

# THE PERSONAL PROPERTY SECURITY ACT (MANITOBA) — REVIEW OF 1982 AND 1983 CASES

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The purpose of this Article is to continue the review of the jurisprudence that has developed in Ontario, Manitoba and Saskatchewan in 1982 and 1983 relating to the Ontario,<sup>1</sup> Manitoba<sup>2</sup> and Saskatchewan<sup>3</sup> *Personal Property Securities Acts* and which have an effect on the *Personal Property Security Act* (Manitoba).<sup>4</sup> The first article<sup>5</sup> in this series reviewed the cases to the end of 1981, and commented on the background to the *PPSA* and the major differences between the pre-*PPSA* law and the *PPSA* and between the Ontario *PPSA* and Manitoba *PPSA*. Prior to reviewing the 1982 and 1983 jurisprudence, there shall be a brief review of the major differences between the Manitoba *PPSA* and Saskatchewan *PPSA*.

## I. Comparison — Manitoba and Saskatchewan *PPSA*

The Saskatchewan *PPSA* is substantially longer than the Manitoba *PPSA*, but follows the same basic structure and principles as the Manitoba and Ontario *PPSA*'s. The Saskatchewan *PPSA* is very similar to the *Uniform Personal Property Security Act, 1982*<sup>6</sup> submitted for joint adoption by The Canadian Bar Association and The Uniform Law Conference. The similarity is as a result of the *UPPSA* and the Saskatchewan *PPSA* being drafted at the same time, with Professor R.C.C. Cuming being instrumental in both the Saskatchewan *PPSA* and the *UPPSA* drafting.

A review of all the differences between the Manitoba *PPSA* and the Saskatchewan *PPSA* could be the subject of a complete article comparing the Acts. However, the more important differences are:

### 1. The inclusion of definitions for the following terms:

building  
building materials  
consignment  
fixtures  
fungible  
future advance  
indebtedness

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1. R.S.O. 1980, c. 375, as amended by 1981, c.2; 1981, c.58.

2. C.C.S.M., c. P35.

3. S.S. 1979-1980, c. P-6.1, as amended by 1980-81, c.72; 1983, c.11, s.61.

4. Hereinafter called the *PPSA*, and any section hereinafter referred to will refer to the section in the Manitoba *PPSA* unless otherwise indicated.

5. D. Voechting, "The Personal Property Security Act (Manitoba) — Review of Cases to the end of 1981" (1982), 12. Man. L.J. 147.

6. Canadian Bar Assoc., Commercial Law Section, Committee on a Uniform Personal Property Security Act, *Uniform Personal Property Security Act* (Ottawa: The Committee, 1969). (Hereinafter referred to as the *UPPSA*).

lease for term of more than one year  
 money  
 obligation secured  
 pawnbroker  
 person  
 purchase  
 purchaser  
 specific goods  
 trust indenture

as well as changes in existing definitions.

2. An expansion and clarification of the scope of the Saskatchewan *PPSA*, with the inclusion of any lease for a term of more than one year and any consignment.
3. An expansion of the exclusions from the Saskatchewan *PPSA*, including;
  - (a) the creation or assignment of an interest in or a lien on real property, including chattels real;
  - (b) the assignment of any right to payment that arises in connection with an interest in or a lease on real property other than:
    - (i) an assignment of rental payments payable under a lease of real property; or
    - (ii) a right to payment evidenced by a security;
  - (c) a sale of accounts or chattel paper as part of a sale of the business out of which they arose, unless the vendor remains in apparent control of the business after the sale;
  - (d) an assignment of accounts made solely to facilitate the collection of accounts for the assignor.
4. The conflict of laws provisions have been expanded.
5. Section 12 has been changed to provide:
 

A security interest attaches when:

  - (a) value is given;
  - (b) the debtor has rights in the collateral; and
  - (c) except for the purpose of enforcing *inter partes* rights of the parties to the security agreement, it becomes enforceable within the meaning of section 10;

unless the parties intend it to attach at a later time, in which case it attaches in accordance with the intentions of the parties.

6. The status of future advances with respect to completing claims of unsecured parties and priority with respect to other secured parties are dealt with in s.20(2) and s.35(4), respectively.
7. Section 25 provides that the registration of a Financing Statement may perfect a security interest in any type of collateral.
8. Section 30 has been expanded with respect to a buyer or a lessee of goods bought or leased primarily for personal, family, household or farming uses.
9. The requirement with respect to a purchase-money security interest<sup>7</sup> claim in inventory under s.34 to give notices every two years because the PMSI priority only applies to the inventory delivered to the debtor within a period of two years after the giving of the notice.
10. Changes to the fixtures provisions in s.36.
11. Clarification of the rules with respect to accessions in s.37.
12. Flexible registration periods may be determined by the registering party.
13. The type of Financing Statement and registration rules are different.
14. The ability to bring action for Registry errors is dealt with in greater detail in s.53, with a limitation prescribed by the Regulations as to the damages that any single claimant may obtain.
15. Revision of provisions in Part V clarifying the status of receivers and receiver-managers.
16. There are additional circumstances where the provision of a notice of disposition under s.59(4) would not have to be provided prior to a disposition of the collateral.
17. Section 59 requires a notice of disposition to be served not less than 20 days (rather than 15) before the disposition of the collateral.
18. The ability of a secured party to apply to a judge to determine that an objection to the proposal of the secured party to retain the collateral is ineffective.
19. Limitations on the ability of the debtor to reinstate a security agreement.
20. The curative provisions of the Saskatchewan *PPSA* are found in s.66, which provides:
  - (1) The validity or effectiveness of a document to which this Act applies is not affected by reason of a defect, irregularity, omission or error therein or in the execution or registration thereof unless the defect, irregularity, omission or error is seriously misleading.

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7. Hereinafter referred to as a PMSI.

- (2) Failure to provide a description required by this Act or the regulations in relation to any type or kind of collateral in a document does not affect the validity or effectiveness of the document as it relates to any other collateral.
21. The rules with respect to a conflict between the Saskatchewan *PPSA* and other legislation gives greater priority to other legislation in Saskatchewan, especially provisions of any legislation for the protection of consumers.
22. The transitional provisions of the Saskatchewan *PPSA* are more detailed and clarify the order of priorities between pre-Saskatchewan *PPSA* and post-Saskatchewan *PPSA* security interests.

Although the principles and organization of the Saskatchewan *PPSA* are similar to the Manitoba and Ontario *PPSA*'s, the exact wording of similar provisions has often been changed in the Saskatchewan *PPSA*. The provisions of the Saskatchewan *PPSA* referred to in any Saskatchewan jurisprudence should be carefully reviewed prior to reference to such Saskatchewan jurisprudence.<sup>8</sup>

## II. Application of *PPSA*

### A. Intended as Security

The *PPSA* is stated to apply to every transaction that in substance creates a security interest, including an assignment intended as security.<sup>9</sup> In *Re Grogan*,<sup>10</sup> it was held that an assignment of an interest in an estate that was provided to a Bank by a beneficiary was "intended as security", and because a Financing Statement was not registered for such an assignment, the Bank's interest was subordinate under s.22 to the interests of the Trustee in Bankruptcy of the beneficiary.

### B. Intangibles

The "intangibles" definition in the *PPSA*<sup>11</sup> is a catch-all property definition which has, as a result of Ontario decisions in 1981,<sup>12</sup> brought within the *PPSA* certain interests in real property, such as leases and mortgages.

The 1981 decision in *C.T.L. Uniforms Ltd. v. ACIM Industries Ltd.*<sup>13</sup> was affirmed by the Ontario Court of Appeal for the reasons delivered by the Trial Judge. That case dealt with a lease of real property and the issue of whether a lease is property which can be covered by a security interest within the *PPSA*. The Trial Judge determined that leases of real property create interests in land that, in law, are also chattels real and are, accord-

8. See for example *DCA Canada Inc. v. Mark*, [1983] 6 W.W.R. 118, 3 P.P.S.A.C. 56 (Sask. Q.B.).

9. *Supra* n.2, at s.2.

10. (1982), 40 C.B.R. (N.S.) 302, 2 P.P.S.A.C. 45 (Ont. S.C.).

11. *Supra* n.2, at s. 1(o).

12. *National Trailer Convoy of Canada v. Bank of Montreal* (1980), 10 B.L.R. 196, 1 P.P.S.A.C. 87 (Ont. H.C.); *Bank of Nova Scotia v. Dilawri Chevrolet Oldsmobile Ltd.* (1980), 3 A.C.W.S. (2nd) 484 (Ont. Co. Ct.); *Robert Simpson Co. Ltd. v. Shadlock* (1981), 119 D.L.R. (3d) 417, 31 O.R. (2d) 612 (H.C.).

13. (1981), 123 D.L.R. (3d) 702, 33 O.R. (2d) 139, 1 P.P.S.A.C. 308 (H.C.); affirmed (1982), 132 D.L.R. (3d) 192, 35 O.R. (2d) 172 (C.A.).

ingly, personal property. As a result of reviewing the definition of "security interest" and "intangible", as well as the provisions of s.2 of the *PPSA*, the Trial Judge found that an assignment of a lease of real property, if intended as security, would be governed by the *PPSA*. He further found that it would require registration in order to perfect such security interest against third parties.

As a result of the 1981 decisions in Ontario, the Ontario legislature amended the exclusion provision of the Ontario *PPSA* in December, 1981<sup>14</sup> to add an exclusion with respect to an interest in real property, including a mortgage, charge or lease of real property. Similar exceptions are found in s.4 of the Saskatchewan *PPSA*. However, Wright J. in *Ranjoy Sales and Leasing Ltd. v. Down*<sup>15</sup> raised doubts as to the applicability in Manitoba of the trial court decision in *Re Urman*,<sup>16</sup> and the Ontario Court of Appeal in December, 1983 allowed the appeal in *Re Urman*. In *obiter* comments in *Ranjoy*, Wright J., after reviewing the definition of "intangibles" and the trial court decision in *Re Urman*, stated:

... I am unable to conclude that it (*Re Urman*) can be relied on as an accurate interpretation of the Manitoba Personal Property Security Act. Certainly the decision that real property security is subject to either the Manitoba or Ontario Act seems on the face to be totally inconsistent with the nature and intention of the legislation. A reading of the Manitoba statute in full reveals numerous sections where this is evident, and it appears to me that the Manitoba Act at least can reasonably be interpreted as *not* intending to cover real property interest.<sup>17</sup>

Wright J. did not elaborate any further on the reasoning in the *Re Urman* trial decision, nor comment on the amendments that were made to the Ontario *PPSA*.

The Ontario Court of Appeal in *Re Urman* addressed the issue as to whether certain real property interests are included in the "intangible" definition. The facts in *Re Urman* revolve around the activities of Mr. Urman, a mortgage broker whose principal business was to purchase and sell mortgages. Urman financed his transactions by means of a revolving line of credit with Canadian Imperial Bank of Commerce. The Bank had as security a general assignment of book debts which was duly registered under the Ontario *PPSA*. At all material times the Bank was aware that Urman, in the ordinary course of his business, was acquiring mortgages for the purpose of resale and the revolving line of credit from the Bank was provided for that purpose. Urman assigned to Kreindel Investments Ltd. two mortgages as security for a loan by Kreindel Investments to Urman in the amount of \$65,000. A Financing Statement respecting the assignment was not registered under the Ontario *PPSA*. In another transaction, Urman took a second mortgage for \$160,000 from Phyllis Eckhardt. Clients of Urman then paid to him sums of money to participate in the Eckhardt mortgage loan and in each case Urman signed a trust agreement with that

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14. *Supra* n.1.

15. [1982] 4 W.W.R. 16, 15 Man. R. (2d) 271, 2 P.P.S.A.C. 107 (Q.B.).

16. (1981), 128 D.L.R. (3d) 33, 15 B.L.R. 165, 38 C.B.R. (N.S.) 261, 1 P.P.S.A.C. 340 (Ont. S.C.); reversed (1983), 48 C.B.R. (N.S.) 129 (C.A.).

17. *Supra* n. 15, at 62.

client. No Financing Statement was registered under the Ontario *PPSA* in respect to those trust agreements. The dispute was among Kreindel Investments, the beneficiaries of the Eckhardt mortgage, the Bank and the Trustee in Bankruptcy of Mr. Urman.

The Trial Judge found that the Bank had waived its rights under its assignment of book debts, and that the Kreindel assignment and the trust agreements created security interests within the meaning of the Ontario *PPSA* which, since no Financing Statements were registered, were unperfected and thus subordinate to the interests of the Trustee in Bankruptcy. The Trial Judge further found that the assignment and trust agreements were interests in the mortgages that were "intangibles" as defined in the Ontario *PPSA* and the Ontario *PPSA* applied to the assignment and trust agreement. The Trial Judge also found that the trust agreements would be "trust receipts" as referred to in s.2 of the Ontario *PPSA*.

The Ontario Court of Appeal disagreed with the findings of the Trial Judge. Weatherston J.A., in writing for the Court, stated:

A mortgage, by which a mortgagor mortgages his land to secure a debt, creates an interest in land. It does not create a 'security interest' as defined by the Act, and so the Act does not apply to it. But mortgages are said to have a dual character, and the right of the mortgagee to receive the mortgage money is treated in equity as personal property and is therefore an 'intangible'. An interest in an intangible that secures payment or performance of an obligation is a 'security interest'. However, an absolute assignment of a mortgage does not secure payment or performance of an obligation and does not create a 'security interest'. It absolutely transfers the mortgagee's interest in the mortgage; it does not create an interest in the right to receive the mortgage money (an intangible) that secures payment or performance of an obligation. So the Act does not apply to the absolute assignment of a mortgage.

