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Insolvency Law Section
Section du droit de l'insolvabilité

Bulk Sales Restrictions and Section 65.13 of the BIA

Jonathan Wigley

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A problem arises, though, when dealing with sales in a proposal situation where a notice of intention has been filed and no actual proposal has yet been made (the "NOI period").

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Commercial List Authorities Book

A note from Madam Justice Sarah Pepall.

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About this Newsletter

Editors:
Jonathan Wigley
Gus Camelino

OBA Editor:
Catherine Brennan

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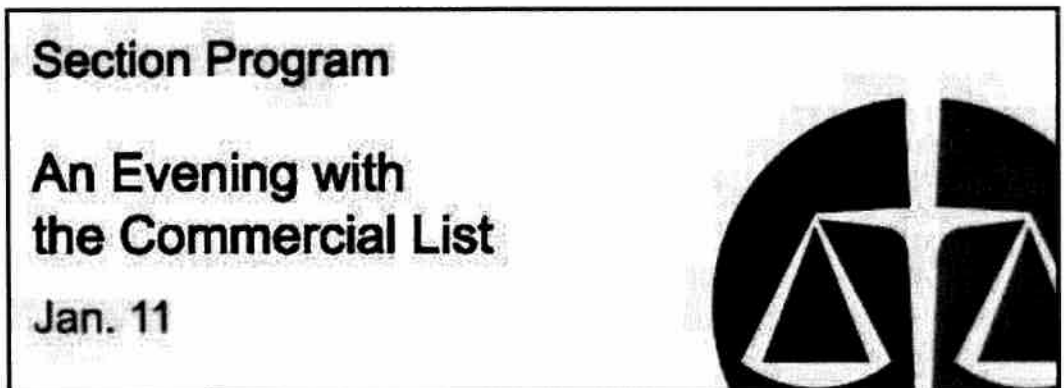

INSOLVENCY LAW
THURSDAY, FEBRUARY 3, 2011 | 2:00 PM TO 5:00 PM

Developments in Insolvency and Restructuring Law and Practice over the Past Year and Emerging Trends

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Save the Date
Jan. 21
Court Proceedings: Procedure, Protocol and Practice

Bulk Sales Restrictions and Section 65.13 of the BIA

*Jonathan Wigley**

Purchasers of assets from insolvent companies do not usually need to worry about the Bulk Sales Act, except in Ontario. The *Ontario Bulk Sales Act* is designed to protect creditors and provides that an out of the ordinary course sale is voidable unless the buyer complies with the Act. The Act does not apply to sales by an executor, administrator, a creditor enforcing security, a receiver, an assignee for the benefit of creditors, bankruptcy trustee, liquidator or a sheriff.

A problem arises though when dealing with sales in a proposal situation where a notice of intention has been filed and no actual proposal has yet been made (the "NOI period"). In that circumstance, the vendor is the company, not the proposal trustee. As a result, the purchaser of assets needs to be assured that there will be no problem with the Bulk Sales Act.

Under section 3 of the Act, the insolvent company can ask a judge for an exemption order where the sale is advantageous to it and does not impair its ability to pay its creditors. The latter clause has been interpreted to effectively mean whether it will make the creditors worse off than they already are.

As of September 19, 2009 and following the amendments to the *Bankruptcy and Insolvency Act*, in the NOI period, the insolvent company cannot sell or dispose of assets out of the

ordinary course without approval of the Bankruptcy Court (section 65.13(1) of the BIA). Often the contemplated proposal of the company will involve the sale of certain or even all of its assets with a view to generating some money with which to make a proposal to its creditors in due course. Often creditors are more than happy to allow these kinds of sale to proceed. Overriding all this is the desire to keep costs as much as possible to a minimum.

Such was the situation in *Re Outdoor Broadcast Network Inc. 2010 ONSC 5647 (CanLII).* Outdoor Broadcast (OBN) was a digital media company in financial distress and had filed an NOI. It proceeded to liquidate its assets with a view to creating a pool of funds for division among its unsecured creditors. The single secured creditor was cooperating though it was clear that if they did not, on a bankruptcy, there would be no assets for the unsecureds at all.

Several sales of OBN's digital billboard signs had been negotiated and a motion was brought for approval under section 65.13(1). The motion however was brought to the *Registrar* under section 192(1)(f) there being no opposition by any of the creditors.

