *Worthington* v. *Robbins and Cadigan* (1924), 56 O.L.R. 285, [1925] 2 D.L.R. 80 at 82 (S.C.).

Aside from some early anomalous cases,[3] the provisions concerning the vendors subject to the legislation have been strictly construed.[4] As a result, many businesses, such as those in the service sector, are not subject to bulk sales law.

2. The Subject Matter of the Bulk Sale

The legislative intent to confine bulk sales law to the sale of tangibles is also apparent from the definition of the assets which may form a bulk sale. A sale in bulk is defined in the Act as a "sale of a stock, or part thereof . . ."[5] under certain conditions (which will be discussed later). Stock was originally defined as the "stock of goods, wares, merchandise or chattels ordinarily the subject of trade and commerce" as well as the "goods, chattels and fixtures ordinarily used in connection with any business",[6] and was interpreted to mean the inventory of a business. For example, in a case where the majority of the purchase price for a business was attributable to goodwill, and machinery and equipment used in the manufacture and bottling of drinks, but "[t]he stock of goods wares and merchandise necessary to make the Act applicable amounted to little or nothing, *viz*: a

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[3] *Id.*, at 83 where the court found that a farmer was a vendor within the meaning of *The Bulk Sales Act*. *Foll'd in Scott* v. *Haycock and Nutt*, [1926] 1 D.L.R. 430 (Ont. S.C.).

[4] *See John Marten Paper Co. Ltd.* v. *American Type Foundry Co.*, [1924] 3 D.L.R. 1080 (Alta. S.C. App. Div.) at 1082 where the Court opined:

> It may be thought unjust that all business concerns are not covered by the Act. But that is a matter for the Legislature. The Court has to decide upon the meaning of the words of the Act as they are found and it ought not to seek to extend the meaning so as to cover cases which it may think should have been covered.

[5] *The Bulk Sales Act (Man.)*, s. 1. The Act defines "sale" as follows: "whether used alone or in the expression 'sale in bulk', includes a transfer, conveyance, barter or exchange; and 'sell' has a similar meaning".

[6] *The Bulk Sales Act*, S.M. 1924, c. 23, s. 2(e).

small amount of syrups and extracts," the court held that the *Bulk Sales Act* was inapplicable.[7]

In 1951,[8] the definition of stock was expanded to its present form:

(1) stock of goods, wares, merchandise or chattels ordinarily the subject of trade and commerce;

(2) the goods, wares, merchandise or chattels in which a person trades, or that he produces or that are the output of, or with which he carries on, a business, trade or occupation.[9]

However, even given this broad definition of stock - encompassing more than simply inventory[10] - the courts have refused to extend its meaning to anything other than tangible assets. Accordingly, property consisting of

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[7] *Re Crystal Springs Mfg. Co.*, [1935] 4 D.L.R. 331 at 332 (N.S.S.C.), although in this case the *Bulk Sales Act* was applied as it was "invoked by the parties to the sale." *See also Adams River Lumber Co. Ltd.* v. *Kamloops Sawmills Ltd.* (1921), 30 B.C.R. 354, 70 D.L.R. 863 (S.C.).

[8] *The Bulk Sales Act*, S.M. 1951, c. 5.

[9] *The Bulk Sales Act (Man.)*, s. 1. In some jurisdictions the "expanded" version was the definition incorporated into the original legislation, and no subsequent expansion of the definition was made: *see, e.g., The Bulk Sales Act*, S.O. 1917, c. 33, s. 2.

[10] *See In Re St. Thomas Cabinets Ltd.* (1921), 50 O.L.R. 492, 61 D.L.R. 487 (S.C.); *Interlake Tissue Mills Ltd.* v. *George Everall Co. Ltd.* (1921), 50 O.L.R. 165, 64 D.L.R. 206 (S.C.).

film distribution contracts[11] or package motor coach tours,[12] have been held not to be within the meaning of stock under bulk sales law. A sale of real property is also outside the scope of the Act.

It should be noted that certain assets which are not within the definition of stock, may be caught collaterally by *The Bulk Sales Act*. This can arise where a sale - consisting of both "bulk sales" assets and "non-bulk sales" assets - is set aside as a whole for breach of the Act as the Court is not willing to sever the bulk sales assets from those which are not; "the legal cannot be separated from the illegal."[13]

3. The Nature of the Bulk Sale Transaction

To constitute a bulk sale, not only must the vendor fall within one of the previously specified categories and the assets being transferred be within the statutory and judicial meaning of the term "stock", the sale must also take place under one of three circumstances. It must be one which is:

(1) out of the usual course of business or trade of the vendor;
(2) of substantially the entire stock of the vendor or;
(3) of an interest in the business of the vendor.[14]

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[11] *In Re United Exhibitors of Canada* (1924), 27 O.W.N. 142, [1924] 4 D.L.R. 816 (S.C.).

[12] *Simpson & Lane School Bus Ltd. v. Majestic Tours Ltrd. et al.* (1986), 44 Alta. L.R. (2d) 265 (Q.B.).

[13] *Royal Bank of Canada v. Meadow Sweet Dairies Limited et al.*, [1942] 3 W.W.R. 289 (Alta. S.C.) at 293, where a sale of stock and equipment as well as real property was held to be contrary to the Act. *See also McMillan v. Jones*, [1923] 2 W.W.R. 641 (Sask. C.A.). *But see Canadian Credit Mens Trust Association v. Westerguard* (1951), 1 W.W.R. (N.S.) 822; [1951] 2 D.L.R. 697 (Alta. C.A.), where, in a mixed sale of land and chattels, the Court apportioned the consideration for the sale between the two and validated the sale of land but invalidated the sale of chattels.

[14] *The Bulk Sales Act (Man.)*, s. 1.

The courts have determined that these provisions are to be read disjunctively. A sale of stock may not constitute a substantial part of a business and yet be outside the usual course of that business. For example, the sale of part of a business,[15] and the sale of a quantity of stock over a period of months at prices below wholesale value,[16] were found to be within the Act because they were sales made outside the usual course of dealing of the businesses.

Sales of substantially the entire stock of the vendor, whether made inside or outside the ordinary course of a business, will be bulk sales within the meaning of the Act. No guidance was given as to what constitutes a substantial portion of stock, and the cases considering this point are few. One case used the quantity of stock sold as the indicia; however, it did not exclude the use of other criteria, such as the value of stock sold, in appropriate circumstances.[17]

The meaning to be assigned to the third phrase - of an interest in the business of the vendor - is unclear. What is clear is that this interest does not mean the sale of a partnership interest in an enterprise, even where that enterprise is a vendor of inventory, For example, where a partner sold his share in a hardware firm, the Ontario Court of Appeal held that the sale was not of an interest in the business.[18] The partner, not the firm, was the vendor and he sold his entire share in the business, not merely an

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[15] *Interlake Tissue Mills Ltd.* v. *George Everall Co. Ltd.*, *supra* n. 10. This case involved a manufacturer of paper bags and envelopes who sold the plant and machinery connected with the envelope branch of the business. *But see Overland Towing Co.* v. *B. Howey Contractors Ltd. and Thompson* (1982), 18 Alta. L.R. (2d) 351 (Q.B.).

[16] *Webber* v. *Hall* (1921), 56 D.L.R. 253 (N.S.C.A.).

[17] *Commercial Motor Bodies & Carriages Ltd.* v. *Perth Ltd.* (1930), 65 O.L.R. 383, [1930] 3 D.L.R. 617 (S.C.). *See also John Allan Ltd. Trustee* v. *T. Eaton Company, Limited* (1927), 8 C.B.R. 497 (Que. K.B. App. Side).

[18] *McLennan* v. *Fulton* (1921), 50 O.L.R. 572, 64 D.L.R. 558 at 562 (C.A.).

"interest" in the business. The court perceived no threat to creditors in this situation as the partnership assets could still be sold for the partnership debts and the transfer of interest was only from the surplus after the payment of debts.

The provision was also considered in the case of a sale of an entire creamery business "as a going concern", including "all interest and goodwill thereof" and equipment but no inventory. The sale was attacked for failure to comply with the *Bulk Sales Act* on the basis that it was the sale of an interest of the vendor in his business.[19] In addressing the plaintiff's argument, the Court stated:

> He further contends that the words "an interest in the trade or business" read in their ordinary sense means an interest in the "occupation" or "industry" of the manufacturer and not merely in the goods produced by the occupation or industry, and raw materials from which they can be produced. If that were the meaning of the section it would lead to inconvenient and unforeseen results. I am bound in fixing upon the intention of the Legislature to view the Act as a whole and to construe the words in light of the whole Act. The plant without any stock of goods which was manufactured in it or any other stock of goods was sold as a going concern. That is not a sale within the plain ordinary conception of a sale of a stock of goods, which is the kind of a sale to which the Act is intended to apply, and I hold, though with doubt, that the Act does not apply.[20]

Neither of these cases is particularly helpful in determining the meaning of "an interest in the business of the vendor". We must conclude that the courts have failed to ascribe any independent meaning to the clause and it adds nothing to the two phrases which precede it.

4. Transactions Excluded From *The Bulk Sales Act*

As noted earlier, some transactions are implicity excluded from *The Bulk Sales Act* by virtue of the combined effect of the Act's definitions; for

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[19] *Norris* v. *McKenzie* (1933), 6 M.P.R. 556, [1933] 3 D.L.R. 713 (N.S.S.C.).

[20] [1933] 3 D.L.R. 713 at 715-716 (N.S.S.C.).

example, transfers made by proprietors in most service industries are not included.

The Act also explicitly excludes transactions involving:

(a) sales by executors, administrators, receivers, assignees or trustees, where the sale is for the benefit of creditors;

(b) sales by authorized trustees under the *Bankruptcy Act*, official receivers or liquidators and public officials acting under judicial process;

(c) sales by wholesale traders or merchants;

(d) assignments by traders or merchants for the general benefit of creditors.[21]

The rationale for excluding persons in fiduciary positions and those acting pursuant to judicial order seems clear; in these cases, other legal duties and sanctions operate to prevent abuses and there is no threat of unchecked danger to creditors. However, the same cannot be said of the third exclusion - wholesalers - and the reason for their special status is puzzling and open to speculation.

Two other exclusions from the Act arise implicitly by virtue of the term "sale" and the judicial interpretation of that term. The granting of a chattel mortgage, debenture or other security interest, whether for new consideration or to secure an antecedent debt, is apparently not a "sale" within the meaning of the Act. Also, transfer by a secured party pursuant to a right to sale under a security agreement is not a bulk sale by the secured party and is not within the scope of the Act.[22]

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[21] *The Bulk Sales Act (Man.)*, s. 3.

[22] *Drinkle* v. *Regal Shoe Co. Ltd., Endacott and Rae* (1914), 7 W.W.R. 194 (B.C.S.C.). *See also Lamontagne* v. *Tremblay*, (1922) 23 O.W.N. 192, (H.C. Div.); *Ex Parte Canada Metal Co.: Re McIntyre*, [1925] 2 D.L.R. 889 (Ont. H.C.); *Ogilvie Flour Mills Co.* v. *Empire Bakery Ltd.*, [1931] 2 W.W.R. 766 (Sask. C.A.).

5. Creditors Protected by *The Bulk Sales Act*

The Act defines "creditor" as:

> . . . a person to whom the vendor of stock is indebted, whether or not the debt is due, and includes a surety and the endorser of a promissory note or bill of exchange who would, upon payment by him of the debt, promissory note or bill of exchange in respect of which the suretyship was entered into or the endorsement was given, become a creditor of such vendor.[23]

Several points should be noted about this broad definition. The Act is not restricted to creditors who have actually supplied the vendor with the goods which are the subject matter of the bulk sale. All creditors of the vendor potentially are covered: trade and non-trade,[24] secured and unsecured. Thus, a sole proprietor's credit card company, which extends credit for personal purchases, is protected in the same way as are the proprietor's inventory suppliers. Persons with unliquidated claims for damages in tort or breach of contract are not within the scope of the Act,[25] but it would appear that creditors who have obtained judgment for such claims are included.[26]

B. OPERATION OF *THE BULK SALES ACT*

Having identified the scope of the Act, we will now consider how the Act operates to fulfil its purpose. The general scheme is as follows: the vendor is required to furnish to the purchaser an itemized list of his

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[23] *The Bulk Sales Act (Man.)*, s. 1.

[24] *Warner et al.* v. *Graham et al.*, [1946] 2 D.L.R. 277 (B.C.S.C.); *Montreal Abattoirs* v. *Picotte* (1917), 52 Que. S.C. 373.

[25] *Pizzolati & Chittaro Manufacturing Co. Ltd.* v. *May et al.* (1972), 26 D.L.R. (3d) 274. (Ont. C.A.). The Court placed some reliance on the American judicial interpretation of "creditor" under the Uniform Commercial Code and, as well, on the meaning of that term, as understood in the context of other debtor-creditor legislation. *See also Commercial Motor Bodies & Carriages Ltd.* v. *Perth Ltd.*, *supra* n. 17.

[26] *Showers* v. *Lewis & Rialto Hat Stores* (1933), 71 Que. S.C. 485.

creditors; upon receipt of the list, the purchaser must ensure that the claims of the named creditors are dealt with satisfactorily - in one of three ways provided by the Act - before advancing the purchase monies to the vendor. Thus, both vendor and purchaser are assigned special and distinct duties designed to protect the interests of creditors. The failure of either party to fulfil properly his own duties will trigger the remedies available to creditors under the Act: the right to block or to set aside a sale.

In this part, the operational aspects of *The Bulk Sales Act* - the roles assigned to vendor and purchaser and judicial interpretation of these roles - will be examined. The effects of non-compliance with the Act, and the rights and remedies that bulk sales law affords creditors will also be considered.

1. The Duties of the Vendor

Section 5 of the Act provides that upon demand from the purchaser, the vendor is required to furnish to him a written statement, verified by a statutory declaration, containing the names and addresses of the vendor's creditors, together with the amounts owing, payable or accruing due to each of them. As discussed previously, all creditors of the bulk seller must be included, not simply creditors of the business of the seller[27] or the creditors who supplied the assets which are now the subject matter of the sale.

The responsibility for the completeness and accuracy of the statement and declaration rests with the vendor. As we will see in our discussion of the duties of the purchaser, this reliance on the vendor has a great impact on the effectiveness of the Act.[28]

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[27]*Thompson* v. *Richardson* (1967), 61 D.L.R. (2d) 162 (Alta. S.C. App. Div.). *See also supra* n. 24.

[28]*Attorney-General of Canada* v. *Bulletin Publications Limited and The Dauphin Herald Company (1976) Ltd.* (1979), 3 Man. R. (2d) 14, at 23 (Co. Ct.). *See also Bank of Nova Scotia* v. *Landry* (1974), 10 N.B.R. (2d) 186, 4 A.P.R. 186 (S.C.).

As a second requirement, before the completion of a bulk sale the seller must either pay all his creditors in full or obtain written consents or waivers of the provisions of the Act from sixty per cent of his creditors in both number and value of claims exceeding fifty dollars as shown by the written statement.[29] The courts require the "clearest proof" that this provision was complied with before the sale was completed.[30]

In the event that clause (c) - written consent of creditors - is chosen as the means for compliance, the purchase price must be paid to a trustee who is then responsible for distributing the proceeds for the general benefit of all creditors in accordance with the provisions of the *Bankruptcy Act*.[31]

2. The Duties of the Purchaser

As discussed, upon demand from the purchaser, the vendor is required to furnish a statement of creditors, supported by a statutory declaration. The purchaser's corresponding duty is to make a request for that statement and declaration. The purchaser may not pay to the vendor any part of the purchase price (except a deposit not exceeding fifty dollars), or give a promissory note or security for the purchase price or part thereof, or execute any conveyance or encumbrance of the property until he has received the required statement and declaration from the vendor.[32]

Although the payment of a deposit exceeding $50.00 accompanying an offer to purchase a business is precluded (a fact that would surprise most

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[29] *The Bulk Sales Act (Man.)*, s. 5.

[30] *Walter* v. *Leduc Lumber Co.* (1915), 8 W.W.R. 360 (Alta. S.C.).

[31] *The Bulk Sales Act (Man.)*, ss. 6-8.

[32] *The Bulk Sales Act (Man.)*, s. 4(1)-4(4). The request for the statement must be made, not only where the purchaser knew that the sale was one which fell within *The Bulk Sales Act*, but also where he ought to have known that the sale was within the ambit of the Act. *See Herman* v. *Sit Hing Fung*, [1953] 1 D.L.R. 507 (B.C.S.C.).

business people and lawyers), the British Columbia Court of Appeal has held that upon their reading of the Act as a whole, a violation of this subsection is not a violation of a "provision of the Act" as contemplated by section 10 of the Act.[33] Accordingly, non-compliance with this provision does not permit an aggrieved creditor to avail himself of the Act's remedial provisions.

Once a purchaser has requested a statement and a declaration from the vendor, his further obligations are very limited. As regards the declaration:

> All the purchaser is required to do is to get a declaration in proper form; he does not become the guarantor of the vendor's veracity, and a perjurous declaration will not avoid the sale if it is in proper form . . . .[34]

In a similar vein, as long as the form of the statement of creditors is in compliance with the Act,[35]

> . . . the purchaser, having demanded and received from the vendor a written statement verified by the statutory declaration of the vendor in the form prescribed by the statute, free from any defects in form and free from any collusion between vendor and purchaser resulting in an incomplete or false written statement, is not liable on account of a false or incomplete statement made by the vendor. The statute, it seems to me, declares firstly the duty of the purchaser and then the duty of the vendor, each distinct from the other.[36]

Consequently, although a statement or declaration may have errors or omissions, a creditor's right to pursue remedies for non-compliance under the

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[33] *Awram* v. *Brunt*, [1950] 2 W.W.R. 282 (B.C.C.A.).

[34] *Warner et al.* v. *Graham et al.*, [1946] 2 D.L.R. 277 at 279 (B.C.S.C.).

[35] *The Bulk Sales Act (Man.)*, Schedule A, sets out a permitted form for the statement and the declaration; s. 4(2) sets out the required contents.

[36] *Paddon* v. *McFarland and McFarland and Goldberg*, [1930] 3 W.W.R. 632 (Alta. Dis.Ct.).

Act will be restricted where the purchaser has no knowledge of those errors or omissions. In such cases, a creditor may pursue any remedies which may be available against the vendor under contract or under statute, such as *The Fraudulent Conveyances Act*, but no cause of action lies against the purchaser (or the vendor) under *The Bulk Sales Act*.

