

An All-Terrain Vehicle under the PPSA and its Regulations: A Comment on *Houle v Meyers, Norris, Penny Ltd.*

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I. INTRODUCTION

In 2004, Master Harrison of the Manitoba Court of Queen's Bench, sitting as a Registrar in Bankruptcy, rendered a judgment in the case of *Houle v Meyers, Norris, Penny Ltd.*¹ The case dealt with the meaning of the term “motor vehicle” under the *Personal Property Security Act*,² and its Regulation.³ Research shows that, despite its age, this is one of the few

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¹ *Houle v Meyers, Norris, Penny Ltd.*(sub. nom. *Houle (Re)*), 2004 MBQB 39, 182 Man R (2d) 88, 49 CBR (4th) 97, 6 PPSAC (3d) 338, [2004] 11 WWR 181 [*Houle v Meyers*].

² SM 1993 c 14.

³ *Personal Property Registry Regulation*, Man Reg 80/2000 [Regulation]. There is a second regulation passed pursuant to the legislative authority of the PPSA. See *Personal Property Registry Fees Regulation*, Man Reg 79/2004, which replaced the *Personal Property*

cases, if not the only one, that considers the issue. In the view of the authors, it is wrongly decided. We begin by laying out why we believe the case is important. In Part II, we discuss the facts in the case, and arguments that would likely have been made on both sides. Part III sets out the regulatory and statutory provisions that are pertinent to this discussion. In Part IV, the reasoning that Master Harrison uses to find that an all-terrain vehicle is not a “motor vehicle” is subjected to analysis. Because this reasoning is found to have certain difficulties, both in terms of statutory interpretation and policy, in Part V both case-law alternatives and regulatory amendment are suggested as potential remedies for this situation. If the legislature wishes to give effect to the concerns that appeared to animate the Court’s decision in *Houle v Meyers*,⁴ an amendment to a statute other than the PPSA may be in order.

II. WHY IS THIS IMPORTANT?

When the writing process for this paper began, we asked ourselves whether this case was worthy of comment. After all, it has survived as a precedent for nearly a decade, only one court has ever cited it,⁵ and we could find no other court in Manitoba that has considered the issue. Some may say that this indicates that the issue is not worthy of space in a law journal. However, this belies the concern expressed here.

It may be that some Manitoba lawyers are following *Houle v Meyers* (and therefore, not including a serial number in the financing statement).⁶

Registry Fees Regulation, Man Reg 81/2000. Neither of the latter two regulations is particularly relevant to the discussion; therefore, neither will form part of the discussion in this article.

⁴ *Supra* note 1.

⁵ *Re Hodgson*, 2004 SKQB 94, 245 Sask R 312, 50 CBR (4th) 83 at para 24, Registrar Herauf. This case was not decided under the PPSA at all. It was decided under section 66 of *The Saskatchewan Farm Security Act*, RSS 1978, c S-17.1 (“SFSA”). The case considers whether a Quad is exempt from seizure under the latter piece of legislation. It was found on the facts that the Quad was not exempt from seizure, because it was not used in *bona fide* farming operations. However, based on the reasoning in *Houle v Meyers*, the Court does not foreclose the possibility that Quads that are used in farming exempt from seizure pursuant to the provisions of the SFSA.

⁶ A financing statement is the document filed (that is, registered, in the parlance of the PPSA) in the public registry to show that a security interest has been taken in one or

Others may be ignoring it (and therefore, despite the holding in *Houle v Meyers*, including a serial number as part of the registration). Still others may not even be aware of the case. No matter what, this means that the treatment of all-terrain vehicles—and perhaps other types of machinery as well—under the PPSA is uncertain. Part of the purpose of the PPSA is to provide certainty in the law.⁷ The fact that uncertainty exists necessarily means that there is a lack of predictability in the ability to enforce security agreements. This in turn increases the cost of credit. Again, the PPSA seeks to avoid this result. Therefore, in the view of the authors, the law on this issue can and should be clarified, through either regulatory amendment, or a ruling of a higher Manitoba court.

III. FACTS AND ARGUMENTS

The facts of the case were as follows: The debtor (Houle) declared bankruptcy,⁸ and Meyers, Norris, Penny Ltd. was appointed as her trustee in bankruptcy.⁹ A credit union had a general security over all of the assets of the debtor.¹⁰ The only asset really at issue in the case was an all-terrain vehicle. It seems as though the parties were agreed¹¹ that the assets fit the definition of “consumer goods”¹² under the PPSA.

Given this concession, the trustee in bankruptcy argued that the registration was invalid.¹³ If the registration was invalid vis-à-vis the all-terrain vehicle, the security interest¹⁴ was attached¹⁵ but unperfected.¹⁶ If it

more pieces of personal property. See PPSA, *supra* note 2, s 1, *sv* “financing statement”.

⁷ Ronald CC Cuming, Cathrine Walsh and Roderick J Wood, *The Essentials of Canadian Law – Personal Property Security Law* (Toronto: Irwin Law, 2005) at 7-8.

⁸ *Houle v Meyers*, *supra* note 1 at para 2.

⁹ *Ibid* at para 2.

¹⁰ *Ibid* at para 3.

¹¹ *Ibid* at para 11.

¹² Consumer goods are goods used in the personal life or household of the debtor. See PPSA, *supra* note 2, s 1, *sv* “consumer goods”.

¹³ *Ibid*, s 43(8)(b).

¹⁴ A “security interest” is the term for the unitary concept of the interest in property of the debtor consensually granted to the creditor by the debtor, generally to ensure the performance of an obligation of a debtor. As implied in the previous sentence, most

was unperfected, the interest of the trustee in bankruptcy would defeat the interest of the secured party.¹⁷

The Court found that the all-terrain vehicle was NOT a “motor vehicle” under the PPSA and its Regulation. Since it was not a “motor vehicle”, it was also not a “serial numbered good.” Since it was not a serial numbered good, the serial number of the all-terrain vehicle did not need to be included in the financing statement. Since it did not need to be included, there was no error in the financing statement. Since there was no error, the security interest was perfected by the registration of the financing statement.¹⁸ Since the security interest was perfected, it stood in priority to the interest of the trustee in bankruptcy.¹⁹

IV. REGULATORY AND STATUTORY FRAMEWORK

A. The Regulation

The following definitions are found in section 1 of the Regulation, and are relevant to the discussion offered below:

often, the “obligation” referred to is the obligation of a debtor to repay amounts advanced under a loan.

¹⁵ “Attachment” is in essence the creation of the security interest, for the purpose of the statute. The debt owed by the debtor is attached to the property in which the creditor is granted a security interest. The elements for attachment are provided for in sections 10 and 12 of the PPSA, *supra* note 2.