Here, the Kreindel assignment was not absolute. The mortgages were assigned as security for the mortgagee's own debt. The mortgagee's right to receive the mortgage moneys was an intangible that secured payment or performance of an obligation, and so, on its literal wording, the Act can be said to apply to this assignment.

But the dual character of real estate mortgages has not been universally applied. By a rule established as long ago as 1804, a mortgage debt is not to be separated from the land in which it is secured for the purpose of determining priority between competing assignees . . .<sup>18</sup>

Weatherston J.A. then referred to *Taylor v. London & County Banking Co.*<sup>19</sup> and *Jones v. Gibbons*,<sup>20</sup> and went on to state:

These two cases are sufficient authority to hold that the Kreindel assignment, although in effect a mortgage of a mortgage, is to be treated as an interest in land and not an intangible, and accordingly the Act did not apply to it. Kreindel is entitled to priority over the trustee in bankruptcy to the extent of its security interest in the mortgages.<sup>21</sup>

With respect to the Eckhardt mortgage and the trust agreements, the Ontario Court of Appeal found that the trust agreements were in form and substance an acknowledgement by Urman that he was the trustee for the trust beneficiaries of undivided proportionate interests in the Eckhardt mortgage and the trust claimants had the same rights as if absolute assign-

18. *Supra* n. 16, at 135 (C.B.R.).

19. [1901] 2 Ch. 231 (C.A.).

20. (1804), 9 Ves. 407, 32 E.R. 659.

21. *Supra* n. 16, at 136 (C.B.R.).

ments of proportionate shares in the mortgage had been made to them. The Ontario Court of Appeal pointed out that all counsel conceded that the trust agreements were not "trust receipts". As with the Kreindel assignment, the Ontario Court of Appeal found that the Ontario *PPSA* did not apply to the Eckhardt trust agreements and the trust beneficiaries took priority over the Trustee in Bankruptcy.

Weatherston J.A. stated that the 1981 amendments to the Ontario *PPSA* must be taken as merely a declaration of the then existing law.

Finally, the Ontario Court of Appeal found that the Bank's assignment of book debts created a "floating charge" which did not crystallize until after the specific equitable interests had been acquired by Kreindel and the trust claimants. The Bank was thus subject to those interests.

The combination of the comments of Wright J. in the *Ranjoy* case and the decision of the Ontario Court of Appeal in *Re Urman* may give some comfort to mortgage brokers and their customers in Manitoba. However, the writer is of the view that clarification of this issue should be provided in the *PPSA* as has been done in the Ontario *PPSA*, Saskatchewan *PPSA* and *UPPSA*.

### C. Lease Intended as Security

Section 2 of the *PPSA* specifically applies to a lease intended as security. There have been several decisions in 1982 and 1983 dealing with this concept. The leading case is *Re Ontario Equipment (1976) Ltd.*<sup>22</sup>, the 1981 trial decision having been affirmed in 1982 by the Ontario Court of Appeal for the reasons given by the Trial Judge.

The review of the *PPSA* cases to the end of 1981 conducted by the writer did not make reference to an Ontario decision made prior to *Re Ontario Equipment (1976) Ltd.* respecting leases intended as securities. That case is *Re 427697 Ontario Limited*<sup>23</sup> which dealt with two cash registers and a leasing arrangement where the question was whether the party intended the leasing arrangement to be a true lease or the transaction was in fact a sale under the guise of a leasing arrangement. There was no evidence that, at the date of the transaction, the lessee was in financial difficulties or that the lessor was approached for financing. The lessor was a leasing company and it had no other business interests but that of a lessor. The lease did not contain any provisions for the lessee to acquire the leased property save and except under a separate agreement at the termination of the lease, based on the appraised value of the equipment. As a result of the facts, Ferron Reg. declared that the transaction was a true lease and not a lease intended as security. Ferron Reg. in *Re 427697* did not have the benefit of the *Re Ontario Equipment* decision, but followed reasoning similar to that used in the *Re Ontario Equipment* case. All other cases dealing with leases intended as security in 1982 — 1983 make reference to the *Re Ontario Equipment* case and the test established in that decision.

22. (1981), 14 B.L.R. 113, 38 C.B.R. (N.S.) 180, 1 P.P.S.A.C. 303 (Ont. S.C.); affirmed (1982), 141 D.L.R. (3d) 766, 35 O.R. (2d) 194 (C.A.).

23. (1982), 2 P.P.S.A.C. 41 (Ont. S.C.).

By way of review, Henry J. in *Re Ontario Equipment* stated:

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 interests of the lessor-owner against creditors.<sup>24</sup>

Two decisions where it was found that the lease was a "true lease" and not a financing lease are *Re Econo Transport Inc.*<sup>25</sup> and *Ford Credit Canada Ltd. v. Robert Rowe Motors Ltd.*<sup>26</sup> Two cases where the lease was found to be intended as security are *Unilease Inc. v. Graphic Centre (Ontario) Ltd.*<sup>27</sup> and *Federal Business Development Bank v. Bramalea Limited.*<sup>28</sup> Those four cases all referred to *Re Ontario Equipment* and relied primarily on whether the option to purchase was for a fair value or for a nominal sum. Another case where a lease was found to not be a lease intended as security, but made no reference to *Re Ontario Equipment*, is *Martel-Stewart Ltd. v. Marco Holdings & Development Ltd.*<sup>29</sup>

The consequences of whether a lease is "intended as security" goes beyond determining priority of interests. For example, if a lease is a "true lease" and the lessor seizes and sells the goods, the lessor would not be subject to the provisions of Part V of the *PPSA*. However, if the lease was "intended as security", and thus within the *PPSA*, the lessor would have to satisfy the provisions of Part V of the *PPSA*. A case dealing with this situation is *Gatx Equipment Leasing Ltd. v. William Day Construction Ltd.*<sup>30</sup>

It should be noted that the Saskatchewan *PPSA* applies to every lease for a term of more than one year.

24. *Supra* n.22, at 183 (C.B.R.).

25. (1982), 43 C.B.R. (N.S.) 230, 2 P.P.S.A.C. 208 (Ont. S.C.); reversed (1982), 46 C.B.R. (N.S.) 314 (C.A.).

26. (1983), 142 D.L.R. (3d) 752 (Ont. H.C.).

27. (1982), 2 P.P.S.A.C. 197 (Ont. Co. Ct.).

28. (1983), 144 D.L.R. (3d) 410, 45 C.B.R. (N.S.) 299, 2 P.P.S.A.C. 317 (Ont. H.C.); aff'd (1983), 150 D.L.R. (3d) 768 (C.A.).

29. (1983), 2 P.P.S.A.C. 312, 23 Man. R. (2d) 30 (Q.B.).

30. (1982), 2 P.P.S.A.C. 203 (Ont. S.C.).



#### D. Notice

There were a number of decisions in 1980 — 1981 that established that the concept of “notice” of other security interests affecting the claims of priority is no longer relevant for the purposes of determining priority under the *PPSA*. Those decisions are followed and confirmed in the Ontario case of *Sperry Inc. v. Canadian Imperial Bank of Commerce and Thorne Riddell Inc.*<sup>31</sup>

The facts in the *Sperry* case were that Sperry sold farm equipment to a dealer and, pursuant to a dealer security agreement executed in 1976, gave Sperry a PMSI in present and future inventory Sperry supplied to the dealer. Sperry perfected the security interest by registration of a Financing Statement under the Ontario *PPSA*. The Bank and the dealer entered into a general security agreement in 1977 and the Bank perfected its interests also by registration of a Financing Statement, all subsequent to the registration by Sperry. The dealer changed its name and gave notice of that event to Sperry and the Bank. Under the provisions of the Ontario *PPSA*, Sperry and the Bank had to file a Financing Change Statement within 15 days after receiving notice of the change of name or their security interests would become unperfected. The Bank failed to file the necessary Financing Change Statement. Sperry made its filing, but beyond the 15 day period. Sperry also failed to file a renewal Financing Statement within 3 years of the date of its initial registration. While both Sperry and the Bank were unperfected, the Bank appointed Thorne Riddell Inc. as Receiver and Manager on March 14, 1980. On March 20, 1980 the Bank and Thorne Riddell Inc. determined that a realization of the assets of the dealer would have to take place. Sperry filed its renewal Financing Statement on March 25, 1980 pursuant to a Court Order allowing for late filing. The Trial Judge found as a fact that the Bank knew the dealer did not own the unpaid inventory obtained from Sperry and the Bank did not intend its general security agreement to cover the unpaid inventory of Sperry. He further found that in doing any valuations of the assets of the dealer, the Bank did not include any value for the unpaid inventory of Sperry delivered to the dealer.

The Bank argued that it perfected its security interest by possession (by virtue of appointing the Receiver on March 14) prior to the reperfecting by Sperry in filing the renewal Financing Statement on March 25. As a result, under the provisions of s.35 of the Ontario *PPSA*, the Bank claimed priority to the interest of Sperry. Sperry made a number of arguments, including:

- (a) that in order for the Bank to be perfected, it must have “attachment”, and all the evidence pointed to the fact that the Bank and the dealer did not intend a security interest to attach to the unpaid inventory of Sperry;
- (b) using the reasoning of the decision in *Re Triad Financial Services*

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31. (1982), 141 D.L.R. (3d) 119, 40 O.R. (2d) 54, 44 C.B.R. (N.S.) 69, 2 P.P.S.A.C. 225 (S.C.).

and *Thaler Metal Industries Ltd.*<sup>32</sup>, the Bank did not make any new advances during the period that Sperry was unperfected and, as a result, could not claim a priority interest for any amounts owing;

- (c) the Bank had notice of Sperry's prior interest; and
- (d) Thorne Riddell Inc. was not acting as an agent for the Bank because under the terms of the Bank's security the Receiver is stated to be an agent of the dealer. As a result, the Bank would not be considered to have "possession" and would not be perfected by possession.

The Court found that there was no intention by the Bank that its general security agreement would attach to unpaid inventory supplied by Sperry to the dealer. As a result of there being no attachment, there was no perfection of the Bank's security interest as against Sperry. The Bank's claim to priority failed. With respect to the other arguments put forth by Sperry, the Court held that the Receiver was acting as agent for the Bank and the Bank was, therefore, perfected by possession. The Court also found that the Bank, by its revolving line of credit, gave new value during the period that Sperry was unperfected to the extent of nearly \$400,000. Finally, the Court held that the actual notice by the Bank of Sperry's security interest would be irrelevant if the Court had determined that the Bank's security interest had attached. Montgomery J. stated "the prize falls to he who perfects first."<sup>33</sup>

## E. Title

Decisions in 1980 — 1981 clearly establish that the possession of title of goods was not relevant for *PPSA* purposes. However, title is still important in other areas, such as determining what is the property of a bankrupt.<sup>34</sup>

## III. Exceptions from *PPSA*

Section 3(1) enumerates several specific exceptions to the applicability of the *PPSA*. The most important exception are liens given by statute or rule of law. Examples of such liens are the innkeepers lien,<sup>35</sup> possessory liens<sup>36</sup> and garagekeepers lien.<sup>37</sup>

The most important Manitoba case dealing with s.3(1) of the *PPSA* is the decision of the Manitoba Court of Appeal in *Royal Bank of Canada v. J.I. Case Canada Inc.*<sup>38</sup> The case involved a contest between the Royal

32. (1980), 98 D.L.R. (3d) 555, 24 O.R. (2d) 424 (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.

33. *Supra* n.31, at 129.

34. See for example, *Re J.W.O. Enterprises Ltd.* (1981), 12 Man. R. (2d) 18 (Q.B.).

35. *Bank of Montreal v. 414031 Ontario Ltd.* (1983), 45 C.B.R. (N.S.) 77, 2 P.P.S.A.C. 248 (Ont. Dist. Ct.).

36. *Re Aztec Steel Manufacturing Inc.* (1983), 45 C.B.R. (N.S.) 241 (Ont. S.C.).

37. *International Harvester Credit Corporation of Canada Ltd. v. Frontier Peterbilt Sales Ltd.* (1983), 149 D.L.R. (3d) 572, [1983] 6 W.W.R. 328, 48 C.B.R. (N.S.) 278, 3 P.P.S.A.C. 86 (Sask. Q.B.).

38. [1983] 6 W.W.R. 122, 149 D.L.R. (3d) 368, 24 Man. R. (2d) 50 (Q.B.); aff'd [1984] 1 W.W.R. 669, 25 Man. R. (2d) 140 (C.A.).

