

THE PERSONAL PROPERTY SECURITY ACT (MANITOBA) — REVIEW OF CASES TO THE END OF 1981

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The purpose of this article is to review the jurisprudence that has developed in Ontario and Manitoba to the end of 1981 relating to the *Ontario and Manitoba Personal Property Security Acts* and which have an effect on *The Personal Property Security Act (Manitoba)*¹. Hopefully, a review will occur each year hereafter. Prior to reviewing the jurisprudence, there shall be a brief review of the background to the *PPSA*, some of the major differences between the pre-*PPSA* law and the *PPSA* as well as the Ontario *PPSA* and Manitoba *PPSA*.

Background

The *PPSA* instituted a new regime in obtaining security upon personal property in Manitoba. The *PPSA* came into effect on September 1, 1978. Prior to September 1, 1978 various Manitoba Statutes dealt with personal property security, all of which were repealed or amended when the *PPSA* came into force in Manitoba.

The pre-*PPSA* law required, in general, the security document (such as a chattel mortgage, debenture, general assignment of book debts, etc.) to be registered in a government office in Manitoba. The place of registration varied depending on the type of instrument, type of goods and the location of the debtor. Some instruments, such as a conditional sales contract, could not be registered in any public office. There were varying time limits to register documents. There were also differing affidavits of execution, affidavits of *bona fides* or statements of particular to be completed and registered with the documents. Errors in affidavits or statements many times caused the registration to be considered a nullity and, thus, affected the security. In addition, due to the varying registration offices and the antiquated methods of registration, doing searches was a time consuming and difficult matter and, many times, uncertain.

The number of statutes involved, the differing registration offices, affidavits, time limits and difficulty with searches, combined with the increasing number of transactions, pointed to the requirement of some form of updating and change. This was not an experience in which Manitoba found itself to be alone. In the post-World War II United States there was a tremendous growth in the use of credit and it was recognized in the United States that laws relating to personal property security had to be updated so as to get away from conflicting systems, rules and judicial decisions and to develop a system to handle the growth. The *Uniform Commercial Code*², Article IX, is the result. A form of *UCC* Article IX is in all States of the United States except Louisiana (due to its civil law). There are some differences from State to State but generally the basic scheme is a code establishing a notice filing (rather than document filing) system, no requirement for affidavits, a central filing office, generally no time limits, and setting forth rules to determine priorities and the rights, remedies and duties of the parties involved in the transaction.

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1. R.S.O. 1980, c. 375, C.C.S.M. 1980, c. P35. (hereinafter referred to as the *PPSA*).

2. Volume 4, (2nd ed. 1971) Article IX (hereinafter referred to as *UCC*).

In Canada, as in the United States, the growth in the use of credit caused a desire to update the law respecting personal property security. A committee created by the Canadian Bar Association, chaired by Mr. Catzman, examined the law of security and personal property with a view to updating such law. That Committee is now a permanent advisory and editorial board to the Ontario Ministry of Consumer and Corporate Relations. The Catzman Committee presented a draft Ontario *PPSA* in 1964 based on the 1962 version of the *UCC* Article IX.

The Ontario legislature passed the Ontario *PPSA* and it was given Royal Assent in June of 1967. However, it was not proclaimed in force and effect until April 1, 1976. The delay was primarily to allow for the development of a centralized computer registry system.

The Commercial Law Section of The Canadian Bar Association established a committee in 1963 to make recommendations with respect to the advisability, form and content of a Uniform *PPSA*. That committee made a report on the *Model Act* in 1970. The *Model Act* and the Ontario *PPSA* were used as a basis for the Manitoba *PPSA*.

The *PPSA* is not, therefore, the whim of some diabolical legislature trying to make life miserable for lawyers, lenders and others. The basic legislative scheme and registry system is rooted in the *UCC* Article IX, which is used throughout the United States and has been tested and refined and is working well to facilitate commercial and consumer transactions in the United States.

Comparison with Pre-September 1, 1978 Law

The significant changes in Manitoba brought about by the *PPSA* compared with the pre-*PPSA* law are:

1. Except for corporate securities, the *PPSA* institutes a notice filing system (by way of filing a "financing statement") instead of a document filing system.
2. Except for garage keeper's liens, there are no affidavits required to effect registration.
3. Except in very specific circumstances and for renewals, there is no time limit for registrations of a financing statement.
4. There is one central registry.
5. Searches are computerized and come from a central registry.
6. The *PPSA* deals with priority rules and the duties, obligations, rights and remedies of the secured party and debtor.
7. Lawyers do not have to "pigeon-hole" their security agreement to be a document which can be registered (such as a chattel mortgage or assignment of book debts). The *PPSA* allows solicitors freedom to create new methods of obtaining security and new forms of security agreements.

Comparison between Ontario and Manitoba *PPSA*

Much of the Manitoba *PPSA* is very similar to the Ontario *PPSA*.³ The following is a brief listing of some of the significant differences between the Manitoba *PPSA* and Ontario *PPSA*:

1. Manitoba *PPSA* includes corporate securities where Ontario has a separate statute (the *Corporation Securities Registrations Act*) dealing with corporate securities.
2. There is no time limit (generally) in Manitoba to register a financing statement whereas Ontario has a 30 day limit.
3. In Manitoba there is a right (s.61) to reinstate the security agreement.
4. The type of financing statement and registration rules are different.
5. Manitoba has an additional sub-section relating to errors and curative provisions (s.4(2)).
6. The Manitoba *PPSA* has s. 34(3) dealing with priority of accounts over a purchase-money security interest.
7. Section 64 has some differences relating to transitional matters.

Application of *PPSA*

Section 2 of the *PPSA* is the starting point in any review of the *PPSA* and shall be the starting point in this review of the cases. The *PPSA* is said to apply to every transaction, without regard to its form and without regard to the person who has title to the collateral, that in substance creates a security interest.

(a) Title

The first significant point within s.2 is the concept that "title" is no longer important when dealing with a security interest within the *PPSA*. The case of *National Trailer Convoy of Canada Ltd. v. Bank of Montreal*⁴ dealt with the concept of title and the *PPSA*. National Trailer sold a tractor-trailer unit to Nanton under a conditional sales agreement whereby National retained title until full payment of the purchase price. Nanton borrowed money from the Bank of Montreal to constitute the down payment for the tractor-trailer unit. Nanton gave the Bank a chattel mortgage on the unit. The Bank was aware of the purpose of the loan and the fact that it was intended that National would have a priority interest in the unit. National's conditional sales contract was executed prior to the Bank's chattel mortgage. The financing statement respecting National's security interest was registered after the Bank's financing statement. There was no valid purchase-money security interest in favour of National because it did not perfect its purchase-money security interest within the 10 day period required by s.34 of the Ontario *PPSA*. Saunders, J. found as follows:

3. Any section hereinafter referred to will refer to sections in the Manitoba *PPSA* unless otherwise indicated.
 4. (1980), 10 B.L.R. 196, 1 P.P.S.A.C. 87 (Ont. H.C.) (hereinafter referred to as *National Trailer*).

It is made clear in s.2(a) of the P.P.S.A. that the statute applies to a transaction that in substance creates a security interest 'without regard to the person who has title'. National under its conditional sale agreement and the bank under its chattel mortgage each had a security interest within the meaning of the P.P.S.A. By reason of s.35(1) the security interest of the bank has priority over the security interest of National and title is not relevant in determining that priority.⁵

The *National Trailer* case was the first case dealing specifically with the concept of title in the PPSA. However, there is a greater authority now existing in Manitoba by virtue of the decision of the Manitoba Court of Appeal in *Joseph Group of Companies Inc., trading as Colonial Jute Products v. Pickles Tents and Awnings Ltd.*⁶ The facts are that Pickles Tent and Awnings Ltd. executed a general security agreement on a form prepared by Bank of Nova Scotia securing "all the inventory of the debtor now owned or *hereafter acquired* and held for sale".⁷ The security agreement was executed on March 23, 1980 and the Bank registered a financing statement on April 2, 1980. On May 5, 1980 there was an agreement that Colonial Jute Products would sell 8 bales of canvas to Pickles. An invoice from Colonial Jute to Pickles reserved title to Colonial Jute until payment was made in full. No representative of Pickles signed the invoice. On September 9, 1980 more bales of canvas were sent on similar terms. On November 14, 1980, pursuant to its security agreement, the Bank appointed a receiver over the assets, property and undertaking of Pickles.

The trial court and Monnin, J.A., in dissent at the Court of Appeal level, held that s.3(2) of the PPSA, which provides: "the rights of buyers and sellers under *The Sale of Goods Act* are not affected by this Act" meant that title was still relevant within the PPSA and, because title had not passed to Pickles, Pickles had no interest to grant to the Bank and the Bank had no right to attempt to retain the bales of canvas. The majority of the Court of Appeal⁸ found that s.3(2) operates to exclude the rights of buyers and sellers *as between themselves* from the operation of the PPSA but does not exclude a sale of goods from the operation of the PPSA where third parties are involved. They followed the decision in the *National Trailer* case and found that the agreement to sell between Colonial Jute and Pickles was, in essence, a conditional sale and thereby was governed by the PPSA. It was also found that there was no document signed by Pickles that would be a security agreement within s.10 of the PPSA and, as a result, the interests of Pickles could not be enforceable against a third party. Finally, the Court also found that Pickles did not have to have title to the goods to have a sufficient interest in the goods to substantiate the security interest in the goods granted to the Bank. All that s.12(1) requires is that the debtor have rights in the collateral.