¹⁶ Perfection is the state where the creditor has done everything that the creditor can do (either unilaterally or with the assistance of the debtor) so that the creditor takes the best priority position possible. “Priority” is referred to, and discussed in more detail, *infra* note 25.

Expressed as a mathematical equation, perfection might be illustrated as follows: “Perfection = Attachment + Perfecting Step.” Attachment is described, *supra* note 15. For our purposes, the PPSA provides for two different possible perfecting steps. The first is possession of the collateral by the debtor. See PPSA, *supra* note 2, s 24. The second is the registration of a financing statement. See PPSA, s 25. A financing statement is discussed in more detail, *supra* note 6.

¹⁷ PPSA, *supra* note 2, s 20(b).

¹⁸ *Ibid.*

¹⁹ *Ibid.*

"serial numbered goods" means

- (a) except where clause (b) applies, motor vehicles, trailers, mobile homes, aircraft, boats or outboard motors for boats, and
- (b) in relation to a registration that was made before the Act came into force, collateral referred to in clause (a) that, under the law in force immediately before the Act came into force, was, or was required to be, described in the area of the financing statement designated for motor vehicle description;

"motor vehicle" means a mobile device that is propelled primarily by any power other than muscle power

- (a) in, on or by which a person or thing may be transported or drawn, and that is designed for use on a road or natural terrain or
- (b) that is being used in the construction or maintenance of roads, and includes a pedal bicycle with a motor attached, a combine or a tractor, but does not include a device that runs on rails and does not include machinery, other than a combine or a tractor, designed for use in farming;

B. The PPSA

The following provisions of the PPSA are also relevant:

- 2(2) Except where otherwise provided in this Act, the determination whether goods²⁰ are "consumer goods",²¹ "inventory"²² or "equipment"²³ shall be made as of the time the security interest in the goods attaches.
- 35(1) Where this Act provides no other method²⁴ for determining priority²⁵ between security interests,²⁶

²⁰ "Goods" are tangible personal property that does not fall into other forms of personal property provided for in the PPSA. See PPSA, *ibid*, s 1 *sv* "goods".

²¹ The definition of "consumer goods" is provided, *supra* note 12.

²² "Inventory" is, among other things, the goods intended to be used, consumed or sold in the business. See PPSA, *ibid*, s 1 *sv* "inventory".

²³ "Equipment" refers to all goods that are neither consumer goods, nor inventory. See PPSA, *ibid*, s 1 *sv* "equipment".

²⁴ The opening words of the section make it clear that this is simply the default priority rule. Other priority rules can apply in specific factual scenarios. For one example of such a specific factual scenario, the concept of a "purchase-money security interest" will alter the general priority rule. On this point, see PPSA, *ibid*, s 34(2).

²⁵ Priority is perhaps best described by analogy to a line. A debtor may give more than one security interest in the same piece of personal property to different people. If a

- (a) priority between conflicting perfected²⁷ security interests in the same collateral²⁸ is determined by the order of the occurrence of the following:
 - (i) the registration of a financing statement without regard to the date of attachment of the security interest,
 - (ii) possession of the collateral under section 24 without regard to the date of attachment of the security interest, or
 - (iii) (perfection under section 5, 7, 26, 28, 29 or 74,²⁹
 - whichever is earliest;
 - (b) a perfected security interest has priority over an unperfected security interest; and
 - (c) priority between conflicting unperfected security interests is determined by the order of attachment of the security interests.
- 43(6) The validity of the registration of a financing statement is not affected by a defect, irregularity, omission or error in the financing statement or in the registration of it unless the defect, irregularity, omission or error is seriously misleading.
- 43(7) An error in the spelling of any part of the name of a debtor set forth in a financing statement or other document required or authorized to be registered in the Registry

debtor does so, there must be a way of figuring out who gets paid first out of the money when the asset is sold. This is referred to as a “priority contest”. The winner of the priority contest will receive funds from the sale of a given piece of personal property before the loser of the priority contest. In other words, the winner is “first in line” with respect to the particular asset. Note, though, that priority is a determination made on an asset-by-asset basis. One creditor may be in a priority position as against another with respect to one asset, yet, the other creditor may be in a priority position as against the first creditor with respect to a different asset.

²⁶ *Supra* note 14.

²⁷ *Supra* note 16.

²⁸ Collateral is a piece of personal property that is subject to a security interest. See PPSA, *supra* note 2, s 1 *sv* “collateral”.

²⁹ These sections allow for some forms of perfection that can be “automatic” and/or temporary. For present purposes, none of these elements is particularly relevant to the issue of serial numbered goods. Therefore, these types of perfection (without a perfecting step being taken by the secured party) will not be the subject of further comment here.

invalidates the registration and destroys the effect of the registration if a search of the Registry under the correct name of the debtor would not reveal the registration.

- 43(8) Subject to subsection (11), where one or more debtors are required to be disclosed in a financing statement, or where collateral consists of consumer goods prescribed as serial numbered goods, and a seriously misleading defect, irregularity, omission or error appears in
- (a) the disclosure of the name of any of the debtors, other than a debtor who does not own or have rights in the collateral; or
 - (b) the serial number of the collateral; the registration is invalid.
- 43(9) Nothing in subsection (6) or (8) requires as a condition to a finding that a defect, irregularity, omission or error is seriously misleading, proof that anyone was misled by it.
- 43(10) Failure to provide a description in a financing statement in relation to any item or kind of collateral does not affect the validity of the registration with respect to other collateral.

V. THE SPECIFIC REASONING

To sustain the finding that an all-terrain vehicle (referred as a “Quad” in the excerpt provided below) is not a “motor vehicle”, the court relies on the closing words of the definition of “motor vehicle” in the Regulation³⁰ (“does not include a device that runs on rails and does not include machinery, other than a combine or a tractor, designed for use in farming”) [emphasis added]. With respect to this, the Court held as follows:

24. This court is certainly prepared to accept that Quads have a recreational use and are in our society in no way restricted to agricultural use. They are, however, used extensively in farming and in particular by those farmers earning their livelihood with cattle and other livestock. Most importantly however the subject machine appears to have been “designed for use in farming” as well as many other commercial ventures. If the machine had not been designed for agricultural purposes, it would not function or be so widespread in that industry.³¹

³⁰ *Supra* note 3.

³¹ *Houle v Meyers*, *supra* note 1 at para 24 [emphasis added].

