WAIVE THE BULK SALES ACT?

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It is not at all uncommon for a lawyer to find himself in the position of having to decide whether or not to advise his client to waive the requirement that the provision of the Bulk Sales Act [1] be complied with. This article will attempt to aid a New Brunswick [2] lawyer in reaching this decision by exploring the possible consequences of noncompliance. In so setting the scope of the article, it shall be assumed that the Bulk Sales Act applies to the transaction and that the only question is not how to comply, but whether or not to comply. However, the practical problems of compliance can't be ignored by a lawyer as a major factor in deciding what advice to give his client. The impracticality of compliance with the Act is what makes the question of waiver of such importance. One readily sees the practical problems of trying to comply, but doesn't fully appreciate the risks of noncompliance. Once the risks are understood, a lawyer may require compliance more frequently, or take other steps such as guarantees, warranties, or trust arrangements in an attempt to reduce the risks for his client. Although this article focuses on the liabilition of a purchaser who does not comply with the Act, it also explores the rights of a creditor of the vendor of stock in bulk, and so should be of interest to a lawyer acting for such a creditor. The rights of such creditors are greater than most lawyers suspect, and the Bulk Sales Act can be a very important weapon in the arsenal of a creditor seeking satisfaction of his claim.

Before examining the details of the consequences of noncompliance, it is necessary to understand the purpose and the general approach of the Act. The Act was passed by the various provinces to fill the gap left by the absence of any bankruptcy legislation at the Federal level. [3] Mr. Justice Orde stated the purpose of the legislation as follows:

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1 R.S.N.B. 1973, c. B-9 as amended by S.N.B. 1975, c. 10. References to the Bulk Sales Act or the Act and to section numbers will refer to this Act, unless otherwise indicated.

2 This article will deal specifically with the provisions of the New Brunswick Bulk Sales Act. However, the article should have considerable relevance in other provinces since the legislation is generally quite similar and in some cases virtually identical.

3 LaForest, G.V., "Filing Under the Conditional Sales Act: Is it Notice to Subsequent Purchasers," (1958) 36 *Can. B.R.* 387, at p. 395.

> Prior to the Bulk Sales Act, there was nothing in itself illegal in bulk sale, and the vendor was entitled to deal with the proceeds of the sale as his own. But to protect creditors against the effect of a secret though valid sale of the debtor's stock and the possible unfair distribution or dissipation of the proceeds, the Bulk Sales Act was passed making it incumbent upon a purchaser under such circumstances to take certain steps to protect the creditors, if any, at the risk of finding his purchase void if he failed to comply. [4]

The fact that the duty is clearly placed on the purchaser of stock in bulk must be emphasized. Unless the purchaser gets a sufficient statement and declaration of the creditors from the vendor as required by s. 4 of the Act; and unless the purchaser then assures himself that those creditors are paid in full, or that the requisite proportion consents to the sale, or waives the application of the provisions of the Act as provided in s. 5; then the purchaser makes himself liable to the creditors of the vendor as provided in s. 9 of the Act. The consequences as provided in s. 9 appear to go beyond mere protection of the claims of the creditors. Indeed, they seem to impose penalties for non-compliance as a further coercion persuading a purchaser to comply with the Act. We shall now examine the scope of these consequences, and the limitation period within which a creditor must take action.

The first result of noncompliance is found in s. 9(1) of the Act which provides as follows:

> 9(1) A sale in bulk in respect of which this Act has not been complied with shall be deemed to be 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 therefor, and every transfer, conveyance and encumbrance of property by the purchaser shall be deemed to be fraudulent and void, as between the purchaser and the creditors of the vendor.

It should be noted that this subsection has two aspects: the first relates to the sale, the second relates to the payment of the purchase price. We shall deal with these aspects in order.

The provision which declares the sale to be both fraudulent and void was dealt with extensively by the Supreme Court of Canada in the case of *Re Crouse: Garson* v. *Canadian Credit Men's Trust Association.* [5] The provision in the Nova Scotia legislation [6] under consideration in that case was virtually identical to that portion of s. 9(1) of the New Brunswick Act relating to the sale. In this case, a sale was caught by the Nova Scotia legislation, but there was no compli-

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4 *Re St. Thomas Cabinets Ltd.* (1921), 61 D.L.R. 487 (Ont. S.C. at p. 491.

