

“Billy, Don’t You Lose My Number”: Law Reform With Respect to the Serial Numbered Goods Regime Under the Manitoba PPSA

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I. INTRODUCTION

In an earlier article,¹ the authors argued that jurisprudence from other jurisdictions could assist the Manitoba courts in determining when the knowledge of a person should disentitle them from relying on the priority provisions of the Manitoba *Personal Property Security Act*.² Here, the authors return to this theme,³ and apply it in a different context, that is, the area of

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¹ Darcy L MacPherson & Edward D (Ned) Brown, “Fraud and Knowledge of a Pre-Existing Security Interest under the *Personal Property Security Act*: Guidance for Manitoba Courts and Practitioners from Other Jurisdictions” (2011) 35:1 Man LJ 201 [MacPherson and Brown].

² CCSM, c P35 [PPSA].

³ The authors have produced a number of papers focused on explaining and/or reforming the PPSA. These include the following: Darcy L MacPherson and Edward D (Ned) Brown, “An All-Terrain Vehicle under the PPSA and its Regulation: A Comment on *Houle v Meyers, Norris, Penny Ltd*” (2012) 35:2 Man LJ 107 [*All Terrain Vehicle*]; Darcy L MacPherson, “Financial Leasing in Common Law Canada” (2011) XVI:1&2 Unif L Rev (this article was part of a Report on Financial Leasing and its Unification by UNIDROIT, prepared for the 18th International Congress of Comparative Law 2011) [“Financial

serial numbered goods under the PPSA, and its Regulation.⁴ In particular, when the law assesses the validity of a registration of a financing statement⁵ in the public registry⁶ with respect to a security interest,⁷ it does so based on a reasonable search of the registry. The registry, and the search thereof, are both computerized. One can search both or either of the following:

- (i) the serial number of the collateral;⁸ and

Leasing”]; Darcy L MacPherson, “Duelling Purchase-Money Security Interests under the PPSA: Explaining the Law and Policy Behind Section 34(7)” (2012) 36:1 Man LJ 383; Darcy L MacPherson, “Subsections 43(7) and 43(8) of the PPSA: Arguments in Favour of Technical Amendments” (2013) 36:2 Man LJ 41 [Technical Amendments].

⁴ Manitoba, *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 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.

⁵ 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 more pieces of personal property.

⁶ In Manitoba, the registry in which security interests are catalogued is referred to simply as the “Personal Property Registry”. See PPSA, *supra* note 2, s 1, *sv* “Registry”. The registry is continued pursuant to the PPSA. See PPSA, *supra* note 2, s 42.

⁷ A security interest is defined under the PPSA as follows (PPSA, *supra* note 2, s 1, *sv* “security interest”):

“security interest” means (a) an interest in personal property that secures payment or performance of an obligation, but does not include the interest of a seller who ships goods to a buyer under a negotiable bill of lading or its equivalent to the order of the seller or an agent of the seller, unless the parties otherwise evidence an intention to create or provide for a security interest in the goods, and (b) the interest of (i) a transferee arising from the transfer of an account or a transfer of chattel paper, (ii) a consignor who delivers goods to a consignee under a commercial consignment, and (iii) a lessor under a lease for a term of more than one year, whether or not the interest [under paragraphs (b)(i), (b)(ii), or (b)(iii)] secures payment or performance of an obligation.

Many of the terms used in this definition are themselves defined terms.

In other words, a security interest is an interest in property given by a debtor in the debtor’s property to ensure for the creditor that the obligation of the debtor with respect to payment will be made without default. If payment goes into default, the creditor may on commercially reasonable terms, seize and sell the collateral to make good on the repayment of the debt.

⁸ Collateral is a piece of personal property that is subject to a security interest. See PPSA, *supra* note 2, s 1 *sv* “collateral”.

- (ii) the name of the debtor.

Given this fact, the question to be answered in this paper is as follows: does a reasonable searcher search both the serial number of the collateral and the name of the debtor, or, alternatively, is a search of only one of the two reasonable?⁹

In Part I, the authors provide a historical overview of the case law around the effect of registration errors. In particular, the authors point out that the case law under previous versions of the PPSA is of limited assistance in answering the question to be resolved here, but should not be totally disregarded. In the following section, the authors use both the statute and the limited case law to explain what constitutes a serial numbered good, for the purposes of the current version of the statute. Part III attempts to explain why the serial numbered goods regime is needed. In Part IV, the authors set out the statutory basis for the serial numbered goods regime, and explain its impact.

In Part V, the authors turn to the case law that addresses the particular issue that is the subject of this paper; that is, is there a requirement on searchers¹⁰ to search both the serial number and the name of the debtor, or is a single search of either the serial number or the name of the debtor sufficient? In particular, the authors discuss the responses of other provinces to this issue. Some have responded through statutory reform, on the one hand, and other provinces have used the common law as a consequence of statutory interpretation, on the other. In Part VI, the authors turn to laying out the competing policy considerations on each side of the argument. Finally, the authors support their thesis that the single search requirement is superior to a dual search requirement, both statutorily and pursuant to the common law.

⁹ Under current provisions of the PPSA, *supra* note 2, there appears to be no case law on this point at all.

¹⁰ "Searcher", in this context, refers to any person who does or might have reason to conduct a search of the Registry with respect to the serial-numbered goods that are subject to the security interest. As will be discussed in more detail below, there are actually significant questions to be answered with respect to the characteristics of appropriate searcher in terms of the law.

II. THE HISTORICAL OVERVIEW¹¹

Under previous iterations of the PPSA,¹² there is some case law on the effect of registration errors on the validity of the registration.¹³ Section 4 of the former version of the PPSA provided as follows:

4(1) A document to which this Act applies is not invalidated, nor shall its effect be destroyed by reason only of a defect, irregularity, omission or error therein or in the execution thereof unless, in the opinion of the judge or court the defect, irregularity, omission or error is shown to have actually misled some person whose interests are affected by the document.

4(2) A registration under this Act is not invalidated, nor shall its effect be destroyed, by reason only of a defect, irregularity or error therein unless, in the opinion of the judge or court, the defect, irregularity or error is shown to have actually misled some person whose interests are affected by the registration.¹⁴

As will be discussed in further detail below, in the current incarnation of the PPSA (as well as personal property security legislation in force in the majority of Canadian jurisdictions), the underlined portions of section 4 no longer represent the current law. In fact, there is a provision that specifically holds that proof that someone was actually misled by the error in the registration is not necessary in order for the registration error to make the registration seriously misleading. Therefore, in the view of the authors, the case law under the previous iteration does not have any application under the current version of the PPSA.

A case under the previous PPSA is *Bank of Nova Scotia v McCormick (Administrator of)*.¹⁵ This is a decision of Master Harrison, sitting as a Registrar in Bankruptcy. Though the case was decided in 1996, the current iteration of

¹¹ Some may question why a historical overview is necessary at all. There are several reasons why this is so. First, it is a cautionary tale for registrants, searchers, litigators and courts. As are detailed below, there are substantive differences in the statutory language on this issue between the older iteration and the current version. Therefore, reliance on older case law that arose under the previous version must be done with care. However, as will become evident, not all the elements of the prior case law can or should be ignored. Despite the language differences, some of the elements of the earlier law continue to be relevant.

¹² *The Personal Property Security Act*, RSM 1987, c P35, and prior.

¹³ One example of this is *National Bank of Canada v Gallagher Refrigeration & Air Conditioning (Receiver for)*, [1988] 6 WWR 314, 54 Man R (2d) 177 (QB), Hanssen J.

¹⁴ Emphasis added.

¹⁵ (1996), 114 Man R (2d) 180 (available on WL Can) (Master).

the PPSA did not come into force until the year 2000; therefore, the case was decided under the prior wording. Interestingly, the issue was not the serial number at all, because the serial number was properly entered. However, the name of the debtor was entered as "Larry", instead of his actual given name of "Lawrence". Master Harrison relies on section 4 in holding that no one was actually misled. The Master then points out that Larry was consistently and habitually used by the debtor as his name.

Then, the Master turns his attention to *Re: Lambert*.¹⁶ As will be discussed in more detail below,¹⁷ this is one of the primary cases used to support the argument in favour of a dual-search requirement. Therefore, *McCormick* is at least some indication that Master Harrison, under the wording of the former iteration of the PPSA was in favour of a dual-search requirement.

Prairie Mack Sales (1990) Ltd v Dueck Builder Mart,¹⁸ is also of interest. There is some language in this case to suggest a dual-search requirement, notably when the judge points out that a searcher could have searched the serial number. However, the Court is far more focused on the fact that it was the debtor who had provided its name to the registrant, and there was no way for the registrant to know of the error, because even in the motor vehicle's registration with the Motor Vehicle Branch the name given was the business name used by a corporation, not the corporate name of the debtor. The trustee in bankruptcy sought to argue that since the proper name of the "owner" was not included, the registration under the PPSA made by the registrant was invalid.

The Court neatly avoids this issue. The Court holds that, since the registration made in what is now the Registry originated as a garage-keeper's lien under the *Garage Keepers Act*,¹⁹ the provisions of that Act allow for the extension of time for the filing of a proper lien. The Court then uses this curative provision to save the registration made under that Act. Thus, the error made by the registrant did not invalidate the registration.

¹⁶ (1994), 119 DLR (4th) 93, 20 OR (3d) 108 (CA), Doherty JA, for the Court (cited to DLR) [*Re: Lambert*]. Request leave to appeal to the Supreme Court of Canada dismissed [1994] SCCA 555, 33 CBR (3d) 291n, L'Heureux-Dubé, Sopinka and McLachlin JJ (as she then was).

¹⁷ See Part V.B.2, below.

¹⁸ [1992] 4 WWR 24, 80 Man R (2d) 51 (QB), Ferg J.

¹⁹ RSM 1987, c G10, which was applicable at the time of the case.

In *Sifton Credit Union Ltd v Barber*,²⁰ Simonsen J also avoided the issue of whether the non-inclusion of the serial number was problematic, when he decided that the perfection of the security interest had occurred through possession of the collateral by the creditor (under what is now section 24 of the current iteration of the PPSA).²¹ Therefore, the validity of the registration was moot.

In the decision of County Court Judge Kennedy (as he then was) in *Demos v Niagara Finance Co*,²² there are again indications that there is a dual-search requirement under the former iteration of the PPSA. These indications are found in the excerpt where the Court writes as follows:

The serial number on the financing statement registered by the respondent in Alberta and against Alex Demos referred to a 1976 Ford Elite bearing serial number 60215186309 and not 6G215186309, however, a search of the debtor's name would have revealed a 1976 Ford Elite with a serial number which one could only conclude related to the same vehicle. In any event, the applicant did not search the personal property register, and could not have relied upon a typing error to his detriment so as to afford him relief under s. 4 of *The Personal Property Security Act*.²³

However, once again, the Court sidesteps the issue. The original registration of a financing statement with respect to the security interest was made in Alberta, before the collateral was brought to Manitoba. Therefore, the Court decides the case on the basis of the applicable conflict of law provisions of the Manitoba PPSA then in force. Since the applicable registration was not made in Manitoba within the applicable statutory 60-day time limit, the security interest was not perfected in Manitoba. Also, when the conflict with the *Consumer Protection Act*²⁴ arose, the provisions of the *Consumer Protection Act* governed.