Bank of Canada and J.I. Case Canada Inc. (as assignee of a lien note from a dealer in farm machinery) concerning a disc sold to a farmer in August, 1982. The farmer defaulted in payment of the lien note acquired on the sale by the dealer pursuant to s.22 of *The Farm Machinery and Equipment Act*,<sup>39</sup> and the disc was seized by J.I. Case. The Bank claimed it was entitled to priority to the disc by virtue of its general security agreement given by the farmer to the Bank on April 14, 1982 covering all the farmer's assets, including after-acquired equipment. The disc was delivered to the farmer on August 27, 1982 and a Financing Statement respecting the dealer's lien note was not registered in the Manitoba Personal Property Registry until September 20, 1982. The delay in registration prevented J.I. Case from claiming a PMSI priority under s.34(4) of the *PPSA*, which requires registration to be made within ten days of delivery to the debtor of goods other than inventory. The Bank relied on its prior registration for priority, and referred to the Manitoba Court of Appeal decision in *RoyNat Inc. v. United Rescue Services Ltd.*<sup>40</sup>

The Trial Judge (Hamilton J.) found that the security interest in the new farm machinery created pursuant to the lien note, which was governed by the *FMEA*, was excluded from the provisions of the *PPSA* as a result of s.3(1)(a) and s.68(2) of the *PPSA*, which provide:

3(1) This Act does not apply

(a) to a lien given by statute or rule of law . . .

68(2) Where there is a conflict between a provision of this Act and a provision of The Farm Machinery and Equipment Act, the provision of The Farm Machinery and Equipment Act prevails.

Hamilton J. stated that the *FMEA* contains provisions too numerous to mention that provide rights, obligations and procedures contrary to those provided in the *PPSA* and, as a result, he held that s.68(2) is applicable and the *FMEA* provisions would take precedence.

The Manitoba Court of Appeal relied more upon the s.3(1)(a) exclusion of a lien given by statute in determining that the Bank did not have priority to the claim of J.I. Case. The Manitoba Court of Appeal found that the lien created by the *FMEA* is covered by the term "statutory lien" and the *PPSA* priority rules were not relevant in determining the priority between the Bank and J.I. Case. Under the provisions of the *FMEA*, J.I. Case had priority.

The writer submits that the *FMEA* does not create the lien, but merely sets forth a procedure in s.22 whereby, through execution of an appropriate lien note, the lienholder may obtain a lien upon the property. This provision is not conceptually different than the provision in the *PPSA* recognizing that by the execution of an appropriate security agreement a security interest can be created in collateral. However, such a security interest is not considered to be a "statutory" lien and the writer submits that the "lien"

39. C.C.S.M., c.F40 (hereinafter referred to as the *FMEA*).

40. [1982] 3 W.W.R. 512, 2 P.P.S.A.C. 49, 23 Man. R. (2d) 290 (C.A.).

referred to in s.22 of the *FMEA* is not the form of lien intended to be covered by s.3(1)(a) of the *PPSA*. In addition, the writer is of the view that the provisions of the *FMEA* and the *PPSA* as regards priority are not in conflict and s.68(2) is not applicable in determining priorities. If the writer's views are correct all interests in farm machinery and equipment covered by the *FMEA* would have to be registered with the PPR and s.68(2) would only be applicable to work out conflicts as regards enforcement of security rights. However, the *J.I. Case* decision at this time is the law in Manitoba and the writer suggests that consideration be given to amending the *PPSA* and the *FMEA* to provide that liens under the *FMEA* are to be governed by the *PPSA*, and to amend the *FMEA* provisions to remove any conflicts that may exist with the provisions of the *PPSA*. To do otherwise would leave a significant exception to the provisions of the *PPSA* where no practical reason exists to allow for such exception.

A further exception contained in s.3(1) is a transfer of an interest in or under a policy of life insurance or contract of annuity. The *Re Rektor*<sup>41</sup> case from Ontario deals with such an exception.

Another form of exception to the *PPSA* is the transitional provisions found in s.64 and s.65, in particular the provisions of s.64(2) which set forth specific priority rules when dealing with a security interest not affected by the *PPSA* when opposed by a security interest within the *PPSA*. However, *Bank of Montreal v. Eaton Yale Limited and The Clarkson Company Limited*<sup>42</sup> removes the significance of s.64(2). In that case, the Bank of Montreal appointed a Receiver of Maneco Equipment Company Limited pursuant to a debenture registered under the pre-*PPSA* law on March 14, 1977. Eaton Yale Limited supplied equipment to Maneco pursuant to conditional sales contracts, and also financed other equipment and took as security chattel mortgages. Financing Statements respecting the conditional sales contracts and chattel mortgages were registered in the PPR in 1980 and 1981. It was admitted by Eaton Yale that it did not make the filings in time, nor give the notices required, to claim a valid PMSI. Eaton Yale relied on the provisions of s.64(2) and argued that the pre-*PPSA* priority rules would govern a dispute between the Bank of Montreal and Eaton Yale Limited. It further argued that under the pre-*PPSA* law and the terms of the Bank's debenture, Eaton Yale Limited would gain priority with respect to its conditional sales contracts and chattel mortgages notwithstanding that those documents were entered into subsequent to the Bank's debenture. Deniset J. relied on the provisions of s. 65(2) to find that the argument of Eaton Yale failed and the priority rules of the *PPSA* were applicable. Section 65(2) of the *PPSA* provides:

Every security interest created by a corporate security that was registered under The Companies Act or The Corporations Act as required under that Act before this section comes into force shall be deemed to have been registered and perfected under this Act and, subject to this Act, the effect of the prior filing or registration is continued under this Act.

41. (1983), 3 P.P.S.A.C. 32 (Ont. S.C.).

42. (1982), 2 P.P.S.A.C. 188 (Man. Q.B.).

A similar provision can be found in s. 65(1) with respect to chattel mortgages, assignments of book debts and other forms of security agreements that were registerable in various registers in Manitoba prior to the *PPSA*.

The writer was one of the counsel for Eaton Yale and is of the view that Deniset J. erred in the interpretation of s. 65(2) and its effect on priority determination.<sup>43</sup> To find that s. 65(2) effects priority makes the provisions of s. 64(2) meaningless. The provisions of s. 65(2) are intended only to establish the *PPSA* rules and mechanisms for the purpose of dealing with renewals, discharges, amendments and other registration provisions, as well as necessary enforcement rights under Part V of the *PPSA*. This view is supported by R.H. McLaren, *Secured Transactions in Personal Property in Canada*,<sup>44</sup> in footnote 16.2 at page 11-8, as well as in an annotation to the report of the *Eaton Yale* case.<sup>45</sup> In order to clarify this issue, the writer suggests that the *PPSA* be amended to specifically and clearly set forth the priority rules that would govern a dispute between a pre-*PPSA* security interest and a security interest governed by the *PPSA*.

The transitional provisions in the Manitoba *PPSA*, Ontario *PPSA* and Saskatchewan *PPSA* are different, but some other cases dealing with transitional provisions are *Re Harbour Chevrolet Ltd.*<sup>46</sup>, *Klein v. Lemore Investments Ltd.*<sup>47</sup> and *Canada Permanent Trust Co. v. Thomas*.<sup>48</sup>

Finally, a further exclusion to the applicability of the *PPSA* is with respect to interests created under a Federal statute which cannot, constitutionally, be affected by the *PPSA*. However, there may be situations where there is no conflict between the provisions of the Federal statute and the *PPSA* and, as a result, the *PPSA* would be applicable. For an example, see *Armitage v. Wincott*.<sup>49</sup>

#### IV. Sale of Goods Act

The Manitoba Court of Appeal decision in *Joseph Group of Companies Inc., trading as Colonial Jute Products v. Pickles Tents and Awnings Ltd.*<sup>50</sup> has substantially limited the effect of s. 3(2) of the *PPSA* as an exception to the applicability of the *PPSA*. However, the provisions of *The Sale of Goods Act*<sup>51</sup> may still be applicable to allow an action to be brought for a breach of implied conditions or warranties, such as the implied warranty that goods will be free from any charge or encumbrance in favour of a third party. In *Zuker v. Paul*,<sup>52</sup> it was held that the provisions of the Ontario

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43. Bank of Montreal and Eaton Yale Limited entered into a settlement one day prior to the Manitoba Court of Appeal hearing date.

44. (1980).

45. *Supra* n. 42, at 189-190.

46. (1981), 122 D.L.R. (3d) 693, 32 O.R. (2d) 671, 37 C.B.R. (N.S.) 249, 1 P.P.S.A.C. 285 (S.C.); reversed (1982), 139 D.L.R. (3d) 376, 39 O.R. (2d) 1, 43 C.B.R. (N.S.) 82, 2 P.P.S.A.C. 161 (C.A.).

47. (1983), 2 P.P.S.A.C. 252 (Ont. H.C.).

48. [1983] 6 W.W.R. 130, 149 D.L.R. (3d) 338, 3 P.P.S.A.C. 66 (Sask. Q.B.).

49. (1983), 3 P.P.S.A.C. 78 (Ont. S.C.).

50. (1981), 9 Man. R. (2d) 204 (Co.Ct.); reversed [1981] 6 W.W.R. 300, 127 D.L.R. (3d) 176, 10 Man. R. (2d) 19, 2 P.P.S.A.C. 1 (C.A.).

51. C.C.S.M., c.S10.

52. (1982), 37 O.R. (2d) 161, 2 P.P.S.A.C. 53 (Div.Ct.).

*PPSA*, whereby the filing of a Financing Statement constitutes notice of the interest, was not able to be of assistance to a vendor in avoiding the implied warranty that the goods were free from charges or encumbrances. However, in *Wynowsky v. Butler*,<sup>53</sup> it was held that if the purchaser actually conducted searches of the *PPSA* and learned of the charge or encumbrance prior to purchasing the goods, the purchaser would not then be able to rely on the implied warranty in *The Sale of Goods Act* that the goods would be free from those charges or encumbrances.

### V. Curative Provisions

The decisions in 1982 — 1983 have not changed the interpretation given to s. 47(5) and the equivalent of s. 4(1) of the Manitoba *PPSA* (s. 4 in the Ontario *PPSA*) as set forth in the *Re Owens: Bank of Montreal v. Touche Ross Ltd.*<sup>54</sup> decision. Other Ontario cases dealing with the curative provisions are *Re Dante Boutique Shoes Limited*,<sup>55</sup> *Re W.H. Cunningham & Hill Limited*,<sup>56</sup> *Bank of Montreal v. Szusz*,<sup>57</sup> *Candev Financial Services Ltd. v. Bank of Nova Scotia*<sup>58</sup> and *Re Laverty*.<sup>59</sup>

In the writer's review of the cases to the end of 1981, reference was made to the possibility that s. 4(2) of the *PPSA* might be interpreted so as to apply only to registrations other than Financing Statements for reasons similar to the reasoning used in the *Bank of Montreal v. Touche Ross* case. *The Clarkson Company Limited and Reichhold Limited*<sup>60</sup> case dealing with s. 4(2) deals with this concern. The facts of the case were that James Stewart Hickson carried on business as a sole proprietorship under the name and style of "Total Printing and Reproduction Services". Hickson provided to Reichhold Limited an assignment of book debts as security. Reichhold Limited registered a Financing Statement in the PPR listing the business name as a business debtor, but not listing Mr. Hickson as an individual debtor. Mr. Hickson declared bankruptcy. The Trustee challenged the security of Reichhold Limited on the grounds that the proper debtor (Mr. Hickson) was not listed on the Financing Statement and, as a result, Reichhold Limited was unperfected and the Trustee had priority over an unperfected security interest.

Dewar C.J.Q.B. reviewed the provisions of the *PPSA*, and in particular s. 18(10) of the Manitoba Regulation 208/80, and found that it was mandatory that the Financing Statement list Mr. Hickson as an individual debtor and it was merely permissive to list the business name as a corporate debtor. Dewar C.J.Q.B. relied on *Bank of Montreal v. Touche Ross Limited* in finding that s. 47(5) and s. 4(1) of the *PPSA* do not apply to allow for

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53. (1982), 2 P.P.S.A.C. 177 (Ont. Co.Ct.).

54. (1979), 103 D.L.R. (3d) 352, 26 O.R. (2d) 468, 32 C.B.R. (N.S.) 42, 8 B.L.R. 186, 1 P.P.S.A.C. 131 (C.A.).

55. (1982), 131 D.L.R. (3d) 243, 40 C.B.R. (N.S.) 19, 2 P.P.S.A.C. 27 (Ont.S.C.).

56. (1981), 41 C.B.R. (N.S.) 79 (Ont. S.C.); aff'd 41 C.B.R. (N.S.) 81, 2 P.P.S.A.C. 79 (C.A.).

57. (1982), 44 C.B.R. (N.S.) 109 (Ont.S.C.).

58. (1983), 2 P.P.S.A.C. 270 (Ont. Co.Ct.).

59. (1982), 47 C.B.R. (N.S.) 109, 3 P.P.S.A.C. 1 (Ont.S.C.).

60. [1983] 3 W.W.R. 167, 45 C.B.R. (N.S.) 215, 20 Man. R. (2d) 422 (Q.B.); aff'd (1984), 24 A.C.W.S. (2d) 153 (C.A.).

a curing of the failure to insert the name of an individual debtor in the Financing Statement. With respect to s. 4(2) of the *PPSA*, he stated:

As to sec. 4(2) of the Act . . . , the first point to be noted is that the word 'omission' used in s.4(1) is not contained within it. Further, the subsection appears to be limited in application to defect, irregularity or error in the act of registration as distinct from deficiency in the content of the document or documents registered. In my opinion, it can have no curative effect upon the invalid financing statements registered by the respondent.<sup>61</sup>

The Manitoba Court of Appeal affirmed the judgment of Dewar C.J.Q.B.

