LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON
BULK SALES LEGISLATION

LRC 67

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The Law Reform Commission of British Columbia was established by the *Law Reform Commission* Act in 1969 and began functioning in 1970.

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TO THE HONOURABLE BRIAN R.D. SMITH, Q.C.,
ATTORNEY GENERAL OF THE PROVINCE OF BRITISH COLUMBIA:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON BULK SALES LEGISLATION

When a merchant wishes to make a sale of a major portion of his assets, out of the usual course of his business, that transaction will normally be one which must comply with the *Sale of Goods in Bulk Act*, R.S.B.C. 1979, c. 371. That Act imposes certain formalities on the transaction. The purchaser must demand a list of the vendor's creditors and, before the sale can be consummated, those creditors must either be paid or a requisite number of them must consent to the sale or waive the protection of the Act. Where the Act has not been complied with, the vendor's creditors may call upon the purchaser to account for the goods and any proceeds realized on their resale.

The *Sale of Goods in Bulk Act* is one of a number of statutes dealing with debtorcreditor relationships enacted around the turn of the century to fill the void created by the absence of federal bankruptcy legislation at that time. Its aim is to protect unsecured creditors, but this goal, to the extent that it is achieved at all, is realized only at the cost of significant commercial inconvenience and disruption. The Act is a response to the commercial needs and practices of a bygone era and in this Report its repeal is recommended.

CHAPTER I INTRODUCTION

A. General

The debtor who wishes to put his property beyond the reach of his creditors, or to deal with it to their detriment, is a familiar creature. He may seek to achieve his aims in a number of ways. He may concentrate his wealth in kinds of assets which may not be taken in execution. He may convey his property to a "friend" or relative, often with the expectation of its return or some other benefit in the future a fraudulent conveyance. He may use his assets to satisfy one "favoured" creditor to the disadvantage of the others a fraudulent preference. He may also convert his assets into a form which is easily concealed or removed from the jurisdiction a bulk sale.

The law views such conduct with disfavour. Discouraging and preventing fraudulent conveyances has been an active source of legislative activity for several hundred years. Modern examples of such legislation are certain provisions of the federal *Bankruptcy Act* and the provincial *Fraudulent Conveyance Act* and *Fraudulent Preference Act*. All are designed to deter fraudulent conduct by debtors and offer remedies to creditors where such conduct has occurred.The general scheme under such legislation is to protect the creditors of a transferor of goods by allowing them to "follow" the goods transferred and to subject those goods to their claims in those cases where the transferee has knowingly participated in a scheme to hinder or defraud them.

These statutes, however, do not protect creditors of a merchant or trader who, at one stroke, sells his entire assets for an adequate consideration to an innocent purchaser. Yet bulk transfers enable debtors to convert their assets into cash and to disappear with the proceeds before their creditors learn of the transaction. This is the kind of conduct which bulk sales legislation attempts to discourage.

In 1908, the first *Bulk Sales Act* was enacted in British Columbia to deal with the perceived problem of debtors seeking to defeat their creditors through bulk sales. A large amount of unsecured credit was extended to commercial debtors mainly on the strength of their "way of business" as security and it was the intent of the legislation to ensure that the creditors of a seller of goods in bulk would be protected against the disappearance of the vendor; the improper dissipation of the proceeds of the sale; or the improper liquidation of the assets, before their debts were satisfied. Specifically, the legislation provided that those extending credit should have protection through advance notice of the debtor's intentions to alter the ownership of the assets and through compliance with a number of statutory obligations by both vendor and purchaser. The current version of this legislation is entitled the *Sale of Goods in Bulk Act*. The full text of the Act is set out as an Appendix to this Report.

There are two ways in which bulk sales legislation supplements the protection available to creditors under bankruptcy legislation and fraudulent conveyance and preference legislation. First, creditors acting under the other legislation must prove fraudulent intent of some sort; this involves a subjective evaluation of the intentions of the vendor and, in some cases, of the purchaser. Bulk sales legislation, through the imposition of positive duties on the parties, substitutes compliance with objective statutory standards of behaviour as the relevant test. Second, under the other statutes, creditors may impeach fraudulent transactions only after the transfer has been completed. Bulk sales legislation offers a degree of protection before the transaction is complete.

In the earliest stages of our work on bulk sales legislation it was thought appropriate to consider it in the context of a larger project on "reviewable transactions" legislation. That study was to encompass not only bulk sales but also the *Fraudulent Conveyance Act*, the *Fraudulent Preference Act* and portions of the *Bankruptcy Act*. Research on these Acts has proceeded and, while it is far from complete, it has disclosed that quite different issues and problems arise under these various Acts. Consequently, the Commission concluded that it could safely proceed to consider the *Sale of Goods in Bulk Act* in isolation from the other Acts and that a separate project on this Act was desirable.

Research into the operation of the *Sale of Goods in Bulk Act* ripened into a Working Paper which we circulated for criticism and comment in March 1983. The Working Paper and the response it received are described in Chapter VI.

The balance of this chapter is devoted to a brief overview of the Act. Succeeding chapters examine its historical origins and its substantive provisions and operation. This is followed by an evaluation of the Act and a discussion of the desirability of its repeal. The Commission's final conclusions and recommendations are set out in Chapter VI.

B. An Overview of the Sale of Goods in Bulk Act

The scheme of the *Sale of Goods in Bulk Act* is to protect the creditors of a businessman who wishes to make a "sale in bulk" of his assets. Precisely what transactions fall within the Act is not easily stated. For present purposes it is sufficient to say that a major disposition of inventory or equipment by a merchant, which is out of the usual course of his business, will usually be caught by the Act.

If a transaction is within the Act, then certain duties are imposed on both the vendor and the purchaser. It is the duty of the purchaser to demand, and the vendor to give, a list identifying the vendor's creditors and the amounts owed to them. This list must be verified by affidavit.

Before the sale can be completed, one of the following three conditions must be satisfied:

(1) The claims of all creditors have been paid in full;
(2) At least 60 per cent of the creditors whose claims exceed $50 have provided a written waiver of the provisions of the Act; or
(3) A similar proportion of the creditors have consented to the sale.

If the condition which has been satisfied is the "consent" of the creditors (the third possibility), then the purchase price for the goods must be paid to a trustee who is then responsible for distributing the proceeds among the creditors. In other cases the purchase price may be paid directly to the vendor.

If the statutory conditions are satisfied, the sale is unimpeachable as against the purchaser. This is so even if the vendor has acted fraudulently in omitting creditors from the list. If the Act has not been complied with, however, and the purchaser failed either to receive the list or to ensure that the creditors had been paid or that the requisite number of waivers or consents had been obtained, then he is at peril.

In that case the Act provides that the sale is to be deemed fraudulent and void as against the vendor's creditors and the purchaser is liable to account to them for the goods or for any proceeds which he may have received on a further sale of the goods. These creditors may attack the sale either through seeking a declaration that it is void against them and that it be set aside, or by levying execution directly against the goods on the basis of a judgment obtained against the vendor. In any legal proceeding in which the validity of the sale is in issue, the burden of proof that the Act has been complied with is on the person seeking to uphold the sale.

The description set out above is a very simple outline. The substantive provisions of the Act and its application are discussed in greater detail in Chapter III and the brief description given above merely provides an overall perspective for the discussion which follows.

CHAPTER II HISTORICAL BACKGROUND

A. The American Background

Bulk sales legislation has its origins in the United States and was a direct response to a perceived inadequacy in the traditional common law remedies aimed at deterring fraudulent dispositions of property. Early legislation was described by an American author, Thomas Billig, in 1928 in the following terms:

> While great need existed for legislation to supplement the common law remedies of the late nineties, it is extremely doubtful if the state legislatures, upon their own initiative, would have rushed pellmell to the aid of the creditor class. However, 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. And behind these various state enactments lies the story of one of the most highly organized, and thoroughly efficient, nationwide lobbying campaigns ever conducted in the interests of one economic group. That group consisted of the credit department representatives of business houses scattered all over the United States, who were bound together in an organization called the National Association of Credit Men.

During the late nineteenth and early twentieth centuries, coinciding with the general growth of retailing and wholesaling operations associated with mass production and mass merchandising, there was a rapid increase in the value and volume of credit transactions. This created a climate for fraudulent conduct, described by J. Tregoe, first President of the National Association of Credit Men, in 1927, in the following terms:

> A favorite indoor sport of three decades ago with the fraudulently inclined debtor was to sell his stock in bulk, pocket the proceeds and laugh at his creditors. There was no way of reaching the debtor along criminal lines if he had broken no law, and the game could be played without fear of punishment whenever the debtor felt the urge of the deceitful method.

The Statute of 13 Elizabeth (an earlier version of the British Columbia Fraudulent Conveyance Act) had been adopted by most states, but the onerous requirement of proving fraudulent intent prompted credit grantors to seek better protection from the "evils" of fraudulent bulk sales dispositions.

A group known as The National Association of Credit Men was formed in the late 1890's and its first few years were devoted principally to lobbying Congress to enact federal bankruptcy laws. Upon achieving that goal, the Association embarked on an extensive campaign of promotion and publicity to secure passage of bulk sales legislation. This campaign was highly successful and in the period between 1898 and 1903 the majority of bulk sales statutes was passed. The statutes varied from state to state but were similar in prescribing specific conditions to be fulfilled by both purchaser and seller before the consummation of the sale. Vendors who knowingly made false statements were, in some Acts, deemed guilty of a criminal offence.

> With the bankruptcy question disposed of for the present, the matter of the adoption of laws regulating sales of stocks of goods in bulk is now the principal feature of the legislative work before the national association. We are pleased to report, even at this early period of the year, the introduction of measures on this subject in the legislatures of Massachusetts, Colorado, Indiana, Missouri, Alabama, and Kansas.
>
> quoted in Billig, ibid. at 83.

Louisiana was a pioneering jurisdiction in this area. In 1894 an act was passed "to define and punish certain misdemeanors in trade and commerce." The Act provided that both selling goods purchased on credit, with intent to defraud, and hiding or absconding from the state constituted misdemeanors.

The Act of 1894 was overtaken two years later by a new *Bulk Sales Act*. The Louisianna Statute of 1896 provided that it was a misdemeanour to purchase inventory in bulk without first obtaining a statement from the seller that the goods had been paid for.

This Act introduced the notion of a sworn statement of creditors and provided for civil consequences, but retained the criminal characteristics of the earlier Act. The purchaser's failure to obtain a sworn statement from the seller was deemed to be evidence of fraudulent intent leaving the purchaser open to civil as well as criminal proceedings.

The leading commercial jurisdiction, New York, passed bulk sales legislation in 1902 which provided that:

> Every sale of any portion of a stock of merchandise, other than in the ordinary course of trade in the regular and usual prosecution of the seller's business, or the sale of an entire stock of merchandise in bulk, shall be fraudulent and void as against the creditors of the seller, unless the seller and purchaser shall at least five days before the sale, make a full and detailed inventory, showing the quantity, and so far as possible with the exercise of reasonable diligence, the cost price to the seller of each article to be included in the sale, and unless such purchaser shall at least five days before the sale in good faith make full, explicit inquiry of the seller as to the name and place of residence or place of business of each and every creditor of the seller, and the amount owing each creditor, and unless the purchaser shall at least five days before the sale in good faith notify or cause to be notified personally or by registered mail each of the seller's creditors of whom the purchaser has knowledge, or can with the exercise of reasonable diligence acquire knowledge of such proposed sale, and of the stated cost price of merchandise to be sold, and of the price to be paid therefore by the purchaser. The seller shall at least five days before such sale file a truthful answer in writing to each and all of said inquiries.

Under this version of the legislation, noncompliance attracted no criminal penalty.

These early statutes met with significant opposition from the judiciary on the grounds that they were a violation of a constitutional guarantee of the power to deal freely with one's property, and many of the first statutes were held unconstitutional. In response, the Association of Credit Men organized and funded further expensive promotional campaigns and lobbied state legislatures to have the statutes amended to overcome constitutional difficulties. Their efforts were successful and in later years, after amendment, bulk sales statutes were universally upheld on constitutional grounds.

In 1905, in a case involving the constitutionality of the New York statute, it was stated:

> It is said that similar statutes, some of them much more drastic, have been adopted in twenty different states or jurisdictions. Twenty wrongs can never make one right. There is, moreover, a singular, not to say suspicious, coincidence in the time and substance of all this legislation. ... [M]ore than half of these statutes were enacted in 1903 and 1904, and nearly all of them since 1900. Statutes that are passed *pro bono publico* rarely sweep the country with such irrestible momentum, while much fantastic legislation has resulted from organized crusades upon legislatures by the advocates and supporters of special classes.

Bulk sales legislation has been part of American commercial law from the early years of the century and is now incorporated in Article 6 of the Uniform Commercial Code. The Code has been adopted by all but one of the states (Louisiana). While the legislation has generated a great deal of comment and criticism over the years, the underlying reasoning and need for bulk sales legislation have not been seriously challenged. The emphasis has been on amendments and revisions to make its application and operation more precise and detailed.