5 [1929] S.C.R. 282.

6 *Bulk Sales Act*, R.S.N.S. (1923), c. 202.

ance with their statute. In the course of the decision [7] the purpose and effect of the provision declaring the sale to be "void" as against the creditors of the vendor was discussed. In the view of the Court, the purpose was to allow the creditors to take their writs of execution issued against the vendor, and seize and sell the stock sold in contravention of the legislation [8] by the vendor to the purchaser. Without such a provision, title to the stock would have vested in the purchaser, and the creditors of the vendor would have no means of reaching it to satisfy their claims. This decision makes it clear that the effect of the first aspect of s. 9(1) of the Act deals with the title to the stock subject to the bulk sale. The provision accords with the purpose of the Act in protecting creditors; ensuring that their position is not prejudiced by the sale.

Before examining the *Crouse* case further, the creditors' ability to seize the purchaser's stock shall be pursued. The New Brunswick legislation goes beyond mere protection of the creditors, and imposes what can only be termed a penalty for noncompliance. Subsection 9(3) provides:

> 9(3) In an action brought, or proceedings had or taken by a creditor of the vendor within the time limited by section 11 to set aside or have declared void in a sale in bulk, or in the event of a seizure of the stock in the possession of the purchaser, or some part thereof, under judicial process issued by or on behalf of a creditor of the vendor within such 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.

The declaration in s. 9(1) that the sale is void is effectively extended to all the stock in the possession of the purchaser at the relevant time regardless of whether or not this stock was purchased from the vendor. This becomes even more significant when one looks at the very broad statutory definition of stock found in s. 1(f) of the Act. The term "stock" has a definition more or less equivalent to the ordinary meaning of the word stock, that is, the stock of goods or inventory of a business. [9] However, many jurisdictions, including New Brunswick, have extended statutory definitions which include

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7 *Re Crouse: Garson* v. *Canadian Credit Men's Trust Association*, [1929] S.C.R. 282, at p. 286.

8 There is some conflicting authority as to whether creditors of the vendor can seize stock under writs of execution issued against the vendor without having first taken proceedings to have the sale set aside. For the position that no proceedings to have the sale set aside is necessary see *Webber* v. *Hall*, (1921), 52 D.L.R. 253 (N.S.C.A.); and *Shediac Boat and Shoe Co.* v. *Buchanan*, (1903), 35 N.S.R. 511 (C.A.); for the contrary view see *McHugh* v. *Campbell* (1922), 22 O.W.N. 464 (C.A.). I would suggest that the Nova Scotia cases would be followed in New Brunswick particularly in light of the fact that s. 9(3) clearly seems to contemplate such a procedure.

9 *Norris* v. *McKenzie*, [1933] 3 D.L.R. 713 (N.S.S.C.).

chattels with which a person carries on a business, trade, or occupation. Not only is the inventory of a business caught but also the tools, equipment, furniture, delivery trucks, finished products and, arguably, raw materials[10] of the business, are caught. The scope of this penalty in s. 9(3) is further broadened when one realizes that there is neither a limitation that the stock in the purchaser's possession be of the same kind or nature as that purchased from the vendor, nor that it be part of the same or a similar business as that purchased from the vendor.

This provision could easily prove a windfall for the creditors of the vendor, and a complete and utter disaster for the purchaser. As an illustration of what could happen, suppose that Vendor (V) has creditors with claims of $1,000,000.00 and assets consisting of inventory worth $100,000.00. Purchaser (P) has assets excluding real estate worth $5,000,000.00 consisting of inventory, raw materials, tools, equipment, delivery trucks, etc. P purchases V's inventory for $100,000.00 but fails to comply with the Bulk Sales Act. Before P knows what's happening, V's creditors may have seized equipment, trucks and inventory worth not just $100,000.00 but worth $1,000,000.00. The purchaser cannot deny that he received this stock from the vendor under the bulk sale by virtue of s. 9(3), even though in fact he may have purchased it years before the sale. S. 9(1) then takes effect, and declares that the sale is void and that the title to that stock is still in the vendor. Therefore it is still available to satisfy the full claims of the vendor's creditors. There is no other limit on the amount of the purchaser's stock that can be seized under s. 9(3). Such a result is penal, and should make any purchaser think twice before agreeing to waive compliance under the Bulk Sales Act.