The rationale for limiting the purchaser's liability in this way can be explained as follows:

> If a purchaser had to embark on an inquiry in depth and at his peril should miss out a creditor, then there would be no end of risk for an honest purchaser.[37]

However, the purchaser is not allowed to turn a blind eye to substantial defects in the form of the statement or the declaration. For example, in a recent case from British Columbia, the County Court noted that, in the circumstances at hand:

> To me it is more than a matter of form that the document omits any mention that the vendor is a corporation, omits any description of the capacity of the person taking the oath, and of ultimate importance omits that the deponent had a personal knowledge of the matters set forth in the statement of creditors . . . .
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> . . . . Under these circumstances I hold the purchaser can gain no protection from this faulty document.[38]

In conclusion, the responsibility for the completeness and accuracy of the statement of creditors and supporting declaration rests with the

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[37] *Larosa Food Importing & Distributing Ltd.* v. *Mel-J Holding Ltd.* (1981), 33 B.C.L.R. 113 at 119 (Co. Ct.).

[38] *Id.* at 120. The court's willingness to set this sale aside, however, may well be explained by their statement that,

> [i]n a very real sense the question here is which of the two innocent parties must bear the burden of the fraudulent act of the third person now out of the country. Under the circumstances at bar the consequences must be shouldered by the appellant [purchaser] who failed to obtain the safeguard of a valid statement and affidavit.

vendor. The purchaser has no duty to inquire behind the statement. As long as it and the declaration are substantially in the correct form, the purchaser will be free from liability. From analysis of the reported decisions, it is apparent that the circumstances where the form of a statement or a declaration will be called into question and the purchaser held responsible are extraordinary and rare.

3. The Effect of Non-Compliance with the Statutory Requirements

The consequences of non-compliance with The Bulk Sales Act are that the sale will be deemed fraudulent and void as against the vendor's creditors, and every payment or transfer made on account of the purchase price will be deemed fraudulent and void as between the purchaser and the vendor's creditors.[39] Where the purchaser has taken possession of any of the stock in bulk, he will be personally liable to account to the creditors for the value of the stock, including any proceeds received by him from the subsequent disposition of any of the stock.[40]

The vendor's creditors are given the power to set aside a bulk sale, as fraudulent and void as between the purchaser and themselves, and to hold the purchaser liable for the vendor's debts. Although the term "void" is used, the courts have consistently held this to mean "voidable". One explanation offered for this interpretation is that:

> It is now common ground between the parties that in the Bulk Sales Act the word "void" means "voidable" only and that a sale made without compliance with the Act is valid unless and until the creditors of the vendor elect to have it set aside. The fact that the Act avoids the sale only as against the vendor's creditors indicates an intention on the part of the legislature that on the sale of property in the goods shall pass, subject to the right of the

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[39] *The Bulk Sales Act (Man.)*, s. 9(1).

[40] *The Bulk Sales Act (Man.)*, s. 9(2).

creditors to have the sale set aside as fraudulent against them.[41]

Aside from the contractual and statutory remedies available to creditors against a fraudulent vendor who prepares an incorrect statement and falsely swears a declaration to that statement, the vendor also may be liable to criminal prosecution for swearing a false affidavit.[42]

4. Proceedings to Attack a Bulk Sale

Proceedings to set aside a sale must be instituted within six months from the date of the completion of the sale.[43] There is some authority for the proposition that the sale, if successfully attacked by creditors, is void only as against those creditors who bring actions within the prescribed time.[44] However, the more widely held view is that an action to set aside a bulk sale should be treated as one brought on behalf of or for the benefit of all creditors.[45] "All creditors" in this context, includes creditors as defined by the Act - persons to whom the vendor of stock is indebted at the time of the sale - and is not limited to only those who are listed on the vendor's statement of creditors.

A sale under *The Bulk Sales Act* may be rendered void by a creditor in one of two ways. First, an action for a declaration that the sale should

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[41] *Re Crouse; Garson* v. *Can. Credit Men's Trust Ass'n,*. [1929] 3 D.L.R. 300 at 302. *See also D'Amours* v. *Darveau*, [1934] 1 D.L.R. 65 (S.C.C.); *Allen* v. *Patterson* (1925), 57 O.L.R. 287 (C.A.); *Draper* v. *Jackson* (1916), 26 Man. R. 165, 26 D.L.R. 319 (C.A.).

[42] *Criminal Code*, R.S.C. 1985, Chap. C-46, s. 133. The swearing of a false affidavit is an indictable offence, punishable by imprisonment for up to 14 years.

[43] *The Bulk Sales Act (Man.)*, s. 11.

[44] *Draper* v. *Jackson*, *supra* n. 41.

[45] *Higgins* v. *Elliot* (1922), 65 D.L.R. 154 (N.S.C.A.); *Drinkle* v. *Regal Shoe Co.*, *supra* n. 22, *Interlake Tissue Mills Co.* v. *George Everall Co.*, *supra* n. 10.

be set aside as fraudulent and void may be instituted; this would be the usual course of action. Second, the sale may be voided by a creditor dealing with the subject matter of the sale in such a way as to show an intent to avoid the transaction.[46] This action may be as follows:

> . . . the creditor in this case was entitled to avoid the sales and it did so by levying on the goods under execution. There could not be a more unmistakeable way for the creditor to manifest its intention to attack the sales. It has long been the practice in this Court to attack a fraudulent or voidable sale or conveyance collaterally in this way. It is not necessary that a direct action shall be instituted for the purpose.[47]

The propriety of this manner of proceeding is also implicitly recognized in section 11, which in addition provides that, in an action to set aside a bulk sale, the burden of proof lies with the purchaser.

> In a proceeding wherein a sale in bulk is attacked or comes in question, whether directly or *collaterally*, the burden of proof that this Act has been complied with is upon the person upholding the sale in bulk. [emphasis added][48]

This concludes our discussion of the scope and operation of *The Bulk Sales Act*. In the next Chapter, we undertake a critical analysis of the provisions of the Act and identify some compelling reasons for major overhaul of the Act.

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[46]*The Bulk Sales Act (Man.)*, s. 9(3).

[47]*Webber* v. *Hall*, *Aranoff* v. *Hall*, *Mosher* v. *Hall* (1921), 56 D.L.R. 253 (N.S.C.A.). *But see Draper* v. *Jackson*, *supra* n. 41.

[48]*The Bulk Sales Act (Man.)*, s. 10.

CHAPTER 4

EVALUATION OF THE PROVISIONS OF *THE BULK SALES ACT*

Having detailed the provisions of the Act in the previous Chapter, we will now consider the problems associated with both the scope and operation of *The Bulk Sales Act*. In particular, we will note the irrational coverage provided by the Act and the ineffective practical application of the legislation. These problems are addressed, not in isolation, but in the context of the purpose of the Act: the prevention or deterrence of business people from liquidating their assets and absconding with the proceeds without making appropriate arrangements for the payment of creditors.

A. SCOPE OF THE ACT

1. The Scope of Vendors Covered

The types of vendors whose sales may be covered by *The Bulk Sales Act* are historically based; they are the vendors who were perceived as threats to creditors nearly a century ago. Although the reasons for including certain vendors and excluding others may have been legitimate at that time, they may no longer be sustainable today.

The Bulk Sales Act is confined in scope to vendors who are retailers or manufacturers of tangible goods and to a few specified service businesses. Excluded are wholesale merchants, most service enterprises, persons in positions of trust, such as fiduciaries, and those acting pursuant to judicial authority. However, the omission of both wholesalers and service businesses from the ambit of the Act is harder to support as the historical rationale for their exclusion has probably disappeared. Very few service businesses operated in the early 1900's when members of the credit industry were lobbying for bulk sales legislation; those that did were small and no significant threat to creditors. But the growth of the service sector in this century calls into question the exclusion of this industry from bulk sales legislation. Likewise, the exclusion of wholesalers from *The Bulk Sales Act*

- the historical reasons for which are unclear - is difficult to justify in a modern day context.

Current explanations which attempt to support the narrow scope of vendors covered by bulk sales legislation belie the reality of modern credit transactions. For example, Article Six of the American Uniform Commercial Code, which deals with bulk sales, regulates a class of businesses similar to that of our Act. The official Comment to the Article provides this reason for its scope:

> While some bulk sales risk exists in the excluded businesses, they have in common the fact that unsecured credit is not commonly extended on the faith of a stock of merchandise.[1]

Critics of the American bulk sales legislation do not accept this explanation:

> This is simply not true. Restaurants, hotels, cleaners and virtually all other types of service enterprise necessarily do incur unsecured credit in substantial quantities for supplies, merchandise, and services which are used, consumed, and in many instances, resold in the course of the service operation. The suppliers of these services are no more readily able to obtain security for their debts than are trade creditors of ordinary businesses; they are entitled to the same protection against sales in bulk.[2]

Indeed, although credit may not be extended to all businesses on "the faith of a stock of merchandise", credit terms are available to most commercial establishments on the basis of the cash flow of the ongoing business,[3] and on "the overall financial ability, integrity, and stability" of the business as a customer.[4] Even more important to the business that is considering extending credit may be the health of its own operations, rather than that of the potential customer's operations.

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[1]Uniform Commercial Code §6-102, Official Comment 2 (1986).

[2]Louis W. Levit, "Bulk Transfers - Stepchild of The Uniform Commercial Code?" (1971), 46 Notre Dame Law. 694, 696.

[3]Donald J. Rapson, "Uniform Commercial Code Article 6: Should It Be Revised or 'Deep-Sixed'?" (1983), 38 Bus. Law. 1753, 1757.

[4]Levit, *supra* n. 2, at 696.

> Indeed, in many industries and except for rather large amounts, there are many indications that trade creditors pay little attention to the specific assets of the debtor to whom credit is extended. A trade creditor is often more concerned with his own commercial viability and profit margin than specifically addressing the asset size of his debtor. Moreover, a significant volume of trade credit is extended involuntarily, such as when a carrier fails to collect on a C.O.D. charge or a customer's check is dishonored for lack of sufficient funds.[5]

If unsecured credit may be extended to all businesses, regardless of the type of operation, why should certain types of businesses, and protection from those businesses, be omitted from the Act? One possible explanation is that there is inherent risk to creditors of the excluded businesses - retailers and manufacturers who deal in an inventory or stock of goods. Implicit in this assumption is the view that there is something inherent in the nature of the economy, or in the nature of these businessmen, which makes their creditors more vulnerable to fraudulent dispositions of assets. We find this argument difficult to accept. And indeed,

> [t]he factors which originally might have justified singling out the particular types of businesses covered . . . no longer appear to exist. It is doubtful that there are any empirical data demonstrating that the current economic disruption is more likely to have a disastrous effect on these particular businesses than on any other businesses.[6]

Accordingly, the distinctions drawn between different businesses by *The Bulk Sales Act* and the narrow scope of businesses covered by the Act appear to be without adequate justification in the modern commercial context.

2. The Scope of the Subject Matter Covered

Generally, the assets which may be the subject of a bulk sale are goods, wares and chattels produced, sold or used in the operations by a business. The selection of these assets to be included in *The Bulk Sales Act* reflects the same thinking which excluded businesses which do not deal in

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[5]Don L. Baker, "Bulk Transfers Act - Patch, Bury or Renovate?" (1983), 38 Bus. Law. 1771, 1779-80.

[6]Rapson, *supra* n. 3, at 1758.

a stock of merchandise: the focus of the Act is on the bulk sale of tangible assets. But as we have seen, businesses which deal in an inventory of assets are not the only ones which purchase on credit; all commercial establishments potentially may do so.

The confinement of the Act to the sale of stock ignores the fact that sales of other assets in bulk may also pose a threat to creditors; in fact, any transaction which diminishes the assets of a business is a potential threat to the ability of creditors to collect their accounts. Arguably, a disposition of intangibles or real property in such a magnitude as to constitute a significant diminishment of the assets of a business should be covered by bulk sales law.

For example, intangibles such as accounts receivable, goodwill, patents and copyrights may constitute the major portion of a business's assets. The sale of the bulk of the accounts receivable of a lumber company may pose as great a threat to creditors as the sale of the bulk of the inventory - the lumber - of that company. The sale of lumber would be covered by *The Bulk Sales Act* but the sale of receivables would not. This seems inexplicable and may, in effect, provide an opportunity for businesses to structure their commercial deals in such ways as to avoid the Act.

Even in the absence of the sale of a business *per se*, such arrangements as described above, conducted in the normal course of business, may adversely affect creditors. For example, the sale of real property, as part of the sale of a business or in the course of the activities of a business, such as a developer, may pose a threat to creditors who have advanced goods or services in reliance on the total assets of the business. Similarly, the mortgaging of property, real or personal, to secure antecedent indebtedness may entail a significant change in the creditworthiness of a business to the detriment of creditors who have already extended credit; and yet, creditors do not receive notice of or protection against such transactions under *The Bulk Sales Act*.

The transfer of assets in settlement of a debt is another transaction which reduces, without notice, the pool of assets available to unsecured creditors; but this too is not covered by bulk sales legislation.

From this discussion, it is apparent that the transfer of tangible assets is not the only evil to be guarded against; the disposition of a substantial portion of a business, however made up or conducted, may involve a significant change in the creditworthiness of a business. The narrow scope of the assets covered by *The Bulk Sales Act* fails to take this into account.

3. The Scope of Creditors Covered

The Bulk Sales Act covers all creditors of the included business vendors. No distinction is made between trade and non-trade creditors or between secured and unsecured creditors.

Non-trade creditors are those who extend credit to the proprietor or to the partners of a business for personal goods unrelated to the operation of the business, as, for example, for the purchase of a television on a department store account. It may be argued, on the one hand, that these creditors should not receive the protection of bulk sales law. They extend credit in reliance on the creditworthiness of the businessman in his personal capacity, not in his commercial capacity.

On the other hand, it may be argued equally that non-trade creditors rely on both the personal and commercial assets of a businessman in determining his creditworthiness. And, indeed, the businessman who chooses not to incorporate his business is aware that his personal assets are open to the claims of trade creditors, as are his business assets open to the claims of non-trade creditors. Accordingly, it may not be advisable to draw a distinction between trade and non-trade creditors for the purposes of bulk sales law. Both kinds of creditors may require the protection of the law as they both may rely on the creditworthiness of the business enterprise in extending credit.

The failure of *The Bulk Sales Act* to distinguish between secured and unsecured creditors may be more troublesome as the rights of secured creditors are already covered by *The Personal Property Security Act*.[7]

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[7] *The Personal Property Security Act*, C.C.S.M. c. P35.

Through a system of registration, interests in collateral are "perfected" or validated as against third parties; the Act provides rules for determining the priorities among creditors, generally according to the time of registration. A secured party has, as protection against default, an interest in particular property of the debtor and the power to realize on that collateral in satisfaction of a claim. Protection against a sale made out of the ordinary course of business, such as a bulk sale of collateral, is afforded the secured party by section 50 of the Act. It provides that where a debtor, with or without the consent of the secured party, transfers his interest in collateral, the transferee becomes the debtor and the secured party retains interest in the collateral upon registration of notice of that interest within specified times. Thus, a security interest in personal property cannot be destroyed simply by transferring the property; the secured party may, in effect, cause the interest in the property to follow.

As a result, the secured creditor does not need to rely on the provisions of *The Bulk Sales Act*. In the event of a fraudulent bulk sale, the creditor retains the right to seize the collateral, now in the hands of the purchaser (assuming this right was retained in the security agreement), and may sell it in full or partial satisfaction of a claim. And, in fact, even though *The Bulk Sales Act* is said to operate for the benefit of *all* creditors, where a purchaser is held accountable under *The Bulk Sales Act* for the sale price of assets transferred in contravention of the Act, the rights of general creditors under *The Bulk Sales Act* will be subject to those of secured creditors under *The Personal Property Security Act*. General creditors will collect only after the claims of secured parties have been satisfied. Thus, *The Bulk Sales Act* offers no additional relief or safeguards to most secured creditors.[8]

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[8]*See* Rapson, *supra* n. 3, at 1760-61 for commentary on similar results under Articles 6 & 9 of the Uniform Commercial Code. But *The Bulk Sales Act* may afford some relief to secured creditors where the proceeds from the disposition of the security interest are insufficient to satisfy the actual credit advanced on that security.

4. The Transactions Covered by the Act

It will be recalled that only three types of transactions are caught by *The Bulk Sales Act*: those made "out of the usual course of business"; those constituting "substantially the entire stock of the vendor"; and those involving a sale of "an interest in the business". Each of these has been the subject of judicial interpretation but no clear definitions have been established. Likewise, with the interpretation of similar provisions under the Uniform Commercial Code, one commentator has noted:

> The question as to which transfers fall within the ambit of bulk transfer law has been one of the most widely litigated and controversial issues under Article 6.[9]

Due to the ambiguity of these terms, those who must comply with or rely on them are often left in the difficult position of determining whether *The Bulk Sales Act* applies to their situation.

The problem with the ambiguity of these terms can be illustrated by way of example. For instance, a vendor may dispose of an asset, such as a piece of equipment, in a one-time sale which is clearly out of the usual course of his business. That transaction would be caught by *The Bulk Sales Act* irrespective of the actual value of the equipment or its value in relation to the other assets of the business. We doubt that a vendor would realize that he must comply with the provisions of the Act. Should such an insignificant sale be the subject of bulk sales law? We think not. The qualitative nature of the phrase "out of the usual course" leads to anomalous results which could not have been within the contemplation of the drafters of the legislation.

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[9]Baker, *supra* n. 5, at 1782.

Similarly, the provision "of substantially the entire stock" lacks specificity. Although the term "substantially" connotes a quantitative test, the criteria and standard to be used in applying this test are unclear. For example, the test may be based upon a percentage of the *quantity* of stock transferred in relation to the entire stock of merchandise. On the other hand, it may be dependent upon the *value* of the assets sold as compared with the total value of all the assets of the business. In the latter case, the uncertainty is further compounded by the variety of ways in which assets may be valued: book value, fair market value or actual purchase price of the assets. With either test, quantity or value, the actual percentage of assets which will satisfy the requirement of "substantially" is also uncertain.

Problems also arise insofar as the phrases "out of the ordinary course" and "substantially the entire stock" are to be read disjunctively. For example, an anomalous result arises where the bulk of the assets of an enterprise or the enterprise itself is sold where it is but one business in a chain under common ownership. This sale would be caught by the provisions of the Act as a sale outside the ordinary course of the business of the vendor. Yet, in this instance, the bulk sale would not pose a threat to creditors as they could look to the assets of the rest of the chain for satisfaction of their accounts.

