

SUBSECTIONS 43(7) AND 43(8) OF THE PPSA: ARGUMENTS IN FAVOUR OF TECHNICAL AMENDMENTS

D A R C Y L . M A C P H E R S O N *

I. INTRODUCTION

In this paper, I argue in favour of two different, but related technical amendments to the Manitoba *Personal Property Security Act*.¹ I refer to these as “technical”, not in the sense of lacking importance, but instead in the sense of bringing the statutory language into compliance with what I believe was the intention of the legislature in passing the sections at issue.

In Part I, the paper begins by discussing the basic structure of the *PPSA*, as viewed through the lens of its intended purposes. Then, since both suggested amendments deal with the treatment of serial numbered goods, as defined by the *PPSA*, attention will turn to the provisions of the *PPSA* dealing with this type of good.² In Part II, the relevant statutory provisions are set out. In Part III, an analysis of certain rules of statutory construction is offered. In particular, the two sides of the “presumption of consistent expression” will be explored. Then, it will be shown that the

* Associate Professor, Faculty of Law, University of Manitoba. Associate, Marcel A. Desautels Centre for Private Enterprise and the Law, University of Manitoba.

¹ *Personal Property Security Act*, CCSM, c P35 [PPSA].

² Some would probably argue that there is little new or novel in this. I cannot disagree. But the reason for looking at this issue is that the fundamental purposes of both *PPSA* generally, and the law of secured transactions is to promote both fairness and certainty of result. In my view, the technical amendments offered here promote both certainty (by letting all potential parties know what is expected of them) and fairness (by applying the rules equally to all registrations involving serial-numbered goods).

majority of the case law with respect to section 43 – in particular, subsection 43(7) – does not actually respect this presumption. The case law pursuant to the section treats different expressions of legislative intention as co-extensive. In Part IV, I point out that subsection 43(8) is said to be subject to subsection 43(11), whereas, for a number of reasons, it seems evident that the reference is intended to be to subsection 43(10). In Part V, I suggest remedies for each of these issues.

II. THE BASIC STRUCTURE AND PURPOSES OF THE PPSA

A. The PPSA Generally

The *PPSA* was originally designed to rationalize the multiplicity of laws within the various Canadian common-law provinces³ that had previously dealt with the taking of security⁴ in personal property.⁵ The *PPSA* does this through a unitary concept⁶ called a “security interest”.⁷

³ For the purposes of this paper, the “common-law provinces” of Canada are the provinces of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, and Saskatchewan, as well as the Northwest Territories, the territory of Nunavut, and the Yukon Territory.

⁴ “Security”, for current purposes, is an interest granted by one person (the debtor) in the property of the debtor in order to provide comfort to another person (the credit grantor) to whom the debtor owes an obligation. Most commonly, the obligation is to repay the principal and interest owing to the credit grantor on a loan made to the debtor.

If the debtor makes all of scheduled payments on the loan, the security is never called upon. However, if the debtor fails to make a payment on the agreed schedule, and thereby falls into default, the loan agreement will generally allow the credit grantor to take the property and sell it, and use the proceeds of the sale (that is, in the hypothetical presented, the cash or equivalent received on sale) to reduce or eliminate the debt of the debtor to the credit grantor. The credit grantor is referred to as the “secured party” under the nomenclature of the *PPSA*. If the proceeds of sale of the security are insufficient to repay the amount owing to the credit grantor, then the credit grantor is no longer secured and must sue on the promise to pay, and hope to recover whatever suit and collection mechanisms are available to unsecured creditors.

⁵ “Personal property” is defined under the *PPSA*, see *PPSA*, *supra* note 1, s 1, *sv* “personal property”. The definition reads as follows: “‘personal property’ includes goods, chattel paper, documents of title, instruments, money, investment property and intangibles”. Each “goods”, “chattel paper”, “document of title”, “instrument”,

The basic concept of the PPSA is that no matter how it is framed by the parties, once the decision is made that a security interest is to be given in the collateral,⁸ there are certain procedural steps that must be followed to create the security interest.⁹ The creation of the security interest is

“money”, “investment property” and “intangible” has its own definition. See PPSA, *supra* note 1, s 1, *sv* “goods”, “chattel paper”, “document of title”, “instrument”, “money”, “investment property” and “intangible”, respectively. It is beyond the scope of this paper to explain the minutiae of each of these definitions.

It is sufficient for current purposes to say that the definition of “personal property” is very broad. Furthermore, it generally excludes land. However, some land-based goods (such as fixtures) and land-based receivables (such as rents owing) may be included for some purposes. The statute has some specific exclusions from what would be considered a fixture under the common law. See PPSA, *supra* note 1, s 1, *sv* “fixture”. It also has specific priority rules with respect to fixtures. PPSA, *supra* note 1, s 36.

Some of the other provincial and territorial PPSAs have specific rules with respect to income streams from rent. See *Personal Property Security Act*, SNWT 1994, c 8, s 37.1 [Northwest Territories PPSA]; *Personal Property Security Act*, SNWT 1994, c 8, s37.1 [Nunavut PPSA] (Nunavut was created by statute as of 1999. In order that it would have a statutory framework in place, the *Nunavut Act*, SC 1993, c 28, s 29, gave Nunavut the laws of Northwest Territories as a starting point); *Personal Property Security Act*, RSO 1990, c P10, s 36 [Ontario PPSA].

⁶ Ronald CC Cuming, Catherine Walsh & Roderick J Wood, *The Essentials of Canadian Law – Personal Property Security Law*, 2d ed (Toronto: Irwin Law, 2012) [Cuming, Walsh & Wood] at 116-119.

