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Shedding bulk

By Neill May

There is something to be said for continuity. There is also something to be said for individuality. And there is still more to be said as well for embracing the odd bit of illogic for the sake of stylistic flair.

But we may have to save all of that discussion for another time, because it looks like the Bulk Sales Act in Ontario is about to disappear. Bulk sales legislation has been around in this country for more than a century, and Ontario is the only Canadian province where it subsists. The illogic part will take a bit more explaining, particularly for those to whom bulk sales spur a plan to bring the tote bags to the local grocer to buy almond slivers and endlessly chewy candies seemingly glowing in the colour of Donald Trump's tan.

The simple premise of bulk sales legislation is fairly apparent. Suppliers who sell goods on credit to businesses are exposed if those businesses sell all of their stock in bulk and don't settle up their debt. There are three constituencies involved in such scenarios. First are the suppliers, who are exposed to the risk. Second are the business owners, who are failing to fulfill their obligations. The third party is the purchaser of the stock in bulk; that constituency is the key to how bulk sales laws work (and in the rest of Canada, worked).

Under the Bulk Sales Act, the buyer, in the case of an out-of-the-ordinary-course sale of stock in bulk, becomes the policeman. The buyer must first require the seller to deliver a statement of the creditors of the business, supported by an affidavit, and then can only proceed with the transaction (unless it's exempt under the statute) if the seller delivers a statement that the creditors have been paid, if adequate provision for the payment of creditors is made, or if instead of paying the seller the buyer pays a trustee who takes care of the creditors, all through a court process. The buyer may well be complicit in a scheme to defraud the seller's creditors, but the law applies whether or not that is so. If a transaction is completed that is subject to bulk sales law, then, unless an exemption is available, the deal is voidable, which would mean that the buyer would have to pay again (twice) for the same goods.

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It has been relatively customary for parties to waive compliance with the Bulk Sales Act and for the seller to indemnify the buyer. This construct, however, puts the buyer at risk for the seller's post-deal creditworthiness. It can also mean that the transaction is subject to challenge, for example, by lower-ranking creditors who would not have participated in the proceeds of sale in any event because they are out of the money but have an opportunity to complain for the loss of their day in court. In this way, the law not only undermines deal certainty and imposes unwieldy requirements on commercial transactions, it also has the potential to result in consequences to the buyer that are unfair and significant. Ironically, the statute doesn't clearly solve the problem it is intended to address: Compliance turns on the seller's list of creditors, and can also depend on the seller confirming that the creditors are satisfied, so

the evil of the fraudulent creditor isn't extinguished.

It is somewhat analogous to parents making older siblings responsible for the conduct of younger children; it is tempting for parents seeking an effective keeper of the peace, but it ropes in a third party who may or just as easily may not be complicit, makes that party an insurer for the behaviour of others and often as not doesn't prevent disruptive behaviour by the younger siblings. Is it obvious that I was the eldest of four?

Perhaps the oddest thing about the endurance of the Bulk Sales Act (I'm not averse to piling on) is that other statutes serve similar objectives with less noise. Without getting into detail, personal property security statutes permit suppliers to perfect super-priority security interests in supplied goods, there are many statutes that address fraudulent conveyances and improper assignments and preferences that subvert creditors' interests, bankruptcy laws countenance review (and unwinding) of commercial transactions and corporate statutes provide creditor recourse to redress through the oppression remedy and derivative actions. That sentence, ironically, is likely a stroll through the bulk bin aisle where the goods for sale are creditor-protection laws.

At the time of this writing, the bill that would kill the Bulk Sales Act in Ontario has received first reading, so news of its demise may be greatly exaggerated. If it does go, for those who are sentimental and who yearn for statutory anachronisms, there is the comfort that there will seemingly always be some continuing bans on raising pet llamas within city limits laws on the books. Actually, there are many such laws in bulk. **CL**

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