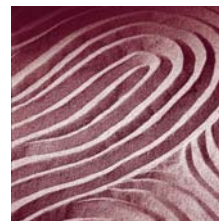
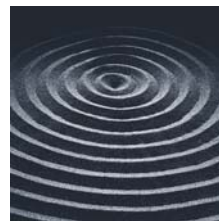


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It's Time To Repeal The Bulk Sales Act

Presented by:

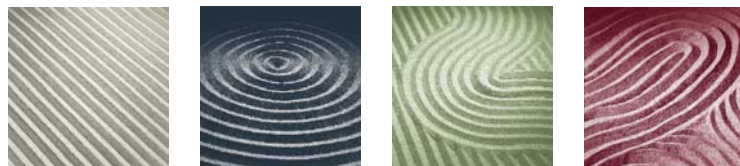
Jennifer E. Babe, Partner,
Miller Thomson LLP

May 16, 2005

MILLER THOMSON LLP

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IT'S TIME TO REPEAL THE BULK SALES ACT

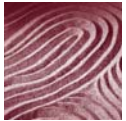
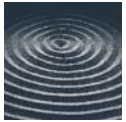
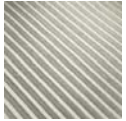


By: Jennifer E. Babe

May 16, 2005

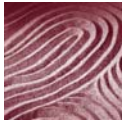
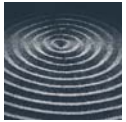
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Purpose of the Ontario Bulk Sales Act ("BSA")

- The purpose is to protect the secured and unsecured creditors from a vendor/debtor selling its assets and leaving its creditors unpaid
- But in the real world, this goal is not fully realized as the BSA is:
 - forgotten by counsel and purchasers
 - waived by the hasty and risk tolerant
 - not applicable to the insolvent business where assets are being liquidated

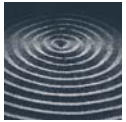


Purpose of the Ontario Bulk Sales Act ("BSA") (cont'd)

- The BSA is an expense added to transactions, if the parties either comply or analyze the risk and waive its application



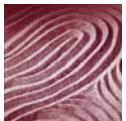
What is a “Sale in Bulk”?



- I’m not always sure, but it is not just a sale of tangibles out of the ordinary course



- Lawyers forget the broad application of the BSA to:



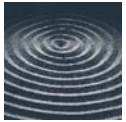
a) intangibles

Re: Excelsior Brands Ltd. v. Itafina et al (1995) 24 O.R. (3d) 801 (Ont. Ct. Gen. Div)

- sale of packaging inventory, goodwill, supplies, distribution and customer lists and art work;
- when the sale of the trademark was coupled with the packaging, it was a “chattel” within the meaning of “stock”.



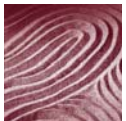
What is a “Sale in Bulk”? (cont’d)



b) real estate:



- “stock in bulk” means stock or part thereof that is the subject of a sale in bulk and all other property, real and personal, that together with stock is the subject of a sale in bulk;



Only Ontario and Newfoundland & Labrador have a Bulk Sales Act

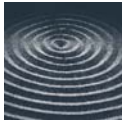
Bulk Sales Legislation

Alberta	<i>Bulk Sales Act, R.S.A. 1980, c. B-13</i>	Repealed effective July 8, 1992
British Columbia	<i>Sale of Goods in Bulk, R.S.B.C. 1979, c. 371</i>	Repealed effective May 17, 1985
Manitoba	<i>Bulk Sales Act, R.S.M. 1987, c. B100</i>	Repealed effective June 24, 1992
New Brunswick	<i>Bulk Sales Act, R.S.N.B. 1973, c. B-9</i>	Repealed effective August 1, 2004
Newfoundland	<i>Bulk Sales Act, R.S.N.L. 1990, c. B-11</i>	<u>In force</u>
NWT	<i>Bulk Sales Act, R.S.N.W.T. 1988, c. B-3</i>	Repealed effective April 18, 1991
Nova Scotia	<i>Bulk Sales Act, R.S.N.S. 1989, c. 48</i>	Repealed effective Nov. 3, 1997
Nunavut	No bulk sales legislation	
Ontario	<i>Bulk Sales Act, R.S.O. 1990, c. B.14</i>	<u>In force</u>
Prince Edward Island	<i>Bulk Sales Act, R.S.P.E.I. 1988, c. B-6</i>	Repealed effective April 27, 1998
Quebec	Articles 1767 to 1778 of <i>Civil Code</i>	Repealed effective June 13, 2002 [Bulk sales made before January 1, 1994 continue to be governed by provisions of articles 1569a and following of the former Code; see S.Q., 1992, c. 57, s. 101]
Saskatchewan	<i>Bulk Sales Act, R.S.S. 1978, c. B-9</i>	Repealed effective August 24, 1992
Yukon	<i>Bulk Sales Act, R.S.Y. 1986, c. 14</i>	Repealed effective Dec. 17, 1992

