

HAS THE CLOCK RUN OUT ON THE BULK SALES ACT: TAX TIME AND OTHER RECENT CASES

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Starting in Louisiana in 1894, bulk sales legislation spread like a pestilence through the United States so that within 20 years it had infected every state. From there, it also spread across the border into Canada so that, within a few more years, every province and territory had contracted it. However, bulk sales laws never spread south to Mexico or beyond the North American continent.

After a lapse of almost 60 years, a push to eradicate bulk sales laws began in British Columbia in 1983. Following a groundbreaking report from the Law Reform Commission of British Columbia, British Columbia became, in 1985, the first jurisdiction in North America to repeal its legislation. Within a decade, law reform commissions in Manitoba (1988), Alberta (1990), Saskatchewan (1990), and the Northwest Territories (1990) had issued separate reports recommending repeal of their bulk sales statutes. Alberta, Saskatchewan, Manitoba, the Northwest Territories and the Yukon quickly did so.

Almost a decade has passed so that, the country is almost divided evenly between those jurisdictions which are BSA-free and those which still have it.

This article examines four recent cases that may collectively serve to reinvigorate the drive to eradicate bulk sales laws in those provinces that have so far been resistant to change. The cases culminated in a 2001 decision of the Ontario Court of Appeal in which the BSA was invoked to force a buyer to pay an unsecured creditor even though the proceeds of the bulk sales were not dissipated but were, in fact, applied in accordance with the evident priorities of the secured creditors.

À partir de 1894, en Louisiane, la législation sur les ventes en bloc, ou ventes d'entreprise, s'est répandue comme une peste à travers les États-Unis, si bien que 20 ans plus tard elle avait infecté tous les États. De là, elle a traversé la frontière du Canada, de sorte qu'en dedans de quelques années, chaque province et chaque territoire l'avaient contractée. Toutefois les lois sur les ventes en bloc ne se sont pas répandues au Mexique ni ailleurs en dehors du continent nord-américain.

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Après un intervalle d'une soixantaine d'années, un mouvement pour éradiquer les lois sur la vente en bloc a débuté en Colombie-Britannique, en 1983. À la suite d'un rapport innovateur de la Commission de réforme du droit de la Colombie-Britannique, cette province, en 1985, est devenue la première juridiction en Amérique du Nord à abroger sa loi. En moins d'une décennie, les commissions de réforme du droit du Manitoba (1988), de l'Alberta (1990), de la Saskatchewan (1990) et des Territoires du Nord-Ouest (1990) avaient publié des rapports distincts recommandant d'abolir leurs lois sur la vente en bloc. Rapidement, l'Alberta, la Saskatchewan, Manitoba, les Territoires du Nord-Ouest et le Yukon procédèrent.

Près d'une décennie s'est écoulée aujourd'hui, en conséquence, le pays est divisé de façon à peu près égale entre les juridictions qui sont libérées des lois sur la vente en bloc, et celles qui ont encore de telles lois.

Cet article examine quatre décisions récentes qui, ensemble, peuvent relancer le mouvement pour éradiquer les lois sur la vente en bloc dans les provinces qui ont jusqu'à maintenant résisté au changement. Ces décisions culminent dans une affaire de la Cour d'appel de l'Ontario de 2001, dans laquelle la loi sur la vente en bloc était invoquée pour contraindre l'acheteur à payer un créancier ordinaire malgré le fait que le produit de la vente n'avait pas été dilapidé, mais avait, en fait, été employé conformément à l'ordre évident de collocation des créanciers garantis.

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I. Introduction

For many years, law reform commissions,² legal academics³ and practitioners⁴ have debated the merits of retaining or abolishing bulk

² These consist of Law Reform Commission of British Columbia, *Report on Bulk Sales Legislation* (Working Paper No. 40, 1983) [hereafter the "BC Interim Report"], Law Reform Commission of British Columbia, *Report on Bulk Sales Legislation*, LRC 67 (Queen's Printer: Victoria, 1984) [hereafter the "BC Final Report"], Manitoba Law

sales legislation. The purpose of this article is not to revisit the arguments on either side of the debate, but rather to take a close look at four recent judicial decisions that have applied the *Bulk Sales Act*.⁵ Do these cases signal that the time has come to reopen the debate and either repeal or reform the *BSA*?

II. Purpose, Scope and Operation of the Bulk Sales Act

Before examining the recent cases on the *BSA*, it is worthwhile to consider the *BSA* itself, particularly its purpose, when it applies and how it seeks to achieve its purpose. The purpose of the *BSA* is to protect secured and unsecured creditors of a business from the situation in which the owners of the business, without the consent of the creditors, liquidate the assets of the business and dissipate the proceeds, leaving the creditors unpaid.⁶ The *BSA* is the commercial equivalent of absconding debtors legislation. The *BSA* does not seek to regulate the amount of proceeds realized from the disposition of assets. Nor does it seek to reorder priorities. Instead, its sole concern is the conversion of illiquid assets used in operating a business into liquidated proceeds on the disposition of that business. The *BSA* imposes hoops that are intended to provide reasonable assurance to the creditors of the business that, provided there are sufficient proceeds, they will be paid upon the liquidation of the business assets.

Reform Commission, *Report on the Bulk Sales Act* (Report No. 71, 1988) [hereafter the "Manitoba Report"], Alberta Law Reform Institute, *The Bulk Sales Act* (Report No. 56, 1990) [hereafter the "Alberta Report"], Law Report Commission of Saskatchewan, *The Bulk Sales Act: Report to the Minister of Justice* (1990) [hereafter the "Saskatchewan Report"] and Northwest Territories Committee on Law Reform, *The Bulk Sales Act* (Working Paper No. 3, 1990) [hereafter the "NWT Report"]. In the United States, the Drafting Committee of the National Conference of Commissioners on Uniform State Laws and the American Law Institute also recommended repeal of Article 6 of the Uniform Commercial Code, the UCC bulk transfer provision.

³ See, for example, Donald J. Rapson, "Uniform Commercial Code Article 6: Should it be Revised or 'Deep-Sixed'?" (1983) 38 Bus. Law 1753 and Don C. Baker, "Bulk Transfers Act – Patch, Bury or Renovate?" (1983) 38 Bus. Law 1771.

⁴ See the survey results summarized at 77-78 of the Manitoba Report, *supra* note 1 and the survey results summarized at 22 of the Alberta Report, *supra* note 1. In the latter, the Alberta Law Reform Institute received over 1,000 responses to the survey. Approximately, 70% of those responding indicated some support for repeal of the legislation while the balance were to some degree opposed to its repeal.

⁵ R.S.O. 1990, ch. B.4 (hereafter the "*BSA*" or the "*Act*").

⁶ B.C. Interim Report at 12 and B.C. Final Report at 8, *supra* note 1. In *Garson v. Canadian Credit Men's Trust Association*, [1929] S.C.R. 282 at 285-6, the Supreme Court of Canada stated that the object of the Nova Scotia bulk sales statute was to "... prevent a trader from making a sale of his stock-in-trade, goods and merchandise without the consent of his creditors thereto or the payment of their claims". In *McLennan v. Fulton* (1921), 50 O.L.R. 572 at 577 (C.A.), Hodgins J.A. bluntly described the purpose of the *Act* as "... to prevent a person, partnership or company from disposing of his or its assets in bulk and pocketing the money, leaving creditors in the lurch".