The risk of such a consequence is apparently reduced, by s. 11 of the Act which provides:

> 11. No action shall be brought or proceeding had or taken to set aside or have declared void a sale in bulk for failure to comply with this Act, unless the action is brought or proceedings had or taken within six months from the date of the completion of the sale.

In evaluating the risk of noncompliance as far as an attack on the sale is concerned, it may be possible to see six months in the future with some degree of certainty. Purchaser may be willing to take such a risk for a period of 6 months. However, before getting too comfortable with the six-month limitation period, let us return to the *Crouse* case to examine what the Supreme Court of Canada said about the scope of s. 9(1).

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10 Kerr, Robert W., *Legal Remedies of the Unsecured Creditor After Judgment*, Third Report of the New Brunswick Consumer Protection Project, Vol. II (1976), p. 168.

In the *Crouse* case, the creditors did not attack the sale or seize the stock until after the purchaser had sold it to a bona fide purchaser for value. There was no question in the Court's mind that the bona fide purchaser would be protected, since "void" would be interpreted as "voidable" for that purpose. As there was no question of seizing the stock, the issue centred on the rights of the creditors to the proceeds of the sale of the stock. The declaration in the statute that the sale was void did not alleviate the personal liability of the purchaser to account for the proceeds from the sale of the stock. There was no provision equivalent to our s. 9(2) (which we shall examine in detail shortly). These problems did not deter the Supreme Court, which focused on the declaration in s. 9(1) that the sale was deemed not only void, but also *fraudulent.* Mr. Justice Lamont speaking for the court proceeded as follows:

> In our opinion the removal of the impediment which intercepted the action of the creditors' writs of execution was not the only effect which it was intended the legislation should have. Had that been the only effect intended, there was no necessity whatever for enacting that the sale should be deemed fraudulent. The setting aside of the sale as invalid would, without branding it as fraudulent, have been sufficient to remove the impediment to the operation of the writs of execution. The creation of a statutory presumption of fraud on the part of both purchaser and vendor as against the vendor's creditors, indicates, in our opinion, a legislative intention to put a sale in bulk made without compliance with the Bulk Sales Act in the same category as sales made with an intention to defraud the vendor's creditors. Such intent the Act presumes to exist, and this presumption of fraud has the effect of bringing into play all other statutes passed for the protection of creditors against a fraudulent sale of his goods by a debtor to the prejudice of his creditors. So that, if, in any such statute the legislature has given to the creditors any remedy in addition to their right to have the sale set aside as invalid, the creditors of a fraudulent debtor under the Bulk Sales Act are entitled to claim the benefit of such remedy, provided, of course, that all the conditions precedent to the right to claim the remedy have been fulfilled. [11]

The Supreme Court then held that the creditors were entitled to the proceeds by virtue of the provision of the Nova Scotia Assignments Act. [12] Due to s. 9(2) of the Act, the decision doesn't have great significance in New Brunswick today insofar as a duty to account is concerned. However, the principle that the deemed fraudulent intent can be used for the purpose of other legislation has been of considerable significance to the application of the six-month limitation period contained in s.11.

One of the first attempts to use this principle of the *Crouse* case was in *Re Stewart: Parsons v. Trustee,* [13] a decision of Mr. Justice

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11 *Re Crouse,* [1929] S.L.R. 282, at pp. 286-287.

12 R.S.N.S. 1923 c. 200.

13 (1935), 16 C.B.R. 244.