Finally, the ambiguity of the transactions covered by *The Bulk Sales Act* is apparent when any attempt is made to give meaning to the phrase "an interest in the business". As we saw in our previous discussion of the jurisprudence on this point, the courts have failed to agree on the meaning of this provision. They have ruled out its applicability to the transfer of a portion of a business, as for example where one partner buys out the shares of another, and having done so, have left the phrase with little, if any, meaning. One is left to wonder how vendors, purchasers and creditors alike are to recognize when *The Bulk Sales Act* will apply to a particular transaction and, accordingly, when their rights and obligations under the Act will arise.

5. Conclusion - The Scope of the Act Is Irrational

The scope of *The Bulk Sales Act* is irrational. The vendors covered by the Act reflect historical considerations which are no longer justified, and the arguments for continuing to exclude some businesses, such as service establishments and wholesalers, are unconvincing. Further, the inclusion of transactions involving only tangible personal property - also rooted in an antiquated view of the structure of the business community - only serves to compound the problems with the scope of the Act. Similarly, the inclusion of secured creditors within the purview of bulk sales law and the ambiguity of the provisions dealing with the transactions covered by the Act further contribute to the confusion. The problems with the scope of the Act, taken together with the ineffectiveness of the operation of the Act in practice, discussed next, seriously call into question how effective *The Bulk Sales Act* is in protecting the interests of creditors.

B. OPERATION OF THE ACT

1. Duties of the Vendor and Purchaser

The most unique feature of *The Bulk Sales Act* is the mechanism it employs to give the creditors of a bulk sale vendor notice of the sale before it takes place. This advance notice is designed to give creditors an opportunity to demand full payment of outstanding accounts before the purchase price is paid to the vendor. It also serves to give notice to creditors of a change in ownership where the sale consists of the whole operation of a business. This information will be of value to creditors in assessing whether and on what terms they should extend credit to the new owners but is really only a secondary benefit to the provision of advance notice. The notice allows creditors to ensure that the vendor does not abscond with the proceeds of sale before their claims are satisfied. This assurance comes from the power given to creditors under the Act to block a sale where all claims have not been paid in full or where creditors with claims representing sixty per cent of all claims, in number and amount, have not waived the provisions of the Act or consented to the sale. This is the theory behind the operation of *The Bulk Sales Act*; the reality is quite different.

The difference between theory and practice arises from the actual effect of the allocation of duties between vendor and purchaser and the nature of those duties. The vendor is required to furnish the purchaser with a list of all his creditors, supported by a statutory declaration. The duties of the purchaser are to request that list, ensure that it is in the proper form and secure the vendor's assurance that the creditors on that list have either been paid in full or have given the necessary waivers or consents to the sale. The purchaser must perform these obligations before he advances the purchase price to the vendor.

It is apparent that the primary responsibilities under *The Bulk Sales Act* are allocated to the vendor who, in effect, sets the bulk sales machinery in motion by supplying the list of creditors. The purchaser's duties stem from this and are wholly dependent upon the nature of this initiative taken by the vendor. Herein lies the fatal flaw of the operation of the Act.

A vendor who is intent on defrauding his creditors by selling off his goods in bulk and absconding with the proceeds may effectively avoid the provisions of *The Bulk Sales Act* in several ways. He may supply the purchaser with a false bulk sales declaration indicating that he has no creditors. Having secured the list and ensured that it is in the correct form, the purchaser will have fulfilled his responsibilities and is under no obligation to look behind the list and check the veracity of the vendor's information.

A vendor may also get around the Act by furnishing a list which is incomplete as to the number of creditors outstanding or the amounts owing. If the required waivers or consents based upon that false information were given to the purchaser, there would be no further obligation on his part to confirm these details. In both these cases, the purchaser in good faith could pay the vendor and would not incur liability for the claims of creditors who were unable to assert their claims against the now absent vendor.

A vendor may also behave fraudulently by complying only partially with the Act. As only sixty per cent in number and amount of creditors are

required to waive or consent to a sale, only that percentage need be notified of a sale. The other forty per cent of creditors need not receive notice. The effect of this is that a vendor may abscond with these creditors' portions of the proceeds of sale and yet be in full compliance with *The Bulk Sales Act*.

It is worth noting in this discussion of notice provisions that, even if creditors receive notice of a sale, the details of that notice may be insufficient to base a decision on whether to consent to the sale or waive the provisions of the Act. *The Bulk Sales Act* provides no requirement as to the content of the notice to be given to creditors and arguably, without adequate information, the advance notice to creditors is little better than no notice at all.

2. Rights and Remedies of Creditors

A transaction conducted in contravention of the Act will be voidable as against creditors, and every payment made on account of the purchase price will be voidable as between creditors and the purchaser. Also, the purchaser will be accountable to the creditors for the purchase price of the assets regardless of whether there has been a sale to a subsequent purchaser.[10]

Although the rights of creditors are sufficiently clear, the methods by which creditors may assert those rights are less clear. Section 9 of the Act appears to recognize two ways that creditors may assert their rights: "in an action brought, or proceedings had or taken . . . to set aside or have declared void a sale in bulk" or by way of "a seizure of the stock in the possession of the purchaser . . . under judicial process". These phrases refer to remedial actions based on declaration and execution. But they are references only, and the Act is particularly vague as to the extent to which execution may be relied upon by creditors in asserting their rights. The courts have held that a creditor may challenge a bulk sale by executing

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[10] *The Bulk Sales Act (Man.)*, s. 9(1) and 9(3).

against the goods in the possession of the purchaser,[11] but without a declaration that the sale is void, it is doubtful that merely executing on the goods would bring into play the sections of the Act dealing with the distribution of proceeds to all creditors.

As a final note on the remedies available to creditors under *The Bulk Sales Act*, the six-month limitation period in which to enforce remedies causes some problems. The period is short, particularly in light of the fact that it runs from the date of completion of the sale, as opposed to the date that creditors become aware of the sale. The former date provides greater certainty to the vendor and purchaser, but at the expense of the creditors. The parties to the transaction may be inclined simply not to comply with *The Bulk Sales Act* in the hopes that the limitation period will have expired before creditors become aware that a sale has taken place and can take steps to enforce their rights under the Act. This may be a good strategy as,

> . . . the creditor faces a short limitations period within which he may ferret out as best he can the circumstances surrounding the sale, the price, the terms of payment and the list of creditors as disclosed by the vendor in his statement to the purchaser. He cannot find these particulars in any document required to be recorded and cannot compel the parties to the sale to disclose them except indirectly by maintaining an action in which he may embark upon a fishing expedition.[12]

In addition, where the purchase price is paid in instalments or on the basis of a conditional sale, the date from which the limitation period is to run will not be precisely determinable.[13] Indeed, the Act

> . . . does not work well except in the case of sales for cash, especially when there are creditors for an amount more than the initial cash payment. Many sales today provide for a series of

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[11] *Supra* pp. 22-23.

[12] Fred M. Catzman, Q.C., "The Bulk Sales Act (Ontario)" (1958), 1 Can. Bar J. 38, 49.

[13] Law Reform Commission of British Columbia, *Report on Bulk Sales Legislation*, 1983, 22.

> payments over a long period of time by the purchaser and there is no machinery in our law for distribution of these instalments rateably to the vendor's creditors.[14]

This lends further uncertainty to creditors who wish to assert their rights under the Act.

3. Conclusion - The Act Does Not Operate To Fulfil Its Purpose

In summary, we are of the view that the theory of bulk sales law - alerting creditors of a potential problem before it happens - does not work in practice. Paradoxically, *The Bulk Sales Act* is of little help in the very situation for which it is intended. If a vendor wishes to sell off his goods and abscond with the proceeds, the Act does little more than act as a slight inconvenience for the vendor to get around. This is easily accomplished by the vendor providing a statement which fails to accurately disclose the claims of creditors to a purchaser who, in turn, relies on that information in fulfilling his limited responsibilities under the Act. This, taken together with the short period in which creditors have to assert their rights, and the uncertainty as to what remedies to pursue, has led us to conclude that the Act offers little more than slight deterrent value to the would-be fraudulent bulk seller.

D. CONCLUSIONS - THE CASE FOR REPEAL

The Bulk Sales Act represents an outdated approach to the regulation of commercial activity. The legislation is a product of a different era when normal business transactions were conducted on a closer or more personal basis and the problems facing business people, and the solutions to those problems were relatively simple compared to those in the modern context. As a solution to the problem of absconding debtors, *The Bulk Sales Act* may have been appropriate at the beginning of the century, but it is no longer so today. The Act's scope is too narrow in some respects, while being too wide in others, and the preventative operational aspects of the Act no longer work in practice.

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[14] J. Gomery, "Bulk Sales" (1967), 27 R. du B. 666, 670.

The result of the irrationality and ineffectiveness of the Act has been that many business people and legal practitioners tend to have little regard for it; they either ignore it or structure their or their clients' affairs in such ways as best to avoid the Act. Indeed, we are aware that it is not unusual for the parties to a bulk sale not to comply with *The Bulk Sales Act* either by ignoring it completely or by having the vendor agree to indemnify the purchaser for any claims arising out of the Act. Obviously, the vendor has little to lose by not complying with the Act - it is unlikely he will be caught and, if he is, no additional liability to the existing contractual one is provided by *The Bulk Sales Act*. The purchaser ignores the Act at his peril, as the value of a vendor's indemnity may be questionable. However, in light of the low profile of *The Bulk Sales Act* and the short six month limitation for taking action under it, a purchaser, anxious to purchase a business, may judge the risks to be minimal and acceptable. In summary, an attractive option for both the vendor and purchaser of a bulk sale is to ignore *The Bulk Sales Act*, close the transaction quickly, and simply wait for the limitation period to expire.

Under the present circumstances, *The Bulk Sales Act* is of little use to creditors and, arguably, receives as much attention from business people and the legal profession as it deserves. It is not difficult for us to conclude that the Act is a dead letter in the law and should be repealed. The more difficult question is whether it can and should be replaced.

CHAPTER 5

THE BULK SALES ACT IN THE PRESENT DAY CONTEXT

Whether a new Act can and should be enacted to replace *The Bulk Sales Act* depends upon several considerations. First, we must decide if there still is a need to protect creditors from bulk sales made by unscrupulous vendors. If so, we must then ask if that need is now being adequately met by other forces, either economic or legal, in our society. If the need is not being met, we then must determine if a viable alternative to *The Bulk Sales Act* can be found which is both effective and commercially acceptable.

A. ECONOMIC FACTORS

The Bulk Sales Act was enacted in a simpler time when the marketplace was small and communications were unsophisticated. As we have said, it was a time when businessmen intent on defrauding creditors could go from one town to the next setting up shop with goods bought on credit, selling those goods off in bulk and absconding with the proceeds, undetected and unaccountable. The success of such activities was due, in part, to the infancy of the credit industry and the attendant opportunity for abuse.

> In the large centres of population, merchants started in business as distributors. They imported merchandise and sold it to small merchants in the surrounding country. Due to the lack of transportation and banking facilities, both shipments and payments were infrequent. The local merchant's visits to his supplier were seldom more than once or twice a year, depending on the distance to be travelled. On such visits, the distributor's customer would bring with him what funds he could spare and thus reduce his indebtedness. He would order further goods and then return home. Terms were, therefore, of necessity long and credit investigation was not considered essential, as the merchant usually owned the business personally, and his opinion of the customer's capability and honesty was the only guide in extending credit.[1]

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[1]Carl B. Flemington, "The Nature and Concept of Credit" in William J. Hambly, ed., *Readings in Credits and Collections in Canada* (1969) 7, 9.

Obviously, times have changed since the turn of the century. One change has been the great diversification in the economy. The shift in concentration of economic activity from primary resource industries to secondary industries and the public sector has altered significantly the type and scope of transactions in the marketplace. Add to this the general increase in the volume of economic activity in all sectors, and it becomes apparent that the whole structure of the economy has changed radically since the inception of bulk sales law.

Along with these changes there has been a virtual revolution in transportation and communications technologies in this century. These developments have not only altered the way business is conducted but have also affected the nature of the problem with which *The Bulk Sales Act* was designed to deal. Gone are the days when a fraudulent merchant could "abscond with the proceeds" simply by running off to the next town. With the relative sophistication of today's communications network, the absconding vendor is now forced to go farther afield, and to rely on other tactics to avoid his creditors. He is now compelled to leave the country or hide behind corporate veils in the hopes of remaining undetected or unassailable.

At the same time, the availability of credit information from trade and credit associations, professional credit analysis companies, such as Dun and Bradstreet, and banks and other financial institutions, has radically changed the nature of the credit granting process.[2] Information rather than intuition is now the primary factor in the making of credit decisions. And, indeed, this information goes a long way in protecting the creditor from the unscrupulous vendor; however, it is based upon the credit history of a merchant and cannot protect against unprecedented fraudulent behaviour.

Although the ways that a fraudulent vendor can achieve his ends may have changed since the time when bulk sales legislation was introduced, it does not necessarily follow that the problem of fraudulent disposition of assets by bulk sale has disappeared. The incidence of these kinds of transactions is difficult to determine empirically, but some of the factors underlying the original impetus for bulk sales legislation still exist today.

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[2]Gordon J. Newman, "The Organization of the Credit and Collection Department", in *id.*, 52, 60.

For example, cyclical economic trends continue to regulate the general health of the business community, as well as the profitability of individual enterprises and, in hard economic times, general creditors are still particularly vulnerable to the consequences of dishonest schemes employed by debtors seeking to avoid the payment of their debts.

B. LEGAL FACTORS

Since the enactment of *The Bulk Sales Act*, significant developments have also taken place in a number of areas of the law which relate to bulk sales. In particular, statutes governing reviewable transactions, remedies and personal property securities have arisen and evolved significantly in this century.

1. Reviewable Transaction Legislation

(a) The *Bankruptcy Act*[3]

Federal bankruptcy legislation was not enacted in Canada until 1919; prior to this, the provinces were active in the field with insolvency legislation. But these provincial statutes, as well as the *Bankruptcy Act*, once it was enacted, were viewed as inadequate protection against the threat of fraudulent bulk sales.

> The *National Bankruptcy Act* is cited as furnishing an adequate remedy in providing "for a speedy discovery of assets and making a preference by an insolvent debtor an act of bankruptcy and voidable." Theoretically, these provisions may seem to furnish the merchandise creditor ample protection. As a practical matter, the average credit man places these legal remedies in the same category with those afforded to the owner of the proverbial stolen horse who had forgotten to lock the barn door.[4]

The relationship between bankruptcy law and bulk sales law has changed little since that time. The bankruptcy provisions which are of most

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[3] *Bankruptcy Act*, R.S.C. 1985, Chap. B-3.

[4] Thomas Billig, "Bulk Sales Laws: A Study in Economic Adjustment" (1928), 77 U. Pa. L. Rev. 72, 101.

relevance to bulk sale situations are those governing acts of bankruptcy and unlawful settlements and preferences. Acts of bankruptcy are defined as including cases where a debtor makes a fraudulent conveyance or preference; departs from the country or disposes of property with the intent to defraud, delay or defeat creditors; or ceases to meet debt obligations as they become due.[5] In each of these situations a creditor's remedy against a debtor is to petition him into bankruptcy and attempt to collect any outstanding debt through the distribution scheme provided in the *Bankruptcy Act*.[6] In the case of unlawful settlements and preferences, a creditor is protected from such transactions before and after bankruptcy; the transactions may be deemed fraudulent and void and set aside as against the trustee in bankruptcy acting on behalf of all creditors.[7]

The *Bankruptcy Act* also offers some protection to creditors through the imposition of criminal sanctions against debtors who commit any of a number of bankruptcy offences, including the fraudulent disposition of property before or after bankruptcy.[8]

The bankruptcy route has two major drawbacks, particularly for the unsecured creditor. First, under the distribution scheme of the *Bankruptcy Act*, the unsecured creditor ranks last behind all other types of creditors and must share, with all other unsecured creditors, the residue of the proceeds realized from the property of the bankrupt. Needless to say, in many cases this affords little or no relief to such claimants. The other drawback, as noted earlier, is that the *Bankruptcy Act* provides some relief to creditors, but only after the fact. Bankruptcy legislation fails to offer any system of preventing fraudulent transactions, except perhaps through the deterrent value of the criminal sanctions in respect of bankruptcy offences.

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[5] *Bankruptcy Act*, R.S.C. 1985, Chap. B-3, s. 42.

[6] *Bankruptcy Act*, R.S.C. 1985, Chap. B-3, s. 136.

[7] *Bankruptcy Act*, R.S.C. 1985, Chap. B-3, s. 91.

[8] *Bankruptcy Act*, R.S.C. 1985, Chap. B-3, s. 198.

(b) *The Fraudulent Conveyances Act*[9]

The Fraudulent Conveyances Act overlaps bulk sales legislation insofar as it covers any conveyance made with the intent to defeat, hinder, delay or defraud creditors or others.[10] However, unlike *The Bulk Sales Act*, under *The Fraudulent Conveyances Act* a fraudulent conveyance may only be set aside as void against prejudiced parties where the purchaser has a fraudulent intent in common with the vendor or has notice or knowledge of such intent on the part of the vendor.[11] Although *The Fraudulent Conveyances Act* will catch those bulk sales in which the vendor and purchaser have acted in concert to defeat creditors, it is likely that the majority of fraudulent bulk sales consist of transfers to *bona fide* purchasers and do not fall within the Act.

Under bulk sales legislation, creditors have the opportunity to block any sale until their accounts have been paid in full, even in the absence of fraudulent intent on the part of either vendor or purchaser. This reliance on objective criteria is an important distinction. The failure of a vendor or purchaser to comply with the obligations imposed under *The Bulk Sales Act*, irrespective of motive or intent, will trigger the rights and remedies available to creditors under the Act. On the other hand, under *The Fraudulent Conveyances Act* the court must engage in an inquiry into the states of mind of the vendor and purchaser and the difficulties in proving the requisite fraudulent intent in this manner are legion.

Finally, it should be noted that, like bankruptcy law, fraudulent conveyance legislation provides only *post facto* relief to creditors; no advance notice of potential fraudulent transfers is provided.

2. *Criminal Code* Provisions

Two sections of the *Criminal Code* are of particular relevance to the bulk sales situation: section 380, the general section governing fraud;

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[9] *The Fraudulent Conveyances Act*, C.C.S.M. c. F160.

[10] *The Fraudulent Conveyances Act*, C.C.S.M. F160, s. 2.