Despite its antiquated terminology, the *Act* has wide application. It *prima facie* applies to every "sale in bulk" as defined in the *Act*.⁷ In turn, the definition of "sale in bulk" is dependent on the highly interrelated definitions of "sale", "stock in bulk" and the undefined expression "out of the usual course of business or trade of the seller". A "sale" is defined inclusively as a transfer, conveyance, barter or exchange.⁸ It does not include security interests such as pledges, charges or mortgages. The term "stock in bulk" is defined broadly but not comprehensively.⁹ It is defined in relation to goods. The sale must include either inventory sold out of the usual course of business or fixtures, goods and chattels with which the seller carries on a trade or business. If the sale includes such tangible personal property, then the stock in bulk of the seller extends to all other property, real or personal, that together with goods, is the subject of the sale in bulk. Thus, if a sale is limited to inventory sold in the ordinary course of business, the *Act* does not apply. If inventory is sold outside the ordinary course of business or the sale includes fixtures or equipment used in the business, the *Act* applies. If, however, no tangible personal property is involved in the sale, the *Act* does not apply. If the sale, for example, only includes real property (exclusive of fixtures) or intangibles such as book debts, negotiable instruments, securities, chattel paper, goodwill and intellectual property, the *BSA* does not apply.

The scope of what is included in and excluded from the *Act* reveals something of its origins. It was created in an era when suppliers were concerned with businesses that had a significant component of tangible personal property.¹⁰ Unlike real property, goods are mobile and can be liquidated without public notice or any filing requirement. Nevertheless, creditors might be even more exposed by a failure to account on a disposition of intangible personal property than by a disposition of tangible personal property.¹¹

As stated, the creditor protection goals of the *Act* are modest. Thus, the *Act* has no application where a creditor takes security or realizes upon security or the sale is by a receiver, trustee in bankruptcy or liquidator.¹² The *Act*, therefore, operates in the space bounded on one side by solvent vendors who pay all their creditors and on the other side by sellers who are so insolvent as to have become bankrupt or been made subject to the remedies of a secured creditor. The *BSA* operates in the netherworld between the clearly solvent and the clearly insolvent.

⁷ *BSA*, *supra* note 5, s. 2 and s. 1 (definition of "sale in bulk").

⁸ *Ibid.* s. 1 (definition of "sale").

⁹ *Ibid.* s. 1 (definition of "stock in bulk").

¹⁰ See discussion in the B.C. Interim Report at 6-11, the B.C. Final Report at 4-6, and the Manitoba Report at 4-7, *supra* note 2.

¹¹ See *ibid.* B.C. Interim Report at 58, the B.C. Final Report at 32, and the Manitoba Report at 27.

¹² *BSA*, *supra* note 5, s. 1 (definition of "sale") and s. 2 (realization).

Where the seller is clearly solvent, there are a number of ways to exclude the sale from the application of the *Act* or to comply with the *Act*. Since the *Act* imposes a regulatory or compliance cost, the practical issue, in the case of clearly solvent vendors, becomes how to most efficiently exempt a sale from the operation of the *Act* or to comply with it. There are broadly three strategies to exempt a sale by a clearly solvent seller from the operation of the *Act*.

First, if both the seller and the buyer are subjectively satisfied that the seller is clearly solvent and its creditors are not at risk that there will be a dissipation of assets, the buyer can simply waive its right to insist upon compliance with the *Act*.¹³ In effect, the buyer takes a calculated gamble that the seller's creditors will be satisfied in full either from the proceeds of the sale or from the seller's remaining resources or continuing operations. A buyer would not, of course, rationally take a calculated gamble unless it decided that the amount at stake multiplied by the risk factor is less than the cost of complying or otherwise exempting the transaction from the operation of the *Act*.

Sellers and buyers naturally assess these risks and costs much differently, often leading to a significant escalation in transaction costs as the parties negotiate a mutually acceptable resolution and then implement the joint *BSA* compliance strategy. The seller remains liable to the creditors. Thus, the seller's sole preoccupation is to minimize the compliance burden. The buyer has the opposite concern. It places a premium on minimizing its unintended liability exposure to creditors of the seller. The buyer also discounts the compliance costs since these are, in practice, largely borne by the seller.

Second, the seller may obtain a court order exempting a sale by a clearly solvent seller from the operation of the *Act*.¹⁴ The judge must be satisfied that the sale is advantageous to the seller and will not impair the seller's ability to pay its creditors in full.¹⁵ The court application takes time and involves expense. Nor is it certain, in borderline cases, whether a court will grant the order exempting the transaction from the *Act*. In effect, the buyer transfers the risk-benefit analysis to the court. Since the application is usually *ex parte*, the court is often placed in the awkward position of having to decide whether those not before the court require the protection of the *Act*. If there is little or no risk to the seller's creditors,

¹³ Usually, the buyer obtains an express indemnity from the seller and, where possible, the seller's major shareholders. An indemnity from the seller alone may be unnecessary as it would be implied in any event. Also, it is rarely useful. If a creditor is forced to look to the buyer for payment, it is probably because the seller is unable to pay. Thus, if a buyer is looking to hedge its calculated gamble that all of the seller's creditors will be paid, the buyer will usually look to a holdback, escrow or other security device from the seller or indemnities from the seller's major shareholders.

¹⁴ *BSA*, *supra* note 5, s. 3(1) and (2).

¹⁵ *Ibid.* s. 3(1).

the court might rationally insist that the parties comply with the *Act* rather than seek an exemption from it.

Third, of course, the clearly solvent seller can comply with the *Act*. Compliance with the *Act* requires a number of steps. First, the buyer must, before completion, demand and receive from the seller a statement listing the seller's unsecured trade creditors and secured trade creditors.¹⁶ Naturally, the *Act* defines the important concepts of "secured trade creditor" and "unsecured trade creditor".¹⁷ The usual practical difficulty is extracting from the seller's records a differentiation between secured and unsecured creditors that conforms to the definitions in the *Act*. Not all creditors are included in either list. Nor is the differentiation between secured and unsecured trade creditors ordinarily consistent with any differentiation the seller may have made in its own records. As a result, the *Act* requires an analysis of the seller's creditors: first, to determine who should be listed; and, second, to determine whether the particular creditor should be listed as an unsecured or secured trade creditor. Once those determinations have been made, the address and amount owing to each such trade creditor must be determined as of the date of sale.¹⁸ Another practical difficulty here is that the list of trade creditors, particularly unsecured trade creditors, varies from day to day. Likewise, the amount owing to the trade creditors varies daily.

Next, the seller must, in the case of secured trade creditors, describe the nature of the security held. The *Act*'s definition of "secured trade creditor" does not conform to the commonly understood meaning of the phrase. The *BSA* definition includes, for example, not only a person who holds security but also one who leases premises or enjoys a preference in respect of a claim.¹⁹ Again, a legal analysis must be performed on each of the seller's trade creditors in order to determine whether they fit the definition of "secured trade creditor". Finally, with respect to secured trade creditors, the aggregate amount owing to the creditor must be differentiated between the amount due or that becomes due on completion of the sale and the amount that becomes due sometime after completion of the sale.²⁰ In the case of secured creditors, therefore, the *Act* properly requires an analysis of the entire set of agreements that determine the relationship between the seller and its secured trade creditor so as to determine the extent to which the secured debt is due or falls due as a result of the sale. Where a trade creditor has a security interest in the seller's assets, it would be logical for the creditor to be left to rely on its *in rem* rights against the seller's assets.²¹ To the extent that the secured

¹⁶ *Ibid.* s. 4(1) and (2) and Form 1 (statement as to seller's creditors).

¹⁷ *Ibid.* s. 1.

¹⁸ *Ibid.* Form 1.

¹⁹ *Ibid.* s. 1 (definition of "secured trade creditor").

²⁰ *Ibid.* s. 4(2) and Form 1.