B. Canadian Historical Background

Bulk sales statutes are presently found in all ten provinces and both territories. The British Columbia Act had its origin in 1908 and, while revised and expanded on a number of occasions, its basic purpose and scope has changed little.

Its enactment reflects two main forces at work around the turn of this century: provincial activity in relation to insolvency and, following the example set in the United States, the lobbying activities of the Canadian credit industry.

The history of bulk sales legislation is intertwined with the the origins of other debtorcreditor legislation enacted around the turn of the century and with the insolvency law of the period. Before confederation, a number of the colonies which later became Canada moved to enact or declare in force certain Imperial bankruptcy legislation. In 1862 the Colony of Vancouver Island, for example, enacted *An Act to declare the law relative to Bankruptcy and Insolvency in Vancouver Island and its dependencies*, while British Columbia enacted *An Ordinance to amend the law relative to Bankruptcy and Insolvency in British Columbia* in 1865.

Those provincial insolvency laws remained in force until 1875 when the Parliament of Canada enacted the *Insolvent Act* which then occupied the field. But in 1880, five years after it was enacted, the *Insolvent Act* was repealed, leaving Canada bereft of bankruptcy legislation. It was only in 1919 that, after a legislative hiatus with respect to bankruptcy of almost 40 years (apart from provincial legislation), the Parliament of Canada enacted the *Bankruptcy Act*. Since that time the Federal legislation has been periodically amended, reenacted and improved in its operation.

The provinces did not regard the absence of federal insolvency legislation as a desirable situation. Their response was to fill the void, to the extent of their legislative powers, with provincial legislation designed to fulfil some of the same functions. In British Columbia, such legislation enacted during this period included the *Creditors' Relief Act* (1902), to ensure equal distributions of execution proceeds among creditors; the *Fraudulent Preferences Act* (1905); the *Creditors' Trust Deeds Act* (1901),designed to facilitate assignments for the benefit of creditors; and the *Bulk Sales Act*. The reentry of the Federal Government into this field in 1919, however, inspired only a limited retreat by provincial governments with respect to legislation enacted to fill the insolvency "void." Most of that legislation remains in force to this day.

A factor which contributed to the acceptance of bulk sales legislation appears to be the emergence of patterns of commercial fraud similar to those existing in the United States. In a recent publication the role of the Association of Canadian Credit Men was noted:

> Previous to the enactment of Bulk Sales legislation, merchants could, if they wished to be dishonest, dispose of their assets for cash and leave their creditors with very little recourse. The Association succeeded in having *Bulk Sales Acts* passed in all provinces, with the exception of Newfoundland.

Although legislation dealing with fraudulent conveyances existed in Canada, credit grantors saw an attractive device on the statute books of their neighbours to the south, and were quick to request similar protection in Canada. The existence of bulk sales legislation in all parts of Canada, including Quebec, attests to the overwhelming success of the campaign for the added protection of bulk sales legislation.

CHAPTER III SUBSTANTIVE PROVISIONS: APPLICATION OF THE ACT

Simply stated, the main object of the *Sale of Goods in Bulk Act* is to prevent a trader from making a sale in bulk of his business assets to the detriment of his creditors. To achieve this object, the Act imposes a duty on any intending purchaser to comply with the requirements of the Act before completing the purchase. Compliance 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. The Act declares that 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." This chapter is devoted to the examination of the provisions of the Act and their application.

A. Scope of the Act

1. To Whom Does the Act Apply?

The Act applies only to sales in bulk by persons in certain types of businesses. Section 2 provides:

> This Act applies only to sales by traders and merchants, who are defined as
>
> (a) persons who, as their ostensible occupation or part of it, buy and sell goods, wares and merchandise ordinarily the subject of trade and commerce;
> (b) commission merchants;
> (c) manufacturers;
> (d) proprietors of hotels, motels, auto courts, apartment houses, rooming houses, restaurants, motor vehicle service stations, oil and gasoline stations and machine shops.

The principal thrust of this section is to limit the application of the Act to businesses which deal in tangible goods. Clauses (a), (b) and (c) all cover businesses whose assets will include inventory as an important component. Proprietors of most purely service related businesses are excluded from coverage of the Act since they do not "buy and sell goods, wares and merchandise." Only those service industries listed in clause (d) are caught by the Act.

The reasons for the emphasis on "inventory industries" is likely historical. When bulk sales legislation was introduced at the turn of the century service industries were fewer in number and the framers of the legislation directed their attention to what was perceived to be the most prevalent danger: sales by "merchants" of inventory. Clause (d) was added to the section comparatively recently, through amendments in 1945 and 1958.

In most cases it is not difficult to establish if a vendor is a trader, merchant or manufacturer. However, certain types of businesses can pose difficult issues of characterization. An example of this difficulty is found in *John Martin Paper Co. Ltd.* v. *American Type Foundry Co*. The court had to determine whether a "jobprinter" who also, at times, sold quantities of envelopes and paper, was a "manufacturer or trader":

> Speaking generally the business of debtor was that of a job printer. The question is, does the above section cover such a person? The appellant contends that the meaning of the word "manufacturers" is restricted by the use of the words "traders and merchants" appearing at the beginning of the section. I cannot agree with this contention, because the effect of the section is to give a statutory interpretation of the words "traders and merchants" and to make them include "manufacturers" for the purposes of the Act. It follows that the real question to be decided is the extent of meaning to give to the latter word ...
>
> It is perfectly obvious that the Legislature did not intend to include all business occupations. A building contractor, for example, certainly turns a mass of different material into a house or a shop building. And he might have a mass of material and plant on hand which he could sell out in bulk. So also with a bridge or paving contractor. Yet no one would, I think, seriously argue that such persons would come within the category of "manufacturers". Such people would commonly be called "contractors" and the same idea underlies the word "jobprinter" ...
>
> It is true that the evidence shews that very rarely the debtor company sold a few envelopes without doing any printing on them and also very occasionally it sold a little copying paper for second or copy sheets. But the evidence also shews that this was quite out of the line of the company's regular business. And it is with respect to its regular business, to the business or occupation which was its substantial purpose and in its usual course, that we must decide whether it could properly be called a manufacturer or a trader or merchant.

Thus, where a business carries on more than one type of activity, it is the "line of regular business" which governs.

2. What Persons are Excluded from the Application of the Act?

In addition to most service industries, a number of specific exclusions are set out. Section 3 provides:

> Nothing in this Act applies to or affects any sale by executors, administrators, receivers, assignees or trustees for the benefit of creditors, trustees under the *Bankruptcy Act*, official receivers, or liquidators, a public official acting under judicial process, or traders or merchants selling exclusively by wholesale or an assignment by a trader or merchant for the general benefit of his creditors.

Basically the persons excluded from compliance fall into two categories, fiduciaries and wholesalers.

Sales by executors, receivers, assignees, trustees in bankruptcy and other fiduciaries seem to be excluded because they are generally conducted by persons who already owe legally enforceable duties to the creditors. As a group they are likely to conduct themselves honestly and the danger of one absconding with the proceeds of a sale is minimal.

The fiduciary exclusion may not be as broad as the language of section 3 suggests. In an Alberta case, *C.I.B.C.* v. *Diplomat Industries Ltd*., the court considered the status of a receiver appointed at the behest of a secured creditor under the terms of a debenture. It was held that he was not a "receiver" within the meaning of a provision comparable to section 3 and, accordingly, was required to comply with the bulk sales legislation in force.

The reason for excluding wholesale merchants or traders is not obvious. When the Act was framed, it appears that wholesale merchants did not pose the danger perceived with respect to retail merchants. This may remain true today.

Assignments for the general benefit of creditors are also excluded from the Act by section 3. General assignments are excluded on the theory that they do not prejudice creditors, but rather usually benefit them. In any event, this exclusion flows from the character of the transaction, an issue canvassed below.

3. What Transactions are Covered by the Act?

The Act will apply to any given transaction only if the type of goods transferred and the nature of the transaction satisfy the definitions set out in section 1. The first definition to examine is that of "sale in bulk." Section 1 defines this term as follows:

> "Sale in bulk" means a sale, transfer, conveyance, barter or exchange of a stock or part of it, out of the usual course of business or trade of the vendor; and a sale, transfer, conveyance, barter or exchange of substantially the entire stock of the vendor; and a sale, transfer, conveyance, barter or exchange of an interest in the business of the vendor; and the word "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;

This definition seems to cover three kinds of transaction:

1. a sale of "stock" out of the usual course of the vendor's business;
2. a sale of substantially the entire "stock" of the vendor;
3. a sale of an interest in the vendor's business.

The scope of the first two kinds of transaction turns on the meaning the Act gives to "stock".

(a) What Property Constitutes "Stock"?

Section 1 of the Act sets out the following definition:

"stock" means

(a) stock of goods, wares, merchandise and 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 outputs of, or with which he carries on, any business, trade or occupation;

A number of observations can be made about this definition. First, it speaks of "goods, wares, merchandise and chattels." The intention of the legislature is clearly to confine the notion of "stock" to tangible personal property goods. Sales of two important types of business assets are *prima facie* excluded from the Act: land and intangibles. Thus the trader who sells his business premises and makes an absolute assignment of all his accounts receivable has not made a sale of any "stock" which would trigger the first two parts of the definition of "sale in bulk." Unless those transactions are part of a sale of an interest in the vendor's business, they are not covered by the Act.

Second, one might note the "inventory flavour" of the definition. Clause (a) and the first limb of clause (b) seem clearly to relate to inventory. The words "with which he carries on, any business", extending the notion of "stock" to equipment, seem almost to have been added as an afterthought.In *Adams River Lumber Co.* v. *Kamloops Sawmills Ltd.*, (1921) 30 B.C.R. 354, 70 D.L.R. 863, the Supreme Court of British Columbia held the sale of raw material and plant of a sawmill was not a sale to fall within the Act. The reasoning of Hunter C.J.B.C. rested on the fact that these assets were used for the purposes of manufacturing goods and not kept for sale. He said at 863 (D.L.R.):

> I think that the Act, 1913 (B.C.), Ch. 65, applies only when the goods in question were kept for sale in the ordinary course of business. The raw material and the plant of a sawmill are not kept for sale, but for the purpose of manufacturing goods for sale. A stock of books kept by the owner for his private use would not be within the Act, but it would be otherwise if kept for sale by a bookseller. Had the lumber been included in the sale a different question would have arisen.

An interesting question of interpretation is the relationship of clause (a) to clause (b). Must an item of property satisfy both clauses before it is "stock" or is it sufficient to satisfy either? Most types of goods will be caught by both headings but there may be cases in which only one clause is satisfied.

For example, what is the status of a sale by a man ufacturer of his inventory of raw materials? It is not caught by clause (b) because this inventory is not an "output" of his business. It may, however, be caught by clause (a) if the raw material consists of things "ordinarily the subject of trade".

That same manufacturer might have a highly specialized piece of equipment which was custom made to his order. This is something with which he carries on his business, within clause (b) but it is not an item of ordinary commerce within clause (a).

The latter example arose in an early Ontario case, *Re St. Thomas Cabinets Ltd.* construing a similar definition of "stock":

> It was further argued that the sale in question did not come within the provision of the *Bulk Sales Act* and that consequently neither the bulk sales trustee nor the original creditors had any status or rights thereunder. It was claimed that the things covered by the agreement did not constitute 'stock' as defined by sec. 2(c) of the Act. The things sold here do not form part of what is ordinarily known as 'stock in trade' but the term 'stock' is given a much more extended meaning by sec. 2(c). Had the definition been confined to para. (i) of sec. 2(c) there would be good ground for that argument, but para. (ii) extends the definition to 'the goods, wares, merchandise or chattels in which any person trades, or which he produces or which are outputs of, or with which he carries on any business, trade or occupation.'

This case supports the view that the two clauses stand independently of each other.

Technically, fixtures are part of land and fall outside any "chattel" definition of stock. Earlier British Columbia authority affirmed this principle; however, in a more recent case it has become some-

what blurred. In *Herman* v. *Sit Hing Fung*, Wilson, J., of the B.C. Supreme Court distinguished the earlier authorities and, without clearly stating an opinion on the issue, seemed to suggest that store fixtures would be covered by the term "chattels with which any persons carry on any business" in the present Act:

> The plaintiff says that the Act does not apply because the only things sold were equipment, not stock as defined by s. 2 already quoted. In support of this provision he refers me first to *Paisley* v. *Leeson Dickie Gross & Co.* (1920), 28 B.C.R. 363. It was there held that store fixtures did not come within the definition of goods in bulk in the *Bulk Sales Act* of 1913. The efficacy of this argument is destroyed by the fact that the Act referred to very clearly applies only to stockintrade and contains no provision relating to the chattels with which any person carries on any business.
>
> Chevrier J. in *Archambault & Gauthier* v. *Barett*, [1949], 3 D.L.R. 324, O.W.N. 295, considered a clause in the Ontario *Bulk Sales Act* which is identical with that in our own Act defining stock, and concluded that it did not cover furniture and fixtures. In so doing he relied, forauthority, on *Paisley* v. *Leeson Dickie Gross & Co.* already cited. It is apparent that the difference between the statute before him and the 1913 Bulk Sales Act of this Province was not brought to his attention ...
>
> I think that the definition of "stock" in s. 2 of the Act as including chattels "with which he carries on, any business, trade, or occupation", considered with the definition in s. 3 of traders and merchants as including proprietors of roominghouses leads irresistibly to the conclusion that the impugned sale is one of goods in bulk voidable under the Act.