[11] *The Fraudulent Conveyances Act*, C.C.S.M. F160, s. 4.

and section 392, dealing with the defrauding of creditors. The general fraud section provides that everyone who, by deceit, falsehood or other fraudulent means, defrauds the public or any person of any property, money or valuable security is guilty of a summary or indictable offence.[12] Section 350 of the Code states that everyone who, with intent to defraud his creditors, deals with his property in any number of ways (including sale, transfer, conveyance, removal, concealment, and disposition) is guilty of an indictable offence.[13]

As with fraudulent conveyance legislation, the requisite intent of the vendor must be established to secure a conviction under these sections, and the same difficulties with proof of intent arise. Although the Code provisions do not offer advance notice to creditors, the threat of criminal sanction should be of some deterrent to the potential fraudulent bulk seller.

3. Remedial Legislation

(a) Attachment of debts and property

The attachment remedies - garnishment of debts and attachment of goods or land - are available to creditors under limited circumstances, especially before judgment. A garnishing order - attaching the debts, obligations and liabilities owed by a garnishee to the debtor - is available to a creditor before judgment where he has instituted a claim which is for a debt or liquidated demand in money arising out of certain specified transactions, such as simple contract.[14]

Attachment of a debtor's goods or land is also available to a creditor before judgment if the case can be brought within the purview of the

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[12] *Criminal Code*, R.S.C. 1985, Chap. C-46, s. 380.

[13] *Criminal Code*, R.S.C. 1985, Chap. C-46, s. 392.

[14] The Queen's Bench Rules, Man. Reg. 115/86, R. 34(a). *See generally* R. 524-533. *Note*: Substantial revision of Manitoba's Queen's Bench Rules is presently being undertaken; enactment of new Rules is expected in early 1989.

"absconding debtors" rule.[15] This provision could cover a bulk sale situation, as the rule includes a debtor who is about to remove personal property from the province or has disposed of or secreted away any of his property with the intent to delay, defeat or defraud creditors.[16] A creditor who can bring his case within this Rule may be granted an Attaching Order which binds all the personal property of the defendant (except for personal property which is exempt from seizure under execution). The defendant's real property may also be bound pursuant to this Order where a Certificate of Attachment for Registration is registered in the appropriate Land Titles Office.[17] The Attaching Order will be for the benefit rateably of all creditors who obtain judgments and executions against the debtor.

Obviously, the main purpose of these prejudgment remedies is to improve a creditor's ultimate recovery position by tying up certain assets of the debtor pending disposition of the action taken by the creditor. They will be of assistance to a creditor who becomes aware that the vendor is intending to abscond from the jurisdiction or otherwise dissipate the proceeds of sale. For the unsuspecting creditor, who is caught off guard when the debtor sells off his goods in bulk and departs the juridiction, the attachment remedies will be of little or no use.

This observation regarding the prejudgment attachment remedies is equally true for post-judgment remedies such as the attachment of debts[18] and property[19] and the use of writs of execution[20] to satisfy judgments. Clearly, these post-judgment remedies are of an enforcement nature only and do not offer the deterrent and policing functions of *The Bulk Sales Act*.

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[15]The Queen's Bench Rules, Man. Reg. 115/86, R. 582. *See generally* R. 581-619.

[16]The Queen's Bench Rules, Man. Reg. 115/86, R. 582(c).

[17]The Queen's Bench Rules, Man. Reg. 115/86, R. 612-619.

[18]The Queen's Bench Rules, Man. Reg. 115/86, R. 524-533.

[19]The Queen's Bench Rules, Man. Reg. 115/86, R. 581-619.

[20]The Queen's Bench Rules, Man. Reg. 115/86, R. 493-502.

(b) *Mareva* injunction

The *Mareva* injunction is a relatively new development which has received great favour in the United Kingdom, in part, we suspect, because the United Kingdom has no absconding debtor legislation. It has not been as popular a remedy in Canada for reasons which we will see.

A court's jurisdiction to grant a *Mareva* injunction restraining a defendant from dealing with or disposing of any assets up to a stated amount arises from the court's statutory authority to order injunctions in all cases in which "it appears to be just and convenient to do so".[21] The plaintiff must demonstrate, as a condition precedent to the order, a strong *prima facie* case,

> . . . that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction to avoid the possibility of a judgment, or that the defendant is otherwise dissipating or disposing of his assets, in a manner clearly distinct from his usual or ordinary course of business or living, so as to render the possibility of future tracing of the assets remote, if not impossible in fact or in law.[22]

The *Mareva* injunction remedy is very similar to that of the previously discussed attachment of property before judgment where the debtor falls within the absconding debtor rule. This, taken together with two other important factors identified by the Supreme Court of Canada in the leading Canadian case,[23] - the federal nature of our country and the existence of provincial reciprocal enforcement of judgment statutes - explain, in part, the conservative approach taken to this remedy in Canada.

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[21] *The Queen's Bench Act*, C.C.S.M. c. C280.

[22] *Aetna Financial Services Ltd.* v. *Feigelman et al.* (1985), 15 D.L.R. (4th) 161 (S.C.C.) at 178, *quoting* the Ontario Court of Appeal in *Chitel et al.* v. *Rothbart et al.* (1982), 141 D.L.R. (3d) 268 at 289.

[23] *Ibid.*

In determining what constitutes a "removal of assets from the jurisdiction", the Supreme Court indicated that the principles under consideration in a case in a unitary state such as the United Kingdom cannot be directly applied in a federal state such as Canada. "Jurisdiction" for the purposes of unlawful removal in the federal context may extend beyond judicial, provincial or territorial boundaries, to the national boundary. This is particularly true in light of the second factor - the availability of reciprocal enforcement procedures between provinces and territories. The argument that a party can be exposed to some inevitable or irreparable loss if assets are moved inter-provincially is severely weakened by the presence of such legislation. It may be that, in most cases, for a threatened removal of assets to be of such a nature as to warrant the granting of a *Mareva* injunction, the removal would have to be out of the country.

As it is questionable how open our courts will be to exercise their jurisdiction in granting the injunction in an inter-provincial absconding debtor case, for most bulk sale creditors, the *Mareva* injunction may offer little additional relief over the attachment of property remedy. In addition, as with the other remedies discussed, the provision of advance notice to creditors is absent and the effectiveness of the *Mareva* injunction is dependent upon a creditor's knowledge of a vendor's fraudulent or absconding intentions.

(c) *The Reciprocal Enforcement of Judgments Act*[24]

This Act provides an aid to a creditor who has recovered judgment against a debtor and wishes to have that judgment enforced against a judgment-debtor who has gone to another jurisdiction. Under the common law, to enforce the judgment the judgment-creditor would be required to bring a new action in the foreign jurisdiction based upon the original judgment. *The Reciprocal Enforcement of Judgments Act* allows for enforcement of judgments between Canadian provinces and territories (except Quebec) through a simple

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[24] *The Reciprocal Enforcement of Judgments Act*, C.C.S.M. c. J20.

system of registration.[25] A judgment which meets certain requirements [26] may be registered in the foreign jurisdiction and will have the same force and effect as if it had been given by the registering court.[27] This kind of arrangement assists a creditor in an absconding vendor situation (assuming the vendor can be tracked to a reciprocating jurisdiction within the country) by expediting the process of recovering the outstanding debt, but is clearly an "after the fact" form of relief.

4. Security Legislation

Two regimes of personal property security legislation operate in Manitoba: the federal *Bank Act*[28] and the provincial *Personal Property Security Act*.[29] The *Bank Act* permits chartered banks to take security in the inventory (and, in some cases, certain equipment) of wholesalers, retailers, manufacturers, farmers and fishermen; the Act sets forth a system of public registrations maintained in offices of the Bank of Canada.[30] All other transactions involving security in personal property in Manitoba are governed by *The Personal Property Security Act*.

The enactment of *The Personal Property Security Act* in Manitoba streamlined and simplified the security granting process in the province. For creditors, *The Personal Property Security Act* provides a simple mechanism to obtain and register security interests in the goods they have supplied. Of particular interest to "bulk sale" creditors who supply inventory on an ongoing basis is the ability to register one master agreement to cover future

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[25] *A Regulation Under the Reciprocal Enforcement of Judgments Act Declaring Reciprocating States*, Man. Reg. 222/80. Several states and territories of Australia are also named as reciprocating jurisdictions.

[26] *The Reciprocal Enforcement of Judgments Act*, C.C.S.M. c. J20, s. 3(6).

[27] *The Reciprocal Enforcement of Judgments Act*, C.C.S.M. c. J20, s. 7.

[28] *Bank Act*, R.S.C. 1985, Chap. B-1.

[29] *The Personal Property Security Act*, C.C.S.M. c. P35.

[30] *Bank Act*, R.S.C. 1985, Chap. B-1, s. 178.

advances, thereby eliminating the necessity to register a security interest for each shipment made.[31]

The Personal Property Security Act and the *Bank Act* do offer alternate relief to *The Bulk Sales Act*, not in the form of an alternate remedy *per se*, but in the increased opportunity for creditors to obtain security interests in collateral. However, security under the *Bank Act* is available only to chartered banks and the opportunity to secure transactions under *The Personal Property Security Act* may not be embraced by nor afforded to all creditors. Some merchants may be unwilling to give security for the merchandise supplied, while some creditors may not wish to take security. For example:

> There is considerable resistance by banks to finance a customer whose inventory is subject to a purchase money security interest which takes priority over the bank's security, with the result that a supplier must forgo this protection if he chooses or is compelled not to jeopardize his customer's bank credit at the price of retaining business.[32]

Accordingly, even with the presence of security legislation, much commercial activity continues to be conducted on the basis of unsecured credit.

C. CONCLUSION

Significant developments have arisen in the law since the enactment of *The Bulk Sales Act*, particularly in the areas of bankruptcy and personal property security legislation. These laws go a long way to assist creditors in protecting their interests against bulk sellers with fraudulent intentions; however, they fail to alert creditors of an impending problem. Bulk sales legislation is designed to provide this protection, but, as we have seen, the legislation does not do so in practice.

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[31] *Re West Bay Sales Ltd. and Hitachi Sales Corp. of Canada Ltd.* (1978), 20 O.R. (2d) 752, 88 D.L.R. (3d) 743 (H.C.).

[32] F.M. Catzman, "Law Reform Commission of British Columbia, Bulk Sales Legislation, Working Paper No. 40" (1983-84), 8 Can. Bus. L.J. 109.

Although we have been unable to confirm in an empirical way a continued need for bulk sales law, we have determined that repeal of the law would leave a gap. The Act serves to alert creditors of an impending sale which could be a threat to the collection of their accounts. Whether this benefit is of sufficient magnitude and importance so as to warrant specific legislation remains open to question.

Without resolving this issue, we decided that it would be useful to determine if it is possible to create a bulk sales law which could fulfil the objectives of the present law, while being commercially acceptable in the modern context. We attempt to devise such a scheme in the next Chapter. In the final Chapter, we compare the costs of that scheme to the benefits it offers and conclude that a law to replace *The Bulk Sales Act* should not be enacted.

CHAPTER 6

OPTIONS FOR A NEW ACT

In this Chapter, we offer the broad parameters of a statute which might replace *The Bulk Sales Act*. In devising a replacement scheme, we proceed from two basic premises. The first is that the objective of the present *Bulk Sales Act* - to warn creditors of an impending sale - may still have some validity today. The second is that our reasons for recommending that the present Act should be repealed will figure prominently in our choice of the best options to be incorporated into a new Act. That is to say, we will draw from our analysis of the present Act when making changes to its scope and operation. Working from these two premises will inevitably mean that our recommendations will be directed at bolstering the Act to make it applicable to a wider range of businesses and more effective in operation. We see no case for implementing a "middle-ground approach" whereby some minor tinkering would be done to the Act without addressing its major flaws.

Our framework for a new Act was originally set out in detail in our earlier Discussion Paper; this Chapter restates these principles in a more summary fashion. In arriving at our suggestions for reform, in addition to our analysis of the Act, we relied on alternatives which are suggested by other sources, including statutes in other Canadian provinces; Article Six of the American Uniform Commercial Code; recommendations of the subcommittee of the Corporate, Banking and Business Law Section of the American Bar Association; and commentaries on these schemes.[1]

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[1]At the time of the writing of the Discussion Paper, only the work of the subcommittee had been reported. Since the completion of our research for this Report, a Drafting Committee of the National Conference of Commissioners on Uniform State Laws and the American Law Institute has finalized recommendations for revision to Article Six. The Commissioners have recommended that Article Six be repealed, but for states which might not accept outright repeal, a replacement for the present Article has been

(Footnote continued to page 51)

A. SCOPE OF THE LEGISLATION

1. Vendors

All sales in bulk made in the Province of Manitoba by every business enterprise, without regard to its activities or to its legal form, should be subject to bulk sales law.

We previously concluded that the select application of *The Bulk Sales Act* to a few types of business vendors is untenable. The historical justifications for limiting vendors under the Act primarily to those who deal in a stock of inventory are unpersuasive in the modern business context, and the current explanations for such a restriction are of little merit. As there is little doubt that a new Act should incorporate a wider range of businesses, the only question is how wide this expansion should be.

This issue has been the subject of some debate in relation to section 6-102 of the Uniform Commercial Code which provides that the Article covers enterprises whose principal business is the sale of merchandise from stock, including those who manufacture what they sell.[2] One suggestion for changing the Article proposed adding some service businesses to the category of enterprises covered by the Article. This change has been implemented by many of the states[3] and could be adapted to Manitoba's situation through the addition of more service businesses to the list of such industries already included in *The Bulk Sales Act*.

(Footnote continued from page 50)
approved and recommended for enactment. *See* National Conference of Commissioners on Uniform State Laws, July 19 - August 5, 1988, Washington, D.C. Minutes and Draft Uniform Commercial Code Revised Article 6 - Bulk Sales.

[2]Uniform Commercial Code [hereinafter U.C.C.], §6-102(3) (1986).

[3]Hawkland, "Proposed Revisions to U.C.C. Article 6" (1983), 38 Bus. Law. 1729 at 1731; David H. Batten, "Article 6: Bulk Transfers" (1982), 18 Wake Forest L. Rev. 339; *see, e.g.,* California, Florida, Idaho, Maryland, Massachussetts, Michigan, Nebraska, Nevada, New Hampshire, New York, North Dakota, Ohio, Oregon, Washington and Wisconsin, where the most typical addition is that of restaurants and other food dispensing establishments.

However, a more comprehensive reform - expanding the scope of bulk sales legislation to include all business vendors, regardless of the type of activity in which they are engaged - has received much favour with commentators of the Uniform Commercial Code.[4] They have concluded, as have we, that it is outdated to draw distinctions between businesses on the basis of the nature of their activities.[5] Today, all types of businesses may extend credit and rely on credit, at least to some extent. Accordingly, any business may potentially be adversely affected by a bulk sale made by a borrower or customer and, conversely, any business may have creditors who will be adversely affected by a bulk sale made by it.

2. Subject Matter

All forms of rights in property, whether real or personal, tangible or intangible property, should be included.

By expanding the vendors included in bulk sales legislation, we have indirectly expanded the scope of assets which will be included. If the types of businesses covered are not confined to those which deal in a stock of inventory, likewise the assets which are the subject of a sale by such businesses will not be confined to inventory. This is consistent with our conclusion that the present Act fails to address the potential danger associated with the bulk sale of assets other than personal property - with the bulk sale of intangible assets and real property.

Several commentators of the Uniform Commercial Code have also

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[4]Don L. Baker, "Bulk Transfers Act - Patch, Bury, or Renovate?" (1983), 38 Bus. Law. 1771; Louis L. Levit, "Bulk Transfers - Stepchild of the Uniform Commercial Code?" (1971), 46 Notre Dame Law. 694; Donald J. Rapson, "U.C.C. Article 6: Should It Be Revised or 'Deep-Sixed'?" (1983), 38 Bus. Law. 1753. *See also* Oklahoma which includes all services within §6-102.

[5]*See, e.g.*, Baker, *id.* at 1781: "The outmoded notion that businesses dealing in sale of inventories at retail pose the only significant fraud risk finds no support in logic or in experience."

suggested that the scope of assets in Article 6 be widely expanded.[6] We favour this view and believe the Act should clearly state the broadened scope of subject matter to be included.

In including real property, we are aware that sales of such property are already conducted under a system of registration and notice which requires disclosure of some of the details of a transaction and allows for public scrutiny by creditors and others. We are also aware that there may be practical problems which would have to be overcome if real property were to be included within the ambit of bulk sales law. In principle, however, we are of the view that, as the most valuable asset of a business is often its real property and, as the sale of that asset may represent a significant diminishment in a business's assets, its inclusion in the legislation is in keeping with the philosophy of bulk sales law.

3. Creditors

Both trade and non-trade creditors should be protected, but secured creditors should be excluded.

We noted earlier that the present scope of business vendors under the Act creates irrational distinctions between creditors based upon whether they are supplying to inventory-intensive or service-based enterprises. We also noted that within the scope of creditors which are covered by the Act, no distinction is made between secured and unsecured creditors or between trade and non-trade creditors. By broadening bulk sales legislation to include all businesses and assets, all creditors would be afforded protection under the Act regardless of the type of business to which they extend credit.

We believe, however, that secured creditors should be excluded from the protection of bulk sales legislation. Although Article 6 in the United States applies to all creditors of a business vendor regardless of whether security has been taken,[7] we agree with the commentators who have criticized

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[6]Baker, *supra* n. 4, at 1783; Levit, *supra* n. 4, at 695. *See also The Bulk Sales Act*, R.S.N. 1970, c. 28, s. 1(i) where stock includes certain specified intangible assets.

[7]U.C.C. §6-104(1) (1986). *See also* U.C.C. §6-109 (1986) governing secured transactions.

this approach and have recommended that the Article apply only to "reliance" creditors.[8] In our view, secured creditors are adequately protected by *The Personal Property Security Act*.

With respect to trade creditors, we had concluded earlier that it may not be advisable to exclude non-trade creditors from the Act as they, like trade creditors, may rely on the business assets of an individual in extending credit. The Uniform Commercial Code follows this reasoning with the inclusion of both types of creditors in Article 6[9] but not without criticism. This criticism focuses primarily on the problems which may be associated with the inclusion of claims in tort or contract which have not gone to judgment,[10] and would solve the problem by excluding all non-trade claims. Rather than

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[8]Rapson, *supra* n. 4, at 1760. *See also*, Baker, *supra* n. 4, at 1789 and Hawkland, *supra* n. 3, at 1750. The subcommittee on review of Article 6 chose to keep secured parties within the Article as it was concerned that a security interest under Article 9 could be cut off by a bulk transfer. Under Article 9, a secured party has ten days from when a purchaser *receives possession of collateral* in which to perfect a security interest. In the absence of notification of a bulk sale under Article 6, a secured creditor may be unaware that a transfer has taken place and, accordingly, may fail to perfect a security interest within the given time period.