Notwithstanding the decisions in the *National Trailer* and *Pickles* cases, title and property can still be relevant for some purposes. One such purpose is where the priority question is not governed by the PPSA. An example of such a situation would be where there is a conflict between an interest within the

5. 10 B.L.R. 196 at 205.

6. [1981] 6 W.W.R. 300, (1981), 127 D.L.R. (3d) 176 (Man. C.A.) (hereinafter referred to as *Pickles*).

7. [1981] 6 W.W.R. 300 at 302.

8. Matas and Hall, J.J.A.

PPSA and another interest governed by a Federal statute, such as the *Bank Act*.⁹ An example of such a situation is the case of *Rogerson Lumber Co. Ltd. v. Four Seasons Chalet Ltd.*¹⁰ where Arnup, J.A. found that:

The P.P.S.A. cannot prejudicially affect the Bank's interest, acquired pursuant to a federal statute. Conversely, the P.P.S.A. confers no rights or priority on the Bank on the facts of this case. The only relevance of the P.P.S.A. is whether it prejudicially affects the plaintiff's (Rogerson's) interest.¹¹

and Wilson, J.A. (as she then was), in dissent, found: "The bank, in my view, has priority by virtue of the *Bank Act* and nothing in the P.P.S.A. can take that away."¹² Therefore, because the concept of title is relevant for the purposes of the *Bank Act*,^{13a} the retention of title may still be an important clause to have in security agreements. A further example is where there has been distress levied by a landlord and s.37 of *The Landlord and Tenant Act*^{13b} is operative, with its reference to "goods and chattels the property of any person except the tenant" being exempt from seizure. Another area where title is important is in determining what is the property of a bankrupt. A case dealing with this matter is *Re Country Kitchen Donuts Ltd.*¹⁴

(b) Intangibles

The type of property covered by the *PPSA* is very broad. To have an example of the breadth of effect of the *PPSA* all one has to do is look at the definition of "intangibles", which is the catch-all property definition in the *PPSA*. Intangible is defined as: "... all personal property, including choses in action, that is not goods, chattel paper, documents of title, instruments or securities".¹⁵ There are specific definitions in the *PPSA* for "goods", "chattel paper", "documents of title", "instruments" and "securities".¹⁶

The broad applicability of the *PPSA* is confirmed by the case of *C.T.L. Uniforms Ltd. et al. v. ACIM Industries Ltd.*¹⁷, which dealt with a lease of real property and the issue of whether such a lease is property which can be covered by a security interest within the *PPSA*. Krever, J. found that:

Leases of real property create interests in land. In law, however, they are chattels real and are, accordingly, personal property... A reading of various provisions of the *Personal Property Security Act* discloses that this Act is concerned with security interests in this kind of personal property. Section 2 of the Act makes the Act applicable 'to every transaction... that in substance creates a security interest...'. A security interest is defined in s.1(y) of the Act to mean, *inter alia*:

(y) ...an interest in...intangibles...that secures payment or performance of an obligation...

9. R.S.C. 1970, c. B-1.

10. (1980), 113 D.L.R. (3d) 671, 29 O.R. (2d) 193, 36 C.B.R. 141, 1 P.P.S.A.C. 160 (Ont. C.A.) (hereinafter referred to as *Rogerson Lumber*).

11. 113 D.L.R. (3d) 671 at 677.

12. *Id.*, at 685.

13a. *Supra* n. 9.

13b. *The Landlord and Tenant Act*, R.S.M. 1970, c. L70, s. 37.

14. (1980), 1 P.P.S.A.C. 176 (Ont. S.C.).

15. Section 1.

16. *Ibid.*

17. (1981), 123 D.L.R. (3d) 702, 33 O.R. (2d) 139, 1 P.P.S.A.C. 308 (Ont. H.C.), aff'd (1981), 35 O.R. (2d) 172 (C.A.) (hereinafter referred to as *C.T.L.*).

Intangible, in turn, is defined in s.1(m) as follows:

(m) 'intangible' means all personal property, including choses in action, that is not goods, chattel paper, documents of title, instruments or securities;

Leases of real property do not fall within any of the exclusions in this definition. Because they are personal property the Act applies to a security interest in leases of real property. It seems clear to me that the floating charge debentures with which I am concerned create a security interest in the leases.¹⁸

Another example of the broad applicability of s.2 of the *PPSA* is found in the case of *Re Urman*¹⁹ which dealt with a dispute between the holders of a general assignment of book debts and holders of specific assignments of mortgages. Steele, J. found that the assignments of mortgages were within the "intangible" definition of the Ontario *PPSA* and, in order to perfect their interests as against third parties (such as the assignees under a general assignment of book debts), required registration of a financing statement. Because the assignees under the assignments of mortgages did not register financing statements and the assignees under the general assignment of book debts did register financing statements, the assignees under the general assignment of book debts took priority with respect to payments made pursuant to the mortgages.²⁰

As a result of the *C.T.L.* and *Re Urman* cases the Ontario legislature amended the exclusion section of the Ontario *PPSA* (s.3) in December of 1981 to add as an exclusion the

...creation or assignment of an interest in real property, including a mortgage, charge or lease of real property, other than,

- (i) a fixture, or
- (ii) an assignment of a right to payment under a mortgage, charge or lease where the assignment does not convey or transfer the assignor's interest in the real property.

Sections 36 and 54 of the Ontario *PPSA* were also amended to deal with priority questions, and to allow registrations against the land respecting assignments of a right to payment under a mortgage, charge or lease.

Similar amendments have not been made to the Manitoba *PPSA*.

(c) Lease or Consignment Intended as Security

Section 2 of the *PPSA* specifically applies to an assignment, lease or consignment *intended as security*.

There are three Ontario cases dealing with leases intended as security. The case of *Re Speedrack Limited*²¹ involved a lease that was found to be intended as security. The facts were that Shelfrack Limited, a company related to Speedrack Limited, owned certain tools and dies which were used by Speedrack. Speedrack and Shelfrack had the same shareholders and directors. In January of 1978 Speedrack had financial difficulties. Shelfrack sold the tools and dies to Canadian Leasing Consultants Ltd., who then leased the tools and

18. 123 D.L.R. (3d) 702 at 708-709.

19. (1981), 128 D.L.R. (3d) 33, 38 C.B.R. 261, 15 B.L.R. 165 (Ont. S.C.).

20. 128 D.L.R. (3d) 33 at 35.

21. (1980), 33 C.B.R. 209, 1 P.P.S.A.C. 109 (Ont. S.C.).

dies to Speedrack. The lease contained an option to purchase. The tools and dies were then sold, and the lease assigned, by Canadian Leasing Consultants to Commercial Credit Corporation Limited. Speedrack went bankrupt and the trustee challenged the claim of Commercial Credit to the tools and dies on the basis that Commercial Credit was an unperfected security interest by virtue of not filing a financing statement for a lease intended as security within the *PPSA*. Henry, J. found that the nature of the transaction may be apparent on the face of the documents; however a court must also look at surrounding circumstances to determine the nature of the transaction for the purposes of s.2 of the *PPSA* and it is not merely a question of construing the agreements between the parties. He found that it is a question of determining the intention of the parties, notwithstanding the form used in setting up the transaction. For this, extrinsic evidence may be relevant and admissible. Henry, J. went on to further find that he was

...unable to find that either Canadian Leasing Consultants or Commercial Credit Corporation Limited had any interest in the equipment as inventory, i.e., for general leasing to others. Indeed, the dies were of use only to Speedrack and Shelfrack, as they were used for a particular design of product called 'Shelfrack' covered by a United States patent, which is pending in Canada; other items of the equipment could be put to other non-patented uses ... The lease is, in my opinion, what is commonly called a 'financing lease' On all the evidence I find that the whole transaction was one of financing whereby the creditors, Canadian Leasing Consultants and Commercial Credit Corporation, advanced \$140,000 to Speedrack and Shelfrack acting in concert by way of a loan repayable at interest secured by the lease and the equipment. The arrangement therefore creates a security interest under s.2(a)(ii) of the Personal Property Security Act, and registration is required to perfect it. As registration was not effected, Commercial Credit Corporation's interest is subordinated by s.22 of the Personal Property Security Act to that of the trustee, and the trustee correctly disallowed the claim of Commercial Credit Corporation made under s.59 of the Bankruptcy Act.²²

There is a more recent case from Ontario that provides more comfort to parties who lease goods in the ordinary course of business and not as part of a financing scheme but, nevertheless, have options to purchase contained in those leases. The case is *Re Ontario Equipment (1976) Ltd.*²³ The facts of the case were that Toronto Motor Car Leasing, a division of an automobile dealer, leased cars in the ordinary course of business. Ontario Equipment (1976) Ltd. entered into a lease with Toronto Motor Car Leasing. The lease provided that at the end of the term Toronto Motor Car Leasing was obliged to sell the car at a price determined by the market and was entitled to recover \$2,500.00. If the sale was less than \$2,500.00, Ontario Equipment (1976) was to pay the deficiency; if it was more than \$2,500.00 Ontario Equipment (1976) Ltd. was entitled to the excess. Ontario Equipment (1976) Ltd. also had the option to purchase at the best price offered on the sale. Toronto Motor Car Leasing went bankrupt and the trustee alleged that, due to the option to purchase contained in the lease, the transaction was a conditional sales contract and, because there was no registration of a financing statement by Toronto Motor Car Leasing, it was unperfected and subordinate to the trustee. Henry, J. found that:

22. 33 C.B.R. 209 at 215-218.

23. (1981), 38 C.B.R. 180, 14 B.L.R. 113, 33 O.R. (2d) 648, 1 P.P.S.A.C. 303 (Ont. S.C.) (hereinafter referred to as *Re Ontario Equipment*).