In a subsequent Ontario case, *Re Sabat*, Schroeder, J. quoted these passages with approval and stated that he was in "respectful agreement" with the observations.

These two decisions should be applied with caution. It is suggested that the proper view is the technical one. Fixtures are neither chattels nor "goods, wares or merchandise" and are outside the scope of the term "stock." The difficulty in the cases has arisen because the terms "store fixtures" and "trade fixtures" are often used loosely in sale documents to refer to items which are not true legal "fixtures" but rather chattels and equipment such as movable lighting fixtures, display cases and the like.

(b) Nature of the Transaction

It is necessary to turn once again to the definition of "sale in bulk." For the Act to apply

1. There must be a "sale" of something;
2. That something must be:
   (i) the vendor's stock or
   (ii) an interest in the vendor's business;
3. If it is a sale of the vendor's "stock" then the sale must be:
   (i) out of the usual course of the vendor's business, or
   (ii) of substantially the entire stock of the business.

What constitutes "stock" was explored under the previous heading; we now turn to the other concepts.

(i) What is a Sale?

In the outline above the word "sale" has been used in a general sense and it is instructive to look at the actual language of the Act.

Section 1 defines a "sale in bulk" so that, in addition to a "sale" in the ordinary sense, it includes a "transfer, conveyance, barter or exchange" and an agreement to do so. The words quoted appear no less than five times in the definition of "sale in bulk" and leave little doubt as to a legislative intent to bring a wide variety of transactions within the Act. For example, sales of assets by sole proprietors to incorporated companies have been held to fall within the Act. In *Thomas & Sons Ltd.* v. *A. Nelson and Nelson Tent & Awning Mfg. Co*., the proprietor of the business incurred debts prior to incorporation and a creditor brought an action to set aside the sale. The vendor had transferred all property and assets of the business

to the newly incorporated company without complying with the terms of the Act in providing the necessary statutory declaration.The sale of the assets was held fraudulent and void and the creditor's claim succeeded.

The definition of sale is wide enough to include transactions which merely result in a credit or setoff in favour of creditors of the vendor. In *Paisley* v. *Leeson*, the court refused to exclude a sale of a business from the application of the Act on the grounds that the purchase money did not change hands:

> It is urged that the transaction between the defendant company and their codefendant does not fall within the provisions of section 3 of the *Bulk Sales Act*, because it is said the defendant company did not pay any part of the purchase price or deliver to the vendor, or her order, or to any person for her use, any promissory note or other document for or on account of the purchase price. I do not think this defence well founded.The transaction between the defendant Company and their codefendant was in reality, that the Company would, as soon as stock was taken, pay therefor at invoice prices and that their codefendant would pay her indebtedness to the company out of the money so received, if it were sufficient to cover such indebtedness and if not, would pay the whole of such purchase price to the defendant company. As the purchase price failed to cover the account of the defendant Company, what really was done was to credit the defendant, Bella Crawford, with the amount of such purchase price. In other words, the defendant Company, as purchaser, has actually paid to itself, as a creditor of the defendant, Bella Crawford, the whole purchase price, except such moneys as have been paid to her other creditors. If this view is correct, the case falls within section 3.

The breadth of the definition of sale is such that it has the potential to encompass many transactions that are not designed to serve a sales function. For example, a business may wish to enter a sale-leaseback transaction with a financer under which its equipment is sold to the financer and then leased back at a fixed rent. This might be done to secure more favourable treatment under the tax laws or as a form of giving security to the financer for a loan.

Even more straightforward security transactions seem to be caught by the definition of sale. A chattel mortgage involves the transfer of title in the goods to the lender and, technically, such a mortgage is a sale. In practice the courts are unwilling to vitiate these transactions and the cases have narrowed the concept of sale in this context.

The sale of stock in trade by a chattel mortgage in *Drinkle* v. *Regal Shoe Co. Ltd. et al*. was held to be outside the scope of the Act. Macdonald, J., of the Supreme Court of British Columbia reasoned that the Act is not intended to destroy a chattel mortgage security and enable the general creditors of a mortgagor to share equally with a secured creditor:

> The sale was attacked on the ground that *The Bulk Sales Act, 1913*, had not been complied with, but finding, as I do, that the defendant Company was acting on the strength of its chattel mortgage, I do not consider that this Act has any application. Defendant Company held the legal ownership of the property described in the security, and the equity retained by the defendant Endacott was worthless. The Act was not intended to destroy a security, in the shape of a chattel mortgage on a stock in trade, and enable the general creditors of a mortgagor to share equally with a secured creditor. This would be the result if the plaintiff were entitled to set aside the sale under the chattel mortgage, for noncompliance with any provision of that Act.

Other cases have adopted a similar view.

(ii) What Other Circumstances must Exist to Constitute a Sale of Stock?

Not every sale of "stock" is a sale in bulk. Before the definition of that term is satisfied the sale must be one which:

(1) is out of the ordinary course of the vendor's business, or
(2) is of substantially the entire stock of the vendor.

The drafting of the definition as a whole suggests that these two criteria were meant to be read disjunctively (hence the "or"). To give it this reading, however, produces curious results.

First it should be noted that almost every transaction which meets the second criterion will also satisfy the first. It will be a rare case in which a disposition of substantially the entire stock of a trader is a transaction in the ordinary course of his business. However, in those rare cases one wonders whether, as a matter of policy the Act should apply.

Second, the part of the definition concerning nonordinary course transactions refers to a sale of "stock or part of it." This would seem to include any minimum value. Theoretically, a transfer of as little as five or ten per cent of the stock, out of the usual course of business, would bring the transaction within the definition, as could the sale of a single item of equipment.

The wide overlap between the two criteria has meant that the courts have not found it necessary to consider the second head, except in the rare cases where a sale in the usual course of business has involved substantially the entire stock of the vendor. In those cases a difficulty arises in establishing a quantitative test to determine at what point a sale of some proportion of total stock meets the "substantially" requirement. Depending on the circumstances of the case, 50 per cent or 80 per cent may be enough to constitute "substantially the entire stock." Furthermore, there is no direction to the court as to whether the quantitative test should be measured by dollar value, or volume, or both.

One of the few cases which offers direction as to the proportion of total assets which will satisfy the "substantially" requirement is an Ontario case, *Commercial Motor Bodies Ltd.* v. *Perth Ltd*., decided in 1930. Orde, J. confirmed that 80 per cent of the stock of a company would constitute substantially the vendor's stock in trade:

> Perth Ltd. was engaged in the business of selling parts used in the upkeep and repair of Ruggles motor trucks, the business being essentially a retail one, to garage proprietors, repair shops, and others requiring new or spare parts for their machines. The sale in question was made by an agreement between Perth Ltd. and Ruggles (Montreal) Ltd., dated September 9, 1927.It covered a large quantity of parts for Ruggles trucks, the price being $12,500. The quantity comprised about 80% of the quantity then in stock and made up when shipped by freight about a carload.
>
> There can be no doubt that the sale was a bulk sale within the meaning of s. 6 of the Act, both because it was made out of the usual course of business of the vendor and because it comprised substantially the vendor's entire stock-intrade, and, as the requirements of the Act were not complied with, the sale would, if properly attacked, be clearly void under s. 3.

The task of distinguishing between those transactions which are in the ordinary course of the vendor's business and those which are extraordinary, for the purposes of the first criterion, presents problems of its own. Here a qualitative test must be applied to the transaction (although the quantity of goods sold may be relevant to its quality).

Each case must be dealt with on its own facts and it may not be possible to lay down any universal principles. The approach taken by the courts is well illustrated in *Busuttil* v. *Drummond T. Trucks*, a recent decision of the Ontario Court of Appeal:

> Having come to the conclusion that a sale of the inventory took place on December 31, 1963, I have no doubt that such sale was a sale in bulk and one that could not be termed to be one in the usual course of business of Mobilex. In this I disagree with the conclusion of the learned trial Judge. The usual course of business or trade of Mobilex would have resulted in the sale of the inventory, item by item, upon what would have been a retail basis to a number of individual purchasers at prices representing a markup of not less than 10% and possibly as high as 18% of the value at which the inventory was carried on the books of Mobilex. A single sale of the whole inventory on a wholesale basis to a purchaser whose usual course of business was identical with that of the seller at a price below the inventory valuation, after the seller has ceased to carry on active business, cannot in my mind be said to be one in the usual course of business, if for no better reason than that having ceased to carry on business, and not having resumed carrying on business, nothing it did could be in the usual course of business.

It is perilously easy, however, to devise more complex fact patterns. Particularly difficult is the case where, instead of a single sale of goods to a single buyer, there are several sales to several buyers. In an early Nova Scotia case it was held that such a series of transactions, taken as a whole, were caught by the Act, for to do otherwise would leave a loophole permitting the kind of fraud the Act was passed to prevent. On similar facts, however, it might equally be argued that the vendor had changed the usual course of his business in response to changing economic conditions and the transactions are not caught by the Act.

(iii) What is an Interest in a Business?

The third category of sale within the definition of "sale in bulk" is the "sale ... of an interest in the business of the vendor." While this language seems to cover the sale of some proportionate fraction of the total business, for example, a partner's interest, it has been held that such sales are not sales in bulk.

The meaning of the term "interest" in this contextarose in an Ontario case, *McLennan* v. *Fulton*. At issue was whether or not the sale by a partner of his interest in the partnership was a vendor's interest under the *Bulk Sales Act*. The Court of Appeal held that such a sale was not the kind to bring the transaction within the scope of the Act:

> What the vendor in this case sold was his share or interest, as one of three partners, in the partnership assets. That interest is thus defined in Lindley on Partnership, 8th ed., p. 402:
>
> > In the absence of a special agreement to that effect, all the members of an ordinary partnership are interested in the whole of the partnership property, but it is not quite clear whether they are interested therein as tenants in common, or as joint tenants without benefit of survivorship, if indeed there is any difference between the two. It follows from this community of interest, that no partner has a right to take any portion of the partnership property and to say that it is his exclusively. No partner has any such right, either during the existence of the partnership or after it has been dissolved.
> >
> > What is meant by the share of a partner is his proportion of the partnership assets after they have been all realised and converted into money, and all the partnership debts and liabilities have been paid and discharged. This it is, and this only, which on the death of a partner passes to his representatives, or to a legatee of his share; which under the old law was considered as *bona notabilia*; and which on his bankruptcy passes to his trustee.
>
> This interest then, is not "stock" within the statutory definitions (i) or (ii). The wording of sec. 7 "whenever an interest in the business or trade of the vendor is sold or conveyed," would seem at first glance to be intended to cover it, but this is nullified by the definition of "vendor" in sec. 2.
>
> The vendor here was A.G. Fulton, not the firm, and it cannot be said *that an interest in his business or trade* was sold because it was his whole share that was dealt with. True it is that his share constituted an interest in the business of the firm, but the firm did not sell out.
>
> This appears to be the proper construction of the words used. It is aided by considering how sec. 3 could be worked out, if the sale of an undivided interest in a partnership carrying on business was included in the term "a sale in bulk."
>
> Can it be said that the creditors mentioned in sec. 3 are all the partnership creditors or merely the separate creditors of the sellingout partner? If the latter, then the Act would be useless; if the former it would require payment of partnership liabilities without the partnership assets being immediately available to pay them. Many partners sell out, with an indemnity against partnership debts, but this would not now be possible if the share sold were held to be a "sale in bulk."
>
> The aim of the Act is to prevent a person, partnership, or company disposing of his or its assets in bulk, and pocketing the money, leaving creditors in the lurch. But the creditors lose nothing by a transaction such as this. The partnership assets can still be sold for the partnership debts, and they remain unaffected by the transfer of an interest which is in effect only of the surplus after payment of debts. This is in itself an effective answer to the argument that such an interest is within the Act. Why should it be forbidden, if it only results in an incoming partner acquiring a share of what is left after the debts are paid?

Thus, even if the transaction alters the ownership of the business, so long as it does not prejudice creditors in the process, it appears that the Act would not apply.