It also appears that under the previous iteration of the PPSA, "errors of a clerical nature" that do not actually mislead are immaterial to perfection. On this point, see the decision of County Court Judge Jewers (as he then was) in *Bank of Nova Scotia v Airline Credit Union Ltd*.²⁵ As will be seen below, this

²⁰ [1986] 4 WWR 341, 41 Man R (2d) 295 (QB).

²¹ *Supra* note 2.

²² (1980), 1 PPSAC 96 (available on Westlaw) (Man Co Ct).

²³ *Ibid* at 97. It is interesting to note that the Court's reasoning relies on section 4 of the previous iteration of the PPSA. As mentioned above, this provision has been overtaken by subsequent statutory change.

²⁴ Now, RSM 1987, c C200, CCSM c C200.

²⁵ [1981] 3 WWR 55, 7 Man R 6.

approach has not found favour in the subsequent case law of any Court of Appeal.²⁶

Interestingly, under a previous iteration of the PPSA, there was a case where the Court of Appeal held that the onus is on the party alleging non-compliance with the PPSA to show such non-compliance. In *Bank of Montreal v Bank of Nova Scotia*,²⁷ both the name of the debtor and the serial number of the vehicle were described differently in the legal documents and the registration. It appears that the serial number of the vehicle was described correctly in the registration while a short form of the name of the debtor was used. However, the debtor was also known by many people by the short form of his name as entered on the registration. Therefore, the Court did not find an error in the registration.

However, there are certain similarities between the past and the present versions of the PPSA. For example, a trade or business name will not suffice for a proper name of a debtor under the PPSA.²⁸ As we will see in our discussion of *Gold Key Pontiac Buick (1984) Ltd v 464750 BC Ltd (Trustee of)*,²⁹ this is still the case under the current iteration of the PPSA.³⁰

A result similar to *Demos v Niagara Finance Co*³¹ was reached in the decision of Master Harrison, again sitting as a Registrar in Bankruptcy, in *Pollard (Re)*.³² While this case was decided under the current iteration of the PPSA, once again the Court relies on the fact that the perfection of the security interest in Manitoba did not occur within the statutory timeframe. Therefore, the Court can and does again avoid a definitive answer on the searches necessary to be done.

²⁶ However, in the case of *Re: Logan*, [1993] 2 WWR 82, (1992), 73 BCLR (2d) 377, Tysoe J, as he then was [*Re: Logan*, cited to BCLR], though the term "clerical" is not used, it seems minor errors are treated differently. *Re: Logan* will be discussed in more detail in Part V.B.5, below.

²⁷ (1983), 24 Man R (2d) 217, 3 PPSAC 107, Matas JA.

²⁸ See *Hickson (Trustee of) v Reichhold Ltd*, [1983] 3 WWR 167, 20 Man R (2d) 422, Dewar CJ, aff'd 6 DLR (4th) 246, [1984] 3 WWR 164, 3 PPSAC 263, Monnin CJ and Hall and Matas JJA, each producing reasons concurring in the result, and dismissing the appeal.

²⁹ 2000 BCCA 435, 189 DLR (4th) 668, Newbury JA, for the Court [*Gold Key*].

³⁰ Although *Gold Key*, *ibid*, arose out of British Columbia, the current iteration of the Manitoba PPSA, *supra* note 2, and its British Columbia counterpart are largely identical for these purposes.

³¹ *Supra* note 22.

³² 2010 MBQB 224, 259 Man R (2d) 317 (Master).

III. WHAT ARE SERIAL NUMBERED GOODS?

A. The Regulatory Definitions

Like the other common-law provinces, Manitoba has a specific serial numbered goods regime.³³ While the term “serial numbered goods” is used throughout the PPSA,³⁴ the term is not in fact defined in the Act itself. Instead, the definitions relevant to this issue are found in the Regulation.³⁵ The definitions are as follows:

“serial numbered goods” means

- (a) except where clause (b) applies, motor vehicles, trailers, mobile homes, aircraft, boats or outboard motors for boats³⁶, 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;

³³ Most of the other common-law provinces have a similar scheme with respect to these types of goods. See *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”]; *Personal Property Security Act*, SNWT 1994, c 8 [“Northwest Territories PPSA”]; *Personal Property Security Act*, SNS 1995-1996, c 13 [“Nova Scotia PPSA”]; *Personal Property Security Act*, SNWT 1994, c 8 [“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*, RSPEI 1988, c P-3.1 [“Prince Edward Island PPSA”]; *Personal Property Security Act* 1993, SS 1993, c P-6.2 [“Saskatchewan PPSA”].

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. 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 P.10 [“Ontario PPSA”] and the *Personal Property Security Act*, RSY 2002, c 169 [“Yukon PPSA”]. This is not meant to be an exhaustive list of the differences between the two sets of jurisdictions. It is just to acknowledge that there are differences, and to explain why there will not be extensive reference to the PPSAs of either Ontario or the Yukon Territory in the discussion that follows.

³⁴ The term “serial numbered goods” is used in the PPSA, *supra* note 2, ss 30(6), 35(4), 38(12), 43(8), 48(1), 59(6), 60(2) and 61(2).

³⁵ *Supra* note 4, s 1.

³⁶ This term (“outboard motors for boats”) is not defined by either the PPSA or the Regulation.

"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;

"trailer" means a device in, on or by which a person or thing may be transported or drawn that is not self-propelled and that is designed to be drawn on a road by a motor vehicle, but does not include a mobile home;

"mobile home" means a structure, whether ordinarily equipped with wheels or not, that is not self-propelled and is designed

(a) to be moved from one place to another by being towed or carried, and

(b) to be used as a dwelling house or premises, or accommodation for any other purpose;

"aircraft" means a machine capable of deriving support in the atmosphere from the reactions of the air, other than a machine designed to derive support in the atmosphere from reactions against the earth's surface of air expelled from the machine;

"boat" means a vessel that is designed for transporting persons or things on water and that is propelled primarily by any power other than muscle power;³⁷

B. The Limited Case Law on the Definitions

In *Royal Bank of Canada v Steinhubl's Masonry Ltd.*,³⁸ 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.³⁹ The Bank had not registered the serial number of the forklift.⁴⁰ The respondent had taken possession of the forklift⁴¹ prior to the date of conflict.⁴² For reasons to

³⁷ PPSA, *supra* note 2, s 1.

³⁸ 2003 SKQB 299, 6 PPSAC (3d) 1, Klebuc J, as he then was [Steinhubl's].

³⁹ *Ibid* at para 5.

⁴⁰ *Ibid* at para 3.

⁴¹ *Ibid* at para 4.

⁴² 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 (CA). Any perfected security that is still effective will generally rank in priority to any

be discussed in more detail below, if the forklift was a serial numbered good, it was clear that the security interest of the Bank was unperfected at the date of conflict as against the respondent, and the respondent would be successful. If however, the forklift was not a “motor vehicle”, it would not be a “serial numbered good”, and thus not subject to the serial-numbered-goods regime.⁴³

The Court conceived of the definitional issue 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 problem⁴⁴ ... 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 section 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 section 2(1)(o).⁴⁵

This is interesting, mainly because this is clearly a purposive approach to the definition, that is, the Court takes a view of the 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.

What is even more interesting, however, is that there is a Manitoba case which also considers the definition of “motor vehicle”. *Houle v Meyers, Norris, Penny Ltd*⁴⁶ is a decision of Master Harrison, sitting as a Registrar in bankruptcy. The debtor declared bankruptcy, and a credit union had a general security over all of the assets of the debtor.⁴⁷ The only asset really at issue in the case was an all-terrain vehicle (referred to as a “Quad” in the

unperfected security interest in the same collateral. See *PPSA*, *supra* note 2, s 35(1).

⁴³ This is considered in more detail in Part III, below.

⁴⁴ The A-B-C-D problem is considered in more detail in Part II, below.

⁴⁵ *Steinhubl's*, *supra* note 38, at paras 22-23.

⁴⁶ 2004 MBQB 39, 182 Man R (2d) 88 [*Houle v Meyers*].

⁴⁷ *Ibid* at para 1.

excerpt provided below). It seems as though the parties were agreed⁴⁸ that the assets fit the definition of “consumer goods”⁴⁹ under the PPSA. Given this concession, it should have been clear that, if the asset was a “serial numbered good”, the registration was invalid by virtue of paragraph 43(8)(b) of the PPSA, discussed in more detail below. Instead, the court relies on the closing words of the definition of “motor vehicle” in the Regulation⁵⁰ (“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”). With respect to this, the Court holds as follows:

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.⁵¹

The authors have written a case comment on this case.⁵² It is not our intention to repeat the substance of that paper here. In short, in that piece, the authors argue that the reasoning of the case is inconsistent with principles of statutory and regulatory interpretation on at least three fronts. First, similar or identical reasoning would exclude trucks and aircraft, which in the view of the authors, were clearly meant to be included in the definition of “serial numbered goods”. Second, the interpretation offered by Master Harrison is inconsistent with the purposes of the inclusion of tractors and combines. In other words, there were, in the view of the authors, specific reasons why the legislature decided to include tractors and combines in the definition of “serial numbered goods”. Master Harrison arguably does damage to these purposes by his ruling. Third, the ruling creates a timing issue as to when the decision as to whether a particular asset is used in farming should be made.

Even absent the issues of interpretation, there were two additional problems. First, the holding in the case was also inconsistent with the admission by both sides in the case that the good at issue was a “consumer

⁴⁸ *Ibid* at para 12.

⁴⁹ Consumer goods are goods used in the personal life or household of the debtor. See PPSA, *supra* note 2, s 1 *sv* “consumer goods”.

⁵⁰ *Supra* note 4.

⁵¹ *Houle v Meyers*, *supra* note 46, at para 24.

⁵² *All Terrain Vehicle*, *supra* note 3.

good". Consumer goods are for personal or household use.⁵³ Farming is generally a business. Therefore, the two holdings – first, that the vehicle was used “in farming” and second, that the vehicle was “a consumer good” – are mutually exclusive. Finally, the secured-transactions system is supposed to be a cohesive whole. Finding something to be a serial numbered good simply requires registration of the serial number. At the same time, if a reasonable person would expect that a good is a “serial numbered good”, the searcher may believe that a search under the serial number will be productive. The searcher may be misled. The point of the PPSA in general and the serial-numbered-goods regime in particular is to provide protection of the reasonable expectations of the parties. Therefore, in the view of the authors, an interpretation of a statute that leads to such a result is to be avoided.

IV. WHY DO WE HAVE A SPECIAL REGIME?

The definitions give at least a partial basis on which to explain why there is a special regime in place for these goods. Most of these categories are of items that will generally have a high value.⁵⁴ Second, they are often major purchases that need to be financed, in the sense that many people need fiscal assistance to acquire these assets.⁵⁵ 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.⁵⁶ Fifth, in many cases, serial number goods are indistinguishable one from the other. Put another way, one fire-engine red 2014 Porsche 911 Cabriolet should be virtually identical to every other fire-engine red 2014 Porsche 911 Cabriolet. Therefore, a serial number is the only reliable way to tell the difference between the two.

It is true that not all of these elements are necessarily present in every one of the categories listed by the legislature in its Regulation. However, one can see sufficient similarities between all of these categories to see the policy basis

⁵³ *Supra* note 49.

⁵⁴ Trailers are a possible exception to this.

⁵⁵ 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 349-350.

