

The Bulk Sales Act
Recent Developments And Future Considerations

Presented by: Alex Eisenberg & Joshua Beattie
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The Current System

Overview of the *BSA*

- **Application of the *BSA***
 - Developed to protect all creditors from a debtor selling their assets and leaving those creditors unprotected and unpaid.
 - Applies to a sale of stock in bulk out of the usual course of business or trade of the seller of all or substantially all of the assets of a business in Ontario.



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The Current System

Overview of the BSA

- **If the buyer fails to comply with the BSA:**
 1. The transaction is voidable; and
 2. If the buyer has taken possession of the assets, the buyer is personally liable to account to the creditors of the seller for the value of the transaction.



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The Current System

Overview of the BSA

- **Inter-Party Waiver and Indemnity**
 - If the buyer is satisfied that the seller is clearly solvent and that the seller's creditors are not at risk if there is a transaction, industry practice has been for the buyer to waive its right to insist that the seller comply with the BSA.
 - In exchange for this waiver, the seller provides an express indemnity to the buyer for all matters related to non-compliance with the BSA by the seller.
 - In an asset deal, the company will have sold all or substantially all of its assets and therefore the shareholders may be asked to guarantee the indemnity.



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Recent Case Law

The Current Jurisprudence

- **The Supreme Court of Canada (2003)**
 - *National Trust Co. v. H & R Block Canada Inc.*, 2003 SCC 66
- **Ontario Supreme Court (2016)**
 - *Cieslok Media Ltd. v. Clarity Outdoor Media Inc.*, 2016 ONSC 1427



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Recent Case Law

National Trust Co. v. H & R Block Canada Inc., 2003 SCC 66

Paragraph 8:

“From the outset, bulk sales legislation has been judicially recognized as protecting the interests of creditors whose merchant debtors had disposed of all or substantially all of the inventory, chattels and fixtures by which they carry on business...”



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Recent Case Law

National Trust Co. v. H & R Block Canada Inc., 2003 SCC 66

Paragraph 8:

“However, such laws were recently repealed in Alberta, British Columbia, Manitoba, Saskatchewan, Yukon and the Northwest Territories, following reports of law reform commissions in those jurisdictions that the goal of protecting creditors, **to the extent that it is achieved by bulk sales legislation, is realized only at the cost of significant commercial inconvenience, disruption and expense.** More importantly, these laws were largely seen as unnecessary in light of the availability of remedies under the general law of fraudulent conveyance.”



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Recent Case Law

Cieslok Media Ltd. v. Clarity Outdoor Media Inc., 2016 ONSC 1427

The Facts

- CBS Canada Holdings (“CBS”) supplied outdoor advertising space to Clarity Outdoor Media (“Clarity”).
- On May 8, 2014, Cieslok Media Ltd. (“Cieslok”) agreed to purchase Clarity’s assets.
- Cieslok waived compliance with s. 4 of the BSA and also failed to fulfil its obligations under s. 11(1), which mandated the filing of an affidavit setting out the particulars of the Clarity sale.



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Recent Case Law

Cieslok Media Ltd. V. Clarity Outdoor Media Inc., 2016 ONSC 1427

The Facts

- CBS commenced an action against Cieslok, alleging a violation of various sections of the BSA.
• Cieslok applied under s. 11(3)(b) of the BSA requesting an extension of the time period for compliance. It claims that failure to file under s. 11 is frequent and common industry practice.



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Recent Case Law

Cieslok Media Ltd. V. Clarity Outdoor Media Inc., 2016 ONSC 1427

Issues

- 1. Is it possible to waive compliance of the requirements of s. 4 of the BSA?
2. What is the test for an extension of the time period for compliance, and should an extension be granted?



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Recent Case Law

Cieslok Media Ltd. V. Clarity Outdoor Media Inc., 2016 ONSC 1427

Waiving Compliance

- Section 4 of the BSA protects not only the buyer's interests, but also the seller's creditors who have no say in any purported waiver.
• There is no mechanism within the BSA for waiving the statutory requirements contained in s. 4.



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Recent Case Law

Cieslok Media Ltd. v. Clarity Outdoor Media Inc., 2016 ONSC 1427

Paragraph 13:

"I am somewhat puzzled by these submissions. Section 4 of the BSA purports to protect not only the interests of the buyer in the transaction but also the seller's creditors who have no say in any purported waiver. **A review of the BSA reveals that there is no mechanism for waiving the statutory requirements contained in s.4.** Moreover, the wording of the section makes clear that compliance with the section is mandatory: the word "shall" is used in describing the conduct of the parties."



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Recent Case Law

Cieslok Media Ltd. v. Clarity Outdoor Media Inc., 2016 ONSC 1427

Paragraph 16:

"**It is not possible to waive compliance of the requirements of section 4 of the BSA.** Non-compliance means that the parties to a transaction run the real risk that the transaction will subsequently be declared void."



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Recent Case Law

Cieslok Media Ltd. v. Clarity Outdoor Media Inc., 2016 ONSC 1427

• Factors for Extension of Filing Period

- the length of delay in complying with the obligations set out in s. 11(1);
- the reason for non-compliance;
- the filing of an affidavit outlining the reasons for the failure to comply with s. 11(3);
- the applicant seeking the extension must come with clean hands; and
- the potential prejudice each party would suffer in granting or denying the extension.



