THE PERSONAL PROPERTY SECURITY ACT (MANITOBA) REVIEW OF 1984 AND 1985 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 1984 and 1985 relating to the Ontario,[1] Manitoba[2] and Saskatchewan[3] Personal Property Security Acts and which have an effect on the *The Personal Property Security Act* (Manitoba).[4] The first article[5] in the series reviewed the cases to the end of 1981, and commented on the background to the *PPSA* the major differences between the pre-*PPSA* law and the *PPSA* and the major differences between the Ontario *PPSA* and the Manitoba *PPSA*. The second article[6] in the series reviewed the cases in 1982 and 1983, and made a comparison of the Manitoba *PPSA* and the Saskatchewan *PPSA*.

I. Application of *PPSA*

A. General

The *PPSA* applies to security upon personal property, including fixtures other than building materials covered by section 36 of the *PPSA*. In *Dolan* v. *Bank of Montreal*[7] the Saskatchewan Court of Appeal found that the Saskatchewan *PPSA* did not apply to a mobile home that had its wheels and undercarriage removed, that rested on concrete blocks and was skirted with wood panelling, that had a porch addition built onto the side of the mobile home and concrete steps connected into place with a concrete patio, and that had sewer, water and power services trenched and connected with the mobile home. The Court reviewed the general principles of determining when chattels become annexed to realty (see XIII Fixtures/Building Materials, below), and concluded that the mobile home was not personal property but was realty, and that the Saskatchewan *PPSA* was not applicable to the chattel mortgage covering the mobile home.

B. 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. Even though the form of a document may state that it is to be an absolute assignment, if it is intended to be security for the payment or performance of an obligation, the document will be found to create a security interest under the *PPSA*.[8]

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1. *Personal Property Security Act*, R.S.O., c. 375.
2. *The Personal Property Security Act*, S.M. 1973, c. 5, C.C.S.M. P35.
3. *The Personal Property Security Act*, S.S. 1979-1980, c. P- 6.1.
4. Hereinafter referred to as the *PPSA* and any section hereinafter referred to will be the section in the Manitoba *PPSA* unless otherwise indicated.
5. David L. Voechting, "The Personal Property Security Act (Manitoba)—Review of Cases to the end of 1981" (1982), 12 Man. L.J. 147.
6. David L. Voechting, "The Personal Property Security Act (Manitoba)—Review of 1982 and 1983 Cases" (1984), 14 Man. L.J. 95.
7. (1985), 5 P.P.S.A.C. 196 (Sask. C.A.).
8. *Re Burton* (1985), 53 O.R. 110, 23 D.L.R. (4th) 408 (H.C.).

The *PPSA* also applies to every assignment of accounts not intended as security, other than an assignment for the general benefit of creditors to which *The Assignment Act*[9] applies, and to every assignment of accounts or chattel paper not intended as security.[10] As a result, any transaction that may involve a sale of accounts or chattel paper (such as the sale of the assets of an ongoing business) would be governed by the *PPSA* and would require registration of a financing statement in order to perfect the security interest in the accounts or chattel paper.

The writer is not certain as to what the effect the *PPSA* would have on an absolute assignment if registration did not take place. Would the priorities be affected, and, if so, as between whom? Would the remedy provisions of the *PPSA* apply? It appears to the writer that absolute transfers of accounts or chattel paper were included merely to provide a record of such transfer in a public registry, and no real purpose is served to require registration if it is an absolute transfer that is taking place. The Saskatchewan *PPSA* recognizes this fact and the following are excluded in section 4 of the Saskatchewan *PPSA* from the operation of the Saskatchewan *PPSA:*

4. (d) an assignment of any right to payment under a contract to an assignee who is to perform the assignor's obligations under the contract;

(f) 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 properties payable under a lease of real property; or

(ii) a right to payment evidenced by a security;

(g) 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;

(h) an assignment of accounts made solely to facilitate the collection of accounts for the assignor;

(i) an assignment of a claim for damages or a judgment representing a right to damages.

C. Lease or Consignment Intended as Security

Section 2 of the *PPSA* specifically applies to a lease intended as security. There have been several Ontario decisions dealing with this concept,[11] but now there is also the Manitoba decision in *Standard Finance, Corporation Ltd.* v. *Coopers & Lybrand Limited, Trustee of the Estate of Econ Consulting Ltd.*[12]

The facts of the *Standard Finance* case were that Econ Consulting Ltd. was interested in acquiring a photocopier and had negotiated with National Typewriter & Office Equipment with respect to the purchase of the

9. *The Assignment Act*, R.S.M. 1970, c. A150, rep. S.M. 1984-85, c. 17, s. 2(1), C.C.S.M. A150.

10. See the definition of "Security Interest" in s. 1(aa) of the *PPSP*, as well as s. 2(b) and (c) of the *PPSA*.

11. *Re Rapid Auto Collision Ltd.* (1983), 49 C.B.R.(N.S.) 142, 3 P.P.S.A.C. 187 (Ont. S.C.); *Re Stark Coaxial Systems Inc.* (1985), 55 C.B.R.(N.S.) 308 (Ont. S.C.); *Re 488723 Ontario Inc. (R.P.M. Motors)* (1985), 55 C.B.R. (N.S.) 311 (Ont.S.C.).

12. [1984] 4 W.W.R. 543, (*sub nom. Standard Finance Corp.* v. *Econ Consulting Ltd.*) 28 Man. R.(2d) 99, 26 B.L.R. 175, 4 P.P.S.A.C. 31 (Q.B.).

photocopy machine. National and Econ negotiated an agreement whereby Econ agreed to lease a photocopier from Standard Leasing, a division of Standard Finance Corporation Limited. The lease would be for a period of 65 months, with monthly payments made, and at the end of the term of the lease Econ had a right to purchase the photocopier for 10% of its original cost. The monthly payments were sufficient to allow Standard Leasing to recover the purchase price of the machine,which it purchased from National, together with interest. National and Standard Leasing had an established relationship, and National prepared the forms of leases and all that Standard Leasing did was investigate the credit worthiness of Econ and pay National the cost of the photocopier machine. It was found as fact that Standard Leasing would not have bought the photocopier unless Econ had intended to lease it, that it was Econ's intention to keep the photocopier at the end of the term of the lease, and that Standard Leasing was not in the business of leasing photocopiers except as a means of financing the purchase of them by others. Econ declared bankruptcy, and the Trustee claimed that the lease arrangement was a lease "intended as security" and, because a financing statement respecting the lease was not registered under the *PPSA*, Standard would not have a claim as a secured creditor with respect to the photocopier.

Morse J. found that all parties did not regard the transaction as a true lease, but regarded it as a means of financing the purchase of the photocopier, and that Standard was not interested in retaining title to the photocopier at the end of the term of the lease because it had no facilities for leasing machines to others. Standard contended that the amount required to be paid at the end of the term of the lease bore a reasonable resemblance to its fair market value, and made reference to the *Re Ontario Equipment (1976) Ltd.*[13] decision which established that one of the tests of determining whether an agreement is a true lease or a conditional sale was set forth in a 1962 American decision:

> 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., Debtor* (1962), 220 F. Supp. 914, by Croake D.J. From the decision of Referee Asa S. Herzog:
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> > 'The test is 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.'[14]

This test has been followed in a number of other decisions.[15] Standard Finance relied on the fact that the purchase price of 10% of the cost of the

13. (1981), 38 C.B.R. (N.S.) 180, 14 B.L.R. 113, 1 P.P.S.A.C. 303 (Ont. S.C.)[hereinafter cited to C.B.R.], aff'd (1982), 141 D.L.R. (3d) 766, 35 O.R. (2d) 194 (C.A.).

14. *Ibid.*, at 183.

15. *Re Econo Transport Inc.* (1982), 43 C.B.R.(N.S.) 230, 2 P.P.S.A.C. 208 (Ont. C.A.), rev'd (1982), 46 C.B.R.(N.S.) 314 (Ont. C.A.); *Ford Credit Canada Ltd.* v. *Robert Rowe Motors Ltd.* (1983), 142 D.L.R. (3d) 752 (Ont. H.C.); *Unilease Inc.* v. *Graphic Centre (Ontario) Ltd.* (1982), 2 P.P.S.A.C. 197 (Ont. Co. Ct.); *Re Federal Business Development Bank and Bramalea Limited* (1983), 144 D.L.R. (3d) 410, [*sub nom. Federal Business Development Bank* v. *Bramalea Limited*] 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.); *Re Stark Coaxial Systems Inc., supra*, note 11.

photocopier was the "norm" in the leasing industry as it related to a 65 month lease, but Morse J. was of the view that the 10% was used by finance companies not because it necessarily represented the fair market value but because it was acceptable to Revenue Canada, and also found that the parties could not realistically have considered that 10% of the purchase price was the fair market value at the end of the lease. It was his position that the fact that the purchase price option may have approximated the fair market value of the property at the end of the term of the lease was not determinative of the issue, although it was a significant factor. However, this factor by itself was not conclusive, particularly where the amount chosen was an arbitrary percentage of the price without regard to the actual condition of the equipment. Morse J. found that the lease was intended as security, and ruled in favour of the Trustee of Econ.

In contrast to the *Standard Finance* decision is the Ontario decision in *Re Stark Coaxial Systems Inc.*[16] In that case there was no evidence as to the role the parties played or what their intent was, so the Court was limited to considering only the lease agreements. The Court found that it is the essence of a lease intended as security that the property in the subject matter of the lease is to pass ultimately to the lessee who is obliged to pay the lessor what might reasonably be regarded as the purchase price with interest and carrying charges over the life of the lease. Upon a review of the lease agreements, the Court held that there were two provisions that persuaded it that the lease was a true lease. One of the clauses reserved to the owner the right to exchange any automobile at any time for one ofsimilar condition and make. The other provision allowed the lessee to purchase the vehicle for a stipulated amount (between 36% and 39% of the value of the vehicle) or to return the vehicle to the lessor, who would sell the vehicle at the highest available cash offer. The lessee would be responsible for any deficit below the fixed sum, or be entitled to any credit for the sale price above the fixed sum. The Court found that the sum in question could not be considered a nominal value, and ultimately found that the lease was a true lease and not one intended as security.

It should be noted that the Saskatchewan *PPSA* applies to every lease for a term of more than one year.[17]

An Ontario decision dealing with a consignment is *Seven Limers Coal and Fertilizer Co.* v. *Larry O. Hewitt*,[18] where the Ontario Court of Appeal held that:

> In a situation like this, the onus is clearly on the plaintiff, and not on the receiver-manager under the debenture, to prove that it was a consignment arrangement and not a conditional sale. Even if the words "on consignment" had been clearly marked on any invoice or document, that would not in itself satisfy the onus. An agreement should be established to the

16. *Supra* note 11.