⁵⁶ Steinhubl's, *supra* note 38 at para 16.

on which the legislature made its decision to include those categories within the definition of "serial numbered goods".

Professors Ronald CC Cuming, Catherine Walsh, and Roderick J Wood provide a further explanation, 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 been registered only against the name of the original debtor. ... this is sometimes referred to as the A-B-C-D problem.

To alleviate the risk faced by remote transferees, the PPSA provides for a more specific alphanumerical description to be entered in the appropriate field where the collateral consists of specified categories of 'serial numbered goods' held as consumer goods or equipment by the debtor. The categories of assets that qualify as 'serial numbered goods' for PPSA purposes comprise relatively high-value items for which there is likely to be a resale market and for which unique and reliable 'serial number' or equivalent alphanumerical identifiers are available. The concept includes: a motor vehicle, trailer, mobile home (a manufactured home in British Columbia), aircraft, boat or an outboard motor for a boat. The Ontario and Yukon systems take a less expansive approach: alphanumerical registration and searching is available only in respect of the vehicle identification number (VIN) assigned to motor vehicles.⁵⁷

Careful readers may suggest that these two explanations of the rationale behind the serial numbered goods regime are at least somewhat inconsistent with one another. One is based on the characteristics of the collateral; the other is based on a certain type of potential mischief to be alleviated. The authors, on the other hand, believe that each explanation provides insight. For example, the A-B-C-D problem is not technically restricted to the area of serial numbered goods. Any goods or other collateral that can be sold or exchanged easily could be said to suffer from the A-B-C-D problem as defined by Professors Cuming, Walsh, and Wood. Similarly, not everything that has a serial number is a "serial numbered good" as defined by the Regulation. Therefore, the rationale for the regime cannot lie entirely within either the character of the asset or the mischief, but together, these two provide a fairly comprehensive explanation, though not a complete one.

The third explanation is one of commonality. Constitutionally, outside of both the banking⁵⁸ and insolvency⁵⁹ contexts, secured credit is within

⁵⁷ Cuming, Walsh & Wood, *supra* note 55 at 349.

⁵⁸ Banking, the incorporation of banks, and the issue of paper money fall within the

provincial jurisdiction.⁶⁰ The adoption of the various provincial PPSAs has been driven at least in part by the idea that, despite the provincial nature of the jurisdiction, the provinces have largely harmonized the approach to many issues.⁶¹ In the view of the authors, this is not an area where being “out of step” with other provinces is necessarily a great idea. In fact, in the view of the authors, it would be a very bad idea. Commonality means certainty both for large scale borrowers (corporations with nationwide operations) and large scale lenders (such as banks⁶²) and their counsel, as well as other users of the Registry system as to what information needs to be registered. Thus, the argument made here is not one that Manitoba should abandon the serial-numbered goods regime. Rather, the argument (made in more detail below) is that the majority of statutes and case law have supported the idea that a “reasonable search” with respect to a serial numbered good is a search of either the serial number of the serial numbered good or the proper name of the debtor against whom the security interest was original registered. A “reasonable search” with respect to a serial numbered good does not require that the searcher search both the serial number and the name.⁶³

exclusive jurisdiction of Parliament. See *The Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, s 91(15). The *Bank Act*, SC 1991, c 46, successor to the *Bank Act* RSC 1985, c B-1, was passed pursuant to this grant of jurisdiction.

⁵⁹ Bankruptcy and insolvency fall within the exclusive jurisdiction of Parliament. See *The Constitution Act, 1867*, *ibid*, s 91(21). The *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA], was passed pursuant to this grant of jurisdiction. As will be discussed below, s 72(1) of the BIA allows the PPSA to determine the priority of secured creditors.

⁶⁰ “Property and Civil Rights in Province” under *The Constitution Act, 1867*, *supra* note 58, s 92(13).

⁶¹ Cuming, Walsh & Wood, *supra* note 55 at 6.

⁶² *The Bank Act*, *supra* note 58, does have security provisions (ss 425-436.1). Banks are the only lenders to whom these provisions are available. The types of borrowers against which this type of security can be asserted is also restricted. However, the PPSA is generally available to all types of lenders, including banks. In many cases, banks are allowed to (and do) take both *Bank Act* security and a security interest under the PPSA. The exception to this rule is Saskatchewan. Under the Saskatchewan PPSA, *supra* note 33, s 9(2), if a bank claims *Bank Act* security, the registration under the Saskatchewan PPSA is ineffective as long as the *Bank Act* security remains in place.

⁶³ See note 11 for the rationale for the importance of understanding the historical background.

V. WHAT IS THE SERIAL NUMBERED GOODS REGIME?

A. The *PPSA*

The following provisions of the *PPSA* are relevant to the discussion below:

2(2) Except where otherwise provided in this Act, the determination whether goods⁶⁴ are “consumer goods”,⁶⁵ “inventory”⁶⁶ or “equipment”⁶⁷ shall be made as of the time the security interest in the goods attaches.⁶⁸

30(6) Where goods that are equipment and of a kind prescribed as serial numbered goods are sold or leased, the buyer of goods or lessee takes free from any security interest in the goods perfected under section 25 if

- (a) the buyer of goods or lessee buys or leases the goods without knowledge of the security interest; and
- (b) the goods are not described by serial number in the registration relating to the security interest.

35(1) Where this Act provides no other method⁶⁹ for determining priority⁷⁰ between security interests,⁷¹

⁶⁴ “Goods” are tangible personal property that does not fall into other forms of personal property provided for in the *PPSA*. See *PPSA*, *supra* note 2, s 1 *sv* “goods”.

⁶⁵ The definition of “consumer goods” is provided, *supra* note 49.

⁶⁶ “Inventory” is, among other things, the goods intended to be used, consumed or sold in the business. See *PPSA*, *supra* note 2, s 1 *sv* “inventory”.

⁶⁷ “Equipment” refers to all goods that are neither consumer goods, nor inventory. See *PPSA*, *supra* note 2, s 1 *sv* “equipment”.

⁶⁸ “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.

⁶⁹ 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*, *supra* note 2 s 34(2).

⁷⁰ 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 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 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 an asset-by-asset determination. 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.

(a) priority between conflicting perfected⁷² security interests in the same collateral is determined by the order of the occurrence of the following:

- (i) the registration of a financing statement without regard to the date of attachment⁷³ 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 74,⁷⁴

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.

35(4) A security interest in goods that are equipment and that are of a kind defined in the regulations as serial numbered goods is not registered or perfected by registration for the purposes of subsection (1), (7) or (8) unless a financing statement relating to the security interest and containing a description of the goods by serial number is registered.

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.⁷⁵

⁷¹ *Supra* note 7.

⁷² 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, *supra* note 70.

Expressed as a mathematical equation, perfection might be illustrated as follows: Perfection = Attachment + Perfecting Step. Attachment is described *supra* note 68. 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, *supra* note 2, s 25. A financing statement is discussed in more detail, *supra* note 5.

⁷³ "Attachment" is referred to, and discussed in more detail, *supra* note 68.

⁷⁴ 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.

⁷⁵ The discussion of the term "seriously misleading" can be found in Part V, below.

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.⁷⁶

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.

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.

47 Registration of a financing statement in the Registry is not constructive notice or knowledge of its existence or contents to any person.⁷⁷

B. How These Sections Interact

With any collateral, the name of the debtor is to be included in the appropriate field of the financing statement.⁷⁸ Where the collateral is a serial numbered good, the general rule is that the serial number⁷⁹ is also to be

⁷⁶ As is discussed in *Technical Amendments*, *supra* note 3, the language that closes this paragraph is effectively the same as the definition of the term “seriously misleading” as provided in the weight of the case law on this issue, as discussed in Part V.B. below.

⁷⁷ PPSA, *supra* note 2.

⁷⁸ Regulation, *supra* note 4, ss 13-17.

⁷⁹ *Ibid.*, s 19.

included in its own field of the financing statement.⁸⁰ However, the effect of the non-inclusion of the serial number is a matter of the categorization of the goods. Each category is dealt with below.

1. *Inventory*

If the goods are inventory, the non-inclusion of the serial number has no effect at all. This is a policy choice of the legislature, but also, a concession to practicality. The basic assumption is that when inventory is purchased, it is expected to be used up, consumed or quickly turned for a profit. A simple example might assist here. Imagine that the debtor is a car dealer. Every car on the lot is financed. If the creditor has to register a financing change statement⁸¹ every time that a car (a piece of inventory) is sold to the ultimate purchaser, in order to reflect the serial number, and remove the serial number of the inventory that was validly sold,⁸² the PPSA becomes both cumbersome and costly.⁸³ Given the unitary nature of the concept of the security interest,⁸⁴ the PPSA must deal with the issue of efficacy. The PPSA cannot expect that which would be unreasonable or unwieldy for the registrant. Therefore, rather than putting inventory outside the PPSA altogether, the PPSA eliminates the unreasonableness for the registrant by eliminating the need for a serial number with respect to inventory.

⁸⁰ *Ibid.*

⁸¹ A financing change statement is the document filed in the Registry to alter any of the information contained in a previously-filed financing statement. See PPSA, *supra* note 2, s 1 *sv* “financing change statement”.

⁸² Generally, where inventory is sold, at least some of the proceeds (cash, cheque or other value) will be used to purchase a replacement piece of inventory. On this point, see *Canadian Imperial Bank of Commerce v Marathon Realty Co Ltd*, [1987] 5 WWR 236, 40 DLR (4th) 326 (Sask CA), Tallis JA, for the Court.

⁸³ Each filing has a cost. Beyond the direct cost, even the time that a debtor and a creditor would each have to spend in order to keep up with all the changes would be an indirect cost to all involved.

Having to re-file the serial number on inventory as it is sold would also be counter the basic concept of “proceeds”, under the PPSA. See PPSA, *supra* note 2, s 28. The money received by the debtor in return for the case of the sale of the car would be “proceeds” of the car, and would be subject to the same security interest as the original collateral, that is, the car. That money is often used to purchase the new inventory (the car to replace the one that was just sold). In such a case, the replacement car would be proceeds as well. The same is true of any other personal property purchased with those funds. See *ibid*, Tallis, JA, for the Court.

⁸⁴ Cumming, Walsh & Wood, *supra* note 55 at 116.

2. Consumer Goods

With respect to consumer goods, it is obligatory to include a serial number with the financing statement. Otherwise, the registration is invalid.⁸⁵ This again is a policy choice by the legislature. It appears that the legislature values the ability of individual debtors to use their personal assets,⁸⁶ and that the secured creditor should only take those assets where the secured creditor has taken all of the necessary steps (including the replication of the name of the debtor and requisite serial number).⁸⁷

3. Equipment

With respect to equipment, the law is in part created by omission. Subsection 35(4) says simply that where there is perfection by registration, by one secured party⁸⁸ without the serial number, and then there is perfection by registration, by another secured party with the serial number in the same collateral, the latter has priority over the former. The part that is omitted from subsection 35(4) is that there are other possible claimants to the property. These include the trustee in bankruptcy of the debtor,⁸⁹ and

⁸⁵ PPSA, *supra* note 2, s 43(8).

⁸⁶ By definition, a debtor that is a business entity (such as a corporation) has no "consumer goods".

⁸⁷ Regulation, *supra* note 4, s 21(2).

⁸⁸ PPSA, *supra* note 2, s 1, *sv* "secured party".