While all of the tests for approval of the sale were met, the issue was raised as to how the Bulk Sales Act could be dealt with by the Registrar as opposed to the apparent requirement of the Bulk Sales Act for exemptions by a *judge.*

In Registrar Nettie's view and following submissions, section 65.13(7) provides the answer. It states that the court can, on a 65.13(1) application, effectively grant a "vesting order". On a 65.13(1) approval, the sale can be declared free of any security, charge, or other restriction. Registrar Nettie found that:

> "...what is the BSA but a series of restrictions on alienability by a property owner of its assets, in order to protect ordinary creditors, who may be unaware of the alienation, occurring as it must, out of the ordinary course of the seller's business. So long as the Court makes the proceeds of the s. 65.13(1) BIA sale transaction themselves subject to the restrictions of the BSA, compliance with s. 65.13(7) BIA is had, and the application of the BSA is not only ousted, but may be so ousted not by a Judge of the Superior Court of Justice, but by the duly authorized judicial officer of the Bankruptcy Court, be that a Judge or a Registrar." (para 15).

The sale was approved and an order was given, not that the application of the Bulk Sales Act was "exempted" but that the sale was "free from the restriction of the Bulk Sales Act." The purchaser accepted that order.

Readers will note that the same result could have easily been obtained by bringing the motion to a judge and avoiding the problem. Moving before the Registrar with uncontested or consent matters is clearly a more efficient use of resources as seems to have been contemplated in section 192 of the BIA. This decision at least paves the way for complete vesting orders in the Registrar's court and the non-application of the Bulk Sales Act in proposal circumstances.

** Jonathan Wigley, Gardiner Roberts LLP*

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Risk Mitigation Key to Receivers Assuming Operations of Licensed Liquor Establishments

*Sheldon Title**

It is a matter of course in insolvencies in Ontario that a court appointed receiver may be required to assume the short-term operation and management of a debtor's business in order that it may be sold as a going concern. Often this is a key factor in ensuring secured creditors receive the greatest possible return on the debts owed to them. While every form of business has its own unique set of operational issues and challenges that must be addressed by the receiver, few carry with them the abundance of legal and regulatory complexities as does a licensed liquor establishment.

Although far from being a common occurrence, it's possible for a receiver to arrange a temporary transfer of an establishment's liquor sales licence and assume management of the establishment's day-to-day business operations. The ultimate purpose of a short-term assignment of this nature is to dispose of the business in a manner favorable to the company's creditors.

On the regulatory front, the *Liquor Licence Act* (Ontario) sets rules relating to, inter alia, the issuance and transfer of liquor licences. The Alcohol and Gaming Commission of Ontario is the regulatory agency responsible for administering the *Liquor Licence Act*; their mandate is to regulate the sale, service and consumption of alcoholic beverages. Their guidelines include dealing with the temporary transfer of an existing liquor licence in order to dispose of a business in an orderly fashion under a variety of circumstances, including when the licensed premises are taken into possession by a court-appointed receiver or a trustee in bankruptcy. This is true even in instances where the licence holder is in default of filing a return or paying retail sales tax, as the *Liquor Licence Act* makes specific exemption for a court-appointed receiver to apply for a liquor licence renewal or transfer under such circumstances.

Of course, like any prudent operator, a receiver who agrees to operate a licensed establishment is going to be concerned about public health and safety concerns and the exposure to liability arising from the operation of the establishment. Indeed, while there are inherent risks to being an insolvency practitioner, the practitioner must assess the full gamut of risks it faces and investigate ways of mitigating them.

Legal Liability

The liquor licence transferee is legally responsible for the safety and sobriety of the establishment's customers and the actions of the employees. The trend in the hospitality industry is to make the licencee bear greater responsibility for the actions of others. In operating a licenced establishment, the licencee owes a duty of care to its patrons. There are a wide range of licenced establishments, ranging from restaurants where serving alcohol is not the prime function of the business to hotel operations that operate licenced bars and nightclubs. The exposure to legal liability is largely dependent on the type of licenced establishment coming under the insolvency proceeding.

In negotiating a going concern sale, the purchaser, as an applicant for a liquor sales licence, may request the receiver, as holder of the liquor licence, to consider the a joint application for the authorization to contract out the liquor sales licence. An authorization to contract out allows a transfer applicant to operate a licensed establishment until the licence is either

transferred into the applicant's name, the licence expires, or the AGCO refuses the transfer, whichever comes first. During this period, both the current liquor sales licence-holder and the transfer applicant are responsible for the sale and service of beverage alcohol. The purchaser may consider offering a premium to acquire the assets from the receiver if it has the means of gaining immediate access to operating the licenced business.
While this type of transaction may serve the needs of the purchaser and the creditors, how does the receiver mitigate its exposure to liability?