17. See the definition of "lease for a term of more than one year" in *PPSA*, S.S., ss 2(y) and 3(b), as well as *Mid-Canada Radio Communication Ltd.* v. *Mechanical Services (1979) Ltd.* (1984), [1984] 2 W.W.R. 569, 25 B.L.R. 187, 3 P.P.S.A.C. 203 (Sask. Q.B.) [hereinafter *Mid-Canada* cited to W.W.R.]; *Re Town and Country Insulation Ltd.* (1984), 27 A.C.W.S. 87 (Sask. Q.B.); *Percival Mercury Sales Ltd.* v. *Touche Ross Limited* (1984), [1984] 5 W.W.R. 710, 52 C.B.R. (N.S.) 218, 4 P.P.S.A.C. 65 (Sask. Q.B.); and *Re Bell's Dairy Ltd.* (1984), 4 P.P.S.A.C. 149 (Sask. Q.B.) for cases on leases in Saskatchewan.

18. (1985), 52 O.R. (2d) 1, 5 P.P.S.A.C. 45 [hereinafter cited to O.R.].

> effect that the consignee was to keep the goods and proceeds separate, was required to account after any sale, and was obliged to pay only for the goods sold by him: . . .[19]

In the *Seven Limers* case the Ontario Court of Appeal held that the onus had not been satisfied and set aside the trial court decision that the transaction was a consignment not intended as security.

It should be noted that the Saskatchewan PPSA applies to all consignments.[20]

D. Notice

There have been a number of decisions in the period 1980-1983 that established that the concept of "notice" of other security interests was important in the claims of priority is no longer relevant for the purpose of determining priority under the *PPSA*. The leading cases are *Robert Simpson Co.* v. *Shadlock*,[21] *Sperry Inc.* v. *Canadian Imperial Bank of Commerce*[22] and *National Trailer Convoy of Canada Ltd.* v. *Bank of Montreal*.[23] Those decisions are followed and confirmed in the Ontario case of the *Bank of Nova Scotia* v. *Gaudreau*,[24] where Sutherland J. quoted the effect of the *Robert Simpson Co.* v. *Shadlock* decision as holding:

> . . . that the effect of the priority rules in s. 35 of the P.P.S.A. was to abolish, in relation to security interests in chattels, any doctrine of actual notice, with the result that priority of registration according to s. 35(1) may be successfully asserted even by a claimant having actual notice of a competing claim.[25]

E. Title

Decisions in the period 1980-1983 clearly establish that the possession of title in or to goods is not relevant for *PPSA* purposes. This concept is confirmed in the Ontario decision in *Misener Financial Corporation* v. *General Home Systems Ltd.*[26]

II. Exceptions to the *PPSA*

A. Section 3

Subsection 3(1) enumerates several specific exceptions to the applicability of the *PPSA* and reads:

> 3 (1) This Act does not apply
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> (a) to a lien given by statute or rule of law except as provided in section 32, clause (b) of subsection (4) of section 36 and clause (b) of subsection (2) of section 37; or
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> (b) to a transfer of an interest in or under a policy of life insurance or contract of annuity; or

19. *Ibid.*, at 9.
20. *Personal Property Security Act*, S.S. 1979-1980, c. P-6.1, s. 3(b).
21. (1981), 31 O.R. (2d) 612 (H.C.), 119 D.L.R. (3d) 417.
22. (1985), 50 O.R. (2d) 267, 17 D.L.R. (4th) 236, 55 C.B.R. 68 (C.A.).
23. (1980), 10 B.L.R. 196, 1 P.P.S.A.C. 87 (Ont. H.C.) [hereinafter cited to B.L.R.].
24. (1984), 4 P.P.S.A.C. 158, 27 B.L.R. 101, (Ont. H.C.) [hereinafter *Gaudreau* cited to P.P.S.A.C].
25. *Ibid.*, at 171.
26. (1984), 27 B.L.R. 247 (Ont. H.C.).

(c) to a transfer of an interest in or under a policy of insurance other than life insurance except in so far as section 27 applies to the proceeds thereof; or

(d) to a transaction under which goods are pledged by a debtor to a person carrying on the business commonly known as pawnbroker as security for money lent to the debtor; or

(e) to an assignment of or a transfer of a claim for wages, salary or other compensation of an employee; or

(f) to security interests in property, assets or interests of the Crown, or of a corporation that is declared by an Act of Parliament or an Act of the Legislature to be an agent of the Crown, or of a municipality, or of a corporation created under The Health Services Act or The Public Schools Act.

The most important exception under subsection 3(1) is a lien given by statute or rule of law. Examples of such liens are distress levied by a landlord,[27] stockbroker's liens,[28] possessory liens,[29] warehouseman's liens,[30] and garagekeeper's liens.[31]

A further exception contained in subsection 3(1) is a transfer of an interest in or under a policy of insurance. However, an assignment of the monies due and payable under the policy of the life insurance, if intended as security, would still be governed by the *PPSA*.[32]

B. Transitional Provisions

Another form of exception to the *PPSA* is the transitional provisions found in section 64 and section 65, in particular the provisions of section 64(2). The decision in *Bank of Montreal* v. *Eaton Yale Limited and The Clarkson Company*[33] was effectively overturned by the Manitoba Court of Appeal decision in *The Assiniboine Credit Union Limited* v. *The Canadian Imperial Bank of Commerce*.[34] The writer previously questioned the decision of Deniset J. in the *Eaton Yale* case and stated:

> 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*, in footnote 16.2 at page 11-8, as well as in an annotation to the report of the *Eaton Yale* case. 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*.[35]

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27. For example, *Commercial Credit Corporation* v. *Harry D. Shields* (1980), 29 O.R. (2d) 703, 112 D.L.R. (3d) 153, 1 P.P.S.A.C. 99 (H.C.), aff'd (1981), 32 O.R. (2d) 703, 122 D.L.R. (3d) 736, 14 B.L.R. 121, 1 P.P.S.A.C. 301 (C.A.); *Canadian Imperial Bank of Commerce* v. *Klunkovski* (1983), 3 P.P.S.A.C. 216 (Ont. S.C.) and *Dube* v. *Bank of Montreal* (1986), 27 D.L.R. (4th) 718, 5 P.P.S.A.C. 269 (Sask. C.A.).

28. For example, *Jones* v. *Davidson Partners Ltd.* (1981), 31 O.R. (2d) 494, 121 D.L.R. (3d) 127, 1 P.P.S.A.C. 242 (H.C.).

29. For example, *Re Aztec Steel Manufacturing Ltd.* (1983), 45 C.B.R. (N.S.) 241 (Ont. S.C.).

30. *Canadian Imperial Bank of Commerce* v. *Maidstone Farming Ltd.* (1984), 46 O.R. (2d) 699, 52 C.B.R. (N.S.) 174, 4 P.P.S.A.C. 127 (Co. Ct.).

31. *International Harvester Credit Corporation of Canada* 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.); *Re Lehner* (1985), 4 P.P.S.A.C. 254 (Sask. Q.B.).

32. For example, *Re Rapid Auto Collision Ltd.*, *supra* note 11.

33. (1982), 2 P.P.S.A.C. 188 (Man. Q.B.).

34. (1984) 11 D.L.R. (4th) 744, [1984] 5 W.W.R. 251, 28 Man. R. (2d) 281 4 P.P.S.A.C. 96 (C.A.) [hereinafter *Assin. C.U.* cited to D.L.R].

35. *Supra*, note 6 at 107.

The decision in *The Assiniboine Credit Union* case now removes the need to amend the Manitoba *PPSA* because of the error of Deniset J. The facts of *The Assiniboine Credit Union* case were that Garland Hotel Inc. was under a 21 year lease of land at Falcon Lake in the Whiteshell Provincial Park. One of the conditions of the lease from the Government of Canada was that Garland was required to maintain a summer home on the lot. On June 1, 1986, The Assiniboine Credit Union Limited made a loan to Garland. The loan was secured by a chattel mortgage, an assignment of the permit for the lot, and an assignment of the lease for the lot. The chattel mortgage was registered on June 9, 1976 in accordance with the legislation in existence at that time, which was subsequently repealed by the *PPSA* which came into full force and effect on September 1, 1978. The chattel mortgage covered a house and all furniture and fixtures described in a schedule to the chattel mortgage. The chattel mortgage was renewed in the Manitoba Personal Property Registry ("PPR") in 1979, and the validity of the renewal was not questioned.

On June 30, 1981, Captran Resorts International Ltd. purchased assets from Garland, including the house and furniture covered by the Credit Union's chattel mortgage and Garland's interest in the lease of the lot. Captran agreed to assume the loan from the Credit Union, and on September 24, 1981, the Credit Union registered in the PPR the appropriate Financing Statement Transfer form under the *PPSA* to indicate a transfer of interest had taken place from Garland to Captran.

Canadian Imperial Bank of Commerce lent money to Captran on security of a demand debenture from Captran to the Bank dated July 28, 1981 and registered under the *PPSA* on August 7, 1981. That registration took place prior to the Credit Union's registration of the Financing Statement Transfer form reflecting the transfer of security from Garland to Captran. The Bank's demand debenture contained a charge on after-acquired chattels.

The Trial Court found that the *PPSA* applied, and that the Credit Union lost its status as a prior security interest holder by operation of section 49 of the *PPSA*. Section 49 required the filing of a Financing Statement Transfer form within 15 days after the Credit Union learned of the transfer of assets from Garland to Captran. If a filing is not made within that time period, a secured party's security interest becomes unperfected and subject to any interest that may be acquired in the collateral after that 15 day period and prior to any actual registration by a secured party.

The Credit Union's position was that the *PPSA* does not apply to its transactions with Garland and Captran. The Credit Union argued that the assignment of the lease was not covered by the *PPSA* at all, and that the chattel mortgage was not subject to the *PPSA* except for registrations of renewals in the PPR as required by the transitional provisions of section 65 of the *PPSA*.

The Court of Appeal reviewed the transitional provisions of the *PPSA* and found that:

> The principle expressed in s. 64(1) is that the Act applies only where the security interest attaches on or after the effective date of the legislation. The security interest which attached

> before the effective date continues to have force and effect as if the Act had not been passed. Under s. 64(2), where there is a contest between a security interest created before the effective date and a security interest created after that date, as there is here, the prior law is to be applied to determine priority. Section 64(3) deals with registration under the Act with respect to prior law.
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> . . .
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> In my view, the provisions of s. 65(1) are inserted to provide a mechanism for continuing registrations and discharge of security interests. The apparent conflict between s. 64(2) and s. 65 should be resolved by holding that the pre-Act rules apply to determine priority. Applying s. 64(2) to the facts of the case leads to the conclusion that the credit union is entitled to priority.[36]

The Court also found that a pre-*PPSA* security interest is not required to make filings under the *PPSA* that it would not have been required to make under the pre-*PPSA* law. In this particular case, prior to the *PPSA* the Credit Union would not have had to make any registration with respect to the transfer of assets from Garland to Captran. Therefore, the Credit Union was not required to make a filing within the 15 day period under section 49 of the *PPSA* upon the transfer from Garland to Captran in order to protect its interests because it would not have had to make such a filing under the pre-*PPSA* law.

It should be noted that the transitional provisions in the Manitoba *PPSA*, Ontario *PPSA* and Saskatchewan *PPSA* are different, and they should be carefully reviewed in each particular instance.