⁸⁹ See PPSA, *supra* note 2, s 20(b). A trustee in bankruptcy only becomes important if the debtor has made an assignment into bankruptcy, or has been petitioned into bankruptcy by one or more creditors. In such a situation, all of the property of the bankrupt debtor is automatically transferred to the trustee in bankruptcy. See the BIA, *supra* note 59, s 67(1). In theory the trustee in bankruptcy represents all of the creditors of the bankrupt. Nonetheless, generally, the rights of secured creditors are unaffected by the BIA. Instead, the rights of secured creditors are determined by provincial law, such as the PPSA, see the BIA, s 72(1). Therefore, in practice, the primary concern of the trustee in bankruptcy is the interests of the unsecured creditors. As will be discussed below, one of the primary concerns identified in *Re: Lambert*, *supra* note 16 is the parties who should be under consideration with respect to the use of the registry system. For the Ontario Court of Appeal, only secured creditors and purchasers are relevant to this analysis. Oddly enough, the distinction between secured and unsecured creditor is not always as stark as many people unfamiliar with the intricacies of the credit system might suppose.

Most obviously, once a creditor's security is exhausted, the underlying debt which remains unpaid is still a debt of the debtor, and therefore, the creditor who was previously secured is now an unsecured creditor of the debtor.

As another example, there are times when the security interest of a creditor may be lost because the PPSA specifically provides as much. For example, where the debtor sells an

execution creditors.⁹⁰ None of these parties are referred to in section 35. Therefore, even if the serial number is entirely absent, these other possible claimants to the equipment will still be subordinate to⁹¹ a security interest perfected by registration.

The public policy is a little tougher to figure out on this one. However, while not universally true, generally, execution creditors, trustees in bankruptcy, and potential purchasers would generally be less likely than secured creditors to rely on the Registry. But this is not universally true. However, with the first two categories (execution creditors and trustees in bankruptcy), there is no specific interest in the particular property prior to the date of conflict. Therefore, the legislature may have thought that the particular property was often irrelevant to the issue of recovery. From the point of view of the execution creditor, as long as there is sufficient unencumbered property to pay the debt owing, the execution should be relatively unfazed by the fact that the serial numbered good is subject to a security interest.

In terms of third party purchasers, there are other methods by which the interest of purchasers can be and are protected. The text of section 30(6) of the *PPSA* is provided above. For convenience, we reproduce the subsection immediately below:

asset in ordinary course of the debtor's business, the security interest in the asset might be lost, see *PPSA*, *supra* note 2, s 30(2). It is true that generally there is also a security interest in any personal property (*PPSA*, *supra* note 2, s 1, *sv* "personal property") generated by the sale of the asset, as proceeds of that asset (*PPSA*, *supra* note 2, s 1, *sv* "proceeds"). However, with respect to the proceeds interest, this may also be lost if the proceeds are used, for example, to eliminate a debt owing by the debtor to a party other than the creditor, see *Flexi-coil Ltd v Kindersley District Credit Union Ltd*, [1994] 1 WWR 1, 107 DLR (4th) 129 (Sask CA), Jackson JA, for the Court.

Therefore, there are numerous ways in which a secured creditor may become unsecured. If this happens, the creditor, who was clearly ready to rely on his, her or its security interest cannot do so, and must rely on the representation of the trustee in bankruptcy in order to generate recovery of at least part of the money owing.

⁹⁰ See *PPSA*, *supra* note 2, s 20(a). An execution creditor is generally an unsecured creditor who has gotten a judgment of a court proving the debt owing to him, her or it, and is now seeking to execute that judgment, that is, use a legal process to allow the creditor to claim the property of the debtor, to cause it to be sold, and to use the proceeds of the sale to recover the amount of the money judgment.

⁹¹ This is one way of referring to the position of a loser of a priority competition.

30(6) Where goods that are equipment and of a kind prescribed as serial numbered goods are sold or leased, the buyer of goods or lessee takes free from any security interest in the goods perfected under section 25⁹² if

- (a) the buyer of goods or lessee buys or leases the goods without knowledge of the security interest; and
- (b) the goods are not described by serial number in the registration relating to the security interest.

Thus, if:

- (i) serial numbered goods are equipment;
- (ii) a financing statement is registered;
- (iii) the proper serial number is not provided in the financing statement;
- (iv) the serial-numbered equipment is sold; and
- (v) the purchaser has no actual knowledge of the existence of the security interest,⁹³

then the purchaser's interest in the collateral will defeat the interest of the secured party in the event of a priority contest between the two. The primary focus of the section quoted is to encourage the inclusion of serial number on a financing statement where the collateral is serial-numbered equipment.

VI. THE RESPONSE IN OTHER PROVINCES

A. Statutory Reform

Three of the four PPSAs for the Atlantic provinces⁹⁴ deal with this issue with one or more specific statutory provisions.⁹⁵ In New Brunswick, the relevant provisions are as follows:

43(8) A registration is invalid if a search of the records of the Registry using the name, as prescribed, of any of the debtors required to be included in the financing statement other than a debtor who does not own or have rights in the collateral does not disclose the registration.

⁹² Section 25 provides for one of the perfecting steps to be registration. Therefore, section 30(6) only applies when there is a registration, as opposed to possession of the collateral by the creditor or the agent of the creditor *PPSA*, *supra* note 2, s 24.

⁹³ It is important to recall that registration of the financing statement does not constitute knowledge for this purpose. See *PPSA*, *supra* note 2, s 47.

⁹⁴ New Brunswick *PPSA*, *supra* note 33; Nova Scotia *PPSA*, *supra* note 33, and Prince Edward Island *PPSA*, *supra* note 33.

⁹⁵ Newfoundland and Labrador *PPSA*, *supra* note 33 does not do this.

43(8.1) Subject to subsections (10) and (10.1), a registration is invalid if a search of the records of the Registry by serial number, as prescribed, for collateral that is consumer goods of a kind that are prescribed as serial numbered goods does not disclose the registration.

43(8.2) A registration disclosed other than as an exact match as a result of a search of the records of the Registry using the name of a debtor or serial number as prescribed does not mean that the registration is, by that fact alone, valid.⁹⁶

Prince Edward Island takes a slightly different approach:

(8) Subject to subsection (10), a registration is invalid if there is a seriously misleading defect, irregularity, omission or error in

(a) the name of any of the debtors required to be included in the financing statement other than a debtor who does not own or have rights in the collateral;
or

(b) the serial number of the collateral if the collateral is consumer goods of a kind that are prescribed as serial numbered goods.

(8.1) For greater certainty, if there is a seriously misleading defect, irregularity, omission or error in the name of any of the debtors required to be included in the financing statement, other than a debtor who does not own or have rights in the collateral, the registration is invalid even if there is no seriously misleading defect, irregularity, omission or error in a serial number.

(8.2) For greater certainty, if there is a seriously misleading defect, irregularity, omission or error in the serial number that is included in the financing statement for collateral that is consumer goods of a kind that are prescribed as serial numbered goods, the registration is invalid even if there is no seriously misleading defect, irregularity, omission or error in the name of any of the debtors required to be included in the financing statement.⁹⁷

The reason that both sets of provisions are set out is that though the wording is different, it would appear that the effect of the two sets of provisions is largely the same, although in the view of the authors certain nuances that could lead to some minor distinctions.⁹⁸ It is quite clear from both sets of language in the PPSAs in the three Atlantic provinces that those jurisdictions have decided that a single search is sufficient.

⁹⁶ New Brunswick PPSA, *supra* note 33 ss 43(8), 43(8.1) and 43(8.2). The Nova Scotia PPSA, *supra* note 33, ss 44(8), 44(8A) and 44(8B) are to the same effect.

⁹⁷ Prince Edward Island PPSA, *supra* note 33 ss 43(8), 43(8.1) and 43(8.2).

⁹⁸ While there are issues with the language of s 43(8.2), this is not the forum to attempt to resolve these issues. These will have to wait for another day.

B. The Case Law⁹⁹

1. New Brunswick

In *GMAC Leaseco Ltd v Moncton Motor Home & Sales Inc (Trustee of); Stevenson v GMAC Leaseco Ltd*,¹⁰⁰ Moncton Motor Home was the debtor. The debtor had purchased a truck from a local automobile dealer on credit terms.¹⁰¹ The dealer then transferred the debt and the security interest¹⁰² to GMAC.¹⁰³ The serial number was not the problem here, as it was properly included. But, the proper name of the debtor was not included. Rather than "Motor Home" (correct), the name of the debtor included "Motorhome" (incorrect). Not only that, but the missing space actually changed the search result, such that a search of only the correct name would not reveal the financing statement.¹⁰⁴ Therefore, when the debtor made an assignment into bankruptcy,¹⁰⁵ and GMAC claimed the collateral by a proof of claim,¹⁰⁶ the trustee in bankruptcy sought to set aside the proof of claim on the basis that the registration was invalid.¹⁰⁷

The basic logic of the trustee position would be as follows. First, the debtor's name was not properly included. Second, since a search of the correct name did not show the registration,¹⁰⁸ the error is "seriously

⁹⁹ To keep this paper within manageable bounds, the authors have decided not to address all of the philosophical underpinnings offered by the various Courts of Appeal in addressing these issues. Rather, the goal here is to examine what the courts have actually said; in other words, the focus is on black letter law, and its practical effects. Conceptual consistency is an important issue. But unfortunately it will have to wait for another day.

¹⁰⁰ 2003 NBCA 26, 227 DLR (4th) 154 [*Moncton Motor Home*].

¹⁰¹ *Ibid* at para 6.

¹⁰² When a security interest is combined with the underlying debt from the point of view of the creditor, this is personal property of the creditor, known as "chattel paper". See *PPSA*, *supra* note 2, s 1 *sv* "chattel paper". In other words, the dealer, as the creditor, sold its right to receive payment from its debtor, Moncton Motor Home. The right to payment was sold to GMAC. In addition to the right to payment, GMAC also received the right to seize the collateral in the event of non-payment by Moncton Motor Home.

¹⁰³ *Moncton Motor Home*, *supra* note 100, at para 6.

¹⁰⁴ *Ibid* at para 6.

¹⁰⁵ *Ibid*.

¹⁰⁶ A proof of claim is an assertion by a party to a distribution from the property of the debtor.

¹⁰⁷ *Moncton Motor Home*, *supra* note 100, at para 7.