McEvoy in the Ontario Supreme Court in Bankruptcy. A partnership allegedly sold assets to a company owned by the partners. The partnership ultimately went bankrupt and the issue arose as to who had title to the assets allegedly sold to the company. No attack had been made on the sale within the statutory period. However, in the course of the argument, the trustee in bankruptcy for the partnership appears to have argued that since there was no compliance with the Ontario Bulk Sales Act, the sale was deemed fraudulent. Therefore, on the basis of the *Crouse* case, the sale would be liable to be set aside — leaving title to the assets in the partnership. The court, however, dismissed this argument by distinguishing the *Crouse* case.[14] Mr. Justice McEvoy noted that the Nova Scotia legislation under consideration in the *Crouse* case did not have a limitation period as found in the Ontario legislation (which was virtually identical to s. 11 of the present New Brunswick Act). The learned justice then seems to have concluded that the limitation period also limited the deemed fraudulent intent provision, and thus limited or restricted the implications of the *Crouse* case. Mr. Justice McEvoy then quoted the following statement from Mr. Justice Middleton's judgment in the case of *Allen* v. *Patterson:*[15]

> It seems to me that the non-compliance with the requirements of the Act has the effect of rendering the transaction liable to be declared void as against the creditors if attacked within the statutory period. This is the only penalty for the violation of the requirements of the Act; and, no attack having been made upon the sale in question within the time limited, the transaction stands as though the Act had not been passed.[16]

One could attempt to weaken the weight of this Ontario authority by noting the context in which Mr. Justice Middleton's statement was made. He was dealing with a case in which the rights between the purchaser and the vendor were in issue and not the rights of the creditors of the vendor against the purchaser. It is in that light that this statement should be read. Also, one could point out that Mr. Justice McEvoy's statements themselves were obiter in light of his later finding that on the basis of a previous Ontario Court of Appeal decision,[17] the trustee in bankruptcy for the partnership couldn't attack the transaction for non-compliance with the Bulk Sales Act anyway. In any event, it does seem that the results in these Ontario cases are correct. It would seem that at least in so far as one attempts to use the *Crouse* case to have a sale declared void, it would have to be

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14 *Ibid.*, at p. 248.

15. (1925), 56 O.L.R. 287.

16 *Ibid.*, at p. 289.

17 *In Re Parker: Ex parte Golding*, (1927), 8 C.B.R. 230.

commenced within six months from the sale. The terms of s. 11 would seem to catch both direct and indirect attacks on the sale, and title to the stock subject to the sale, based on non-compliance with the Act.

Yet, one cannot safely leave the *Crouse* principle thinking that title to the stock is safe after six months. Two recent western decisions have indicated a willingness to use the *Crouse* case as the basis for setting aside a sale beyond the statutory limitation period. In the case of *Thompson* v. *Richardson*[18], the Alberta Court of Appeal considered statutory provisions[19] virtually identical to those in New Brunswick. It was willing to consider the applicability of fraudulent conveyances legislation in light of the deemed fraudulent intent, despite the fact that the action had been commenced beyond the statutory six-month limitation period. The court, however, found on the facts of the case that, even using the deemed fraud provision, the fraudulent conveyances legislation was not applicable. The interesting aspect here is the willingness of a provincial court of appeal to set aside a sale beyond the six-month statutory limitation period despite the two Ontario cases, *In Re Stewart*[20] and *Allen* v. *Patterson*,[21] both of which were cited by the Court on a different point.

The second western decision is that of Mr. Justice Matas of the Manitoba Queen's Bench in the case of *Wiebe* v. *Holmes*.[22] This case also dealt with statutory provisions[23] virtually identical to those in New Brunswick. In this case, the *Crouse* case was specifically applied so as to extend the liability of the purchaser beyond the statutory six-month limitation period by combining the deemed fraud for non-compliance with the Bulk Sales Act and the Manitoba Fraudulent Conveyances Act.[24] In light of these western cases, it is not safe to assume that you are taking the risk of an attack on the sale for six months only. It is not inconveivable that a New Brunswick Court would distinguish the Ontario cases and follow these western cases. A purchaser could have at least the stock actually purchased from the vendor seized after the six-month limitation period. The operation of s. 9(3), on the other hand, is specifically limited by s. 11.

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18 (1967), 58 W.W.R. 743.

19 Bulk Sales Act, R.S.A. 1955, c. 33 as amended.

20 (1935), 16 C.B.R. 244.

21 (1925), 57 O.L.R. 287.

22 [1971] 4 W.W.R. 588 (Man. Q.B.).