C. Federal Statutes

A further exclusion to the applicability of the *PPSA* is with respect to an interest created under a federal statue which cannot, constitutionally, be affected by the *PPSA*. A prime example is the *Banks and Banking Law Revision Act of Canada*.[37] Basically, in a priority dispute between an interest governed by the PPSA and an interest acquired by a bank under the Bank Act, the *Bank Act* will govern priority.[38] Section 179 of the *Bank Act* states that the security interest of a bank acquired pursuant to section 178 has priority over all rights *subsequently* acquired in the property. Therefore, if a secured party acquires a security interest under the *PPSA* prior to a bank acquiring section 178 security, the secured party would have priority by virtue of section 179(1) of the *Bank Act* over the bank, even if the secured party had not properly perfected its interests under the *PPSA*.[39]

D. Trusts

The finding of a trust relationship may also act to exclude the provisions of the *PPSA* from being operative. Over the past few years, federal and provincial governments have begun to establish statutory trusts to ensure priority over security interests,[40] and the courts are becoming more willing

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36. *Supra*, note 34 at 748.

37. (1980), S.C. 1980-81-82-83, c. 40 (hereinafter referred to as the *Bank Act*).

38. For example, *Rogerson Lumber Co.* v. *Four Seasons Chalet Ltd.* (1980), 29 O.R. (2d) 193, 113 D.L.R. (3d) 671, 36 C.B.R. (N.S.) 141, 1 P.P.S.A.C. 160 (C.A.); *Moose Jaw* v. *Pulsar Ventures Ltd.* (1985), 5 P.P.S.A.C. 133 (Sask. Q.B.); *J.I. Case Credit Corporation* v. *Canadian Imperial Bank of Commerce* (1985), 60 C.B.R. (N.S.) 235, 5 P.P.S.A.C. 181 (Sask. Q.B.).

39. See, *J. I. Case Credit Corporation* v. *Canadian Imperial Bank of Commerce*, *supra* note 38.

40. See, *National Bank of Canada* v. *Director of Employment Standards* (1983), 3. P.P.S.A.C. 119 (Ont. Ref.); *Royal Bank of Canada* v. *G. M. Homes Inc.* (1984), 52 C.B.R. (N.S) 244, 26 B.L.R. 297 (Sask. C.A.) [hereinafter *G.M. Homes* cited to C.B.R.].

to find a constructive trust relationship so as to avoid what they feel are unfair consequences if a trust is not found to exist.[41] Unfortunately, the proliferation of statutory trusts and willingness of courts to find constructive trusts removes the certainty as to priority that the *PPSA* has tried to introduce.

E. Crown

A further exception to the applicability to the Ontario *PPSA* is the fact that the Crown is not bound by the provisions of the Ontario *PPSA*.[42] However, section 72 of the Manitoba *PPSA* provides that the Crown is bound by the Manitoba *PPSA*.[43]

F. Land Interest

A further exception to the *PPSA* may be any interest involving land. Wright J. in *Ranjoy Sales and Leasing Ltd.* v. *Down*[44] stated that it appeared to him that the Manitoba *PPSA* can reasonably be interpreted as not intending to cover real property interests. The Manitoba Court of Appeal in *The Assiniboine Credit Union* v. *Canadian Imperial Bank of Commerce*[45] supported that view in finding that an assignment of a lease of real property should not be considered a personal property interest under the *PPSA*.

The Ontario *PPSA*[46] and Saskatchewan *PPSA*[47] clearly set forth that certain interests in land that are excluded from the operation of the Ontario and Saskatchewan *PPSA*. The writer suggests that section 3 of the *PPSA* should be amended to clearly indicate the interests in real property that would be excluded from operation of the *PPSA*.

III. Curative Provisions

The Manitoba Court of Appeal decision in *Re Hickson; The Clarkson Company Limited* v. *Reichhold Limited*[48] sets forth a discussion of the interrelationship of section 4 and subsection 47(5), and noted the fact that the Ontario *PPSA* does not have the equivalent of subsection 4(2) of the Manitoba *PPSA*. The facts of the *Reichhold* 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 and his Trustee challenged the

41. *Kimwood Enterprises Ltd.* v. *RoyNat Inc. and Canadian Imperial Bank of Commerce* (1984), 31 Man. R. (2d) 105, 56 C.B.R. (N.S.) 183 (C.A.), *contra*, *Re Town and Country Insulation Ltd.*, *supra* note 17.

42. See, *Re Doxtator* (1984), 44 O.R. (2d) 581, 49 C.B.R. (N.S.) 34, 26 B.L.R. 147, 3 P.P.S.A.C. 246 (S.C.).

43. See, *Royal Bank of Canada* v. *R.* (1984), 52 C.B.R. (N.S.) 198, 27 B.L.R. 276, 4 P.P.S.A.C. 131 (Fed. Ct.) [hereinafter *Royal Bank* cited to C.B.R.].

44. (1982), [1982] 4 W.W.R. 16, 15 Man. R. (2d) 271, 2 P.P.S.A.C. 107 (Q.B.).

45. *Supra* note 34.

46. *PPSA*, R.S.O., s. 3(1)(e), and see *Re Deputy Sheriff of Algoma* (1984), 3 P.P.S.A.C. 230 (Ont. D.C.).

47. *PPSA*, S.S. ss 4(e) and (f), and see *United Dominion Investments Limited* v. *Morguard Trust Company* (1985), 5 P.P.S.A.C. 8 (Sask. Q.B.), rev'd (1986), [1986] 1 W.W.R. 78, 5 P.P.S.A.C. 203 (C.A.) and *Dolan* v. *Bank of Montreal*, *supra* note 7.

48. (1984), 6 D.L.R. (4th) 246, [1984] 3 W.W.R. 164, 26 Man. R. (2d) 5, 3 P.P.S.A.C. 263, 51 C.B.R. (N.S.) 241 (C.A.) [hereinafter *Clarkson* cited to D.L.R.].

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's security was unperfected and the Trustee had priority over an unperfected security interest. The Trial Court agreed with the Trustee.

The Manitoba Court of Appeal affirmed the judgment of the Trial Court, and Matas J.A. went on to review the relationship of the curative provisions in the *PPSA* and found:

> The Act contains three provisions which may be applicable: ss. 4(1), (2) and 47(5).
>
> Section 4(1) is a general section. It is expressed in wide terms and covers any document to which the Act applies. A defect, irregularity, omission or error in the document, or in its execution, will not invalidate the document or destroy its effect, unless, in the opinion of a Judge or the Court, the defect, etc., is shown to have actually misled a person affected by the document.
>
> Section 47(5) is more restrictive. It covers financing statements or other documents required or authorized to be registered under the Act. As in s. 47(5) of the Ontario Act, Manitoba s. 47(5) provides for two kinds of errors: clerical errors and errors in an immaterial or non-essential part of a financing statement (*Re Ovens*, supra, p. 47 [C.B.R.]). Errors of this type, which do not mislead, will not invalidate the registration or destroy the effect of the registration. (The difference in wording between the Manitoba and Ontario sections is not material in respect of this analysis [Dewar C.J.Q.B., at p. 278 (P.P.S.A.C.) [p. 170] of his reasons for judgment].)
>
> Sections 4(1) and 47(5) read:
> "4(1) A document to which this Act applies is not invalidated, nor shall its effect be destroyed by reason only of a defect, irregularity, omission or error therein or in the execution thereof, unless, in the opinion of the judge or court the defect, irregularity, omission or error is shown to have actually misled some person whose interests are affected by the document.
> . . .
> 47(5) An error of a clerical nature or in an immaterial or non-essential part of a financing statement or other document required or authorized to be registered in the personal property security registry that does not mislead does not invalidate the registration or destroy the effect of the registration."
>
> I agree with the conclusion of Houlden J.A. in *Re Ovens* that in a case of the kind before us, s. 47(5) is the applicable curative section; s. 4(1) does not apply. At p. 46 [C.B.R.,] Houlden J.A. said:
> "Catzman, Personal Property Security Law (1976), p. 191, discusses the relationship between the two curative sections and makes the following comments:
> 'S. 4 of the Act appears to also provide curative relief. S. 4 is a general section having broader curative provisions than s. 47(5). For example, s. 4 provides curative relief for any document, not just for financing statements or financing change statements. It provides relief from errors in completing the document and also from errors in executing the document. It would therefore appear that in relation to financing statements or financing change statements which are only one type of document used under the Act, the only applicable curative section is s. 47(5). That subsection is more restrictive and specific and, therefore, excludes the general and wider s. 4.' This accords with the usual rule of statutory construction and is applicable in these circumstances:
> Craies on Statute Law, 7th ed. (1971), p. 222. Section 4 deals with errors that invalidate documents, s. 47(5) with errors that invalidate registration. We agree with Catzman that s. 47(5), having specifically provided for errors that invalidate registration, has excluded the operation of s. 4. Section 47(5) is therefore the only applicable curative section for this case."
>
> (And see McLaren, Secured Transactions in Personal Property in Canada, (1979), vol. 1, pp. 20-19 and 20-20.)
>
> In light of the need for the public to have proper notice of security transactions, it cannot be argued successfully that the absence of the debtor's name is immaterial or non-essential,

or that the absence of the individual's name is a clerical error within the meaning of the section (*Re Ovens*, supra).

Finally, Reichhold relies on s. 4(2) of the Act. (That section does not have a counterpart in the Ontario Act.) Section 4(2) is in the same form as s. 4(1) but it refers to invalidating or destroying the effect of a registration instead of to a document. And the term "omission" does not appear in the section. The section reads:

"4(2) A registration under this Act is not invalidated, nor shall its effect be destroyed, by reason only of a defect, irregularity or error therein unless, in the opinion of the judge or court, the defect, irregularity or error is shown to have actually misled some person whose interests are affected by the registration."

Dewar C.J.Q.B. differentiated s. 4(2) by pointing out that it "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." [pp. 170-1] Assuming s. 4(2) is applicable, I do not think it helps Reichhold. While the extended meaning of a defect, or irregularity, or error might include an "omission," the section must be taken to have intended to draw a distinction between "omission" and the other terms. In my view, the absence of the debtor's name must be categorized as an omission and would not be remediable by s. 4(2).

I would dismiss the appeal with costs.[49]

An error in a security agreement would, under the existing interpretation of the relationships of sections 4 and 47(5), be governed by section 4 of the *PPSA*. Mackinnon A.C.J.O. of the Ontario Court of Appeal stated in *Re Ayerst and Ayerst*[50] that:

There was an inadequate description of the collateral covered by the chattel mortgage. However, it is agreed that the omission of the detailed description of the goods and chattels covered by the mortgage was omitted through mutual error. It is also acknowledged that no one whose interests have been affected has been actually misled by the omission or error.

Accordingly, in our view this is a case in which s. 4 of the Personal Property Security Act, R.S.O. 1980, c. 375, can be prayed in aid. The plain intent of the legislation, and remedial thrust of s. 4, which should be given a large and liberal interpretation, is to avoid, in appropriate cases, the hardship which resulted from the highly technical and mechanical interpretations and applications of sections of previous legislation on the subject. There is no legislative reason why the respondent here should suffer the loss of her moneys honestly owed.[51]

In addition, an error in an immaterial or non-essential part of a financing statement would be curable, even under subsection 47(5) of the *PPSA*. For example, in Manitoba a financing statement requires a detailed description of the collateral, as well as an indication (by x'ing in the appropriate boxes on the financing statement) of the nature or type of the collateral. In Ontario, there is no mandatory requirement to describe the collateral, but it is allowed. Errors in the description of the type of collateral have been found by the Ontario courts to be errors in immaterial or non-essential parts of the financing statement, and thus curable.[52] The reasoning of those decisions are even more applicable to Manitoba where the collateral description is a mandatory requirement or, with respect to corporate securities, the

49. *Ibid.*, at 254.