¹⁰⁸ Given the wording of s 43(9), referred to above, it is unnecessary to show that a proper search was in fact done, though one was done on the facts of the case. The more

misleading".¹⁰⁹ Since a seriously misleading error was made, the registration is invalid, pursuant to paragraph 43(8)(a).¹¹⁰ There is no suggestion that there was possession of the collateral by the creditor. Therefore, the only remaining possible perfecting step is proper registration. If the registration is invalid, then the security interest is unperfected as of the date of conflict.¹¹¹ Since the security interest is unperfected, the interest of secured party will be subordinate to the interests of the trustee in bankruptcy,¹¹² meaning that the proceeds of the property would be distributed in accordance with the bankruptcy regime.¹¹³ Therefore, the entire case turned on whether a single search was proper. If it was, the trustee would be successful; if it was not, the secured party would be successful. As Justice Robertson explains the issue:

As well, in addressing whether a "right number" saves a "wrong name", the courts have been unable to avoid the inverse question. Does a "right name" save a "wrong number"? Finally, one is forced to ask whether there are substantive differences between the security regimes in place in each province. The short answer is that, presently, the legislation of the western provinces and New Brunswick is strikingly similar. Only the legislation of Ontario is appreciably different with respect to the issue at hand.¹¹⁴

The Court essentially adopts the trustee's argument, as laid out above. It goes on to hold that a since the PPSA is "notice filing" system, and not a "document filing"¹¹⁵ system, only minimal information is required.¹¹⁶

appropriate way to refer to this is that the proper search would not have revealed the registration. It is quite clear both in this case, and in the cases generally that this is an objective test, dependent on the qualities of the computerized registry system. See *ibid* at paras 18 and 58-60. The wording of subsection 43(9) is also meant to reverse some of the prior law that suggests that the searcher should be deemed to have constructive notice of what is in the registry (PPSA, *supra* note 2, s 47, and *Motor Home*, *ibid* at para 65), and that in order to be able to rely on the error, actual knowledge and prejudice would be necessary. See *ibid* at paras 19-22, and 65.

¹⁰⁹ *Ibid* at paras 8, 11.

¹¹⁰ *Ibid* at para 99.

¹¹¹ This would be because there was no valid perfecting step.

¹¹² PPSA, *supra* note 2, s 20(b).

¹¹³ *Giffen (Re)*, [1998] 1 SCR 91, 155 DLR (4th) 332 Iacobucci J, for the Court.

¹¹⁴ *Moncton Motor Home*, *supra* note 100 at para 4.

¹¹⁵ Under prior security legislation, the entire document evidencing the security agreement (now defined under the PPSA, *supra* note 2, s 1, *sv* "security agreement") had to be registered in the appropriate public registry. Therefore, any searcher could find not only evidence of the existence of the security agreement, but could also review its terms. In such a system, the doctrine of constructive notice (abolished by PPSA, *supra* note 2, s 47)

Therefore, the information needs to be correct.¹¹⁷ The Court's emphasis is on the obligation of registrants to enter the correct information.¹¹⁸ It may seem odd to refer to the absence of a space as "seriously misleading".¹¹⁹ But relying on a "common sense" interpretation may cause problems.¹²⁰

The Court points to a statutory interpretation problem with a dual search requirement. Where a searcher is required to search both, this effectively rewrites subsection 43(9) in that between paragraphs (a) and (b) is the word "or". Yet, the effect of a dual requirement would be to change that "or" to an "and".¹²¹ Also, in the view of the Court, the dual search requirement is dangerously close to constructive notice, contrary to section 47.¹²² Even if unfairness is perceived, what is fair must be analyzed in accordance with the statutory expectations.¹²³ Put another way, people involved in the credit industry know what is expected under the PPSA. Therefore, what is "fair" should be judged in lights of the terms of the PPSA, under which the security interest was created. Finally, the Court discusses the case of *Re: Lambert*¹²⁴ at some length. We will return to this discussion as we turn our attention to that case immediately below.

2. Ontario

In Canada's most populous province, the case law is of limited assistance for two reasons. First, there is a significant difference in statutory language between Ontario and the Yukon Territory, on the one hand,¹²⁵ and the other

would make significantly more sense.

¹¹⁶ *Supra* note 100 at paras 27-28.

¹¹⁷ *Ibid* at para 67.

¹¹⁸ *Ibid*.

¹¹⁹ *Ibid* at para 48.

¹²⁰ *Ibid* at para 49.

¹²¹ *Ibid* at paras 61-62.

¹²² *Ibid* at para 64.

¹²³ *Ibid* at para 66.

¹²⁴ *Ibid* at paras 80-89.

¹²⁵ For example, the provision in the Ontario PPSA, *supra* note 33 relevant to this discussion is s 46(4). This provides as follows:

46(4)A financing statement or financing change statement is not invalidated nor is its effect impaired by reason only of an error or omission therein or in its execution or registration unless a reasonable person is likely to be misled materially by the error or omission.

Also, it is important to remember that the Ontario PPSA does not apply the special regime

Canadian common-law jurisdictions in terms of the PPSA.¹²⁶ Second, there is a smaller philosophical difference between the two, including with respect to serial-numbered goods, along the same lines.¹²⁷

Nonetheless, *Re: Lambert*¹²⁸ is discussed in many of the major cases on the issue of a potential dual-search requirement. Therefore, it is important component of the analysis.

In *Re: Lambert*, a vendor had sold a car to Mr. Lambert.¹²⁹ The car was clearly a motor vehicle, as defined,¹³⁰ and thus subject to the Ontario version of the special regime, different though it is from that described above. The car was a consumer good.¹³¹ The chattel paper¹³² was then sold to GMAC.¹³³

The name used in the signature of the debtor was used in completing the financing statement.¹³⁴ Unfortunately, the name used in the signature of the debtor was not his legal name,¹³⁵ as required by the applicable regulation.¹³⁶ Mr. Lambert then made an assignment into bankruptcy, and the trustee in bankruptcy investigated the registration by GMAC.¹³⁷ The trustee caused the appropriate name searches (based on the correct information provided by the debtor's birth certificate) to be conducted. These searches did not reveal the registration.¹³⁸ Then, the trustee in bankruptcy moved to set aside the registration.¹³⁹ Despite the fact that the trustee in bankruptcy had the relevant information, no search of the vehicle identification number (the serial number for the purposes of the Ontario regime) was done. The serial number was properly entered in the registration.¹⁴⁰ The trial judge found in favour of

to anything except "motor vehicles" as defined. See the Ontario PPSA, *supra* note 33.

¹²⁶ *Ibid.*

¹²⁷ See MacPherson, "Financial Leasing", *supra* note 3, at 101-103

¹²⁸ *Re: Lambert*, *supra* note 16.

¹²⁹ *Ibid* at 96.

¹³⁰ *Supra* note 33.

¹³¹ *Re: Lambert*, *supra* note 16 at 96.

¹³² The concept of "chattel paper" is discussed, *supra* note 102.

¹³³ *Re: Lambert*, *supra* note 16 at 96.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ The applicable regulation at the time was the now revoked, RRO 1990, Reg 912, s 16(1).

¹³⁷ *Re: Lambert*, *supra* note 16 at 97.

¹³⁸ *Ibid* at 97-98.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid* at 96.

the trustee,¹⁴¹ while the Court of Appeal reversed this ruling.¹⁴² Justice Doherty, speaking for the Court of Appeal, was quite clear that but for the wording of subsection 46(4), the registration would have been invalid.¹⁴³ After a lengthy review of the case law the Court of Appeal specifically rejects any test based on the type of person searching.¹⁴⁴ This would be subjective in nature, and the Court of Appeal is clear that that the test should be objective.¹⁴⁵ Based on the work of Richard H McLaren,¹⁴⁶ the Court then limits the scope of reasonable searchers to those who were either potential purchasers, or potential secured lenders thinking of using the asset as collateral.¹⁴⁷ As a result, the Court of Appeal frames the test as follows:

In this case, therefore, the question becomes – would a potential purchaser of the motor vehicle referred to in the financing statement, or a person considering taking that motor vehicle as security, be materially misled by the error in a previously registered financing statement? This articulation of the test accords with the purpose of the inquiry function of the system, and gives meaning to the requirement that the error be "likely to mislead materially". Unless the effect of the error is addressed in the context of a potential purchase or loan involving the property specified in the financing statement, I am unable to see how an error in that financing statement could be "likely to materially mislead" a prospective purchaser or lender.¹⁴⁸

Clearly, the Court is motivated by the fact that a reasonable searcher would have access to both relevant pieces of information (and the trustee in bankruptcy in fact had the information here). This in turn leads them to believe that a reasonable search would use all of that information to conduct its search. The Court then distinguishes this purpose for the registration from other purposes for which the computerized system may be used:

In so describing the purpose of the search function of the system, I am not unaware that it has other uses in the commercial world. Some potential creditors may do a P.P.S.A. search as part of their inquiry into the credit worthiness of a potential borrower. Those creditors will not be interested in the status of any particular property, but will be looking for any information that may assist in assessing the

¹⁴¹ *Ibid* at 98.

¹⁴² *Ibid* at 113.

¹⁴³ *Ibid* at 112.

¹⁴⁴ *Ibid* at 105.

¹⁴⁵ *Ibid*.

¹⁴⁶ *Secured Transactions in Personal Property in Canada*, 2d ed (Toronto: Carswell, 1992) at 28-30.

¹⁴⁷ *Re: Lambert*, *supra* note 16 at 105.

¹⁴⁸ *Ibid* at 106 [citation omitted].

potential borrower's overall debt situation and credit worthiness. In describing the reasonable person for the purposes of s. 46(4), I would distinguish between a use to which the P.P.S.A. system can be put and the purpose for which the system exists. The system was not designed as a credit inquiry service, although it can provide information which will assist in determining credit worthiness. That same incidental use exists with respect to information stored in various other data banks established for a myriad of other purposes.¹⁴⁹

The Court then goes to hold that a reasonable searcher would be reasonably competent with the search system, with awareness of the various search options, and the record produced by each search option.¹⁵⁰ A reasonable search would in essence demand all the relevant information, including full name and birth date of the current owner of the vehicle, and the appropriate serial number.¹⁵¹ The Court then restates the issue, and resolves it as follows:

Would the reasonable person, having access to the seller or borrower's name (and birth date) and the V.I.N. of the motor vehicle, use both sources of information to conduct two searches of the registration system? With respect to the contrary view, I have no doubt that a reasonable person in possession of the information needed to conduct the two searches would in fact conduct both searches. The reasonable person would want to know about any prior encumbrances registered against the motor vehicle and would take all reasonable steps to locate notice of any prior encumbrance in the system. As a reasonable user of the registration system, he or she would know that prior encumbrances for motor vehicles could be registered under the debtor's name, the V.I.N., or both. A name search might not locate all prior encumbrances. A V.I.N. search might not locate all prior encumbrances if the motor vehicle was not classified as consumer goods for the purposes of a prior transaction. By performing the two searches, the reasonable user would increase the probability of recovering all prior encumbrances. The added protection would come at minimal cost. Any reasonable user would spend the few dollars required for the added information and comfort provided by two independent searches of the registration system.¹⁵²

This decision has been roundly criticized for its approach.¹⁵³ In the view of the authors, it should not be followed.

¹⁴⁹ *Ibid* at 106.

¹⁵⁰ *Ibid* at 108.

¹⁵¹ *Ibid*.

¹⁵² *Ibid* at 122 [citations omitted].

¹⁵³ See e.g. David L Denomme, "Search Again?: Names, Numbers and Reasonable Persons" (2002) 17 BFLR 1 at 32-38; Roderick J Wood, "Registration Errors Under the OPPSA: *Lambert (Re)*" (1995) 44 CBLJ 444 at 448-456; Cumming, Walsh & Wood, *supra* note 55 at 367-368.