23 Bulk Sales Act, R.S.M. 1954, c. 30.

24 R.S.M. 1954 c. 91 as amended.

A further consequence which can best be discussed in the context of an attack on the sale is found in s. 9(2) of the Act:

> 9(2) If, however, the purchaser has received or taken possession of the stock in bulk, or any part thereof, he is personally liable to account to the creditors of the vendor for the value thereof including all money, security or property realized or taken by him from, out of, or on account of the sale or other disposition by him of the stock in bulk, or any part thereof.

This provision imposes on the purchaser a personal liability to account to the creditors of the vendor for the value of the stock received, and thus imposes a minimum liability on the purchaser. This liability is basically the same as that ultimately imposed on the purchaser in the *Crouse* case in the somewhat circuitous manner discussed previously. It should be noted at this stage that the liability imposed by s. 9(2) is limited to the value of the stock received. This should be contrasted to s. 9(3) where, as pointed out earlier, the only limit to the amount of the stock in the purchaser's possession which can be seized is the total amount of the creditor's claims. S. 9(2) seems to be the more reasonable and less penal in nature, and thus furthers the basic purpose of protecting creditors of the vendor from any worsening of their position as a result of the sale. The important aspect with the liability in s. 9(2) is not its existence, but its duration — is it limited to the six-month period after the sale by virtue of s. 11 of the Act? A certain limited liability to account based on the *Crouse* case may extend beyond the six-month period if the western cases [25] are followed. There are two approaches to reaching an answer to this question as far as the statutory liability is concerned.

First, it is arguable that the Act has created two alternate methods of attack for a creditor under s. 9. The first method is by removal of impediments to creditors seeking execution of their judgements against the vendor by attacking title to the stock. The second is by suing the purchaser personally for the value of the stock received but not the property of the purchaser. From 1927 [26] to 1952 the New Brunswick legislation contained the first alternative only. Also, the wording of s. 10(2) of the 1927 statute was identical to the wording of s. 9(3) of the present legislation including the specific reference to the statutory limitation period within which the sale could be set aside, or stock seized. When the personal liability to account was added by s. 9(2) in 1952, there was no reference made to the limitation period, nor was any change made in s. 9(3) providing for the seizure of the stock. If it were intended, in 1952, to have the limitation period apply to both the setting aside of the sale, and the personal liability to account, why wasn't the section made

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25 *Thompson* v. *Richardson*, (1967), 58 W.W.R. 743 (Alta. C.A.); *Wiebe* v. *Holmes*, [1971] 4 W.W.R. 588 (Man. Q.B.).

26 R.S.N.B. 1927, c. 150.

consistent? This could have been done by either adding a reference in s. 9(2) to the limitation period, or by deleting the reference to the limitation period in s. 9(3). Since this was not done, the indication would seem to be that s. 11 was not intended to apply to s. 9(2). A close examination of the wording of s. 11 would tend to confirm this conclusion. Reference there is made only to an action to have the sale set aside or declared void: no mention is made of an accounting.

It may seem strange that the statute would have two greatly differing limitation periods for basically the same liability. However, it should be pointed out again that the liability for seizure can be vastly greater because of s. 9(3) than the liability to account under s. 9(2). It is not unreasonable to impose a very short period on such a severe penalty as found in s. 9(3), but to have a longer period for the compensatory liability found in s. 9(2). It should be further noted that any liability (imposed by s. 9(2)) beyond the six-month period would only be to creditors at the time of the sale [27]. As an illustration that legislatures have felt that six years is not too long for such liability as found in s. 9(2), one should examine the Nova Scotia legislation. [28] Under this legislation there is no penalty equivalent to New Brunswick's s. 9(3). The legislation simply declares the sale to be void for noncompliance and thus effectively imposes a liability on the purchaser to return the stock or account for it under the *Crouse* case - a liability analogous to s. 9(2) of the New Brunswick Act in terms of the degree of severity. There is no special limitation period found in the Nova Scotia legislation, so that the liability of the purchaser extends for six years.