50. (1984), 4 P.P.S.A.C. 81, 52 C.B.R. (N.S.) 215, 27 B.L.R. 43 (Ont. C.A.) [hereinafter *Ayerst* cited to P.P.S.A.C.].

51. *Ibid.*, at 83.

52. *Croeker* v. *Kubota Tractor Canada Ltd.* (1985), 5 P.P.S.A.C. 95 (Ont. S.C.); *Re 533812 Ontario Ltd.* (1985), 52 O.R. (2d) 750, 23 D.L.R. (4th) 270, 58 C.B.R. (N.S.) 49, 5 P.P.S.A.C. 128 (S.C.).

corporate security containing a description of the collateral is attached to the financing statement, provided that the error does not mislead any person.[53]

An error of a clerical nature, provided that it does notmislead any person, may also be cured under the operation of subsection 47(5). In *Bank of Nova Scotia* v. *Gaudreau*[54] the security agreement contained the correct serial number for a motor vehicle, but the financing statement contained an error in the serial number. The Court accepted a definition of "clerical error" which had been adopted in previous decisions: ". . . an error in a document which could only be explained by considering it to be a slip or mistake of the party preparing or copying it . . ."[55] and found that the clerical error on the financing statement did not mislead any person, and allowed it to be cured under the provisions of subsection 47(5) of the Ontario *PPSA*.

Errors in an essential or material part of the financing statement that are not clerical errors cannot be cured by any provision in the *PPSA*. Examples include inserting the incorrect first name of an individual debtor (such as Tom rather than Thomas,[56] Dave rather than David[57] or Dan rather than Daniel[58]) or failing to insert the middle initial required by the regulations to the *PPSA*.[59] In view of the Manitoba PPR practice of providing information on individual debtors by virtue of the first and last name notwithstanding the middle initial indicated, it is open to a Manitoba court to find that the failure to insert the middle initial, or the inserting of the wrong middle initial, should be an error that is curable under the *PPSA* notwithstanding the specific language of sections 4 and 47(5).

The Saskatchewan *PPSA* has only one provision dealing withcuring errors, and that provision is significantly different from the provisions in the Ontario *PPSA* and the Manitoba *PPSA*. The Saskatchewan curative provision provides:

> 66.—(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.

Any Saskatchewan cases dealing with curing errors in financing statements or security agreements[60] would likely not be of assistance in Manitoba courts.

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53. For example, *Regal Feeds Ltd.* v. *Waldner*(1985), [1985] 5 W.W.R. 259, 34 Man. R. (2d) 299, 5 P.P.S.A.C. 32 (Q.B.).
54. *Supra*, note 24.
55. *Ibid.*, at 168.
56. *Re Wilson* (1984), 46 O.R. (2d) 28, 8 D.L.R. (4th) 271, 26 B.L.R. 271, 4 P.P.S.A.C. 69 (S.C.).
57. *Re Elliott* (1984), 3 P.P.S.A.C. 296 (Ont. S.C.).
58. *Regal Feeds Ltd.* v. *Waldner, supra*, note 53.
59. *Re Gibbons* (1984), 45 O.R. (2d) 664, 8 D.L.R. (4th) 316, 51 C.B.R. (N.S.) 235, 4 P.P.S.A.C. 53 (C.A.); *Re Charron* (1984), 54 C.B.R. (N.S.) 301, 4 P.P.S.A.C. 228 (Ont. S.C.).
60. *Re Bell's Dairy Ltd., supra*, note 17; *Re Lehner, supra*, note 31; *Elmcrest Furniture Manufacturing Ltd.* v. *Price Waterhouse Ltd.* (1985), 5 P.P.S.A.C. 22 (Sask. Q.B.); *Gates Fertilizers Ltd.* v. *Waddell* (1985), 5 P.P.S.A.C. 79 (Sask. Q.B.).

IV. Compensation

Under section 45 a person who suffers loss or damage as a result of reliance upon a PPR certificate that is incorrect because of an error or an omission in the operation of a PPR is entitled to compensation from the Government of Manitoba, subject to:

1. the claim being made within 1 year of the loss or six years after the issue of the PPR certificate (whichever is earlier);
2. the claim being limited to $25,000.00 or, if a corporate security, a total loss of $200,000.00;
3. the application being in writing to the PPR Registrar setting forth the particulars of the claim.

Once the Registrar receives a claim he is to refer the application by Originating Notice of Motion to a Queen's Bench judge and a hearing must be held by the judge.

It is the writer's view that section 45 sets forth a short form of proceeding, and should not limit the bringing of action by way of statement of claim against the Government if the loss exceeds the amount set forth in section 45, or the claim is not made within 1 year of the loss.

The Ontario decision in *Federal Business Development Bank* v. *Registrar of Personal Property Security*[61] dealt with a compensation claim. The facts in that case were that Federal Business Development Bank ("FBDB") requested a PPR inquiry giving the individual debtor's name, including his middle initial. Financing statements had been previously registered against the individual, but in those statements the middle initial was omitted and, as a result, those registrations were not revealed in the PPR search. The individual became bankrupt and the Trustee, despite FBDB's objection, paid the prior registered creditor. FBDB claimed its loss under the Assurance Fund under the Ontario *PPSA*. The claim was allowed by the Master, but was set aside on appeal because the loss was caused by FBDB's failure to assert against the Trustee priority at the proper time and not by an error in the operation in the PPR system.

V. Conflict of Laws Provisions

The conflict of laws provisions found in section 7 of the Ontario *PPSA* (the Manitoba *PPSA* contains similar provisions) were discussed in two cases,[62] both of which relied upon *Trans Canada Credit Corporation* V. *Bachand*.[63] Both cases dealt with a situation where goods already perfected outside of Ontario were brought into Ontario but became unperfected after a failure to file a financing statement within the time period set forth in section 7. Section 7 allows the date of perfection in Ontario to be considered

61. (1984), 45 O.R. (2d) 780, 7 D.L.R. (4th) 479, 30 C.B.R. (N.S.) 121, 25 B.L.R. 269, 4 P.P.S.A.C. 1 (Div. Ct.).
62. *Gaudreau, supra*, note 24, and *Re Adair* (1985), 49 O.R. (2d) 583, 15 D.L.R. (4th) 596, 54 C.B.R. (N.S.) 281, 4 P.P.S.A.C. 262 (C.A.) [hereinafter *Re Adair* cited to O.R.].
63. (1980), 30 O.R. (2d) 405, 117 D.L.R. (3d) 653, 1 P.P.S.A.C. 185 (C.A.).

to be "backdated" to the date of perfection in the other jurisdiction if a financing statement is filed within the time period set out in section 7. In both instances a financing statement was filed in Ontario, but it was found that the date of perfection (because of the failure to file within the time limit set forth in section 7) was the date of registration in Ontario and, as a result, the secured party who registered a financing statement prior in time,[64] or a Trustee in Bankruptcy appointed prior to the registration,[65] obtained priority.

Sutherland J. in *Bank of Nova Scotia* v. *Gaudreau*[66] discussed the effect of not filing within the time period set forth in section 7, and stated:

> If B.N.S.'s security interest is determined to have been perfected at the time the vehicle was brought into Ontario the rights of B.N.S are governed by section 7 of the P.P.S.A. which provides under section 7(1) for a 60-day period of automatic perfection provided there is perfection in Ontario, by registration or possession, within the 60 days. That 60-day period is subject to reduction under section 7(2) where the holder of the security interest receives notice within the 60 days that the collateral has been brought into Ontario; in that event the perfection will end unless otherwise perfected on or before the earlier of the last day of the 60-day period or the fifteenth day after the receipt of such notice. On the other hand, if the security interest of B.N.S. is found not to have been perfected B.N.S. would be subject to provisions much less favorable to it, namely the provisions of section 8 under which B.N.S. would have to have perfected its security interest within 30 days from the date the collateral was brought into Ontario and there would not be the benefit of any period of automatic perfection protecting the priority of B.N.S. in the period between the date the collateral came into Ontario and the date of perfection within such 30-day period. Under section 8 perfection dates from the time of registration or other perfection in Ontario, with no grace period.
>
> . . . .
>
> I find with reference to section 7(2) of the P.P.S.A. that the 60-day automatic perfection period was not shortened, as notice of the removal of the vehicle to Ontario was not received by B.N.S. more than 15 days before the end of the period.
>
> B.N.S. did not register a financing statement under the P.P.S.A., or take possession of the subject vehicle within the 60-day period. In fact, it did not register a financing statement until August 25, 1980. The security interest of B.N.S. thus became unperfected as at June 26, 1980, when the benefit of the grace period was lost to it because it did not perfect within that grace period. In this regard see the reasons of MacKinnon A.C.J.O. speaking for the Court of Appeal in *Trans Can. Credit Corp.* v. *Bachand.*[67]

The Ontario Court of Appeal stated in *Re Adair:*

> In my view the principle enunciated in the Trans Canada case is that a security interest in collateral perfected under the law of the jurisdiction in which the collateral was when the security interest attached and before being brought into Ontario becames [sic] an unperfected security interest as of the date upon which the collateral is brought into Ontario if the person who owns such security interest fails to perfect it in Ontario within the times limited by section 7(1) and (2), whichever is applicable, and it remains an unperfected security interest unless and until it is perfected as provided by section 7(3). In my view this principle applies regardless of the manner in which the claimant, who claims an interest in priority to that of the unperfected security interest, has obtained his interest. The only question that remains to be decided in such a case is whether the claimant has obtained priority over the other contending party's security interest under the provisions of the P.P.S.A. . . .

64. *Bank of Nova Scotia* v. *Gaudreau, supra*, note 24.

65. *Re Adair, supra*, note 62.

66. *Supra*, note 24.

67. *Supra*, note 24, at 188 and 190.