It is of the essence of a lease intended as security within the meaning of The Personal Property Security Act that the property in the subject of the lease is to pass ultimately to the lessee, who is obliged to pay the lessor what might be reasonably regarded as the purchase price with interest and carrying charges over the life of the lease. In such a case the transaction is not unlike a conditional sale agreement or hire-purchase agreement.

What I consider to be a practical definition of the distinction between a true lease and a lease by way of security was adopted in *Re Crown Cartridge Corp.* (1962), 220 F. Supp. 914 at p. 916, by Croake D.J. from the decision of Herzog, referee:

'The test in determining whether an agreement is a true lease or a conditional sale is whether the option to purchase at the end of the lease term is for a substantial sum or a nominal amount... If the purchase price bears a resemblance to the fair market price of the property, then the rental payments were in fact designated to be in compensation for the use of the property and the option is recognized as a real one. On the other hand, where the price of the option to purchase is substantially less than the fair market value of the leased equipment, the lease will be construed as a mere cover for an agreement of conditional sale.'

The critical issue in every case is the intention of the parties and this depends upon the facts of the case

Parties must be free to contract as they see fit without restraint, except as clearly imposed by law. It is only if on a reasonable view of the agreed arrangements the lessor has financed the purchase of the vehicle, under the guise of a lease which is in reality a security instrument, that the Act requires registration to protect the interest of the lessor-owner against creditors.

In the present case I am not persuaded that the lease is anything more than a straightforward leasing arrangement which recovers for the lessor, as owner, over the effective life of the vehicle, his cost, together with a reasonable profit. The lessor is entitled to do that. That [sic] is no additional evidence, as there was in *Re Speedrack Ltd.*, supra, to lead to the conclusion that the true nature of the transaction was the sale of the asset financed on the security of the lease.²⁴

The *Re Ontario Equipment* case was affirmed by the Ontario Court of Appeal with the Court affirming the judgment of Henry, J. for the reasons given by him.²⁵

The third Ontario case is *Re Dempster's Custom Sheet Metal Limited*²⁶ where a lease was found to be a lease intended as security. The writer understands that an appeal is pending.

There have been two Ontario cases respecting consignments intended as security. In both cases Saunders, J. found that the consignments in question were not intended as security. On a close reading of the cases, it is very difficult to determine what forms of consignment would ever be considered as being taken as security so that they would be within the PPSA. The cases in question were decided on the same day and are *Re Stephanian's Persian Carpets Ltd.*²⁷ and *Re Toyerama Limited.*²⁸ The writer understands that the *Toyerama* case was affirmed by the Ontario Court of Appeal. Of particular interest is the reference by Saunders, J. in the *Toyerama* decision to the fact that one of the purposes of the consignment was to protect the consignor as

24. (1981), 38 C.B.R. 180 at 183-184.

25. 35 O.R. (2d) 194.

26. (1981), 40 C.B.R. 23 (Ont. S.C.).

27. (1980), 34 C.B.R. 35, 1 P.P.S.A.C. 71 (Ont. S.C.).

28. (1980), 34 C.B.R. 153, 1 P.P.S.A.C. 126 (Ont. S.C.) (hereinafter referred to as *Toyerama*).

against creditors but, because there were other purposes to the consignment, it did not fall with s.2 of the *PPSA*.²⁹

It is of interest that s.3 of the Saskatchewan *PPSA*, which came into force in 1981, provides that the Saskatchewan *PPSA* applies to:

an assignment of accounts, transfer of chattel paper, *consignment*, or a lease for a term of more than one year, notwithstanding that such interests may not secure payment or performance of an obligation (emphasis added).

There is a fairly extensive definition of a "lease for a term of more than one year" contained in the Saskatchewan *PPSA*.

The reasoning for inclusion of long-term leases and consignments in the Saskatchewan *PPSA* is expressed in the Law Reform Commission of Saskatchewan (1977) *Report on Proposals for a Saskatchewan Personal Property Security Act*:

True consignments and leases have one feature in common with security agreements. They create a potential for deception of innocent third parties who deal with the lessee or (consignee) as the case may be, in the belief that no one else has a claim to the property involved.

Any modern personal property security legislation must embody a system designed to protect innocent third parties who might otherwise suffer loss as a result of dealing with a person who has given a security interest in his property. The Commission has concluded that a system which avoids deception in cases where security transactions are involved can be employed with equal effectiveness in cases where certain types of non-security agreements create the same type of deception. It is totally unrealistic to attempt to bring within the scope of the *Act* every kind of transaction in which deception results from a separation of interest and appearance of interest. However, it is realistic to include in the registration and perfection system of the *Act* certain types of transactions which, because of their commercial importance, are likely to continue to produce significant disruption if left out. The Commission has concluded that long-term leases and certain types of true consignment agreements fall within this category. Note, however, that the *inter partes* sections of the *Act* (Part V) do not apply to these non-security transactions (see section 55).

...While there is potential for deception in all leases, it is commercially impractical to require all leases to be registered. The volume of short-term leases such as car rentals would be overwhelming, and the costs of registering every such transaction would be prohibitive. Where long-term leases are involved, these problems are not of such dimension as to cause concern.

Any definition distinguishing long-term leases which fall within the *Act* from short-term leases which do not, to a large extent must be arbitrary. The Commission has concluded that leases of a term of one year or less should be excluded from the *Act* unless they are security leases...

The inclusion of long-term leases within the scope of the *Act* does not eliminate the necessity to distinguish between true leases and security leases. All security leases are subject to the *Act* regardless of their term. The *Act* does not provide guidelines to be used in distinguishing true leases from security leases.³⁰

(d) Notice

Earlier, the concept of "title" within the *PPSA* was discussed and found to be no longer a relevant concept for *PPSA* purposes. The concept of "notice"

29. 34 C.B.R. 153 at 157-158.

30. Law Reform Commission of Saskatchewan (1977) *Report on Proposals for a Saskatchewan Personal Property Security Act* at 7-8.

of other security interests affecting the claims to priority is another pre-PPSA concept that appears to have become less important with the enactment of the PPSA. In the *National Trailer* case,³¹ Bank of Montreal knew about National's prior created interest under a conditional sales contract and the Bank felt that it would be second in priority, subordinate to National's security interest. However, because Bank of Montreal registered first and National did not file in time to claim a purchase-money security interest, the Bank obtained priority notwithstanding its actual notice of National's interest. Saunders, J. found that:

It was argued that the knowledge of the bank has the effect of rendering the P.P.S.A. inapplicable. As I understand the argument the purpose of the P.P.S.A. is to provide a means by which a third party interested in collateral could acquire knowledge of other interests. If the third party already has such knowledge then it is said the P.P.S.A. is redundant and the respective rights of the parties should be determined on the basis of long-standing equitable principles. With respect I cannot accept this argument. A reading of the P.P.S.A. shows that the Legislature intended to provide a code whereby secured interests in personal property could be determined and enforced.

Notice other than is provided in the statute is not an element in determining priority as it was an element in certain of the statutes which were replaced by the P.P.S.A. and as it remains an element, for example, in The Registry Act, R.S.O. 1970, c.409, and The Mining Act, R.S.O. 1970, c.274. I conclude the omission of any reference to notice or knowledge on the part of the Legislature was deliberate, and that it was intended that priority as between competing security interests was to be determined in accordance with the statute."³²

Two other Ontario cases which followed the decision of Saunders, J. in the *National Trailer* case are *Bank of Nova Scotia v. Dilawri Chevrolet Oldsmobile Ltd. and Craig Edward Schwartz*³³ and *Robert Simpson Co. Ltd. v. Shadlock et al.*³⁴

There are, however, still a number of sections within the PPSA where the concept of notice is important. For example, s.22(2) refers to "any representative creditor was, on the relevant date, *without* knowledge..." [emphasis added], and s.22(1)(b) refers to a transferee *without* notice. In addition, s.7 refers to a time period commencing when the secured party receives notice. The same applies to s.49 dealing with a transfer of goods by the debtor and whether the interest of the secured party becomes unperfected.

Exceptions From The PPSA

Section 3 of the PPSA sets out a number of exceptions to the applicability of the PPSA. The Manitoba Court of Appeal decision in the *Pickles*³⁵ case already has limited the effect of s.3(2) of the PPSA as an exception to the applicability of the PPSA.

Section 3(1) enumerates several specific exceptions, the most important being liens given by statute or rule of law. An example of such a lien would be the distress levied by a landlord. The Ontario Court of Appeal in *Commercial Credit Corporation Ltd. v. Harry D. Shields et al.*,³⁶ found that the right of

31. *Supra* n. 4.

32. *Id.* at 206.

33. (1980), 3 A.C.W.S. (2d) 484 (Ont. Co. Ct.).

34. (1981), 119 D.L.R. (3d) 417, 31 O.R. (2d) 612 (Ont. H.C.).

35. *Supra* n. 6.

36. (1981), 122 D.L.R. (3d) 736, 32 O.R. (2d) 703, 1 P.P.S.A.C. 301 (C.A.).

distress, once exercised, is a common law lien within s.3(1)(a) and, thereby, does not require registration of a financing statement by the landlord levying distress to protect the landlord's priority position. Another form of lien would be a stockbroker's lien such as referred to in *Jones v. Davidson Partners Ltd. et al.*³⁷.

Another form of exception is contained in s.64 of the *PPSA*, which indicates that the *PPSA* only applies where a security interest attaches on or after September 1, 1978. In particular, s.64(2) sets forth specific priority rules to look to when dealing with a security interest not affected by the *PPSA* when opposed to security interests within the *PPSA*. In effect, s.64(2) directs that the applicable priority rules are those rules in effect prior to the *PPSA* coming into force and effect. The transitional provisions in Manitoba are different from those within Ontario, but two Ontario cases dealing with the transitional provisions are *Re Margaritis*³⁸, and *Re Harbour Chevrolet Ltd.*³⁹.