²¹ B.C. Interim Report at 60 and B.C. Final Report at 33, *supra* note 2. Long after

creditor's *in rem* rights against these assets are insufficient, it would be fair to treat the unsecured portion of the creditor's residual claim in the same way that claims of other unsecured trade creditors are treated under the *Act*. However, the *Act* focuses, not on the adequacy of the creditor's security, but instead on the terms for repayment of the debt.

The remaining steps in the process of complying with the *BSA* can be briefly set out. The seller, or an officer of the seller, verifies by affidavit the statement as to the seller's creditors.²² Where the seller is clearly solvent, the buyer must ensure that adequate provision is made for the immediate payment in full of: (i) all unsecured trade creditors of the seller of which the buyer has notice; and (ii) all claims of secured trade creditors of the seller that are or become due and payable on completion of the sale of which the buyer has notice.²³ The claims of those creditors must be paid in full forthwith after completion of the sale unless a specific creditor has delivered a waiver in writing of the need to make provision for immediate payment of that creditor's claim.²⁴ Within five days after completion of the sale, the buyer must file its own affidavit setting out particulars of the sale at the office of the court of each county or district in which all or part of the assets sold are located.²⁵

Reference must also be made to the post-sale exemption order. Where the buyer and the seller have failed to comply with the *Act*, the buyer, after the lapse of one year from the date of completion of the sale, may apply to the court for an order dispensing with the necessity for compliance.²⁶ The court will grant the order if it is satisfied that the claims of all unsecured and secured trade creditors of the seller existing at the time of completion of the sale have been paid in full and that no action or proceeding is pending to set aside the sale or to have it declared void.²⁷ The post-closing court order dispensing with *BSA* compliance is not a fourth strategy for either exempting a sale from the operation of the *Act* or complying with it. Rather, it allows the buyer to remove a permanent cloud on the title to the assets purchased. It is frequently needed where a downstream buyer of the assets or lender on the security

the original advent of bulk sales legislation into early 20th century Canada, trade creditors supplying goods (inventory or equipment) to a business have, of course, been afforded the opportunity of securing themselves under the applicable *Personal Property Security Act*. In particular, taking a purchase-money security interest affords much more reliable protection to a supplier of goods on credit than *ex post facto* reliance on bulk sales laws. A limited number of service suppliers such as repairers, storers, carriers, vendors of undelivered goods, marine suppliers, solicitors and insurance brokers may also enjoy statutory or common law possessory or non-possessory liens.

²² *BSA*, *supra* note 5, s. 4(1) and Form 1 (statement as to seller's creditors).

²³ *Ibid.* s. 8(1)(c).

²⁴ *Ibid.* Form 2 (waiver).

²⁵ *Ibid.* s. 11(1) and (2).

²⁶ *Ibid.* s. 11(3)(c).

²⁷ *Ibid.*

of the assets is not prepared to accept the buyer's previous decision waiving compliance with the *Act*. An example is where the seller and the buyer were not dealing at arm's length and, therefore, were prepared to ignore the *Act*. A subsequent buyer of, or lender taking security on, those assets may require a post-sale exemption order.

Where the seller's ability or willingness to pay its creditors in full is unclear, the available options and their priority follow a different path than in the case of sales by clearly solvent sellers. First, as discussed, for the clearly insolvent seller, a secured creditor can realize on its security, and, to that extent, the *Act* does not apply.²⁸ Likewise, a receiver, trustee in bankruptcy or liquidator can be appointed to sell the assets of the seller, which will be free of any further *BSA* concerns.²⁹ Second, if, for some reason, these options are not available or desirable, the remaining options include applying to court for an order exempting the transaction from the *Act*,³⁰ seeking to comply with the *Act* with the assistance of waivers or consents from the seller's unsecured trade creditors and secured trade creditors³¹ or paying the proceeds to a trustee appointed by the seller or the court.³² If a trustee is appointed, it will distribute the proceeds of sale to the creditors in accordance with the priorities set out in the *Bankruptcy and Insolvency Act*.³³

In partial recognition that the *BSA* imposes a compliance cost that may outweigh any benefits derived from it, the *Act* exempts low-value transactions from a portion of the compliance requirements of the *Act*. In these cases, the seller must still deliver the statement of its creditors verified by affidavit.³⁴ As well, the buyer must still file an affidavit setting out particulars of the sale with the applicable court.³⁵ However, no provision has to be made for payment of these trade creditors.³⁶ The compliance requirement is partially truncated. However, the arbitrary threshold is set at a level far below the level at which the compliance burden imposed on the *Act* exceeds the benefit. The partial exemption only applies where the aggregate claims of the unsecured trade creditors of the seller do not exceed \$2,500 and the aggregate claims of the seller's unsecured trade creditors do not exceed the same threshold.³⁷

²⁸ *Ibid.* s. 2.

²⁹ *Ibid.*

³⁰ *Ibid.* s. 3.

³¹ *Ibid.* s. 8(1)(c) and Form 2.

³² *Ibid.* s. 8(2), 9(1), 10 and 12(1) and (2).

³³ R.S.C. 1985, c. B-3, especially, s. 136(1) [hereafter the "*BIA*"].

³⁴ *BSA*, *supra* note 5, s. 8(1)(a) and s. 4(1).

³⁵ *Ibid.* s. 11(1) and (2) and s. 4(1).

³⁶ *Ibid.* s. 8(1)(a).

³⁷ *Ibid.*

³⁸ *Ibid.* s. 16(1).

The *Act* imposes severe sanctions for failure to comply. The sale is voidable unless the buyer complies with the *Act*.³⁸ An unpaid creditor of the seller or the seller's trustee in bankruptcy can apply to set aside a non-compliant sale or have the sale declared void.³⁹ Where a sale is set aside or declared void and the buyer has obtained possession of the purchased assets, the buyer becomes personally liable to account to the creditors of the seller for the value of the purchased assets.⁴⁰ If the buyer has converted any of the purchased assets into cash or other proceeds, the buyer must account to the creditor for those proceeds.⁴¹

III. Recent Cases

Four recent cases illustrate some of the practical and theoretical problems still imposed by the *Act* notwithstanding its long history in Canada.⁴² What the cases do not reveal, however, are the heavy compliance costs that the *Act* imposes,⁴³ a concern in virtually every asset transaction that occurs. It imposes largely unquantifiable risks on buyers. These costs are imposed even where the seller is clearly solvent and the buyer is prepared to waive compliance with the *Act*. Where the buyer is unwilling to waive compliance with the *Act*, then the negotiations usually end, and the seller seeks the most efficient way to either comply with the *Act* or obtain an exemption from it. The cost of forcing compliance with the *Act* on the part of clearly solvent sellers is not to be ignored just because it is hidden. It operates as a private tax payable by the parties to their respective

³⁹ *Ibid.* s. 17(1).

⁴⁰ *Ibid.* s. 16(2).

⁴¹ *Ibid.*

⁴² The Ontario *BSA* was first enacted in 1917. British Columbia passed its statute in 1908, Saskatchewan in 1911, and Alberta in 1913. The first *Uniform Bulk Sales Act* was adopted by the Conference of Commissioners on Uniformity of Legislation in Canada in 1920. Subsequent uniform statutes were approved in 1950 and 1961. The first US legislation, the precursor of Canadian legislative activity, was passed in Louisiana in 1894. By 1904, most states had passed bulk transfer legislation. Later, the bulk transfer statutes became Article 6 of the *Uniform Commercial Code*.