In the present case, following this Court's decision in *Trans Canada* v. *Bachand*, the security interest of G.M.A.C. must be deemed to have been unperfected until June 28, 1983. The interest of the trustee was acquired therein on May 26, 1983 as provided by section 22(2) of the P.P.S.A. Accordingly, by virtue of the provisions of section 22(1)(*a*)(iii), the unperfected security interest of G.M.A.C. in the van is subordinate to the interest of the trustee therein.[68]

VI. Security Agreement

A. Substance and Not Form

Subsection 1(z) defines a security agreement as an agreement that creates or provides for a security interest. It is the substance of the agreement that is important and not its form. In *Guntel* v. *Kocian, Ward and Bank of Nova Scotia*,[69] Dureault J. dealt with a situation where Fay Kocian was duped by her boyfriend into borrowing funds from a bank so she could purchase a GMC truck, which she then sold to her boyfriend, Bryan Ward. Ward provided to Kocian a signed document (Exhibit 22) stating:

> "Sept. 1/82
> "I Bryan Ward owe Fay Kocian $7699.99 plus the interest of the Bank of Nova Scotia for 1979 GMC, truck SETCS249B517842.
> "Bryan Ward (signed)"

Dureault J. found that Kocian intended to secure her interest in the truck as a condition of the transfer of ownership to Ward, and went on to find:

> Ex. 22 is an agreement signed by the debtor Ward containing an accurate description of the truck offered as collateral. While conceding that it is not a draughtsman's model, still giving it a broad interpretation, as I feel it must, I conclude that it meets all of the statutory requirements of a valid security agreement. It did provide Kocian with a security interest in the vehicle described therein securing Ward's performance of the obligation which he had undertaken. Though imperfect in form that is the substance of the agreement. Otherwise, the reference therein to "the Bank of Nova Scotia" would be meaningless. When Ward defaulted, Kocian became entitled to exercise the remedies provided for under Pt. V of the Act.
>
> . . .
>
> If simplicity is a fault then Ex. 22 is guilty of it. But that characterization does not, in my view, affect its intrinsic validity as a security agreement, and I so hold.[70]

Cases from Ontario[71] and Saskatchewan[72] also look to the substance of the transaction rather than its form.

B. Effectiveness

Sections 9 and 52 deal with the effectiveness of a security agreement, and provide:

> 9 Except as otherwise provided by this or any other Act, a security agreement is effective according to its terms between the parties to it and against third parties.

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68. *Re Adair, Supra*, note 62 at 590.
69. (1985), [1985] 6 W.W.R. 458, 36 Man. R. (2d) 179, 5 P.P.S.A.C. 109 (Q.B.) [hereinafter *Guntel* cited to W.W.R.].
70. *Ibid.*, at 464.
71. *Re Burton, supra*, note 8, respecting an assignment document that on its terms appeared to be an absolute assignment, but on the facts was found to be a security interest.
72. *Mid-Canada Radio Communication Ltd.* v. *Mechanical Services (1979) Ltd., supra*, note 17, where lease purchase quotations were more than mere invoices and amounted to hire-purchase instruments that were security agreements.

52(1) Where the collateral covered by a security agreement is other than instruments, securities, letters of credit, advices of credit or negotiable documents of title, registration under this Act

(a) of a financing statement relating to the security agreement constitutes notice of the security agreement to all persons claiming any interest in the collateral and is effective during the period of three years following the registration of the financing statement;

(b) of a renewal statement constitutes notice of the security agreement to which it relates to all persons claiming any interest in the collateral and

(i) if it is registered in the last 2 months of the period of effectiveness of the financing statement to which it relates, is effective during the period of 3 years following the period of effectiveness of the financing statement to which it relates, and

(ii) if it is registered prior to the last 2 months of the period of effectiveness of the financing statement to which it relates, is effective during the period of 3 years following the registration of the renewal statement; and

(c) of any other document constitutes notice thereof to all persons claiming any interest in the collateral and is effective during the remainder of the period for which the registration of the financing statement or renewal statement relating to the security agreement is effective.

However, Montgomery J. stated in *Brownell* v. *United Dominions Corporation (Canada) Ltd.*[73] respecting the Ontario *PPSA* (which has provisions similar to the Manitoba *PPSA*) that a security agreement did not "operate in rem upon persons not parties to that agreement."

The failure to perfect, or maintain perfected, the security interest created in a security agreement does not affect the validity of that security interest and security agreement as between the debtor and the secured party.[74] The failure to perfect, or maintain perfection, will affect the relationship between the secured party and third parties other than the debtor.

C. Schedules

It has been found that the schedules added to a master lease agreement from time to time in order to add property to the lease are separate security agreements which require separate financing statements to be filed with respect to each schedule. Thus the one financing statement filed for the master lease agreement would not be able to be relied upon.[75]

D. Financing Statement Descriptions

Under the Manitoba *PPSA* a security agreement and financing statement must contain a description of the collateral sufficient to identify it.[76] However, Smith J. found in *Regal Feeds Ltd.* v. *Waldner*[77] that so long as the description is sufficient within the security agreement, and the description in the financing statement is sufficient to put third parties on warning as to what may be covered, the description in the financing statement would

73. (1984), 4 P.P.S.A.C. 217 at 219 (Ont. H.C.), aff'd (1985), 34 A.C.W.S. 424 (C.A.).

74. *Canadian Imperial Bank of Commerce* v. *Klunkovski, supra*, note 27.

75. *First City Capital Ltd.* v. *Arthur Anderson Inc.* (1984), 46 O.R. (2d) 168, 9 D.L.R. (4th) 117, 4 P.P.S.A.C. 74 (H.C.).

76. *PPSA*, ss. 10 and 47(1)(c).

77. *Supra*, note 53.

be adequate. The facts of the *Regal Feeds* case were that the security agreement covered:

> "All hogs now owned by and in possession of the Debtor, including without limiting the generality of the foregoing, all pigs, sows, boars, weanlings, and feeder hogs, being in, around, or upon the Southwest Quarter of Section 26-6-3 East, or any premises to which they are removed, together with all of such livestock which may hereafter be acquired by the Debtor, and brought in, around, or upon said premises, or any other premises used by the Debtor in connection with this farming operation during the continuance of this security, or any renewal thereof."

However, the financing statement referred to "all hogs, pigs, sows, boars, weanlings and feeder hogs . . ."[78]

Smith J. found that:

> McLaren in his text *Secured Transactions in Personal Property in Canada*, vol. 2, p. 21-15 21.04[1] states:
>
> > The theory under which the registration system operates is known as notice filing. . . . Once a search has revealed the existence of a registered financing statement it is then the responsibility of the inquirer to ascertain from the parties the exact state of affairs between them concerning any secured transaction. To assist in obtaining the necessary information from an uncooperative secured party, section 20 of the Act gives certain individuals a statutory right to make a written demand on the secured party for information.
>
> It is clear therefore that the respondents had notice of a claim and it was then up to them to investigate and obtain details of the security agreement. I agree with the unanimous Saskatchewan Court of Appeal decision in *Touche Ross Ltd.* v. *Royal Bank*, [1984] 3 W.W.R. 259, 31 Sask. R. 131, 3 P.P.S.A.C. 280 at p. 285, 51 C.B.R. (N.S.) 253 (*sub nom. Re Apollo Fitness Academy Inc.; Touche Ross Ltd.* v. *Royal Bank*), 6 D.L.R. (4th) 654 when referring to the province's similar Personal Property Security Act:
>
> > "The Act has adopted a notice filing system which rejects the earlier notions that a central registry must be the depository of detailed information about the transaction between the debtor and secured party. In this case, a search of the registry would disclose sufficient information to permit the person searching to determine the existence and basic nature of the underlying agreement. . . ."
>
> I cannot locate any provision of the statute or regulations where it is stated that a financing statement must set out the details or in fact make any reference to after acquired property. Section 47(1)(c) of the Act states that the financing statement shall contain "a description of collateral sufficient to identify it."
>
> In this case the description is clear: "all hogs, pigs, sows, boars, weanlings and feeder hogs."
>
> This is clearly a description which identifies an interest in the security indicated. Notice is given it is up to the searcher to obtain any exact details from the security document itself.
>
> I would therefore declare that the security interests of Regal Feeds Ltd., the applicant has priority over the interests of the respondents.[79]

78. *Ibid.*, at 267.
79. *Ibid.*, at 268.

E. Conditions to become Security Agreement

A document that by its terms requires some part of it to be completed in order for it to become a "conditional sales contract" is not a security agreement if that part of it is not completed. In *Manning* v. *Furnasman Heating Ltd.*,[80] the Manitoba Court of Appeal held that a "proposal" remained as a mere proposal unless the instructions to complete the back of the form were followed in order to turn the document into a conditional sales contract.

F. Amendments

Where changes are made to the terms of a security agreement, it is not necessary to register a new financing statement each time a change is made. In *Trans Canada Credit Corporation* v. *Royal Bank of Canada*,[81] the individual borrower executed a chattel mortgage in favour of Royal Bank of Canada with respect to a $9,000.00 loan. A registration was made for that chattel mortgage. The loan was subsequently rewritten and a new chattel mortgage was executed and a second financing statement was registered. A further rewriting of the loan took place with a third chattel mortgage executed, and a third registration occurring. Between the time of the first and second chattel mortgages being granted by the individual borrower, that borrower also executed a chattel mortgage in favour of Trans Canada Credit Corporation on the same property. Trans Canada Credit Corporation took the position that as each loan was rewritten, the prior loan was extinguished, and that as each loan was extinguished, so was the security interest granted to the Bank. Thus, the only security interest which the Bank was entitled to act upon was the third chattel mortgage registered subsequent to the Trans Canada Credit Corporation chattel mortgage registration. Geatros J. relied upon a much quoted statement from Catzman, *Personal Property Security Law in Ontario* (1976), at page 3:

> "The fundamental aim of the Act is to provide rules under which commercial transactions can be concluded with reasonable simplicity and certainty. It recognizes that all security devices regardless of form have one single purpose—to give creditors who bargain for them special, definite, specific and exclusive rights in particular property to secure payment of a debt or satisfaction of an obligation. It is this common objective that dictates a single lien concept with precise specification of rights and obligations. *The Act abolishes multiple documentation and registration.* Thus a borrower may now charge his inventory and accounts receivable in one single document, whereas under the law in effect prior to the proclamation of this Act two documents, a chattel mortgage and an assignment of book debts, would usually be required. It permits complete integration of a borrower's needs in a single transaction by the simple expedient of abolishing distinctions in secured transactions based on form." [The italics are mine.][82]

He went on to find that the Bank's first financing statement:

> . . . gave notice to all concerned that the 1978 Dodge van is subject to a security interest held by the bank. In October 1981, the applicant could have served a demand on the bank (s. 18 of the Act) for "a statement in writing of the amount of the indebtedness and the terms of

80. (1985), [1985] 6 W.W.R. 1, 35 Man. R. (2d) 220, 5 P.P.S.A.C. 67 (C.A.), aff'g (1985), [1985] 3 W.W.R. 266, 33 Man. R. (2d) 216, 4 P.P.S.A.C. 246 (Q.B.).

81. (1985), 5 P.P.S.A.C. 1 (Sask. Q.B.).

82. *Ibid.* at 3-4.

> payment thereof as of the date specified in the demand (and) . . . a copy of the security agreement and amendments thereto." Each subsequent chattel mortgage in effect amounted to an amendment of the original one. The collateral has remained the same throughout. The Act does not require inclusion of amount and terms of payment in the financing statement. That information can be obtained from the creditor on demand. The Bank's priority is not put in jeopardy because circumstances dictated a change in amount and terms of payment from time to time.[83]

Accordingly, it was declared that the Bank had priority over Trans Canada Credit Corporation.