B. Requirements of the Act

When the Act applies to a transaction, under section 4 certain obligations arise with respect to that transaction which embody the basic scheme of protection for the vendor's creditors. If these obligations are not met, the creditors may attack the transfer. Section 4 provides:

> (1) Each purchaser of stock in bulk shall obtain from the vendor a statement and affidavit in the form set out in Schedule A or of similar effect containing the names and addresses of all the vendor's creditors and the indebtedness or liability that is due and payable, or is accruing due or is to become due and payable by the vendor to each of the creditors, including amounts due for taxes.
>
> (2) Each vendor of stock in bulk shall furnish to the purchaser the statement and affidavit provided for in this section.
>
> (3) The statement shall be written and verified by the affidavit of the vendor or his authorized agent, or if the vendor is a corporation, by the affidavit of its president, vice president, secretary treasurer or manager.
>
> (4) 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 executing a transfer or encumbrance of property for the purchase price, shall obtain the statement and affidavit provided for in this section, except that before obtaining that statement and affidavit, the purchaser may pay to the vendor on account of the purchase price a sum not exceeding 5% of the purchase price.
>
> (5) After providing the statement and affidavit required by this section, no preference or priority is obtainable by attachment, garnishment, contract or otherwise by a creditor of the vendor in respect of the stock in bulk or the proceeds of the sale of it.

Responsibility for the completeness and accuracy of the statement of creditors rests on the transferor alone. The cases confirm that a transfer is not rendered ineffective by errors or omissions unless the transferee is shown to have had knowledge of them. In *Warner* v. *Graham*, the vendor provided a statutory statement in respect of the sale of a restaurant business. It failed to disclose all of the creditors, and one of the omitted creditors brought an action to void the sale. Mr. Justice Wilson of the British Columbia Supreme Court noted the effect of the omission:

> The question is whether the statutory declaration furnished by the creditor is in substantial compliance with the Act, that is: (1) Is it "in the form set forth in Schedule A or to the like effect", and (2) does it otherwise comply with section 5.
>
> The plaintiff, a creditor, was not mentioned in the declaration. Some other creditors, whose claims were unsatisfied at the time of the sale, were not mentioned in the declaration. But this, as long as the form of the statement and declaration are satisfactory, will not avoid the sale. All that 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 ...

If the statement provided substantially conforms with the requirements of the Act, then the purchaser acquires a good title. If, on the other hand, the purchaser is lax in his demands for the statement, and the requirements of section 4 are not closely followed, he may himself endanger his title. Wilson, J. continued:

> But ... It was encumbent upon ... [the purchaser] to insist on and obtain from...[the vendor] an affidavit which would conform, substantially at least, to the provisions of the Statute, and consequently it is he who must bear the consequences of the irregularity of the affidavit with which he was content.
>
> The irregularities here suggested are: 1. That the form used is not to "the like effect" with the form in Schedule A since it consists merely of a statutory declaration and not of a statement verified by a statutory declaration. 2. That the form used does not set out the names and addresses of the creditors, and does not substantially follow the form in Schedule A since it omits the name of the landlord, the exact amount of the debt to him, the addresses of both creditors listed, the description of the nature of the indebtedness, and a statement of when it is due. 3. That the form is defective in that it does not purport to list all the creditors of the vendor, but only says

> There are no debts or liabilities due, owing, payable or accruing due or to become due and payable by me in connection with the restaurant business formerly operated by me at 3307 Kingsway, under the name of the Felix Café ... other than the 2 defendants listed.
>
> I think this latter is a fatal defect. Section 5 clearly requires a statement giving the names and addresses of all the creditors of the vendor, not just those who are creditors in connection with the business being sold. It might well be that if such a declaration had been insisted on by the purchasers the plaintiff's debt would have been listed and she would have been paid as were the other creditors listed in the declaration. I think her claim was one in connection with the business and should have been listed as such, but the vendor may not have thought so, and may for this reason, have left it out. At any rate there is a clear failure to obey the requirements of the Act. To refer again to *Montreal Abattoirs* v. *Picotte*:
>
> > The defendant was required to mention in his affidavit all his creditors generally, as prescribed by the Statute, and not only those whom he might owe in respect of the effects and merchandise which formed the subject matter of the bulk sale.
> >
> > It follows that the Act was not complied with, and the sale was voidable. It has been properly attacked by a *bonafide* creditor, and I declare it fraudulent and void as against the plaintiff.

The obligation imposed upon the purchaser to demand a statement is qualified to some extent by his knowledge at the time of the sale. Wilson, J., of the Supreme Court of British Columbia, in *Herman* v. *Sit Hing Fung* indicated that, if at the time of the sale transaction, the purchaser had no knowledge of the details of the type of business so as to put him on notice that the sale came within the Act, he may not be bound by the requirement to demand a statement:

> It is clear that under these circumstances there might be a purchase by a buyer who had no notice or no means of knowing that Labuda was or ever had been proprietor of a roominghouse, and hence no reason to ask him for a declaration under the *Bulk Sales Act*. A purchaser might, for instance, buy the stockintrade of a merchant who had gone out of business with no notice that he ever had been a trader as defined by the Act, and hence no knowledge that a declaration under the Act was required. On the other hand to hold that a purchaser can, in all cases, and despite any knowledge that he may have of the fact that the vendor was a trader, buy his stock soon after he goes out of business without obligation to comply with the Act, is to open a wide door to evasion and to frauds on creditors. In this case the plaintiff knew, or should have known, that Labuda was a trader ...

Creditors referred to in section 4 are defined in section 1, as follows:

> "creditor" means a person to whom the vendor of any stock as defined by this Act is indebted, whether the debt is due and owing or not yet payable, and includes any 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 the vendor;

Though the Act appears to have been intended to apply only in the commercial sphere, the term "creditor" has been interpreted by the courts to include all creditors, trade and nontrade alike.

While the definition of creditor has been framed so as to include one type of contingent claim, that of a surety, the courts have shown no inclination to extend it further:

> "Creditor" ... includes "a person to whom the owner of any stock as defined by the Act is indebted, whether the debt is due and owing or not yet payable." This of course gets rid of any difficulty as to a debt owing but not yet enforceable, *debitum in praesenti, solvendum in futuro*. But it must be a debt something owing. Were it not so, the scheme of the Act could hardly be workable, for the vendor must furnish the purchaser with a statement of all his creditors. And, while the Act includes among creditors sureties and endorsers of notes and bills of exchange who upon payment would stand in the shoes of the direct creditor, I do not think that the term can be extended to contingent claims arising out of torts or of transactions of a tortious character, until the relationship has become really that of debtor and creditor by virtue of some judgment.

A more recent Ontario case has also affirmed this principle.

One important group of persons who are caught by the definition of creditor is secured creditors of the vendor. These persons have acquired protection independently of the Act and their need for the further protection of the Act is not obvious.

Section 5 of the Act sets out three alternative conditions which must be met at the time of the sale. It attempts to ensure that a majority of creditors will receive either advance notice of the transaction or have their claims paid in full. It provides:

> At the time of the completion of every sale in bulk one of the following provisions shall be complied with:
>
> (a) The claims of all the creditors of the vendor as shown by written statement shall be paid in full;
> (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 said written statement, which waiver may be in the form set out in Schedule B, or of similar effect; 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 said written statement.

The waiver referred to in clause (b) must be obtained prior to the completion of the sale. In *Paisley* v. *Leeson*, Murphy, J., considered the position of a purchaser who attempted to validate a past sale by belatedly obtaining a waiver from 60 per cent of the creditors.

> Then, it is attempted to establish the defence of waiver ... When the defendant Company became aware of the plaintiff's claim, they went to the creditors whose claims they had purchased and obtained from them an alleged waiver. They also obtained a waiver from two other creditors.
>
> Treating themselves as creditors and adding to their claims the amounts of the claims thus allegedly waived, this alleged waiver represents more than 60 per cent. of the total indebtedness of Bella Crawford including therein the plaintiff's claim. On this set of facts, the proviso in section 4 is relied upon as a defence. That proviso, in my opinion, requires that the waiver therein dealt with must be obtained before the sale is carried out and that no bulk sale can be legally made where the purchase price is less than the amount of the total indebtedness of the vendor to his creditors, unless such consent is previously obtained. Further, I think, as a condition precedent to obtaining such consent, the purchaser must obtain the statutory declaration.

Parties seeking to uphold a sale may be put to strict proof of the waiver being obtained from 50 per cent of the creditors in both value and number as in an early Alberta case, *Walter* v. *Leduc Lumber Co*.:

> A written waiver was filed as an exhibit at the trial and this is depended upon to take the transaction out of the Act ... The evidence fails to satisfy me that this waiver is signed by "creditors representing 50% in number and value of the claims as shown by said written statement." There is absolutely nothing to indicate the total number of creditors, though there is evidence of the total amount of their claims ...
>
> When a trader is endeavouring to uphold a transaction which without the waiver of the creditors would be in plain disregard of this Act it is his duty to show that the statute does not apply to it by the clearest proof of such a waiver as the Act calls for. The bald proof of it that we have here is far from satisfying to me and I must hold that it has not been proved.

The third option in section 5(c) is obtaining the consent of a requisite number of creditors to the sale. Where this is done, section 6 requires the payment of the proceeds of the sale to a trustee:

> Where a sale in bulk is made with the written consent of the creditors of the vendor, under section 5(c), the entire proceeds of the sale shall be paid, delivered, and conveyed to the person named as trustee by the creditors in the written consent, or, if no trustee is named in the written consent, then to the trustee named by the vendor or appointed under section 12, to be dealt with by the trustee as provided by section 7.

Section 7 directs the trustee to distribute the proceeds of the sale pro rata. The procedures and priorities of the *Bankruptcy Act* are incorporated by reference into this section.

C. Noncompliance with the Act

Section 9 spells out the result of noncompliance with the Act:

> (1) Every sale in bulk in respect of which the provisions of this Act have not been complied with is deemed 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 for it and every transfer and encumbrance of property by the purchaser is fraudulent and void as between the purchaser and the creditors of the vendor.
>
> (2) If the purchaser has received or taken possession of the stock which is the subject of the sale in bulk or any part of it, he is personally liable to account to the creditors of the vendor for all money, security or property realized or taken by him from, out of or on account of the disposition by him of the stock or any part of it; and in any action brought or proceedings 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 and the possession of the purchaser, or some part of it, under judicial process issued by or on behalf of a creditor of the vendor within that period, the purchaser is 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.
>
> (3) If the stock then in the possession of the purchaser, or some part of it, was in fact purchased by him subsequent to the sale in bulk from some one 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 supplied, are entitled to share proportionately with the creditors of the vendor in the amount realized on the disposition of the stock in the possession of the purchaser at the time of the action, proceedings or seizure, in the same manner and within the same time as if they were creditors of the vendor.

Subsection (1) contains the essence of the incentive for compliance a threat to the title of the purchaser. Although the expression used is "void", there is clear authority that the expression means voidable. In one case it was observed that:

> A breach of section 3 renders the sale "fraudulent and absolutely void as against creditors of the vendor." There is no penalty provided by the Act. The expression "absolutely void" is not, I think, any stronger than "void." If a thing is void it is of no effect and there cannot be degrees in nullity. When an instrument is void as against persons who may or may not take advantage of it, it is voidable only ... The provision ... that no action shall be brought to set aside a bulk sale after 60 days ... shows that the expressions "void" and "absolutely void," as used in the Act, mean only voidable. The lapse of time cures the defects resulting from nonobservance of the statute. The sale is, therefore, void only as against the creditors who attack it within the time prescribed by the statute.

And in another case:

> 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 the property in the goods shall pass, subject to the right of the creditors to have the sale set aside as fraudulent against them.
>
> It is also common ground that if the goods are resold by the fraudulent transferee to a *bona fide* purchaser for value without notice, before the creditors challenge the validity of the sale, such purchaser has a valid title to the goods and the creditors cannot recover them.

A clear example of the danger faced by a purchaser who fails to comply with the Act is demonstrated in a 1935 case, *In Re White*. A party purchased stock in bulk from the vendor and failed to comply with the Act. The vendor absconded with the proceeds, leaving his creditors unpaid. The vendor was subsequently declared bankrupt and the trustee in bankruptcy demanded and obtained the return of the goods sold. In the bankruptcy proceedings, the purchaser, having lost those goods to the creditors, filed a claim for the purchase price as a creditor of the absconding debtor. His claim was disallowed, the court ruling that the purchaser's claim arose *ex turpi causa*.

The expression in section 9(1), "Every sale in bulk in respect of which the provisions of this Act have not been complied with", has been read narrowly to exclude itsapplication to the maximum downpayment requirement found in section 4(4). An earlier version of the Act stated that no more than $50 could be paid prior to obtaining the required declaration. In *Awram* v. *Brunt*, the British Columbia Court of Appeal refused to set aside a transaction because there had been a downpayment exceeding the maximum allowed by $200. O'Halloran, J.A., stated:

The respondent paid James $250 as a down cash payment on the purchaseprice of $4,250, clear of all debts, several weeks before he obtained from James a bulk sales declaration regarding creditors. Under sec. 5(1) of the *Bulk Sales Act*, RSBC, 1948, ch. 35, "it shall be the duty" of the purchaser to obtain a bulk sales declaration regarding creditors before paying the vendor any part of the purchaseprice "exceeding fifty dollars."