A distinction between secured and unsecured creditors is made under the Ontario *Bulk Sales Act*, R.S.O. 1980, c. 52, s. 8(2)(a) and (b). Both secured and unsecured trade creditors must be included on the vendor's statement of creditors furnished to the purchaser, but only unsecured creditors are permitted to consent to the completion of a sale in bulk thereby relieving the vendor of the obligation to notify all trade creditors of the impending bulk sale.

[9]U.C.C. §6-104 (1986).

[10]Lawrence B. Raff, "Bulk Transfers Under The Uniform Commercial Code" (1962), 17 Rutgers L. Rev. 107, 112; Donald J. Rapson, "Article 6 of the Uniform Commercial Code: Problems and Pitfalls in Conducting Bulk Sales" (1963), 68 Com. L.J. 226, 227,

> Suppose the wife of one of the owners of the business was involved in an automobile accident while driving their children to school in his car. Apparently, all the claimants (or potential claimants) in an auto liability case are "creditors" . . . entitled to all the rights and remedies of Article 6 in event of a bulk transfer of the husband's business.

The author suggests that this problem could be eliminated by excluding non-trade creditors.

excluding non-trade creditors from bulk sales legislation, we believe that, as some non-trade creditors may benefit from bulk sales law, the better way to resolve the problem is to exclude unadjudicated claims from the Act. This is in line with the Canadian case law which excludes creditors who have not obtained judgment for claims based on trade accounts.[11]

Finally, we believe the provincial government, in its capacity as a creditor, should receive the protection of the Act. Although the government often accords to itself a lien and charge upon the assets of taxpayers to secure the payment of taxes owing,[12] it does not generally incorporate special bulk sale provisions within taxing statutes, unlike many American states.[13] Therefore, the government, like other creditors, would benefit from the advance notice afforded by bulk sales legislation.

4. Sale in Bulk

"Bulk sale" should be defined as "any transfer of a major part of the assets of the transferor's enterprise which transfer is out of the ordinary course of the tranferor's business."

"Transfer" should be defined as "any conveyance of an interest in any assets, including but not limited to sales, exchanges, leases, assignments and gifts."

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[11] *See also Bulk Sales Act*, R.S.O. 1980, c. 52, ss. 8 and 12, trade creditors only, receive notice of a proposed bulk sale but all creditors, trade and non-trade, participate in the distribution of the proceeds of sale.

[12] *See, e.g., The Corporation Capital Tax Act*, C.C.S.M. c. C226, s. 24(1); *The Gasoline Tax Act*, C.C.S.M. c. G40, s. 17(5); *The Tobacco Tax Act*, C.C.S.M. c. T80, s. 14(5).

[13] *See generally* Lee R. Rydalch, "Dividing the Bulk Sales Stew in Utah: Hot Potatoes to the Courts, the Federal Government's Share, and Other Problems under the Uniform Commercial Code - Bulk Transfers" (1972), 71 Utah L. Rev. 71; Baker, *supra* n. 4, at 1786; Hawkland, *supra* n. 3, at 1750. *See generally*, Joseph H. Murphy and E. Parker Brown, II, "Bulk Sales Under New York State Tax Law" (1981), 53 N.Y.S.B.J. 190. *But see The Retail Sales Tax Act*, C.C.S.M. c. R130, s. 8.

"Major Part" should be defined as "forty percent or more in fair market value of the transferor's assets."

As discussed previously, three types of transactions are defined by *The Bulk Sales Act* as being sales in bulk: those out of the usual course of business; those constituting substantially the entire stock of the vendor; and those which are in the nature of a sale in the interest of a business. Each of these phrases lacks clear definition and, accordingly, a great deal of uncertainty exists for vendors, purchasers and creditors alike in determining when a sale falls within the purview of the Act.

To deal with the ambiguities of the present definition of "bulk sale" we have assigned clear meaning to each element of the definition. This approach, also suggested by many American commentators of Article 6 and recommended by the subcommittee on review of Article 6,[14] has a number of distinct advantages over the present one. We use "outside the ordinary course of business" because it is a familiar phrase in business law; there is ample jurisprudence on its meaning and little doubt would arise as to the type of transaction which the Act was intended to cover.[15]

The clear meaning assigned to a "major part" - "forty percent or more in fair market value of assets" - would lend certainty to a central provision of the Act. This quantitative requirement, based upon value rather than volume, seems logical as creditors are ultimately concerned with the reduction of asset value rather than with the volume of assets transferred. Although the use of any threshold number, such as forty percent, may seem somewhat arbitrary and inflexible, we believe that, on balance, clarity is of primary importance and outweighs any drawbacks associated with inflexibility.[16] The revised definition of "major part" also overcomes the

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[14]*See* Baker, *supra* n. 4, at 1783; Hawkland, *supra* n. 3, at 1733-36; Levit, *supra* n. 4, at 710.

[15]*See, e.g., The Factors Act*, C.C.S.M. c. F10; *The Personal Property Security Act*, C.C.S.M. c. P35; *The Sale of Goods Act*, C.C.S.M. c. S10.

[16]Baker, *supra* n. 4, at 1783 and Hawkland, *supra* n. 3, at 1732, suggest
(Footnote continued to page 57)

problem which arises with the sale of one outlet in a chain of businesses as, under our reform, the transfer would only come within the Act where forty percent or more of *all* of the vendor's assets located within the province are to be transferred. This is more in keeping with the purpose of the Act as creditors are not threatened by the sale of a major part of the assets of one outlet where the vendor has assets at other outlets which can be used to satisfy their claims.

The previous anomalous situations, such as the "unusual" sale of a small percentage of assets, also would be overcome by this new definition. As "out of the usual course" and "major part" are conjunctive, only a transfer of a substantial value of assets - where that type of transfer is also unusual for that business - would be caught by the Act.[17]

5. Excluded Transactions

The following transactions should be excluded:

(a) general assignments for the benefit of all creditors of the tranferor;

(b) sales by executors, administrators, receivers, trustees in bankruptcy, or any public official under judicial process;

(c) isolated bona fide transfers for consideration of less than $5,000;

(d) transfers made in settlement of a security interest;

(e) transfers made to give security;

(f) transfers which are already subject to the requirement of notice to creditors.

(Footnote continued from page 56)
a 50% threshold, but we believe that 40% represents a sufficient diminishment in assets to be a potential threat to the ability of creditors to collect their outstanding accounts.

[17]Auction sales also should be included within the Act, as their omission could provide a loophole for unscrupulous vendors. *See* U.C.C. §6-108 (1986).

The first two types of transactions are presently excluded by *The Bulk Sales Act*[18] and we favour their continued exclusion as other statutes or the courts provide sufficient safeguards to creditors. These transactions are also excluded by a provision of Article 6 of the Uniform Commercial Code, which has been adopted by all states,[19] and supported by the subcommittee on Article 6 as well as by reviewers of the Code.[20]

We believe the other exclusions from bulk sales legislation should be added as the law should not impede transactions which, for practical or philosophical reasons, do not require bulk sales regulation.[21] We would exempt from the burdens of compliance with bulk sales legislation insignificant sales, which we would define as *bona fide* sales with an aggregate consideration of less than $5,000.[22] The *bona fide*

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[18]*The Bulk Sales Act (Man.)*, s. 4.

[19]U.C.C. §6-103 (1986).

[20]Hawkland, *supra* n. 3, at 1743. *See also* Baker, *supra* n. 4, at 1790, who recommends that only general assignments which are made in good faith be excluded. Lack of good faith would be presumed if the transferor received anything of value which did not benefit the general creditors of the transferor; Thomas C. Billig and Kingsley R. Smith, "Bulk Sales Law: Transactions Covered By These Statutes" (1933), 39 W. Va. L.Q. 323, 330-33, discusses the problem of fraudulent assignments.

[21]Another approach is the *Bulk Sales Act*, R.S.O. 1980, c. 52, s. 3, which makes provision for judicial exemption of sales in bulk where, upon application, it is shown that "the sale is advantageous to the seller and will not impair his ability to pay his creditors in full . . . ." *See also Bulk Sales Act*, R.S.N.B. c. B-9, s. 3.1.

[22]Baker, *supra* n. 4, at 1790, suggests transfers for a total consideration of less than $2,000 be excluded; Hawkland, *supra* n. 3, at 1731, uses a slightly different approach, recommending that only those enterprises whose tangible and intangible assets have a fair market value of $10,000 or more before a bulk transfer be included within the ambit of the legislation.

requirement is directed at vendors who attempt to conduct a bulk sale, in effect, through several small transfers.

The exclusion of transfers in settlement of a security interest is in line with Canadian jurisprudence which holds that bulk sales law is not intended to destroy security interests and enable general creditors to share equally with secured ones. We would add that transfers made in settlement of security interests only be excepted if the transfers are made in good faith.[23] The exemption is also incorporated in Article 6 and has been adopted by all states.[24]

Transfers made to give security are excluded under the Uniform Commercial Code on two grounds: "security interests of all kinds in personal property are regulated by Article 9, "Secured Transactions";[25] and security transactions are not considered likely to lead to the type of fraud to which Article 6 is directed.[26] Although this is part of the bulk sales legislation of all the states, this issue has been described as "the toughest question in the whole area of this Article (6)."[27]

It has been argued that:

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[23]*See* Baker, *supra* n. 4, at 1790; Thomas C. Billig and William L. Branch, Jr., "The Problem of Transfers Under Bulk Sales Law: A Study of Absolute Transfers and Liquidating Trusts" (1936), 35 Mich. L. Rev. 732, 747.

[24]U.C.C. §6-103(3) (1986).

[25]U.C.C. §6-103(1) (1986), Official Comment 2.

[26]Levit, *supra* n. 4, at 697. *See generally*, Peter N. Hill, "Bulk Transfers in the Guise of Security: A *Wolfe* in Sheep's Clothing" (1982), 60 J.Ur.L. 85.

[27]Charles Bunn, *Transcript of Hearings before the Law Revision Commission of the State of New York on the Uniform Commercial Code, Article 6*, 1 Law Rev. Commission Report 1954, State of New York, 19 *as quoted in* William D. Hawkland, "The Trouble with Article 6 of the U.C.C.: Some Thoughts About Section 6-103" (1977), 82 Com. L.J. 113, 115.

> Although a security transfer for new consideration is ordinarily not prejudicial to the interests of general unsecured creditors, their rights can be, and often are, seriously jeopardized by bulk transfer [sic] to secure antecedent indebtedness.[28]

And indeed, the drafters of Article 6 initially opted for the inclusion in the Code of bulk transfers to secure antecedent indebtedness and excluded "the granting and foreclosing of security interests only where they had been given for new value."[29] However, this approach gave way to the present version because of what may best be described as "commercial realities". Although still a source of some debate, the present exclusionary approach continues to receive the general support of the subcommittee on review of Article 6.[30]

We recognize that the mortgaging of assets may represent a serious impediment to the ability of unsecured creditors to collect their accounts. In this sense, it would be in keeping with the purpose of bulk sales legislation to include such transactions within the ambit of the Act. However, the inclusion of transactions which mortgage the assets of the vendor, whether they be real or personal assets, could undoubtedly be an undue commercial hindrance. Compliance with the Act would be required in every instance where the significant portion of a business's assets was given as collateral. On balance, we are of the view that transfers made to give security should be exempted from bulk sales legislation.

Finally, some transfers are, in principle, akin to the earlier noted fiduciary relationship exclusions and do not require regulation by bulk sales law. For example, the Uniform Commercial Code exempts several kinds of transactions because notice of such transactions is given to creditors either

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[28]Levit, *supra* n. 4, at 697.

[29]Hawkland, *supra* n. 27, at 114. *The Bulk Sales Act* of Newfoundland, R.S.N. 1970, c. 28, s. 2(e), includes chattel mortgages for new consideration which affect substantially the entire stock of a seller and which are given as security outside the ordinary course of business.

[30]Hawkland, *supra* n. 27, at 115.

pursuant to court order or through public notice.[31] We are of the opinion, however, that exclusion of specific types of transactions, as in the Uniform Commercial Code, may not be required. A general exemption of transactions which already require notice to creditors or public notice should suffice.[32]

6. Summary

Needless to say, by expanding the scope of bulk sales legislation, a greater number of business transactions would be subject to the law and the result would be greater intrusion of the law in commercial dealings. Although the provision of exclusions from the Act would address this concern to some extent, the intrusion can only be justified if the benefits to be gained from bulk sales law outweigh the inconveniences associated with complying with the law. To appreciate fully what these inconveniences may be, as well as their impact on creditors and on commercial freedom, consideration must be given to how a bulk sales Act would have to operate to fulfil the purpose of advising creditors in advance of a bulk sale.

B. REFORM OF THE OPERATION OF THE ACT

We noted in Chapter 3 that the main problem with the operation of *The Bulk Sales Act* arises from the heavy reliance placed upon the bulk vendor; he is expected to supply the purchaser with an accurate and complete list of creditors. We also saw some problem with respect to the remedies available to creditors and the short limitation period under the Act; the latter in particular may work a hardship on creditors and be used by the parties to bulk sales to avoid the Act altogether.

As it now stands, the Act may be easily subverted by a vendor giving a false or incomplete statement and declaration. We think that there are several plausible ways that the Act may be changed to overcome this primary problem, including the implementation of a public registration system and the

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[31] U.C.C. §6-103 (1986).

[32] *See, e.g., The Corporations Act*, C.C.S.M. c. C225, ss. 209(4) and 214(b), regarding dissolution and liquidation of corporations.

imposition of additional responsibilities upon the purchaser. Both methods have in common the aim of removing from the vendor as much responsibility as possible for the operation of the Act. The bulk sales statutes of Ontario and Nova Scotia, as well as the American Commercial Code - Article Six, rely to varying degrees on provisions of this kind. We will consider these schemes in devising a model for reform.

1. Other Provincial Jurisdictions

Only Ontario and Nova Scotia depart to any extent from Manitoba and the other provinces in terms of the operation of their bulk sales laws. The Ontario legislation contemplates two ways that a bulk sale may be completed. Both are subject to the requirement that, prior to the sale, the vendor deliver to the purchaser a statement of creditors verified by affidavit.[33]

The first method of completing a sale allows the purchaser to pay the purchase price directly to the vendor in any of these three circumstances: if the claims of trade creditors (as disclosed in the statement or otherwise known to the buyer) do not exceed $5,000; if the seller verifies that all claims of trade creditors have been paid in full; or if adequate provision has been made for the immediate payment of all trade creditors upon completion of the sale.[34] The latter method of compliance contemplates a buyer withholding from the purchase price an amount sufficient to pay off the claims of all creditors and being absolved from any further liability to creditors if he does, in fact, pay the claims in full immediately after the sale.[35]

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[33] *The Bulk Sales Act*, R.S.O. 1980, c. 52, s. 4. Interestingly, the legislation used to have a further requirement of publication of notice of the intended sale in *The Ontario Gazette*, *The Bulk Sales Act*, S.O. 1959, c. 9, s. 7, as rep. by *The Bulk Sales Act*, S.O. 1960, c. 6, s. 3.

[34] *The Bulk Sales Act*, R.S.O. 1980, c. 52, s. 8(1).

[35] Fred M. Catzman, "Bulk Sales in Ontario" (1960), 3 Can. B.J. 28, 34.

The alternative way of complying with the Ontario *Bulk Sales Act* involves the purchaser paying the proceeds of sale to a trustee who makes a *pro rata* distribution among the creditors.[36] Under this method, the vendor must obtain the consent of sixty per cent of unsecured trade creditors and deliver to all trade creditors, at least 14 days before the date of closing, details of the sale and a statement of business affairs.

Both methods of closing a bulk sale under the Ontario Act are subject to a further requirement that an affidavit setting out the particulars of the sale and documentation showing that there has been compliance with the Act be filed with the office of the clerk of the court within five days of completion of the sale.[37] *The Bulk Sales Act* of Nova Scotia also makes provision for registration. The agreement for sale must be filed in a registry office within 10 days of execution of the agreement, and no part of the purchase price may be paid within thirty days after execution of the agreement;[38] the operation of that Act does not otherwise depart significantly from the Manitoba approach.

The consequences of the buyer's non-compliance with the Ontario Act are the same as under our legislation: the sale in bulk is voidable and where the buyer has taken possession of the stock in bulk, he will be personally liable to account to the seller's creditors for the value thereof.

2. The Uniform Commercial Code - Article Six

The Uniform Commercial Code also provides two ways in which to complete a bulk sale. The first is the heart of Article 6 and has been adopted by the majority of states. The second method is similar but adds an optional section imposing greater liability on the purchaser. We will examine both of these methods in more detail.

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[36] *The Bulk Sales Act*, R.S.O. 1980, c. 52, s. 8(2) and s. 9.

[37] *The Bulk Sales Act*, R.S.O. 1980, c. 52, s. 11.

[38] *The Bulk Sales Act*, R.S.N.S. 1967, c. 28, s. 2.

(a) Majority approach

The operation of the Uniform Commercial Code is similar to *The Bulk Sales Act* to the extent that the transferor is required, upon request, to furnish the transferee with a list of his creditors and the amounts owing to them, together with an affidavit in support. As under our law, responsibility for the completeness and accuracy of the list of creditors rests on the transferor and the transfer will not be rendered ineffective by errors or omissions in the list unless the transferee is shown to have had knowledge of them. Unlike our legislation, however, the parties are required to prepare a schedule of the property to be transferred, sufficient to identify it, and the transferee is to preserve the schedule and creditor list or file the documentation in a public office for a period of six months following the transfer to permit inspection by creditors.[39] Article 6 also imposes responsibility on the transferee to notify creditors by mail of a bulk transfer at least 10 days before paying for the goods or taking possession of them.[40]

The Code does not impose a penalty for violation of Article 6 in the sense in which that term is normally used. When the requirements of Article 6 are violated, the only penalty to transferor and transferee is the consequence that the sale is ineffective as against the creditors of the transferor. However, in the event that the transferee does any act which places the goods beyond the reach of the transferor's creditors, the transferee will become personally liable for the debt of the transferor.[41]

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[39]U.C.C. §6-104(1) and (2) (1986).

[40]U.C.C. §6-105 (1986). §6-107 provides that the notice is to include the the names and addresses of the transferor and the transferee, and whether the debts of the transferor are to be paid in full as they fall due as a result of the transaction. If the creditors are not to be paid in full as their accounts fall due, the notice must also include the location and description of the property to be transferred, the estimated total of the outstanding accounts, and an address where the schedule of property and list of creditors may be inspected.