⁷ PPSA, *supra* note 1, s 1, *sv* “security interest”.

⁸ “Collateral” is the property of the debtor which is subject to a security interest. See PPSA, *supra* note 1, s 1, *sv* “collateral”.

⁹ These procedural steps include the following (see PPSA, *supra* note 1, ss 10, 12). First, the debtor must have some rights in the collateral. This may be significantly less than full ownership of the collateral. On this point, see 994814 *Ontario Inc v RSL Canada Inc et al* (2006), 9 PPSAC (3d) 240, 20 CBR (5th) 163, (Ont CA) per Justice Rouleau, for the Court.

Second, value must be given by the secured party. Value in this context means anything that would constitute consideration for an ordinary contract, including past consideration. See PPSA, *supra* note 1, s 1 *sv* “value” and “new value”. The latter definition specifically does not include past consideration.

Third, there must be one of the following: there can be possession of the collateral by the secured party or another person at the direction of the secured party, who is not (and does not appear to be) the debtor or an agent of the debtor. Where a receiver is appointed, as an example, for the purposes of ensuring the maintenance of assets or running the debtor’s business, the terms of security agreement (the agreement between the secured party and the debtor

called “attachment”,¹⁰ largely because the interest of the secured party is “attached” to the collateral.

The next piece of the puzzle is referred to as “perfection”. Perfection is where the secured party (either unilaterally or with the consent of the debtor) has done everything possible to take the best priority¹¹ position possible.¹² To be perfected, there must be attachment of a security interest, and a perfecting step. There are generally two perfecting steps to which the parties may agree to.¹³ These are:

granting the security interest - see *PPSA*, *supra* note 1, s 1 *sv* “security agreement”) will determine whether the receiver is the agent of the secured party or the agent of the debtor. On this point, see *Sperry Inc v Canadian Imperial Bank of Commerce et al* (1985), 50 OR (2d) 267, 17 DLR (4th) 236 (Ont CA), Justice Morden, as then was, for the Court [*Sperry*]; or

a written agreement signed by the debtor, with sufficient identification of the collateral by item or kind such that at the date of conflict, a court can determine whether or not the property at issue is subject to the security interest.

The date of conflict arises when any of the parties does something inconsistent with the recognition of the rights of others. For example, where a secured party attempts to seize the collateral to sell it, this brings the right of that secured party into conflict with those of other claimants to the property. On this point, see *Sperry*, at 277-280.

¹⁰ Cuming, Walsh & Wood, *supra* note 6 at 18.

¹¹ Priority is perhaps best described as a line. The *PPSA* does not say that there can only be one claimant to the collateral. There can be as many secured parties to the collateral as are willing to lend against the asset, if the debtor is willing to provide a security interest in the collateral. Other claimants to the property made be the trustee in bankruptcy of the debtor, unsecured execution creditors, and buyers and lessees of the property. Where there are multiple claimants to the property, and at least one of them is a secured party, the *PPSA* provides a system to resolve which of the claimants will have first priority to the particular asset. Priority is determined on an asset-by-asset basis, meaning that a claimant may have priority on one piece of collateral, but on others.

However, the fact that someone ranks first with respect to a particular asset does not necessarily mean that this claimant will receive all the value for the asset. If the claimant is a creditor, once debt owing to the claimant is repaid in full, the remaining value in the asset will go to the next claimant. If all claimants to the asset are repaid in full, the remaining value flows to the debtor. The process then repeats itself with the next item of collateral.

¹² Cuming, Walsh & Wood, *supra* note 6 at 419-421.

¹³ There are other automatic forms of perfection. These are by operation of law and apply in very limited circumstances. These need not be detailed to support the argument made it here.

- (i) possession of the collateral by the secured party or its agent;¹⁴ or
- (ii) the filing of a financing statement¹⁵ in the public registry¹⁶ to provide notice to searchers¹⁷ that a security interest is taken in given collateral.¹⁸

If I were to express this as a mathematical equation, it would be as follows: Attachment + Perfecting Step = Perfected Security Interest. However, “perfected” does not mean “perfect”. Even a perfected security interest may be defeated by other claimants to the collateral in proper circumstances.¹⁹ Nevertheless, generally, a security interest perfected as of the date of conflict²⁰ will defeat any unperfected security interest in the same collateral.²¹

Through this unitary concept, the legislation was trying to be comprehensive, in that it avoids the piecemeal approach that was often present under the prior law.²² The PPSA also tries to be efficient (through the reduction of agency costs),²³ flexible,²⁴ transparent,²⁵ and predictable²⁶ (to avoid surprises for a secured party, a searcher, and the debtor).

¹⁴ PPSA, *supra* note 1, s 24.

¹⁵ A financing statement is the document that to be filed to provide notice of the security interest. See PPSA, *supra* note 1, s 1 *sv* “financing statement”.

¹⁶ The registry is the Personal Property Registry. Section 42 of the PPSA continues it. See PPSA, *supra* note 1, s 1 *sv* “Registry”

¹⁷ A “searcher” has many potential definitions. For present purposes, a “searcher” can be defined as anyone who has a legitimate interest in the information provided by the Registry, as a potential lender or other claimant to the property of the debtor.

¹⁸ PPSA, *supra* note 1, s 25.

¹⁹ For example, a security interest, whether perfected or not, will be defeated where (i) a debtor grants the security interest to a secured party, and (ii) the debtor disposed of the collateral by sale or other transfer; (iii) the sale occurs in the ordinary course of business of the debtor. See PPSA, *ibid*, s 30(2).