Receivers oftentimes assess the ability to operate the business as being contingent upon there being a sufficient level of liability insurance. Oftentimes, however, a liquor establishment's existing insurer is not prepared to permit the coverage to continue after a receiver is appointed. In such instances, the receiver must find alternative coverage, which, if available, is usually more expensive than any existing policy coverage. If the business also operates as a restaurant, not only does the receiver have to protect against the general liability that may arise from carrying on a licensed liquor establishment, they must also protect themselves against the product liability issues inherent in operating a business supplying food product to the public. Limits of coverage under insurance policies may not be sufficient to fully protect the receiver against the legal liability associated with operating a liquor licenced establishment.

Other liability considerations must be weighed in relation to the training and experience of the licensed establishment's business and floor managers, servers and security staff; the safe maintenance and upkeep of the physical facilities; and the existence of policies and procedures aimed at mitigating potential sources of liability.

Notwithstanding the existence of an effective risk management program, the receiver must assess whether stakeholders are prepared to indemnify the receiver against risk, and determine the adequacy of those indemnities.

Summary
By agreeing to operate the business of the debtor, the receiver is doing its part to facilitate a process that may result in a going concern sale of the business. The receiver is, however, merely a facilitator and does not wish to expose itself to an unreasonable level of risk. The risk from operating the licensed establishment may be mitigated to an extent by insurance and the charge against the debtor's assets. However, given the inherent and significant risk of operating a licensed establishment the risk may not be fully mitigated, and the receiver will need to look to key stakeholders to protect it in order to facilitate the transaction.

** Sheldon Title is president of Shimmerman Penn Title & Associates Inc., Trustee in Bankruptcy.*

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Bankruptcy Forms Production

*Jonathan Wigley**

While rumours of the demise of the billable hour are greatly exaggerated, there is no question that lawyers are under pressure in the practice of civil litigation. Seemingly, more work is required – faster and for increasingly negotiated fees by insurance firms and their cousins in corporate, in-house counsel. Civil litigators who are blithe to the value-based

billing trends growing in corporate America and the UK, may be vulnerable to the implications they pose to traditional billing practices.

All is not necessarily doom and gloom on the fiscal front. Many lawyers and the firms they represent have taken a rational approach to improving work-flow inside their practices with a view to becoming more efficient. Opportunities for reducing needless cost in a litigation practice abound. One such lies in the streamlining and automation of manual, repetitive tasks, such as "document assembly."

A litigator is a unique and sometimes envied practitioner. Nothing exemplifies the archetypal "lawyer image" quite like an inspired court appearance resulting in a client win. But to those who practice, litigation is far more than trial work. Litigation is beset with a myriad of court forms, motions, letters and rules of procedure like no other. Sifting through volumes of "precedent" documents and manually copying and pasting parties' names and addresses from document to document is a costly, time-consuming endeavour that is fraught with inevitable errors that can distract a litigator from his main task. It makes increasingly little sense to employ costly clerks and assistants who could be delivering more value for a law firm's payroll than manually generating documents.

The typical commercial litigator/ bankruptcy and insolvency practitioner can usefully embrace the use of technology to automate document assembly, using a software program called ACL3 *Automated Civil Litigation*. Clients need fast turnaround; a stay of proceedings is about to be imposed, multiple priorities are piling up and it's twenty minutes to the lawyer's assistant leaving for the day with critical documents that have to get out the door. Manual document assembly becomes frustrating and slow.

A typical insolvency matter is instructive. The lawyer or any assistant in the firm simply enters the names of the parties involved into ACL3, creating an accurate service list, title of proceedings and back page. Court address and opposing counsel are already in the ACL3 database saving more time and eliminating common errors such as misspellings of names. The moment the parties are entered and saved, ACL3 can instantly produce any document required – fully filled-in with the basic information (yes, you do have to add your own specifics) and corrected for gender, grammar and persons vs. entities. In Our typical insolvency matter, the lawyer might require:

1. Title of Proceedings
2. Statement of Claim or Application
3. Notices of Motion
4. Affidavits
5. Draft Orders

Forms change frequently, but ACL3 automatically updates with the most current *Rules of Procedure*. The lawyer probably has some unique letters he likes to use and his firm has its own formatting conventions – all of which is stored in ACL3 such that a new assistant joining the firm requires less training and is fully productive to lawyers, faster.