[41]Ronald A. Anderson, *Anderson on the Uniform Commercial Code*, 3rd ed. (Rochester: The Lawyers Co-operative Publishing Co., 1985) 400-401.

Article 6, like our *Bulk Sales Act*, does not specify the remedies which an aggrieved creditor may employ, but a creditor may rely on any procedure provided by local law;[42] these include execution or garnishment against the transferred property and securing of a judgment for the fair market value of the transferred property.[43] These procedures must be taken within six months of the date of the transfer, unless the transfer has been concealed, in which case action must be brought within six months of discovery of the transfer.[44]

(b) Minority approach

Section 6-106 of the Uniform Commercial Code imposes further requirements upon a bulk sale. However, it is an "optional" provision in the sense that states which choose to adopt Uniform Article 6 may choose not to include this section in their legislation. The majority of states have not adopted this provision[45] for reasons which will be discussed shortly.

The section provides that, where a bulk transfer is made for new consideration, the transferee must, in addition to the requirements already discussed under the majority approach, pay from the purchase price the claims of creditors as shown on the list furnished by the transferor or filed within 30 days from the date of the mailing of the notice.[46] Where any debts are in dispute, a necessary sum may be withheld from distribution until the dispute is resolved and, in the event that the consideration payable is not

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[42]U.C.C. §6-104 Official Comment 2 (1986).

[43]Anderson, *supra* n. 41, at 401-402. *See also*, Leonard Lakin, "Bulk Transfers: What Hath The Uniform Commercial Code Wrought?" (1975), 35 Md. L. Rev. 197, 229.

[44]U.C.C. §6-111 (1986). Official Comment 1 states: "This Article imposes unusual obligations on buyers of property. A short statute of limitations is therefore appropriate."

[45]Anderson, *supra* n. 41, at 411 lists 30 states which have omitted §6-106 and 20 states which have adopted §6-106 in some form.

[46]U.C.C. §6-106(1) (1986). The Code does not prescribe a procedure for compliance; a transferee under §6-106 may perform his duty in any suitable manner - U.C.C. §6-106 Official Comment 3.

enough to satisfy fully all of the debts, distribution is to be made on a *pro rata* basis. The section also makes provision for payment of the consideration into court and distribution therefrom through filing of claims.[47]

As stated in the Official Comment to section 6-106, ". . . the purpose of the section is to give the transferor's creditors direct protection against improper dissipation by the transferor of the consideration which he receives . . . ."[48] Whether a state decides to adopt section 6-106 depends upon its philosophy regarding the extent to which creditors should be statutorily protected. This divergence in opinion can be summarized as follows:

> Those acts [without section 6-106] were designed simply to give notice to the seller's creditors. Underlying these acts was the presumption that the seller's creditors, once notified of the proposed bulk sale, could adequately protect their interests. In contrast, [acts incorporating section 6-106], long favoured by credit men, reflect an assumption that the creditors' interests could be effectively protected only by imposing upon the transferee the personal duty to apply the new consideration from the bulk sale to the payment of the seller's debts.[49]

It has been asserted that, where section 6-106 has been adopted and there has been non-compliance with the provisions of Article 6, the transferee will be personally liable to the transferor's creditors for their debts, even if a fair consideration was paid and the transferee had acted in good faith.[50] Many reviewers of the Code believe that not only is this threat of personal liability for non-compliance with the Article the hallmark of section

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[47]U.C.C. §6-106(4) (1986). This is an optional paragraph and as stated in the accompanying explanatory note, "recommended for those states which do not have a general statute providing for payment of money into court."

[48]U.C.C. §6-106 (1986) Official Comment 1.

[49]Lakin, *supra* n. 43, at 223.

[50]Anderson, *supra* n. 41, at 416. The author also notes, however, that a transferee is not liable to unpaid creditors of which he was not aware.

6-106, but that for Article 6 to be effective such a provision should be mandatory.[51] Others are of the view that failure to comply with §6-106 renders a transfer ineffective but does not make the transferee personally liable for the value of the property transferred or the amount paid for it.[52] Aside from the possible personal liability which may result under §6-106, other substantial burdens are also a consequence of such a provision.[53]

The dilemma over section 6-106 illustrates that, in constructing the operational scheme of a bulk sales act, consideration must be given to how far the legislation should go in protecting the interests of one group at the expense of another.

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[51] *See* Rapson, *supra* n. 4, at 1768. *See also*, Baker, *supra* n. 4, at 1786; Leona M. Hudak & Edward J. King, "Reforming and Rewriting Article Six of the UCC" (1976), Com. L.J. 284, 287-288; Lennart V. Larson, "Bulk Transfers: Some Interpretive Problems" (1970), 2 Rut.-Cam. L.J. 101, 118; Levit, *supra* n. 4, at 702-705, 711; Rydalch, *supra* n. 13, at 88. *But see* Paul Carrington, "The Uniform Commercial Code - Sales, Bulk Sales & Documents of Title" (1960), 15 Wyo. L.J. 1, 16; Hawkland, *supra* n. 2; Myron Kove, "Procedural Problems in a Bulk Sale Under the Uniform Commercial Code" (1968), 1 U.C.C.L.J. 91, 101-105.

[52] Hawkland, *supra* n. 3, at 1748, where the subcommittee of review of Article 6 proposed the following amendment:

> Failure to comply with this section renders the transfer ineffective against any omitted creditor . . . but does not otherwise make the transferee personally liable for the value of the property transferred or the amount paid therefor, unless the transferee . . . transfers the property to a purchaser for value in good faith, and without notice of any non-compliance with the requirements of this Article, in which case the transferee shall be personally liable to the creditors. . . .

[53] Rapson, *supra* n. 4, at 1763:

> (1) Added delay and costs, particularly regarding disputed, contingent or unliquidated claims;
> (2) Abrogation of state and federal laws regarding priorities and lien rights where pro rata distribution is required;
> (3) Conflict of law problems where assets are located in more than one state and some states have section 6-106 and others do not; and
> (4) Problems associated with the failure of the Article to set out a comprehensive priority system of payment of creditors.

See Kove, *supra* n. 51, at 102-105; Levit, *supra* n. 4, at 705; Rydalch, *supra* n. 13, at 86.

> The rationale of Article 6 is that creditors should be protected by imposing substantial burdens and sanctions upon *buyers* of businesses, even though they may have acted in good faith and paid top dollar for the purchase. Is that really fair? Does it make sense to place burdens upon a *buyer* in order to protect creditors of the seller who have taken the risk of extending unsecured credit? Can we support a value judgment that the purchaser should bear the risk that a seller will not pay his creditors? If not, as has happened in most jurisdictions, section 6-106 will be rejected and the purchaser will have no duty to apply the purchase proceeds to the payment of the seller's debts.[54]

3. Reform of the Act

The alternative approaches just discussed incorporate the concepts of increasing the purchaser's responsibilities - through the requirement to pay creditors from the proceeds of sale - and making notice of a sale more accessible to creditors - through public registration of the details of the sale. We rely on these and other concepts in considering the reforms which may be implemented to make bulk sales law more effective and provide a reasonable balance between the interests of creditors and those of the parties to a bulk sale. The following are our suggestions for the broad parameters of a reformed bulk sales statute.

The vendor's duties should be as minimal as possible but he should be required to prepare and deliver to the purchaser a statement, verified by statutory declaration, detailing the outstanding claims of all unsecured creditors. Responsibility for alerting creditors should then be shifted away from the vendor towards a more reliable person. This could be accomplished, as we have seen, in several ways.

Verification by purchaser - The purchaser could be required to check the vendor's list of creditors for completeness and accuracy. This has been suggested in relation to Article 6 and described as "fair and not unduly

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[54]Rapson, *supra* n. 4, at 1763-1764.

burdensome".[55] The proposal contemplates that primary responsibility for the completeness and accuracy of the statement of creditors would rest with the vendor. A sale would not be rendered ineffective by errors or omissions in the statement unless the fact of such errors or omissions were known or disclosed to or reasonably discoverable by the purchaser. Such fact would be deemed known by a purchaser where it is revealed by the vendor's regular bookkeeping records or where it would be discovered by the purchaser's reasonable inquiry concerning the vendor's creditors.[56]

Although this practice would probably be effective in ensuring that creditors are not left out, we are of the opinion that such a provision would be extremely onerous on a purchaser, particularly one who wishes to acquire a business which has a great number of creditors. The requirement to make reasonable inquiry concerning the vendor's creditors could prove both costly and time-consuming. Indeed, thorough investigation may be impossible, introducing unacceptable uncertainty and risk into business acquisitions.

Distribution by purchaser - A section like 6-106 of the Uniform Commercial Code could be adopted. By requiring the purchaser to distribute the proceeds of sale directly to the vendor's creditors, the possibility of the vendor absconding with the funds would seem to be eliminated. The vendor would receive no monies until the claims of creditors had been satisfied.

Despite the theoretical effectiveness of this method, the opportunity to defraud creditors remains even where a purchaser is required to pay the proceeds to creditors who are listed on the statement of creditors which has been furnished by the vendor. Substantial reliance is still placed on the accuracy and completeness of that statement: on the honesty of the vendor.

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[55]Hawkland, *supra* n. 3, at 1746. *See also* Henry A. Easley, III, "Bulk Sales - Transferee's Duty to Make Careful Inquiry of the Transferor's Creditors Abolished" (1973), 52 N.C.L. Rev. 165; Eric M. Reuben, "Significant Developments Uniform Commercial Code - Bulk Sales - Abrogation of Transferee's Duty to Conduct a Careful Inquiry to Discover Creditors. *Adrian Tabin Corp.* v. *Climax Boutique*, 34 N.Y. 2d 210, 313 N.E. 2d 66, 356 N.Y. 2d 606 (1974)." (1974), 55 B.U.L. Rev. 288.

[56]Hawkland, *supra* n. 3, at 1745.

Public notice - We prefer a third option - a mandatory system of public notice to creditors. Under this approach, a purchaser would be required to publish notice of a sale and pay the accounts of those creditors who advise of their claims. The vendor's role in such a scheme would be negligible; he would merely collect whatever was left over after all accounts were settled. Most of the responsibility would be shifted to the purchaser and the creditors.

Although a requirement of public notice in advance of a sale could involve some delay in closing a transaction, this could be planned for in most commercial transactions and would not create a hardship.[57] We believe that most transactions could and should be completed by giving notice in advance, but, to deal with those few instances where the delay would not be acceptable, some flexibility could be incorporated into the Act. We contemplate two methods of compliance, each carrying different responsibilities and consequences, to provide this flexibility.

(1) Pre-closing notice

This method would work as follows. The purchaser would send written notice to each unsecured creditor named in the vendor's statement or otherwise known to the purchaser. The notice would indicate the vendor's name and address, together with any and all trade names under which he carried on business; the purchaser's name and address; that the purchaser had agreed to buy the vendor's business or, where the purchaser had only agreed to purchase specific assets of the vendor, that the purchaser had agreed to buy those named assets; the date of closing of the proposed purchase; the amount that the purchaser believed to be owing by the vendor to the creditor; that, if the creditor disputed the amount owing to the vendor, he could so advise the purchaser in writing by a specified date, and that the identified indebtedness would be paid in full to the creditor on the closing of the proposed purchase.

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[57]Many commercial transactions are already subject to the possibility of delay by reason of regulatory requirements. For example, the purchase of a hotel or restaurant with a liquor licence is not possible without approval under *The Liquor Control Act*, C.C.S.M. c. L160. That process can take 4 to 6 weeks from filing of application to notification of decision.

The purchaser would also be required to place a similar notice in a daily newspaper and in the *Manitoba Gazette* requiring any creditor of the vendor to advise the purchaser or his lawyer in writing of the nature and amount of his claim by a specified date.

The vendor and purchaser would be prohibited from closing the transfer until some reasonable period of time had elapsed from the mailing and publication of the notices. This minimum period of time - say two weeks - should be sufficient to allow a creditor to ascertain whether or not the vendor is indebted to him and to send written notification of such indebtedness to the purchaser.

Each creditor would be required to have confirmed, disputed or identified his claim prior to the expiration of the notice period. The purchaser would then be free to apportion the purchase price and acquire title to the assets. Failure of a creditor to advise of his claim within the allotted time would absolve the purchaser from any responsibility to that creditor, although the creditor's contractual right to proceed against the vendor would remain.

We think that having the purchaser pay the proceeds directly to all creditors who have confirmed their claims would work well in this case. Practically speaking, this could be done by forwarding the proceeds to the vendor's solicitor on the trust condition that they be distributed to the confirmed creditors according to their claims or that other adequate arrangements be made for their payment in full. Disputed claims could be paid into court. In the event that the proceeds are insufficient to satisfy fully the estimated disputed and undisputed claims of all creditors, the purchaser could be required to pay the monies to a trustee for *pro rata* distribution to the creditors.

Transferring the purchase price directly into the hands of creditors or through the court would help to eliminate the threat of the vendor misappropriating the funds before the creditor accounts are paid. This, taken together with the public notice provisions of the proposed scheme, we submit, would offer the kind of preventative protection which bulk sales law is supposed to afford to creditors.

(2) Post-closing notice

In the normal course, advance notice should be given to creditors. However, as the delay caused by the notice requirements may be unacceptable in some circumstances, we propose a second method of compliance whereby a bulk sale could be closed at the will of the vendor and purchaser without notifying creditors before the closing. Once the transaction has closed, the parties would then be responsible for providing notice, both directly and through publication, in a manner similar to the advance notice scheme. However, in order to confine this method of compliance to extraordinary situations, both the vendor and the purchaser would have continuing joint and several liability for *all* creditors' claims as of the date of closing.

Two conditions precedent would have to be met before this method could be invoked. First, the purchaser must have reasonable grounds for believing that he is and will be solvent upon completion of the transfer and the assumption of the vendor's debts.[58] This is intended to afford a minimum safeguard to creditors that the purchaser will be financially able to make good on the assumed liabilities. Second, the vendor and purchaser would agree in writing to be bound by this method of compliance to ensure that both parties are aware that they are assuming some extraordinary responsibilities.

Upon satisfaction of the conditions precedent, the purchaser would be required to demand and receive from the vendor prior to the date of closing a statement of his creditors supported by a statutory declaration. Upon the close of the sale, the purchaser would pay to the vendor that part of the purchase price exceeding the amount outstanding to the vendor's creditors. In effect, the purchaser would be required to hold back an amount equal to the claims of creditors as listed on the vendor's statement. Although this would give rise to the familiar problem of the purchaser having to rely on the vendor's statement, it is unlikely that the purchaser would do so blindly

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[58]We would use a solvency test similar to those found in many sections of *The Corporations Act*, C.C.S.M. c. C225. It should require that (a) the purchaser is and will, after the acquisition, be able to pay his liabilities as they come due, and (b) the realizable value of the purchaser's assets is and would, after completion of the purchase, be greater than the aggregate of his liabilities.

under this method of compliance, as the purchaser would ultimately be responsible for all of the vendor's debts, whether or not they were on the statement.

Once the transaction had closed, the purchaser would be required to notify creditors in a manner similar to that previously described, with one very important addition: the notice would also contain a statement that the bulk sale had closed as of a specified date and that the purchaser had become jointly and severally liable with the vendor for all the debts of the vendor as of that date.

Admittedly, this is an onerous obligation to impose upon any purchaser, but it is intended to be so. As creditors would not receive advance notice of the bulk sale, there must be some mechanism for ensuring that creditors can collect on their accounts after the transfer. Under this method, the purchaser is given great incentive to satisfy himself that all of the creditors' claims are paid in full out of the purchase price of the bulk assets; otherwise, they will have to be paid out of his pocket. This should also encourage the parties to give advance notice and discourage them from relying on this method of compliance as a matter of course.

(3) Remedies available to creditors

If the purchaser fails to comply with any provision of the Act, he would become jointly and severally liable with the vendor for the claims of any creditor. We think creditors should be given the opportunity to bring an action against the purchaser on the basis of the original contract for goods or services between the creditor and vendor. The imposition on the purchaser of joint and several liability with the vendor for the debts of all creditors is a potent remedy which need not be supplemented by any additional remedy. The vendor, of course, would remain liable to all his creditors under his contractual commitments to them and we think a creditor's remedy against the vendor should continue to be based upon their contract rather than upon a contravention of the Act. Finally, a court could, in its discretion, relieve the purchaser from liability for minor errors or omissions where, in the circumstances of the case, including the good faith of the purchaser, it was reasonable to do so.

C. SUMMARY

Under our suggested reforms, the selective and outmoded application of the Act to specific types of vendors and subject matter would be overcome by expanding the scope of the legislation to include all businesses and both tangible and intangible assets. Likewise, the select group of creditors given protection would be expanded and the scope of creditors would be rationalized through the inclusion of reliance creditors only. A clearer and more specific definition of "sale in bulk" would also help to achieve the central purpose of the legislation as would the exclusion of certain transactions from the Act.

The operation of the Act would cease to depend on the honesty of the vendor. Public notice would act as a safeguard against careless or fraudulent vendors who state that no creditors exist or who omit creditors from their list. Every creditor would be afforded the oppportunity to receive advance notice of the details of a bulk sale.

Although the proposed notice requirements could add increased legal and advertising costs, which might fall most heavily on purchasers of small businesses, the overall costs would be equitably distributed. The vendor and purchaser would be responsible for the costs of advertising and sending out notices while the expense of monitoring the publications in which notices appear would be incurred by creditors. The system may work a hardship on those few who could not afford to monitor the necessary publications, but protection of creditors through public notice is not unusual.[59]

These legislative reforms address many of the problems with the present *Bulk Sales Act*. By adjusting the scope of the vendors and creditors covered, the Act is brought more in line with modern commercial dealings. By placing less reliance on the information originating from the vendor, and more

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[59]*See, e.g., The Trustee Act*, C.C.S.M. c. T160, s. 43; *The Real Property Act*, C.C.S.M. c. R30, ss. 130(1), 155; *The Corporations Act*, C.C.S.M. c. C225, ss. 179(3), 209(4).

on independent methods of verification, the Act is less likely to be abused and disregarded. And, finally, by clarifying the methods of enforcement of rights under the Act, the wronged creditor would have clearer means of redress.

As we have demonstrated, it is possible to close the gaps found in existing bulk sales legislation. However, it is still necessary to determine whether a model such as we have outlined should be implemented in Manitoba. To do so, the costs and benefits of its adoption must be considered in light of the uncertain need for bulk sales law in general. In the next Chapter, we undertake this analysis and reach our conclusion as to the ultimate fate of *The Bulk Sales Act*.