In the view of the authors, this paragraph misconstrues the exclusion, for at least five reasons. The first three are interrelated statutory interpretation arguments. The fourth is a factual difficulty based on the concessions of both sides in the litigation process in the particular case. The fifth is an explicitly policy-based argument. Let us consider each of these reasons in turn.³²

A. Statutory and Regulatory Interpretation

1. *Trucks and Aircraft*

First, if Master Harrison's holding is sound, what is to stop people from making the argument that trucks are used equally extensively in farming, or even more so? Perhaps more importantly, if the argument of

³² An additional argument opposed to Master Harrison's approach does suggest itself simply on the structure of the definition of "motor vehicle" given above. The farming exclusion is contained within paragraph (b) of the definition. Therefore, it could be argued that the exception applies only to that paragraph. If there were the case, nothing which transported people or drew machinery that was used in farming would be subject to the exclusion. In fact, in the view of the authors, as discussed below, an all-terrain vehicle would fall under paragraph (a), because it can be used to either transport people or draw machinery, and is clearly used on natural terrain. Therefore, the exclusion provided for in paragraph (b) would have no application.

However, it is clear some motorized farm equipment (other than just a tractor or combine) will transport the driver. Nonetheless, in the view of the authors, it is clear that such machinery was meant to be excluded as farm machinery.

One other point supports the same conclusion, that is, that despite the actual formulation of the definition, the exclusion should apply to the entire definition. Paragraph (b) begins by stating a general rule ("used in the construction or maintenance of roads"), followed by three specific inclusions ("a pedal bicycle with a motor attached", "a combine" and "a tractor"), and two specific exclusions ("a device that runs on rails" and "machinery, designed for use in farming"). The issue is that the specific inclusions and the specific exclusions are not really connected, in any meaningful way, to the general rule. In fact, in the view of the authors, the specific inclusions and exclusions only make sense when read in the context of the whole definition, that is, paragraphs (a) and (b) together. Therefore, the argument provided above should not be accepted.

Further, as discussed in more detail below (in Part V.A.), the definition of "motor vehicle" should be amended to put the exclusion of motorized farming equipment into its own paragraph (after paragraphs (a) and (b)) so that it is clear that the exclusion of motorized farming equipment applies to both prongs of the definition.

Master Harrison is sound, there is nothing to stop the argument from succeeding. It is the opinion of the authors that it is quite clear that a truck is a “motor vehicle.”³³ Also, snowmobiles are often used in winter farming operations as well (often in herding). Finally, there can be no doubt that some aircraft are in fact used in crop-dusting operations. Does this mean that any snowmobile or aircraft that could be used in farming is outside the serial-numbered goods regime? On Master Harrison’s holding, the answer would apparently be in the affirmative.

This is clearly not consistent with the intention of the legislature. The reasoning behind the creation of the regime was to provide more information in the financing statement with regard certain types of assets,³⁴ and avoid a particular type of mischief.³⁵

³³ All of the following cases treat a truck as serial numbered goods. See *Tacan v Hamiota Credit Union Ltd.*, [1980] MJ 365, Ferg Co Ct J, as he then was; *Guntel v Kocian*, [1985] 6 WWR 458, 36 Man R (2d) 179, (Man QB) *per* Dureault J; *General Motors Acceptance Corporation of Canada Ltd.*, and *Bank of Nova Scotia*, [1983] MJ 86, 149 DLR (3d) 766, 24 Man R (2d) 141, 3 PPSAC 63, (MBQB) *per* Deniset J; *International Harvester Credit Corp. v Bell's Dairy Ltd. (Trustee of)* (1986), 30 DLR (4th) 387, 6 PPSAC 138, (Sask CA) *per* Cameron JA; *GMAC Leaseco Ltd. v Moncton Motor Home & Sales Inc. (Trustee of)* (2003), 2003 NBCA 26, 227 DLR (4th) 154, (NBCA) *per* Robertson JA [*Moncton Motor Home*].

³⁴ We are working on a larger article on the serial numbered goods regime. Its working title is “Billy, Don’t You Lose My Number’: Law Reform with Respect to the Serial Numbered Goods Regime under the Manitoba PPSA”. [“Law Reform”] (forthcoming) There, we argue that most serial numbered goods are of a high value, are often financed, are fairly common in terms of their use (especially motor vehicles), are highly mobile or transportable, and indistinguishable from some other goods of the same type. Since the assets have these characteristics, a serial number as a search criterion to allow differentiation is a positive aspect of the PPSA.

³⁵ The mischief that the serial numbered goods regime is designed to reduce is often referred to as the “A-B-C-D problem” with respect to highly mobile goods. Essentially, this problem arises where highly mobile goods (which are collateral) are transferred a number of times. As explained in *Royal Bank of Canada v Steinhilb's Masonry Ltd.*, 2003 SKQB 299, [2003] SJ 520, [2004] 1 WWR 267, 237 Sask R 297, 46 CBR (4th) 116, 6 PPSAC (3d) 1, 2003 CarswellSask 531 [*Steinhilb's*], Klebuc J, as he then was, at para 14:

“It follows that s. 35(4) of the PPSA and ... the Regulations (“the serial number registration regime”) are intended to eliminate, or at least abate, what is often described as the “A-B-C-D problem” associated with personal property registry systems that employ the debtor’s name (i.e., “B”) as their registration and search criterion. The following example illustrates the noted deficiency:

In the view of the authors, the decision of Master Harrison does nothing to achieve these public-policy goals. The decision would actually make it easier for the mischief to occur, with respect to at least three types of goods that are clearly meant by the legislature to be included (those being, trucks snowmobiles and aircraft). Therefore, the result is that the argument put forward by Master Harrison does not survive the concept of consequentialist analysis in statutory (or in this case, regulatory) interpretation.³⁶

2. The Purpose of the Inclusion of Tractors and Combines

Second, why would one include in the definition of “motor vehicle”, the tractor or combine, yet exclude other motorized farming equipment, such as a bailer, tiller, or grain separator. The latter three are excluded by the closing wording of the definition. Why? In the view of the authors, this is due to a combination of at least two factors: (i) a concession to practicality; and (ii) a desire to protect farming. Let us consider each of these in turn.

i. Concession to Practicality

With respect to the former, practicality, there could be issues since it is not entirely clear that all motorized farming equipment would have a serial number. Much of it will be powered by the tractor that pulls or draws the other equipment. Therefore, it is powered by something other than muscle power. This fulfils the first requirement in the opening words of the definition. Some of the equipment will transport materials (a bailer will bring together hay, and a tiller will move earth, for example). This could be said to fulfil the second requirement under paragraph (a) of the

A obtains a security interest in B's goods. B sells his goods to C who in turn offers to sell them to D. D conducts a registry search based on C's name, being the only search criterion available to him/her. The search does not reveal A's security in the goods because A's security interest was perfected by registration based on B's name. In the result, the registry system will not afford D any protection vis-à-vis A, notwithstanding his/her search.”

For a more detailed discussion of the “A-B-C-D problem”, see, for example, Cuming, Walsh and Wood, *supra* note 7 at 255-256, and “Law Reform”, *ibid.*

³⁶ See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Toronto: LexisNexis Canada, 2008) c 9, in particular at 299-302, and at 309-317.

definition. All of this equipment would be used on natural terrain. This fulfils the third requirement under paragraph (a) of the definition.