ACL *Automated Civil Litigation* is used by over 1,500 litigators in Ontario, with Alberta-jurisdiction documents soon to be added to the program. Fourteen Ontario colleges are using ACL3 in the training of legal assistants, paralegals and clerks prompting a major insurance company executive to remark, "I've been seeing "trained on ACL" in job applicants' resumes to our legal department. When I saw the program work, I knew we had to

modernize the way we produce documents today."

From sole practitioners who tend to be very hands-on to larger firms, ACL3 is being increasingly seen as the *de facto* standard for civil litigation document assembly. More importantly for an insolvency practice, it is currently being expanded to include standard bankruptcy and receivership documents.

For more information see, http://www.korbitec.ca/acl/whyuseACL/whyuseACL.php

* *Jonathan Wigley, Gardiner Roberts LLP*

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Commercial List Authorities Book

*Provided by Madam Justice Sarah Pepall**

The Commercial List Users' Committee has developed a Commercial List Authorities Book. It contains case law that is repeatedly reproduced on motions and applications heard on the Commercial List. The Authorities Book will be available electronically on the Superior Court Commercial List website and a hard copy of the Authorities Book will be in each Commercial List courtroom.

If you are relying on an authority that is contained in the Authorities Book, it need not be reproduced as part of the materials filed at court.

The Commercial List Users' Committee will update the Authorities Book annually commencing January 1 of each year. The Committee hopes that this Authorities Book will save time and expense for those who appear on the Commercial List.

Commercial List Authorities Book

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A. *BCE Inc.* v. 1976 *Debentureholders,* [2008] 3 S.C.R. 560.

B. *Naneffv. Con-Crete Holdings Ltd.* (1995),23 O.R. (3d) 481 (C.A.), 1995 CanLII 959 (ON c.A.).

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C. *Le Maitre* v. *Segeren* (2009), 55 B.L.R. (4th) 123,2009 CanLII 6419 (ON S.C.). Liability of Corporate Officers

D. *ADGA Systems International Ltd.* v. *Valcom Ltd.* (1999),43 O.R. (3d) 101 (C.A.), 1999 CanLII 1527 (ON C.A.).

E. *Meditrust Healthcare Inc.* v. *Shoppers Drug Mart, a division oflmasco Retail Inc.,* 124 O.A.C. 137, [1999] 0.1. No. 3243 (C.A.), 1999 CanLlI 2316 (ON C.A.).

F. *ScotiaMcLeod Inc.* v. *Peoples Jewellers Ltd.*, 26 O.R. (3d) 481, [1995] 0.1. No. 3556 (C.A.)., 1995 CanLII 1301 (ON c.A.).

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G. *Royal Bankv. Soundair Corp.* (1991) 4 O.R. (3d) 1 (C.A.), 1991 CanLII 2727 (ON C.A.).

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H. *Canwest Publishing Inc. (Re),* 2010 ONSC 222, [2010] C.C.S. No. 2083, [2010] 0.1. No. 188,2010 ONSC 222 (CanLII).

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I. *RJR-MacDonald Inc.* v. *Canada (Attorney-Genera!),* [1994] 1 S.C.R. 311.

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[illegible]se Canada Inc. v. *Murray Demolition Corp* .. [2006] 2 S.C.R. 189.

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[illegible]h Pharmacal Co. v. *Customs and Excise Commissioners,* [1974] A.C. 133, [1973] [illegible] 164, [1973] 2 All E.R. 943 (H.L.).

[illegible]roupAG v. *Flex-N-Gate Corporation,* 2009 ONCA 619, 96 O.R. (3d) 481, 2009 [illegible]9 (CanLII).

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M. *Brant Investments Ltd* v. *KeepRite* Inc., [1991] 0.1. No. 683, 3 O.R. (3d) 289, (C.A.), 1991 CanLII 2705 (ON c.A.).

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N. *UPM-Kymmene Corp.* v. *UPM-Kymmene Miramichi Inc.,* [2002] 0.1. No. 2412, 214 D.L.R. (4th) 496, (Sup. Ct.)., 2002 CanLII 49507 (ON S.c.).

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O. *Sierra Club ofCanada* v. *Canada (Minister ofFinance),* [2002] 2 S.C.R. 522.

* *Madam Justice Pepall is a judge of the Superior Court of Justice.*

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