As a result of the decision in *Clarkson v. Reihhold*, Manitoba may be faced with exactly the same limitations found in Ontario even though the Manitoba *PPSA* has s. 4(2) as an additional curative provision. According to Dewar C.J.Q.B., s. 4(2) would only apply to the "act of registration" and not to the content of the document or documents registered. Even if s. 4(2) could apply to the contents of a Financing Statement, it is important to note that it does not apply to an "omission" from the Financing Statement.

The Manitoba *PPSA* Regulations require that the complete first name of the individual debtor be set forth on the Financing Statement. An important question that arises is whether the name provided to the secured party is the correct first name. A Manitoba decision dealing with this matter is *Bank of Montreal v. Bank of Nova Scotia*<sup>62</sup> where the Bank of Nova Scotia made a registration against Kamp L. Malaker and the Bank of Montreal (the creditor claiming under a writ of execution against an asset of Mr. Malaker) claimed that the correct first name of Mr. Malaker was "Kamalendu". The Court of Appeal was not convinced that the Bank of Montreal had discharged the onus of proving non-compliance with the *PPSA* by the Bank of Nova Scotia because there was no proof that "Kamalendu" was the correct first name of Mr. Malakar. The evidence established that Mr. Malakar was commonly known as both "Kamalendu" and "Kamp Lendu". As a result of failure to prove the correct name, the Bank of Nova Scotia's position was not subordinated to that of the Bank of Montreal under the provisions of s. 22. The Court of Appeal did not deal with the arguments relating to the curative provisions of the *PPSA*.

The Saskatchewan *PPSA* has only one curative provision. Section 66(1) provides:

The validity or effectiveness of a document to which this Act applies is not affected by reason of a defect, irregularity, omission or error therein or in the execution and registration thereof unless the defect, irregularity, omission or error is seriously misleading.

By having only one curative provision, the Saskatchewan *PPSA* has avoided the problem of the relationship between s. 47(5) and s. 4 that exists in the Manitoba and Ontario *PPSA*'s. In addition, the Saskatchewan *PPSA* test is whether the defect, irregularity, omission or error is "seriously misleading". A case dealing with the Saskatchewan *PPSA* curative provision is *Re Barous*.<sup>63</sup>

61. *Ibid.*, at 218 (C.B.R.).

62. (1983), 24 Man. R. (2d) 217 (C.A.).

63. (1983), 3 P.P.S.A.C. 61 (Sask. Q.B.).

The *PPSA* established a registration system that is used by other statutes, such as *The Garage Keepers Act*<sup>64</sup> and *The Payment of Wages Act*.<sup>65</sup> An interesting question is whether the curative provisions of the *PPSA* would apply to a Financing Statement registered in the PPR under those other statutes? This question was addressed in the Saskatchewan case of *International Harvester Credit Corporation of Canada Ltd. v. Frontier Peterbilt Sales Ltd.*<sup>66</sup> which dealt with a registration made in the Saskatchewan PPR under the provisions of *The Garage Keepers Act* of Saskatchewan. Matheson J. found that the Saskatchewan *PPSA* does not apply to a lien given by statute, and there is no specific provision in the Saskatchewan *PPSA* making its provisions applicable to liens created by *The Garage Keepers Act*. He found that it therefore follows that s. 66(1) of the Saskatchewan *PPSA* does not apply to a registration of a Financing Statement under *The Garage Keepers Act* for the preservation of a non-possessory garageman's lien. However, Matheson J. did take note of the policy intention of the Saskatchewan legislature and found that it intended to repudiate the strict approach employed by some Canadian courts when construing the requirements of personal property security statutes. He went on to find that he would not be implementing the legislative intention if a Financing Statement involving a statutorily created lien should be so strictly construed that the security interest could become unperfected as a result of an omission (in this case, in part of the serial number of the motor vehicle) in the Financing Statement which did not mislead anyone. In effect, Matheson J. adopted the Saskatchewan *PPSA* curative provision although recognizing that s. 66(1) of the Saskatchewan *PPSA* did not, by its terms, apply to a garage keepers lien.

## VI. Conflict of Laws Provisions

The Manitoba decision in *Westman Equipment Corporation v. The Royal Bank of Canada*<sup>67</sup> indicates the significance of s. 5 of the *PPSA*. Section 5 is the first of the conflict of laws provisions in the *PPSA*, and s. 5(1) provides:

The validity and perfection of a security interest and the possibility and effect of proper registration with regard to intangibles or with regard to goods of a type that are normally used in more than one jurisdiction, if the goods are classified as equipment or classified as inventory by reason of their being leased by the debtor to others, shall be governed

- (a) where the chief place of business of the debtor is in Manitoba, by this Act; and
- (b) where the chief place of business of the debtor is not in Manitoba, by the law, including the conflict of laws rules, of the jurisdiction in which the chief place of business is located.

The effect of s. 5 is that if the collateral is of a type indicated in s. 5, and the chief place of business of the debtor is not in Manitoba, so long as the jurisdiction in which the chief place of business is located has a form of

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64. C.C.S.M., c.G10, s.6.

65. C.C.S.M., c.P15, s.7.

66. *Supra* n.37.

67. (1983), 19 B.L.R. 56, 24 Man. R. (2d) 297, 2 P.P.S.A.C. 171 (Co.Ct.).



registration system (see s. 5(2)), the laws of Manitoba will have no effect whatsoever on the issues of validity and perfection and the possibility and effect of proper registration of the security interest respecting that collateral.

The facts in *Westman Equipment Corporation* were that an Ontario branch of the Bank lent money in 1980 to the debtor and took a chattel mortgage on a 1978 Mack truck. A Financing Statement with respect to that chattel mortgage was registered in Ontario. In 1981 the debtor entered into an agreement with Westman (located in Brandon, Manitoba) to purchase a new truck. Part of the purchase price was to be the trade-in by the debtor of the 1978 Mack truck. Westman did not conduct any search under the Ontario *PPSA*. The debtor took delivery of the new truck and Westman took possession of the 1978 Mack truck. About five months after the transaction between the debtor and Westman, the Bank filed a Financing Change Statement under the Ontario *PPSA* recording a transfer by the debtor. The registration took place within the 15 day period required by s. 49 of the Ontario *PPSA*. At the same time, the Bank filed a Financing Statement in Manitoba with respect to the chattel mortgage. As a result of default in payments, the Bank seized the 1980 Mack truck from Westman. It was found that at all material times Westman was without actual knowledge of the existence of the Bank's chattel mortgage.

Counsel for Westman argued that the registration in Ontario did not impose notice on Manitobans and that the Manitoba *PPSA* does not impose a duty to search outside jurisdictions, and on the facts the Ontario registration meant nothing in Manitoba. Westman's counsel also submitted that all the Manitoba *PPSA* does is provide that Manitoba will recognize security registration in Ontario, notwithstanding that the form and substance in Ontario may not comply with Manitoba law in that regard, providing proper re-registration is made in Manitoba. It was submitted that s.5 applied only to the "choice of law" that applies, and does not determine priorities or perfection of security or "close the door" on purchasers for value without notice.

The Bank's counsel, with reference to Volume 1 of McLaren, *Secured Transactions in Personal Property in Canada*,<sup>68</sup> argued that, with respect to the circumstances set forth in s. 5 of the Manitoba *PPSA*, Manitoba will give effect to security agreements entered into and registered outside Manitoba. He also argued that s. 5 not only gives effect to the validity of such security agreements, but also gives effective priority in Manitoba after proper registration outside Manitoba, and acknowledges and gives validity to the perfection by proper registration outside Manitoba to establish priority.

Ferg C.C.J. found that the 1978 Mack truck and its use satisfied the "test" in s. 5 because it was equipment normally used in more than one jurisdiction. He further found that the chief place of business of the debtor was Ontario. After those findings of fact, Ferg C.C.J. accepted the submissions of the counsel for the Bank as to the effect in Manitoba of s. 5 of the *PPSA*, and accordingly did not have to deal with the provisions of ss.

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68. *Supra* n.44.

6, 7 or 22 of the *PPSA*. He held that the proper law to be applied was that of Ontario and the security interest of the Bank was properly registered and remained effective at all times in Ontario. As a result, under s. 5(1)(b) of the *PPSA*, the Bank remained entitled to exercise in Manitoba the rights granted under Ontario law, all in priority to the interest of Westman.

The other conflict of laws provision in the *PPSA* most often used is s. 7. In *Re Bedard*,<sup>69</sup> the Court relied on the provisions of ss. 7(1) and (2), but seemed to ignore the provisions of s. 7(3) of the Ontario *PPSA*. The *Re Bedard* case involved an application by a Trustee in Bankruptcy for an order that a security interest claim by Banque Nationale du Canada on a 1982 Buick automobile was subordinate to the interests of the Trustee. The Assignment in Bankruptcy was made on September 10, 1982. The Bank filed a secured claim based upon a conditional sales contract relating to the automobile entered into in the Province of Quebec on May 16, 1982. The automobile was brought into Ontario on May 17, 1982, and the Bank did not file a Financing Statement until July 20, 1982, 65 days after the security interest attached and 64 days after the vehicle was brought into Ontario. Smith J. relied upon the provisions of s. 7(2) of the Ontario *PPSA*, which provide that the Bank's security interest would become unperfected in Ontario unless the Bank registered a Financing Statement within 15 days from the date that it receives notice that the automobile had been brought into Ontario, or upon the expiration of a 60 day period after the automobile was brought into Ontario, whichever is earlier. Smith J. found that the Bank knew that the car was for personal use and that the residence of the debtor was Ontario and, as a result, the Bank received notice in the sense which must be ascribed to the words of "acquiring notice" in s. 7. Therefore, the interest of the Bank under the provisions of s. 7(2) of the Ontario *PPSA* was unperfected at the time of the bankruptcy and, pursuant to s. 22 of the Ontario *PPSA*, the Trustee had priority over the Bank with respect to the automobile.

Smith J. ignored the provisions of s. 7(3) of the Ontario *PPSA*, which provides:

A security interest that has ceased to be perfected in Ontario due to the expiration of the sixty-day period may thereafter be perfected in Ontario, but such perfection takes effect from the time of its perfection in Ontario.

The Bank did file a Financing Statement after the 60 day period and prior to the bankruptcy and it might have been considered perfected *vis a vis* the Trustee. A discussion of this matter appears in an annotation to the report of *Re Bedard*.<sup>70</sup>

It should be noted that s. 7(3) of the Ontario *PPSA* only refers to a security interest ceasing to be perfected as a result of the expiration of the 60 day period. In the *Re Bedard* fact situation, Smith J. relied on the security interest of the Bank becoming unperfected as a result of the expiration of the 15 day period after the Bank acquiring notice that the

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69. (1983), 46 C.B.R. (N.S.) 172, 3 P.P.S.A.C. 29 (Ont.S.C.).

70. (1983), 3 P.P.S.A.C. 29.

automobile was removed to Ontario. As a result, it might be argued that the provisions of s. 7(3) would not apply in the *Re Bedard* fact situation. The Manitoba *PPSA* equivalent, s. 7(3), would apply, as it provides:

A security interest that has ceased to be perfected in Manitoba due to the expiration of the sixty day period, or the expiration of the fifteen day period mentioned in subsection (2), may thereafter be perfected in Manitoba, but in that case the perfection takes effect from the time of its perfection in Manitoba. (emphasis mine)

## VII. Security Interest/Security Agreement

The decision in *Banque Nationale de Paris (Canada) v. Pine Tree Mercury Sales Ltd.*<sup>71</sup> followed 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.*<sup>72</sup> It did so by finding that an invoice setting forth a reservation of title constitutes a "security interest" within the *PPSA* and requires perfection under the Ontario *PPSA* in order to protect the interest of the seller.

An important provision of the *PPSA* is s. 10 which 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 most instances, the secured party does not wish to have possession of the collateral and it will have a "security agreement" executed by the debtor. In *Atlas Industries Ltd. v. Federal Business Development Bank*,<sup>73</sup> Noble J. dealt with a situation where a sale of certain equipment was made by a manufacturer (Atlas Industries) to the debtor pursuant to certain "work orders" which did not contain any reservation of title or other wording that might create a security interest in the goods in favour of Atlas. However, subsequent to the delivery of the goods and after Atlas learned that a Bank might exercise its security against the debtor, Atlas sent invoices to the debtor upon which were stamped the following words:

Title to property described on this invoice retained by vendor until payment in full. Vendor has right of repossession on default. Power to forceably retake. This is a security agreement.<sup>74</sup>

Noble J. was of the opinion that it was "a little late" for Atlas to claim a security interest after the fact and in circumstances which make it clear that the buyer of the goods was not aware of the terms of the transaction at the time the goods were delivered. The documents evidencing the transaction were found to not represent a security agreement as defined by the Saskatchewan *PPSA* and the sale by Atlas to the debtor was on the basis of goods and chattels delivered pursuant to an order on an open account. Even if it could be found that a "security interest" was intended to be

71. (1983), 42 O.R. (2d) 303, 47 C.B.R. (N.S.) 300, 3 P.P.S.A.C. 51 (Co.Ct.).

72. *Supra* n.50.

73. (1983), 3 P.P.S.A.C. 29 (Sask.Q.B.).