²⁰ “Date of conflict” for these purposes, is defined *supra* note 9.

²¹ PPSA, *supra* note 1, s 35(1).

²² Cuming, Walsh & Wood, *supra* note 6 at 6.

²³ *Ibid* at 9.

²⁴ *Ibid* at 6.

²⁵ *Ibid* at 7-8.

²⁶ *Ibid* at 10-11.

Manitoba did not act alone, as every Canadian common-law province has a similar statute.²⁷ The philosophical basis of the PPSAs of most of the provinces is the same. Even much of the statutory language is identical.²⁸ This commonality facilitates interprovincial and international secured transactions.²⁹

B. The Serial Numbered Goods Regime Specifically

Under the Regulation,³⁰ serial numbered goods includes motor vehicles,³¹ trailers,³² mobile homes,³³ aircraft,³⁴ boats,³⁵ and outboard motors for boats.³⁶ Subject to certain minor differences, most of the other Canadian common-law jurisdictions have equivalent inclusions in their individual serial numbered goods regimes. The exceptions to this are Ontario and Yukon.³⁷

The point of the serial numbered goods regime is to provide an alternative search to simply the name of the debtor. All of the provincial

²⁷ See the *Personal Property Security Act*, RSA 2000, c P-7, [Alberta PPSA]; *Personal Property Security Act*, RSBC 1996, c 359 [British Columbia PPSA]; *Personal Property Security Act*, SNB 1993, c P-7.1 [New Brunswick PPSA]; *Personal Property Security Act*, SNL 1998, c P-7.1 [Newfoundland and Labrador PPSA]; Northwest Territories PPSA, *supra* note 5 ; *Personal Property Security Act*, SNS 1995-1996, c 13 [Nova Scotia PPSA]; Nunavut PPSA, *supra* note 5; *Personal Property Security Act*, RSPEI 1988, c P-3.1 [Prince Edward Island PPSA]; *Personal Property Security Act* 1993, SS 1993, c P-6.2 [Saskatchewan PPSA].

²⁸ Both of the PPSAs in Ontario and the Yukon Territory work off a different philosophical basis than that used in the other Canadian common-law provinces. See Ontario PPSA, *supra* note 5 and the *Personal Property Security Act*, RSY 2002, c 169 [Yukon PPSA]. As will be discussed below, this is particularly true in the area of the serial numbered goods regime.

²⁹ Cuming, Walsh & Wood, *supra* note 6 at 11-12.

³⁰ See *Personal Property Registry Regulation*, Man Reg 80/2000 [Regulation].

³¹ See Regulation, *ibid*, s 1 *sv* “motor vehicle”.

³² See Regulation, *ibid*, s 1 *sv* “trailer”.

³³ See Regulation, *ibid*, s 1 *sv* “mobile home”.

³⁴ See Regulation, *ibid*, s 1 *sv* “aircraft”.

³⁵ See Regulation, *ibid*, s 1 *sv* “boat”.

³⁶ This term is not defined by either the PPSA or the Regulation.

³⁷ These PPSAs only include motor vehicles in the special regime, and exclude the other types of goods referred to in the regulations of other provinces.

and territorial PPSAs have such a regime.³⁸ Most of the included categories of goods are of items that will generally have a high value.³⁹ Second, they are often major purchases that need to be financed, in the sense that many people need fiscal assistance to acquire these assets.⁴⁰ Third, motor vehicles in particular are fairly ubiquitous, in that the vast majority of both individuals and businesses use them. Fourth, they are either highly mobile or transportable.⁴¹ Fifth, in many cases, serial number goods are indistinguishable one from the other. Put another way, one fire-engine red 2012 Porsche 911 Cabriolet should be virtually identical to every other fire-engine red 2012 Porsche 911 Cabriolet. Therefore, a serial number is the only reliable way to tell the difference between any two.

The ability to easily move serial numbered goods makes what one set of authors refers to as the “A-B-C-D” problem particularly acute. Professors Cuming, Walsh and Wood explain it as follows:

Suppose the debtor sells collateral subject to a security interest that has been perfected by registration outright to a third party who, in turn, proposes to sell or grant security in it to a fourth party. Assuming the fourth party is unaware that the third party acquired the collateral from the original debtor, he or she will search the registry using only the third party’s name. That search obviously will not disclose the security interest since it will have only been registered against the name of the original debtor. As noted earlier in the chapter, this is sometimes referred to as the A-B-C-D problem.

To alleviate the risk by remote transferees, the PPSA provides for a more specific alphanumeric description to be entered into the appropriate field where the collateral consists of specified categories “serial numbered goods” held as consumer goods or equipment by the debtor. ... The concept includes: a

³⁸ There are references to serial numbered goods throughout the PPSA, and its Regulation. What follows are the main sections from each of the provincial and territorial PPSAs. See the Alberta PPSA, *supra* note 27, s 43; the British Columbia PPSA, *supra* note 27, s 43; the New Brunswick PPSA, *supra* note 27, s 43; the Newfoundland and Labrador PPSA, *supra* note 27, s 44; the Northwest Territories PPSA, *supra* note 27, s 43 the Nova Scotia PPSA, *supra* note 27, s 44; the Nunavut PPSA, *supra* note 27, s 43; the Prince Edward Island PPSA, *supra* note 27, s 43; and the Saskatchewan PPSA, *supra* note 27, s 43.

³⁹ Trailers are a possible exception to this.