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Recent Case Law

Cieslok Media Ltd. v. Clarity Outdoor Media Inc., 2016 ONSC 1427

- **Decision**
 - The Court granted Cieslok's application by granting an extension for complying with the BSA.
 - However, the Court ordered that the granting of the application would have no effect on the outcome of the main action commenced against Cieslok by CBS for invalidity pursuant to Cieslok's failure to file an affidavit required under section 11 of the BSA.



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Recent Developments

Bill 218, the *Burden Reduction Act*, 2016

- Repeal of the BSA was one of the key recommendations contained in the June 15, 2015 report to Ontario's Minister of Government and Consumer Services by the *Business Law Agenda: Priority Findings & Recommendations Report*
- On June 8, 2016, Bill 218 passed first reading in the Ontario Legislature. Among other changes, Bill 218 would repeal the BSA.



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Recent Developments

Bill 218, the *Burden Reduction Act*, 2016

- Starting with British Columbia in 1985, all Canadian provinces and territories repealed their bulk sales legislation.
- 44 out of the 50 U.S. states have repealed their bulk sales legislation



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Recent Developments

Bill 218, the *Burden Reduction Act*, 2016

• Possible Reasons for Repeal

- Lacks a *de minimis* exemption for small transactions.
- Undermines transaction finality.
- Is intrusive on transacting parties.
- Wastes scarce judicial resources.
- Is inconsistent with commercial practices in most of Ontario's major trading partners.
- Imposes a compliance burden with few off-setting advantages.



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Recent Developments

Bill 218, the *Burden Reduction Act*, 2016

• Possible Reasons for Repeal

- Other means for protecting creditors (discussed later)
- Compliance with the *BSA* can be impossible where part of the purchase price is paid by the assumption of debt or the issuance of shares
- The *BSA* is uneven in its application – often the parties will prefer an asset sale but will proceed with a share deal in order to avoid the *BSA*
- The *BSA* does not apply to a sale in bulk only involving intangibles, such as intellectual property, which are increasingly becoming more valuable



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Moving Forward

Remaining Protection for Creditors

• Federal Law

- **Transactions at undervalue under the *Bankruptcy and Insolvency Act* (“BIA”).** Under section 96.1(2) and (3) of the BIA, a court can order the opposite party to the transaction to pay the trustee in bankruptcy the difference between the fair market value of the property or services sold or disposed of by the debtor and the actual consideration given or received by the debtor
- **30-day goods.** Under section 81.1(1) of the BIA, a supplier or distributor of goods may, in certain circumstances, repossess goods that it has delivered to a customer who later becomes bankrupt or placed into receivership



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Moving Forward

Remaining Protection for Creditors

- **Federal Law**

- **Canada Business Corporations Act ("CBCA") oppression remedy and derivative action.** Suppliers have obtained remedies under sections 241 (oppression remedy) and 239 (derivative action) of the CBCA, if the corporate debtor is incorporated or continued under the CBCA.



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Moving Forward

Remaining Protection for Creditors

- **Ontario Law**

- **The Personal Property Security Act.** If properly created, perfected and, in the case of the supply of inventory, notified to competing secured parties, the supplier's PMSI will rank in priority ahead of security interests that the debtor gives to its bank or other lenders (and the interests of unsecured creditors).
- **Fraudulent Conveyance.** The *Fraudulent Conveyances Act*, assists a creditor to recover real or personal property that the debtor has conveyed or transferred to others with the intent to defeat, delay or defraud the rights of creditors or others.



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Moving Forward

Remaining Protection for Creditors

- **Ontario Law**

- **Fraudulent Preference.** The *Assignment and Preferences Act*, gives one group of creditors (generally, in practice, the general body of unsecured creditors) the right to recover property that a debtor transfers to one or more of its other creditors in preference to the complainant creditors.
- **Absconding Debtor.** The *Absconding Debtors Act*, provides a mechanism for seizing real or personal property in Ontario if a resident of Ontario leaves the province with the intent to defraud her creditors.



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Moving Forward

Remaining Protection for Creditors

- **Ontario Law**

- **Mareva injunction.** If there is a genuine risk that the defendant will dispose of assets within the jurisdiction of the court or remove them from the jurisdiction, an interlocutory injunction may be available to enjoin the defendant from disposing of or removing the assets pending a determination of the plaintiff's claim.
- **Business Corporations Act ("OBCA") Oppression Remedy and Derivative Action.** Supplier have obtained remedies under section 248 (oppression remedy) and section 246 (derivative action) of the *OBCA*, if the corporate debtor is incorporated or continued under the *OBCA*.



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Moving Forward

Remaining Protection for Creditors

- **Further Considerations**

- *Breach of trust or trustee de son tort*
- Business Judgment Rule in *Peoples Department Store Inc. (Trustee of) v. Wise*
- Refinements to the BIA and CCAA

- **Final Thoughts**

- Counsel to purchasers of assets should continue to be mindful of the solvency of the seller and the impact of potential claims by unpaid creditors under remaining creditor protection legislation.



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Questions?



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Contact Us

Alex Eisenberg

 416.865.6668

 aeisenberg@grllp.com

 grllp.com

 @grllp

Joshua Beattie

 416.865.4016

 jbeattie@grllp.com

 grllp.com

 @grllp



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