To add even more confusion to the matter, at least one subsequent case, relying on *Re: Lambert*, holds that the dual-search requirement only applies to a situation where the name is wrong, but the serial number is correct.¹⁵⁴ In other words, if the only universal search criterion (that is, the name of the debtor) is incorrect, this may not invalidate the registration. However, if a search criterion that may or may not apply (the serial number) does in fact apply, and is entered incorrectly, this will most likely invalidate the registration. To the authors, such an approach is at best perplexing, and at worst contradicts the spirit, if not the letter of the PPSA. Imagine the following scenario: A general security agreement¹⁵⁵ was entered into between Debtor and Secured Party #1, over all of Debtor's property. But Secured Party #1 does not register against the name of Debtor at all. But instead Secured Party #1 does register the correct serial number of the major asset of Debtor, which is a piece of equipment that is a serial numbered good. Debtor then approaches Secured Party #2 for a loan. Secured Party #2 does not have access to the serial number, but does a search of the Debtor's name. Secured Party #2 does not have the other information, which is the serial number, so Secured Party #2 believes that he may complete a loan transaction with the Debtor. Secured Party #2 registers the correct name of Debtor. Prior to making the loan, Secured Party #2 amends the registration to add the serial number. It would seem to the authors that in an ensuing priority competition, since every registration needs a debtor, Secured Party #2 ought to be successful. We will return to this issue below.

3. Saskatchewan

Saskatchewan has historically been of two minds about this issue. In *Ford Credit Canada Ltd v Percival Mercury Sales Ltd*,¹⁵⁶ the Court of Appeal quoted the trial judge¹⁵⁷ as to the facts of the case as follows:

The bankrupt operated a business under the firm name and style of "Licensed Boarding Care Home". She leased the vehicle in question from Percival which assigned the paper to Ford. Both companies made the error of referring to the debtor

¹⁵⁴ See *Paterson (Re)* (1994), 29 CBR (3d) 133, 8 PPSAC (2d) 126 (Gen Div, Bankruptcy) Registrar Ferron.

¹⁵⁵ A general security agreement usually refers to a security agreement that gives the secured party security over all or the vast majority of the assets of the debtor.

¹⁵⁶ [1986] 6 WWR 569, 50 Sask R 268 (CA) Cameron JA, for the Court [*Percival Mercury Sales* (CA)].

¹⁵⁷ [1984] 5 WWR 714 (Sask QB) Halvorson J [*Percival Mercury Sales* (QB)].

by trade name rather than the bankrupt's name in the financing statements registered under *The Personal Property Security Act*, 1979-80, S.S. ch. P-6.1, with the consequence that her name did not appear in the registry. However, the documentation was properly registered against the vehicle in terms of identifying the serial number, make and model. Because of the failure to name the bankrupt in the financing statements, the trustee contends the security is unperfected and refuses to allow Ford or Percival priority to the automobile.¹⁵⁸

Therefore, the case was about an error in the name, with a correct serial number. The Court held as follows:

Of the two methods of search open to anyone interested in determining the state of title to a car, namely the name of the person and the serial number of the vehicle, the serial number is of particular importance. There will be but one serial number, recorded without variation. And a serial number registration, to be effective, must be accurate. It is also required by the regulations to be accompanied by the make, model and type of the vehicle, so that additional identification is possible.¹⁵⁹

Later case-law seems to suggest that a single search is sufficient. In *Kelln (Trustee of) v Strasbourg Credit Union Ltd.*,¹⁶⁰ the debtor had a truck, and the Credit Union took a security interest in it.¹⁶¹ However, there was no serial number provided.¹⁶² It was clear that the truck was both a serial number good¹⁶³ and a consumer good.¹⁶⁴

Despite some language differences between the earlier version of the PPSA at issue and the current version, there is also substantial similarity. The curative provision at issue in the case provided as follows:

66(1) The validity or effectiveness of a document to which this Act applies is not affected by reason of a defect, irregularity, omission or error therein or in the execution or registration thereof unless the defect, irregularity, omission or error is seriously misleading.

Subsection 5(1) of the applicable regulation required the provision of the serial number in these circumstances.¹⁶⁵ The questions on this issue before the Court were described this way:¹⁶⁶

¹⁵⁸ *Percival Mercury Sales (CA)*, *supra* note 156 at 570, quoting *Percival Mercury Sales (QB)*, *ibid* at 715.

¹⁵⁹ *Percival Mercury Sales (CA)*, *ibid* at 572.

¹⁶⁰ 89 DLR (4th) 427, [1992] 3 WWR 310, [*Kelln*, cited to DLR].

¹⁶¹ *Ibid* at 432, Vancise JA, for the majority.

¹⁶² *Ibid*.

¹⁶³ *Ibid*.

¹⁶⁴ *Ibid*.

¹⁶⁵ *Ibid* at 434.

If the creditor files a financing statement in a transaction which requires that the collateral be described by serial number correctly describing the debtor by name but describes the collateral only in a general way as "vehicles" and does not identify it by serial number, is the description of one of the two registration-search criterion sufficient to validly perfect the security interest? In that type of transaction, there are two mandatory registration-search criteria, the name of the debtor and the serial number. Are the two mandatory registration-search criteria alternatives one to the other, or are they inseparable and not alternate registration-search criteria? Are the registration-search criteria alternatives or are they both required to properly register the security interest? If they are alternatives, are they true alternatives or is one mandatory and the other merely secondary?

The Court concludes that both criteria are mandatory when the serial number is required.¹⁶⁷ Therefore, if the serial number is required, and either the name or the serial number is absent or seriously misleading,¹⁶⁸ then registration is invalid.¹⁶⁹

4. Alberta

In *Case Power & Equipment v 366551 Alberta Inc (c.o.b. MST Trucking Co) (Receiver of)*,¹⁷⁰ the debtor 366551 Alberta Inc had been placed in

¹⁶⁶ *Ibid* at 438.

¹⁶⁷ *Ibid* at 444.

¹⁶⁸ It is important to note that since the serial number was entirely absent in *Kelln*, the Court did not have to address the meaning of the term "seriously misleading" under the Saskatchewan PPSA.

¹⁶⁹ The concurring reasons of Chief Justice Bayda essentially arrive at the same place, but via a different route. As Bayda CJS writes as follows (*ibid* at 431): "Should a reasonable person foresee that registering parties will from time to time inadvertently omit something important from their financing statements? I think that the answer is yes but it does not follow that reason and logic therefore impose upon a person using the system a positive obligation (as for example an obligation to conduct a second search, that is, a search using the debtor's name) to mitigate or attempt to prevent any loss that may flow from that foreseeable omission. A reasonable person is entitled to rely on the assumption that the onus to prevent any such loss should in law rest not on him or her but upon the person responsible for the omission. This stance in reason and logic is supported by certain legal principles that the legislators likely intended should come into play when they enacted the Act. Because the Act is concerned with the status of titles (broadly speaking) to property and a system of registration which in large measure determines that status, the principles of certainty and predictability must predominate if the integrity of the system and efficacy of commercial transactions are not to be undermined. It is indisputable that these principles militate the need for accuracy in the recording of important information and the lack of carelessness in matters that count."

¹⁷⁰ (1994), 157 AR 212, 118 DLR (4th) 637 (CA) [*Case Power* cited to DLR].

receivership.¹⁷¹ There were differing problems with four different pieces of serial numbered equipment.¹⁷² For purposes of description of the facts, the authors cannot do better than the summary offered by the Court of Appeal.¹⁷³ For clarity, the appellant is Case Power, which was purportedly a secured creditor of the debtor having taken an assignment of a security interest previously held by another party. First Calgary is a secured party of the debtor.

June 8, 1990

Appellant's assignor registers notice of its conditional sales contract over the Volvo loader under wrong debtor name, but correct serial number.

November 27, 1990

Appellant's assignor registers notice of its conditional sales contract over the Case Dozer and Case Rammer under wrong debtor name. It gives wrong serial number for dozer, but correct serial number for rammer.

June 28, 1991

Appellant's assignor registers notice of its security agreement over Case Excavator under wrong debtor name, but correct serial number.

December 2, 1991

First Calgary registers notice of a general security agreement with the debtor under correct debtor name, but with no serial numbers and no specific descriptions of individual items encumbered.

January 8, 1992

Appellant files amending registrations for three items (all but the excavator) correcting the debtor name.

March 2, 1992

First Calgary amends its registrations to give the correct serial numbers and specific descriptions of the Volvo Loader, the Case Dozer, and the Case Excavator.

¹⁷¹ *Ibid* at 641.

¹⁷² *Ibid* at 641-642.

¹⁷³ *Ibid* at 641.

First, Côté JA says that the PPSA, through its specific provisions replaced all notions of priority based on common law or equity.¹⁷⁴ Second, an amending registration is simply a registration.¹⁷⁵ Third, with respect to the loader and the rammer, since Case Power registered properly (through an amending registration) against both the proper name of the debtor and the serial numbers of the equipment before First Calgary registered against the serial numbers, the Alberta equivalent¹⁷⁶ to section 35(4) of the PPSA¹⁷⁷ applied.¹⁷⁸ With respect to the dozer, an error was made in the serial number given by the appellant's assignor.¹⁷⁹ Based on the Alberta equivalent¹⁸⁰ wording to section 43(6) and 43(8) of the PPSA,¹⁸¹ Côté JA held that not all errors in serial numbers are necessarily seriously misleading.¹⁸² The Justice then held 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.¹⁸³

The majority disagreed, writing as follows:

Mr. Justice Côté says (at p. 9) that an error in the serial number of a chattel would be seriously misleading in either of two situations, that is, if

- (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 chattel¹⁸⁴

¹⁷⁴ *Ibid* at 642-643.

¹⁷⁵ *Ibid* at 643-644.

¹⁷⁶ *Personal Property Security Act*, RSA 2000, c P-7, s 35(3).

¹⁷⁷ *Supra* note 2.

¹⁷⁸ *Case Power*, *supra* note 170 at 644.

¹⁷⁹ *Ibid*.

¹⁸⁰ *Personal Property Security Act*, RSA 2000, c P-7, s 43(6), and 43(7).

¹⁸¹ *Supra* note 2.

¹⁸² *Case Power*, *supra* note 170 at 645.

¹⁸³ *Ibid*.

¹⁸⁴ *Ibid* at 639[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.

Relying on *Re: Logan*,¹⁸⁵ (dealt with in more detail below), Côté JA – the minority – said that computer programming should not determine the outcome of the case.¹⁸⁶ However, the Justice goes on to point out that the registration would appear as an “inexact match” with the entry of the correct information.¹⁸⁷ Based on the Alberta equivalent¹⁸⁸ wording to section 43(9) of the PPSA,¹⁸⁹ the Justice holds the actual searches done and results produced thereby are not relevant to the discussion.¹⁹⁰ This was a sufficiently small error that it was not seriously misleading.¹⁹¹

With respect to the excavator, there was a clear mistake in the provision of the debtor's name, in that the appellant put in both the corporate name and the trade name of the debtor in the same field without putting any punctuation to separate the two names.¹⁹² As a result, a search of either one would not reveal the registration.¹⁹³ The Justice holds that, absent serial number considerations, this error in the name of the debtor would be seriously misleading.¹⁹⁴ With respect to the use of the serial number, the Justice writes

Therefore, if the name of the debtor is seriously misleading taken alone, it does not cease to be so because the description of the chattel, complete with serial number, is accurate. And that is so whether or not these are serial number goods.

¹⁸⁵ *Supra* note 26.

¹⁸⁶ *Case Power*, *supra* note 170 at 646-647.

¹⁸⁷ *Ibid* at 648.

¹⁸⁸ *Personal Property Security Act*, RSA 2000, c P-7, s 43(8).

¹⁸⁹ *Supra* note 2.