The decision in *Trans Canada Credit Corporation* v. *Royal Bank* should be contrasted to the Saskatchewan decision in *Saskatoon Credit Union Limited* v. *Bank of Nova Scotia*.[84] In the latter case, the individual borrowers purchased a mobile home in 1977, secured by a conditional sales contract ultimately assigned to Bank of Nova Scotia. In 1978 the individual borrowers executed a chattel mortgage in favour of Saskatoon Credit Union Limited, which was registered in 1979. In 1982 the individual borrowers executed a new chattel mortgage in favour of the Bank with the mobile home as security. The 1977 promissory note in favour of the Bank was endorsed "rewritten not paid", and that new chattel mortgage was registered subsequent to the Credit Union registration. The Credit Union took the position that the registration of the first security agreement by the Bank had expired with the result that the security interest thereunder was no longer perfected and that the security interest of the Credit Union took priority.

Gerein J. found that the position of the Bank could not be supported for two reasons:

> The first relates to the security interest created by the first agreement of June 28, 1977. That agreement created a security interest in the mobile home which was put up as collateral to secure payment to the bank by Wolch. However, the bank's security agreement of June 28, 1982, replaced the earlier agreement. Wolch no longer had a payment to make or an obligation to perform pursuant to the first agreement. This being so, the mobile home was no longer securing payment or performance of an obligation flowing from the agreement of June 28, 1977. The enforceability of the first security agreement had come to an end: *Ashmore* v. *Trans-Canada Finance Corp.*, [1930] 1 W.W.R. 537, [1930] 3 D.L.R. 488, affirmed 39 Man. R. 52, [1930] 2 W.W.R. 558, [1930] 4 D.L.R. 982 (C.A.). As a result, the security interest created by the agreement had ceased to exist. The security interest of the Credit Union then obtained priority as of June 28, 1982, being the date of the second agreement in favour of the bank.
>
> The second reason why the bank cannot succeed is that even if the security interest created by the first agreement continued after execution of the second agreement, that security interest became unperfected as of June 5, 1983, that being the date when registration of the bank's first agreement expired pursuant to the Personal Property Security Act. The registration of the second agreement by the bank did not continue the registration of its first agreement. Upon the registration of the first agreement expiring the perfection of the security interest came to an end as the perfection was based solely on registration.[85]

83. *Ibid.* at 4.
84. (1985), [1985] 6 W.W.R. 556, 5 P.P.S.A.C. 123 (Sask. Q.B.) [hereinafter *Sask. Credit Union* cited to W.W.R.].
85. *Ibid.*, at 559.

VII. Attachment

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

1. Value must be given. Value is defined as any consideration sufficient to support a simple contract, and it has been confirmed that a forbearance to sue on a loan in arrears is sufficient consideration to support the granting of a security interest.[86]

2. The debtor must have rights in the collateral.

3. The debtor and the secured party must intend the security interest in the collateral to attach.

The most difficult part of section 12 to satisfy is the "intention" element. In *Sperry Inc.* v. *Canadian Imperial Bank of Commerce and Thorne Riddell Inc.*,[87] the trial judge found that a bank did not intend its general security agreement to attach to unpaid inventory supplied by Sperry to a dealer. As a result, there was no attachment under section 12 of the Ontario *PPSA* and, thus, no perfection of the bank's security interest as against Sperry. The Ontario Court of Appeal overturned the trial court's decision in this matter, and found that there was embodied in the terms of the security agreement between the bank and the dealer enough evidence of the parties' intention that the bank's general security agreement was intended to cover Sperry's unpaid inventory.

As discussed in the writer's article reviewing the 1982-83 cases,[88] the requirement to have an "intention" to attach may raise problems when dealing with floating charges within the concepts of the *PPSA*. The discussion of this matter in *Re Huxley Catering Ltd.*[89] was adopted by Muldoon J. in *Royal Bank of Canada* v. *R.*,[90] and the same reasoning was referred to in the Saskatchewan decision in *Royal Bank of Canada* v. *G.M. Homes Inc.*,[91] where it was stated:

> The purpose of the Personal Property Security Act is to create a complete commercial code which provides a system of priorities for security interests in personal property in consensual transactions when security interests are granted. The Act specifically sets out when a security interest attaches to collateral. The use by the parties of a floating charge in a consensual transaction does not, in my opinion, raise a presumption that the parties intended the security interest to attach to the collateral at a later time. This form of security alone is not, without more, evidence of the intention of the parties that the security interest would not attach to the collateral at the time of execution. The Act, in my opinion, contemplates that for attachment to occur at a time other than on the execution of the security agreement, there must be a contrary intention contained in the agreement itself.[92]

86. *Gaudreau, supra*, note 24.

87. (1982), 40 O.R. (2d) 54, 141 D.L.R. (3d) 119, 44 C.B.R. (N.S.) 69, 2 P.P.S.A.C. 225 (S.C.), aff'd (1985), 50 O.R. (2d) 267, 17 D.L.R. (4th) 236, 55 C.B.R. (N.S.) 68, 4 P.P.S.A.C. 314 (C.A.).

88. *Supra*, note 6.

89. (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.).

90. *Supra*, note 43.

91. *Supra*, note 40.

92. *G.M. Homes, supra*, note 40 at 252.

The Ontario Court of Appeal discussed floating charges in the context of the Ontario *PPSA* in *Euroclean Canada Inc.* v. *Forest Glade Investments Ltd.*[93] and stated:

> [S.]21 of the P.P.S.A. provides that a security interest is perfected when it has attached and when all steps required for perfection under any provision of the Act have been completed. By s.12(1), a security interest attaches when the parties intend it to attach, value is given, and the debtor has rights in the collateral. Counsel for Euroclean relied on the subordination clause in Mady's debenture as indicating that the parties did not intend the security interest to attach when value was given.
>
> . . .
>
> I agree with Fitzpatrick J. that the clause does not indicate an intention that Mady's security interest was not to attach. As Fitzpatrick J. said, *supra*, at p. 18 O.R., p. 264 D.L.R., p. 218 C.B.R.(N.S.):
>
> > That provision does not indicate that the parties intended that Mady's security interest should *not* attach. It granted to Brazier the right to buy goods subject to security interests which would rank ahead of Mady's. It neither says nor implies anything with respect to the intentions of the parties with respect to the attaching of Mady's security interest.
>
> Clause (e) is directed only to the creation and ranking of security interests coming into existence after the execution of the debenture, not to the time of the attachment of the debenture. Rather than indicating an intention that Mady's security interest was not to attach, in my opinion, cl. (e) leads to an exactly opposite conclusion. If Mady's security interest was not intended to attach until default occurred under the debenture, there was no need for cl. (e). It is only if the security interest created by the debenture attached that provision had to be made for subsequent encumbrances.
>
> The problem of attachment in connection with floating charge security interests is discussed in Catzman, op. cit. at pp. 62-66. At p. 65 the learned authors make the following comments concerning the matter of attention:
>
> > When the parties contract for a floating charge security interest a key question is their intention as to when it attaches. Is it their intention that the security interest will not attach until the occurrence of some future event, such as a default, or do they intend that the security interest will attach to the collateral when value has been given but be subordinated to the rights of certain third parties arising out of stipulated dealings and activities of the debtor vis-a-vis the collateral? If the former is the intention of the parties, then the floating charge security interest will be an unattached and unperfected security interest and be subordinate to the interests of those persons set forth in s. 22(1) until an event occurs which results in crystallization. However, the foregoing review of the jurisprudence establishes that the courts have recognized the priority of the floating charge over the competing interests referred to in s. 22. In other words, the courts have construed the intention of the parties to be that the floating charge should have priority over such interests. Therefore, it is submitted that by implication when the parties contract a floating charge under this Act they intend the security interest to attach in order to create a priority position over the s. 22(1) competing interests but to be subordinate to certain stipulated interests and rights created or granted by the debtor in favour of third parties in the course of carrying on business.
>
> I would refer also to McLaren, *op. cit.*, at p. 2-13. In the present case, I believe that it was the intention of the parties that the security interest created by the debenture would attach to the collateral in existence at the time when Mady advanced the $8,000 to Brazier. With respect to after-acquired property, such as Euroclean's laundry equipment, I am of the opinion that the floating charge attached as Brazier acquired rights in the collateral. And since registration had already taken place, perfection occurred simultaneously when Brazier

93. (1985), 49 O.R. (2d) 769, 16 D.L.R. (4d) 289, 54 C.B.R. (N.S.) 65, 4 P.P.S.A.C. 271 (C.A.) [hereinafter *Euroclean* cited to 49 O.R.]. rev'g (1984), 46 O.R. (2d) 14, 8 D.L.R. (4d) 260, 51 C.B.R. (N.S.) 68, 4 P.P.S.A.C. 56 (H.C.). Leave to appeal S.C.C. refused (1985), 31 A.C.W.S. 246.

acquired rights in the laundry equipment: see s. 21 of the P.P.S.A. and Maddaugh, op. cit., at p. 360.[94]

Section 21 of the PPSA provides that a security interest is perfected when

(a) it has attached, and

(b) all steps required for perfection under any provision of the *PPSA* have been completed,

regardless of the order of occurrence. As a result, a financing statement might be registered in order to perfect a security interest and it would be the date of that filing that would determine priorities even with respect to security interests that have not attached until after the filing of the financing statement.[95] Such a result is important when dealing with the priority to after-acquired property covered by a security agreement. Without the provisions of section 21, the priority would always relate back to the date of attachment rather than perfection, and there would be a loss of certainty in dealing with the PPR system if inquiries had to always be made as to when the security interest attached as opposed to when the financing statement was registered.[96]

VIII. Perfection

Of all the concepts introduced by the *PPSA* perfection is the most important because it is time of perfection that generally determines priorities as between competing interests.

One method to become perfected is by possession of the collateral by the secured party or person representing the secured party. Perfection by possession may be achieved by repossession of the collateral,[97] but must be by the secured party or its agent. A receiver who is, by the terms of the security agreement, stated to be an agent for the debtor will not be able to affect the secured party's security interest by possession.[98]

Perfection is usually accomplished by registration because it is simple and normally the secured party and debtor do not want the collateral to be held by the secured party or its agent. However, it should be remembered that there are certain types of collateral a security interest in which can only be perfected by possession, and they include instruments, securities, letters of credit and advices of credit, and negotiable documents of title.[99]

Because of the importance of being and remaining perfected, it is necessary to have special rules to allow for continuity of perfection when certain things occur:

94. *Ibid.*, at 777.

95. *J.I. Case Credit Corporation, supra*, note 38.

96. See *Regal Feeds, supra*, note 53 for an example of attachment after registration on after-acquired collateral.

97. *Re Olmstead* (1984), 4 P.P.S.A.C. 220 (Ont. S.C.); *Re Charron, supra*, note 59.

98. *Sperry, supra*, note 87.

99. *PPSA*, R.S.O., s. 24.