By reason of this payment in excess of $50 it is now argued that "a provision" of the Bulk Sales Act has not been complied with, and hence that the sale is void under sec. 10 of that Act which reads in part:

> "Every sale in bulk in respect of which the *provisions of this Act* have not been complied with shall be deemed to be fraudulent and void as against the creditors of the vendor."

Reading the Act as a whole, this Court is unable to accept the restriction in sec. 5(1) regarding of sec. 10 in the circumstances disclosed in this case. If however the language appearing in the statute is inapt enough to permit a contrary interpretation, then, in our judgment, the Legislature could not rationally have intended such an unfortunate *impasse*, and *Stradling* v. *Morgan* (1560) 1 Plowd 190, at 205, 75 ER 305, may be invoked to enforce the true and rational purpose of the legislation.

D. Proceedings to Set Aside the Transaction

The usual relief sought by the plaintiff who commences an action to attack a bulk sale is a declaration that it is void and an order that it be set aside. Such an action is maintainable by any creditor, as defined in section 1, and the creditor need not first establish his claim in an action. Other forms of remedy may be sought in one action and creditors need not bring separate actions to enforce their rights. The seller is not a necessary party to proceedings under the Act, unless the plaintiff has a specific claim for relief against him. A Saskatchewan case, *McMillan* v. *Jones*, held that it is not even necessary to plead the Act specifically. So long as the illegal sale is brought to the attention of the court, it is the court's duty to consider and act upon it.

It should also be noted that an action attacking the sale may not be necessary. In *Webber* v. *Hall*, it was held that when sales of goods fall within the *Bulk Sales Act*, and the Act is violated, judgment creditors of the vendor may avoid these sales by levying execution directly upon the goods without first obtaining an order or declaration under the Act. Chisholm, J., noted:

> But assuming the sale to be voidable and not void as against the creditors of the vendor, 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 unmistakable 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.

Any litigation testing the legality of such a seizure would probably be the kind of "collateral" action referred to in section 10. It provides:

> In an action, issue or proceeding in which 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 rests upon the person upholding the sale in bulk.

Section 11 sets out a special limitation period:

> No action shall be brought or proceedings taken to set aside or have declared void any sale in bulk for failure to comply with this Act unless the action is brought or the proceedings are had or taken within 6 months from the date of the sale in bulk.

Irregularities in a sale can only be directly challenged within six months. Terms of a sale transaction calling for partial payment or a conditional sale can often cause difficulty in establishing the precise moment at which a sale occurs. This determination can be of critical importance if the sixmonth limitation period is in issue.

CHAPTER IV AN EVALUATION OF THE ACT

The *Sale of Goods in Bulk Act* is now over 70 years old and three main questions arise with respect to the legislation and its functions:

(1) What were the original policies which led to its enactment and are those policies still valid today?
(2) What functions did the early legislation fulfil; are they still important today?
(3) Have alternative remedies arisen which serve these policies and perform these functions?

A. Original Objectives

Rogers, J., of the Nova Scotia Supreme Court, in 1922, commented on the purpose of bulk sales legislation in the following terms:

> The legislation is remedial and its purpose is to improve the position of general creditors as against those who would seek special advantages and it must without straining the language used be reasonably construed so as "to suppress the mischief and advance the remedy." It is ancillary to the many modern statutory enactments tending to compel a trading debtor to respect the equal claims of all creditors to share ratably in his assets. The condition of solvency or insolvency has no relationship to this added safeguard for the payment of just debts without priority or preference. It is made clear that a trader who is about to sell out his business must consult his creditors and be quite sure that he intends to shew equal justice to all and the purchaser has a duty thrown upon him of declining to purchase in the absence of evidence disclosing that the debtor is respecting the primary obligation of paying his debts out of his goods, the possession of which is assumed to be the basis of credit.

Hodgins, J.A., of the Ontario Appeal Court, commenting on Ontario bulk sales legislation, noted one year earlier:

> The aim of the Act is to prevent a person, partnership, or company disposing of their assets in bulk, and pocketing the money, leaving their creditors in the lurch.

The American author Billig, in a 1928 work, referred to earlier, summarized the original functions of the U.S. legislation:

> Such has been the history of bulk sales legislation. It was socially desirable. It was fostered by a highly organized unit the National Association of Credit Men. The wholesalers, because of practices prevalent among dishonest merchants, especially during the late nineties, placed a premium upon any extension of credit to a retailer, whether he were honest or dishonest. The ultimate consumer eventually underwrote the wholesaler's risk when the former settled his fortnightly account with "the butcher, the baker and the candlestick maker." Society at large, as well as the credit men, needed some new legal remedy to curb the then alltoocurrent practice of unannounced sales of entire stocks of merchandise. The solution of the problem came with the passage of those statutes which regulate the transfer of goods in bulk.

These passages suggest two main concerns of the early sponsors:

(1) discouraging fraudulent dispositions of business assets thereby improving the position of creditors; and
(2) unduly increasing the cost to society of credit granting because of the high risks present.

1. Credit Granting

The considerations involved in a decision to grant credit were not very sophisticated at the turn of the century when bulk sales legislation originated:

> 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.
>
> Collection methods were lax and while conditions were normal all went well, but during an adverse period the local merchants found it difficult to meet their obligations, and the distributors or wholesale firms became involved. A chaotic condition ensued, with many failures and much hardship.
>
> In spite of these unfortunate periods, the country developed rapidly and business also expanded until proprietors of firms had to assign to others the supervision of their different branches. The responsibility of customers' accounts was then given to a member of the staff, usually, familiar with the customers' accounts or accounting in general. The title of "credit man" was later assigned to this individual.

Fraudulent sales of bulk assets and the hardship they imposed on creditors appear to have been quite significant in the late 19th century and early part of this century. The credit granting process was unsophisticated and very much left to chance. Creditors were often at the mercy of their debtors.

An appreciation of the protection afforded creditors by the operation of the bulk sales legislation and other protective devices likely had an important bearing on decisions to grant credit. In one of the early cases dealing with the Alberta Bulk *Sales Act*, Clarke, J.A., noted:

> ... I gather the intention of the Act to be that persons supplying machinery on credit for the purpose of enabling the purchaser to use it for the purpose of carrying on a business and persons supplying material on credit to be used with the aid of the machinery in supplying such products as it was the business of the debtors in this case to supply should be secured, not by a lien or charge on the machinery or material but by the lesser security provided by the Act, viz., the prevention of the sale of the machinery and stock in bulk, except on certain conditions designed to secure payment to creditors *pro rata*.
>
> So long as the business goes on in the regular course, the creditors supplying the machinery or material, could well rely upon receiving payment from time to time from the profits, but in case of a sale in bulk the business stops, and the profits stop, and it is to ensure the creditors participation in the assets that provision is made.

In contrast, credit granting today is a relatively sophisticated operation, with most suppliers of credit using the services of specialized personnel and credit reporting firms. Even small suppliers make use of credit experts and reports on a contract basis. A great deal of information and expertise is brought to bear upon credit granting decisions. The hit or miss situation that prevailed when bulk sales legislation originated has been replaced by sophisticated information disclosure systems.

The more personal commercial world of the turn of the century no longer prevails. At that time, urban centres were much smaller, knowledge of transactions was more comprehensive and the volume and size of asset sales and credit accounts were much more manageable. Bulk sales legislation may have been important in its early years in reducing the cost to society of credit granting by reducing the actual and perceived threats of fraud to the wholesalers granting credit. The same conclusion with respect to the role of the *Sale of Goods in Bulk Act* in reducing credit costs is more difficult to support today in the context of sophisticated commercial credit granting techniques.

2. Preventing and Deterring Fraudulent Dispositions

The Act and its requirements are said to protect creditors, both unsecured and secured, from fraudulent conveyances, and to deter wouldbe rogues from absconding with the proceeds from the disposal of assets. The Act attempts to accomplish its objective through two main requirements: the threat to the title of the purchaser of the assets flowing from noncompliance; and the requirement of an affidavit by the vendor, a falsely sworn affidavit being attended by criminal sanctions. It is worth noting that some

of the early U.S. statutes made breach of the statute a criminal offence. However, in keeping with other general attitudes towards commercial dealings, these provisions were deleted from the U.S. Acts early in the century and were never adopted in Canada.

(a) Penalty for Noncompliance

The strongest protection from fraudulent dispositions lies in the burden placed on the purchaser to obtain a list of creditors and to ensure compliance with one of three alternatives set out in section 5. The purchaser becomes, in a sense, the main guarantor of compliance and the main actor working to prevent fraudulent dispositions.

Although the purchaser is charged with this responsibility, the intention of the vendor continues to play a significant part in determining whether the Act is effective. A seller intent on disposing of assets in violation of the Act may merely comply with the form of the requirements of the Act while omitting creditors and nonetheless pass good title to the purchaser. Alternatively he may disregard the formal requirements entirely and dispose of the assets so as to place the proceeds and articles beyond the reach of the creditors.

In the first case, the purchaser's obligations under the Act require only that he ensure that the form of the Act is complied with. He is not responsible for the accuracy of the documents he must demand and receive.

As to the second possibility, the intentions of the vendor were discussed by an American author:

> [I]t is not likely that the unscrupulous character referred to is going to contract with an honest buyer. More likely our seller will quietly dispose of his property in small pieces or all at once by negotiating with "mafia" types.
>
> The obligations imposed by the Act may well have some influence in deterring fraudulent transfers. The extent to which the compliance requirements actually prevent fraudulent sales, however, is a question of fact that is difficult, if not impossible, to quantify. Changes in commercial practices over the years may have significantly affected the original utility of the Act as a vehicle for prevention of fraud. For example, greater anonymity of commercial transactions today may make it easier to deal with unscrupulous buyers and remain undetected.

(b) The Affidavit

The requirement of an affidavit from the vendor in the Act is intended to help ensure compliance with the Act. It was noted in this Commission's Report "ExtraJudicial Use of Sworn Statements" that one of the functions of affidavits in statements between private parties, as in the *Sale of Goods in Bulk Act*, is the reinforcement of honesty and accuracy through affirmation under oath. In addition, if an individual makes a false affidavit, he becomes liable to prosecution under section 122 of the *Criminal Code*.

122. Every one who, not being a witness in a judicial proceeding but being permitted, authorized or required by law to make a statement by affidavit, by solemn declaration or orally under oath, makes in such a statement, before a person who is authorized by law to permit it to be made before him, an assertion with respect to a matter of fact, opinion, belief or knowledge, knowing that the assertion is false, is guilty of an indictable offence and is liable to imprisonment for fourteen years.

It is doubtful if the requirement in the Act of an affidavit by the vendor would, in itself, serve to deter a fraudulent vendor. The affidavit may have some impact in deterrence but the exact degree would be difficult to quantify.

Similarly, the potential criminal liability for the making of a false affidavit in a bulk sale may have only limited importance. Creditor recourse to the Criminal Code for false affidavits is not generally in keeping with the commercial objectives of the business community. Creditors are rarely, if ever, interested in invoking criminal sanctions in circumstances such as the sale of bulk assets.

3. Advance Notice to Creditors: The Policing Function

One safeguard for creditors in the Act is to be found in the giving of advance notice of the impending bulk transfer. The notice is implicit in the requirement that waivers or consents be obtained from the requisite percentage of creditors. The notice services two functions:

(1) It reduces the need to use afterthefact remedies such as the *Fraudulent Conveyance Act, The Fraudulent Preferences Act*, or the *Bankruptcy Act*;
(2) It provides creditors with an opportunity to assess the situation and either request full payment of the account or waive compliance.

In most instances, creditors will not intervene in the sale and will waive compliance with the Act. Most sale transactions are *bona fide* and creditors do not wish to hamper the sale. The significance of the Act is that it brings the fact of the impending transfer of assets to the attention of the creditors, thereby preventing a secret disposition by the debtor. Other reviewable transactions statutes such as the *Fraudulent Conveyance Act* do not do this.

The Act *per se* does not ensure payment of a debt since the creditor must still take other action to secure payment. It does give the creditor the important advantage of a clear statement of the impending sale, which can then be evaluated to determine if other steps may be necessary.

The extent to which the Act is successful in its policing and notice functions depends on two factors: the degree to which the commercial community abides by the Act; and the degree to which the vendor is truthful in disclosure of information.

It may be significant to note that policing and notice are regarded as a most important, if not the primary, function of bulk sales legislation in the United States. The Official Comment to Article 6 of the Uniform Commercial Code (Bulk Transfers) first describes the "evil" at which the Article is aimed:

> The merchant, owing debts, who sells out his stock in trade to anyone for any price, pockets the proceeds, and disappears leaving his creditors unpaid.

The Comment then goes on to state:

> The contribution of the bulk sales laws to the problems is in the requirement that creditors receive advance notice of bulk sales. Having such notice, they can investigate the price and other circumstances of the sale before it occurs, and determine then instead of later whether they should try to stop it. This is a valuable policing measure, and is continued.
>
> The ... form of fraud suggested above represents the major bulk sales risk, and its prevention is the central purpose of the existing bulk sales laws and of this Article. Advance notice to the seller's creditors of the impending sale is an important protection against it, since with notice the creditors can take steps to impound the proceeds if they think it necessary. In many states, typified for instance by New York, such notice is substantially the only protection which bulk sales statutes give.