A further exclusion from the *PPSA* is the constitutional one, whereby those interests created under a federal statute are not within the *PPSA* and, thereby, holders of such interests do not have to register a financing statement. A prime example is the *Bank Act*⁴⁰ interest created under what is now s.178 of the *Bank Act*.

The Ontario Court of Appeal in *Rogerson Lumber*⁴¹ dealt with a *Bank Act* s.88 (now s.178) claim and a *PPSA* claim. Rogerson was a supplier of lumber to Four Season Chalet Limited. It was agreed between Rogerson and Four Seasons that the lumber would be supplied to Four Seasons on a conditional sale basis, with title to remain with Rogerson until full payment was made for the lumber. A form of written conditional sale contract was prepared but not signed until September 8, 1976. Rogerson supplied the lumber prior to September 8, 1976 on the basis of an oral conditional sale arrangement. Rogerson's solicitors registered a financing statement on September 27, 1976. Bank of Montreal had filed a s.88 *Bank Act* notice on December 17, 1973 and provided credit from time to time to Four Seasons. On December 26, 1975 Four Seasons executed the document of assignment under s.88 of the *Bank Act*. On September 13, 1976, with no actual notice of Rogerson's interest, the Bank, through a receiver, took possession of the lumber supplied by Rogerson. The Bank claimed priority pursuant to s.88 of the *Bank Act*. No payments were made by Four Seasons to Rogerson for the lumber.

The majority of the Court of Appeal (Arnup and Houlden, J.J.A.) found that Rogerson had priority. Arnup, J.A. found that:

Since the agreement in the nature of a conditional sale between the plaintiff (Rogerson) and Four Seasons is valid, the purchaser, Four Seasons, could not give the Bank security over the goods so sold, and the plaintiff vendor has priority over the Bank with respect to the goods, unless some provision in either the *Bank Act* or the P.P.S.A. takes away the vendor's priority or precludes the enforcement of its agreement.

....

37. (1981), 121 D.L.R. (3d) 127, 31 O.R. (2d) 494, 1 P.P.S.A.C. 242 (H.C.).

38. (1976) 12 O.R. (2d) 178 (S.C.); (1977), 77 D.L.R. (3d) 359, 16 O.R. (2d) 83, 23 C.B.R. 150, 1 P.P.S.A.C. 1 (C.A.).

39. (1981), 122 D.L.R. (3d) 693, 32 O.R. (2d) 671, 37 C.B.R. 249, 1 P.P.S.A.C. 285 (S.C.).

40. *Supra* n. 9.

41. *Supra* n. 10.

I do not think this case turns on whether Four Seasons was the 'owner' of the goods at the relevant time within the meaning of s. 88 of the *Bank Act*. Rather the question is what interest Four Seasons had in the goods on which they could give security to the Bank. If a conditional purchaser has paid nothing on account of the purchase price — which is the fact here — then the dollar value of the purchaser's interest is nil.

....

In my view the plaintiff was the vendor under a valid conditional sale agreement, which was in writing signed by the purchaser-debtor at the time that the rights of the Bank under its security were sought to be enforced, and no provision of the P.P.S.A. makes that agreement invalid as against the bank. No provision of the P.P.S.A. subordinates the interest of the plaintiff to that of the Bank. I therefore agree with O'Leary, J. that in these circumstances the proceeds of the sale of the lumber in question are the property of the plaintiff.⁴²

Houlden, J.A. found:

If it is assumed for the purposes of this appeal that Four Seasons was the owner of the lumber within the meaning of s.88(2), then, by virtue of the above sections (s.86(1)(2)), Four Seasons could not give the bank any greater right or title to the lumber than it itself possessed: *Bank of Montreal v. Guaranty Silk Dyeing & Finishing Co. Ltd.*, [1935] O.R. 493, [1935] 4 D.L.R. 483, 16 C.B.R. 363. Four Seasons having paid nothing to the bank and having done nothing to add to the value of the lumber, the bank acquired nothing under its s.88 security.⁴³

Wilson, J.A. (as she then was), in dissent, found:

The Bank, in my view, has priority by virtue of the *Bank Act* and nothing in the P.P.S.A. can take that away. Indeed, s.10(b) of the P.P.S.A. fortifies the bank's position because at the time its interest attached, i.e., upon delivery of the lumber to Four Seasons, Four Seasons had not signed a security agreement. The bank was in the position under s.88(2) of a person deemed to have received a warehouse receipt or bill of lading covering the lumber as soon as it was delivered to Four Seasons. It therefore had priority under s.89(1) over all rights subsequently acquired in the lumber by others including the rights of Rogerson, the unpaid vendor, of whose reservation of title the bank had no knowledge.⁴⁴

Curative Provisions

There are many cases dealing with the Ontario *PPSA* curative provisions, s.4 and s.47(5), which are equivalent to the Manitoba *PPSA* s.4(1) and 47(5). The Manitoba *PPSA* s.4 and 47(5) read as follows:

- 4(1) A document to which this Act applies is not invalidated, nor shall its effect be destroyed by reason only of a defect, irregularity, omission or error therein or in the execution thereof unless, in the opinion of the judge or court the defect, irregularity, omission or error is shown to have actually misled some person whose interests are affected by the document.
- 4(2) A registration under this Act is not invalidated, nor shall its effect be destroyed, by reason only of a defect, irregularity or error therein unless, in the opinion of the judge or court, the defect, irregularity or error is shown to have actually misled some person whose interests are affected by the registration.
- 47(5) An error of a clerical nature or in an immaterial or non-essential part of a financing statement or other document required or authorized to be registered in the personal property security registry that does not mislead does not invalidate the registration or destroy the effect of the registration.

42. *Supra* n. 11 at 676-680.

43. *Id.*, at 682.

44. *Id.*, at 685.

The major Ontario case on curative provisions is *Bank of Montreal v. Touche Ross Ltd.*⁴⁵. Bank of Montreal filed a financing statement naming "Silver Creek Leasing" as the debtor. The regulations to the Ontario *PPSA* require the name of the individual carrying on a business under a trade name to be placed on the financing statement, and allow the additional listing of the trade name (a similar provision is contained in the Manitoba regulations). Touche Ross, as trustee in bankruptcy, challenged Bank of Montreal's registration on the basis that it was not properly perfected because the individual's name was not listed on the financing statement and, thus, was subordinate to the trustee under s.22(1)(a)(iii). The Court found as a fact that no one was misled by the failure of the Bank to list the individual's name on the financing statement. However, notwithstanding that no one was misled, the Court found that s.4 dealt with errors that invalidated *documents* and s.47(5) dealt with errors that invalidated registrations. Therefore, s.47(5) was the only curative provision for financing statements (which are registered). Section 47(5) is very limited and was found not to be applicable in Bank of Montreal's situation. To fall within the curative provision provided in s.47(5) there must be an error of a clerical nature or in an immaterial or non-essential part of a financing statement. The form of error by Bank of Montreal was not a clerical error, which the Court defined as "an error in a document which can only be explained by considering it to be a slip or mistake of the party preparing or copying it."⁴⁶ There was also not an error in an immaterial or non-essential part because the debtor's name is an essential or material part of the financing statement. The security interest of the Bank was found to be unperfected as against Touche Ross.

A Manitoba case dealing with the curative provisions is the case of *Bank of Nova Scotia v. Airline Credit Union Limited*,⁴⁷ where both Bank of Nova Scotia and Airline Credit Union Limited filed financing statements listing the wrong serial number of the same automobile. The Credit Union seized the automobile and after seizure found out the true serial number and filed an amending financing statement with the correct serial number. The Bank of Nova Scotia and the Credit Union were not aware of the other's interest and no one was misled by the incorrect serial number. The Bank had registered its financing statement first and claimed priority. Judge Jewers found that the errors by both the Bank and the Credit Union were clerical errors and used the same definition of "clerical error" as the Ontario Court of Appeal in *Bank of Montreal v. Touche Ross*.⁴⁸ Because no one was misled and there was a clerical error, the defects in both financing statements were cured by s.47(5) and the Bank's registration, because it was first, had priority. Judge Jewers relied only on s.47(5) and did not make any reference to s.4.

A concern with the *Bank of Nova Scotia v. Airline Credit Union* case is that nothing was said respecting s.4(2), which also refers to a "registration under this Act" and could include a financing statement. Section 4(2) would widen the scope in Manitoba of the curative powers relating to the financing

45. (1979), 103 D.L.R. (3d) 352, 26 O.R. (2d) 468, 32 C.B.R. 42, 8 B.L.R. 186, 1 P.P.S.A.C. 131 (C.A.) [sub. nom. *Re Owens*].

46. 103 D.L.R. (3d) 352 at 355.

47. [1981] 3 W.W.R. 55, 37 C.B.R. 25, 1 P.P.S.A.C. 237 (Man. Co. Ct.).

48. *Supra* n. 45.

statements. However, if the same reasoning is used as in the *Bank of Montreal v. Touche Ross* case, it is possible to argue that s.4(2) may only apply to registrations *other* than financing statements, because financing statements are specifically dealt with in s.47(5). Judge Jewers had an opportunity to clarify this point but, unfortunately, did not take advantage of such an opportunity.

One matter that should be noted respecting s.4 is that s.4(1) refers to omissions but s.4(2) does not refer to omissions. Therefore, the problem with the financing statement in *Bank of Montreal v. Touche Ross* case would not be curable in Manitoba by s.4(2) because it was an error of omission.

