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Backgrounder

LRC 67—Report on Bulk Sales Legislation

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The *Sale of Goods in Bulk Act* was enacted early in the twentieth century with the aim of filling a gap in debtor–creditor legislation protecting unsecured creditors. At the time of its enactment, the federal government had exited the field of bankruptcy regulation, leaving the provinces straining to fill the void with whatever means they had at their disposal. One such tool was bulk sales legislation. A bulk sale is a transfer of all (or substantially all) of the assets of a business, outside the ordinary course of business. Bulk transfers were a means of enabling debtors to convert their assets into cash and disappear with the proceeds before their creditors learn of the transaction.

The report begins by providing some historical background to the origins of the Act. Reference is made first to the introduction of debtor–creditor legislation in the United States, followed by a brief summary of the historical development of the law in this area in Canada culminating in the present Act. In broad terms, the Act involves the purchaser obtaining, and the vendor furnishing, a sworn statement listing the vendor's creditors. The creditors must either consent to the sale, waive the protection of the Act, or be paid their claims. Where the purchaser and vendor do not comply with the Act, the sale is deemed to be fraudulent and void as against the creditors of the vendor.

The report then moves on to provide a more detailed examination of the Act and its application. In particular, the scope of the Act is looked at in terms of to whom it applies, who is excluded, and the type of transactions covered. Some of the key terms used in the Act are assessed as part of this process, with reference to pertinent case law. Also discussed are the obligations of the vendor (debtor) and the purchaser, the consequences of non-compliance, and proceedings to set aside a transaction.

Chapter four of the report contains an evaluation of the Act. It focuses first on the original objectives of the legislation and suggests that it was enacted to address two main concerns: (1) unduly increasing the cost to society of credit granting because of the high risk present; and (2) discouraging fraudulent dispositions of business assets, thereby improving the position of creditors. The report concludes that the impact of the Act in addressing these concerns has to a large degree been lessened over the years by modern commercial practices.

The evaluation then looks at a number of other issues including possible alternative protection for creditors through the *Fraudulent Conveyance Act* and the *Fraudulent Preference Act*, the criticism that the Act does not distinguish between solvent and insolvent debtors, thereby causing unnecessary expense and delay, and the failure of the Act to adequately lay down what information as a minimum must be given to a creditor.

The question of whether or not the Act should be repealed is addressed in chapter five. A number of arguments in favour of repeal are outlined. One such argument is that the Act is the product of conditions that no longer prevail. This argument is supported by reference to the lack of federal bankruptcy legislation and the primitive state of the credit information industry when the Act was conceived. It is also said that the Act is not efficient in protecting creditors, highlighting the fact that a determined fraudster would simply swear a false declaration that they have no creditors. Other arguments in favour of repeal point to the fact that the scope of the Act is irrational and that it is commercially disruptive in the sense that compliance can be both time-consuming and costly.

Three arguments for retaining the Act are examined. First, it is claimed that the Act does deter a significant number of fraudulent dispositions, despite criticism of its effectiveness. Second, the Act provides protection that is not available under other statutes and is unique in the sense that it creates a category of reviewable transactions which depends almost entirely upon objective criteria. Third, the Act provides protection that cannot be obtained privately or consensually.

In the final chapter of the report the commission sets out it recommendation. The conclusion reached is that the Act should be repealed. The reality appears to be that in modern commercial transactions, the business community does not generally depend upon the Act for security in extending credit, while vendors and purchasers tend to ignore and avoid compliance with the Act. It is felt that the repeal of the Act would result in a significant reduction in time, delay, and expense in the sale and purchase of assets.

Further Developments

See *Law Reform Amendment Act, 1985*, S.B.C. 1985, c. 10, s. 11 (repealing the *Sale of Goods in Bulk Act*, R.S.B.C. 1979, c. 371).