74. *Ibid.*, at 40.

created between the parties, Noble J. stated that such a security interest would not be enforceable as against a third party because the documents were not signed by a person who was in fact authorized to sign on behalf of the debtor. In addition, the signature was placed upon the "work order" and not on the invoice. Even if the signature upon the document was considered to be by a person authorized to sign on behalf of the debtor, Noble J. found that:

... [I]t would be absurd to suggest that it was intended to authorize delivery upon any terms [Atlas] chose to impose as to price, security or payment. Thus, if there is to be an agreement that [Atlas] shall retain title to the goods once they were delivered, that condition should be imposed before the transaction is finalized, and in any event it cannot be said that the signature on the work order somehow authorized the unknown condition in advance. So I am inclined to agree that even if it could be successfully argued that [Atlas] had a "security agreement" and thereby acquired a security interest in the equipment parts, it is not enforceable as against the bank's security in any event. In this regard *Pickles Tents and Awnings Ltd. v. Joseph Group of Companies* ... and the case of *RoyNat Inc. v. United Rescue Services Ltd.* ... in McLaren's Secured Transactions in Personal Property in Canada, seem to support the bank's position.<sup>75</sup>

The decision in *Re Atlas Industries* does not preclude a series of documents from being considered a "security agreement". In *Midland — Ross of Canada Ltd. v. Bachan Aerospace of Canada*,<sup>76</sup> Master Peppiatt found the combination of a "proposal", which contained a reservation of title but was not signed by the debtor, and later purchase orders executed by the debtor and referring on several occasions to the proposal, might be found to be a security agreement under the *PPSA*. As a result, he concluded there was sufficient grounds for granting a replevin order in favour of the "secured party".

The issue of how much of an interest in the collateral a debtor must have in order to grant a security interest was dealt with in the Manitoba decision of *Royal Bank of Canada v. Obsco Beauty (Manitoba) Ltd.*<sup>77</sup> In that case, two individuals ordered equipment from Obsco on July 3, 1979 and paid a deposit on account of the purchase price. At the request of the individuals, Obsco held the equipment until October 29, 1979, at which time the equipment was delivered to the business premises of Venus Beauty Centre Ltd., a corporation owned by the two individuals. Between the ordering of the equipment from Obsco and Obsco's delivery of the equipment, Venus Beauty Centre Ltd. applied for a loan from the Bank and provided to the Bank, as security for the loan, a chattel mortgage securing the equipment ordered from Obsco. The Bank registered a Financing Statement in the PPR prior to the delivery of the equipment by Obsco to Venus. At the time of the delivery of the equipment to Venus, the individuals executed a conditional sales contract with Obsco covering the equipment. The equipment listed in the conditional sales contract with Obsco was the same equipment covered by the Bank's chattel mortgage. Obsco did not register a Financing Statement until February 7, 1980, such Financing Statement showing the individuals as the debtor. On February 3, 1981 Venus made an

75. *Ibid.*, at 42.

76. (1983), 3 P.P.S.A.C. 21 (Ont.S.C.).

77. Man.Q.B. unreported, April 16, 1982.

**Assignment in Bankruptcy.** The Bank's counsel argued that in order for Venus to obtain a security interest in the equipment within the meaning of the *PPSA*, it was not necessary that Venus have title to the goods which are the subject of the security interest. All that was necessary was that Venus have a sufficient interest in the goods to obtain title. This point was not challenged by the counsel for Obsco. Morse J. found that a legally binding agreement came into existence on July 3, 1979 between Obsco and the two individuals and at that time the two individuals had acquired a sufficient interest in the goods to create a valid legal charge in favour of Obsco. Counsel for Obsco took the position that there was no evidence that the two individuals had transferred their interest to Venus, resulting in Obsco's security interest not being affected by the bankruptcy of Venus. Morse J. did not accept this submission and had no hesitation in concluding that the two individuals had transferred their interest in the equipment to Venus prior to the signing of the application for the loan from the Bank and the Bank, due to its registration prior to Obsco, had a priority interest in the equipment.

The Manitoba case of *Martel-Steward Limited v. Marco Holdings & Development Ltd.*<sup>78</sup> is an example of a situation where the Court found that, on the facts, no security interest existed and the *PPSA* was not applicable.

### VIII. Attachment

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

- (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; and
- (c) the debtor and secured party intend a security interest in the collateral to attach.

The concept of "attachment" of a security interest in collateral is important because it is a condition precedent to achieving "perfection" of a security interest, and thus can effect priority claims.

The most difficult part of s. 12 is the "intention" element that exists in the Ontario and Manitoba *PPSA*'s. An example of the effect of the "intention" to attach not being present can be found in the trial decision in *Re M.C. United Masonry Limited*.<sup>79</sup> One of the reasons of the Trial Judge for denying that a pledgee of shares had a perfected security interest against the Trustee in Bankruptcy of the pledgor was that the parties to the pledge did not intend the security interest to attach until such time as the transfer of the pledged shares were recorded on the records of the company that issued the shares. As such notation was not made, the Trial Judge found that there was no perfected security interest by the pledgee in the shares

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78. *Supra* n.29.

79. (1981), 40 C.B.R. (N.S.) 106, 16 B.L.R. 176, 2 P.P.S.A.C. 15 (Ont. S.C.); rev'd (1983), 142 D.L.R. (3d) 470, 40 O.R. (2d) 330, 44 C.B.R. (N.S.) 174, 21 B.L.R. 172, 2 P.P.S.A.C. 237 (C.A.).

at the time of the bankruptcy because there had been no “attachment” of the security interest. The Ontario Court of Appeal disagreed with the Trial Judge, Houlden J. A. stating:

As stated previously, it is my opinion that the security interest was intended to take effect immediately upon the execution of the [Pledge Agreement], and the delivery of the agreement and the shares . . . I can see no conceivable reason why [the pledgee] would want to postpone attachment of the security interest until the shares were transferred on the books of Palm Hill. With respect, I think that Steele J. erred in finding that the appellant’s security interest had not attached. In my opinion, the security interest attached when the [Pledge Agreement] was executed, and the agreement and the Palm Hill shares were delivered to [the pledgee].<sup>80</sup>

Another case dealing with the “intention” element of attachment is *Sperry Inc. v. Canadian Imperial Bank of Commerce and Thorne Riddell Inc.*<sup>81</sup> The facts of that case were dealt with earlier in this article. One of the findings of facts by Montgomery J. was that the Bank did not intend its general security agreement to attach to unpaid inventory supplied by Sperry to the dealer. As a result, there was no attachment under s. 12 of the Ontario *PPSA* and thus no perfection of the Bank’s security interest as against Sperry.

The requirement to have an “intention” to attach may also raise problems when dealing with floating charges within the *PPSA*. By way of review, at common law a floating charge is one that “floats” over the assets of a corporation. It is not a specific fixed mortgage or charge on any asset until it “crystallizes” by virtue of some action or event occurring, such as an appointment of a receiver. Until crystallization, a corporation is allowed (usually under the terms of the floating charge) to deal with the assets subject to the floating charge in the ordinary course of business without the concurrence of the mortgagee. The definition of “security interest” in the *PPSA* does not make any distinction between fixed and floating charges. The *PPSA* makes only two references to floating charges.<sup>82</sup>

There are two possible views as to how floating charges fit within the *PPSA*:

- (1) the “crystallization” view, where it is argued that the secured party and debtor intend the security interest in a floating charge situation to attach only when there is crystallization. Because attachment is a pre-requisite of perfection, a perfection of a floating charge security interest would only occur when crystallization takes place notwithstanding the date of execution of a debenture or the registration in the PPR. Until crystallization, the secured party would be unperfected with respect to the collateral covered by the floating charge and thus subordinate to those interests set forth in s. 22 of the *PPSA*, such as a Trustee in Bankruptcy.
- (2) The writer believes the better view is expressed at pages 62 — 67

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80. *Ibid.*, at 476 (D.L.R.).

81. *Supra* n.31.

82. *Supra* n. 2, at ss. 2(a)(i), 25(1)(e).

of F. Catzman, *Personal Property Security Law*.<sup>83</sup> This view is based on the secured party and the debtor intending the floating charge security to attach upon execution of the debenture or registration in the PPR, but not upon crystallization. The granting of a security interest does not necessarily mean that there is a fixed charge on the collateral so as to prevent the debtor from dealing with the collateral. The debenture could provide that the collateral subject to a floating charge can be used by the debtor in the ordinary course of business or in other circumstances, and that provision would be a sufficient subordination of the floating charge (s. 39 of the *PPSA*) and be binding on third parties (s. 9 of the *PPSA*). The floating charge security interest would attach and be perfected upon registration in the PPR, but subordinate only to those certain security interests specifically allowed in the debenture. Section 22 would not be applicable and the date of crystallization would have no effect on priority.

The writer is not aware of any decisions dealing with this issue and floating charges contained in debentures. However, there have been decisions relating to the "floating charge" nature of a general assignment of book debts, and those decisions generally favour the view expressed by Catzman and find that priority is determined by the date of registration and not the date of the "crystallization" of the floating charge assignment of book debts. Those cases are *Royal Bank of Canada v. Inmont Canada Ltd.*,<sup>84</sup> *Re Huxley Catering Ltd.*<sup>85</sup> and *Peter T. Hesse Enterprises Inc. v. Canadian Imperial Bank of Commerce*.<sup>86</sup> Notwithstanding those decisions, the Ontario Court of Appeal in *Re Urman* did comment that a Bank's "floating charge" under a general assignment of book debts "did not crystallize until after the specific equitable interests had been acquired by Kreindel and the trust claimants, and was therefore subject to those interests".<sup>87</sup>

In the writer's review of the cases to the end of 1981, it was suggested that the "intention" element of attachment should be removed and the writer urges the Ontario and Manitoba legislatures to amend s. 12 to remove the "intention" element and replace it with provisions similar to those found in the Saskatchewan *PPSA*, UCC Article IX and *UPPSA*. Until such an amendment occurs, the writer still 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.

### IX. After-Acquired Property

The Manitoba Court of Appeal in *RoyNat Inc. v. United Rescue Services Ltd.*<sup>88</sup> had an opportunity to deal with a floating charge contained in a debenture and how such a floating charge would be affected by the priority rules of the *PPSA*. However, the Manitoba Court of Appeal relied upon

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83. (1976).

84. (1980), 1 P.P.S.A.C. 197 (Ont.Co.Ct.).

85. (1981), 16 B.L.R. 1, 1 P.P.S.A.C. 372 (Ont.S.C.); *aff'd* (1982), 134 D.L.R. (3d) 369, 2 P.P.S.A.C. 22 (C.A.).

86. (1982), 2 P.P.S.A.C. 57 (Mich. Cir.Ct.).

87. *Supra* n.16, at 141 (C.B.R.).

88. *Supra* n.40.

the terms of the debenture and the provisions of s. 13 of the *PPSA*, which provides, "Except as provided in Section 14, a security agreement may cover after acquired property."

The dispute in the *RoyNat Inc.* case was between RoyNat Inc., the holder of two debentures, and General Motors Acceptance Corporation of Canada Ltd. (GMAC), a conditional sales vendor, over two trucks which each claimed as collateral under their separate security agreements with United Rescue Services Ltd., the debtor. GMAC had not registered a Financing Statement with respect to its conditional sales contract within the ten day period required by s. 34(4) of the *PPSA* in order to claim a PMSI priority over the prior registered RoyNat debentures. If it had registered within the time period, the Manitoba Court of Appeal commented that GMAC would have had priority over RoyNat. The argument on behalf of GMAC was that priority of its security interest should be determined by order of perfection and, since the RoyNat debentures were perfected only when a demand was made and a receiver appointed (the "crystallization" argument referred to earlier), GMAC's priority prevailed because it perfected its security interest by registration prior to the appointment of a receiver by RoyNat.

Hall J.A. recognized that the argument advanced by GMAC was founded upon the proposition that the floating charge created by the debentures crystallized when a demand was made and a receiver appointed and until that date the security interest, although registered, had not been perfected. However, Hall J.A. found:

The whole submission presupposes that the debentures did not create a fixed charge in the two trucks as after-acquired property. In my opinion, the security created by the debenture covered the trucks.

The relevant clauses of the debentures read:

#### 6. Security

As security for the payment of the principal, interest and other moneys from time to time owing on this Debenture, and the performance by the Company of all its obligations hereunder, but subject to Permitted Encumbrances and to the exception as to leaseholds hereinafter contained, the Company hereby grants, assigns, mortgages and charges as and by way of a first, fixed and specific mortgage and charge, to and in favor of RoyNat: . . .

(b) all furniture, machinery, equipment, vehicles and accessories other than inventory now owned or hereafter acquired by the Company, including without limitation the property described in Schedule 'C' hereto . . .

Having regard to the terms of the debentures and the provisions of the Act . . . the registered security interest of the debenture-holder attached as soon as the debtor acquired rights in those trucks, which was a date long before the conditional sales vendor perfected its security interest by registration.<sup>89</sup>

The Court of Appeal favourably referred to the views expressed by McLaren in *Secured Transactions in Personal Property in Canada*<sup>90</sup> at page 2.02 with respect to after acquired property. The RoyNat debentures were found to have priority over the security interest of GMAC.

89. *Ibid.*, at 514-515 (W.W.R.).

90. *Supra* n.44.