CHAPTER 7

EVALUATION AND RECOMMENDATIONS FOR REFORM

After reviewing the provisions of the present *Bulk Sales Act*, we determined that the scope of the Act is so out-dated and its operation so ineffective that the Act is of little value in its present form and should be repealed. The more difficult question then became whether the Act should be replaced. To answer this, we considered whether there was still a need for the law, in a practical as well as a legal sense. We found that it was difficult to quantify this need, but from a legal standpoint only a small gap would be left by the repeal of the bulk sales law. That gap would be the theoretical benefit afforded to unsecured creditors by advance notice of an impending bulk sale. But what would be the cost of filling in the gap; would it be worth the benefit?

To answer this, we devised a bulk sales proposal which we felt would address many of the problems with the present Act. As we saw in the last Chapter, to afford creditors the type of relief that bulk sales law promises, a fairly elaborate system of checks and balances must be created. We relied on a system of public notice to provide this, although other jurisdictions have shown that other schemes are possible. Whatever type of system is chosen, we concluded that, to address the present problems with bulk sales law, two key elements are needed: rationalization of the scope of transactions covered by the Act, and reform of the operation of the Act to provide unsecured creditors with advance notice of a bulk sale. In saying this, we know that any scheme which offers these two elements will necessarily involve increased costs. But any scheme which does not offer these elements - although it may have significantly lower costs - will not be worth implementing as it will add little to other legislation already affecting creditors.

In this final Chapter of our Report, we weigh the costs and benefits of the two ways of addressing reform of bulk sales law - repeal or replacement - and make our final recommendations for repeal. We are aided in this analysis by the comments from members of the legal, business and credit communities who responded to our Discussion Paper.

A. REPEAL OR REPLACEMENT OF *THE BULK SALES ACT*

The benefits of a replacement scheme, such as the one we have proposed, were detailed in the last Chapter. The requirement of public notice would take much of the onus away from the vendor, ensuring that creditors would become aware of a sale and that they could collect their accounts from the proceeds. The recommended changes to the scope of transactions and creditors covered by *The Bulk Sales Act* would ensure that the Act was applied more equitably.

The costs of this scheme were alluded to. Aside from the more onerous nature of the recommended requirements for publication and notification of creditors by mail, increased legal and advertising costs would also result under this scheme. These would be incurred by the vendor and purchaser, while the creditors would incur the cost of monitoring publications for bulk sale notices. In addition to these increased monetary costs, the vendor and purchaser would be unable to close a bulk sale without incurring at least a one-month delay while advertising for creditors. This is an additional burden, unknown in our present Act and with the potential to alter dramatically the means of completing this type of transaction in this Province. Although the optional post-compliance provisions would be available to parties who wished to avoid the delay, this system is not intended for common use and has its own major costs, including the purchaser's liability for all of the vendor's debts. Finally, the change in the scope of the Act would eliminate some transactions but, in general, the legislation would be of broader application under our reforms. This, together with the more onerous compliance provisions of the Act, leads to the inescapable conclusion that the proposed scheme represents a significant intrusive departure from present business practices.

Most of the dozen or so respondents to our Discussion Paper were in agreement that the present *Bulk Sales Act* is unsatisfactory and should be repealed.[1] Further, most believed that our replacement scheme would serve

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[1]The exception was Fred M. Catzman, Q.C., of the Ontario Bar who has written several articles advocating retention of the legislation and who responded against the idea of repeal of the Act. Letter from Fred M. Catzman, Q.C., December 8, 1987.

to protect creditors, but that the additional costs involved to accomplish this could not be justified. Many respondents, while recognizing the necessity of shifting the burden for compliance away from the vendor, were particularly concerned that it would be the purchaser who would be saddled unjustly with the increased costs of the scheme.

The majority thought that the Act should not be replaced by our proposed scheme, or by any scheme at all.[2] The general consensus was that, in the absence of a demonstrated need for bulk sales legislation, the law imposes an unwarranted burden upon commercial transactions. It was also pointed out that, as bulk sales legislation is now treated as a "dead letter" in the law and ignored by many lawyers and business people, the legislation has, in effect, been repealed by practice. Formal repeal would merely be recognition of the status quo.[3] This view is supported by the fact that repeal of the legislation in British Columbia has been described as "wholly uncontroversial".[4] Finally, most respondents pointed to the availability of alternative creditor relief such as bankruptcy and personal property security legislation, as offering adequate protection to creditors.

As we noted, several respondents were uncomfortable with the idea of outright repeal of *The Bulk Sales Act*. The Business Law Subsection of the Manitoba Bar Association was of the view that, as bulk sales law provides salutary protection, the legislation should be maintained in some form. They

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[2]Several respondents, however, did favour implementation of a new scheme to replace the Act: letter from The Manitoba Insolvency Association Inc., March 22, 1988; the Business Law Subsection of the Manitoba Bar Association suggested an alternate proposal which is discussed later.

[3]Letter from Jim Rattenbury, Co-ordinator of Legal Research, Law Reform Branch of the Office of the Attorney General, New Brunswick, September 10, 1987.

[4]Letter from Arthur L. Close, Chairman, Law Reform Commission of British Columbia, October 20, 1987.

agreed with our recommended changes to the scope of the legislation, but were of the view that implementing an intricate notice system to advise creditors of the availability of bulk sale funds was unnecessary as creditors would become aware of a sale during the ordinary course of business. They suggested that the Act simply impose a statutory trust on the funds received by the vendor for the benefit of the vendor's unsecured creditors. This would allow the unsecured creditors to make a claim upon the purchase price "in specie", and would permit recourse to equitable remedies such as tracing.[5]

We appreciate that it is important to have some form of deterrent against fraudulent bulk sales, but we are not convinced that a bulk sales statute should fulfil this role, particularly in light of the deterrent effect of other legislation, including the *Criminal Code*. Even if we assume that the Act should be kept for its salutary effect, we believe that the theoretical benefits of a statutory trust - the availability of equitable remedies - would be illusory in practice. Tracing would be available only in the rare instances where the purchase monies had not been dissipated or become unidentifiable. Also, the right to trace could not be exercised against a *bona fide* purchaser for value who was unaware of the existing trust. Even where the purchaser had acted in concert with a bulk seller, the imposition of a trust would add nothing to the remedies available to creditors under fraudulent conveyance legislation. Accordingly, although the imposition of a statutory trust on the proceeds of a bulk sale suggests a way to simplify the operation of the Act while providing a deterrent to fraud, we believe that the practical problems with its implementation would outweigh these considerations.

In summary, we identify the following as the decisive factors in the debate over whether to replace or repeal the Act:

1. Repeal of *The Bulk Sales Act* is called for because of the irrationality and ineffectiveness of the present scheme.

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[5]Letter and "Recommendations with Respect to The Manitoba Law Reform Commission Discussion Paper on *The Bulk Sales Act*" from Manitoba Bar Association, Business Law Subsection, January 18, 1988.

2. In considering whether the Act should be replaced, consideration should be given to the costs and benefits of a new Act which is designed to implement the goals of bulk sales law.

3. The costs associated with an effective scheme include delay in closing a transaction, imposition of additional duties and liability on the purchaser, and increased monetary costs to all parties.

4. The benefits to be gained from a comprehensive scheme enure largely to unsecured creditors, and include: rationalization of the scope of transactions covered; provision of information and advance notice of an impending sale; and simplication of the forms of relief available against non-complying vendors.

5. The costs and benefits of a comprehensive scheme must be weighed in light of these considerations:

   (a) In the modern commercial context, it is questionable whether the problem of bulk sales still poses a significant commercial threat to creditors.

   (b) Alternative means of preventing bulk sales are available to creditors including obtaining credit information on potential customers and taking security in personal property.

   (c) Alternative forms of relief from fraudulent bulk sales are available including bankruptcy legislation, attachment and injunctions, reciprocal enforcement of judgments, fraudulent conveyance legislation and criminal law sanctions.

   (d) The extent of the deterrent value of bulk sales legislation is also questionable, especially in light of the deterrent effect of fraudulent conveyance legislation and applicable provisions of the *Criminal Code*.

   (e) The repeal of bulk sales legislation in British Columbia has been without adverse consequence, and many other jurisdictions, including the United Kingdom, have never adopted such laws.

B. CONCLUSIONS AND RECOMMENDATIONS

In reaching our final recommendations, we have considered the costs and benefits of implementing a bulk sales statute which would meet the unique objectives for which the law was originally intended; other legal and economic factors which impinge upon this analysis; and the views of representatives of the business, legal and credit communities. On balance, we are of the opinion

that the benefits of maintaining a viable bulk sales Act are outweighed by the costs. This, taken together with the questionable need for bulk sales law both from a practical and legal point of view, lead us to recommend:

RECOMMENDATION

That The Bulk Sales Act should be repealed and no scheme should be implemented to replace it.

C. CONSIDERATIONS UPON REPEAL

The repeal of *The Bulk Sales Act* would put Manitoba out of step with the other provinces in the country, with the exception of British Columbia, and would be an abandonment of the generally accepted goal of uniformity of laws. We believe that the reasons for repeal of bulk sales legislation, however, override the goal of uniformity. The presence of bulk sales statutes in other jurisdictions should not pose a problem as in the many other instances where the laws between provinces vary, the question of applicable law in the interprovincial bulk sale context will be resolved according to the usual conflict of laws principles.

Specific reference to *The Bulk Sales Act* is made in several other Manitoba statutes. Upon repeal of the Act, these references may be deleted without consequence[6] except in the case of *The Retail Sales Tax Act*.[7] This Act adopts the definition of a bulk sale contained in *The Bulk Sales Act* for purposes of collecting taxes upon such a sale. With the repeal of *The Bulk Sales Act*, a definition of "bulk sale" would have to be incorporated directly into *The Retail Sales Tax Act*.

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[6] *The Cooperatives Act*, C.C.S.M. c. C223, s. 144(4); *The Machinery and Farm Equipment Act*, C.C.S.M. c. F40, s. 34(13); *The Natural Gas Supply Act*, C.C.S.M. c. N15, s. 27(2); *The Credit Union and Caisses Populaires Act*, C.C.S.M. c. C301, s. 126(4).

[7] *The Retail Sales Tax Act*, C.C.S.M. c. R130, s. 8(1)-(3).

This is a Report pursuant to section 5(2) of *The Law Reform Commission Act*, signed this 21st day of December 1988.

Clifford H.C. Edwards, Chairman

John C. Irvine, Commissioner

Gerald O. Jewers, Commissioner

Eleanor R. Dawson, Commissioner

Pearl K. McGonigal, Commissioner

CHAPTER B100

THE BULK SALES ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Definitions.

1 In this Act,

"creditor" means a person to whom the vendor of stock is indebted, whether or not the debt is due, and includes a surety and the endorser of a promissory note or bill of exchange who would, upon payment by him of the debt, promissory note or bill of exchange in respect of which the suretyship was entered into or the endorsement was given, become a creditor of such vendor: ("créancier")

"proceeds of the sale" includes the purchase price or consideration payable to the vendor, or passing from the purchaser to the vendor, on a sale in bulk, and the moneys realized by a trustee under a security, or by the sale or other disposition of any property, coming into his hands as the consideration, or part of the consideration, for the sale: ("produit de la vente")

"purchaser" includes a person who gives to a vendor real or personal property in barter or exchange for a stock in bulk; ("acheteur")

"sale", whether used alone or in the expression "sale in bulk", includes a transfer, conveyance, barter or exchange and an agreement to sell, transfer, convey, barter or exchange; ("vente")

CHAPITRE B100

LOI SUR LES VENTES EN BLOC

SA MAJESTÉ, sur l'avis et du consentement de l'Assemblée législative du Manitoba, édicte :

Définitions

1 Les définitions qui suivent s'appliquent à la présente loi.

"acheteur" Est assimilée à l'acheteur la personne qui donne à un vendeur des biens réels ou personnels en troc ou en échange d'un stock en bloc. ("purchaser")

"créancier" Personne envers laquelle le vendeur de stock est endetté, que la créance soit exigible ou non, et s'entend également d'une caution et de l'endosseur d'un billet à ordre ou d'une lettre de change qui, sur paiement de la créance, du billet à ordre ou de la lettre de change qui a donné lieu au cautionnement ou à l'endossement, deviendrait un créancier de ce vendeur. ("creditor")

"produit de la vente" Sont assimilés au produit de la vente le prix d'achat ou la contrepartie payable au vendeur ou passant de l'acheteur au vendeur à l'occasion d'une vente en bloc ainsi que les sommes réalisées par un syndic en vertu d'une garantie, ou par la vente ou toute autre aliénation d'un bien qui vient à se trouver en sa possession à titre de contrepartie totale ou partielle de la vente. ("proceeds of the sale")

"sale in bulk" means a sale of a stock, or part thereof, out of the usual course of business or trade of the vendor or of substantially the entire stock of the vendor, or of an interest in the business of the vendor; ("vente en bloc")

"stock" means
(a) stock of goods, wares, merchandise or chattels ordinarily the subject of trade and commerce;
(b) the goods, wares, merchandise or chattels in which a person trades, or that he produces or that are the output of, or with which he carries on, a business, trade or occupation; ("stock")

"stock in bulk" means any stock or portion thereof that is the subject of a sale in bulk; ("stock en bloc")

"trustee" means an authorized trustee under the Bankruptcy Act (Canada) appointed for the bankruptcy district wherein the stock of the vendor or some part thereof is located, or the vendor's business or trade or some part thereof is carried on at the time of the sale in bulk thereof; or any person named as trustee by the vendor or by the creditors of the vendor in their written consent to a sale in bulk; or any person appointed as trustee under section 13; ("syndic")

"vendor" includes a person who barters or exchanges stock in bulk with another person for other property, real or personal. ("vendeur")

Persons to whom this Act applies.

2 This Act applies only to sales in bulk by,

"stock"
a) Stock d'objets, de denrées, de marchandises ou de biens personnels qui font habituellement l'objet du commerce;
b) objets, denrées, marchandises ou biens personnels dont une personne fait commerce ou qu'elle produit, ou qui proviennent de son entreprise, de son commerce ou de sa profession, ou avec lesquels elle exerce une entreprise, un commerce ou une profession. ("stock")

"stock en bloc" Tout stock ou toute partie de stock qui fait l'objet d'une vente en bloc. ("stock in bulk")

"syndic" Syndic autorisé en application de la Loi sur la faillite (Canada), nommé pour le district de faillite où est situé le stock du vendeur ou une partie de ce stock ou dans lequel le vendeur exerce au moment de la vente en bloc la totalité ou une partie de son commerce ou de son entreprise; ce terme désigne également toute personne désignée comme syndic par le vendeur ou par ses créanciers donnant leur consentement écrit à une vente en bloc ou toute personne désignée comme syndic en application de l'article 13. ("trustee")

"vendeur" Est assimilée au vendeur la personne qui troque ou échange un stock en bloc avec une autre personne contre d'autres biens réels ou personnels. ("vendor")

"vente" S'entend en outre, que le terme soit employé seul ou dans l'expression "vente en bloc", d'un transfert, d'un troc ou d'un échangeainsi que d'un contrat de vente, de transfert, de troc ou d'échange; " vendre" a une signification équivalente. ("sale")

"vente en bloc" La vente d'un stock ou d'une partie de ce stock effectuée en dehors du cadre habituel de l'entreprise ou du commerce du vendeur ou la vente de la quasi-totalité du stock du vendeur ou d'un intérêt dans l'entreprise de ce dernier. ("sale in bulk")

Personnes visées par la présente loi

2 La présente loi ne s'applique qu'aux ventes en bloc effectuées :

(a) persons who, as their ostensible occupation or part thereof, buy and sell goods, wares or merchandise ordinarily the subject of trade and commerce;
(b) commission merchants;
(c) manufacturers;
(d) proprietors of hotels, rooming houses, restaurants, motor vehicle service stations, oil or gasoline stations or machine shops.

a) par les personnes dont la totalité ou une partie de la profession notoire consiste à acheter et à vendre des objets, denrées ou marchandises qui font habituellement l'objet du commerce;
b) par les commissionnaires;
c) par les fabricants;
d) par les propriétaires d'hôtels, de maisons de rapport, de restaurants, de stations service, de stations d'essence ou d'ateliers de construction mécanique.

Scope of Act.
3 Nothing in this Act applies to, or affects, a sale by an executor, administrator, receiver, assignee or trustee for the benefit of creditors, authorized trustee under the Bankruptcy Act (Canada), official receiver or liquidator, a public official acting under judicial process, or a trader or merchant selling exclusively by wholesale, or an assignment by a trader or merchant for the general benefit of his creditors.

Champ d'application de la loi
3 Aucune disposition de la présente loi ne vise et ne concerne ni une vente effectuée par un exécuteur testamentaire, un administrateur, un séquestre, un cessionnaire ou un syndic dans l'intérêt des créanciers, par un syndic autorisé en application de la Loi sur la faillite (Canada), par un séquestre officiel ou un liquidateur, par un fonctionnaire agissant en vertu d'un acte de procédure judiciaire, par un commerçant ou un marchand vendant exclusivement en gros, ni une cession faite par un commerçant ou un marchand dans l'intérêt général de ses créanciers.

Statement of creditors to be furnished.
4(1) Except as otherwise provided in this Act, a purchaser of stock in bulk, before paying to the vendor any part of the purchase price or giving a promissory note or security for the purchase price or part thereof, or executing a transfer, conveyance or encumbrance of property, shall demand of and receive from the vendor, and a vendor of stock in bulk shall furnish to the purchaser, a written statement verified by the statutory declaration of the vendor or his duly authorized agent or, if the vendor is a corporation, by the statutory declaration of its president, vice-president, secretary-treasurer or manager.

Relevé des créances
4(1) Sauf disposition contraire de la présente loi, avant de verser au vendeur toute portion du prix d'achat, de donner un billet à ordre ou une garantie en paiement de la totalité ou d'une partie du prix d'achat ou de passer un acte de transfert de biens ou de grever des biens d'une charge,l'acheteur d'un stock en bloc doit exiger et recevoir du vendeur, qui doit le lui fournir, un relevé écrit des créances attesté par une déclaration solennelle du vendeur ou de son représentant dûment autorisé ou, si le vendeur est une corporation, par une déclaration solennelle du président, du vice-président, du secrétaire-trésorier ou du directeur.

Contents of statement.
4(2) The statement shall contain the names and addresses of the creditors of the vendor, together with the amount of the indebtedness or liability due, owing, payable or accruing due or to become due and payable by the vendor to each of the creditors.