⁴⁰ Cuming, Walsh & Wood, *supra* note 6 at 349-350.

⁴¹ *Royal Bank of Canada v Steinhubl's Masonry Ltd*, 2003 SKQB 299, [2004] 1 WWR 267 at para 16.

motor vehicle, trailer, motor home (manufactured home in British Columbia), air craft, boat or an outboard motor for a boat.⁴²

Thus, the purpose of the serial-numbered goods regime is designed to put an onus on registrants to offer the searcher two different searchable criteria (debtor name and serial number) to as to avoid the A-B-C-D problem.

III. THE RELEVANT SECTIONS OF THE PPSA

The following provisions of the *PPSA*⁴³ are essential to the analysis offered below. Emphasis is added in the form of underlying to demonstrate the words that have the most direct bearing on the arguments made here:

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 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.

⁴² Cuming, Walsh & Wood, *supra* note 6 at 349.

⁴³ *Supra* note 1.

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.

43(11) Notwithstanding anything in this Part, the Registrar may reject a financing statement when, in the opinion of the Registrar, it does not comply with this Act, a regulation under this Act, or any other Act or regulation under which registration of a financing statement is authorized.⁴⁴

IV. DIFFERENT LANGUAGE, SAME MEANING?

The first portion of this analysis will focus on the different wording between subsection 43(7) and other subsection of section 43. In essence, the argument runs as follows. There are two interrelated rules of statutory interpretation about consistency of legislative expression. Essentially, if the same words are used more than once in an enactment, the same meaning is generally presumed in each instance. Conversely, if different words are used, a different meaning is presumed.

A. The Applicable Rules of Statutory Interpretation

Generally, a pattern of legislative drafting is presumed to be a meaningful indicator of legislative intention. One author refers to this as “the presumption of consistent expression”.⁴⁵ This presumption gives rise to two related rules of statutory interpretation. First:

- (i) where the legislature chooses to use a particular phraseology to express itself, and
- (ii) the legislature uses that phraseology more than once in the Act, then,
- (iii) generally, the interpretation of each occurrence of the phraseology should be consistent with that of each other occurrence.⁴⁶

Conversely, where the legislature uses different phraseology in the Act, generally, the two different phrases should not be given the same meaning by virtue of statutory interpretation. Put another way, if the legislature uses different words in expressing itself from one location to the next, there is

⁴⁴ *Ibid* [emphasis added].

⁴⁵ See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5d ed (Toronto: LexisNexis Canada, 2008), at 162-167.

⁴⁶ *Ibid* at 163-164.

presumed to be a different legislative intent.⁴⁷ In this case, subsection 43(7) of the *PPSA* refers to an error where “a search of the Registry under the correct name of the debtor would not reveal the registration”. For ease of reference, the full subsection reads as follows:

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 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.

Subsection 43(7) does not refer to a “seriously misleading” error. Yet, subsections 43(6), 43(8) and 43(9) all use this wording. Therefore, pursuant to the second rule of statutory interpretation discussed above, the interpretation of subsection 43(7) should be different than the interpretation of the other subsections mentioned. However, as will be seen in the discussion of the case law immediately below, even though the wording is different, the interpretation of the term “seriously misleading” (in relation to informational errors) means that a search of the Registry with the correct information would not reveal the registration. Therefore, with respect to the *PPSA*, in these circumstances, although the second rule would seem to apply, in practice, the rule of interpretation may be honoured more in the breach than in application.

B. The Case Law

There is much commonality between the common-law provinces. The weight of authority with respect to the meaning of the term “seriously misleading error” in the *PPSA* is one such area of commonality. The vast majority of the cases equate a “seriously misleading error” with an error that would not, if the correct information were entered in a reasonable search,⁴⁸ display the registration at issue.

⁴⁷ *Ibid* at 164-165.

⁴⁸ What constitutes a “reasonable search” for these purposes is a matter of some debate. It is not the goal of this paper to resolve this debate. Therefore, an extended discussion of this issue will have to wait for another day. In fact, the author is currently working on a project that will discuss whether Manitoba should statutorily adopt a single-search or dual-search requirement. The working title of this project is “‘Billy, Don’t You Lose My Number’: Law Reform with Respect to the Serial Numbered Goods Regime under the Manitoba *PPSA*,” 37:1 *Man LJ* [forthcoming in 2014]. Many of the cases referred to here will be covered in more detail in that article. However, a short analysis of the lay of the land on this issue is provided immediately below.

Statutorily, three of the four most eastern provinces deal with this issue. New

For example, in *GMAC Leaseco Ltd v Moncton Motor Home & Sales Inc (Trustee of); Steven*,⁴⁹ Justice Robertson writes as follows: It can be fairly inferred that the Application Judge was speaking of the error as being seriously misleading in the limited sense that a computer search using the correct name would not reveal the financing statement's existence.⁵⁰ He continues:

Brunswick PPSA, *supra* note 27, ss 43(8), 43(8.1) and 43(8.2); Nova Scotia PPSA, *supra* note 27, ss 44(8), 44(8A) and 44(8B), and Prince Edward Island PPSA, *supra* note 27, ss 43(8), 43(8.1) and 43(8.2). With respect to serial numbered goods, all of these jurisdictions say that a single search of either the name of the debtor or the serial number of the serial numbered goods is sufficient.