## X. Unperfected Security Interests/Trustee in Bankruptcy

Section 22(2) has, as a conditional precedent to the trustee obtaining priority over an unperfected security interest, the requirement that "any represented creditor was, on the relevant date, without knowledge of the unperfected security interest." The onus of proof on the Trustee to establish one creditor was without knowledge has been confirmed in *Re Dante Boutique Shoes Ltd.*,<sup>91</sup> *Re Earl Shibou*,<sup>92</sup> *Re Massari*<sup>93</sup> and *Touche Ross v. Canada Trustco Mortgage Co.*<sup>94</sup>

## XI. Perfection

Because the time of perfection generally determines priorities, all secured parties desire to be "perfected" under the terms of the *PPSA* in order to protect their interests as against third party claims. There are basically two ways to become perfected. One method is by possession of the collateral by the secured party or a person representing the secured party. In *Sperry Inc. v. Canadian Imperial Bank of Commerce*,<sup>95</sup> Montgomery J. found that a receiver appointed by a secured party was the agent of the secured party once a decision had been made to liquidate the undertaking of the debtor, notwithstanding that the terms of the security agreement indicated the receiver was the agent of the debtor. The *Sperry Inc., M. C. Masonry Limited*<sup>96</sup> and *Re STR-8 Line Systems Inc.*<sup>97</sup> cases are examples of perfection by possession. The most common method of perfection under the *PPSA* is the registration of a Financing Statement in the Manitoba Personal Property Registry.<sup>98</sup> The consequences of a failure to register a Financing Statement, or to have otherwise perfected by possession, is illustrated in many decisions, including *Re J.W.O. Enterprises Ltd.*<sup>99</sup>

There are many provisions in the *PPSA* dealing with continuity of perfection. Some examples are s. 23(1), s. 27 with respect to dealings with the collateral and proceeds that arise, s. 49 respecting transfers of collateral and s. 51 and s. 52 respecting renewals of Financing Statements every three years. It should be noted that s. 49 of the Ontario *PPSA* not only deals with the debtor transferring his interest in the collateral but also deals with the debtor changing his name.

The decision in *General Motors Acceptance Corporation of Canada, Limited v. The Bank of Nova Scotia*<sup>100</sup> deals with s. 23(1) of the *PPSA*. This dispute between GMAC and the Bank related to a 1979 GMC truck. GMAC registered a Financing Statement on July 31, 1979 with respect to

91. *Supra* n.55.

92. (1982), 134 D.L.R. (3d) 568 (Man. Q.B.).

93. (1983), 46 C.B.R. (N.S.) 106, 3 P.P.S.A.C. 7 (Ont.S.C.).

94. (1983), 46 C.B.R. (N.S.) 106 (Ont.S.C.).

95. *Supra* n.31.

96. *Supra* n.79.

97. (1982), 42 C.B.R. (N.S.) 314, 2 P.P.S.A.C. 81 (Ont.S.C.).

98. Hereinafter referred to as the PPR.

99. *Supra* n.34.

100. (1983), 149 D.L.R. (3d) 766, 3 P.P.S.A.C. 63, 24 Man. R. (2d) 141 (Q.B.).

its financing the purchase of the truck. The Bank loaned money to the truck owner and took as security a chattel mortgage on the truck and registered a Financing Statement on March 12, 1982. At all times the Bank was aware of GMAC's interest. GMAC amended the repayment terms of the loan to the truck owner and on May 17, 1982 registered a new Financing Statement Form A in the PPR. At the time of the second Financing Statement registration, the July 31, 1979 registration by GMAC was still in force. GMAC did not register a renewal Financing Statement with respect to its first registration. In January, 1983 the Bank seized the vehicle as a result of default in payments. The Bank's position was that it had, under s.35(1), priority as the first registered security interest. GMAC relied upon the May 17, 1982 registration and the provisions of s. 23(1), which provides:

If a security interest is originally perfected in any way permitted under this Act, and is again perfected in some way under this Act without an intermediate period when it was unperfected, the security interest shall be deemed to be perfected continuously for the purposes of this Act.

Deniset J. recognized that the issue was whether the original Financing Statement filed in 1979 by GMAC was perfected again "in some way" by the registration by GMAC of a new Financing Statement on May 17, 1982. Deniset J. answered that question in the affirmative, and granted GMAC priority.

It should be pointed out that Deniset J. in his reasons for judgment makes reference to the fact that the second filing by GMAC was an "amendment" filing. This reference is misleading. GMAC's second filing was a completely new Financing Statement, and not an Amendment Financing Statement. The reference to "amendment" refers to the reasons why the new Financing Statement was filed, being the amendment by GMAC to the terms of repayment of the loan. If the second registration by GMAC was in fact a filing of an Amendment Financing Statement rather than a completely new Financing Statement, the failure by GMAC to renew the initial registration would have resulted in the Bank obtaining priority because the failure to renew by GMAC would have made its interest unperfected. However, the filing of the new Financing Statement (not an Amendment Financing Statement) by GMAC allowed it to protect its interests under the provision of s. 23(1) of the *PPSA*.

It is interesting to note that the Saskatchewan *PPSA* requires that the re-perfection be done "in some other way" under the Saskatchewan *PPSA*. As a result, if the *GMAC v. Bank of Nova Scotia* case had been in Saskatchewan, the Saskatchewan Courts might have decided in favour of the Bank because the registration by GMAC was not in "some other way" but was done in exactly the same method as the initial perfection in 1979.

The decision in *The Assiniboine Credit Union Limited v. The Canadian Imperial Bank of Commerce*<sup>101</sup> deals with s. 49 of the *PPSA*. The dispute between the Credit Union and the Bank related to the debtor's house, which was on leased land, and all the furniture and other goods and chattels

located in the house. The Credit Union was provided a chattel mortgage on the house and all the furniture and other goods and chattels, and that chattel mortgage was registered in June, 1976 under *The Bills of Sale Act* of Manitoba.<sup>102</sup> The registration under *The Bills of Sale Act*, pursuant to s. 65(1) of the *PPSA*, was carried forward into the *PPSA* registration system and the Credit Union renewed that registration on June 9, 1979. The owner of the house, furniture and other chattels sold all of that property on June 30, 1981 to a corporation. The Credit Union was aware of the transfer, but did not register a Financing Statement under s. 49(1) of the *PPSA* until September 24, 1981. Between the time of the actual transfer and the filing of the Financing Statement by the Credit Union under s. 49, the transferee corporation gave security on the transferred assets to the Bank by way of debenture, which was registered in the PPR prior to the Credit Union's s. 49 filing. The Bank's debenture did not contain language placing a charge upon the actual house (which Wilson J. found was personal property covered by the *PPSA*), but in July 1982 the Bank amended the debenture and filed an Amendment Financing Statement adding the house as security. Wilson J. found that the Bank had priority as to the furniture and other chattels by virtue of its registration during a period of time that the Credit Union's registration was unperfected under the provisions of s. 49. However, the Bank's filing of the amendment in July, 1982 to add the house as security was only effective from the date of its registration.<sup>103</sup> Therefore, the Bank's security interest in the house was not perfected until after the Credit Union had reperfected its interest pursuant s. 49 of the *PPSA* and, as a result, the Credit Union had priority with respect to the house.

The *Sperry Inc. v. Canadian Imperial Bank of Commerce*<sup>104</sup> case is authority for the proposition that the method of reperfecting under s. 49 does not have to be in the same method as the initial perfection of the security interest. The Bank had initially perfected its security interest by registration, and reperfected its security interest by seizing the collateral and thereby perfecting by possession. Sperry argued that reperfecting under s. 49 must be made by the registration of a Financing Statement and not by another method of perfection permitted by the Ontario *PPSA*. Montgomery J. rejected that contention and stated "[t]o so hold would import into the *P.P.S.A.* an intention nowhere expressed in the Act".<sup>105</sup>

## XII. Proceeds

Section 27(1) provides that where proceeds arise from some dealing with the collateral or from damage or loss to the collateral, the security interest in the collateral extends to the proceeds, subject to ss. 27(2) and (3). Section 27(2) provides:

The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected but it ceases to be a perfected security interest and becomes unperfected ten days after receipt of the proceeds by the debtor unless

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102. Repealed when the *PPSA* was proclaimed in full force and effect effective September 1, 1978.

103. *PPSA*, s.50.

104. *Supra* n.31.

105. *Supra* n.33, at 128 (D.L.R.).

(a) a registered financing statement covers the original collateral and proceeds therefrom; or

(a.1) where the security interest arises from a corporate security, the trust deed, bond, debenture or debenture stock a copy of which accompanied the financing statement on registration covers the original collateral and proceeds therefrom; or

(b) the security interest in the proceeds is otherwise perfected before the expiration of the ten day period.

Section 27(3) provides that there is no perfected security interest in proceeds that are not identifiable or traceable.

The decision in *Massey-Ferguson Industries Limited v. Bank of Montreal*<sup>106</sup> deals with s. 27 and proceeds. Massey sold farm equipment, pursuant to contractual arrangements, to a dealer. One of the contracts was a Security Agreement. The Financing Statement filed in Ontario by Massey classified the collateral as inventory and had inserted in the space for the general collateral description the words:

EXISTING OR TO BE ACQUIRED NEW MF GOODS INCLUDING FARM, INDUSTRIAL, CONSTRUCTION MACHINERY, LAWN TRACTORS, SNOWMOBILES, REPAIR PARTS AND MF FINANCED USED MACHINERY OF SIMILAR TYPE, AND ALL PROCEEDS.

Massey supplied its farm equipment to the dealer without payment, but retained a security interest in that equipment. The dealer made banking arrangements with the Bank, and obtained an operating line of credit secured by a General Assignment of Book Debts and a floating charge against inventory. The Bank registered its security interest subsequent to the registration by Massey of its security interest. During the ordinary course of business the Bank transferred money from the dealers' current account to itself in payment of interest on loans and in part payment of the principal amount of the loans made by the Bank to the dealer. The Bank placed the dealer in receivership and Massey discovered that the dealer had failed to notify Massey of sales of certain of Massey's equipment and had deposited proceeds from those sales in the dealer's account with the Bank. The Bank claimed the full amount of the funds deposited to the account, and Massey claimed the amount in the account equal to the deposits relating to the equipment sold. An Agreed Statement of Facts identified the names of the purchasers of equipment and the amounts the dealer received from them, and the deposits by the dealer of those amounts in the current account with the Bank.

The Bank argued that Massey's priority in proceeds was lost when the equipment was sold because it did not register a fresh Financing Statement with respect to the proceeds in order to protect its claim to those interests as required by s. 27(2). The Bank further argued that Massey could not trace or identify the sale proceeds of Massey's equipment once it was mixed with other funds of the dealer in the dealer's current account with the Bank. O'Brien J. found that the description of the collateral on the financing statement filed, which included the words "and all proceeds", satisfied the

provisions of s. 27(2) of the Ontario *PPSA*. With respect to the ability to trace and identify the proceeds, Montgomery J. concluded that the funds were identifiable and traceable by reason of the Agreed Statement of Facts which listed the name of each customer, a brief description of the machine sold, the amount of the cheque received and down payment and the date of its deposit in the current account, and also found that the funds would be identifiable and traceable as those terms are used at common law and at equity.

The provisions of s. 27(2) of the Ontario *PPSA* are slightly different than the provisions of the Manitoba *PPSA*. The provision of s. 27(2)(a) of the Ontario *PPSA* provides that, "A financing statement in the prescribed form in respect of the collateral is registered." The X'ing of the "proceeds box" on the Manitoba Financing Statement would probably be all that is required in order to have a continuously perfected security interest in proceeds under the provisions of s. 27(2)(a) of the Manitoba *PPSA* and would not require a specific description of proceeds on the Financing Statement.

For an example of a situation where the proceeds are other than cash proceeds, see *Quigley v. General Motors Acceptance Corporation of Canada Ltd.*<sup>107</sup> where the proceeds claimed included a trade-in received for the original collateral.

### XIII. Sale in the Ordinary Course of Business

The Ontario decision in *Ford Motor Credit Company of Canada Limited v. Centre Motors of Brampton Limited*<sup>108</sup> considered the provisions of s. 30(1) of the Ontario *PPSA*, which provides:

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

The provisions of the Ontario *PPSA* are similar to the Manitoba *PPSA*, except that Manitoba includes a lease transaction.

The relationship of s. 30(1) to s. 27 was also considered in the *Ford Motor Credit* case. The facts were that Ford Motor Credit was an inventory financier and entered into a Wholesale Financing and Security Agreement with Maitland Motor Sales Limited, a used car dealer. Ford Motor Credit registered its security interest in three automobiles purchased as new automobiles by Maitland. Maitland sold the automobiles, without express authorization from Ford Motor Credit, to Centre Motors. Centre Motors was also a car dealer who bought the three automobiles from Maitland on a wholesale basis for a total of \$1,100 less than the amount fixed as security for the loan to Maitland by Ford Motor Credit. Centre Motors resold the cars on a wholesale basis to other car dealers. Ford Motor Credit appointed a receiver of Maitland and sued Centre Motors for damages for conversion.

Centre Motors admitted that Ford Motor Credit had a perfected security interest in the three automobiles within the meaning of the Ontario

107. (1983), 3 P.P.S.A.C. 43 (Ont. Co.Ct.).