Contenu du relevé
4(2) Le relevé doit contenir les noms et adresses des créanciers du vendeur ainsi que le montant de la dette ou de l'obligation échue, due, payable, à échoir ou à devenir échue et payable par le vendeur à chacun de ses créanciers.

Form of statement.
4(3) The statement and declaration may be in the form set forth in Schedule A.

Payment on account of purchase price.
4(4) A purchaser may, before obtaining the statement, pay to the vendor a sum not exceeding $50. on account of the purchase price.

No preference or priority.
4(5) From and after the furnishing of the statement and declaration, no preference or priority shall be obtainable by any creditor of the vendor in respect of the stock in bulk or the proceeds of sale thereof by attachment, garnishment proceedings, contract or otherwise.

Payment of creditors in full.
5 Before the completion of a sale in bulk,
(a) the claims of the creditors of the vendor as shown by the written statement shall be paid in full; or
(b) the vendor shall produce and deliver to the purchaser a written waiver of the provisions of this Act, other than the provisions contained in section 4, from creditors of the vendor representing not less than 60% in number and amount of the claims exceeding $50. as shown by the written statement, which waiver may be in the form set forth in Schedule B; or
(c) the vendor shall produce and deliver to the purchaser the written consent thereto of creditors of the vendor, representing not less than 60% in number and amount of the claims exceeding $50. as shown by the written statement.

When proceeds of sale to be paid over to trustee.
6 Where a sale in bulk is made with the written consent of the creditors of the vendor under clause 5(c), the purchaser shall pay, deliver or convey the entire proceeds of the sale to the person named as trustee by the creditors in the written consent, or, if no trustee is named therein, to the trustee named by the vendor or appointed under section 12, to be dealt with as provided by section 7.

Forme du relevé
4(3) Le relevé et la déclaration peuvent être faits selon la formule prévue à l'annexe A.

Paiement à valoir sur le prix d'achat
4(4) L'acheteur peut, avant d'obtenir le relevé, verser au vendeur une somme de 50 $ au plus à valoir sur le prix d'achat.

Aucun droit de préférence ou de priorité
4(5) À partir du moment où le relevé et la déclaration sont fournis, un créancier du vendeur ne peut obtenir aucun droit de préférence ou de priorité sur le stock en bloc ou sur le produit de la vente de ce stock par voie de saisie, de saisie-arrêt, de contrat ou de toute autre façon.

Paiement intégral des créances
5 Avant la réalisation d'une vente en bloc :
a) ou bien les créances des créanciers du vendeur indiquées dans le relevé écrit doivent être intégralement réglées;
b) ou bien le vendeur doit produire et remettre à l'acheteur une renonciation écrite au bénéfice des dispositions de la présente loi, à l'exclusion de l'article 4, provenant de ses créanciers représentant au moins 60 %, en nombre et en valeur des créances dépassant 50 $ mentionnées dans le relevé écrit, cette renonciation pouvant être faite selon la formule prévue à l'annexe B;
c) ou bien le vendeur doit produire et remettre à l'acheteur le consentement écrit de ses créanciers représentant au moins 60 %, en nombre et en valeur, des créances de plus de 50 $ mentionnées dans le relevé écrit.

Produit de la vente versé au syndic
6 Lorsqu'une vente en bloc est réalisée avec le consentement écrit des créanciers du vendeur donné en application de l'alinéa 5c), l'acheteur doit verser, remettre ou transférer à la personne désignée comme syndic par les créanciers dans le consentement écrit ou, si aucun syndic n'y a été désigné, à celui désigné par le vendeur ou nommé en application de l'article 12, la totalité du produit de la vente qui doit être affecté de la façon prévue à l'article 7.

Distribution of proceeds of sale.

7(1) Where the proceeds of the sale are paid, delivered or conveyed to a trustee under section 6, the trustee shall be a trustee for the general benefit of the creditors of the vendor and shall distribute the proceeds of the sale among the creditors of the vendor in proportion to the amounts of their claims as shown by the written statement, and such other creditors of the vendor as file claims with the trustee in accordance with the Bankruptcy Act (Canada).

Method of distribution.

7(2) The distribution shall be made in like manner as moneys are distributed by a trustee under the Bankruptcy Act (Canada) and in making the distribution all creditors' claims shall be proved in like manner, are subject to like contestation, and entitled to like priorities as in the case of a distribution under that Act.

Rights and liabilities.

7(3) The creditors, vendor and trustee have in all respects the same rights, liabilities and powers as the creditors, authorized assignor, and authorized trustee respectively have under the Bankruptcy Act (Canada), the vendor being deemed for such purpose to be an authorized assignor under that Act, and the trustee an authorized trustee under that Act, and the priorities of creditors shall be determined as of the date of the completion of the sale.

Publication of notice before distribution.

7(4) Before making distribution,

(a) the trustee shall cause a notice thereof to be published once in The Manitoba Gazette and in not fewer than two issues of a newspaper published in the province and having a circulation in the locality in which the stock in bulk was situated at the time of the sale; and

(b) a period of 14 days shall elapse after the last of such publications.

Répartition du produit de la vente

7(1) Lorsque le produit de la vente est versé, remis ou transféré à un syndic en application de l'article 6, le syndic a la qualité d'un syndic dans l'intérêt général des créanciers du vendeur et doit répartir le produit de la vente entre les créanciers du vendeur au prorata de leurs créances dont le montant est indiqué dans le relevé écrit ainsi qu'entre les autres créanciers du vendeur qui déposent leurs créances entre les mains du syndic conformément à la Loi sur la faillite (Canada).

Méthode de répartition

7(2) La répartition se fait de la même manière que dans le cas de la répartition de sommes d'argent par un syndic sous le régime de la Loi sur la faillite (Canada). Pour la répartition, toutes les créances des créanciers doivent être prouvées de la même façon et sont susceptibles d'être contestées de la même manière et bénéficient des mêmes priorités que dans le cas d'une répartition sous le régime de la Loi sur la faillite (Canada).

Droits et obligations

7(3) Les créanciers, le vendeur et le syndic ont, à tous égards, les mêmes droits, obligations et pouvoirs qu'ont respectivement les créanciers, le cédant autorisé et le syndic autorisé sous le régime de la Loi sur la faillite (Canada), le vendeur étant réputé à cette fin être un cédant autorisé en application de cette loi et le syndic étant réputé être un syndic autorisé en application de cette loi; l'ordre de préférence entre les créanciers doit être déterminé au jour de la réalisation de la vente.

Publication d'un avis avant la répartition

7(4) Avant de procéder à la répartition :

a) le syndic doit en donner avis dans un numéro de la Gazette du Manitoba et dans deux numéros au moins d'un journal publié dans la province et diffusé dans la localité où était situé le stock en bloc au moment de la vente;

b) il doit s'écouler un délai de 14 jours après la dernière de ces publications.

No other notice.
7(5) It is not necessary to publish any advertisement or notice of the distribution other than as provided in subsection (4).

Fees of trustee.
8 The fees or commission of the trustee shall not exceed 3% of the proceeds of the sale that come to his hands; and, in the absence of an agreement by the vendor to the contrary, the fees or commission, together with any disbursements made by the trustee, shall be paid by being deducted out of the moneys to be received by the creditors and shall not be charged to the vendor.

Sale void against creditors unless Act complied with.
9(1) A sale in bulk in respect of which this Act has not been complied with shall be deemed to be fraudulent and void as against the creditors of the vendor; and every payment made on account of the purchase price, and every delivery of a note or other security therefor, and every transfer, conveyance and encumbrance of property by the purchaser shall be deemed to be fraudulent and void, as between the purchaser and the creditors of the vendor.

Liability of purchaser to account.
9(2) If, however, the purchaser has received or taken possession of the stock in bulk, or any part thereof, he is personally liable to account to the creditors of the vendor for the value thereof including all moneys, security or property realized or taken by him from, out of, or on account of the sale or other disposition by him of the stock in bulk, or any part thereof.

Estoppel of purchaser.
9(3) In an action brought, or proceedings had or taken, by a creditor of the vendor within the time limited by section 11 to set aside or have declared void a sale in bulk, or in the event of a seizure of the stock in the possession of the purchaser, or some part thereof, under judicial process issued by or on behalf of a creditor of the vendor within such period, the purchaser shall be

Autre avis
7(5) Il n'est pas nécessaire de publier d'autre annonce ou avis que celui prévu au paragraphe (4).

Honoraires du syndic
8 Les honoraires ou la commission du syndic ne doivent pas dépasser 3 % du produit de la vente qui vient à se trouver entre ses mains et, à défaut de convention contraire de la part du vendeur, les honoraires ou la commission du syndic, auxquels s'ajoutent les débours qu'il a faits, doivent être payés par déduction sur les sommes que doivent recevoir les créanciers et ne sont pas imputés au vendeur.

Vente nulle à l'égard des créanciers
9(1) Est réputée frauduleuse et nulle à l'égard des créanciers du vendeur la vente en bloc qui n'a pas respecté les dispositions de la présente loi; tout paiement à valoir sur le prix d'achat, toute remise d'un billet ou d'une autre garantie en paiement du prix ainsi que tout transfert de biens par l'acheteur ou toute charge dont il grève les biens sont réputés frauduleux et nuls entre l'acheteur et les créanciers du vendeur.

Acheteur comptable aux créanciers
9(2) Toutefois, si l'acheteur a reçu la totalité ou une partie du stock en bloc ou en a pris possession, il est personnellement tenu de rendre compte aux créanciers de la valeur de ce stock ou de cette partie de stock, y compris de l'ensemble des sommes, garanties ou biens qu'il a réalisés ou obtenus par la vente ou toute autre aliénation qu'il a faite de la totalité ou d'une partie du stock en bloc.

Préclusion
9(3) Dans une action ou procédure en annulation ou déclaration de nullité d'une vente en bloc intentée ou engagée par un créancier du vendeur dans le délai fixé à l'article 11 ou dans le cas d'une saisie du stock en possession de l'acheteur ou d'une partie de ce stock pratiquée en vertu d'un acte de procédure judiciaire établi par un créancier du vendeur ou au nom de ce créancier dans ce délai.

estopped from denying that the stock in his possession at the time of the action, proceedings or seizure is the stock purchased or received by him from the vendor.

Rights of creditors of purchaser.
9(4) If the stock then in the possession of the purchaser, or some part thereof, was in fact purchased by him subsequent to the sale in bulk from a person other than the vendor of the stock in bulk and has not been paid for in full, the creditors of the purchaser, to the extent of the amounts owing to them for the goods so supplied, are entitled to share with the creditors of the vendor in the amount realized on the sale or other disposition of the stock in the possession of the purchaser at the time of the action, proceedings or seizure, in like manner and within the same time as if they were creditors of the vendor.

Burden of proof on purchaser.
10 In a proceeding wherein a sale in bulk is attacked or comes in question, whether directly or collaterally, the burden of proof that this Act has been complied with is upon the person upholding the sale in bulk.

Limitations.
11 No action shall be brought or proceedings had or taken to set aside or have declared void a sale in bulk for failure to comply with this Act, unless the action is brought or proceedings had or taken within six months from the date of the completion of the sale.

Appointment of trustee by judge.
12 Upon the application of a person interested, if the creditors of the vendor in their written consent to a sale in bulk have not named a trustee and the vendor has not named one, a judge of the Court of Queen's Bench, shall appoint a trustee and fix the security, if any, to be given by him.

Uniform construction.
13 This Act shall be so interpreted and construed as to effect its general purpose of making uniform the law of the provinces that enact it.

l'acheteur est empêché de nier que le stock qu'il a en sa possession au moment de l'action, de la procédure ou de la saisie est celui qu'il a acquis ou reçu du vendeur.

Droits des créanciers de l'acheteur
9(4) Si le stock ou une partie du stock en possession de l'acheteur a, de fait, été acquis par ce dernier, après la vente en bloc, d'une personne autre que le vendeur du stock en bloc et que le prix de ce stock ou d'une partie de ce stock n'a pas été intégralement payé, les créanciers de l'acheteur ont le droit, jusqu'à concurrence des sommes qui leur sont dues pour les objets fournis, de prendre part, avec les créanciers du vendeur, à la répartition des sommes réalisées par la vente ou toute autre aliénation du stock en possession de l'acheteur au moment de l'action, de la procédure ou de la saisie, de la même façon et dans les mêmes délais que s'ils étaient des créanciers du vendeur.

Charge de la preuve
10 Dans une procédure où une vente en bloc est attaquée ou contestée, que ce soit directement ou accessoirement, la charge de prouver qu'elle est conforme aux dispositions de la présente loi incombe à la personne qui en soutient la validité.

Prescription des actions
11 Les actions ou procédures en annulation ou déclaration de nullité d'une vente en bloc pour défaut de conformité aux dispositions de la présente loi se prescrivent à l'expiration d'un délai de six mois à partir de la date de réalisation de la vente.

Nomination d'un syndic par un juge
12 Sur demande de toute personne intéressée et à défaut par les créanciers du vendeur d'avoir désigné un syndic dans le consentement écrit à une vente en bloc et à défaut également par le vendeur d'en avoir désigné un, un juge de la Cour du Banc de la Reine doit nommer un syndic et fixer le montant de la garantie que ce dernier doit, le cas échéant, fournir.

Interprétation uniforme
13 La présente loi doit être interprétée de façon à donner plein effet à son intention générale d'uniformisation du droit des provinces qui l'édictent.

SCHEDULE A

Statement and Declaration
Statement showing names and addresses of all creditors of:

Name of Creditors	Post Office Address	Nature of Indebtedness	Amount	When Due

I, , of in the Province of Manitoba, do solemnly declare that the above is a true and correct statement of the names and addresses of all creditors of - , and shows correctly the amount of indebtedness or liability due, owing, payable or accruing due or to become due and payable by to each of said creditors. (If the declaration is made by an agent, add:

I am the duly authorized agent of the vendor and have a personal knowledge of the matters herein declared to).

(Or, if the vendor is a corporation)

I, , of in the Province of Manitoba, do solemnly declare that the above is a true and correct statement of the names and addresses of all the creditors of the (name of corporation) and shows correctly the amount of the indebtedness or liability due, owing, payable or accruing due, or to become due, and payable by the corporation to each of the said creditors, and that I am the of the said corporation, and have a personal knowledge of the matters herein declared to.

And I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath, and by virtue of The Canada Evidence Act.

Declared before me at the of , in the Province of Manitoba, this day of , 19 .

A Commissioner, etc.

ANNEXE A

Relevé et déclaration
Relevé indiquant les noms et adresses de tous les créanciers de:

Nom des créanciers	Adresse postale	Nature de la dette	Montant	Échéance

Je soussigné, , de dans la province du Manitoba, déclare solennellement que ce qui est présenté ci-dessus est un relevé fidèle et exact des noms et adresses de toûs les créanciers de et indique correctement le montant de la dette ou de l'obligation échue, due, payable, à échoir ou à devenir échue et payable par à chacun desdits créanciers. (Si la déclaration est faite par un représentant, ajouter :
Je suis le représentant dûment autorisé du vendeur et j'ai une connaissance personnelle des faits ci-déclarés).
(Ou, si le vendeur est une corporation)

Je soussigné, , de dans la province du Manitoba, déclare solennellement que ce qui est présenté ci-dessus est un relevé fidèle et exact des noms et adresses de tous les créanciers de la (nom de la corporation) et indique correctement le montant de la dette ou de l'obligation échue, due, payable, à échoir ou à devenir échue et payable par la corporation à chacun desdits créanciers, et que je suis le de ladite corporation, et que j'ai une connaissance personnelle des faits ci-déclarés.
Je fais la présente déclaration en la croyant consciencieusement être vraie et sachant qu'elle a la même force et produit le même effet que si elle était faite sous serment, et en application de la Loi sur la preuve au Canada.
Déclaré devant moi dans le (la) de dans la province du Manitoba, ce 19 .
Commissaire, etc.

SCHEDULE B

Waiver

We, the undersigned creditors of of in the Province of Manitoba, do hereby waive the provisions of The Bulk Sales Act, of the Province of Manitoba in so far as that Act would apply to, affect or cause to make fraudulent or void the sale in bulk by the said of his stock of goods, wares, merchandise and fixtures, or part thereof, or an interest in his business (as the case may be) to of in the Province of Manitoba and we do hereby admit having received notice of the intended sale and agree not to disturb, dispute or question the validity of the said sale in any way under the provisions of the said Act.

Dated this day of , 19 .

Signed in the presence of .

ANNEXE B

Renonciation

Nous, les créanciers soussignés de de dans la province du Manitoba, renonçons par le présent acte au bénéfice des dispositions de la Loi sur les ventes en bloc de la province du Manitoba dans la mesure où ces dispositions viseraient, modifieraient, rendraient frauduleuse ou nulle la vente en bloc par ledit de la totalité ou d'une partie de son stock d'objets, de denrées, de marchandises et d'objets fixés à demeure ou d'une partie de ceux-ci ou d'un intérêt dans son entreprise (selon le cas) à de dans la province du Manitoba, et nous reconnaissons par le présent acte avoir reçu avis de la vente projetée et nous nous engageons à ne pas nuire à la validité de ladite vente, à ne pas la contester et à ne pas la mettre en doute d'aucune façon en application des dispositions de ladite loi.

Fait ce 19 .

Signé en la présence de

APPENDIX B

RESPONDENTS TO OUR DISCUSSION PAPER

E. Arthur Braid, Q.C. - Professor of Law, Faculty of Law, Universty of Manitoba

Fred M. Catzman, Q.C. - Lawyer, Catzman and Wahl, Toronto

Mark D. Chernin - Stagiaire, MacKenzie Gervais, Montreal

E. Arthur Close - Chairman, Law Reform Commission of British Columbia

Hon. Mr. Justice W.R. DeGraves - Manitoba Court of Queen's Bench

Steven L. Harris - Professor of Law, University of Illinois (Urbana-Champaign)

Manitoba Bar Association - Business Law Subsection

S.R. Moshenko - Director, Retail Sales Tax Branch, Winnipeg

Donald P. Rapson - Assistant General Counsel, The CIT Group, Livingston, New Jersey

Tim Rattenbury - Coordinator of Legal Research, New Brunswick Law Reform Branch of the Office of the Attorney General

Douglas Steinburg - Lawyer, Newman MacLean, Winnipeg

David Voechting - Lawyer, Aikens, MacAulay & Thorvaldson, Winnipeg

D.M. Wallace - Manager, Capital Resources Division, Credit Union Central of Manitoba

Ken A. Zealand - President, Manitoba Insolvency Association Inc.