However, there is one basic premise for the conclusion that s. 9(2) liability extends for six years. The premise is that liability under s. 9(2) does not depend on the sale being set aside. In short, s. 9(2) must be a clear alternative to, and independent from, the sale being set aside and declared void. However, a second approach is found in the two western cases discussed earlier in relation to the *Crouse* principle. In *Thompson* v. *Richardson* [29], the Alberta Court of Appeal was considering a statutory provision [30] virtually identical to s. 9 of the New Brunswick Act. In answer to the argument that the liability created by the equivalent of our s. 9(2) was not limited to a six-month period, Mr. Justice Allen for the court said:

> I cannot agree with this contention. In my view sec. 10 must be read as a whole and it is necessary that the plaintiff must be able to establish by

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27 *Bank of Montreal* v. *Ideal Knitting Mills Ltd.*, [1924] 4 D.L.R. 429 (Ont. C.A.); *Re St. Thomas Cabinets Ltd.*, (1921), 61 D.L.R. 487 (Ont. S.C.).

28 R.S.N.S. 1967, c. 28.

29 (1967), 58 W.W.R. 743.

30 R.S.A. 1955 c. 3 s. 10.

> action that the sale is fraudulent and void as against creditors and thus must be set aside if he wishes to take advantage of any of the provisions of this section. To put it in other words, I think that subsec. (2) of sec. 10 provides only an ancillary or supplemental remedy to the creditor when a sale is set aside after the purchaser has received or taken possession of the stock that is the subject of the sale and does not provide an alternative remedy to setting aside the sale in cases where the Act is not complied with.
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> . . . To hold otherwise would create a situation which I am sure was not intended by the legislature, namely, that while action to set aside the sale is barred after the expiration of six months from the date of sale, action for an accounting under subsec. (2) would not be barred for six years from the same date. The statute created rights and remedies in favour of a creditor which did not exist at common law. It should not be construed to enlarge upon those rights and remedies expressly granted by the statute. [31]

This decision was followed in the *Wiebe* v. *Holmes* [32] case decided in the Manitoba Queen's Bench. However, if the legislation did intend the liability of s. 9(2) to be supplementary only, that intention could have been made much clearer. The opening phrase in our s. 9(2), "If, however", arguably contemplates the creation of an additional liability, one which would be independent from an attack on the title to the property. As discussed earlier, it is not unreasonable to conclude that the legislature did contemplate that there would be two limitation periods depending on the severity of the liability. In any event, though the Alberta Court of Appeal decision makes it difficult, it is not impossible that a New Brunswick court would follow the first approach and hold that the liability to account created by s. 9(2) has a limitation period of six years and not just six months. This possibility is another factor to consider in deciding on whether a purchaser should waive compliance with the Act.

Another, and more or less seperate, result of noncompliance with the Act is the possibility of garnishment. Certainly, if the creditors did not have the sale set aside under the Act, they would be entitled to have the balance of the purchase price owing attached in garnishment proceedings. Such an option seems to be contemplated in the following excerpt of the Supreme Court of Canada in the *Crouse* case:

> It is now common ground between the parties that in the Bulk Sales Act the word "void" means "voidable" only and that a sale made without compliance with the Act is valid unless and until the creditors of the vendor elect to have it set aside. The fact that the Act avoids the sale only as against the vendor's creditors indicated 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. [33]

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31 (1967), 58 W.W.R. 745 at pp. 752-753.

32 [1971] 4 W.W.R. 588.

33 *Re Crouse: Garson* v. *Canadian Credit Mens Trust Association*, [1925] S.C.R. 282 at p. 285.

The possibility of garnishment of the balance of the purchase price, even more than six months after the sale, is not a major risk for a purchaser since he would have to pay the vendor anyway. However, there is a very good argument that a creditor could both garnish the balance of the purchase price and seize the stock. This should be possible since an attack on the sale would relate to the title of the stock only, and not to the contract as a whole, or to the debt created. If a court makes that distinction, then a creditor should not have to elect his course of action through the operation of estoppel. The right of a creditor to do both would seem to be clearly contemplated by the wording of s. 9(1) of the Act. As we shall see in detail shortly, this provision makes both the sale *and* any payment void. Although there may be some concern about a creditor being allowed to take both approaches,[34] legislation in other provinces expressly provides for such a result.[35] Thus, the possibility of garnishment of the unpaid balance of the purchase price, plus loss of what was purchased, is a risk that the purchaser should not overlook.