108. (1982), 137 D.L.R. (3d) 634, 38 O.R. (2d) 516, 2 P.P.S.A. C. 63 (H.C.).

*PPSA*. Potts J. indicated that Ford Motor Credit's perfected security interest in the cars could only be defeated by:

1. a sale in the ordinary course of business pursuant to s. 30(1) of the Ontario *PPSA*; or
2. the dealing in the goods being expressly or impliedly authorized by the secured party pursuant to s. 27(1) of the Ontario *PPSA*; or
3. the security interest becoming unperfected and subject to the provisions of the Ontario *PPSA* relating to unperfected interests.

Potts J. wrote:

Whether a transaction is in the ordinary course of business under s. 30(1) is a question of fact to be objectively assessed, taking into consideration all circumstances which were known, or ought reasonably to have been known, to the purchaser. . . . It follows that a transaction apparently in the ordinary course of business is within the scope of s. 30(1) notwithstanding that circumstances not known or not reasonably within the knowledge of the purchaser at the time of the transaction establish that the dealing was not in the ordinary course of business. In considering whether s. 30(1) applies to the instant case, I therefore need not inquire whether these transactions were fraudulent. I need only ask: were they in the ordinary course of business? . . .

The plaintiff also submits that the application of s. 30(1) should be restricted to sales between retailers and the public. It bases its submission on the following dicta of McDonald J. in *Albutt & Co. v. Riddell*, [1930] 2 D.L.R. 166, [1930] 1 W.W.R. 555, 42 B.C.R. 344 (B.C.S.C.), where, commenting on s. 4 of the *Conditional Sales Act*, R.S.B.C. 1924, c. 44, he said . . . :

A retailer does not in the ordinary course of business buy from a competing retailer; nor does a retailer in the ordinary course of business exchange with a competing retailer a portion of a stock for a portion of the stock of the latter. After all one must in considering a statute examine into the purpose for which it was passed and it does seem fairly clear that this section was intended to protect the ordinary every day man on the street who goes into a retail dealer's premises, looks over his stock and purchases in the ordinary way. This section was not intended to cover an extraordinary transaction such as the one in question . . .

With respect, I must disagree with McDonald J.'s conclusion that transactions between traders cannot be in the ordinary course of business within the meaning of s. 4. There is no support to be found in the section (or s. 30(1) of the *P.P.S.A.*) for the gloss upon it. Nor am I aware of any other authority supporting such an interpretation.

. . .

In the final analysis, the real issue is whether or not the cars in question were used cars. If they were used cars, then there is no question that they were sold in the ordinary course of business. If they were new cars, then it would still be open to argument as to whether or not they were sold in the ordinary course of business . . .

. . . In my view, the proper question is whether these cars objectively were new or used, not whether any party to the security agreement regarded them as such.

In the instant case, the cars sold were all year-old models and each had substantial mileage . . .

. . .

I find it difficult to credit the suggestion that these were new cars. The average man on the street, if invited to buy a new car, would be astonished to discover that he was being offered a two-year-old model with over 9,000 miles on it. On the other hand, a current model car with only a few miles on it would, in all likelihood, be regarded by that same man as a new car notwithstanding that it had have been registered previously to a retail buyer . . .

Having regard to the facts that cars in question had a very high mileage, that they were two-year-old models, that they had been used as demonstrators and that they were sold to the defendant as a wholesale dealer who subsequently resold them to other dealers and that

there was a relatively small profit margin on the sales, I find as a fact that the cars were used cars and that they were sold in the ordinary course of business within the meaning of s. 30(1) of the Act. Accordingly, the defendant took the cars free from any security interest therein given by Maitland Motors to the plaintiff and did not convert the cars by subsequently selling them.<sup>109</sup>

As a result of the finding that the transaction between Maitland and Centre Motors was in the ordinary course of business, it was not necessary for McDonald J. to deal with s. 27(1). However, he did comment as follows:

Section 27(1)(a) focuses on the arrangement between the security holder and the debtor; it expressly adopts the standard of express and implied contractual relations between the secured party and the debtor. Section 30(1), on the other hand, focuses on the dealings between the seller (debtor) and the purchaser. It is blind to the relations between the secured party and debtor, indicating that those relations are irrelevant to the operation of that subsection. As Richard H. McLaren states in *Secured Transactions in Personal Property in Canada* (Carswell, Toronto, 1979), at 12.01(2)(a):

The protection extended to the purchaser by s. 30(1) does not depend on title but rather the nature of the transaction. It is intended to promote a policy of certainty for commercial transactions. *It rejects the concept of express or implied power of sale as the basis for determining the nature and extent of the interest of a buyer who deals with a debtor qua seller in the ordinary course of his business.* A purchaser obtains absolute protection regardless of the terms of the contract between the debtor *qua* seller and a secured party who has a security interest in the goods purchased.

(Emphasis added.)

Further, whereas s. 27(1)(a) is expressly made subject to the Act, s. 30(1) is not. Section 27(1)(a) is, therefore, subject to s. 30(1). It follows that if goods subject to a security interest are sold by a seller in the ordinary course of business, the purchaser takes them free of any security interest given by the seller, notwithstanding that the secured party did not expressly or impliedly authorize the dealing.<sup>110</sup>

Other cases dealing with s. 30(1) are *Income Trust Company v. Glanbrook Auto Sales Ltd.*,<sup>111</sup> *Quigley v. General Motors Acceptance Corporation of Canada Ltd.*<sup>112</sup> and *Royal Bank of Canada v. 216200 Alberta Ltd.*<sup>113</sup>

#### XIV. Purchase-Money Security Interest (PMSI)

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

The requirements of s. 34 make a distinction between a PMSI interest in inventory and a PMSI interest in goods other than inventory. In order to claim a valid PMSI interest in collateral other than inventory so as to obtain

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109. *Ibid.*, at 644-647.

110. *Ibid.*, at 643.

111. (1982), 2 P.P.S.A.C. 211 (Ont. Co.Ct.).

112. *Supra* n.107.

113. [1984] 1 W.W.R. 558 (Sask. Q.B.).

priority over other ordinary security interests in the same collateral, the PMSI must be perfected at the time the debtor obtains possession of the collateral or within ten days thereafter. The requirements when dealing with a PMSI in inventory are more complicated, namely:

1. a PMSI must be perfected at the time of, or before, the debtor obtains possession of the collateral;
2. the PMSI secured party must notify all prior registered claimants in the same collateral or those persons it has actual knowledge of having an interest in the same collateral. As a result, the priority of a PMSI is only attributable to inventory provided to the debtor after all recipients of the notice have actually received the notice; and
3. the notice to be given as set forth above must state that the secured party giving notice has, or expects to acquire, a PMSI in inventory of the debtor and must describe the inventory by item or type.

Section 34(3) modifies the PMSI priority rule in inventory with respect to proceeds arising from inventory, and protects the priority of an ordinary security interest in accounts given for new value where the Financing Statement relating to the ordinary security interest in accounts has been registered before the PMSI interest in inventory was perfected.

A Manitoba case dealing with a PMSI interest in inventory is *Clark Equipment of Canada Ltd. and Clark Equipment Credit of Canada Ltd. v. Bank of Montreal and Maneco Equipment Co. Ltd., in Receivership*.<sup>114</sup> Clark Equipment and Clark Credit were involved in financing and supplying Clark inventory to Maneco. Bank of Montreal was the ordinary operating lender of Maneco. Bank of Montreal had received a debenture from Maneco as security, and that debenture was registered in the PPR prior to any Financing Statement registered by Clark. Clark Equipment and Clark Credit registered a Financing Statement in the PPR indicating that the security agreement they had with Maneco was a PMSI in inventory and provided notice to the Bank by a letter stating that they, jointly and severally, had or expected to acquire a PMSI in the inventory of Maneco, including all inventory whether or not manufactured or distributed by Clark.

Deniset J. was of the view that the interest of Clark was not a proper PMSI claim. He referred to the definition of a PMSI, being a security interest:

- (1) taken or reserved by the seller of the collateral to secure payment of all or part of its price, or
- (2) 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.

Deniset J. pointed out that the Clark security agreement covered all inventory and that Clark was not a seller of all the inventory. Some of the equipment was not financed by Clark and, as a result, Clark did not have

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114. *Supra* n.42.



a valid PMSI in all the inventory. In addition, it was found that Clark had not complied with the provisions of s. 34(2) because the notice did not identify the inventory subject to the PMSI by item or type. In his judgment Deniset J. did indicate that Clark could have done one of two things to protect its interest, namely:

- (1) By inserting a clause in the security agreement dated September 20, 1978, that provided that upon the sale by Clark to Maneco of any new equipment or parts, Clark would retain a security interest therein until the balance of the purchase price therefor had been paid in full; or,
- (2) By having Maneco enter into a Conditional Sales Contract with Clark whereby Clark would retain title to the equipment until Maneco had paid for it in full. A Financing Statement referring to that Conditional Sales Contract would then have to be filed in the Personal Property Registry and notice thereof given to all prior encumbrancers.<sup>115</sup>

As a result of not satisfying the PMSI definition and the requirements of s. 34(2) of the PPSA, the priority dispute between Bank of Montreal and Clark was determined by s. 35, and because the Bank was the first to register it obtained priority over the Clark Equipment.<sup>115a</sup>

### XV. Fixtures/Building Materials

Section 36 of the Ontario and Manitoba *PPSA*'s deal with the priority of security interests in fixtures. Both the Ontario and Manitoba *PPSA*'s exclude "building materials" from the operation of s. 36. The Ontario *PPSA* does so in the definition of "security interest". The Manitoba *PPSA* excludes building material under the provision of s. 36(1), which clearly states that s. 36 does not apply to building materials. Neither the Ontario nor Manitoba *PPSA* defines "building materials" or "fixtures". The Saskatchewan *PPSA* defines both terms.

The *Charles A. Hare Ltd. v. Payn*<sup>116</sup> case adopts the test for determining "building materials" that was set forth in the *Rockett Lumber and Building Supplies Limited v. Papageorgiou*<sup>117</sup> case. In the *Charles A. Hare Ltd.* case the goods in question were an electronic low-profile motor-truck scale digital indicator and other related equipment. The scale was installed in a seed mill at ground level and was fastened to sunken concrete slabs or footings by bolts imbedded therein. As opposed to conventional weigh systems, the scale did not have to be recessed into a pit which would require costly below ground clean out. The supplier of the scale was involved in a dispute relating to the construction of the seed mill. It claimed priority over the owner of the land, lien claimants and mortgagee because the goods were fixtures or

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115. *Ibid.*, at 196.

115a. This decision was reversed on appeal. The decision will be discussed in the next review.

116. (1982), 42 C.B.R. (N.S.) 284, 18 B.L.R. 209, 2 P.P.S.A.C. 93 (Ont. S.C.).

117. (1979), 30 C.B.R. (N.S.) 183 (Ont.Co.Ct.), where at p.186, the test was stated as follows:

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 . . .

goods other than building materials that had been affixed to realty. As a result, it would have priority under s. 36 of the Ontario *PPSA* as against the purchaser, owner, mortgagee of the lands, and other lien claimants. Using the test set forth in the *Rockett Lumber* case, Carley L.J.S.C. found that the scale formed an "integral part of the whole construction as compared with other articles which were mere adjuncts or appendages"<sup>118</sup> and was a building material affixed to realty. The supplier of the scale was not able to rely on the provisions of s. 36 of the Ontario *PPSA*.

An example of how the priority rules set forth in s. 36 operate is set forth in *Re Cormier and Federal Business Development Bank*.<sup>119</sup> The provisions of the Ontario and Manitoba *PPSA*'s are basically the same and are:

1. If the security interest attached to goods before those goods become fixtures, the secured party has priority as to the goods over claims of any person who has an interest in the real property.
2. If the security interest attached after goods become fixtures, the secured party has priority to those goods over any person who subsequently acquires an interest in the real property but not over a person who had a registered interest in the real property at the time the security interest attached to the goods and who has not consented in writing to the security interest or disclaimed an interest in the goods as fixtures.

In Manitoba, the priority rules are subject to the provisions of s. 36(4) of the *PPSA*, which provides that a security interest in fixtures is subordinate to the interest of:

- (1) subsequent purchasers or mortgagees for value of an interest in the real property;
- (2) a creditor with a lien on real property subsequently obtained as a result of judicial process; or
- (3) a creditor with a prior encumbrance of record on real property in respect of subsequent advances;

if the subsequent purchase or mortgage was made, or lien created or advance made, without knowledge of the security interest and before a Financing Statement in respect of the security interest is filed in the appropriate land titles office in Manitoba as authorized by s. 52 of the *PPSA*.

The facts in *Re Cormier* were that the applicants leased premises to a corporation, which operated an auto-body repair business. Five items of equipment were installed during the tenancy at various times. Four items were covered by a chattel mortgage, and the fifth item was subject to a conditional sales contract. The lease was terminated as a result of the corporation's bankruptcy, and the chattel mortgagee and conditional sales

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118. *Supra* n. 116, at 289 (C.B.R.).