Two Canadian jurisdictions have dealt with the issue by the common law and come to the conclusion that a single search is sufficient. In New Brunswick, prior to the statutory amendment, the Court of Appeal decided the issue in *GMAC Leaseco Ltd v Moncton Motor Home & Sales Inc (Trustee of); Stevenson v GMAC Leaseco Ltd*, (2003) NBCA 26, 227 DLR (4th) 154, Robertson JA, for the Court [*Moncton Motor Home*]. The Alberta Court of Appeal came to the same conclusion in *Case Power & Equipment v 366551 Alberta Inc (Receiver of)* (1994), 118 DLR (4th) 637, 23 Alta LR (3d) 361 (Alta CA) [*Case Power*].

Saskatchewan is an unusual case. Some early jurisprudence seemed to suggest a dual search (both debtor name and serial number of the collateral) is required. On this point, see *Ford Credit Canada Limited v Percival Mercury Sales Ltd and Touche Ross Limited*, [1986] 6 WWR 569, 50 Sask R 268, Cameron JA, for the Court. While this was pursuant to different statutory language, the policy rationale offered in the case could also be used to justify a dual-search requirement. However, later cases seem to suggest that a single search is sufficient for these purposes. On this point, see *Kelln (Trustee of) v Strasbourg Credit Union* (1992), 89 DLR (4th) 427, [1992] 3 WWR 310, (CA), Vancise JA, for the majority (Tallis JA concurring; Bayda CJS delivered separate reasons concurring in the result) [cited to DLR]. The weight of authority appears to be with the later cases.

Five Canadian common-law provinces have not dealt with this issue either statutorily or in case law. Manitoba, Newfoundland and Labrador, the Northwest Territories, Nunavut, and the Yukon Territory have not yet confronted the issue.

Two jurisdictions (British Columbia and Ontario) have confronted the issue in the case law and found that a dual search is necessary. With respect to British Columbia, see *Gold Key Pontiac Buick (1984) Ltd v 464750 BC Ltd (Trustee of)*, (2000) BCCA 435, 189 DLR (4th) 668 [Gold Key], Newbury JA, for the Court. With respect to Ontario, see *Re Lambert* (1994), 28 CBR (3d) 1, 20 OR (3d) 108 (Ont CA), Doherty JA, for the Court.

⁴⁹ *Moncton Motor Home*, *ibid*.

⁵⁰ *Ibid* at para 11.

How does one go about determining whether an error in either the debtor's name or a serial number is seriously misleading? The issue can be approached in one of two ways. Both satisfy the legal requirement that the test be an objective one.

The first approach is based on the information storage and retrieval capabilities of the registry system. If a search using the correct information does not disclose the existence of the financing statement as either an exact or close match, then the error will be deemed "seriously misleading". If the search reveals one or more close matches further reflection is required.

The alternative approach is to examine the issue in terms of whether the error would seriously mislead a reasonable person: that is to say the reasonable user or searcher. However, in order to answer that question it is necessary to address two sub-issues. What are the attributes of the reasonable searcher and what kinds of searches are such persons likely to make? Admittedly, this approach leaves open the possibility that the reasonable searcher will be characterized as one who would conduct a dual search. The down side is that there is apt to be disagreement on the two sub-issues.

In my view, only the first approach is consistent with the wording of s. 43(8) of the NBPPSA.⁵¹

Quite clearly, in New Brunswick "seriously misleading" means an error in registration where the correct information will not reveal the registration.⁵² The same appears to be the case in British Columbia. The Court of Appeal's decision in *Gold Key*⁵³ is not explicit on this issue (though the Court does acknowledge the need for an objective test).⁵⁴ However, *Gold Key* does not take issue with the earlier decision of the British Columbia Supreme Court in *Coates v General Motors Acceptance Corp. of Canada*.⁵⁵ In this case, the searcher requested a search of a serial number, and not a name. There was an error in the registrant's transcription of the serial number. The proper information did not display the registration of a financing statement of another secured party.

The search done was limited to exact matches only, by a government official (but it is unclear whether it was limited at the request of the searcher, or simply as a matter of course).⁵⁶ However, it was possible to get

⁵¹ *Ibid* at paras 57-60.

⁵² See also *ibid* at paras 49, 67.

⁵³ *Supra* note 48.

⁵⁴ *Ibid* at para 10.

⁵⁵ *Coates v General Motors Acceptance Corp of Canada Ltd* (1999), 69 BCLR (3d) 357,14 PPSAC (2d) 315 (BCSC), Grist J [*Coates*].

⁵⁶ *Ibid* at para 5.

a search that included inexact matches. The registrant of the earlier financing statement showed that, if inexact matches had been included, the earlier financing statement would have been disclosed. Grist J writes as follows:

If we are to employ an electronic registry, which can only be searched by a computer program, the crucial fact is whether the incorrect filing prevented a searcher from finding the registration when searching under one of the alternate search criteria. If a search using a correct version of the criteria does not reveal the registration, the registration has failed. It is not a question of whether the filing and search program satisfactorily catches common mistakes, such as transposed numbers, easily mistaken letters and digits, misspellings and the like. Section 43 offers some forgiveness from error if a filing is wrong but is not seriously misleading. This forgiveness should extend only so far as the capability of the filing and search program to reveal the registration despite the error. If a filing were found not to be seriously misleading on some other basis which forgave a mistake not revealed by the filing and search program, the effect would be to expose the searcher, who is not responsible for the error, to a loss of priority in dealing with the chattel.⁵⁷

In *Re Munro*,⁵⁸ Master Patterson defined the term “seriously misleading” as follows:

“Misleading” is defined as being “led astray” or “led into error”, and “serious” as “weighty, important or grave”. Applying that definition, I cannot see that, in the circumstances, anyone could be led seriously astray or into grave error by the one digit error in each serial number. Searches of both vehicles using the correct serial numbers disclosed the charges in favour of the Credit Union, even though the charges were registered using the incorrect serial numbers. Clearly, no one has been misled in this instance and, in my view, that is a factor which I can consider in deciding that these are errors that are not seriously misleading. An obvious intention of the legislature which can be derived from the wording of the P.P.S.A. is that total accuracy in serial numbers is no longer necessary.⁵⁹

Other cases make a similar point, finding that the ability to locate the financing statement was critical to the term “seriously misleading”.⁶⁰

Despite these cases, in *Re Logan*, Justice Tysoe wrote as follows:

⁵⁷ *Ibid* at paras 14-15.