Other cases dealing with the curative provisions of the Ontario PPSA are *McMullen v. Avco Financial Services Canada Ltd.*⁴⁹; *Re Lawrence*⁵⁰; *Re Robert Sisk Development Corporation Ltd.*⁵¹; *Re Owl Restaurants Limited*⁵²; *Re Bellini Manufacturing & Importing Ltd.*⁵³; *Re Duke*⁵⁴; *Re Polano and Bank of Nova Scotia*⁵⁵; *Re Alduco Mechanical Contractors Ltd.*⁵⁶; and *Re 360081 Ontario Ltd.*; *Re Patenaude*.⁵⁷

Conflict of Laws Provisions

Sections 5 through to and including section 8 of the PPSA can be loosely classified as the conflict of law provisions. The only cases dealing with those provisions relate to s.7, which provides that where there is a security interest perfected under the law of another jurisdiction respecting collateral brought into Manitoba, then that security interest continues perfected in Manitoba until the earlier of:

1. 60 days after the collateral entered Manitoba;
- or
2. 15 days after the secured party receives notice that the collateral is in Manitoba.

A Manitoba case dealing with s.7 is *Demos v. Niagara Finance Co. Ltd.*⁵⁸ Nick Demos bought a car from Alex Demos on February 22, 1979. The purchase occurred in Manitoba. Alex Demos lived in Edmonton until January of 1979. Niagara Finance Co. Ltd. in Alberta properly perfected under Alberta law a security interest in the automobile owned by Alex Demos. Niagara learned in October of 1979 of the move of the vehicle to Manitoba and seized the car from Nick Demos. Nick Demos applied to the Court for relief from forfeiture and Judge Kennedy found that the interest of Niagara was not perfected under s.7 since the 60 day period had elapsed, notwithstanding that Niagara filed a financing statement in Manitoba within 15 days of learning of

49. (1979), 98 D.L.R. (3d) 560, 24 O.R. 440, 7 B.L.R. 282, 1 P.P.S.A.C. 49 (S.C.).

50. (1979), 104 D.L.R. (3d) 760, 31 C.B.R. 125, 26 O.R. (2d) 3, 1 P.P.S.A.C. 76 (S.C.).

51. (1977), 80 D.L.R. (3d) 445, 25 C.B.R. 167, 17 O.R. (2d) 305, 1 P.P.S.A.C. 11 (S.C.).

52. (1977), 27 C.B.R. 159, 1 P.P.S.A.C. 19 (Ont. S.C.).

53. (1981), 122 D.L.R. (3d) 472, 37 C.B.R. 209, 32 O.R. (2d) 684, 1 P.P.S.A.C. 259 (C.A.).

54. (1981), 128 D.L.R. (3d) 71, 38 C.B.R. 74, 1 P.P.S.A.C. 281 (Ont. S.C.).

55. (1979), 95 D.L.R. (3d), 510, 29 C.B.R. 184, 23 O.R. (2d) 324, 1 P.P.S.A.C. 36 (D.C.).

56. (1979), 106 D.L.R. (3d) 540, 32 C.B.R. 48, 27 O.R. (2d) 323, 1 P.P.S.A.C. 142 (S.C.).

57. (1980), 36 C.B.R. 44 (Ont. S.C.).

58. (1980), 1 P.P.S.A.C. 96 (Man. Co. Ct.).

the transfer. Niagara did not have priority as against Nick Demos because it was subordinate under s.22(1)(b) as against a transferee for value without notice (Nick Demos). The Ontario Court of Appeal case of *TransCanada Credit Corp. Ltd. v. Bachand*⁵⁹ followed the same reasoning.

Security Agreement/Security Interest

Section 10 of the *PPSA* provides that a security interest is not enforceable against a third party unless

(a) the collateral is in possession of the secured party;

or

(b) The debtor has signed a security agreement that contains a description of the collateral sufficient to enable it to be identified.

In the *Pickles*⁶⁰ case, the majority of the Manitoba Court of Appeal found that an invoice reserving title but not signed by the buyer, or a letter from a representative of the buyer who was not an authorized signing officer, did not constitute a security agreement. Matas, J.A. found that;

While undue formality is not to be imposed under the (Personal Property) Security Act, I would expect minimum compliance with general requirements in respect of documents executed by a corporation. In this case, the letter falls short of the minimum.⁶¹

Of interest are the comments of Houlden, J.A. in the *Rogerson Lumber*⁶² case respecting when a written and signed security agreement is to exist. In the *Rogerson Lumber* case, the Rogerson conditional sales agreement was executed *after* seizure of the lumber by a Bank pursuant to s.88 *Bank Act* security. Houlden, J.A. found:

The conditional sales agreement was a 'security agreement' as defined in s.1(x) of the *Personal Property Security Act*, R.S.O. 1970, c. 344. In order to be enforceable against third parties (in this case the bank) it was necessary to comply with s.10(b) [am. 1973, c. 102, s.3] of the P.P.S.A. Mr. Mungovan argued that s.10(b) required the security agreement to be signed, at the latest, when the goods left the possession of the plaintiff. I am unable to find any such time-limit in s.10(b). So long as the agreement is signed before proceedings are taken to enforce it, then, in my opinion, the requirements of s.10(b) are satisfied.⁶³

Another issue canvassed in the *Rogerson Lumber* case is how much of an interest in the collateral must a debtor have in order to grant a security interest. In dissent, Wilson, J.A. wrote:

I cannot accept that prior to payment Four Seasons had no rights in the lumber seized by the bank. Indeed, if this were so, I think it would be unrealistic to describe Rogerson as the holder of a 'security interest' under the P.P.S.A. Rogerson would simply be an absolute owner of the lumber. Moreover, a 'security interest' only attaches under the P.P.S.A. when tests set out in s.12(1) are met including the test that 'the debtor has rights in the collateral'.

59. (1980), 117 D.L.R. (3d) 653, 30 O.R. (2d) 405, 1 P.P.S.A.C. 185 (C.A.).

60. *Supra* n. 6.

61. *Supra* n. 7 at 312.

62. *Supra* n. 10.

63. *Supra* n. 11 at 680-681.

64. *Id.*, at 684-685.

And it is only enforceable against third parties under s.10(b) [am 1973, c. 102, s.3] when there is an agreement in writing. The learned trial Judge speaks of the 'beneficial ownership' of the lumber being in Rogerson pending payment, no doubt because of the trust language in the agreement ultimately signed by the parties on September 8, 1976.

In my view, Rogerson was a conditional sales vendor who transferred to Four Seasons, pursuant to an oral agreement, possession of the lumber and certain rights in it, such as the right to retain possession of it until default, to dress it and to acquire title to it on payment of the purchase price. At the time of delivery of the lumber to Four Seasons, the bank's antecedent s.88 security on after-acquired property automatically attached. I believe that just as the conditional sales purchaser was treated by the Court as an 'owner' within the meaning of s.88 of the *Bank Act* in *Royal Bk. v. Hodges*, [1930] 1 D.L.R. 397, [1929] 3 W.W.R. 605, 42 B.C.R. 44, because the vendor had failed to protect itself by registration under the *Conditional Sales Act*, so also Four Seasons should be treated as having 'become an owner' because Rogerson failed to protect itself by an agreement in writing. The oral agreement for the reservation of title to the vendor, although effective as between the parties, was ineffective as against the bank.⁶⁴

The *Pickles*⁶⁵ case also dealt with what level of interest the debtor must have in the collateral in order to be able to grant a valid security interest in the collateral to a secured party. The majority of the Court of Appeal looked at the attachment provisions in s.12 and the phrase "debtor has rights in the collateral" and found that it refers to something less than the debtor having title to the property. The majority found that the buyer's interest in the collateral was enough to create a security interest, the specific language of Matas, J.A. being:

It would appear that, although Pickles did not have title to the goods (in the traditional sense) when it acquired them from Colonial, it had a sufficient interest in the goods (i.e., rights in the collateral) to substantiate the security agreement in favour of the bank...⁶⁶

Another Manitoba Case dealing with security agreements and security interests is *J.J. Riverside Manufacturing Ltd. v. E.J.W. Development Co. Ltd.*⁶⁷ In that case a salesman employed by J.J. Riverside entered into a sales agreement with E.J.W. purporting to bind J.J. Riverside to sell to E.J.W. a piece of equipment. J.J. Riverside did not complete the transaction because it alleged the purported sale was made by the salesman without authority and was thus not binding on J.J. Riverside. E.J.W. demanded the delivery of the machine and registered a financing statement in the Manitoba Personal Property Registry. J.J. Riverside made an application to the County Court demanding that the financing statement be removed. Judge Jewers found that even if the contract was valid and binding, it did not constitute a security agreement and a financing statement could not be registered. For a security agreement to arise, he found, there must be an interest in personal property and that interest must be to secure payment or performance of an obligation. In the fact situation before Judge Jewers, he found that the making of the contract transferred title, and, therefore, was not a conditional sales contract. In addition, no money was owed by J.J. Riverside to E.J.W. — it was the other way around. There were, in fact, other duties upon J.J. Riverside (for example, to give good title and to actually deliver the goods) but Judge Jewers found that those duties did not fall within the traditional legal sense of "security", being something in the buyer's interest in the goods which makes the enforcement of the seller's obligations more certain or more readily achieved.

65. *Supra* n. 6.

66. *Supra* n. 7 at 315.

67. [1981] 5 W.W.R. 607 (Man. Co. Ct.).