⁴³ The B.C. Final Report at 34, *supra* note 2, concluded:

"Perhaps the single most objectional aspect of the legislation is its effect on the orderly conduct of business. Full compliance with the *Act* calls for fulfillment of formalities which can be both time-consuming and costly. This cost and delay is imposed on every transaction which comes within the *Act* and must necessarily be reflected, to some extent, in the cost 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, their totality 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 and which cannot be justified. It is significant that in many cases, the cost and delay is so great that the *Act* will be ignored, the seller preferring to assume the risk of liability to the seller's creditors."

counsel. Of course, these systemic costs must be weighed against the incremental protections that the *Act* affords.⁴⁴

*A. Sidaplex-Plastics Suppliers Inc. v. Elta Group Inc.*⁴⁵

Sidaplex was a secured trade creditor of Elta. Elta consented to a judgment in the amount of \$97,000 which was to be secured by an automatically renewable irrevocable letter of credit. The letter of credit was to be put in place and renewed until resolution of other issues between Sidaplex and Elta, particularly Elta's outstanding counter-claim against Sidaplex.

Elta, through Lin, its sole shareholder, director and officer, obtained a letter of credit from its bank. However, the letter of credit was for a fixed term and was not automatically renewable as required under the settlement agreement. Neither Elta's solicitors nor Sidaplex's solicitors apparently noticed the material discrepancy.⁴⁶

Subsequently, Elta sold all of its remaining assets to Kimoto, a competitor. The proceeds of sale were used to eliminate Elta's bank indebtedness. The satisfaction of the bank indebtedness eliminated the contingent liability of Lin under his guarantee in favour of the bank. The balance of the sales proceeds was used to pay off other indebtedness of Elta. The sale did not comply with the *BSA*. Nor was an order obtained exempting the sale from the application of the *BSA*. Sometime later, the fixed-term letter of credit expired. At that point, Elta had no further assets. The result, therefore, was that Sidaplex was facing a completely dry judgment. Lin, the directing mind of Elta, was nearly in the clear.

Sidaplex went to court seeking two separate remedies. One was the oppression remedy found in s. 248 of the Ontario *Business Corporations Act*.⁴⁷ The other was to set aside the sale under the *BSA*.

At trial, ⁴⁸ Blair, J. held that Lin, as the sole owner, director and officer of Elta, was the one who benefited personally from the events that transpired because he was relieved of his substantial exposure under his personal guarantee of Elta's bank indebtedness. Rather than leave Sidaplex as the only unpaid creditor of Elta, Blair, J. applied the oppression remedy and held that Lin was personally liable to pay

⁴⁴ It would be wrong to say that the *BSA* does not afford any protection to creditors. See the B.C. Interim Report at 63-67, the B.C. Final Report at 35-37, and the Manitoba Report at 77-80, *supra* note 2.

⁴⁵ (1988), 162 D.L.R. (4th) 367 (C.A.); reversing in part (1995), 131 D.L.R. (4th) 399 (Ont. Gen. Div. - Comm. List).

⁴⁶ See trial decision per Blair, J., *ibid.* at 402.

⁴⁷ R.S.O. 1990 c. B-15 [hereafter the "OBCA"]. See also s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C. 44.

⁴⁸ *Supra* note 45.

Sidaplex the amount of Elta's judgment debt.⁴⁹ The Court of Appeal, holding that it had a limited power of review and was entitled to interfere only where it is established that the trial court erred in principle or its decision was otherwise unjust, refused to interfere with the trial court's application of the oppression remedy.⁵⁰ Rosenberg, J.A., speaking for the Court of Appeal, did affirm that it is no longer necessary, in an oppression action, to prove bad faith or want of probity.⁵¹

With respect to the bulk sale issue, the Court of Appeal held that, although Sidaplex was a secured trade creditor at the time of the sale to Kimoto, it was not entitled to be paid at the time of the sale pursuant to s. 8(1)(c). The reason for this is that the Sidaplex debt was not then due, nor did it become due as a result of the sale. The payment of the judgment depended on the resolution of outstanding matters in dispute between Sidaplex and Elta. Thus, it would easily have been possible for Elta and Sidaplex to have complied with the *BSA*. Under the circumstances, Elta should also have had no difficulty obtaining a court order exempting the sale from the application of the *Act*. The sales proceeds were adequate to satisfy all other claims. Alternatively, Elta could have supplied the necessary statement, verified by affidavit, listing its secured and unsecured trade creditors. In either case, these would have been empty formalities. No provision would need to have been made for the payment of Sidaplex. No doubt Sidaplex would have been indifferent to these steps since it considered itself adequately secured by the letter of credit.

Nevertheless, the Court of Appeal held that, even though Sidaplex would not have been a creditor entitled to the protection of s. 8(1) of the *BSA*, it was a creditor entitled to apply to have the sale set aside and declared void pursuant to s. 17(1) of the *Act*.⁵² In effect, the set of creditors entitled to apply to have a bulk sale declared void and set aside is wider than the subset of creditors entitled to be paid on closing. Nor did it matter that the parties could have gone through an apparently empty formality of complying with the *Act* and thereby left Sidaplex without a remedy under the *BSA*. If nothing else, the *Sidaplex* case demonstrates the conceptual difficulties in providing a remedy which is open to a creditor who would not have been protected had there been compliance with the *Act* and in affording relief that goes beyond what the creditor would have received had the parties complied with the *Act*.

The second broad point that arises from *Sidaplex* is the significant overlap between various creditor's remedies. In *Sidaplex*, the same facts

⁴⁹ *Ibid.* at 407.

⁵⁰ *Sidaplex*, *supra* note 44 at 567. In doing so, the Court of Appeal applied its own decision in *Naneff v. Con-Crete Holdings, Ltd.* (1995), 23 O.R. (3d) 481.

⁵¹ *Ibid.* Again, the Court of Appeal applied its own decision in *Brant Investments Ltd. v. KeepRite Inc.* (1991), 80 D.L.R. (4th) 161.

⁵² *Ibid.* at 572.

gave rise to remedies under the *BSA* and s. 248 of the *OBCA*. Creditors can avail themselves of the oppression remedy.⁵³ Although it has a wide application, the usual set of circumstances in which creditors have been successful in invoking the oppression remedy is where those in control of the corporation have stripped it of its assets⁵⁴ or otherwise shifted value out of one corporation to other corporations in the group in prejudice to the rights of creditors.⁵⁵ The sale of assets and the dissipation of those assets otherwise than in accordance with the priorities accorded to creditors are classic grounds for an order under the oppression remedy.⁵⁶ Nor is oppression the only alternative to a remedy under the *BSA*. Creditors can also invoke the statutory derivative action, particularly, where those in control of the corporation have dissipated assets or otherwise breached their fiduciary duties.⁵⁷ Where assets have been disposed of to related persons at an undervalue, the creditor can invoke the *Fraudulent Conveyances Act*⁵⁸ or a trustee (or in default, a creditor) can invoke the reviewable transactions provisions of the *BIA*.⁵⁹ Where the seller has dissipated the proceeds from the sale by favouring one group of creditors over another group, the creditors who are short can also invoke the remedy provided for in the *Assignments and Preferences Act*.⁶⁰ Likewise, a trustee in bankruptcy can invoke the fraudulent preference

⁵³ Examples of creditor use of the oppression remedy include: tax authorities (*R. v. Sands Motor Hotel Ltd.*, [1985] 1 W.W.R. 59); landlords (*First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28 (Alta.Q.B.), rev'd. [1990] 2 W.W.R. 670 (C.A.)); suppliers (*Prime Computer of Canada Ltd. v. Jeffrey* (1991), 6 O.R. (5d) 733); customers (*Canadian Opera Co. v. 670800 Ontario Inc.* (1989), 69 O.R. (2d) 532 (H.C.J.), aff'd. (1990), 25 O.R. (2d) 720 (Div. Ct.)); employees (*Downtown Eatery (1983) Ltd. v. Ontario* (2001), 200 D.L.R. (4th) 289 (Ont.C.A.) and *Tavares v. Deskin Inc.* (1993), A.C.W.S. (3d) 70 (Ont. Gen.Div.)); and unliquidated damages claimants (*Downtown Eatery, A.E. Realisations (1989) Ltd v. Time Air Inc.*, [1995] 3 W.W.R. 927 (Sask. Q.B.), aff'd. [1995] 6 W.W.R. 423 (C.A.), *Standal's Patents Ltd. v. 160088 Canada Inc.* (1993), 49 A.C.W.S. (3d) 425 (Que.S.C.) and *Levy-Russell Ltd. v. Shieldings Inc.* [1998], 41 O.R. (3d) 54 (Ont. Ct. Gen. Div.)). See generally, W.D. Gray, "Creditor Use of Statutory Corporate Law Remedies" (1998) *Corporate Liability* 219.