1. Where there is a change in method of perfection, if such change occurs without any period when the security interest is unperfected, section 23(1) of the *PPSA* deems the security interest to be continuously perfected.[100] In order to take advantage of section 23(1), the security interest that is being reperfected must be the identical security interest originally perfected. In *Canadian Imperial Bank of Commerce* v. *International Harvester Credit Corporation*[101] the original security interest was under a lease containing an option to purchase, and was a lease intended as security. The second security interest arose by virtue of the exercise of the purchase option which resulted in a conditional sales contract being entered into between the same parties on the same collateral. Rosenberg J. found that:

> The plain meaning of this section is that the identical security interest must be perfected and then again perfected. The security interest of International under the conditional sales agreement is not the identical interest that it had under the lease option. Accordingly, International security is not deemed to be continuously perfected for the purposes of the P.P.S.A.[102]

2. Assignees of the secured party succeed to the position of the assignor at the time of the assignment.[103]

3. Movement of collateral into Manitoba.[104]

4. If there is a transfer of collateral by the debtor, the secured party must file a financing statement against the transferee within the time periods established in section 49, which provide:

> Transfer of collateral by debtor.
> 49(1) Where a security interest has been perfected by registration, and the debtor with the consent of the secured party transfers his interest in the collateral, the transferee becomes a debtor and the security interest becomes unperfected unless the secured party registers a notice in the prescribed form within fifteen days of the time he consents to the transfer.
> Where a security interest becomes unperfected.
> 49(2) Where a security interest has been perfected by registration, and the secured party learns that the debtor has transferred his interest in the collateral, the security interest becomes unperfected fifteen days after the secured party learns of the transfer and the name and address of the transferee unless he registers a notice in the prescribed form within the fifteen days.
> Second registration.
> 49(3) A security interest that becomes unperfected under subsection (1) or (2) may thereafter be perfected by registering a notice in the prescribed form or as otherwise provided by this Act.
> Execution of notice.
> 49(4) A notice under this section shall not be registered unless it is signed by the secured party of record, but it is not necessary for the notice to be signed by the debtor or the transferee of the interest in the collateral.

100. See *General Motors Acceptance Corporation of Canada* v. *Bank of Nova Scotia* (1983), 149 D.L.R. (3d) 766, 24 Man. R. (2d) 141, 3 P.P.S.A.C. 63 (Q.B.), but see also *Sask. Credit Union, supra*, note 84, which distinguished the *General Motors* decision.

101. (1985), 4 P.P.S.A.C. 329 (Ont. S.C.).

102. *Ibid.*, at 335.

103. *PPSA*, R.S.O., ss. 23(2) and 48(1), and see *Kevill* v. *Trans Canada Credit Corporation* (1979), 23 O.R. (2d) 432 (Co. Ct).

104. *PPSA*, ss. 6 and 7, and see *Gaudreau, supra*, note 24 and *Re Adair, supra*, note 62.

The section 49 filing is intended to protect persons who may purchase or finance the collateral *after* the fifteen day period has passed if no registration under section 49 takes place. A security interest is still perfected until the 15 day period passes without registration, and any person who purchases or finances within the 15 day period may not take the collateral free of the security interest.

In *Pampena* v. *Cartolano*,[105] Pampena (the plaintiff) purchased a car from Cartolano, who had purchased the car from a dealer. Cartolano had financed his purchase of the car with the dealer, who had assigned the conditional sales contract to General Motors Acceptance Corporation (GMAC). Pampena purchased the car in June, 1977. Cartolano defaulted in payments to GMAC in September, 1977, and he informed GMAC on December 20, 1977, that Pampena was in possession of the car. GMAC seized the car on December 20, 1977 and sold it on January 23, 1978. GMAC never made any filings under section 49 of the Ontario *PPSA* against Pampena. The claim by Pampena was that GMAC was required to register within 15 days after December 20, 1977, pursuant to section 49, and in failing to so file GMAC lost its priority over Pampena. German J. stated:

> I am in agreement with the plaintiff that GMAC had an obligation to register a financing change statement within 15 days of the date it learned of the sale to the plaintiff, but I do not agree that this assists the plaintiff. The purpose of the section is to protect those parties who might give security to the plaintiff. If a party contemplating advancing funds to the plaintiff and taking security over the automobile had searched against the plaintiff's name, there would be no record of the security agreements of GMAC or the Toronto Dominion Bank and anyone who advanced funds to the plaintiff on the security of the automobile at any time after 15 days after December 20, 1977, would have priority over GMAC for the amount of their advance.[106]

In Ontario and Saskatchewan, the equivalent of section 49 also applies if the debtor changes its name,[107] but in Manitoba section 49 only applies if there is a transfer of collateral.

5. The effectiveness of registration ceases (except for corporate securities in Manitoba) unless the secured party renews the registration under section 52. In Manitoba, a corporate security financing statement does not have to be renewed (subsection 52(4)), and the renewal period in Manitoba for other financing statements is three years.

6. It may be necessary to make the filing of a Financing Statement-Extend to Proceeds in order to perfect a security interest in proceeds.[108]

Subsection 22(1) of the PPSA refers to those interests to which an unperfected security interest is subordinate. One of those interests is any

105. (1984), 3 P.P.S.A.C. 258 (Ont. Co.Ct).

106. *Ibid.*, at 260-261, and see also, *Bank of Montreal* v. *Kalatzis* (1984), 29 A.C.W.S. 262 (Sask. Q.B.).

107. See *Re Media Corporation* (1984), 3 P.P.S.A.C. 253, 55 C.B.R. 283 (Ont. S.C.); *General Motors Acceptance Corporation* v. *Bank of Nova Scotia* (1985), 50 O.R. (2d) 84, 4 P.P.S.A.C. 290 (H.C.).

108. *PPSA*, s 27(2)(b), as am. S.M. 1979, c. 32, s. 3, and Man. Reg. 208/80.

person assuming control of the collateral through legal process. The obtaining of judgment and (i) issuing a direction to garnish wages or (ii) having a sheriff serve notice of the seizure, is not an assumption of control of the collateral.[109] However, payment of garnished wages into court may be enough control for the purpose of section 22(1).[110]

IX. Proceeds

Of primary importance in being able to claim against the proceeds of collateral is the requirement found in subsection 27(3) that the proceeds be identifiable or traceable. The decision in *Massey-Fergusson Industries Limited* v. *Bank of Montreal*,[111] where it was found that the proceeds were identifiable and traceable into a dealer's account at Bank of Montreal, was distinguished by the decision in *General Motors Acceptance Corporation of Canada Ltd.* v. *Bank of Nova Scotia*.[112] In the *GMAC* case the Court relied on essential differences of facts in order to distinguish the *Massey-Fergusson* case. In *GMAC*, a dealer of GMAC sold certain vehicles secured by perfected security agreements in favour of GMAC, and paid the proceeds of those sales into its general bank account with The Bank of Nova Scotia. The Bank had lent money to the dealer and taken a general security agreement against all assets of the dealer, and had an agreement with the dealer to reduce its outstanding loan on a regular basis by removing funds from the dealer's general account at the Bank into which the proceeds of the sale of GMAC secured vehicles were paid. GMAC alleged that it could trace and identify the proceeds into the account, and demanded from the Bank repayment of the amounts retained by the Bank. The Court found that GMAC could not succeed because the proceeds of sale of the various vehicles in question were neither identifiable nor traceable within the well-recognized meaning of those words, whether in the common law or equity, and relied on the judgement of the English Court of Appeal in the case of *Re Diplock*:[113]

> The equitable form of relief whether it takes the form of an order to restore an unmixed sum of money (or property acquired by means of such a sum) or a declaration of charge upon a mixed fund (or upon property acquired by means of such a fund) is, of course, personal in the sense that its efficacy is founded upon the jurisdiction of equity to enforce its rules by acting upon the individual. But it is not personal in the sense that the person against whom an order of this nature is sought can be made personally liable to repay the amount claimed to have belonged to the claimant. The equitable remedies pre-suppose the continued existence of the money either as a separate fund or as part of a mixed fund or as latent in property acquired by means of such a fund. If, on the facts of any individual case, such continued existence is not established, equity is as helpless as the common law itself. If the fund, mixed or unmixed, is spent upon a dinner, equity, which dealt only in specific relief and not in damages, could do nothing. If the case was one which at common law involved breach of contract the common law could, of course, award damages but specific relief would be out of the question.[114]

109. *Bank of Montreal* v. *Osborne* (1983), 3 P.P.S.A.C. 227 (Ont. D.C.); *Re Burton*, *supra*, note 8.

110. *Jenner* v. *K.R. Tracey Construction Co.* (1985), 5 P.P.S.A.C. 15 (Sask. Q.B.); *Gates Fertilizers*, *supra*, note 60.

111. (1985), 52 O.R. (2d) 165, 21 D.L.R. (4d) 640, 55 C.B.R. (N.S.) 314, 5 P.P.S.A.C. 27 (C.A.), var'g (1983) 44 O.R. (2d) 350, 4 D.L.R. (4d) 97, 49 C.B.R. (N.S.) 84, 3 P.P.S.A.C. 209 (H.C.).

112. *Supra*, note 107.

113. [1948] 1 Ch. 465 (C.A.).

114. *G.M.A.C.*, *Supra*, note 107 at 104.

If funds paid to a general account are frozen before the sale proceeds can be intermingled with other funds, it has been found that those proceeds would be identifiable or traceable.[115]

It should be noted that subsection 27(1) provides that where proceeds arise from some dealing with the collateral, the security interest in the collateral will continue as to the collateral unless the secured party expressly or impliedly authorized the dealing with the collateral. If the secured party authorized the dealing with the collateral subject to certain conditions, and the conditions are not satisfied, the secured party will not be considered to have authorized the dealing with the collateral,[116] and the security interest will continue in that collateral unless it is a sale in the ordinary course of business governed by section 30.

X. Sale in Ordinary Course of Business

The Ontario decisions in *Fairline Boats Ltd.* v. *Leger*[117] and *Ford Motor Credit Company of Canada* v. *Centre Motors of Brampton Limited*[118] have been consistently followed[119] and detailed discussions of those cases can be found in the first two articles of this series.[120]

It should be noted that a sale in the ordinary course of business may arise even if the sale only occurs once per year or is of goods that form a part of other property being transferred. In *Topnotch Feeds Ltd.* v. *Lo-Enn Farms Ltd.*,[121] the sale of a crop by a farmer that occurs once per year was considered to be a sale in the ordinary course of business based on the fact that, because of climactic conditions in Canada, there can only usually be one crop per year. In *Camco Inc.* v. *Frances Olsen Realty (1979) Ltd.*,[122] the sales by a developer of condominiums of appliances that were normally installed in all condominium projects sold by the developer were considered to be sales in the ordinary course of the developer's business.

XI. Subordination

All the priority rules set forth in the *PPSA* can be abrogated by a secured party subordinating its security interest to some other security interest. Section 39 provides that a secured party may, in the security agreement[123] or otherwise (such as filing a Financing Statement Form C or a separate writing[124]), subordinate its security interest to any other security interest.

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115. *Prince Albert Credit Union Limited* v. *Cudworth Farm Equipment Ltd.* (1985), 5 P.P.S.A.C. 116, 60 C.B.R. (N.S.) 49 (Sask. Q.B.).

116. *Canadian Commercial Bank* v. *Tisdale Farm Equipment Ltd.*, [1984] 6 W.W.R. 122 (Sask. Q.B.).

117. (1980), 1 P.P.S.A.C. 218 (Ont. H.C.).

118. (1982), 38 O.R. (2d) 516, 137 D.L.R. (3d) 634, 2 P.P.S.A.C. 63 (H.C.).