It is important that each piece of equipment receive a unique serial number that would allow a creditor to distinguish this piece of equipment from any others. In the view of the authors, this is implicit in the nature of the serial numbered goods regime itself. A serial number is a search criterion. If a serial number were only a reference to a class of farming equipment, rather an identifier of a single piece of equipment, it would serve little purpose as a search criterion. Where either: (i) there is no serial number; or (ii) the serial number would not be unique to the particular piece of equipment, it would be problematic to expect a serial number to be included. Therefore, by restricting farm equipment for which a serial number is expected under the regime, to only tractors and combines, the legislature can be relatively certain that the required information does in fact exist, and that this information will be useful as a search criterion.

ii. The Desire to Protect Farming

There can be little doubt that on the Canadian prairies, the desire to protect farming enterprises has found statutory expression. For example, one of the few statutes³⁷ to which the PPSA is subject (and subordinate)³⁸ is *The Farm Machinery and Equipment Act*.³⁹ A careful reader might ask: How is it that the exclusion of farming equipment from the definition of “motor vehicle” protects farming? After all, exclusion from the serial numbered goods makes it easier for the secured creditor to seize the collateral. This, some would argue is the opposite of protection. But, this is only one side of the argument. As one of the authors explained in another publication:

In one sense, the PPSA can be explained as a series of policy choices that balance the interests of three sets of parties. On the one hand, the PPSA seeks to protect subsequent acquirers of property that is subject to a security interest. As mentioned above, the common-law rules of property could work significant injustice to such acquirers if the rules were strictly applied. On the other hand, if

³⁷ The others are *The Consumer Protection Act* RSM 1987 c C200, or a provision for the protection of consumers in any other Act. All other statutory provisions are subject to the PPSA in any case of conflict.

³⁸ PPSA, *supra* note 2, s 69(1).

³⁹ SM 1998, c 38.

the PPSA were to *overly* favour the interests of a third-party acquirer of property, the credit markets – which rely extensively on credit providers being granted an interest in the property of debtors – could potentially grind to a halt, because the property interest granted to the credit provider would not give sufficient certainty for the provider to grant credit to the debtor. Therefore, many of the provisions of the PPSA to be discussed try to resolve the tension between protecting the availability of credit in the market by protecting the security interest granted to the credit provider, on the one hand, and by protecting the finality of transactions of general commercial transactions – such as sales to third-party purchasers – by ending the security interest of the secured party in the original collateral, on the other hand.

Finally, the third group involved in the area of secured transactions, and whose interests are therefore sought to be protected by at least certain provisions of the PPSA, is the debtor who grants the security interest to the credit provider. For example, the requirement that all actions taken by the secured party pursuant to the security agreement must be taken in a commercially reasonable matter means that the debtor can prevent commercially unreasonable behavior by the secured party.⁴⁰

A farm is a major undertaking. As such, many of the assets of a farming family will be tied to the farming operation. Yet, it is clear that many farms require financing. If the law makes it too hard for lenders to take security on farm loans, farming will be more difficult, not less so. Given the protection offered by *The Farm Machinery and Equipment Act*,⁴¹ the balance is that the Act tells the secured party, and the searcher, among others, that certain practices with respect to farming machinery are prohibited unless certain statutory requirements are met, but it is easier to take a security interest in that machinery. In other words, rather than having to jump two sets of hurdles (one set in the *Farm Machinery and Equipment Act*, the other set in PPSA) when taking a security interest in a farm machinery, the *Farm Machinery and Equipment Act* provides the only set of hurdles, unless some provision of the PPSA is incorporated by reference.⁴²

But if the case law expands the definition of farming machinery to everything that could be used in farming that balance may be thrown off.

⁴⁰ Darcy L MacPherson, “Financial Leasing in Common Law Canada” (2011) 16:1 & 2, *Unif L Rev* 83 at 89.

⁴¹ *Farm Machinery and Equipment Act*, *supra* note 39.

⁴² See, for example, *The Farm Machinery and Equipment Act*, *ibid*, ss 35(3) and 35(4).

Not only will this have an effect on farming, it would also affect any business that uses any machinery that might also be used in farming.

Neither of these issues (practicality or the protection of farming) is, in the view of the authors, a pressing concern with an all-terrain vehicle. There is clearly a serial number that could be entered with respect to virtually every type of all-terrain vehicle. Therefore, there is no practical reason for not including a serial number. With respect to the desire to protect farming, on the other hand, the non-inclusion of all machinery used on the farm (including all terrain vehicles) may in fact do damage to the balance that the legislature was likely trying to achieve, rather than enhancing it. Therefore, interpreting the exclusion of farming machinery from the definition of “motor vehicle” in the way, and for the reasons, suggested by Master Harrison does not, in the view of the authors, achieve a particularly positive result, and may do harm. Therefore, it is to be avoided.

3. *The Timing Issue*

Third, the regime must work as a cohesive whole. It is important to recognize that the intended use of the goods at the time of attachment defines the categorization of the serial numbered good as inventory, equipment or consumer goods of the debtor.⁴³ Therefore, the creditor must know his, her or its registration obligations under the PPSA at the time that the security interest was created. After all, it is possible for the perfecting step to be taken before, at the same time, or following the attachment of the security interest.⁴⁴ In the view of the authors, to do otherwise would leave open the possibility that subsequent events could alter the registration requirements of the secured party, after the security interest in the goods has attached, and the registration has been made.⁴⁵

A simple example might assist here. This example assumes that if an all-terrain vehicle is used in farming, it falls under the farming machinery exclusion, whereas if it is not, a serial number is recommended, because

⁴³ PPSA, *supra* note 2, s 2(2).

⁴⁴ *Ibid*, s 19.

⁴⁵ This is not just a hypothetical scenario. In *Re Hodgson*, *supra* note 5 at para 24, it is suggested (admittedly in *obiter dicta*) that this is the appropriate way to deal with the use of all-terrain vehicles under the PPSA. We will return below to why this is better dealt with through either regulatory or statutory amendment.

this is equipment.⁴⁶ On January 1, 2012, Big Bank registers a security interest against an all-terrain vehicle purchased by Aaron Andrews, a farmer in Carmen, Manitoba. The all-terrain vehicle is used in the farming operation. Aaron then sells the all-terrain vehicle to Brian Black, for fair market value, without the permission or knowledge of Big Bank. Brian Black is not a farmer, and does not wish to use the all-terrain vehicle for anything other than recreation. A few days later, Brian's friend, Charlie Carlson, wishes to purchase the all-terrain vehicle for almost \$500 more than fair market value. Brian agrees. Charlie goes to his local Credit Union. The manager is even astute enough to ask whether the all-terrain vehicle is used in a farming operation. Charlie answers honestly, saying it is not. Charlie has no knowledge of Aaron, that he owned the all-terrain vehicle, or how the all-terrain vehicle was used previously. Charlie gets the serial number of the all-terrain vehicle from Brian. The Credit Union searches both Brian's name, and the serial number of the all-terrain vehicle. Neither search showed any registrations.