⁵⁸ *Re Munro*, (1992) 77 BCLR (2d) 98 at para 13, 4 PPSAC (2d) 245 (BC SC).

⁵⁹ *Ibid* at para 13, cited in *Coates*, *supra* note 55 at para 8.

⁶⁰ See for example, *Kelln* *supra* note 48, at 442-443, Vancise JA for the majority, and 430-431, Bayda CJS for the minority; and *Re 314162 BC Ltd dba Mountain View Contractors*, [1998] BCJ 3271 at paras 19-21 (BCSC).

These cases raise some interesting questions. Collectively, they appear to stand for the proposition that if the P.P.S.A. legislation contains a mandatory requirement in connection with the completion of a financing statement, any error or omission in the completion of that requirement will invalidate the security interest corresponding to the statement unless a search on the personal property registry computer using the correct feature (i.e., debtor's name or serial number) will disclose the financing statement containing the error or omission. I have a great deal of difficulty with that proposition. It means that the programming of the computer is determinative of the "objective" test of deciding whether a defect, irregularity, omission or error is seriously misleading. Should an error in the last digit of a serial number be considered to be more seriously misleading than an error in the first digit of the serial number because, unbeknown to the person completing the financing statement, the computer is programmed to ignore the first digit of the serial number when a search is conducted? Should an error in the spelling of a first name of a debtor that is misleading to no one other than the computer be considered to be seriously misleading, especially when the Law Reform Commission that recommended the curative provision in the Saskatchewan legislation (which is the forerunner of the British Columbia statute) was intending to "repudiate the strict approach" applied to the pre-P.P.S.A. statutes? On the other hand, it is difficult to avoid the conclusion that an error in the last name of the debtor or the portion of the serial number that is used as a search criterion by the computer is seriously misleading because the error means that a person searching under the correct last name or the correct serial number would not be able to locate the financing statement. The search criteria utilized by the computer will unavoidably have to be considered in determining whether an error or omission is seriously misleading, but it is my view that the legislature did not intend the programmer of the computer to be the judge of determining what is seriously misleading.⁶¹

In Justice Tysoe's view, small errors that would not confuse an individual if the Registry were able to be searched on paper (that is, manually) should not be allowed to be "seriously misleading".

In *Case Power*,⁶² the Court seems somewhat confused on this issue. On the one hand, Coté JA (concurring in the result, but speaking for himself

⁶¹ *Re Logan*, (1992) [1993] 2 WWR 82 at para 14, 73 BCLR (2d) 377, (BCSC), Tysoe J (as he then was).

⁶² *Supra* note 48.

alone) cites *Re Logan*,⁶³ for the proposition that the computer system alone cannot determine the issue:

We were treated to a good deal of evidence about what actual searches by the parties did or did not reveal this registration, either as an exact match or an inexact match. And we were referred to a number of official government publications. These reveal that the government has chosen a computer and a certain computer program to register financing statements and to search for them. Evidently the computer has been told that certain pairs are equivalent, and that other things might be equivalent and should be listed as an inexact match. Some of the decided cases go into that sort of thing also.

However, this case should not be won or lost on such computer programming. It is the job of the court to interpret and apply the law: *Re Logan* (1992) 73 B.C.L.R. (2d) 377, 385-86.⁶⁴

This would suggest – and probably do a lot more than suggest – that the abilities of the computer system are not the only factors to be considered in whether the error is “seriously misleading”. However, earlier, Côté JA seems to indicate opposite, writing as follows:

In my view, an error in describing a chattel would make a registration “seriously misleading” in either of two situations.

- (i) It would likely prevent a reasonable search under a reasonable filing or registration system from disclosing the existence of the registration, or
- (ii) It would make a person who did somehow become aware of the registration think that it was likely not the same chattel.⁶⁵

The underlined words would seem to suggest that in fact the capacities of the computer system are relevant to the inquiry. Thus, the intention of Côté JA is not clear on this issue. Perhaps the words of Hetherington JA (Conrad JA concurring) will clarify the matter. Hetherington JA writes as follows:

Mr. Justice Côté says ... that an error in the serial number of a chattel would be seriously misleading in either of two situations, that is, if

⁶³ *Supra* note 61.

⁶⁴ *Case Power*, *supra* note 48 at 645-646.

⁶⁵ *Ibid* at 645 [emphasis added].

- "(i) It would likely prevent a reasonable search under a reasonable filing or registration system from disclosing the existence of the registration, or
 (ii) It would make a person who did somehow become aware of the registration think that it was likely not the same chattel." (Emphasis added)

I would omit from the first alternative the words underlined.