⁵⁴ See *Sands Motor Hotel*, *ibid.*; *Prime Computer*, *ibid.*; *Tavares*, *ibid.*; *A.E. Realisations*, *ibid.*; *Sandal's Patents*, *ibid.*; and *Levy-Russell*, *ibid.*

⁵⁵ *Downtown Eatery*, *supra* note 53.

⁵⁶ *SCI Systems, Inc. v. Gornitzki Thompson Little Co.* (1998), 110 O.A.C. 160 (Div. Ct.), varying (1997), 147 D.L.R. (4th) 300 (Gen.Div.).

⁵⁷ *First Edmonton Place*, (Alta. Q.B.), *supra* note 52 and *A.E. Realisations*, *supra* note 53.

⁵⁸ R.S.O. 1990 c. F-29 [hereafter the "FCA"].

⁵⁹ *BIA*, *supra* note 32, ss. 91 (settlements), 95 (fraudulent preferences) and 100 (reviewable transactions).

⁶⁰ R.S.O. 1990, c. A.33 [hereafter the "APA"].

provisions of the *BIA* or the *APA*.⁶¹ There are probably few, if any, transactions that should be impeachable under the *BSA* that would not also be impeachable under at least one of these other remedies.⁶² However, the *BSA* might successfully be used to set aside transactions that could not be said to be unfairly prejudicial to a creditor, entail a breach of duty to the seller or involve a fraudulent conveyance, fraudulent preference or reviewable transaction.

In *Sidaplex*, the oppression remedy had juristic advantages to the remedy available under the *BSA*. Using the oppression remedy, the court was able to fix liability on Lin, the directing mind of Elta, and the one who benefited from the lapsed letter of credit. The *BSA* would have afforded no remedy against Lin. Rather, the *BSA* could only impose its remedy against the innocent buyer, Kimoto. The perceived fairness in shifting a benefit away from Lin is not assisted by the *BSA*. The loss would be shifted from an innocent creditor (*Sidaplex*) onto an innocent buyer (Kimoto). If Kimoto is forced to satisfy *Sidaplex*'s judgment, then Kimoto, rather than *Sidaplex*, is stuck with a worthless claim against Elta and, again, Lin benefits.

B. *Re Canadian Red Cross Society*⁶³

The Red Cross administered Canada's blood system during what later became known as the Canadian blood tragedy. A large number of recipients suffered tragic harm from diseases contracted as a result of the blood contamination problem. While the Red Cross was only one of several defendants, it was the operator of the system and, in theory, the

⁶¹ *Robinson v. Countrywide Factors Ltd.*, [1978] 1 S.C.R. 753.

⁶² If seller disposes of its business to a related party at an undervalue, the oppression, derivative, *FCA* and reviewable transactions provisions of the *BIA* would be available. If the proceeds are not distributed in accordance with the priority scheme set out in the *BIA*, then the *APA*, *BIA* and oppression remedy would apply. If the debtor absconds with the proceeds but remains in Canada, the oppression and derivative remedies would apply. If the debtor absconds from Canada or otherwise threatens to dissipate the proceeds, a *Mareva* injunction is available. See *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2. Finally, courts in Canada have left open the importation of the American doctrine of successor liability on the purchase of assets. See, for example, *Trustee Company of Winnipeg v. Manitoba Bridge and Iron Works, Ltd.*, [1922] 1 W.W.R. 178 (Man. C.A.) and, more recently, *Suncor Inc. v. Canada Wire & Cable Ltd.*, [1993] 3 W.W.R. 630 (Alta. Q.B.) and *E.D.L.P. v. Children's Aid Society of Metropolitan Toronto* (unreported) [1995] O.J. No. 3814 (Gen. Div.). One significant distinction, of course, is that these other remedies are, in each case other than a *Mareva* injunction and an injunction granted in an oppression action, after-the-fact. The *BSA* is prophylactic. The second significant distinction is that, unlike these other remedies, the *BSA* does not depend on a creditor's initiating a court proceeding to prevent the dissipation of assets.

⁶³ (1998), 5 C.B.R. (4th) 299.

primary target of \$8 billion in tort claims.⁶⁴

Largely as a result of the claims against it and its loss of credibility as administrator of the Canadian blood supply system, the Red Cross was forced to sell its assets to its successors, Hema-Quebec, in the case of Quebec, and the Canadian Blood Service in the rest of Canada. The overwhelming claims brought against it forced the Red Cross to seek protection under the *Companies' Creditors Arrangement Act*.⁶⁵ It then sought court ordered approval of the sale of all of its assets to the two successor agencies. The aggregate purchase price of the assets of the Red Cross was about \$169 million. After payment of secured and unsecured claims, the balance remaining to be paid to the transfusion claimants was a pool of between \$70 to \$100 million.⁶⁶ Since the Red Cross was not bankrupt, the sale of its assets was not automatically exempt from the *BSA*. Thus, the Red Cross also applied for a court ordered exemption under s. 3 of the *BSA*. Compliance with the *BSA* would have been financially impractical.⁶⁷

Blair, J. held that the transfusion claimants did not qualify as creditors for the purposes of the *BSA*. Their claims had not yet been reduced to a judgment. The result was that instead of absorbing about 98% of the asset value of the Red Cross, the transfusion claimants received about 1% of the amount of their claims out of sale proceeds while the remaining creditors were paid in full. If a trustee had been appointed under s. 9(1) of the *BSA*, the trustee would have been obligated to distribute the proceeds of the sale among all of the creditors of the seller in accordance with s. 12(1). In contrast to the *BIA*,⁶⁸ the jurisprudence under the *BSA* has consistently treated claimants who have unliquidated claims not yet reduced to judgment as irrelevant for purposes of the *BSA*.⁶⁹ In the circumstances, Blair, J. granted the requested exemption from the *Act* under s. 3. In doing so, Blair, J. felt that the sale would not impair the ability of the Red Cross to pay creditors in full. He said that, in fact, the sale may well enhance the seller's ability to pay. A liquidation or

⁶⁴ *Ibid.* at 301-2.

⁶⁵ R.S.C. 1985, c. C.36.

⁶⁶ *Red Cross*, *supra* note 63 at 304.

⁶⁷ *Ibid.* at 313. On a liquidation, it had been estimated that the assets of the seller would result in \$95 - \$139 million decrease in the sales proceeds.

⁶⁸ See for example, *Letovsky v. Mutual Motor Freight Ltd.* (1958) 10 D.L.R. (2d) 355 (Man. Q.B.), *Scottish Canadian Assurance Corp. v. Dufour*, [1970] 1 O.R. 362 and *Re Confederation Treasury Services Ltd. (Bankrupt)* (1997), 43 C.B.R. (3d) 4, 96 O.A.C. 75 (C.A.).