The "A-B-C-D problem"⁴⁷ is clearly an issue here. As mentioned earlier, one of the primary purposes of the entire serial-numbered goods regime is to reduce the "A-B-C-D problem."⁴⁸ Therefore, to the extent that this detracts from the solution to the "A-B-C-D problem", it undermines the serial-numbered goods regime as a whole. Therefore, in our view, if the idea (to not require the registration of the serial numbers of all-terrain vehicles in all circumstances) would do damage to the regime of which it is a part, this militates against the adoption of this approach.

Moreover, all of this can happen without the knowledge of the original secured party (Big Bank). Once the categorization of the goods changes, there is no opportunity for the original secured party to protect its interest by registering the serial number. Therefore, when circumstances occur which are beyond the control of the secured party, its interest may be affected. This is generally to be avoided.⁴⁹

⁴⁶ *Ibid.*, s 35(4).

⁴⁷ This problem is discussed in more detail *supra* note 35.

⁴⁸ *Ibid.*

⁴⁹ One notable exception to this general statement can be found in the area of conflict of laws under the PPSA. Where the collateral is moved out of the Canadian common law jurisdiction in which the original registration was made into another Canadian common law jurisdiction, the secured party has at most 60 days in which to re-register

Furthermore, even if the original secured party did not know in advance that this was going to happen, the solution is simple: enter the serial number into the registration. But the most common time for a potential lender to get information from a potential borrower is when the original loan agreement is negotiated. So, if the original secured party may have to enter the serial number at a later date, the best time to ask for the information is at the beginning of the lending relationship. However, if the creditor asks for (and presumably receives) the information (the serial number) at the beginning of the lending relationship (so that the creditor has it if need arises at a later date), the question is simple: Why not enter the serial number into the financing statement as soon as one has it? In the view of the authors, if the secured party has to have the information on file in any event, and could enter that information into the original registration, there is no practical reason for the distinction between machinery actually used in farming, on the one hand, and machinery that could be used in farming, on the other.

Also, section 2(2) indicates the expected timing of categorization, that is, at the time of attachment of the security interest at issue. This means that there is no opportunity to decide that since the all-terrain vehicle is in fact being used in farming, it should be excluded from the serial-numbered good regime. The PPSA itself does not allow for the success of such an approach. In other words, there is no practical advantage to a later change to categorization and there is also a legal impediment contained in the PPSA itself.

B. A Factual Difficulty

Fourth, as a matter of law, farming is generally carried on as a business. The parties have already agreed that the all-terrain vehicle is a “consumer good.”⁵⁰ This, in the view of the authors, specifically excludes any business activity, including farming. In other words, the use of the closing language is completely inconsistent with the acceptance of the parties that the matter is both intended for household use, yet it is designed for use in farming. Therefore, in order for the analysis offered by Master Harrison to be correct, the farming exclusion must apply to any

the financing statement with respect to the collateral in the new jurisdiction. On this point, see PPSA, *supra* note 2, for example, ss 5(3), 6(2) and 7(3).

⁵⁰ *Supra* note 12.

equipment that could be used in farming (except, of course, the tractor and the combine, which, though they are clearly used in farming, are specific inclusions in the definition of “motor vehicle”).

C. A Policy Concern

Fifth, the labelling of something as a “serial numbered good” does not mean that a security interest cannot be granted in that asset. Rather, it means simply that additional information must be provided by the registrant⁵¹ with respect to the asset in order for the registration to be complete. In other words, requiring the inclusion of the serial number does nothing more than add one step for the registrant, to provide information that the registrant can obtain from the debtor as a condition of the loan. Yet, the absence of the information may prove quite costly to the searcher who, if the search is conducted on the serial number, may not locate the registration. As a result, the searcher may lend money to the debtor reasonably believing that there is no outstanding registration against something which would appear to be closely akin to a car, a truck or other motor vehicle, yet unbeknownst to the searcher is subject to different rules. Therefore, in the view of the authors, it is better to err on the side of finding more motorized transports to be “motor vehicles”, rather than fewer, because so little has to be asked of the registrant. To not demand that small action by the registrant may mislead searchers.

VI. THE ALTERNATIVES

Is there an approach that better calibrates the wording of the regulation to its intended purpose? We believe there is. Whether implemented as a regulatory amendment, or through case-law, an approach that looks at whether or not at the time of design of the equipment or implement, its primary expected use would be in farming would seem to do the job. It would be rare indeed that a searcher in looking at a farming implement (or even seeing its name on a listing of assets of the debtor as part of the general security agreement) would be misled into believing that the implement was not used in farming.

⁵¹ The term “registrant” refers to person who is indicated as such on the financing statement. In general, this will be a reference to either the secured party or its representative.

On the other hand, someone could certainly be forgiven for thinking that an all-terrain vehicle is a “motor vehicle.” Before reading *Houle v Meyers*,⁵² we certainly would have made this mistake, and we are supposed to be experts with respect to the PPSA. Therefore, a searcher might reasonably search only the serial number and find no registration, and be left without a remedy. On this view, unless it is clear that the implement at issue falls within the exception, the best course of action is for the law to require a serial number for anything that might reasonably fall within the definition as a serial numbered good, and subject the good to the regulatory and statutory provisions discussed in Part III. There are, in the view of the authors, three ways to achieve a better result: (i) an amendment to the Regulation;⁵³ (ii) statutory amendment to legislation other than the PPSA; or (iii) case-law that in essence overrules the decision of Master Harrison.

A. Regulatory Amendment

In the view of the authors, the following alterations to the definition of “motor vehicle” would be sufficient to accomplish the goal set out here:

“motor vehicle” means a mobile device

- (a) in, on or by which a person or thing may be transported or drawn, and that is designed for use on a road or natural terrain or
- (b) that is designed for use primarily in the construction or maintenance of roads,

and includes

- (c) a pedal bicycle with a motor attached,
- (d) a combine and
- (e) a tractor,

but does not include

- (f) any device that is propelled primarily by muscle power, including a pedal bicycle without motor attached;
- (g) a device that runs on rails;
- (h) machinery, other than a combine or a tractor, designed for use and generally known to be primarily intended at the time of its design for use in farming;

⁵² *Supra* note 1.

⁵³ *Supra* note 3.

In the view of the authors there are several advantages to this formulation over the current one. First, it avoids the problem of trying to sort out whether the farming equipment exclusion—currently contained within paragraph (b) of the definition—is restricted to only that paragraph.⁵⁴ From this formulation, it is quite clear that the exclusions apply to the entire definition, rather than potentially only one part of it.