B. Alternative Protection

1. Reviewable Transaction Statutes

As a means of policing and preventing fraudulent sales, the legislation must be understood as operating in addition to, and as supplementing the legislation generally characterized as reviewable transactions statutes, referred to earlier.

One important type of alternative legislation is that relating to bankruptcy. Billig, writing in 1928, offered the following critical comment on the alternative availability of bankruptcy proceedings:

> 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. 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*.

In British Columbia, depending on the circumstances, a creditor may have recourse to the *Fraudulent Conveyance Act* or the *Fraudulent Preference Act*. These statutes also provide access to assets which are fraudulently transferred and, where collusion exists, continue to protect the rights of a creditor to go against the original debtor personally. However, the same "stolen horse" analysis must be applied to the availability of these two remedial statutes as is applicable to bulk sales legislation. The policing and advance notice functions of the legislation are not duplicated in these or other statutes.

2. Personal Property Security Legislation

If legislation similar to that recommend by this Commission in its "Report on Personal Property Security" is implemented, it could then be argued that significant protection would be available to creditors outside the scope of the *Sales of Goods in Bulk Act*.

Such legislation would provide a new legal framework for secured transactions involving personal property and would make it much easier for certain creditors to achieve the status of secured parties. That can be done today, but the applicable legislation places burdens on a secured party which may outweigh the value of the protection received.

For example, a wholesaler of goods would like to be able to supply those goods from time to time to a retailer on credit but retain a security interest in the goods he has supplied. If he wishes to do that at present, he would supply the goods under a conditional sale, but to protect his interest he would be forced to file, with the Registrar General, a separate copy of the agreement in respect of each lot of goods delivered. This is obviously impractical if small lots of low value goods are supplied frequently.

Under modern personal property security legislation it would be open to the supplier to enter into a master agreement for the supply of goods from time to time and a single filing of notice of the master agreement would perfect the supplier's security interest in the goods supplied.As a secured party, the creditor would have little need for the protection of the *Sale of Goods in Bulk Ac*t.

C. Nonselective Application: Expense and Delay

One of the main sources of criticism against the Act is its nonselective application to all bulk sale dispositions. While, in theory at least, one of the main objectives of the Act is to regulate sales of assets by insolvent debtors, it is not limited in its application to cases of insolvency. The fact that it applies equally to solvent and insolvent debtors raises a major concern about unnecessary time, effort, expense and complication in those cases of the undoubted solvency of the vendor. The Act fails to provide machinery to exempt from its operation the sale by a solvent debtor of surplus merchandise or the disposal by a a large chain of one of its assets where strict compliance with the Act is onerous, cumbersome and pointless.

In response to this criticism, a version of the *Bulk Sales Act* 3. (1) A seller may apply to a judge for an order exempting a sale in bulk from the application of this Act, and the judge, if he is satisfied, on the affidavit of the seller and any other evidence, that the sale is advantageous to the seller and will not impair his ability to pay his creditors in full, may make the order, and thereafter this Act, except section 7, does not apply to the sale.

(2) The judge may require notice of the application for the order to be given to the creditors of the seller or such of them as he directs, and he may in the order impose such terms and give such directions with respect to the disposition of the proceeds of the sale or otherwise as he considers appropriate. R.S.O. 1970, c. 52, s. 3.

reenacted in Ontario in 1959 contained a provision that, upon the vendor satisfying a judge that a proposed sale is advantageous and will not impair his ability to pay his creditors in full out of the proceeds of sale and his remaining assets, the vendor should be exempted from compliance with the formalities of the Act. The judge would have the power to order that notice of the application be given to the creditors and to impose terms with respect to disposition of the proceeds of sale.

It is questionable whether anything useful was achieved by this change. Rather than truly simplifying compliance with the Act, the new procedure calls for the use of court applications, extensive notice to creditors and judicial controls. The net effect of the reform may be an increase rather than a reduction in legal complexities.

D. Special Interest Legislation

It was noted earlier that the *Sale of Goods in Bulk Act* is a piece of special interest legislation. Its origin clearly confirms this. Does this fact weaken the basis of support for the Act?

> However, that certain economic groups, because of selfinterest, foster particular types of legislation, is no reason, in itself, for condemning that legislation. Many of our statutory enactments, which are socially most desirable, have been adopted, not because the legislature hearkened to the voice of the sovereign multitude raised spontaneously in behalf of its own welfare, but because some organized group, for its own particular benefit, had carried its carefully planned campaign into the legislative halls.

Clearly, its special interest status is not reason *per se* for condemning it. However, this status does focus attention on the narrow operative importance of the Act. If it appears that the Act no longer serves the interests of the original sponsoring and benefitting groups, namely commercial creditors, its retention is questionable.

E. Creditors' Rights

1. Compliance and the Effect on Creditors' Rights

Compliance required under sections 4 and 5 of the Act may result in notification being given to only 60 per cent in number and amount of the creditors in order to obtain either waivers or consents. In contrast to the provisions of the *Uniform Commercial Code*, the notice under our Act is not explicit. Rather it is only impliedly required, and there is no minimum information required to be given to the creditor as to the details of the sale or as to the extent to which the transferor's obligations are to be satisfied. The creditor, in most instances, has little information on which to form an intelligent opinion as to the *bona fides* of the transfer. In the result, although in theory a creditor can "police" the sale, in practice he will usually have inadequate information concerning the debtor and the sale to do so effectively.

If the creditor has the time and resources to seek out further information, he may face an elusive seller and an equally elusive purchaser both intent on concluding the transaction as quickly as possible. He may have to make an educated guess as to the terms of the sale, the intentions of the vendor and of the purchaser, and the eventual application of the sale proceeds. All this must be done in a short period of time so as to avoid jeopardizing the transaction and, perhaps, thereby risking what might constitute the creditor's only hope of realization on the account of the insolvent vendor.

2. Noncompliance and the Effect on Creditors' Rights

Where a bulk sale has taken place and the requirements of the Act have not been met, what is the impact of the *Sale of Goods in Bulk Act* on the rights of the seller's creditors?

It is important to note that the creditor's personal remedies against the seller are unaffected. The seller remains liable for the debt. If the seller is solvent and can be located, no difficulty is presented. The creditor can take judgment against the seller and, if necessary, execute against his other assets. This may be the preferable approach. However, where the seller is insolvent, or has left the jurisdiction taking the proceeds of the sale with him, the creditor must turn to other remedies which allow him to follow the assets into the hands of the buyer.

If the transfer is fraudulent within the meaning of the *Fraudulent Conveyance Act* or the *Fraudulent Preference Act*, the creditor may pursue the remedies provided under those Acts. Recourse to the "fraudulent" statutes is a somewhat onerous route for following the assets because proof of guilty intent on the part of the buyer is needed.

Proceedings which rely on bulk sales legislation have the advantage that the creditor need only prove noncompliance. Section 9 simplifies this procedure further by stating explicitly that the transferee shall be personally liable to account to the creditors of the seller for the stock that he has received.

The improperly constituted bulk sale only theoretically enables the creditor to act to set aside the sale. The actual procedures involved may be quite complex. The creditor must first acquire knowledge about what has transpired, search for and determine the location and status of the assets, and often sort through complex sales arrangements to establish his own status. For this he frequently requires the assistance of a lawyer.

The remedial use of the Act is subject to the limitations endemic to many creditors' remedies: high legal costs, long delay and difficulty in enforcement. Frequently the small unsecured creditor will not possess the resources to pursue his claim when the chances of success are not guaranteed and the costs are high relative to his individual claim.

CHAPTER V SHOULD THE ACT BE REPEALED?

In this chapter we address the issue whether the *Sale of Goods in Bulk Act* should be repealed or retained and explore some of the arguments in support of both points of view.

A. Arguments in Favour of Repeal

1. The Act is the Product of Conditions Which no Longer Prevail

At the outset it is important to review the legal and economic climate in which bulk sales legislation was first introduced. At that time there was no federal bankruptcy legislation and provincial governments felt the need to enact a number of pieces of legislation to fill that void as best they could and to enhance the position of creditors.The original *Bulk Sales Act* was one such Act. Today, of course, we do have federal legislation relating to insolvency and one of the forces which led to the Act has disappeared. Although the precise relationship between bulk sales legislation and bankruptcy legislation is somewhat elusive, it is significant to note that in England, which has a continuous history of bankruptcy legislation, bulk sales legislation has never been enacted. Nor, so far as we are able to ascertain, has there ever been any pressure to do so.

A further difficulty faced by creditors at the turn of the century was the way in which the law discouraged them from their protecting themselves through taking security interests in inventory they had supplied to a trader. This difficulty is one which is with us today, but, if a *Personal Property Security Act*

similar to that proposed in the Commission's 1975 Report is adopted, it will become relatively simple for a supplier of inventory to retain a security interest in the goods supplied.

One type of transaction the Act aims to catch is the purchase and sale of a business. The protection of creditors in this context has a certain validity so long as the most common form of ownership is the unincorporated partnership or proprietorship. Today a majority of business ventures are conducted through a company, and a sale of the business often takes the form of a transfer of shares. Such a transaction is not caught by the Act. Nor does such a transaction imperil creditors of the company. As a device to enable creditors to "police" the sale of a business, the significance of the Act has diminished significantly.

Finally, at the time the Act was introduced, the credit information industry was in a primitive state. The supplier of goods or services who wished to extend credit often had no means of evaluating the risk undertaken if the prospective debtor was not known to him. The bulk sales legislation offered a degree of protection from this risk and may have had a salutary effect in stimulating credit. Today, the credit information industry is immensely sophisticated and its services are available to all prospective creditors at a modest cost. Credit granting need not be the hazardous business it once was and the protection of the Act has declined in importance.

2. The Act is not Efficient in Protecting Creditors

Although a purpose of the Act is the protection of creditors who might be defeated by dispositions of goods in bulk, it makes a number of concessions to commercial reality which make it a lessthaneffective tool in achieving its aims.

First, the bulk seller who is truly bent on defrauding his creditors will not boggle at falsely swearing a bulk sales declaration indicating that he has no creditors. Such a declaration would provide a complete defence to an innocent buyer against the creditors' claims. The fact that the seller might be prosecuted for a criminal offence in respect of the declaration will be cold comfort to the creditors.

Second, the limitation period within which creditors may attack a bulk sale is relatively short: six months. In many situations the seller may be able to keep his creditors at bay or in the dark so as to allow that period to expire.

Third, even if the Act does permit the rights of creditors to survive against goods sold in bulk and make the buyer accountable for their proceeds, that is no guarantee that the buyer or the goods will remain readily available. The buyer can disappear as easily as the seller and the creditors' rights may then be meaningless.

There is also authority for the proposition that a buyer is not prejudiced by the Act unless he knew or ought to have known that the sale was one governed by the Act. Thus if the seller misrepresents the nature of his business, or the nature of the sale in relation to his business, his creditors may be left without recourse.

Finally, although "sale" is defined in the Act so as to include "barter," "exchange," etc., it is still sufficiently narrow that a number of "near sales" would appear to be outside the Act. For example, a disposition in bulk might take the form of a "lease" of the goods with the full lease price paid in advance. It would appear to be open to the parties to a disposition in bulk to structure the transaction in a way which avoids the application of the Act.

3. The Scope of the Act is Irrational

Even assuming that the policies underlying the *Bulk Sales Act* are sound, it is difficult to discern the reasoning which underlies the way in which the scope of the Act is defined.

(a) Real Property

As presently framed, the application of the Act is limited to the disposition of chattels. But often the most valuable asset of a business is its real property and a liquidation of that asset, with an intent to abscond with the proceeds, may do creditors much more harm than a disposition of chattels. The reasons behind the inclusion of chattels and the exclusion of real property are not obvious.

(b) Personal Property Other Than Goods

The main assets of a business may be concentrated in intangible personal property such as accounts receivable, shares, patents and copyrights, and a disposition of those assets would not be caught by the Act. The remarks relating to the exclusion of real property sales also apply to this class of personal property.

(c) Exclusion of Mortgage Transactions

A judicial gloss on the *Sale of Goods in Bulk Act* is that "sale" does not include a transaction by which the "vendor" (borrower) mortgages his assets to the "purchaser" (lender) although technically, title passes to the lender. In terms of mercantile convenience, this view is wholly defensible. Commerce would be unduly hindered if, every time a lender took chattel security, compliance with the Act was necessary.

On the other hand, the exclusion of mortgage transactions is a clear violation of the policy and spirit of the Act. A mortgage, no less than a sale, has the effect of reducing the pool of assets available to unsecured creditors. If it is social policy that those creditors be protected from unilateral acts of the debtor which have such an effect, then the *Sale of Goods in Bulk Act* ought logically to extend to chattel mortgage transactions.