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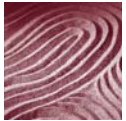
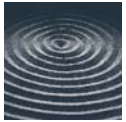
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USA Situation

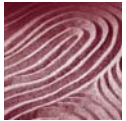
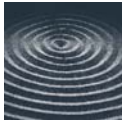


- There are both the original UCC Article 6 on Bulk Transfers, and Revised Article 6 created in 1989
- As at March 15, 2004, 31 states had repealed Article 6 and 19 states and the District of Columbia have either Article 6 or Revised Article 6
- “For a treatise writer, Article 6 is the article from hell...We are persuaded by the arguments for repeal of Article 6...We look forward to the next edition where we can omit any consideration of Article 6”

See: J. White & R. Summers, Uniform Commercial Code. (4th Edition, 1995: West-Publishing) at pp. 215 and 216.

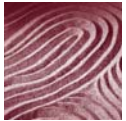
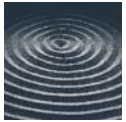
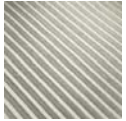


- Who is lobbying for re-instatement of these Bulk Sales statutes in either Canada or the U.S.A.?
- No one as far as I can tell



Supplier Remedies have expanded:

- Since the BSA was passed in Ontario in 1917 suppliers have other resources and remedies:
 - Better credit investigation (e.g. credit reporting agencies; PPSA searches)
 - Suppliers may readily take security in all 13 jurisdictions of Canada (PMSI security and the *Civil Code* has lease and conditional sale registration)
 - 30 day goods recovery under BIA
 - Oppression remedies, fraudulent preferences, BIA reviewable transactions

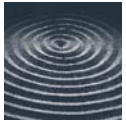


The BSA is more honoured in the breach:

- Exemption orders if the vendor is very creditworthy
- Waivers and indemnities in many deals
- If vendor is not creditworthy, then parties go outside the Act:
 - the quick private receivership appointment and sale;
 - the bankruptcy and sale; and
 - the court ordered sale and vesting order
- Lawyer disciplined for swearing affidavit in advance, dated as of the closing date, and evidence was adduced in the hearing that this was a “common” practice to facilitate a closing



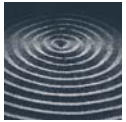
If the vendor is insolvent then:



- Re: Canadian Red Cross Society [1998] O.J. No. 3306; 5 C.B.R. (4th) 299 at page 317(Ont. Ct., Gen. Div.)
 - BSA exemption order granted where debtor under CCAA had \$8 billion in claims against it and the court determined the sale was advantageous to provide funds to pay claimants

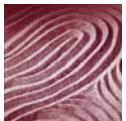


Even if you don't comply all is not lost:

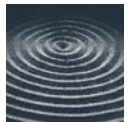


National Trust Co. v. H&R Block Canada Inc.

[2003] S.C.J. No. 70



- \$800,000 sale of largely goodwill and customer lists
- No compliance by purchaser with the BSA
- Sale price paid to 2 highest ranking secured creditors and the Supreme Court upheld the economic result

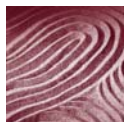
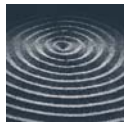


For more discussion on problem cases under the BSA see:

1. Jeff Carhart, “Bulk Sales by Insolvent Vendors – Some Recent Jurisprudence from the Canadian Red Cross Society CCAA Proceedings” (1999)
11 Comm. Insolvency Review 57
2. Jeff Carhart, “The Bulk Sales Act and the Decision in National Trust Co. v. H&R Block Canada Inc.”, (2005) 22 National Insolvency Review 1



For more discussion on problem cases under the BSA see: (cont'd)



3. Wayne Gray, “Has the Clock Run out on the Bulk Sales Act: Tax Time and Other Recent Cases” [2003] 82 C.B.R. 27
4. Wayne Gray, “Interpretation of Commercial Statutes in the Supreme Court of Canada: A Triumph of Pragmatism”, (2004) 26 S.C.L.R. (2d) 593, at p. 599