¹⁹⁰ *Case Power*, *supra* note 170 at 647-648.

¹⁹¹ *Ibid* at 648.

¹⁹² *Ibid* at 649.

¹⁹³ *Ibid*.

¹⁹⁴ *Ibid* at 649-650.

That is doubly so because the Regulations s. 17 require that one always register the debtor's name, in contrast to the serial number of the chattel (as discussed above). And the Act expressly permits one to search by name: see sec 48(1)(a). If a correct serial number registration cured a hopelessly defective name registration, then any name search would be an empty hope. See *Re Kelln* [1992] 3 W.W.R. 310, 320, 100 Sask R 164 (C.A.), *G.M.A.C. v Trans Canada Credit Corp* (1994) 147 A.R. 333, 335 (M.), and cases cited. Cf. *Re Rose* (1993) 16 O.R. (3d) 360.

Therefore, in my view the defect in the appellant's registration of the excavator is fatally defective, and the respondent has priority with respect to it.¹⁹⁵

While there is a minor disagreement for the majority with the Justice Côté with respect to the second test for the definition of "seriously misleading" on these facts,¹⁹⁶ all three judges agree that the use of the trade name alongside the actual name is seriously misleading on the first test above.¹⁹⁷

One of the ambiguities contained in *Case Power* is whether or not the majority believes that there should be a separate analysis of whether an error is "seriously misleading" beyond whether the entry of the correct data into the computer search algorithm. For the minority, reliance on *Re: Logan* is a clear indication that such an analysis is required. For the majority judgment, it is less clear. First, the majority says that it agrees with the minority, except for the areas referred to in the rest of its judgment.¹⁹⁸ The majority makes no reference to *Re: Logan*. Also, there is a reference to the difference between the actual serial number and the mistaken one as being "so small".¹⁹⁹ This suggests a review by an individual of the two serial numbers to assess the size of the error. A future court could take these two pieces of information together as proof that the majority agrees with the minority, not only on the result, but also on the route to arrive at that result.²⁰⁰ However, in the prior paragraph,²⁰¹ the analysis focused on the fact that the correct information would show the mistaken registration as an "inexact match". Such an approach only makes sense if one is focused on the capacities of the computer system. Also, the first disagreement between the majority and the minority, as

¹⁹⁵ *Ibid* at 651-652.

¹⁹⁶ *Ibid* at 640.

¹⁹⁷ *Ibid*.

¹⁹⁸ *Ibid* at 639.

¹⁹⁹ *Ibid* at 640.

²⁰⁰ *Ibid*.

²⁰¹ *Ibid*.

discussed above, was whether it would be appropriate to find that the computer system was inadequate to the task. The minority said that this would be an appropriate inquiry; the majority disagreed. The majority would seem therefore, to limit the issue of “seriously misleading error” to the computer system generated search result.

5. *British Columbia*

The most important case out of British Columbia on this issue is *Gold Key Pontiac Buick (1984) Ltd v 464750 BC Ltd (Trustee of)*.²⁰² In many ways, the case is similar to *Moncton Motor Home*,²⁰³ discussed above. In this case, the debtor (464) had leased five vehicles from Gold Key.²⁰⁴ However, as was the case in *Moncton Motor Home*, the serial number was entered correctly. The problem lay in the fact that the secured party registered, not against the corporate name of the debtor, but the business name of the debtor, that is, “Pinecraft Furniture Manufacturing”.²⁰⁵ The vehicles were “equipment”.²⁰⁶ The other claimant was the trustee in bankruptcy of the debtor.²⁰⁷ The Court explains the issue before it as follows:

On appeal, Mr. Brown on behalf of Gold Key submits that the Chambers judge erred in four respects, namely:

1. in failing to consider whether the trade name used by a numbered company is a search criterion that a reasonable person would have used to “disclose” Gold Key’s financing statement;
2. in failing to consider whether the Act is clear in requiring that a company must be described by its correct legal name;
3. in misapprehending *Kelln*, *supra*, and its application to the instant case; and
4. in concluding that “a reasonable person using the British Columbia registration/ search system to search a motor vehicle would not undertake two searches, one using the name and one using the serial number.

²⁰² *Supra* note 29.

²⁰³ *Supra* note 100.

²⁰⁴ Long-term leases (leases that are for more than one year) are part of what is referred to as the extended application of the PPSA. See PPSA, *supra* note 2, s 3(2). Basically, the section constitutes a realization by the legislature that creditors can be misled by assets that appear to be owned by the debtor, when in fact the assets are subject to long term leases. The lessor must register an interest in the leased asset in order to take a perfected “deemed” security interest. Therefore, in this case, Gold Key was expected to register its deemed security interest in the vehicles.

²⁰⁵ *Gold Key*, *supra* note 29 at para 1.

²⁰⁶ *Ibid* at para 7.

²⁰⁷ *Ibid* at para 1.

In my view, this appeal turns on the last ground, which raises an issue on which at least two Canadian appellate courts are in disagreement. The third ground may be dealt with as part of the last, and the remaining arguments can be dealt with fairly briefly.²⁰⁸

There is little doubt that the error was seriously misleading, in the sense that there was no similarity between the corporate name of the debtor, and the business name under which the registration was made.²⁰⁹ Yet, the serial numbers of the vehicles were correctly entered.²¹⁰ After a discussion of an article by Professor Cuming,²¹¹ Kelln,²¹² and Lambert,²¹³ Justice Newbury adopts the view of Justice Doherty in the latter case.²¹⁴

There is another case from British Columbia that deals with the issue of what constitutes a "seriously misleading error". The case is *Re: Logan*.²¹⁵ The case arose under an earlier version²¹⁶ of the British Columbia PPSA.²¹⁷ Under the earlier version, it was possible to include middle names of individual debtors. The debtor's full name was Jennifer Louise Logan.²¹⁸ The registration was made under the name Jennifer Louis Logan.²¹⁹ In a case of "truth is stranger than fiction", a search of the correct information²²⁰ would not have revealed the registration. The algorithm was built to show registration that are consistent with the information provided. As the Court points out, if you search "Michael Warren", you will not turn registrations under the name "Mike Warren", and vice versa.²²¹ But if the searcher searches "Mi Warren",

²⁰⁸ *Ibid* at para 5.

²⁰⁹ *Ibid* at para 11.

²¹⁰ *Ibid* at para 1.

²¹¹ RCC Cuming, "Judicial Treatment of the Saskatchewan *Personal Property Security Act*" (1986-7), 51 Sask L Rev 129. See *Gold Key*, *supra* note 29 at para 10.

²¹² Kelln, *supra* note 160. See *Gold Key*, *supra* note 28 at paras 18-24.

²¹³ Lambert, *supra* note 16. See *Gold Key*, *supra* note 28 at paras 25-29.

²¹⁴ *Gold Key*, *ibid* at paras 30-31.

²¹⁵ *Re: Logan*, *supra* note 26.

²¹⁶ *Personal Property Security Act*, SBC 1989, c 36.

²¹⁷ British Columbia PPSA, *supra* note 33.

²¹⁸ *Re: Logan*, *supra* note 26 at para 2.

²¹⁹ *Ibid* [emphasis added].

²²⁰ Interestingly, because of the way that the computer algorithm was set up at the time in British Columbia, almost any other variation of the name of the debtor, including no middle name, or first name with middle initial, the registration would have shown up in the search. See *ibid*, at para 8.

²²¹ *Ibid* at para 6.

registrations under both names would appear.²²² With respect to the previous case law, Tysoe J has this to say:

Collectively, they appear to stand for the proposition that if the *PPSA* 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 B.C. statute) was intending to "repudiate the strict approach" applied to the pre-*PPSA* 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.²²³

Quite clearly, Justice Tysoe sees a role for judges to interpret whether it is fair to blame the registrant for the failure of the registration system to disclose the registration. However, as will be discussed in more detail below,²²⁴ this approach would do damage to the certainty principle.

Two other cases out of British Columbia deserve to be mentioned as well. In *Coates v General Motors Acceptance Corp of Canada*,²²⁵ the collateral was a dump truck.²²⁶ The first secured party with respect to the collateral was

²²² *Ibid.*

²²³ *Ibid* at para 14.

²²⁴ See Part V.B. below for more discussion on the importance of certainty in the law of secured transactions.

²²⁵ 69 BCLR (3d) 357, 10 CBR (4th) 116, Grist J [*Coates*].

²²⁶ *Ibid* at para 2.

GMAC.²²⁷ An error was made with respect to the registration of the serial number. The second secured party, Coates, did a search. The search did not reveal the registration.²²⁸ However, in the office where Coates did his search, the search result showed only exact matches.²²⁹ However, it was possible, under the PPSA computer algorithm then in use, to get a search with inexact or approximate matches, as well as the exact ones.²³⁰ After referring to the judgment of Tysoe J,²³¹ and subsequently to academic commentary to the contrary,²³² the Court held as follows:

I find the latter view to be persuasive. 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.²³³

Note first that *Coates* precedes the decision of the Court of Appeal in *Gold Key*. Secondly, however, note that the decision is based on the ability of the searcher, in a single search to decide upon which information the searcher wishes to take away from that search. In the view of the authors, *Coates* stands for the proposition that, in conducting a search, a reasonable searcher would want all of the information that could be drawn from the search result to be so drawn.²³⁴

²²⁷ *Ibid* at para 5. GMAC is the financing arm of General Motors, allowing General Motors distributors to finance the sale of their inventory.

²²⁸ *Ibid* at para 4.

²²⁹ *Ibid* at para 5.

²³⁰ *Ibid*.

²³¹ *Re: Logan*, *supra* note 26.

²³² *Coates*, *supra*, note 225 at para 13.

²³³ *Ibid* at para 14.

²³⁴ To be complete in our analysis here, one could make the argument that this line of reasoning could also be used to justify the result in *Re: Logan*, *supra* note 26. After all, as discussed above, if there was a broader search done in *Logan* (such as by excluding the middle name as a search criterion), the registration would have appeared. However, the situation in *Logan* is a bit different, in that under the former system, there were multiple options as to how a searcher might conduct the search, and entering more information might actually exclude matches. Therefore, the searcher must apply judgment to the search criteria in order to have the search bring up the proper results.

In *Coates*, the action of the searcher did not really involve judgment. The computer

In *Re Munro*,²³⁵ the priority contest arose between a Credit Union and a trustee in bankruptcy. There was an error in the serial number of a Dodge Van,²³⁶ and the middle name of the debtor was absent.²³⁷ However, the search of the correct serial number of the asset or the full name of the debtor would still have disclosed the registration.²³⁸ After quoting the British Columbia equivalent to subsections 43(8) and 43(10)²³⁹ of the PPSA,²⁴⁰ the Court held 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.²⁴¹

The Court then holds that the errors were not seriously misleading.²⁴² Therefore, the Credit Union’s registration is invalid.

VII. A SUMMARY OF THE COMPETING POLICY ARGUMENTS

At the end of the day, in the view of the authors, there is no “correct” answer, in the sense of an answer where the opposite conclusion is indefensible. Rather, this is a contest between a number of policy arguments. These arguments are discussed in a summary form below:

algorithm is designed to remove judgment, in that the computer will give the searcher a set of close or approximate matches based on a pre-determined set of criteria, generally unalterable by the actions of the searcher.

²³⁵ (1992), 77 BCLR (2d) 98 (SC), Master Patterson [*Re: Munro*].