119. *Belleville Truck Centre Ltd.* v. *Ford Credit Canada Ltd.* (1983), 4 P.P.S.A.C. 236 (Ont. Co.Ct); *Brownell* v. *United Dominions Corp. (Canada) Ltd.* (1984), 4 P.P.S.A.C. (Ont. H.C.), 34 A.C.W.S. 424 (C.A.); *Misener Financial Corporation* v. *General Home Systems Ltd.* (1984), 27 B.L.R. 247 (Ont H.C.); *Canadian Trailmobile Finance Ltd.* v. *Lafferty-Smith Express Lines Ltd.* (1984), 24 A.C.W.S. 434 (Ont. H.C.).

120. *Supra*, notes 5 and 6.

121. (1985), 5 P.P.S.A.C. 179 (Ont. D.C.).

122. (1985), 5 P.P.S.A.C. 175 (Sask. Q.B.).

123. *International Harvester, supra*, note 101.

124. *Chrysler Credit Canada Ltd.* v. *Royal Bank of Canada* (1984), 3 P.P.S.A.C. 278 (Sask. Q.B.).

XII. Purchase-Money Security Interest[125]

The Manitoba Court of Appeal in *Clark Equipment of Canada* v. *Bank of Montreal*[126] reviewed in detail a PMSI in inventory. The facts in that case were that Clark Equipment and Clark Credit were involved in financing and supplying Clark inventory to Maneco Equipment Co. Ltd. The ordinary operating lender of Maneco was Bank of Montreal which had received a debenture from Maneco as security. That debenture was registered in the PPR prior to any financing statement registered by Clark. Clark 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 letter stating that they had or expected to acquire a PMSI in the inventory of Maneco, including all inventory whether or not manufactured or distributed by Clark. The Trial Court found that the mixing of the inventory description in the security agreement and the PMSI Notice as between inventory in which Clark would claim a PMSI and inventory in which they could not claim a PMSI, was fatal and found in favour of the Bank of Montreal. The Court of Appeal found that there was nothing in the *PPSA* which precludes the existence of more than one kind of security in the security agreement, and found that a PMSI can exist with other kinds of security interests and can be effective, and held that the detailed PMSI Notice provided by Clark to Bank of Montreal was sufficient to satisfy the requirements of subsection 34(2)(b) of the *PPSA*.

The Manitoba Court of Appeal decision in *Clark* should be contrasted to the Saskatchewan Court of Appeal in *Dube* v. *Bank of Montreal*,[127] where the Saskatchewan Court of Appeal found that a security agreement should have language whereby a PMSI is specifically granted.

The PMSI priority in inventory is not effective until such time as all parties entitled to notice under subsection 34(2) have received the notice.[128] It should be noted that the Saskatchewan *PPSA* requires PMSI notices to be sent out every two years. The Manitoba *PPSA* and Ontario *PPSA* require only one notice to be sent out.

In order to claim a PMSI in goods other than inventory all that is required is that a financing statement be filed before or within 10 days after the debtor receives possession of the collateral.[129]

In the event that a PMSI claimant does not satisfy the requirements of section 34, that PMSI claimant will rank as an ordinary secured creditor and will have its priorities determined in accordance with the provisions of section 35 of the *PPSA*.[130]

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125. Hereinafter referred to as PMSI.

126. (1984), [1984] 8 D.L.R. (4th) 424, 4 W.W.R. 519, 27 Man. R. (2d) 54, 4 P.P.S.A.C. 38 (C.A.).

127. *Supra*, note 27.

128. *Elmcrest Furniture Manufacturing Ltd.* v. *Price Waterhouse Ltd.*, *supra*, note 60; *Re Fosters Services (81) Ltd.* (1985), 5 P.P.S.A.C. 192 (Sask. Q.B.).

129. *PPSA*, s. 34(4), and see *First City Capital*, *supra*, note 75.

130. *Borg-Warner Acceptance Canada Ltd.* v. *Federal Business Development Bank* (1985), 5 P.P.S.A.C. 92 (Sask. Q.B.).

XIII. Fixtures/Building Materials

Section 36 of the *PPSA* sets forth special priority rules when dealing with a fixture. The term "fixture" is not defined in the *PPSA*. The general common law must be reviewed in order to determine whether something is a fixture that may be governed by the provisions of section 36. The general common law principles were reviewed in *Dolan* v. *Bank of Montreal*[131] where *Stack* v. *Eaton*[132] was cited as follows:

> "I take it to be settled law:—
> (1) That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as shew that they were intended to be part of the land.
>
> (2) That articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue chattels.
>
> (3) That the circumstances necessary to be shewn to alter the *prima facie* character of the articles are circumstances which shew the degree of annexation and object of such annexation, which are patent to all to see.
>
> (4) That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation.
>
> (5) That, even in the case of tenants' fixtures put in for the purposes of trade, they form part of the freehold, with the right, however, to the tenant, as between him and his landlord, to bring them back to the state of chattels again by severing them from the soil, and that they pass by a conveyance of the land as part of it, subject to this right of the tenant."[133]

The difficulty that can be found in determining what is a "fixture" using the general common law principles is illustrated by the Manitoba Court of Appeal decision in *Manning* v. *Furnasman Heating Ltd.*[134] Ultimately, the Manitoba Court of Appeal was unanimous in finding that there was no security agreement executed, but two of the three judges[135] also made comments with respect to what would constitute fixtures and, thus, be governed by section 36. Unfortunately, both those judges did not agree as to what would amount to being a fixture.

It should also be noted that the Manitoba *PPSA* excludes "building materials" from the operation of section 36. The standard for determining what constitutes building materials was adequately set forth in *Rockett Lumber and Building Supplies Limited* v. *Papageorgiou*:[136]

> When the term 'building materials' is used, the ordinary ingredients such as lumber, mortar, brick and stone are 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

131. *Supra*, note 7.
132. (1902), [1902] 4 O.L.R. 335 (C.A.).
133. *Supra*, note 7 at 198-199.
134. *Supra*, note 80.
135. Monnin C.J.M. and O'Sullivan J.A.
136. (1979), 30 C.B.R. 183 (Ont. Co.Ct).

> with other materials generally described as building material, that they must for all practical purposes be considered as building materials.[137]

The Manitoba Court of Appeal in *Manning* v. *Furnasman Heating Ltd.*[138] had an opportunity to discuss the concept of "building materials" when dealing with a furnace installed in a house, but did not seize upon the opportunity. It is evident to the writer that a furnace installed in a home in Manitoba is an essential "building material," and the Manitoba Court of Appeal in *Manning* v. *Furnasman Heating Ltd.* could easily have found in favour of Mr. Manning by determining that the furnace was a "building material." However, the Manitoba Court of Appeal missed this opportunity to make a comment as to what constitutes building materials.

XIV. Subsection 58(5)— Notice of Intention to Sell

Subsection 58(5) requires that a secured party must give a notice of its intention to sell within at least 15 days prior to the disposition of seized collateral. The notice is to be made in writing and is to be given to the debtor, any secured party registered in the PPR against a debtor and who has an interest in the collateral, and any person known by the secured party to have a security interest in the collateral. It has previously been held that a guarantor, as an obligor within the definition of "debtor" under the *PPSA*, must be given notice,[139] but the *Moskun* v. *Toronto-Dominion Bank*[140] decision is of the view that guarantors were not "debtors" under the chattel mortgage and the secured party was not required to send notices to those guarantors.

It has also been found that the initial transferee in a section 49 situation is not a person entitled to notice because he is not the debtor or any secured party registered in the PPR and does not have a security interest in the collateral.[141]

XV. Enforcement

The decision in *Mid-Canada Radio Communication Ltd.* v. *Mechanical Services (1979) Ltd.*[142] establishes that a security agreement should contain the right to seize collateral upon the happening of an event of default. Wright J. stated:

> The plaintiff's right to possession will still be determined by the provisions of the security agreement, and if the plaintiff has no contractual right to re-take the personal property on default it does not acquire that right by application of the statute. The inclusion of the words "unless otherwise agreed" in s. 58(a) reflect the ongoing importance of the security agreement itself in determining the rights of the secured party. In the present cases the secured party's rights are restricted to retention of title until payment and to suits for arrears. The agreements do not provide for acceleration of arrears, so even that right is restricted. I conclude the plaintiff has no right to possession even in the event of default. I have con-

137. *Ibid.*, at 186.

138. *Supra*, note 80.

139. *Donnelly* v. *International Harvester Credit Corp. of Canada* (1983), 22 B.L.R. 66, 2 P.P.S.A.C. 290 (Ont. Co.Ct).

140. (1985), 35 A.C.W.S. 485 (Ont. H.C.).

141. *Pampena, supra*, note 105.

142. *Supra*, note 17.

> sidered the effect of the phrase "upon default" in the opening words of s. 58. Default is defined in section 2(1) as meaning:
>
> "(1). . . the failure to pay or otherwise perform the obligation secured when due or the occurrence of any event or set of circumstances whereupon, under the terms of the security agreement, the security becomes enforceable."
>
> There was a failure to pay a secured obligation here, but no term by which the security agreement became enforceable as a result.[143]

In view of the comments of Wright J., it is essential that all security agreements contain a provision allowing the secured party to seize the collateral upon default.

In addition to providing for the right to seize the collateral, a security agreement should also always provide clearly that the costs of enforcing the security interest are to be added to the indebtedness secured by the security agreement.[144]

Every aspect of the enforcement of a security agreement must be "commercially reasonable," which the U.S. courts have interpreted as meaning that every effort to sell the collateral under every possible advantage of time, place and publicity is required. Cases respecting the issue of whether enforcement has been proceeded with in a commercially reasonable manner include *Kimco Steel Sales Ltd.* v. *Latina Ornamental Iron Works Ltd.*,[145] *Federal Business Development Bank* v. *Hamilton*,[146] *Re Station De L'Eleveur St. Redempteur*[147] and *Continental Bank of Canada* v. *Stewart*.[148] It may be that one of the requirements of a commercially reasonable enforcement of the security is to continue the operation of a business in order to secure the value for an asset, such as the goodwill of the business. However, if there is no substantial value to be gained by continuing the business, it would not be prudent or commercially reasonable to require that continued operation.[149]

XVI. Conclusion

As the *PPSA* jurisprudence is quickly coming into place, there is even greater reason to have a committee established, with representatives from each *PPSA* jurisdiction, to publish annual reports on the *PPSA* legislation similar in concept to the Uniform Commercial Code Annual Survey conducted by the American Bar Association.

143. *Ibid.*, at 573.
144. *MacDougall & Son Transport Ltd.* v. *Continental Bank of Canada* (1983), 3 P.P.S.A.C. 103 (Ont. Co.Ct).
145. (1984), 3 P.P.S.A.C. 237 (Ont. Co.Ct).
146. (1984), 4 P.P.S.A.C. 84 (Ont. Co.Ct).
147. (1984), 4 P.P.S.A.C. 231, 55 C.B.R. 140 (Ont. S.C.).
148. (1985), 31 A.C.W.S. 353 (Ont. D.C.).
149. *Ontario Development Corp.* v. *Ralph Nicholas Enterprises Ltd.* (1985), 33 A.C.W.S. 243 (Ont. H.C.).