It is not obvious why the policy of the Act should give way to mercantile convenience in this area but not in others.

(d) Distinctions Among Business Sellers

(i) Wholesalers

Wholesale traders are excluded from the Bulk Sales Act
but there is no obvious reason why this should be the case.

(ii) Service Enterprises

The "traders and merchants" to whom the Act applies are defined, in section 3(d), to include a number of enterprises which are primarily concerned with the provisions of services. A larger number of service enterprises are excluded from the Act. What rationale underlies this selective application of the Act?

(e) Who is Protected?

(i) Nontrade Creditors

The Act defines "creditor" broadly enough to include nontrade creditors, that is persons whose claims against the seller did not arise in connection with the bulk seller's business. It may be that these creditors deserve protection, but their status is difficult to reconcile with the exclusion from the Act of bulk dispositions by consumers. If the policy of the Act is to enhance the position of trade creditors, the inclusion of nontrade creditors in the definition is counterproductive.

(ii) Secured Creditors

The definition of "creditor" is also broad enough to include secured creditors. But secured creditors are, by definition, persons who have taken steps to protect themselves from the consequences of the debtor's default and to whom rights under the bulk sales legislation are of secondary and often minor importance. Giving them rights under the Act means that they, in effect, have greater security than they were prepared to bargain for. This, arguably, is bad policy and is unfair to other creditors who are unsecured.

(iii) Unliquidated Claims

The definition of "creditor" recognizes certain contingent claims such as those of a surety but it does not extend to a person whose claim is unliquidated, even though that claim arose in connection with the business. Thus a person who has an unliquidated claim against the bulk seller for a breach of contract arising out of the seller's business has no status under the Act, while the person who guaranteed a personal loan made to the seller to enable him to take a vacation has that status.

(f) Summary

It is very difficult to defend the irrational way in which the scope of the Act has been defined. Distinctions are drawn which cannot be supported on the basis of logic or principle. Moreover it is especially difficult to rationalize this aspect of the Act without reaching the conclusions that one class of creditor is more worthy of protection than another and that one kind of debtor is more likely to defraud his creditors than another. On what rational basis can such choices be made?

The second choice is almost impossible to make on an a priori basis, and about all that can be said of the first is that the person who extends credit wisely and after careful investigation should be preferred to one who does not. But bulk sales legislation does not draw any distinction between wise and unwise extensions of credit. Generally speaking, and in the long run, the marketplace draws that distinction whether bulk sales legislation is in force or not.

If difficult choices of the kind mentioned are to be avoided, there seem to be only two options. The first is a Bulk Sales Act of the widest possible scope (which would still be subject to a number of the other objections raised in this chapter) or no bulk sales legislation at all.

4. The Act is a Trap for the Unwary

Although the legal profession and the more sophisticated members of the business commmunity are aware of the existence of the *Sale of Goods in Bulk Act* and its requirements, this is not true of every potential buyer of goods, whose interests may be affected by it. Very often a small business may change hands and the transaction is consummated without the assistance of a lawyer. The buyer who is not aware of the need to comply with the Act may find himself liable for creditors' claims.

Assuming the seller has disappeared, the law is faced with the common dilemma of choosing between two essentially innocent parties, one of whom must bear the loss. In this case, the law clearly favours the interests of the seller's creditors to the detriment of those of the buyer. Opinions may vary as to which is less innocent and any conclusion on that issue may depend on the facts of the individual case. It seems clear, however, that there will be cases in which, having regard to all the circumstances, the equities are in favour of the buyer and that the law should rigidly favour the creditor produces an unfair result.

5. The Act is Commercially Disruptive

Perhaps the single most objectionable aspect of the *Sale of Goods in Bulk Act* is its effect on the orderly conduct of business. Full compliance with the Act calls for fulfilment of formalities which can be both timeconsuming and costly. This cost and delay is inflicted on every transaction which comes within the Act and must necessarily be reflected, to some extent, in the costs of goods and services supplied to the public.

While one might be able to quantify the cost and delay in respect of an individual transaction, the total cost must necessarily be speculative. Nonetheless, it is the experience of many commercial lawyers that full compliance with the Act gives rise to cost and delay which far outweigh the beneficial effects the Act occasionally produces. It is significant that in many cases, the cost and delay is so great that the Act will be ignored, the buyer preferring to assume the risk of liability to the seller's creditors.

6. The Argument for Repeal Concludes

In an earlier age, indebtedness was regarded as something which was reprehensible, if not immoral. Today, that view has been largely rejected and it is widely recognized that credit is one of the cornerstones of Canadian commerce and plays an essential role in our economy. The social stigma attached to debt, *per se*, has disappeared.

The *Sale of Goods in Bulk Act*, however, reflects the earlier view. Its language and approach involve an a priori conclusion that every debtor is a potential rogue who, if given the opportunity, will arrange his affairs so as to defeat his creditors and who must be positively restrained from doing so. It is doubtful if this cynical view truly reflects today's marketplace or attitudes towards it. In a majority of transactions which fall within the Act, the solvency and probity of the seller are not in question and it simply does not make sense to impose the rigid formalities of the Act on such transactions. Nor is it fair that those who buy and sell goods in bulk should be held to ransom merely to protect the creditors of the minority of sellers who may be disposed to behave fraudulently.

B. Arguments in Favour of Retention

1. The Act Serves to Deter Some Fraud

The previous section argued that there are a number of ways in which it might be said that the *Sales of Goods in Bulk Act* is not effective in achieving its aim of protecting creditors from the adverse effects of bulk dispositions of goods by their debtors. It is worth examining some of those arguments more closely.

It is first asserted that the truly fraudulent seller will not hesitate to make a false bulk sales declaration. That may be so, but it may also be the case that large numbers of sellers are on the "border line" of defeating their creditors through a bulk sale and are deterred by the possibility of criminal liability.

It is then asserted that there are a number of other ways in which the effect of the Act can be avoided by the crafty seller so as to defeat his creditors. This may be true in theory but there is no evidence that these evasive techniques have been widely adopted or pose a practical problem.

It is unreasonable to ask that legislation of this type should be effective in deterring all fraudulent dispositions. So long as a reasonable case can be made that it prevents a significant number of them, the Act justifies its existence. A conclusion that it should be repealed cannot be based solely on the failure of the Act to be totally effective either in theory or practice.

The question of the actual extent to which fraud is deterred is a difficult one. By its nature it is almost impossible to quantify and reduce to a dollars and cents amount. Nonetheless, there is real possi-

bility that the value is significant and there is no evidence that it is outweighed by the equally abstract cost of compliance with the Act.

2. The Act Provides Protection that is not Available Under Other Statutes

The protection provided by the *Sale of Goods in Bulk Act* is unique in that it creates a category of reviewable transactions which depends almost entirely on objective criteria. Under other enactments relating to reviewable transactions, as a general rule, it must be established that there was an intent to delay or defeat creditors and that the purchaser of property somehow shared that intent.

Under this Act, the buyer's state of mind is largely irrelevant to the issue. The test of reviewability is compliance with specified procedures. Moreover, the burden of proof of compliance rests on the person seeking to uphold the sale. This makes it much easier for a creditor to assert his rights than under any other Act relating to reviewable transactions which would cover the same transaction.

In fact, most of the transactions which are within the Act would be outside the scope of other legislation. A sale to a bona fide purchaser in which there has been new and adequate consideration can seldom be impeached. Under this Act, the adequacy or inadequacy of the consideration is irrelevant. Again, the only test is whether the procedures set out in the Act have been complied with.

The relationship between the enactment of the bulk sales legislation and the absence of federal bankruptcy legisation at the time can be overstated. While some provisions of the Act, such as section 6 which provides for payment of the sale proceeds to a trustee, do suggest an intention to fill a bankruptcy "void," the Act as a whole is not aimed at insolvency. It cannot be said that a creditor's rights under the Act are duplicated under the Bankruptcy Act and that creditors would not be worse off if the Sale of Goods in Bulk Act were repealed.

3. The Act Provides Protection that Cannot be Obtained Privately or Consensually

It was also suggested that recent developments in the law relating to personal property security may soon make it possible for suppliers easily to obtain a perfected security interest in the goods which they have supplied. For this reason, trade creditors will be able to protect themselves and the Sale of Goods in Bulk Act will become unnecessary. There are some difficulties with this approach.

First, it is not always possible, in a competitive marketplace, to persuade a debtor to enter into a consensual security agreement. It is unlikely that a lone supplier could successfully demand security to replace rights lost through a repeal of the *Sale of Goods in Bulk Act* in the absence of an industrywide practice of doing so.

Second, a security interest which is assured of priority can only be created in goods supplied by the creditor. Any security interest created in other property may well be subordinated to other interests. It follows from this that where a creditor's claim rests on services performed for the bulk seller, there is no identifiable collateral in which he can bargain for a security interest which is assured of priority. The *Sale of Goods in Bulk Act* provides a measure of equality between the "services creditor" and the "goods creditor" which would vanish if it were repealed and the parties were forced to rely on personal property security legislation only.

Moreover, under the *Sale of Goods in Bulk Act*, even if a creditor's claim arises in respect of goods supplied, his remedies are not limited to recourse to those particular goods. If a bulk sale occurs and the Act is not complied with, he has recourse against the entire subject matter of the sale, whether or not it includes the goods supplied. A security interest would not necessarily give him similar protection.

4. The Argument for Retention Concludes

The previous section pointed out a number of difficulties that exist in relation to the *Sale of Goods in Bulk Act*. Some of these are endemic to all rules of law which define rights and liabilities. Many laws are a trap for the innocent and unwary, but that does not inexorably lead to a conclusion that those laws should be repealed.

Nor do the irrationalities in the scope of the Act which were pointed out justify such a conclusion. The choice is not necessarily one between an Act of the widest possible scope and no Act at all. A middle position is possible even though it may involve hard choices. It should not be beyond the wit of man to devise a workable compromise between principle and practical considerations.

The *Sale of Goods in Bulk Act* in its present form is not perfect and a number of the criticisms made of it are well taken. It may be, however, that substantial modifications only are called for and that most criticisms of the Act can be met by reform rather than repeal. The issue of repeal must be approached with extreme caution. The principles of bulk sales legislation have been adopted in almost every jurisdiction in Canada and the U.S.A., including those which adhere to civil law principles. Moreover, that legislation has been widely reviewed and scrutinized by various agencies concerned with commercial law. Nowhere has such legislation, once enacted, ever been repealed. The wide and unquestioned acceptance of bulk sales legislation suggests it has a place in our law and it ought to be retained.

CHAPTER VI THE WORKING PAPER AND THE RESPONSES

A. The Working Paper

In March 1983, we circulated a Working Paper on Bulk Sales Legislation. In that Working Paper we examined the *Sale of Goods in Bulk Act*, its history and operation, and the issue of repeal in terms similar to the first five chapters of this Report. Following the discussion of the issue of repeal, the Working Paper stated:

> One point which seems beyond argument is that the Act, in its present form, should not remain on the statute book. If the Act is not repealed it should be replaced with a new and modern Act which embodies a consistent policy and which harmonizes to the greatest extent possible with modern business practices.

The Working Paper then went on to explore a number of different ways in which the present Act might be modified so as to improve its operation. In this context, however, "improvement" had a special meaning. We stated:

> We think it fair to state at the outset that almost all of the possible modifications to the Act which we identify tend in the direction of "narrowing" the Act. By this we mean that an Act which incorporated some or most of the possibilities described would almost certainly have fewer transactions within its scope, protect a more limited class of creditors and dilute the quality of that protection. We do not believe any case exists for widening or strengthening the Act.

Some of the possibilities for reform explored in the Working Paper included narrowing the range of transactions to which the legislation prima facie applies and developing a broader list of specific exclusions, altering the significance of creditor inaction by placing the creditors response on a negative option basis, altering the mechanics of notifying creditors of a proposed sale, andaltering the legal consequences of a failure to comply with the legislation.

The Working Paper then went on to outline, for exposure purposes, a "minimal scheme" which would combine a number of the elements discussed into an Act which "would be as close as one could get to the repeal of the Act without taking that final step."

It was the tentative conclusion of a majority of Commissioners that the *Sale of Goods in Bulk Act* should be repealed for the reasons outlined in Chapter V of this Report. One member of the Commission

was apprehensive about the outright repeal of the Act and tentatively favoured the replacement of the present *Sale of Goods in Bulk Act* by something resembling the "minimal scheme" referred to above.The Working Paper invited comment on these tentative conclusions and the reasoning and analysis which led to them.

B. Responses to the Working Paper

Although the Working Paper was given wide circulation within the credit community and within that sector of the legal profession having a particular interest in commercial law, the number of responses which we received was not large. The responses which we did receive, however, were cogent and well considered and we derived considerable assistance from them. The paucity of response suggests that the possibility of the repeal of the *Sale of Goods in Bulk Act* is not a matter of high concern within the commercial community or among its legal advisers.