⁶⁹ *Pizzolati Chittaro Manufacturing Co., Ltd. v. May et al.*, [1972] 2 O.R. 606, *per* Arnup, J.A. reversing [1971] 3 O.R. 768 (*per* Houlden, J. as he then was).

bankruptcy alternative would only have yielded about 44% of the purchase price.⁷⁰

In contrast to fraudulent conveyance legislation and, to a lesser extent, fraudulent preference legislation, the archetype situation in which the *BSA* applies is where the seller and buyer are acting at arm's length.⁷¹ In those circumstances, the seller has every normal incentive to maximize the sales proceeds. There is nothing in the *BSA* that directly invites a creditor to challenge the price paid for the assets. The *Red Cross* case indicates that, even if the sale proceeds will be insufficient to satisfy claims of creditors or even that subclass of creditors holding outstanding debts or judgment debts, the *BSA* will not stand in the way of the sale. The applicable tests are whether the sale is advantageous to the seller and whether it will impair the seller's ability to pay its creditors in full. Blair, J. appeared to favour the argument that emphasis should be placed on the "impairment" language. The question is not whether the sale will result in full payment to creditors but whether, on the facts, the transaction is improvident.

The court's distinction between claimants who have unliquidated claims and creditors who are owed debts or judgment debts also leads to difficulties. One of the difficulties is how a trustee obliged to distribute the proceeds in accordance with the scheme of the *BIA* can do so unless all such creditors, liquidated and unliquidated, are included in the distribution.⁷² The distinction also makes the operational protection of the *BSA* haphazard. Unless all such creditors are treated equally, the *BSA* not only condones but mandates differential treatment depending, in part, on the nature of the creditor's claim, a result at variance with federal legislative policy under the *BIA* and provincial legislative policy under the *Creditors' Relief Act*.⁷³ It protects some but excludes others. It leads to avoidance behaviour on the part of sellers. It changes the dynamic between the two camps of creditors who have claims against the corporate assets. Hard pressed sellers are encouraged to accelerate the sale and stall the prosecution of any unliquidated claims against it so as to both minimize the amount that must be paid out on closing and restrict the number of creditors who can apply to set aside the sale. It is irrational

⁷⁰ *Red Cross*, *supra* note 63 at 316.

⁷¹ Of course, the *BSA* applies to non-arm's length transactions as well. However, in non-arm's length transactions, great weight is generally accorded to minimizing compliance costs and little weight to the buyer's exposure to liability. Although fraudulent conveyances can take place between arm's length parties, there is normally no incentive for the seller to convey its assets to an arm's length party at an undervalue and, therefore, such a transfer carries a strong presumption that the sale price falls within an acceptable range of reasonableness.

⁷² *BSA*, *supra* note 5 s. 12(1).

⁷³ R.S.O. 1990, c.C. 45.

to restrict the right to complain on the basis of an arbitrary criterion such as the date of a creditor's judgment.

Finally, the distinction between liquidated and unliquidated claims is artificial. For instance, in *Sidaplex*, Sidaplex had a consent judgment and, therefore, was a "creditor" subject to the protection of the *BSA*. However, it could not enforce its judgment pending the resolution of the counter-claim involving Elta's unliquidated claims for breach of contract and breach of fiduciary duty. Until these claims were resolved, Sidaplex would not be able to enforce its judgment. Doubtless, the amount of Elta's liability to Sidaplex under the judgment would have been subject to a set-off of any damages awarded in Elta's favour against Sidaplex. Thus, until resolution of the litigation, the amount, if any, of Sidaplex's ultimate recovery under its judgment would have been uncertain. The practical distinction between a judgment debt (consented to but subject to set-off against unliquidated damages) and a straight claim for unliquidated damages is negligible.

As the *Red Cross* case also demonstrates, however, it is difficult for a creditor to challenge a sale on the basis that it is improvident. Ordinarily, no one is in a better position than the seller, even one who is *in extremis*, to determine the adequacy of the sale price. A seller facing claims from creditors may not be in any position to hold out for a high sale price.⁷⁴ Storm clouds are closing in on it. Unless the creditor itself is willing to pay a higher price for the assets or finds an alternative buyer willing to pay a premium for the assets, the court is likely to have a hard time refusing to approve an arm's length sale under s. 3 of the *BSA*.

*C. Devry v. Atwood's Furniture Showrooms Ltd.*⁷⁵

Atwood's dismissed Devry as an employee. Devry brought an action for pay in lieu of notice and ultimately obtained a judgment almost five years after the date of her dismissal. During the period before judgment, Atwood's experienced intermittent financial difficulty. Finally, approximately 18 months after the judgment in favour of Devry, the controlling shareholder of Atwood's caused it to sell its assets to a related company.

The court found that the sale complied with the *BSA* even though Devry was not named in the list of unsecured trade creditors. Based on the jurisprudence, Swinton, J., correctly held that the exclusion of Devry was proper because she was not a trade creditor.⁷⁶ No provision needed to be made for payment of Devry's judgment debt.

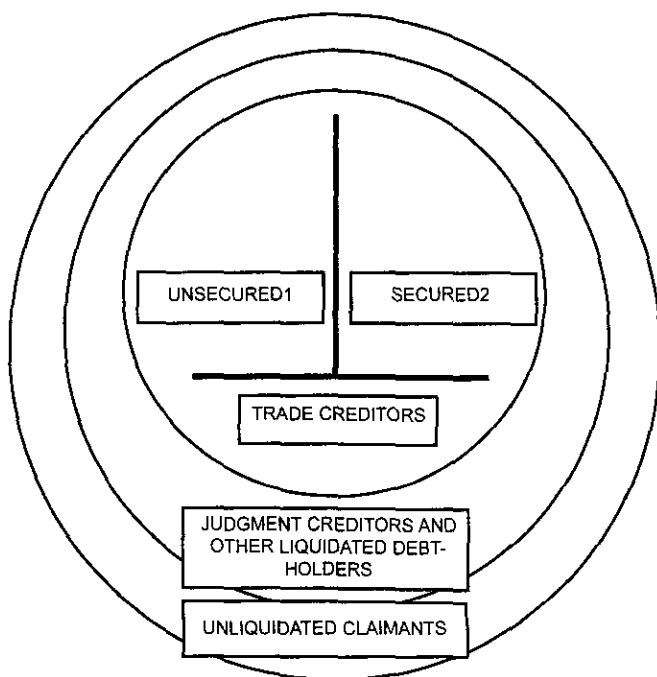
⁷⁴ Even where the seller is forced to make a fire sale, the price obtained presumably represents the highest possible price obtainable under the then prevailing circumstances.

⁷⁵ (2000), 11 B.L.R. (3d) 227 (Ont. S.C.J.).

⁷⁶ *Crabtree (Estate) v. Barrette*, [1993] 1 S.C.R. 1027.

In effect, the *BSA* sanctioned the payment in full of some creditors but the exclusion of Devry. Although she had the right to complain about the sale, she did not have the right to complain that no provision had been made to pay her. As in the *Red Cross* case, Devry was unsuccessful in challenging the price obtained for the assets sold even though, in her case, these were sold to a company related to the then controlling shareholder. Swinton, J. said that the onus was on Devry to bring forward evidence to show that the sale was at an undervalue or that her judgment would have been satisfied had the price been different.⁷⁷ The seller, of course, had not sought an exemption order under s. 3. However, had it done so, the result arguably would have been no different. Devry would have had the daunting challenge of proving that the sale was at an undervalue and that her lot in life would have been different had a fair price been paid. The result was that Devry received no recovery despite two separate actions in the courts and one appeal combining almost 12 years of struggle. Her problem was that she belonged to the subclass of creditors who receive less than full protection under the *BSA*. Figure 1 depicts the classification and treatment of creditors under the *BSA*.