119. (1983), 22 A.C.W.S. (2d) 297 (Ont.Co.Ct.).

vendor, using the Ontario *PPSA*, claimed priority to the claims of the landlord to the goods. The Court held that the items were fixtures. With respect to the four items covered by the chattel mortgage, two of the items were fixed to the property prior to the time the chattel mortgage attached. With respect to the item covered by the conditional sales contract, it was also installed and became a fixture prior to execution of the conditional sales agreement. With respect to the two items that were installed after the attachment of the chattel mortgage, the chattel mortgagee was entitled under the provisions of s. 36 of the Ontario *PPSA* to receive them upon payment, pursuant to s. 36, of any costs of removal. The applicant landlord was entitled to possession of the three items installed prior to attachment of the security interests.

### XVI. Constructive Seizure

Section 57 of the *PPSA* provides that upon default under a security agreement, if the collateral is equipment and the security interest has been perfected by registration, the secured party may, in a reasonable manner, render the equipment unusable without removal thereof from the debtor's premises and the secured party shall thereupon be deemed to have taken possession of the equipment. The Saskatchewan *PPSA* has the identical provision in s. 58(b).

The Saskatchewan decision of *Bank of Montreal v. Gravelle*<sup>120</sup> deals with the constructive seizure allowed under s. 58(b) of the Saskatchewan *PPSA*. In that case, the debtor executed a chattel mortgage in favour of the secured party in which he mortgaged certain farm machinery. As a result of default in payment, the secured party instructed a bailiff to render the equipment unusable without removing them from the debtor's premises. The bailiff removed the keys from a tractor, the rotor from a combine, and did nothing to a cultivator. After the bailiff had been on the premises, the debtor was able to still use, and he did use, the equipment supposedly "seized" by the bailiff. The debtor argued that the seizure of the equipment was done in contravention of *The Limitation of Civil Rights Act* of Saskatchewan, and as a result, under s. 27 of that Act, the chattel mortgage was determined and the debtor was released from all liability under the chattel mortgage. Dielschneider J. found that the pieces of equipment in question were usable by the debtor after the bailiff attended upon the premises and because they were not rendered unusable the presumption of possession set out in s. 58 of the Saskatchewan *PPSA* could not arise. As a result, the provisions of *The Limitation of Civil Rights Act* could not be evoked against the secured party.

### XVII. Section 58(5) Notice of Intention to Sell

After the seizure of collateral, the secured party may only dispose of the collateral after it has provided not less than 15 days notice in writing to the debtor, to any other person who has a security interest in the collateral and who has registered a Financing Statement under the *PPSA*, and to any

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120. (1982), 2 P.P.S.A.C. 219 (Sask. Q.B.).

other person who is known by the secured party to have a security interest in the collateral. Section 58(5) lists in detail the information that must be set forth in the notice.

There are four exceptions to the giving of notice, namely:

- (1) the collateral is perishable; or
- (2) the secured party believes on reasonable grounds that the collateral will decline speedily in value; or
- (3) the secured party is enforcing under a "corporate security"; or
- (4) the enforcement is by a receiver or manager who has been appointed by a court or pursuant to the security agreement.

Where a notice of repossession of collateral is required to be given to a debtor under s. 46 of *The Consumer Protection Act of Manitoba*, the giving of the notice to any person in a form that complies with *The Consumer Protection Act* shall be deemed to be in compliance with any requirement under the *PPSA*.

One issue that has been canvassed by the courts is whether the guarantor of the debtors' obligation must be provided with the s. 58(5) notice. In *Federal Business Development Bank v. Hiebert, O'Halloran & McKay*,<sup>121</sup> the Court held that the guarantors would have had a security interest if they had paid the obligation to the Bank and had taken an assignment of the security which the Bank held. Without making such a payment to the Bank and the guarantors receiving such an assignment, the guarantors were not a party holding a "secured interest" under the provisions of s. 57 of the Ontario *PPSA* (similar to s. 58 of the Manitoba *PPSA*) and it was not necessary for the secured party to provide notice to the guarantors. However, the decision in *Donnelly v. International Harvester Credit Corporation of Canada Ltd.*<sup>122</sup> held that notice must be provided to a guarantor even prior to the guarantor making payment to the enforcing secured party and taking an assignment of the security. The Court in the *Donnelly* case relied on the definition of "debtor" in s. 1(g) of the Ontario *PPSA*, which defines a debtor as:

... [A] person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, ...

The Court found that a guarantor would fit within the definition of "debtor" in the Ontario *PPSA*.

The Manitoba *PPSA* is even clearer in providing that a guarantor falls within the "debtor" definition because it specifically includes "the obligor in any provision dealing with the obligation".

The consequences of failing to satisfy the obligations of s. 58(5) is to expose the secured party to the remedy provisions of s. 62(1) of the *PPSA*

121. (1982), 43 C.B.R. (N.S.) 192, 2 P.P.S.A.C. 183 (Ont. S.C.).

122. (1983), 22 B.L.R. 66, 2 P.P.S.A.C. 290 (Ont.Co.Ct.).

and, as a result of recent decisions in Ontario, the possibility that any claim by the secured party for a deficiency on realization would be unsuccessful as against the debtor or guarantor. Greater discussion of the consequences of failure to satisfy the provisions of s. 58(5) will be dealt with later under the "Claim for Deficiency" heading of this Article.

### XVIII. Sale of Collateral — Enforcement

The disposition of the collateral in an enforcement situation is governed by two basic principles:

1. Section 55(2) of the *PPSA* provides that a secured party has, in addition to any other rights and remedies, the rights and remedies provided in the security agreement. However, those rights and remedies in the security agreement are limited by the provisions of s. 55(6), which provides that the provisions of the following subsections or sections, to the extent they give rights to the debtor and impose duties upon the secured party, cannot be waived or varied:

58(3) — requiring sale to be "commercially reasonable"

58(4) — secured party delaying disposition if it is "commercially reasonable"

58(5) — the notice provisions prior to disposition

59 — accounting for a surplus after disposition

60 — compulsory disposition of consumer goods, retention of collateral by the secured party, and the requirement to dispose of collateral rather than retain the collateral

61 — redemption and reinstatement rights of the debtor

62 — remedies for failure of the secured party to comply with s. 19 or Part V of the *PPSA*;

2. The principle that in all matters relating to the seizure and disposition of the collateral the actions of the secured party must be "commercially reasonable".

An example of a situation where the terms and conditions set forth in the security agreement would have an effect on disposition is the decision in *Re La Societe de Gestion Andre Paquette & Associes Inc. and Nantel*.<sup>123</sup> In that case, the secured parties held share certificates in the capital stock of a corporation pursuant to a pledge of those shares made by the debtor to a secured party. The terms of the pledge agreement allowed for the debtor or the majority shareholder in the corporation to exercise an option to purchase the shares for the amount of the secured debt. The sheriff seized the share certificates subject to the pledge agreement in execution of a judgment debt. The Court held that the rights of the majority shareholder

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123. (1982), 15 A.C.W.S. (2d) 410 (Ont.Co.Ct.).

in the pledge agreement must prevail over the interests of the sheriff acting on behalf of the judgment debtor. Because the pledge agreement provided for repurchase by the majority shareholder and the judgment creditor had made no offer to purchase the shares for the amount of the debt, the sheriff was directed to return the share certificates to the secured party in order that it could perform the terms of the pledge agreement and sell the shares to the majority shareholder.

The primary principle when dealing with enforcement and sale of the collateral is that the sale must be "commercially reasonable". A Manitoba decision dealing with this concept is *Royal Bank of Canada v. Michaels*.<sup>124</sup> Michaels borrowed funds from the Bank and provided as security an interest in an automobile. Michaels defaulted in payment to the Bank and as a result of a demand letter and conversations between Michaels and representatives of the Bank, Michaels delivered to the Bank the automobile. The Bank proceeded to give notice to Michaels of its intention to sell the automobile, and advertised the automobile for sale in three issues of *The Winnipeg Free Press*, sent a memorandum to all of its branches in Winnipeg, and inserted a memorandum in the Bank's inter-branch newsletter. A notice was also posted on the main entrance of the local Bank branch. There was no discussion between the Bank manager and Michaels as to the value of the automobile. The Bank did not obtain any independent appraisals of the market value of the automobile. The automobile was specially adapted by Michaels for the purpose of racing, which included the installation of a new engine as well as other parts, such as a special carburetor. However, the automobile did not appear to be in good condition because the inside of the vehicle was stripped, except for the driver's seat, for the purpose of reconditioning and the vehicle needed a paint job. Michaels did not disclose to the Bank the fact that the automobile was specially adapted and had extra value, and the Bank did not recognize that the vehicle might have additional value due to the special equipment installed. The automobile was sold, and the Bank sued Michaels for the deficiency. Michaels claimed that the Bank did not sell the automobile in a commercially reasonable manner and requested a set-off for the difference between the price obtained by the Bank and the highest price that could have been obtained for the sale of the automobile. Barkman C.C.J. was satisfied that the sale by the Bank was conducted in a manner that was commercially reasonable except for the fact that no independent valuation or appraisal was obtained. He was of the opinion that the sale without an independent valuation or appraisal, when the Bank officers had no expertise which would cause them to realize the value of the special equipment on the vehicle, was a deficiency in complying with the requirement that "every aspect of the disposition is commercially reasonable" as required by s. 58(3) of the *PPSA*. The set-off claim by Michaels was allowed.

Another case dealing with a failure to deal with collateral in a "commercially reasonable" manner is *Donnelly v. International Harvester Credit Corporation of Canada Ltd.*,<sup>125</sup> where it was held that the failure to recondition collateral to increase its sale value resulted in the disposition not being made in a commercially reasonable manner.

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124. (1983), 2 PPS.A.C. 302 (Man.Co.Ct.).

125. *Supra* n. 122.

### XIX. Claim for Deficiency

The consequences of failing to satisfy the provisions of Part V of the *PPSA* is to expose the secured party to the remedies allowed under s. 62 of the *PPSA*. In addition, recent decisions of Ontario Courts have created a new penalty by not allowing the secured party to claim a deficiency after disposition if the secured party failed to satisfy the provisions of Part V of the *PPSA*.

The two leading cases are *Ford Motor Credit Company of Canada Ltd. v. Preuschoff*<sup>126</sup> and *Donnelly v. International Harvester Credit Corporation of Canada Ltd.*<sup>127</sup> In both instances, the form of notice required by s. 59(5) of the Ontario *PPSA* (the equivalent of s. 58(5) of the Manitoba *PPSA*) was not properly given. In the *Preuschoff* case, the notice did not contain all the information required by s. 59(5). In the *Donnelly* case, the notice was not given to a guarantor. As a result of the defects, the Courts in the *Preuschoff* and *Donnelly* cases found that, after disposition, the secured party was not able to maintain an action for any deficiency as against the debtor or guarantor. Both cases relied on pre-*PPSA* law in support of the proposition that a claim for deficiency would not be allowed. Other cases setting forth similar propositions are *Unilease Inc. v. Graphic Centre (Ontario) Ltd.*<sup>128</sup> and *Gatx Equipment Leasing Ltd. v. William Day Construction Ltd.*<sup>129</sup>

The writer submits that the Ontario decisions have ignored the fact that Part V of the *PPSA* has set forth a comprehensive scheme governing the rights and remedies of the debtor and secured party on default. Section 62 of the *PPSA* sets forth the remedies for failure by the secured party to comply with the *PPSA* and does not limit the secured party's right to sue for any deficiency after disposition. In support of the writer's view is the Saskatchewan decision in *Canada Permanent Trust Co. v. Thomas*<sup>130</sup> where Wright J., in discussing the remedies under pre-Saskatchewan *PPSA* law, stated:

The Legislature intended, in my respectful view, that different consequences would follow where a secured creditor overstepped his position under the latest legislation. Critics of this view may argue that Draconian measures are still needed. That remains to be seen. The legislation recognizes that the debtor who has defaulted in his obligation should not receive a windfall simply because a creditor does not comply with a statutory step in realizing on his security unless that debtor has suffered some loss or damage.<sup>131</sup>

### XX. Redemption/Reinstatement

After default and seizure by the secured party, s. 61 of the *PPSA* allows the debtor, or any other person other than the debtor who is the owner of the collateral, or any secured party in possession, to either:

1. redeem the collateral by tendering fulfillment of all obligations secured by the collateral; or

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126. (1983), 2 P.P.S.A.C. 279 (Ont.Co.Ct.).

127. *Supra* n.122.

128. *Supra* n.27.

129. *Supra* n.30.

130. *Supra* n.48.

131. *Ibid.*, at 346 (D.L.R.).

2. reinstate the security agreement by paying the sums actually in arrears, *exclusive* of the operation of any acceleration clause, or by curing any other default by reason whereof the secured intends to dispose of the collateral.

In addition he must pay a sum equal to the reasonable expenses of retaking, holding, repairing, processing, preparing the collateral for disposition and arranging for its disposition and, to the extent provided for in the security agreement, the reasonable solicitor's cost and legal expenses.

The Ontario *PPSA* allows for a redemption of the collateral but does not allow for a reinstatement of the security agreement. For a brief discussion of the redemption rights in Ontario, see *Klein v. Lemore Investments Ltd.*<sup>132</sup>

### XXI. Conclusion

The *PPSA* jurisprudence is still quickly expanding, especially now that Saskatchewan has a *PPSA*. The writer still urges 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*.<sup>133</sup>

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132. *Supra* n.47.

133. Permanent Editorial Board for the Uniform Commercial Code, "The Uniform Commercial Code Survey" (1984), 39 *Business Lawyer* 1315.