The tentative conclusion of the Commission, that the Act be repealed, was supported by a majority of those who responded to the Working Paper. Only two submissions disagreed with the Commission's analysis or the proposal to repeal the Act.

One commentator took issue with the Commission's conclusions that the Act has outlived its usefulness and that compliance places an unjustified burden on the parties to a purchase and sale of assets in bulk. He characterized the legislation as "an ounce of prevention" which obviates the need for the proverbial pound of cure. He concluded by commending the amendments to the Ontario legislation, referred to in Chapter IV, as an appropriate model if it is felt that reform measures are called for.

This view is difficult to reconcile with our own experience, and that of a majority of those who responded to the Working Paper. Most of the latter agreed that bulk sales legislation is commercially disruptive and that the benefits derived from it are minimal. In particular, the Commission's Working Paper was considered at a meeting of the Business Law Section of the British Columbia Branch of the Canadian Bar Association and the proposal for repeal received the unanimous support of the members present. What emerges is that bulk sales legislation, rather than being the proverbial ounce of prevention, amounts to a ton of prevention which yields an ounce of cure.

The only other submission which favoured the retention of bulk sales legislation expressed particular concern for the plight of the small unsecured trade creditor and made a number of suggestions aimed at focusing the protection of the Act more squarely on that group.

We are not bereft of sympathy for the small unsecured creditor, but we doubt whether bulk sales legislation is an appropriate or efficacious vehicle to enhance their rights. No one would deny that the plight of the unsecured creditor has worsened in recent years, but that has little to do with the kinds of issues addressed by bulk sales legislation. Rather, it reflects the growth of secured lending and a growing tendency of governments to enact legislation which provides a higher priority for Crown claims such as those for unpaid taxes and assessments under various statutes. In any insolvency, by the time that all claims having a special preference or priority have been satisfied, usually little or nothing is left for the mass of unsecured creditors. The implementation of the recommendations made by this Commission in its Report on the Crown as Creditor: Priorities and Privileges would go much further toward improving the position of the unsecured creditor than would any possible modifications to the *Sale of Goods in Bulk Act*.

CHAPTER VII CONCLUSION

A. Recommendation

Any evaluation of the *Sale of Goods in Bulk Act* involves striking a balance between satisfying the legitimate needs of creditors and at the same time not unduly encumbering the marketplace. Put in another way, the objectives of the Act in minimizing abuses by insolvent debtors must be balanced against the degree to which the Act creates difficulties for buyers and sellers.

The abuses prevalent among fraudulent vendors at the turn of the century in the United States are said to have led directly to the birth of bulk sales legislation. The commercial milieu has changed greatly in the intervening years and the credit granting industry is today very sophisticated and much less dependent on statutory protection. While the state may have been warranted in intervening in the transfers of assets in 1908, is such intervention still, in light of all considerations, essential?

The Commission is unanimous in the view that intervention in the form of the present *Sale of Goods in Bulk Act* is not, on balance, warranted and that the Act should be repealed. While the Act, in theory, provides creditors with a means of policing their debtors' acts in relation to disposition of bulk assets, in practice, this protection is illusory. The business community does not generally depend on the Act for security in extending credit. Moreover, vendors and purchasers tend largely to ignore, and to avoid compliance with the Act.

It is our view that repeal of the Act would not have serious repercussions in the commercial sphere, but rather would result in a significant reduction in time, delay and expense in the sale and purchase of assets. Creditors would continue to enjoy certain statutory and common law protection from fraudulent dispositions, though such protection is, in some circumstances, more difficult to use.

Those who extend credit to businesses covered by the Act obtain a special status not shared by other credit grantors. It is not obvious why this special status should continue. The cost of this special status is frustration and delays in the completion of sales and purchases which cause aggravation and additional expense to the parties concerned far beyond the totality of the evils which it may prevent.

Some measure of support for the repeal of the Act is to be found in the English experience, where bulk sales legislation has never been enacted. There is no evidence that the lack of such legislation has caused serious hardship to grantors of credit.

We are aware that if the Act were repealed, British Columbia would be the only jurisdiction in North America to take such a position. This does not, however, detract from what we conclude to be the most logical and reasonable result possible.

The Commission recommends that the *Sale of Goods in Bulk Act* be repealed.

B. Acknowledgements

We wish to express our appreciation to all those who took the time to consider the Working Paper and offered us their comments and suggestions, either through correspondence or publication. The submissions we received assisted us considerably and provided much food for thought.

We also wish to acknowledge the contribution of a former member of the Commission who played an important role in this project. Mr. Kenneth C. Mackenzie, whose appointment as a Commissioner expired only shortly before this Report was finalized, assisted in the development of this Report and the Working Paper which preceded it.

JOHN S. AIKINS

BRYAN WILLIAMS

ANTHONY F. SHEPPARD

ARTHUR L. CLOSE

RONALD I. CHEFFINS

October 28, 1983

APPENDICES

Appendix A

CHAPTER 371
SALE OF GOODS IN BULK ACT

Interpretation

1. In this Act

"*Bankruptcy Act*" means the *Bankruptcy Act (Canada)* and amendments, and any Act which may be substituted for it;

"creditor" means a person to whom the vendor of any stock as defined by this Act is indebted, whether the debt is due and owing or not yet payable, and includes any surety and the endorser of a promissory note or bill of exchange who would, on 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 the vendor; "proceeds of 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 money realized by a trustee under any security, or by the disposition of any property, coming into his hands as the consideration or part of the consideration for the sale;

"sale in bulk" means a sale, transfer, conveyance, barter or exchange of a stock or part of it, out of the usual course of business or trade of the vendor; and a sale, transfer, conveyance, barter or exchange of substantially the entire stock of the vendor; and a sale, transfer, conveyance, barter or exchange of an interest in the business of the vendor; and the word "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;

"stock" means

(a) stock of goods, wares, merchandise and 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 outputs of, or with which he carries on, any business, trade or occupation;

"stock in bulk" means any stock, or portion of it, which is the subject of a sale in bulk;

"trustee" means a trustee under the *Bankruptcy Act*; or a trust company licensed or authorized to carry on business in the Province; or a person appointed as trustee under section 12 of this Act or named as trustee by the creditors of the vendor in their written consent to any sale in bulk.

"vendor" includes any person who barters or exchanges stock in bulk with any other person for other property, and "purchaser" includes the person who gives the other property in barter or exchange. RS1960392.

Persons to whom Act applies

2. This Act applies only to sales by traders and merchants who are defined as
   (a) persons who, as their ostensible occupation or part of it, buy and sell goods, wares and merchandise ordinarily the subject of trade and commerce;
   (b) commission merchants;
   (c) manufacturers;
   (d) proprietors of hotels, motels, auto courts, apartment houses, rooming houses, restaurants, motor vehicle service stations, oil and gasoline stations and machine shops. RS1960393.

Scope of Act

3. Nothing in this Act applies to or affects any sale by executors, administrators, receivers, assignees or trustees for the benefit of creditors, trustees under the *Bankruptcy Act*, official receivers, or liquidators, a public official acting under judicial process, or traders or merchants selling exclusively by wholesale or an assignment by a trader or merchant for the general benefit of his creditors. RS1960394.

Statement and affidavit

4. (1) Each purchaser of stock in bulk shall obtain from the vendor a statement and affidavit in the form set out in Schedule A or of similar effect containing the names and addresses of all the vendor's creditors and the indebtedness or liability that is due and payable, or is accruing due or is to become due and payable by the vendor to each of the creditors, including amounts due for taxes.

(2) Each vendor of stock in bulk shall furnish to the purchaser the statement and affidavit provided for in this section.

(3) The statement shall be written and verified by the affidavit of the vendor or his authorized agent, or if the vendor is a corporation, by the affidavit of its president, vice president, secretary treasurer or manager.

(4) 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 executing a transfer or encumbrance of property for the purchase price, shall obtain the statement and affidavit provided for in this section, except that before obtaining that statement and affidavit, the purchaser may pay to the vendor on account of the purchase price a sum not exceeding 5% of the purchase price.

(5) After providing the statement and affidavit required by this section, no preference or priority is obtainable by attachment, garnishment, contract or otherwise by a creditor of the vendor in respect of the stock in bulk or the proceeds of the sale of it. RS1960395.

Payment or waiver or consent of creditors

5. At the time of the completion of every sale in bulk one of the following provisions shall be complied with:

(a) the claims of all the creditors of the vendor as shown by the written statement shall be paid in full;
(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 out in Schedule B, or of similar effect; 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. RS1960396.

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 section 5 (c), the entire proceeds of the sale shall be paid, delivered and conveyed to the person named as trustee by the creditors in the written consent, or, if no trustee is named in the written consent, then to the trustee named by the vendor or appointed under section 12, to be dealt with by the trustee as provided by section 7. RS1960397.

Distribution of proceeds of sale

7. (1) In case the proceeds of 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 proportionately among the creditors of the vendor as shown by the statement, and those other creditors of the vendor that file claims with the trustee in accordance with the provisions of the *Bankruptcy Act*.

(2) Distribution under subsection (1) shall be made in the same manner as money is distributed by a trustee under the *Bankruptcy Act*, and in making the distribution all creditors' claims shall be proved in the same manner, are subject to the same contestation and entitled to the same priorities as in the case of a distribution under that Act, and the creditors, trustee and vendor have in all respects the same rights, liabilities and powers as the creditors, authorized assignor and trustee respectively have under that Act, the vendor being for the purpose deemed an authorized assignor under the *Bankruptcy Act*, and the trustee a trustee under that Act.

(3) The priorities of all creditors shall be determined as of the date of the completion of the sale. RS1960398.

Fees of trustee

8. The fees or commission of such a trustee shall not exceed 3% of the total proceeds of the sale which 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 money to be received by the creditors and shall not be charged to the vendor. RS1960399.

Sale void against creditors unless Act complied with

9. (1) Every sale in bulk in respect of which the provisions of this Act have not been complied with is deemed 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 for it and every transfer and encumbrance of property by the purchaser is fraudulent and void as between the purchaser and the creditors of the vendor.

(2) If the purchaser has received or taken possession of the stock which is the subject of the sale in bulk or any part of it, he is personally liable to account to the creditors of the vendor for all money, security or property realized or taken by him from, out of or on account of the disposition by him of the stock or any part of it; and in any action brought or proceedings 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 of it, under judicial process issued by or on behalf of a creditor of the vendor within that period, the purchaser is 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.

(3) If the stock then in the possession of the purchaser, or some part of it, was in fact purchased by him subsequent to the sale in bulk from some one 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 supplied, are entitled to share proportionately with the creditors of the vendor in the amount realized on the disposition of the stock in the possession of the purchaser at the time of the action, proceedings or seizure, in the same manner and within the same time as if they were creditors of the vendor. RS19603910.

Burden of proof on purchaser

10. In an action, issue or proceeding in which 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 rests on the person upholding the sale in bulk. RS19603911.

Limitation of actions to set aside bulk sales

11. No action shall be brought or proceedings taken to set aside or have declared void any sale in bulk for failure to comply with this Act unless the action is brought or the proceedings are had or taken within 6 months from the date of the sale in bulk. RS196039 12.

Appointment of trustee by court

12. On the application of an interested person, 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, the County Court within the territorial limits of which the vendor's stock or any part of it or the vendor's business or trade is located at the time of the sale in bulk shall appoint a trustee and fix the security, if any, to be given by him. RS19603913.

SCHEDULE A

Statement and Affidavit

Statement showing names and addresses of all creditors of .....

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

I, ... , of ..... , in the Province of British Columbia, declare that the above is a true and correct statement of the names and addresses of all ..... creditors, and shows correctly the amount of indebtedness or liability due and payable, or accruing due or to become due and payable by ..... to each of the creditors. [If the affidavit is made by an agent, add: I am the authorized agent of the vendor and have a personal knowledge of these matters.]

Or, if the vendor is a corporation:

I, ... , of ..... , in the Province of British Columbia, declare that the above is a true and correct statement of the names and addresses of all the creditors of the ..... Company, and shows correctly the amount of the indebtedness or liability due and payable, or accruing due or to become due and payable by the Company to each of the creditors, and that I am the ..... of the Company, and have a personal knowledge of these matters. And I make this affidavit 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 .....,)
in the Province of British Columbia,)
..... [month, day], 19 .....)
) .....
.....)
A Commissioner for Taking Affidavits)
within British Columbia.)
RS196039Sch. A)

SCHEDULE B

Waiver

We, the undersigned creditors of ..... , of ....., in the Province of British Columbia, waive the provisions of the *Sale of Goods in Bulk Act* of the Province of British Columbia in so far as the Act would apply to make fraudulent or void the sale in bulk by ..... of his stock of goods, wares, merchandise and fixtures, or part of it, or an interest in his business, as the case may be, to ..... , of ..... , in the Province of ....., and we admit having received notice of the intended sale and agree not to disturb, dispute or question the validity of the sale in any way under the provisions of that Act.

Dated ..... [month, day], 19 .....

Signed in the presence of

....
RS196039Sch.B.