Classification And Treatment Of Creditors Under The Bulk Sales Act



⁷⁷ Devry, *supra* note 75 at 234-5. However, contrast this with the subsequent decision of the majority of the Ontario Court of Appeal in *National Trust*, *infra* note 78.

Notes:

¹ Unsecured trade creditors must be listed in the seller's sworn statement and are entitled to be paid in full forthwith after completion of the sale (unless the creditor specifically waives such right).

² Secured trade creditors are to be listed in the seller's sworn statement. However, they are only entitled to be paid forthwith that portion of their claims that are or become due and payable on completion of the sale (unless the creditor specifically waives such right). The balance is unprotected under the *BSA*.

³ Judgement creditors and other creditors holding liquidated debts at the date of the sale (other than trade creditors provided for in 1 and 2 above) do not have to be listed in the seller's sworn statement and are not entitled to be paid forthwith after completion of the sale. However, such creditors can apply to set aside a non-compliant sale and have the sale declared void.

⁴ Creditors with merely unliquidated claims at the date of the sale do not have to be listed in the seller's sworn statement, are not required to be paid forthwith after completion of the sale and have no right to apply to court to set aside a non-compliant sale or have the sale declared void.

D. *National Trust Company v. H&R Block Canada Inc.*⁷⁸

The assets of Tax Time Services Limited were sold to a competitor, H&R Block, for \$800,000. At the time of sale, Tax Time was in serious financial difficulty. The book value of its assets was \$813,000, but it had liabilities of almost \$1.4 million. It may have had further contingent secured claims amounting to more than \$2.1 million.⁷⁹

Out of the sales proceeds, approximately \$425,000 was paid to the first secured creditor, First City. The balance of approximately \$375,000 was paid to the Royal Bank. The Bank was left with a residual claim of \$590,000.⁸⁰ National Trust was an unsecured creditor in the amount of

⁷⁸ (2001), 207 D.L.R. (4th) 147, 18 B.L.R. (3d) 172, leave to appeal to S.C.C. allowed by S.C.C. on October 17, 2002 but leave to cross-appeal dismissed. The hearing in the S.C.C. is scheduled to be heard on June 3, 2003.

⁷⁹ The amounts owing to creditors in National Trust are hard to follow. At 196, Borins, J.A. first states that as of 31 May 1991, Tax Time's liabilities were \$1,398,898. However, in the same paragraph he states that Tax Time's owner gave evidence to the effect that, at that time, Tax Time owed its secured creditors in excess of \$3.5 million. Elsewhere, the judgment sets out that \$424,920.78 was owed to First City, about \$969,000 to Royal Bank, about \$280,000 to National Trust and \$100,158 to other unsecured creditors, *ibid.* These debts total \$1.77 million and, except where otherwise stated, are the figures used in the remainder of this article.

⁸⁰ *Ibid.* at 196.

about \$205,000 plus interest which, at the time of the sale, would have made its whole claim approximately \$280,000. National Trust obtained judgment two years after the sale in the amount of \$327,625, which included further accrued interest.⁸¹ In addition, there were 35 other unsecured creditors of Tax Time. Their claims amounted to approximately \$100,000.⁸²

The sale to H&R Block took place without compliance with, or an exemption from, the *BSA*. A number of financial institutions released their respective security interests in the purchased assets so that the sale could be completed.⁸³ As stated, the entire sales proceeds were distributed to the first and second-ranking secured creditors. In effect, the payments were distributed as if the secured creditors had realized upon their security or Tax Time had become bankrupt. Presumably, the parties concluded that payment of the sales proceeds in accordance with their respective priorities was sufficient and that compliance with the *Act* would only entail expense but yield no different result for the creditors. Again, the seller was motivated to obtain the highest available price. Indeed, Royal Bank, which had to release its security interest to facilitate the sale, would not have done so had it thought that it could have received repayment of more than 39% of its secured debt. The sale price would need to have been at least \$1.39 million, a 72% increase in the actual price, before the unsecured creditors would start seeing any return.⁸⁴

Despite these compelling facts, a majority of the Court of Appeal held that it was now too late to speculate about what would have happened had the parties sought compliance with the *BSA*.⁸⁵ National Trust was not required to produce any evidence that a higher price could have been obtained. H&R Block was ordered to pay National Trust an amount equal to its loan plus accrued interest.⁸⁶

The *BSA* itself provides a class action remedy.⁸⁷ The buyer is required to pay an amount to the creditors of the seller equal to the value of the assets acquired.⁸⁸ In this case, that would have compelled H&R Block to pay the full purchase price a second time, together with interest from the date of closing to the date of sale. Royal Bank, as the holder of a residual secured claim for \$590,000, would have absorbed approximately 75% of

⁸¹ *Ibid.* at 191.

⁸² *Ibid.* at 196.

⁸³ *Ibid.*

⁸⁴ See comments in note 79 above. If the secured claims were \$3.5 million, the price would have to have been increased 4.5 fold before the unsecured creditors were in the money.

⁸⁵ *Supra* note 78 at 212.

⁸⁶ *Ibid.*

⁸⁷ *BSA*, *supra* note 4 s. 17(1) and 16(2). See also Borins, J.A., *ibid.* at 209.

⁸⁸ *Ibid.*, s. 16(2).

the second payment. The remaining unsecured creditors would have shared the balance of the proceeds *pro rata*.⁸⁹ Having found that H&R Block made a calculated decision not to insist upon compliance with the *BSA*, the majority did not want to consider whether the assets were sold at an undervalue or whether, had an application been made, the court would have exempted the transaction under s. 3 on the basis that the sale would not impair the position of the creditors.⁹⁰

The majority decision has the dubious merit of putting some teeth back into the *BSA* and reinvigorating it as a remedy in a creditor's arsenal. Borins, J.A. wrote a strong dissent. In it, he concluded that, had there been compliance with the *BSA*, National Trust would still have received nothing.⁹¹ There was no misuse of the sales proceeds nor unjust enrichment. National Trust was not prejudiced by the failure to comply with the *BSA*. He found it unconscionable that a creditor would be in a better position than it would have been in had there been compliance with the *BSA*.⁹² As a result of his finding, Borins, J.A. did not go on to consider a further level of analysis. If H&R Block must pay a second time, then the second payment should have been committed, firstly, to the Royal Bank and, thereafter, any contingent secured creditors. Only the balance should have been paid rateably to unsecured creditors. It would, of course, have been anomalous to permit the Royal Bank to participate in the second payment when it had waived its rights so that it could receive 47% of the first payment. There would, however, have been less objection to the contingent secured creditors sharing in the proceeds of the second payment.

On the other hand, had the majority agreed with Borins, J.A., the *BSA* would have been further emasculated to the point of extinction. Without compliance with the *BSA*, an unpaid creditor will have difficulty determining what became of the debtor, what was paid for its assets and how the sales proceeds were distributed. Unsecured creditors, such as National Trust, would be largely left in the dark. An unsecured creditor could, of course, demand that either the seller or the buyer provide particulars of the sale pursuant to s. 7 of the *BSA*. However, at that point, the seller may be out of business. The obligation to disclose particulars does not extend to the seller's directors or officers. Without a filing under the *BSA*, a creditor of the seller may have difficulty even identifying the buyer.

The facts in *National Trust* are not unusual. Where they occur, the

⁸⁹ Ignoring, of course, the possibility that there might also have been contingent secured creditors whose aggregate claims exceeded \$2.1 million. Again, see comments in note 79 above.

⁹⁰ *Supra* note 78 at 208.

⁹¹ *Ibid.* at 210.