In my view, whether an error in the serial number of a chattel is seriously misleading or not, must be determined with regard to the facts of the case. The nature of the registration and search system in place at the relevant times is one of those facts. Whether a search using the correct serial number of the chattel, would have produced information about the security interest in the chattel registered using an incorrect serial number, is a second. Whether a search of the debtor's name would have produced this information, is a third. There may be others. In relation to the dozer, a search using the correct serial number, produced information about the registration of the appellant's security interest using the incorrect serial number. It showed it as a match "closely approximating your search criteria". A search of the debtor's name also produced information about this security interest, as did a search of the name under which the debtor carried on business. In these circumstances, Mr. Justice Côté's first test, as I would amend it, has surely been satisfied.

I agree with Mr. Justice Côté that the difference in the two serial numbers is so small that any reasonable person would have thought that they referred to the same chattel. Mr. Justice Côté's second test is also met. The appellant's error in relation to the dozer was not, therefore, seriously misleading.⁶⁶

The last paragraph seems to refer to the perceptions of an individual reading the two serial numbers side-by-side. This may suggest an approach that does not appreciate the computerized nature of the search function. However, the paragraph immediately preceding the final paragraph quoted makes specific reference to the search results, and approximate matches that are clearly available only from a computerized search.

The majority makes no reference to *Re: Logan*.⁶⁷ This could be given one of two possible meanings. First, the majority agrees with the minority. This approach would find support in the opening words of the majority decision of Hetherington JA, which read as follows: "I have read the judgment of Mr. Justice Côté in this case, and agree with the final conclusions which he has reached. However, I disagree with his reasoning in the following respects."⁶⁸ The argument would then run that since the

⁶⁶ *Ibid* at 639-640 [emphasis added].

⁶⁷ *Supra* note 61.

⁶⁸ *Case Power*, *supra* note 48 at 369.

minority decision specifically referenced *Re: Logan*, and the majority did not do so, the majority must therefore agree with the minority's use of *Re: Logan*.

I do not subscribe to this approach. In my view, it is clear that at least part of the disagreement between the majority and the minority in this case is with respect to the degree to which the Court should inquire into the adequacy of the search system in place in any given jurisdiction. The majority would not allow a determination that the search was *de facto* unreasonable and therefore, the search conducted pursuant to that system is also unreasonable. Like in *Re: Logan*, the minority could foresee a circumstance in which such a conclusion might be reached. Therefore, the majority's decision is implicitly opposed to *Re: Logan*.

C. The Academic Approach

The academic commentary on the meaning of the term "seriously misleading" seems fairly uniform. For example, as Professor Catherine Walsh explains:

Whether or not an error or omission in the registration of a serial number or debtor name is seriously misleading so as to invalidate the registration can only be decided in the context of the information storage and retrieval capabilities of the relevant registry system. The question is not whether the deviation from the correct name or number appears to be minor or trivial in the abstract but whether it caused the registration not to be disclosed on a search of the system using the correct information. So referring to "Granstrand Bros Inc" as "Grandstrand Bros Inc" might not be viewed as a fatal error in a manual registry at least if the two names showed upon the same page or in reasonably close physical proximity to each other so as to alert a prudent searcher. But in an electronic system, the error may well be fatal depending on how the particular system has been programmed.

Thus, in Ontario, any error or omission whatsoever in the registration of a debtor's name or birth date invalidates the registration. This is because a specific-name search in the Ontario system discloses only those names and dates that precisely match the information entered by the searcher. Searchers can elect to perform a non-specific-name search that matches all information in the database to the first name and surname ignoring initials and birth dates. However, it has been held that searchers cannot be expected to know the difference between the two types of searches and it is therefore the results obtained on a specific-name search that matter.

In contrast, the New Brunswick system, like the systems in place in Alberta and British Columbia, have been programmed to automatically disclose both exact and inexact matches of names and serial numbers on a search result. This allows more latitude for non fatal errors and omissions than in Ontario.

Nonetheless, not all similar matches are flagged and if the registration is not disclosed on a search using the correct name or serial number, there is a very strong – one might as well say irrebuttable – presumption that the error or omission is *ipso facto* misleading however minor it may seem in the abstract. It is not open to the court, in other words, to conclude that the system should have been programmed to disclose the name or number as an inexact match; the question is whether it was.⁶⁹

One finds the same basic approach elsewhere as well.⁷⁰ Therefore, notwithstanding some outliers, in the majority of cases in the majority of jurisdictions that have considered the issue are fairly consistent. An error that is made in a financing statement where a reasonable search of the correct information would not reveal the registration is considered to be “seriously misleading” for the purposes of the *PPSA*. This approach also animates the amendments to the *PPSA* suggested in Part V below.

V. SUBSECTION (8) IS SUBJECT TO SUBSECTION (11)?

The reference to “subsection 11” in the opening line of subsection 8 is quite clearly in error. The reasons for this are two-fold. The first is commonality between Manitoba and other *PPSAs* across the country. The second is that there is no logical reason that subsection 8 should be subject to subsection 11, while such a reason does exist with respect to subsection 10. Each of these is considered in turn below.

First, the commonality of language between the Manitoba *PPSA* and its counterparts in many of the other Canadian common-law jurisdictions has already been mentioned. In other *PPSAs* across the country, the connection is between the equivalents to subsection 43(8) and subsection 43(10).⁷¹ Given the similarity of language in these statutes, in the view of

⁶⁹ Catherine Walsh, *An Introduction to the New Brunswick Personal Property Security Act* (Fredericton: University of New Brunswick, 1995) at 220-221. This passage is cited in *Moncton Motor Home*, *supra* note 48 at para 49, although the excerpt is incorrectly attributed by Robertson JA to 217-218.