Corporate Security/Security Agreement

The *PPSA* makes a distinction between a "corporate security" and a regular security agreement. The Ontario *PPSA* does not have the same distinction; Ontario has a separate statute and registration for corporate securities.

A corporate security is defined in the Manitoba *PPSA* as including:

every security interest in personal property or fixtures created by a corporation and contained

- (i) in a trust deed or other writing to secure bonds, debentures or debenture stock of the corporation or of any other corporation; or
- (ii) in any bonds, debentures or debenture stock of the corporation as well as in the trust deed or other writing securing the same, or in a trust deed or other writing securing the bonds, debentures or debenture stock of any other corporation; or
- (iii) in any bonds, debentures or debenture stock or any series of bonds or debentures of the corporation not secured by a separate writing;⁶⁸

A corporate security is treated differently from a regular security agreement in the following respects:

- (a) different method to complete a financing statement;
- (b) copy of corporate security to be registered with financing statement (s.47(3));
- (c) increased filing fee for corporate security registration;
- (d) no renewal requirements for corporate security (is a perpetual registration (s.52(4)));
- (e) different discharge rules (s.53(6.1)(6.2));
- (f) no s.58(5) notice required in corporate security enforcement (s.58(11));
- (g) holder of corporate security can apply to a judge for an order (s.61(2)) that the debtor does not have any right to reinstate the security agreement under s.61(1).

A concern the writer has, is the effect of the narrow curative provisions of the *PPSA* if a financing statement for a regular security agreement is prepared when it is a corporate security or vice versa. It is submitted that there is no valid reason to treat corporate securities and regular security agreements differently within the *PPSA*, especially with the development of "debenture-like" general security agreements.

However, until such time as the distinction between corporate securities and regular security agreements are removed from the *PPSA*, cases such as *Re Turf World Irrigation Ltd.*⁶⁹ and *Re Rollies' Sports and Marine (1974) Ltd.*⁷⁰ respecting whether agreements in Ontario are within the *PPSA* or are corporate securities within the *Corporation Securities Registration Act* of Ontario, will be of interest to Manitoba solicitors.

68. Section 1(f).

69. (1979), 30 C.B.R. 280, 7 B.L.R. 215, 1 P.P.S.A.C. 53 (Ont. S.C.).

Attachment

Attachment is a term describing when, between the debtor and the secured party, rights, duties and obligations arise. The "attachment" of a security interest in collateral is a condition precedent (s.21) to achieving "perfection" of a security interest.

Section 12 of the *PPSA* sets forth three necessary ingredients to have attachment, *all* of which must be present:

- (a) value must be given (value is defined as any consideration sufficient to support a simple contract);
- (b) the debtor must have rights in the collateral;
- (c) the debtor and secured party intend a security interest in the collateral to attach.

The most difficult element of s. 12 is the "intention" element that has been introduced in the Ontario and Manitoba *PPSA*. The intention element is not present in the *UCC* Article IX, the United States legislators preferring some certainty as to time of perfection. The *UCC* Article IX also refers to value being given and the debtor having rights in the collateral being ingredients of attachment, with the third element being the execution of the security agreement. Once all three requirements have been met there is attachment "unless explicit agreement postpones the time of attaching".⁷¹

The Saskatchewan *PPSA* and Model *PPSA* prepared by The Canadian Bar Association also do not refer to the "intention" of the parties but refers to when the security agreement becomes enforceable within the meaning of the equivalent of s.10 of the Manitoba *PPSA*.

The writer is of the view that the Ontario and Manitoba *PPSA* encourage uncertainty through s.12(1)(c) by relying on the intention of the parties as an element of attachment. It is submitted that relying on intention can lead to mischief through one or both parties denying an intention to attach.⁷²

The writer submits that on the execution of the security agreement the parties should be deemed to have intended that attachment occur unless there is an explicit statement to the contrary set forth in the security agreement, such statement setting forth when the parties intend the security interest to attach. The writer urges the Ontario and Manitoba legislatures to amend s.12 accordingly. Until such an amendment occurs, the writer suggests that all security agreements contain, as a standard clause, a statement by the parties as to their intention respecting the attachment of the security interest.

Unperfected Security Interests

Section 22(1) of the *PPSA* refers to those interests to which an unperfected security interest is subordinate. They include:

1. Interests entitled to priority under the *PPSA* or other *provincial*

70. (1981), 14 B.L.R. 41, 1 P.P.S.A.C. 278 (Ont. S.C.).

71. See *Supra* n. 2 at s. 9 - 203(2).

72. See for example: *Re M.C. United Masonry Limited* (1981), 40 C.B.R. 106 (Ont. S.C.).

legislation⁷³ such as statutory liens, purchase-money security interests, prior registered or attached interests, etc.

2. A person assuming control of the collateral through legal process.⁷⁴
3. Interests of transferees without knowledge to the extent they give value.
4. A person representing the creditors, such as a receiver or trustee in bankruptcy.

It should be noted that there are a number of provisions in the *PPSA* where a security interest can be unperfected for a period of time, such as not filing within the time limits allowed in s.7, 49(1) or 52.

If another interest (interest "B") is obtained while a security interest (interest "A") is unperfected, and interest A is subordinate to interest B by virtue of s.22, then, even if interest A was perfected before and re-perfected after interest B arose, interest A is subordinate to interest B. A case dealing with this situation is *Re Triad Financial Services and Thaler Metal Industries Ltd. et al.*⁷⁵ In that case Triad was a secured party under a conditional sales agreement with Thaler regarding the sale of certain equipment. A chartered bank had a debenture. A financing statement was filed by Triad respecting the conditional sales contract and that registration occurred prior to the debenture. Advances were made from time to time by the bank under the debenture to Thaler. Triad failed to renew the financing statement and, after the time period for renewal had passed, filed a new financing statement (pursuant to a Court order in Ontario). Between the time that the renewal should have taken place and the registration of the new financing statement by Triad, the bank advanced \$10,000. The bank made no searches at the time of the advance. Southey, J. held that the bank had priority for the \$10,000 but not for advances made prior to the renewal date or after the registration of the new financing statement, and it was immaterial to the existence of priority rights of the bank that it did not search or know of its priority position.

The decision in the *Triad* case has been subject to criticism by J.S. Siegal in "The Quickening Pace of Jurisprudence under the Ontario Personal Property Security Act"⁷⁶ and L.J. Lysaght and R.L. Simmonds in "The Lapsed Registration Problem under the Ontario Personal Property Security Act"⁷⁷, and the writer submits that the date of advances under the bank's debenture in the *Triad* case and the bank's knowledge of the prior interest should not have been factors in determining priority. The decision should have been to follow the s.35 priority rules and give priority in order of registration at the time of the priority dispute.

73. See the comment of Arnup J.A. in the *Rogerson Lumber* case, *supra* n. 10, respecting "provincial" legislation.

74. See the comments of Arnup J.A. in the *Rogerson Lumber* case, *supra* n.10, respecting "legal process."

75. (1979), 98 D.L.R. (3d) 555, 24 O.R. (2d) 423 (Ont. H.C.); aff'd without reasons 106 D.L.R. (3d) 706 (C.A.). Leave to appeal to S.C.C. dismissed April 22, 1980.

76. (1979-80), 4 Can. Bus. L.J. 54.

77. (1979-80), 4 Can. Bus. L.J. 442.

Another key element with respect to unperfected security interests is the giving of value, such as referred to in s.22(1)(b). A case dealing with this matter is *Royal Bank of Canada v. Dawson Motors (Guelph) Ltd.*⁷⁸ where the plaintiff loaned money to an individual to purchase an automobile and took a chattel mortgage on that automobile on July 27. That same individual agreed to sell that automobile to the defendant on the evening of August 15. The plaintiff registered its security interest on the morning of August 16, but used the incorrect serial number. The defendant searched the correct serial number and found no registrations up to August 15 and paid for the automobile on the afternoon of August 16. It was agreed by all parties that the defendant became the owner of the automobile on August 15. It was held that the plaintiff's security interest was unperfected when the defendant became owner. However, the defendant did not give value for the automobile until after the plaintiff's financing statement was perfected, and the defendant's *promise* to buy did not constitute "value" within s.22(1) of the Ontario *PPSA*. The defendant could not claim priority under s.22(1)(b) because it did not give value when the plaintiff was an unperfected interest. The incorrect serial number on the plaintiff's financing statement was immaterial, as a search with the correct number would not have shown the plaintiff's registration because it was not made until the morning of August 16. Therefore, the error in the plaintiff's financing statement did not mislead the defendant when he searched on August 15 and was a clerical error that could be cured under s.47(5) of the Ontario *PPSA*.

It should also be noted that s.22(1)(a)(iii) refers to a person "who represents the creditors of the debtor". Therefore, if the person attempting to take advantage of s.22(1)(a)(iii) does not represent the creditors he will not be able to use s.22 to gain priority. An example of such a situation is *Re Mercantile Steel Products Ltd.*⁷⁹ where Anderson, J. held that a trustee under a proposal to creditors represents the debtor, not the creditors of the debtor, and thus such a trustee could not take advantage of s.22. Another example would be a receiver appointed pursuant to security agreement but not Court appointed. Such a receiver is representing the secured party that appointed him and not the creditors of the debtor.

Trustee in Bankruptcy

The position of a trustee in bankruptcy under s.22 of the *PPSA* has been the subject of a number of cases in Ontario.

The case of *Re Hillstead*⁸⁰ dealt with the issue of at what point in time the trustee's rights arise for the purpose of s.22(2). In a voluntary assignment in bankruptcy, the relevant date for s.22(2) is the date of the assignment. In a petition, by operation of s.22 of the *PPSA* and s.50(4)(5) of the *Bankruptcy Act*,⁸¹ the relevant date for s.22(2) is the filing of the petition. The date a trustee's rights arise are very relevant when dealing with a financing statement registration after a petition is filed but before the trustee is formally appointed.