⁹² *Ibid.* at 212.

buyer will be forced to insist that an exemption order be obtained under s. 3 of the *BSA*, that the secured creditors exercise their respective remedies and sell the assets of their debtor, that the debtor make an assignment in bankruptcy to facilitate the sale, or that a trustee be appointed under the *BSA*. In any of these cases, the result is to increase the transaction costs and decrease the bargaining power of the troubled seller. The seller's fate will be in the hands of the court, its secured creditors or a trustee (under the *BIA* or the *BSA*). Once the seller has gone so far, it is difficult to retreat. Fire sale circumstances are inevitable. By contrast, Tax Time was able to obtain close to the book value of its assets and was able to conclude the transaction on its own terms and with the consent of those of its creditors who had any apparent economic stake in the proceeds.

IV. Conclusions

The *BSA* imposes some difficult challenges on commercial parties and on the courts.

The *Sidaplex* case demonstrates that the same facts will often give rise to alternative remedies that are juridically preferable to the remedy that the *BSA* provides. In that case, it was the oppression remedy. In other cases, it will be fraudulent conveyance legislation, fraudulent preference legislation or the reviewable transaction provisions of the *BIA*. *Sidaplex* also demonstrates the inconsistencies arising due to the differentiation between those creditors who can complain and those creditors who are entitled to full payment on closing under s. 8(1)(c).

The *Red Cross* case illustrates that, even where a seller is deeply insolvent, the *BSA* is not necessarily an obstacle to the liquidation of its assets. The seller can still dispose of its assets but will require a court order to do so. The *Red Cross* case also demonstrates that creditors who have unliquidated claims not yet reduced to judgment by the time of the sale will be ignored for the purposes of the *BSA*. The magnitude of their claims or the certainty of a whopping judgment matters not.

The *Devry* case highlights that the *BSA* creates three categories of unsecured creditors. First, there are unsecured trade creditors who receive the maximum protection under the *Act*. In the absence of a court order or a specific written waiver, the unsecured trade creditors must be paid in full. Second, there are creditors who have a liquidated debt or an unliquidated claim reduced to judgment. These creditors are not entitled to be paid anything from the sale. However, they are entitled to complain if there is non-compliance with the *Act*. It does not matter that, had there been compliance, these creditors would not have been paid. Third, there are those creditors who, at the date of the sale, have not yet reduced their unliquidated claims to judgment. These creditors are entitled neither to be paid on the sale nor to complain if there is non-compliance with the *Act*.

Finally, there is the *National Trust* case. It demonstrates that the *Act* may produce a windfall for a secured or unsecured creditor who has a liquidated debt outstanding at the time of the sale or an unliquidated claim that has been reduced to a judgment by the time of sale. Unless an order exempting the transaction has been obtained beforehand or unless there is compliance with the *Act*, an unpaid creditor can look to the seller for full payment of the outstanding debt. The court will not speculate as to what might have happened had there been compliance with the *Act* or had an application for an exemption order been sought. The court will not, therefore, examine the adequacy of the price or the extent to which the price would need to be increased before the unpaid creditor receives any proceeds. Windfalls are permitted. Perhaps more surprisingly, the remedy available to the complainant creditor is measured by what it is owed at the time of the sale. It is not a class remedy. *National Trust* was entitled to recover the full amount of its debt plus interest.⁹³ There was no mention of any remedy available for the other unsecured creditors of Tax Time. Nor did it matter that the Royal Bank had effectively waived security on a portion of its secured debt equal to approximately 75% of the sale price or that other secured creditors may have discharged security for debts exceeding \$2.1 million. *National Trust* did not have to share its windfall with any secured creditor or any of the other unsecured creditors.

It is unclear what would have happened had the aggregate amount owed the unsecured creditors exceeded \$800,000. The *BSA* purports to limit the buyer's liability to the value of the assets acquired. In *National Trust*, the value of these assets was taken to be \$800,000. Despite the majority's unwillingness to speculate on the adequacy of the sale price, some value must be placed on these assets to determine the magnitude of the buyer's liability to the unpaid creditors.⁹⁴ If the aggregate amount of H&R Block's liability is \$800,000, the creditors ought to share the proceeds ratably. If some secured creditors waived claims, should these creditors be re-included for the purposes of sharing in the second distribution? Is it possible to waive a claim subject to the creditor's right to share in the proceeds of any second payment required under the *BSA*? On the one hand, it is hard to see why a secured creditor should participate in the fruits of a second distribution when it has waived its rights in order to permit the initial sale. On the other hand, it is hard to see the justification for subordinating a secured creditor to an unsecured creditor.

⁹³ *BSA*, *supra* note 4 s. 16(2). The majority in *National Trust* tried to duck the logical inconsistency in saying, at the same time, that it was too late to speculate about the value of the assets transferred and the reference in s. 16(2) to the buyer's being liable "for the value" of the stock in bulk received or taken in possession. In *National Trust*, the majority said that the issue does not arise because *National Trust's* recovery is less than \$800,000, which, in itself, is an acknowledgement of the buyer's liability ceiling. However, the issue remains because of the buyer's liability to other creditors.

⁹⁴ *BSA*, *ibid.* s. 16(2).

The *BSA* continues to present the courts with dilemmas. It is ultimately difficult to find fault with the decisions in *Sidaplex*, *Red Cross*, *Devry* or *National Trust*. The ultimate fault lies with the deeply flawed legislation. In *National Trust*, the majority of the Court of Appeal may have reached the conclusion, without saying so explicitly, that the intractable difficulties that the *Act* presents mandate a legislative solution. Parties will either have to comply with the legislation or face the consequences. If the consequences prove to be draconian, it is for the legislature to decide whether to retain the *Act* or change it. In the meantime, the courts may not consider that they have the power to emasculate the *Act* in the only circumstance in which it has a legitimate application: when the seller is clearly insolvent and the parties have not bothered either to comply with the *Act* or to apply for an order exempting the sale from the *Act*, taking it upon themselves to say how the proceeds are to be distributed.

Given the results of these cases, particularly *National Trust*, the time has come to re-examine whether the *BSA* should have a continuing role in the arsenal of creditor's remedies in the 21st century. Does it protect creditors in a way that is not served by other remedies? Is the scope of its application rational? Does it arbitrarily differentiate amongst classes of creditors? Does it produce windfalls? Will it force parties to obtain exemptions or to comply with its provisions even where the seller is clearly solvent? Are the remedies that the *Act* calls for rationally related to its purpose? Finally, do its compliance costs outweigh any perceived benefits?

Law reform commissions in British Columbia, Alberta, Saskatchewan, Manitoba, and the Northwest Territories have each examined these questions. In all cases, those law reform commissions reached the conclusion that, on balance, the case for repeal is stronger than the case for improvement.⁹⁵ In light of these recent cases under the Ontario *BSA*, it is time for legislatures in the remaining provinces to examine whether the lead of Canada's western provinces and northern territories should be followed.⁹⁶

⁹⁵ *Supra* note 2.

⁹⁶ In 1985, British Columbia became the first jurisdiction in North America (and, therefore, the world) to repeal its bulk sales legislation. Others have followed British Columbia's lead, including Alberta, Saskatchewan, Manitoba (1992), the Northwest Territories, the Yukon, Nova Scotia (in 1977), Prince Edward Island (in 1998) and Quebec (in 2002). Nunavut never enacted *BSA* legislation. Hence, the only remaining *BSA* jurisdiction are Ontario, New Brunswick and Newfoundland and Labrador. Currently, New Brunswick is considering repeal of its *Bulk Sales Act*. See: T. Rattenbury, "Law Reform Notes #17" (New Brunswick: Department of Justice, December 2002) at 2-3.