Second, it is consistent with the definition of “lease for a term of more than one year” under the PPSA, which provides as follows:

“lease for a term of more than one year” includes a lease

- (a) for an indefinite term and includes a lease for an indefinite term that is determinable by one or both of the parties within one year from the date of its execution
- (b) initially for a term of one year or less than one year where the lessee, with the consent of the lessor, retains uninterrupted or substantially uninterrupted possession of the leased goods for a period in excess of one year after the day the lessee, with the consent of the lessor, first acquired possession of them, but the lease does not become a lease for a term of more than one year until the lessee's possession extends for more than one year, and
- (c) for a term of one year or less, where
 - (i) the lease provides that it is automatically renewable or that it is renewable at the option of one of the parties or by agreement of the parties for one or more terms, and
 - (ii) the total of the terms, including the original term, may exceed one year,

but does not include a lease

- (d) involving a lessor who is not regularly engaged in the business of leasing goods,
- (e) of household furnishings or appliances as part of a lease of land where the goods are incidental to the use and enjoyment of the land, or
- (f) of prescribed kinds of goods, regardless of the length of the lease term;⁵⁵

Like that definition, there is a general rule (a lease that would generally be viewed as being for a term of more than one year, implied in

⁵⁴ See the argument presented, *supra* note 32.

⁵⁵ PPSA, *supra* note 2, s 1, *sv* “lease for a term of more than one year”.

the word “includes” in the opening line of the definition), a list of specific inclusions (paragraphs (a) through (c)), followed by a list of specific exclusions (paragraphs (d) through (f)). Consistency in legislative and regulatory drafting is to be encouraged.⁵⁶ Therefore, consistency between the form of the definition of “lease for a term of more than one year” in the PPSA, and the definition of “motor vehicle” in its Regulation is positive.

Third, this approach is also consistent with the definition of a “commercial consignment”, as follows:⁵⁷

“commercial consignment” means a consignment under which goods are delivered for sale, lease, or other disposition to a consignee, who, in the ordinary course of the consignee's business, deals in goods of that description, by a consignor who

- (a) in the ordinary course of the consignor's business, deals in goods of that description, and
 - (b) reserves an interest in the goods after they are delivered,
- but does not include an agreement under which goods are delivered
- (c) to an auctioneer for sale, or
 - (d) to a consignee for sale, lease or other disposition if the consignee is generally known to creditors of the consignee to be selling or leasing goods of others;

Perhaps even more important than the structure of the definition is the case law under the section. In *Royal Bank of Canada v Autotran Manufacturing Ltd.*,⁵⁸ the Bank found itself in a priority contest with Harmon International Industries Inc., over goods in the possession of Roundup Sales & Service Ltd. Roundup was a customer of the Bank who was in default in its obligations to the Bank.⁵⁹ Harmon was an equipment supplier to Roundup on consignment. If the consignment from Harmon

⁵⁶ Inconsistency between the enabling statute and the delegated legislation (such as regulations) made pursuant to its provisions can invalidate the delegated legislation. See, for example, Denys C Holland & John P McGowan, *Delegated Legislation in Canada* (Toronto: Carswell, 1989), at 181-182. Consistency in drafting between makes such inconsistency less likely.

⁵⁷ PPSA, *supra* note 2, s 1, *sv* “commercial consignment”.

⁵⁸ [1991] 6 WWR 238, 95 Sask R 250, (Sask QB) *per* McLean J [Harmon].

⁵⁹ *Ibid* at 7.

to Roundup was a “commercial consignment”,⁶⁰ Harmon was required to register its interest in the goods consigned, in order to protect that interest. Harmon had not done so properly.⁶¹ In other words, if Harmon could not fit itself within the exemption contained in the words of what is paragraph (d) of the definition of “commercial consignment” under the PPSA,⁶² Harmon would lose its entitlement to the return of the consigned items, and the Bank would be successful in its claim to those items of collateral. The Court dealt with the definition, by citing another Saskatchewan Court of Queen’s Bench decision (in *Canadian Imperial Bank of Commerce v Westfield Industries Ltd.*)⁶³ as follows:⁶⁴ [internal footnote added]

It may be reasonable to assume that the term “generally known in the area” would be limited in its application to persons who would have some reason to care one way or another whether a dealer sold his own goods or those of someone else. Such an assumption might eliminate persons who merely intended to buy the goods and take them away since they would usually know that a purchaser in the ordinary course of business would obtain a good title regardless of the basis upon which the dealer had possession of the goods. But every buyer of a machine has an interest in the stability of his vendor – he wants to know where to get parts and service for the machine and he needs to know who stands behind the warranties of quality and performance. Thus, as Professors Cuming and Wood⁶⁵ say, correctly:

...The general knowledge to which the section refers is knowledge on the part of the persons who might be expected to deal with the consignee as creditors, buyers or lessees. These are the classes of people for whose benefit the public disclosure system of the Act was created.

⁶⁰ The Saskatchewan equivalent to the PPSA, *supra* note 2, at the time of the case was *The Personal Property Security Act*, SS 1979-1980, c P-6.1. The definition was substantively identical to that currently in use in Manitoba, other than the reference to “an auctioneer for sale”. This statute was subsequently repealed and replaced by *The Personal Property Security Act*, 1993, SS 1993, c P-6.2, which is substantively identical to that currently in use in Manitoba.

⁶¹ *Harmon*, *supra* note 58 at 6.

⁶² *Supra* note 2.

⁶³ (1990), 1 PPSAC (2d) 142, 86 Sask R 1, Kyle, J.

⁶⁴ *Harmon*, *supra* note 58 at 15.

⁶⁵ Ronald CC Cuming & Roderick J Wood, *A Handbook on the Saskatchewan Personal Property Security Act* (Regina: Law Reform Commission, 1987) at 32-33.

Thus, the general knowledge portion of the definition is designed for those affected by their intended use of the registry system. This is designed to meet the reasonable expectations of users of the registry system.⁶⁶ In the view of the authors, the PPSA should also be interpreted in such a way to meet the reasonable expectations of those who use the registration system, whether as debtors, registrants, or searchers.

By making the definition of “motor vehicle” about what a reasonable person would believe with respect to the machinery at issue (that is, is this machinery meant to be used in a farming operation) at the time of the creation of the machinery, the definition puts those who use the PPSA registration system on notice as to the requirements to ensure that the registration will be effective for the purposes for which it was made. When one looks at an airplane, a truck or an all-terrain vehicle, one does not automatically think of farming. With an industrial tiller, a bailer, a tractor or a combine, reasonable people would ordinarily think very quickly of a farming operation.