The second major consequence of noncompliance as provided by s. 9(1) of the Act goes beyond mere garnishment of the unpaid balance of the purchase price. It provides as follows:

> . . . and every payment made on account of the purchase price, and every delivery of a note or other security therefor, and every transfer, conveyance and encumbrance of property by the purchaser shall be deemed to be fraudulent and void, as between the purchaser and the creditors of the vendor.

The effect of this provision appears clear: the purchaser shall be deemed to have made no payment on account of the purchase price, even though he may have in fact paid in full. Thus, a creditor of the vendor in garnishment proceedings could attach the full purchase price in every case of noncompliance. The risk of having to pay twice is one a purchaser must surely think twice about — particularly when one adds the possibility that the creditors may at the same time seize the stock in the purchaser's possession under s. 9(3). This second aspect in s. 9(1) relating to garnishment and potential double liability is consistent with the penalty approach of s. 9(3) noted earlier. To see that such a result was contemplated in the New Brunswick legislation (and considered desirable from a policy standpoint by at least some jurisdictions), we can look at the provision found in Saskatchewan and Prince Edward Island. Following a provision identical to s. 9(1) of the New Brunswick Act, the legislation in those two provinces provides as follows:

> "(2) Notwithstanding that such sale, barter or exchange is void as against the creditors of the vendor, so as to render the goods, wares, merchandise

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34 Kerr, *op. cit.*, at p. 187.

35 R.S.S. 1965, c. 389, s. 31(2); R.S.P.E.I. 1974, c. B6, s. 9(2).

> and fixtures liable to satisfy their claims, the purchaser shall nevertheless continue to be indebted to the vendor in the full amount of the purchase price in the case of a sale, and in the full value of the goods, wares, merchandise and fixtures in the case of barter or exchange, so that the indebtedness may be attached by the creditors of the vendor; and the purchaser shall also be a trustee of the goods, wares, merchandise fixtures for the benefit of the creditors of the vendor, and shall be personally liable to account to them for all and any monies or security realized or taken by him from, out of, or on account of the sale or other disposition by him of the goods, wares, merchandise and fixtures, or any part thereof." [36]

The application of this provision was dealt with in the case of *Dominion Fruit Limited* v. *Cove et al. (No. 2).* [37]

The final problem with regard to the garnishment of the purchase price is the limitation period. Certainly, where there is a garnishment of the balance of the purchase price in fact owing, the six-month limitation period found in s. 11 doesn't apply. But so far as the deemed fraud and voidability of any payment by virtue of s. 9(1) is concerned, would a garnishment proceeding fall within the scope of the language of s. 11? The key here appears to be whether garnishment was dependent on, or ancilliary to, the sale being set aside. The answer would seem to be no. The garnishment would be based on the validity of the sale not on an attack to have it set aside or declared void. Section 9(1) itself uses the word *and* which would clearly indicate that the sale and garnishment aspects are separate and that garnishment of the full purchase price is in addition to an attack on the sale. Further, unlike the cases dealing with the limitation period for the duty to account found under s. 9(2), there is some authority for the proposition that the right to garnish the full purchase price is separate and independent from an action to have the sale set aside. In the Saskatchewan case of *Dominion Fruits Limited* v. *Cove et al. (No. 2)* Mr. Justice Davis stated:

> Although sec. 31(1) declares that a sale, such as the one in question, shall be deemed fraudulent and void as against creditors of the vendor, it is in no way related to the declaration contained in subsec. (2) that the purchaser shall continue to be indebted to the vendor and that such indebtedness may be attached by the creditors of the vendor. The two provisions are not, in my opinion, interdependent. [38]

There is one final note of caution with regard to garnishment. In reading the authorities from other jurisdictions one must be careful because the statutes of Nova Scotia, [39] Ontario [40] and

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36 *Ibid.*

37 [1950] 1 W.W.R. 375 (Sas. R.B.).

38 *Ibid.*, at p. 379.