78. (1981), 39 C.B.R. 304, 15 B.L.R. 83 (Ont. Co. Ct.).

79. (1978), 27 C.B.R. 161, 20 O.R. (2d) 237 (S.C.).

80. (1979), 103 D.L.R. (3d) 347, 32 C.B.R. 55, 9 B.L.R. 74, 1 P.P.S.A.C. 136 (Ont. S.C.).

81. R.S.C. 1970, c. B-3.

Section 22(2) also refers to "if any represented creditor was, on the relevant date, without knowledge of the unperfected security interest" as a condition precedent to the trustee obtaining priority over an unperfected security interest. The Ontario courts in *Re Bellini Manufacturing & Importing Ltd.*⁸² and *Re Harper*⁸³ have put the onus of proof on the trustee to establish that one creditor was without knowledge because it is easier for the trustee to find one creditor without knowledge than for the secured party claiming priority to find that all other parties had knowledge. If no evidence is put forth by the trustee respecting one or more creditors without knowledge, then the trustee has no priority, under s.22, over an unperfected security interest claim.

Perfection

The term "perfection", as used in the *PPSA*, refers to the state that all secured parties desire to reach in order to protect their interest as against third party claims. The time of perfection generally determines priorities.

Sections 24 and 25 of the *PPSA* set out the basic methods to obtain perfection of a security interest to be by possession of the security interest by the secured party or by registration of a financing statement.

Section 24 sets out the types of collateral in which a security interest can be perfected by possession of the collateral. The list in s.24 contains some types of collateral not found in s.25 (for example, instruments, securities, letters of credit and advices of credit or negotiable documents of title) and s.25 lists types of collateral a security interest in which can only be perfected by registration (for example, intangibles and collateral of any type the security interest in which arises under a floating charge.).

A recent Ontario case has dealt with what type of possession is required for perfection. In *Re Darzinskas*,⁸⁴ Dompok provided to Joel Morgenstern a chattel mortgage upon a heavy piece of manufacturing equipment. Morgenstern's financing statement was improperly registered and as a result Morgenstern's interest was not perfected by registration. By reason of default under the chattel mortgage, Morgenstern instructed a bailiff to seize the equipment. The seizure was done on July 28, 1981. Because of the size of the equipment it was not removed from the premises nor were any operative parts removed. As a result of promises to pay, Morgenstern allowed Dompok to use the equipment. Dompok was petitioned into bankruptcy August 17, 1981 and the trustee argued that Morgenstern's interest in the equipment is subordinate to the trustee's claim.

Steele, J. found that s.24 of the Ontario *PPSA* requires actual physical possession of the goods to be held by a secured party in order to be perfection under s.24 and, thereby, give notice to all persons dealing with the goods. Because Morgenstern did not take such physical possession, his security interest was unperfected and subordinate, by virtue of s.22, to the interests of the trustee.

82. *Supra* n. 53.

83. (1981), 126 D.L.R. (3d) 327, 34 O.R. (2d) 491, 39 C.B.R. 23 (S.C.).

84. (1981), 40 C.B.R. 36, 34 O.R. (2d) 782, 15 B.L.R. 317 (S.C.).

It should be noted that s.57(b) of the *PPSA* allows a secured party to render equipment unusable without removal; however, only a secured party who has perfected by registration may do so. Section 56(b) is not a provision that provides that perfection by possession may occur by making equipment unusable.

The Ontario case of *West Bay Sales Ltd. v. Hitachi Sales Corporation of Canada Ltd.*⁸⁵ supports the proposition that a single registration may be all that is required to perfect a security interest in a multitude of transactions between the same parties if a proper security agreement is taken and a financing statement is properly completed and registered. West Bay purchased goods from Hitachi on conditional sales arrangements. Standard forms of conditional sales contracts were entered into for each shipment. Hitachi assigned those conditional sales contracts to FinanceAmerica. FinanceAmerica registered one financing statement and claimed a security interest in "All Hitachi products now or hereafter held for sale or lease as inventory and proceeds thereof".⁸⁶ After registration of a single financing statement numerous shipments were made to West Bay by Hitachi, with separate conditional sales contracts for each shipment. West Bay went bankrupt and the trustee challenged the single registration of FinanceAmerica. Henry, J. found that:

The Personal Property Security Act was designed to replace the former archaic, complicated and conflicting laws relating to security on personal property, by a simple set of rules that will accord with sound business practices. I adopt in this respect as a true statement of the policy of the Act, as discernible from its provisions, the following description by the learned author of Catzman, *Personal Property Security Law in Ontario* (1976), p.3:

'The fundamental aim of the Act is to provide rules under which commercial transactions can be concluded with reasonable simplicity and certainty. It recognizes that all security devices regardless of form have one single purpose — to give creditors who bargain for them special, definite, specific and exclusive rights in particular property to secure payment of a debt or satisfaction of an obligation. It is this common objective that dictates a single lien concept with precise specification of rights and obligations. The Act abolishes multiple documentation and registration. Thus a borrower may now charge his inventory and accounts receivable in one single document, whereas under the law in effect prior to the proclamation of this Act two documents, a chattel mortgage and an assignment of book debts, would usually be required. It permits complete integration of a borrower's needs in a single transaction by the simple expedient of abolishing distinctions in secured transactions based on form.'

It would be redundant, uninformative and costly to require inventory financing and deliveries to be the subject of multiple registrations and the resulting searches, tracing and legal proceedings to ascertain whether particular items of inventory among a multitude have become the subject of a security agreement. The business community have simplified the process, and it is not the intent of the Legislature to complicate it by unnecessary formality. The financing statement in this case gives notice to all concerned that the West Bay inventory is subject to a security interest held by FinanceAmerica. Successive registration of a multitude of new financing statements as inventory rolls over could add nothing to the information originally conveyed by the registration of the general statement of April 1, 1976.⁸⁷

It should be noted that in Ontario it is not a mandatory requirement that a description of the collateral be contained in the financing statement. It is an

85. (1978), 88 D.L.R. (3d) 743, 28 C.B.R. 244, 4 B.L.R. 224, 20 O.R. (2d) 752, 1 P.P.S.A.C. 21 (S.C.).

86. 88 D.L.R. (3d) 743 at 744.

87. *Id.*, at 746.

option. However, in Manitoba the *PPSA* (s.10) provides that, where the secured party is not in possession of the collateral, to have the security agreement enforceable as against third parties there must be existing a security agreement signed by the debtor containing a description of the collateral sufficient enough to identify the collateral. Exactly the same language is used in the *PPSA* respecting the description necessary to be contained in the financing statement registered in the Manitoba Personal Property Registry. Therefore, unless there is a master security agreement containing an adequate general description, the writer is of the view that it is open for Manitoba Courts to find that a number of conditional sales contracts, containing differing descriptions of collateral, are separate and distinct security agreements and require separate and distinct financing statements to be registered because the requirements for the description of the collateral in the security agreements and financing statements are identical. Such is not the case in Ontario. As a result, it is submitted that care should be taken in deciding whether one registration is sufficient.

Proceeds

Section 27 of the *PPSA* deals with proceeds arising from the use or sale of collateral. Proceeds are defined in s.1(t) as:

...personal property in any form or fixtures derived directly or indirectly from any dealing with the collateral and the proceeds therefrom, and includes payment representing indemnity or compensation for loss of or damage to the collateral or proceeds therefrom;

Section 27(1) provides:

“Subject to this Act, where proceeds arise from some dealing with the collateral, or from damage or loss to the collateral, the security interest in the collateral

- (a) continues as to the collateral unless the secured party expressly or impliedly authorized the dealing with the collateral; and
- (b) extends to the proceeds.”

Section 27(1) is subject to s.27(2) and also the provision, as set forth in s.27(3), that the proceeds are identifiable or traceable. Two cases dealing with proceeds are *C.T.L. Uniforms Ltd. v. ACIM Industries Ltd.*⁸⁸ and *Re Kryzanowski*.⁸⁹

In *Re Kryzanowski* the secured party consented to a sale of goods but Steele, J. found that, because the secured party gave its consent, s.27 does not protect his interest in proceeds as against the trustee. However, Steele, J. found that the money was being held in trust for the secured party and honoured the claim by the secured party under trust law concepts. One problem with the decision is that there is no mention why there was no perfected interest in the proceeds which would be good against a trustee. A mere sale with the consent of the secured party is not enough to take away the perfection of, and interest in, the proceeds. There was nothing mentioned in the case as to the failure of the secured party to satisfy s.27(2) in order to continue the perfection in proceeds.

88. *Supra* n. 17.

89. (1979), 97 D.L.R.(3d) 744, 30 C.B.R. 204, 24 O.R. (2d) 18, 1 P.P.S.A.C. 37 (S.C.).

It should be noted that s.27(2) refers to a security interest becoming unperfected 10 days after the proceeds are received by the debtor. However, the *C.T.L.* case held that the receipt of proceeds by the trustee in bankruptcy of the debtor was not receipt by the debtor and, therefore, s.22(2) did not make the claims of the secured party unperfected for proceeds in the possession of a trustee in bankruptcy.

Sale in the Ordinary Course of Business

Section 30(1) of the *PPSA* provides:

A purchaser or lessee of goods from a seller or lessor who sells or leases the goods in the ordinary course of business takes them free from any security interest therein given by his seller or lessor even though it is perfected and the purchaser or lessee actually knows of it.