⁶⁶ Security agreements, though they are subject to the PPSA, *supra* note 2, are also contracts. See the PPSA, s 9. There can be little doubt that one of the basic elements if the law of contracts is that it generally seeks to uphold the reasonable shared expectations of the parties to the contract. One Canadian academic goes so far as to maintain that “the purpose or function of the law of contracts is to protect the reasonable expectations of the parties to any contract”. See Angela Swan, *Canadian Contract Law* 2nd ed (Toronto: LexisNexis Inc., 2009) at §1.27. Other commentators have disagreed with this primacy. See Geoff R. Hall, “A Study in Reasonable Expectations” (2007), 45 CBLJ 150. While we may take issue with the degree of emphasis placed on the reasonable expectations of the parties by Professor Swan (and agree with the comments of Mr. Hall in this regard), the fact that the reasonable expectations of the parties are a valid consideration in the law of contracts is virtually beyond debate.

It is true that there more people involved under the PPSA security agreement than just the immediate parties to the contract (that is, the particular secured party and the debtor). All other secured parties of the debtor with an actual or potential claim to the property that is subject to the security interest of the particular secured party, and other searchers who will use the registration search system for any number of purposes must also be taken into account. However, this means that there are more “moving parts” in a PPSA situation (as opposed to a more traditional contractual scenario). In the view of the authors, this provides more incentive to try to meet the reasonable expectations of all involved. After all, the failure to do so could mean much more far-reaching effects than just the immediate parties to the security agreement.

Fourth, the approach offered here would be more consistent with the timing provided for in 2(2) for the categorization of goods as either (i) inventory; (ii) consumer goods or (iii) equipment. This formulation makes the determination of all of the elements of the registration filing at the time of attachment. The actual use to which the machinery is designed to be put would clearly be known at the time of attachment, if not beforehand. Moreover, this would not be subject to change at a later date. Therefore, the information required (or recommended) to be put in the financing statement would be known and constant. This leads to certainty in the credit markets, which is one of the goals of the PPSA.⁶⁷

Fifth, administratively, this is unquestionably the simplest of the alternatives proposed here. In fact, the change would not even require legislative action of any kind. Rather, the Lieutenant-Governor-in-Council (that is, the Cabinet) could make the change proposed because the PPSA gives the regulation-making power to the Lieutenant-Governor-in-Council.⁶⁸ For the reasons presented here, in the view of the authors, this alternative is in fact the best of the three proposed in this section.

B. A Statutory Amendment

The legislature may believe that all-terrain vehicles used by a farmer in farming operations ought to be treated differently in the Manitoba statute book. For the reasons discussed above,⁶⁹ the authors do not agree with this assertion. However, in deference to those who might take a different view, we will consider how best to accomplish this. In our view, it would perhaps be best if this were done by a statutory amendment, but not to the PPSA.⁷⁰ Instead, such an amendment would perhaps be most appropriate in the Manitoba equivalent to the *Saskatchewan Farm Security Act*⁷¹ (namely, *The Farm Machinery and Equipment Act*).⁷² This would have two large advantages. First, the exemption would clearly only apply to the personal use of the machinery by the farmer in a farming operation. Therefore, the

⁶⁷ Cuming, Walsh & Wood, *supra* note 7.

⁶⁸ PPSA, *supra* note 2, s 72(n).

⁶⁹ See above, Part IV, A.3.

⁷⁰ *Supra* note 2.

⁷¹ *Supra* note 5.

⁷² *Supra* note 39.

more expansive aspects of Master Harrison's holding would be curtailed. Secondly, there is specific reference in the PPSA to the *Farm Machinery and Equipment Act* and the fact that PPSA is subordinate to it.⁷³ Therefore, lenders who deal with the farming community should be familiar with *The Farm Machinery and Equipment Act*, and its impact on their business. At the same time, a regulatory change may not be as widely known in the farming community, or by their lenders.

C. The Case Law

There is actually relatively little case law on the definition of "motor vehicle" under the PPSA.⁷⁴ There is none with respect to the current definition from the Manitoba courts.⁷⁵ However, in Saskatchewan, there is a case that considers this issue.

In *Royal Bank of Canada v Steinhubl's Masonry Ltd.*,⁷⁶ the debtor (Pro Masonry) was indebted to the applicant, the Bank. The Bank had provided a loan to the debtor, and had taken a security interest in a forklift.⁷⁷ The Bank has not registered the serial number of the forklift.⁷⁸ The respondent had taken possession of the forklift⁷⁹ prior to the date of conflict.⁸⁰ Therefore, the respondent had a security interest perfected by possession.⁸¹ It was clear that the forklift was equipment under the

⁷³ PPSA, *supra* note 2, s 69(1).

⁷⁴ *Ibid*, s 1, sv "motor vehicle".

⁷⁵ The prior iteration of the PPSA had a different serial-numbered goods regime. Therefore, given the statutory change around the serial-numbered goods regime, we will not discuss it further here. However, for a further discussion of the prior iteration of the PPSA, see "Law Reform", *supra* note 34.

⁷⁶ *Supra* note 35.

⁷⁷ *Ibid* at para 3.

⁷⁸ *Ibid*.

⁷⁹ *Ibid* at para 5.

⁸⁰ For current purposes, it is sufficient to say that the "date of conflict" is the date at which the court is to determine whether a security interest in "perfected" or not. See *Sperry Inc. v Canadian Imperial Bank of Commerce et al.* (1985), 50 OR (2d) 267, 17 DLR (4th) 236, (OCA). Any perfected security that is still effective will generally rank in priority to any unperfected security interest in the same collateral. See PPSA, *supra* note 2, s 35(1).

⁸¹ PPSA, *ibid*, s 24.

PPSA.⁸² The only question left was whether the applicant had a security interest in the forklift which was perfected by registration.⁸³ If, as equipment, the forklift is a serial numbered good, the security interest of the applicant would be unperfected as against the respondent.⁸⁴ Therefore, the respondent would be successful, if it were a serial numbered good. If it were not a serial numbered good, there would no errors in the financing statement. It was clear that the security interest of the Bank would be perfected at the date of conflict, and that the Bank had taken its perfecting step (registration) prior to the respondent's perfecting step (possession). In this case, the applicant Bank would be successful.⁸⁵ Therefore, the only question that the Court needs to resolve is whether a forklift is a serial numbered good. The only category of serial numbered goods into which the forklift could possibly fall was that of a "motor vehicle".

The Saskatchewan Court of Queen's Bench defined the problem as follows:

The first category ("motor vehicle") includes self-propelled mobile devices capable of traversing unrestricted landscapes and which, by virtue of their mobility or portability, are susceptible to the A-B-C-D problem⁸⁶... Registration by serial number therefore takes on added importance, particularly when viewed from the perspective of a third party who intends to acquire ownership of or a security interest in such a good. In my opinion, this category falls squarely within the definition of motor vehicle in s. 2(1)(o) of the Regulations.