39 R.S.N.S. 1967, c. 28.

40 R.S.O. 1970, c. 52.

Quebec [41] do not declare the payments made by the purchaser to be fraudulent and void. This could be very misleading when one considers the creditors' remedies against a purchaser. However, in New Brunswick, it is fair to say that the possibility of garnishment of the full purchase price within six years, even though there has been payment in whole or in part, is a risk that cannot be overlooked.

In addition to the above direct effects of noncompliance with the Act, there are a couple of indirect and perhaps not so obvious risks that should be considered. For example, when a business is being purchased as a going concern, the liabilities of that business are often assumed by the purchaser. In that case the purchaser is trusting the vendor to the extent that he has disclosed all the trade creditors and the amounts owed. In many cases a purchaser might be willing to take this risk and waive the Bulk Sales Act since he has agreed to pay the creditors in full anyway. However, if he is purchasing a business from a sole proprietor, a partnership, or even a corporation which carries on other businesses, such reasoning may be dangerous. The Act protects all creditors of the vendor and it has been held on several occasions [42] that the Act makes no distinction between trade and personal creditors, or creditors of different businesses carried on by the same legal person. This result seems reasonable when we consider that there are no such distinctions when a creditor seeks to satisfy his judgment out of the property of a judgment debtor. A sole proprietor or partner, for example, has unlimited personal liability for the debts of the business, while his personal creditors can seize business assets to satisfy their claim. Therefore, the purchaser of a sole proprietorship had better consider the liabilities he is assuming. Is he willing to take the risk that the vendor not pay his Chargex bill, car loan, or mortgage on his house? These creditors may have the right to attack the transaction, under the Bulk Sales Act.

A final, indirect result of noncompliance with the Act relates to the purchaser's recovery from the vendor. It seems that a purchaser is left in the position that he can't claim or rank as a creditor of the vendor for goods that have been returned, or for a part of the purchase price that has been attached and thus paid twice. In the case of *Re White: Ex parte Lipkus* [43] there was a sale in bulk but no compliance with the Nova Scotia legislation. The vendor went bank-

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41 Quebec Civil Code, Article 1569.

42 See for example, *Warner* v. *Graham*, [1946] 2 D.L.R. 277 (B.C.S.C.); and *Thompson* v. *Richardson*, (1967), 58 W.W.R. 731 at p. 750. See also R.S.O. 1970, c. 52, s. 4(2), where the legislation does make a distinction between trade and personal creditors of a vendor.

43 [1925] 1 D.L.R. 1189 (N.S.C.A.).

rupt and the purchaser was requested by the trustee in bankruptcy to return the goods. The purchaser did so because, as was noted by the court, he had no other choice. The purchaser then claimed against the estate of the vendor in bankruptcy for the amount he had paid the vendor for the goods. The claim was disallowed in the lower court and the purchaser appealed. In rejecting the appeal, Mr. Justice Ritcher for the court said:

> In order to prove his right to rank on the estate Lipkus must travel through a transaction fraudulent on his part. I have no alternative but to hold the transaction to which he was a party fraudulent because the statute says it shall be deemed to be fraudulent and shall be absolutely void as against creditors. In Leake on Contracts, 7th ed., p. 579, the law is correctly stated: — " 'If, from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law, there the court says he has no right to be assisted'. If it appears on the face of the contract or by evidence that the plaintiff requires any assistance from the illegal transaction to establish his case, he must fail." [44]

The approach taken here would clearly preclude a purchaser from claiming under legislation such as the Creditors Relief Act. This result adds further to the penal nature of the legislation. In New Brunswick, a purchaser would have an even greater problem in recovering payments since s. 9(1) clearly declares any payment made by the purchaser to be fraudulent. Further, it would appear that the deemed fraud which precludes recovery would have effect for at least six years. If a purchaser has been made to pay twice, or has lost stock, as a result of noncompliance, any other result would reduce the liability of the purchaser as imposed by the statute. [45]

In conclusion, it is fair to say that the direct and indirect consequences of not complying with the Bulk Sales Act are substantial, and can be of a truly penal character.

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44 *Ibid.*, at p. 1191.

45 See Kerr, *op. cit.*, at p. 187, where it is recommended that such a policy be continued.