⁷⁰ Stikeman Elliott LLP, *2006 Ontario PPSA & Commentary* (Toronto: LexisNexis Canada, 2006) at 24-25. Although the Ontario *PPSA* is worded differently than most of its provincial and territorial counterparts, even it adopts a review of the search results that would have been produced had the correct information been input as part of the search.

⁷¹ See the Alberta *PPSA*, *supra* note 27, ss 43(7) and 43(9), the British Columbia *PPSA*,

the author, it is virtually beyond debate that the intention was for the reference to be made to subsection 10, and not subsection 11.⁷²

In addition, even without reference to other jurisdictions, in the view of the author, the reference to subsection 11 makes little sense. Subsection 11 refers to a right of the Registrar to refuse to accept a registration (that is, a refusal prior to registration). The application of subsection 8 is most often found after the registration has been made, a conflict in the interests of the various claimants to the property has arisen, and the matter cannot be resolved. Therefore, there is little reason to make subsection 8 subject to subsection 11. If the right of refusal of the Registrar under subsection 11 is exercised, the need to resort to subsection 8 never arises. If this right of the Registrar is not exercised, the right of other claimants to rely on subsection 8 to resolve any conflict between claimants would still be available.

With respect to subsection 10, however, the connection is far more obvious. Subsection 8 says that the registration is invalid. Subsection 10, however, qualifies this general rule. A single registration may cover many pieces of collateral. Some of the collateral may be serial numbered goods; the rest may not. Where this is the case, if subsection 8 were taken at face, despite that this invalidity applies only to the asset whose serial number ought to have been registered, but was not registered at all, or was registered improperly such that the error was seriously misleading when a search of the correct information was conducted. Therefore, subsection 10 is designed to make it clear that the financing statement remains valid vis-à-vis other collateral. In other words, a mistake with respect to the serial number of the good affects only that particular good.

supra note 27, ss 43(7) and 43(9); the New Brunswick PPSA, *supra* note 27, ss 43(8.1), 43(10), and 43(10.1); the Newfoundland and Labrador PPSA, *supra* note 27, ss 44(8) and 44(10); the Northwest Territories PPSA, *supra* note 27, ss 43(7) and 43(9). the Nova Scotia PPSA, *supra* note 27, ss 44(8A), 44(10), and 44(10A); the Nunavut PPSA, *supra* note 27, ss 43(7) and 43(9); the Prince Edward Island PPSA, *supra* note 27, ss 43(8) and 43(10); and the Saskatchewan PPSA, *supra* note 27, ss 43(7) and 43(9).

⁷² This of course excludes both Ontario and the Yukon. See the Ontario PPSA and the Yukon PPSA, both *supra* note 28. These two jurisdictions take a different approach to serial numbered goods, including only motor vehicles, and using subtly different language to approach this issue. Therefore, neither the Ontario PPSA nor the Yukon PPSA is particularly appropriate to this discussion.

Therefore, in the end, in my view, this point is by definition a problem of mislabelling, as opposed to one that shows a fundamental flaw or a policy choice on the part of the legislature. Therefore, this should be an easy fix.⁷³

VI. REMEDIES

Below, I offer solutions to both of the issues discussed in Parts III and IV. Ultimately, these are only suggestions as there are many routes to reach the same destination. But, if the analysis offered above is defensible, then some route should be found to correct these issues. Rather than trying to explain every change from nothing, in my view, it is more efficient to show how I would change the *PPSA* to rectify these issues.

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 there is a seriously misleading error.

43(7) No 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 invalidates the registration and destroys the effect of the registration unless there is a seriously misleading error.

43(8) Subject to subsection (10), 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 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 of a seriously misleading error, 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.

⁷³ The government of Manitoba would seem to agree. Before this article was published, but after it was accepted for publication, the government introduced Bill 46, *The Statutes Correction and Minor Amendments Act*, 2nd Sess, 40th Leg, Manitoba, 2013, s 53 (1st reading) to make this alteration.

43(11) Notwithstanding anything in this Part, the Registrar may reject a financing statement when, in the opinion of the Registrar, it does not comply with this Act, a regulation under this Act, or any other Act or regulation under which registration of a financing statement is authorized.

43(12) For the purposes of this section, a “seriously misleading error” refers to any defect, irregularity, omission or error in the required piece of information where a reasonable search of the correct information would not reveal the registration.

These changes are three-fold. First, the opening words of subsection 43(8) are amended to correct the issue identified in Part IV. Second, all references to “defect, irregularity, omission or error” are altered to a consistent defined term of “seriously misleading”. This avoids the statutory construction argument set out in Part III of this paper. Third, the added subsection 43(12) defines the term “seriously misleading error” consistently with the weight of the authority on this issue. This is not to say that there are not cases that take the opposite view. In other words, the statutory amendment removes any ambiguity in the *PPSA*. While this will remove some of the commonality between the Manitoba *PPSA* and some of its provincial and territorial counterparts, it nonetheless accords with the national trend on the issue. Further, if the proposed changes are in fact an improvement to the current version of the *PPSA*, then at least one jurisdiction must at some point lead the way.

In the end, in my view, the suggested changes are not meant to take issue with the *PPSA*’s policy perspective in general, or the serial-numbered-goods regime specifically. Rather, the goal is to bring into sharp relief two issues that can be, and in my view should be, rectified. More clarity in the law of secured transactions should be preferable to less clarity, and if the suggestions made here are implemented the *PPSA* would be clearer.