The second category ("non-motor vehicles") includes self-propelled mobile devices designed with limited mobility, for example, motorized wheelchairs and motorized wheelbarrows. Both are designed primarily for use in or between buildings, on their owner's premises, construction sites and other similar locations. The confining nature of their places of usage limits their exposure to A-B-C-D problem previously discussed. Thus, registration by serial number is of lesser importance. In my view, this category of self-propelled mobile devices is not a "motor vehicle" for the purposes of s. 2(1)(o).⁸⁷

This is interesting, for at least three reasons. First, this is clearly a purposive approach to the definition, that is, the Court takes a view of the

⁸² PPSA, *ibid*, s 1, *sv* "equipment".

⁸³ PPSA, *ibid*, s 25.

⁸⁴ PPSA, *ibid*, s 35(4).

⁸⁵ PPSA, *ibid*, s 35(1).

⁸⁶ The A-B-C-D problem is considered in more detail *supra* note 35.

⁸⁷ *Steinhubl's*, *supra* note 35 at paras 22-23.

definition that is consistent with the mischief that the serial-numbered goods regime (and the definitions which form a part of this regime) is designed to prevent. In other words, the Court is alive to the policy issues which animate the definitions under consideration. The Court is focused not only on the part of the definition that is said to apply. In the abstract, the words of the regulatory exclusion might be broad enough to support the interpretation that Master Harrison seeks to place on them. But, as explained throughout this paper, this view may not be appropriate in the wider context of the statute to which the definition of “motor vehicle”, the serial numbered goods regime and the Regulation are all related. *Steinhubl’s*⁸⁸ is simply cited here to demonstrate that this wider view is not only possible, but it is also a view for which there is case law support.

Second, a forklift might also fit the test that Master Harrison used to exclude an all-terrain vehicle pursuant to the farm machinery exclusion. Forklifts can be used to move many large loads, including in farming operations. This would include moving large amounts of grain or hay. It is important to remember that part of Master Harrison’s reasoning in *Houle v Meyers* was that the all-terrain vehicle would be used “particular by those farmers earning their livelihood with cattle and other livestock.”⁸⁹ Therefore, a subcategory of farming would appear to be sufficient to trigger the application of the farming machinery exemption, according to Master Harrison. In *Steinhubl’s*,⁹⁰ the fact that a forklift might be used for farming purposes was not even considered by Klubec J., showing that the decision in *Houle v Meyers* may be a significant outlier in the jurisprudence.

Third, there can be little doubt that there are practical benefits to having commonality between the various common law provinces.⁹¹ In fact,

⁸⁸ *Supra* note 35.

⁸⁹ *Supra* note 1, at para 24.

⁹⁰ *Supra* note 35.

⁹¹ Most of the other common-law provinces have a similar scheme with respect to security interests taken in personal property. See *Personal Property Security Act*, RSA 2000, c P-7; *Personal Property Security Act*, RSBC 1996, c 359; *Personal Property Security Act*, SNB1993, c P-7.1; *Personal Property Security Act*, SNL 1998, c P-7.1; *Personal Property Security Act*, SNWT. 1994, c 8; *Personal Property Security Act*, SNS 1995-1996, c 13; *Personal Property Security Act*, SNWT 1994, c 8 (Nunavut was created by statute as of 1999. In order that it would have a statutory framework in place, the *Nunavut Act*, SC

many of the provinces work off a common philosophical base,⁹² and have substantively similar or identical wording in the statute generally, and in the serial numbered goods regime in particular. This feeds into the certainty that the PPSA is trying to achieve.⁹³ This is especially important in the area of conflict of laws.⁹⁴ For example, the conflict of laws principles enunciated in the PPSA, there are special rules for goods that are moved between jurisdictions.⁹⁵ The PPSA also has rules dealing with conflict of laws for highly mobile goods.⁹⁶ There can be little doubt that vehicles (cars and trucks, at least) qualify as highly mobile goods for these purposes.⁹⁷

Given this reality of legislative and regulatory commonality, those involved might be forgiven for thinking that the expectations as to what constitutes “serial numbered goods” would be the same between jurisdictions. The incongruity between *Houle v Meyers*, on the one hand, and *Steinhubl’s*, on the other, may lead to significant problems when machinery that is not serial numbered goods under the judgment of Master Harrison is transported to another province, such as Saskatchewan, and the debtor refuses to co-operate and provide a serial number so that the creditor may make the appropriate registration in Saskatchewan. In short, in the view of the authors, Manitoba should either (i) fall into line with Saskatchewan through jurisprudence, because Saskatchewan has identical regulatory wording on this issue, or (ii) change the wording of its Regulation to bring it into line and resolve any ambiguity, or (iii) change

1993, c 28, s 29, gave Nunavut the laws of Northwest Territories as a starting point); *Personal Property Security Act*, RSPEI 1988, c P-3.1; *Personal Property Security Act* 1993, SS 1993, c P-6.2.

⁹² The PPSAs in Ontario and the Yukon Territory work off a different philosophical basis than that used in the other Canadian common-law provinces. For example, in those two jurisdictions (Ontario and the Yukon), only “motor vehicles” as defined in the statute, are subject to the special regime. See *Personal Property Security Act*, RSO 1990, c P10 and the *Personal Property Security Act*, RSY 2002, c 169. Therefore, these jurisdictions tend to use substantively different wording than their provincial cousins.

⁹³ *Supra* note 7 and associated text.

⁹⁴ PPSA, *supra* note 2, s 5-8.

⁹⁵ *Ibid*, ss 5(3) and 6(2).

⁹⁶ PPSA, *ibid*, s 7(2).

⁹⁷ *Gimli Auto Ltd v BDO Dunwoody Ltd.* (1998), 1998 ABCA 154, 160 DLR (4th) 373, 219 AR 166, Côté JA.

the wording of the Regulation, so the distinction between the two provinces is clear for anyone who chooses to examine the issue. The authors favour a combination of (i) and (ii), but if a single option is available, then we choose (ii) over (i).

VII. CONCLUSION

In the end, we believe that the decision *Houle v Meyers* is significantly misplaced in its emphasis. In the view of the authors, the judgment does not conform to the basic rule of statutory and regulatory interpretation. The decision is also inconsistent with the factual concessions made by both parties before Master Harrison. Finally, in the view of the authors, jurisprudentially, the decision does not advance the policy goals of the PPSA generally, or the policy rationale for the serial numbered goods regime in particular. More than not helping, the decision may actually do damage to the policy goals that the PPSA seeks to achieve. Therefore, we would recommend that the decision be overruled either by regulatory amendment, or the development of the common law.

Of course, the next step in the process is not ours to take. Now, the “ball”, as the old adage goes, is in the “court” of three branches of government. The legislature could amend the appropriate legislation; the Cabinet could amend the Regulation; the courts could clarify the common law to provide a clearer picture for the practising bar. We hope that one of more of these groups will act soon, and we are anxious to see which group will step forward first.