The Ontario case of *Fairline Boats Ltd. v. Leger*⁹⁰ deals with s.30. Of course, Linden, J. found that in determining whether there is a "sale in the ordinary course of business" depends on a finding of fact and requires a review of all the circumstances. Linden, J. went on to review certain factors that should be considered and found that the objective of s.30(1) is

...to permit commerce to proceed expeditiously without the need for purchasers of goods to check into titles of sellers in the ordinary course of their business. Purchasers are allowed by our law to rely on sellers using the proceeds of sales to repay any liens on the property sold. In these days inventory is almost invariably financed, and as a result is almost invariably subject to liens of one kind or another. To require searches and other measures to protect lenders in every transaction would stultify commercial dealings, and so the Legislature exempts buyers in the ordinary course of business from these onerous provisions, even where they know that a lien is in existence. The risk is placed on lenders of an occasional dishonest dealer who may sell some of his goods in the ordinary course of business and then fail to repay the debt because 'he is in a much better position than the buyer to weigh the risks'⁹¹

The factors to look to in order to determine if the sale was in the ordinary course of business, recognizing that Courts must consider all the circumstances of the sale, is a question of fact and some of the factors referred to in the *Fairline* case were:

- (a) the usual or regular type of transaction that people in the seller's business engage in;
- (b) where the agreement is made;
- (c) parties to the sale;
- (d) quantity of goods sold;
- (e) price charged;
- (f) the financial position of the parties (for example, if one party is in difficulty).

90. (1980), 1 P.P.S.A.C. 218 (Ont. H.C.). (hereinafter referred to as *Fairline*).

91. *Id.*, at 220-221.

Purchase-Money Security Interest (“PMSI”)

A PMSI is a special type of interest that can be created and, if s.34 of the PPSA is satisfied, will give priority over regular security interest that are registered prior in time and would, in normal circumstances, have priority under s.35 or some other priority rule in the PPSA.

A PMSI is defined in s.1(u) as being a security interest

- “(i) taken or reserved by the seller of the collateral to secure payment of all or part of its price, or
- (ii) taken by a person who gives value that enables the debtor to acquire rights in or the use of the collateral, if that value is applied to acquire those rights;”

A couple of questions or issues that arise with a PMSI are:

1. Can there be more than one PMSI in the same collateral and, if so, how is priority determined?
2. Can one security agreement cover both a non-PMSI and a PMSI?
3. What happens if the steps necessary to be taken to achieve a PMSI priority position are not taken or satisfied?

In obiter, the first question was answered in *Re Polano and Bank of Nova Scotia*⁹² where Judge Loukidelis found that there could be more than one PMSI in the same goods (i.e. two chattel mortgages where both loans were used to acquire goods) and s.34(4) is not applicable because it deals with the priority between a PMSI and a non-PMSI interest. Where there are two or more PMSI interests in the same collateral the priority will be determined by the s.35 rules, namely the first to register.

In the *National Trailer* case⁹³ there were two potential PMSI claims in the same collateral that could have existed if National had registered its interest within 10 days. Saunders, J. had an opportunity to deal with the other two issues in the *National Trailer* case but decided the matter on other grounds and did not deal with those issues.

There are two views as to the existence of a PMSI and non-PMSI claim in the same agreement. They are:

1. Having a PMSI and non-PMSI in the same agreement taints the PMSI and no priority can flow under the PMSI rules.
2. The better view is that there can be a mixture of PMSI and non-PMSI interests because it is in keeping with the scheme of the PPSA and the PPSA impliedly allows more than one type of security interest to be covered in one security agreement (although the writer suggests that care should be taken to identify the collateral in which a PMSI is claimed).

92. *Supra* n. 55.

93. *Supra* n. 4.

The third issue, being what happens if there is a failure to satisfy a PMSI requirement, is logically answered by there then existing an ordinary security interest which may be governed by other special priority rules but is more likely governed by s.35. Section 35 is the section that Saunders, J. looked to in the *National Trailer* case to determine the priority between the claims of the Bank of Montreal and National. The decision implies that the possible PMSI that fails to satisfy the PMSI requirements is still a valid non-PMSI security interest.

General Priority Rule

The general priority rule in the *PPSA* is set forth in s.35(1), which states:

“If no other provision of this Act is applicable, priority between security interests in the same collateral shall be determined

- (a) by the order of registration, if the security interests have been perfected by registration;
- (b) by the order of perfection, unless the security interests have been perfected by registration; or
- (c) by the order of attachment under subsection (1) of section 12, if no security interest has been perfected.”

Section 35 may change concepts of priority when compared to the old law, especially the concept of notice of interests referred to earlier.

One such difference in effect can be seen when reviewing the law as to assignments of book debts. The decision of Morse, J. in *Harding Carpets Limited v. Royal Bank of Canada*⁹⁴ provided that the first to give notice to the creditors of a pre-*PPSA* assignment of book debts obtained priority notwithstanding when the general assignment of book debts was registered. Section 35 now implies that it is the first to register that gets priority notwithstanding when notice is given. This position was supported in *Royal Bank of Canada v. Inmont Canada Ltd.*⁹⁵ Briefly, the facts of the *Inmont* case were that Royal Bank obtained a general assignment of book debts from a customer which was executed and properly registered prior to the same customer's general assignment of book debts in favour of Inmont. However, Inmont gave notice of demand to creditors of the customer directing payment to Inmont prior to the Royal Bank's notice to the creditors to make payment to the Bank. Inmont argued that priority to the payments from a creditor of the customer depended upon the date of notice. Royal Bank argued that priority depended on the date of registration of the financing statement. Judge Clements reviewed the common law respecting floating charges and general assignments of book debts and the purpose and provisions of the *PPSA*. He found that, on an overview of the *PPSA*, certain of the common law principles had been abrogated by the *PPSA*. He quoted and relied on statements from *Personal Property Security Law in Ontario*⁹⁶ and held that the Bank's security interest attached on execution of the general assignment of book debts and was perfected by registration and that priority was governed by date of registration (s.35) and not by the date of notice to creditors.

94. [1980] 4 W.W.R. 149 (Man. Q.B.).

95. (1980), 1 P.P.S.A.C. 197 (Ont. Co. Ct.) (hereinafter referred to as *Inmont*).

96. F.M. Catzman (1976).

Morse, J. recognized in *Harding Carpets Limited v. Royal Bank of Canada* (dealing with pre-PPSA general assignment of book debts) that the PPSA, if applicable, might change the situation, when he stated “[t]he situation as to notice may now be different with respect to assignments of book debts registered under the Personal Property Security Act, C.C.S.M., p. 35”⁹⁷

Fixtures

Section 36 sets forth a priority scheme relating to fixtures attached to real property. However, s.36 does not apply to building materials. The case of *Rockett Lumber and Building Supplies Limited v. Papageorgiou*⁹⁸ 183 (Ont. Co. Ct.) attempted to set forth a standard to determine what constitutes building materials:

‘When the term ‘building materials’ is used, the ordinary ingredients such as lumber, mortar, brick and stone are the first to suggest themselves as logical illustrations. But on further consideration there are a great many other things that go into the construction of a building which do not come under these headings, which nevertheless are integral parts of the whole construction, as compared with other articles which are mere adjuncts or appendages. In determining what is building material it is necessary to consider the entire construction. Certain equipment that by itself would appear to come under the classification of a chattel, may in the general construction of a building become so closely interlinked and identified with other materials generally described as building material, that they must for all practical purposes be considered as building materials ...’⁹⁹

Section 58(5) Notice

Section 58(5) of the PPSA requires a notice to be given to the debtor and other persons interested in the collateral by the secured party prior to the secured party disposing of seized collateral. One of the provisions in the notice is a requirement to indicate that the secured party may sue the debtor for any deficiency after the sale. The case of *George O. Hill Supply Ltd. v. Little Norway Ski Resorts Ltd.*¹⁰⁰ dealt with a s.58(5) notice in a conditional sales contract situation where the secured party seized and sold goods. No. s.58(5) notice was given and the secured party attempted to sue for a deficiency. Judge Kurisko held that the right to sue for a deficiency must be based upon:

1. a right given in the security agreement;
2. the provisions of the PPSA; or
3. a valid contract made after default between the parties.¹⁰¹

Judge Kurisko found that there was nothing in the security agreement allowing an action for any deficiency and that there was no valid contract after default. He also found that no notice was given under s.58(5) and thus there could be no action for deficiency. Judge Kurisko quoted *Personal Property Security Law in Ontario*¹⁰² in support of his doubts as to whether s.58(5) in itself give rights

97. *Supra* n. 94 at 161.

98. (1979), 30 C.B.R. 183 (Ont. Co. Ct.).

99. *Id.* at 186.

100. (1980), 1 P.P.S.A.C. 190 (Ont. D.C.).

101. *Id.*, at 195.

102. *Supra* n. 96.

to sue for a deficiency. Therefore, it might be prudent for solicitors to review their conditional sales security agreements to make certain that it allows for an action for a deficiency after sale.

Another case dealing with s. 58(5) notice is *Jones v. Davidson Partners Ltd.*¹⁰³

Conclusion

The foregoing review is only of cases decided in 1981. The *PPSA* jurisprudence is quickly expanding now that the Ontario *PPSA* has been in force for more than six years. As the Manitoba and Saskatchewan *PPSA*'s mature further cases will develop. The writer hopes to review each year the cases of the preceding year as they relate to the Manitoba *PPSA* and suggests that a committee of the Canadian Bar Association be formed to publish annual reports similar in concept to *The Uniform Commercial Code Annual Survey* conducted by The American Bar Association in the April editions of the *Business Lawyer*.

103. *Supra* n. 37.