²³⁶ *Ibid* at para 4.

²³⁷ *Ibid*.

²³⁸ *Ibid* at para 6.

²³⁹ PPSA, *supra* note 2.

²⁴⁰ *Re: Munro*, *supra* note 235 at para 8.

²⁴¹ *Ibid* at para 13.

²⁴² *Ibid*.

A. In Favour of a Dual Search Requirement

First, a dual-search requirement forces those who have access to serial numbers to obtain those serial numbers, and use those serial numbers as a search criterion. In other words, a dual-search requirement forces searchers to be as thorough as possible in conducting their searches. A single-search requirement, on the other hand, allows searchers to essentially ignore the serial-numbered goods regime altogether, in that even if the serial number is available, the searcher may choose to search only the name of the debtor. Therefore, a dual-search requirement forces searchers to engage with the serial-numbered goods regime, rather than avoid it. Since the legislature does not speak in vain,²⁴³ the regime should not be thought to have been created to be avoided by searchers.

Second, the question here is whether one search or two is necessary. Doing two searches is always in the hands of the searcher, not the registrant. Therefore, the searcher can protect him- or herself by simply doing two searches. The law will generally seek to protect those who cannot protect themselves; it is generally not designed to protect those who are able to protect their own interest, but choose not to.²⁴⁴

Third, a very minor error may be enough to create an issue. In fact, based on *Moncton Motor Home*²⁴⁵ and *Re: Logan*,²⁴⁶ an error as small as a missed space in a corporate name, or one missed letter in a middle name, may invalidate registrations. A dual-search requirement would avoid this.

B. In Favour of a Single-Search Requirement

First, a dual-search requirement would in essence allow registrants to avoid the need to register in the serial-numbered-goods regime unless and until the collateral were transferred to a third party. As long as the named debtor was still in possession of the collateral, if the registrant registers against the correct debtor name, the failure to register against the serial number is irrelevant.

Second, the registrant has control over the information registered. Only the registrant can take due care in registering that information. If the

²⁴³ See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis Canada Inc, 2008) at 210 [Sullivan].

²⁴⁴ See MacPherson & Brown, *supra* note 1 at 212, n 78.

²⁴⁵ *Supra* note 100.

²⁴⁶ *Supra* note 26.

registrant makes no mistakes with respect to both the name and the serial number, the secured party is protected as much as the law allows, regardless of anything that the searcher does. The law will generally seek to protect those who cannot protect themselves; it is generally not designed to protect those who are able to protect their own interest, but choose not to.²⁴⁷ Clearly, the registrant can protect his or her interests through due care.

Third, we have clearly moved from a human system to one that is governed by computer printouts of search results. There are both advantages and disadvantages to this approach. First, the computer algorithm is only as good as the individual programmer who created it. This in itself is a neutral factor, in the sense that, in the view of the authors, these form the “rules of the game”. Therefore, in the same sense that all entrants to a casino must accept that all games played against the casino²⁴⁸ have a “house edge”, all “players” in secured credit transactions must accept the limitations of the PPSA computer system. In some cases, any such limitation may provide an advantage to one side or the other.²⁴⁹ As such, a “small” error becomes “large”. Imagine if there was a “small” error in the coding of the algorithm that controlled a nuclear weapon. Would we really say that this is a “small” error? If the consequences of a mistake are substantial, the size of the error is generally proportional to those consequences. Therefore, if the error causes the registration not to appear when the appropriate and correct information is properly searched, the error is no longer a small one.²⁵⁰

Put another way, the point of the computer registry is that it is the definitive source of information for the purposes of the PPSA. The printout from the computer is the only result the searcher can hope for. Essentially, the entire PPSA is built on the following basic statement to those interested in

²⁴⁷ *Supra* note 243.

²⁴⁸ Such games would include baccarat, blackjack, craps and roulette, among others. In these games, if the player is successful, it is the casino that pays the winning player, and is therefore concomitantly unsuccessful. Other games, such as poker, are not played against the house, but rather against other casino patrons. The casino will usually take a small percentage of the winnings of the successful player (sometimes referred to as “the rake”) as compensation for the use of the facilities of the casino.

²⁴⁹ For a discussion of the relative advantages (and disadvantages) of a computerized system over a manual one, see Roderick J Wood, “The Evolution of the Personal Property Registry: Centralization, Computerization, Privatization and Beyond” (1996) 35 *Alta L Rev* 45 at 54.

²⁵⁰ Cumming, Walsh & Wood, *supra* note 55 at 364-365.

knowing about security interest: "Look here with the correct information. If you do so, and the Registry is wrong, the government itself insures that you will be made whole."²⁵¹ Beyond the ability to search for "inexact matches",²⁵² the searcher has little ability to examine the registry as a whole to look for other similar debtors, as may be possible in a manual system.

Fourth, a dual-search requirement presumes that the searcher has access to both pieces of information when deciding upon what search or searches need to be done. This is not necessarily so. As Professors Cuming, Walsh and Wood point out in their discussion of the A-B-C-D problem,²⁵³ at least part of the justification for the regime is that the debtor who currently has the asset may or may not have his or her name on the registration. The searcher may have no way of knowing under what name the registration can properly be found. With respect to the serial number, to the extent that a serial numbered good is proceeds²⁵⁴ of another asset, the searcher may have no reason to know the serial number of the new serial numbered good of which even the secured party may not be aware. In both cases, a dual-search requirement would be inappropriate because the searcher may not have the requisite information to conduct a dual search. In other words, the basic assumption of a dual-search requirement (that is, that both pieces of information necessary to carry out a dual search are available to the searcher) may be lacking. Given that the serial-numbered-goods regime is available in all sorts of circumstances, it would be an absurdity for it to apply in such a way that a searcher could not reasonably comply with the regime.

Fifth, expectation of a dual search may become quite expensive for a searcher who does such searches on a regular basis. For example, In *Re Giffen*,²⁵⁵ there was a vehicle at issue.²⁵⁶ The BC Telephone Company had a program under which it would lease personal vehicles to its employees.²⁵⁷

²⁵¹ PPSA, *supra* note 2, ss 52-54.

²⁵² See Coates, *supra* note 225.

²⁵³ *Supra* note 57 and associated text.

²⁵⁴ *Supra* note 90.

²⁵⁵ *Supra* note 113.

²⁵⁶ *Re Giffen* presents other issues that will not be dealt with here. For example, why is it that the Act says that a trustee in bankruptcy should be able to defeat a security interest in serial numbered consumer goods where the serial number is not provided (section 43(8)) but with respect to equipment, the security interest remains intact and defeats the interest of the trustee in bankruptcy? These issues will have to wait for another day.

²⁵⁷ *Ibid* at para 3.

While the issue of single or dual search was not a concern in the case,²⁵⁸ the case shows quite clearly that a creditor of BC Tel might have to do a large number of searches to verify the ability to take security over these assets.²⁵⁹ While, as the court in *Re: Lambert* points out, one dual search is not prohibitively expensive,²⁶⁰ if a debtor has multiple assets that need to be searched individually as serial numbered goods, multiple serial number searches can add significant cost.²⁶¹

Furthermore, as mentioned above, serial numbers are not necessary if the goods are inventory. Part of the reason for this decision must be the cost-effectiveness of requiring the registration of new financing statements with each new piece of inventory. The cost effectiveness of the dual search requirement may be a factor against its implementation.

Sixth, as mentioned above, the effect of the dual-search requirement is to forgive the secured party registrant for a clear failure. In order to be enforceable as against any third party, any security agreement must contain the proper name of the debtor.²⁶² If it does not, then there is no attachment. If there is no attachment, then the security interest is never created.²⁶³

The debtor name on the financing statement should match that on the security agreement. The main regulation²⁶⁴ promulgated under the PPSA²⁶⁵ has certain requirements for what constitutes the proper name of the

²⁵⁸ Neither the company that had originally leased the vehicle to the BC Telephone Company, nor the BC Telephone Company, in leasing the vehicle to the debtor, had made any registration at all, *ibid* at para 5. Therefore, neither search would have produced any applicable result.

²⁵⁹ Note that in *Giffen*, the serial numbered goods were equipment, and not inventory.

²⁶⁰ *Supra* note 16 at 123.

²⁶¹ Cuming, Walsh & Wood, *supra* note 55 at 368 make this point. It is also interesting to note that the debtor name search would only have to be done once.

²⁶² *Universal Handling Equipment Co v Redipac Recycling Inc* (1992), 4 PPSAC (2d) 15 (Ont Gen Div), Rosenberg J, as he then was.

In this case, the improper use of the name of a related company (whose name differed from that of the actual debtor simply by the chosen cautionary suffix, "Inc." as opposed to "Corp.") was held to not comply with the Ontario equivalent of paragraph 10(1)(d) of the Manitoba PPSA. Despite the minor nature of the difference, Justice Rosenberg held that there was a step missing in the attachment process, and therefore, there was not a security interest created.

²⁶³ Cuming, Walsh & Wood, *supra* note 55 at 242.

²⁶⁴ Regulation, *supra* note 4.

²⁶⁵ *Supra* note 2.

debtor.²⁶⁶ These are mandatory.²⁶⁷ Although other information may be added, the inclusion of such information is permissive and not mandatory.²⁶⁸ There is a general expectation of consistency between delegated legislation, such as regulations.²⁶⁹

One sees this clearly in the treatment of the collateral description. In order to be valid and enforceable as against third parties, the security agreement must generally²⁷⁰ contain one of the following:

- (i) a description of the collateral by item or kind or as "goods", "chattel paper", "investment property", "documents of title", "instruments", "money" or "intangibles",
- (ii) a description of collateral that is a security entitlement, securities account, or futures account if it describes the collateral by those terms or as "investment property" or if it describes the underlying financial asset or futures contract,
- (iii) a statement that a security interest is taken in all of the debtor's present and after acquired personal property, or
- (iv) a statement that a security interest is taken in all of the debtor's present and after-acquired personal property except
 - (A) specified items or kinds of personal property, or
 - (B) personal property described as "goods", "chattel paper", "investment property", "documents of title", "instruments", "money" or "intangibles".²⁷¹

This language is largely replicated²⁷² in the part of the Regulation dealing with collateral description.²⁷³ Therefore, placing the wrong name in the security agreement has already been acknowledged as problematic (in, ironically, a case from Ontario, a jurisdiction that is one of the most ardent

²⁶⁶ Regulation, *supra* note 4, ss 13-16.

²⁶⁷ Each of these sections uses the term "shall". It is true that the meaning of the term can vary with the context. See *Sullivan*, *supra* note 243 at 79. However, in the view of the authors, none of these contextual factors that would remove the use of the word "shall" from its mandatory, proscriptive meaning are present here.

²⁶⁸ Such information may include business names under which the debtor carried on business. On this point, see Regulation, *supra* note 4, s 17.

²⁶⁹ See e.g. Denys C Holland & John P McGowan, *Delegated Legislation in Canada* (Toronto: Carswell, 1989) at 181-182.

²⁷⁰ The exceptions to this requirement are contained in ss 10(1)(a) through 10(1)(c) of the PPSA.

²⁷¹ PPSA, s 10(1)(d).

²⁷² One potential for a large part of the discrepancy between the PPSA and the Regulation (notably the non-inclusion of an equivalent to sub-paragraph 10(1)(d)(ii) of the PPSA) may be the failure to update the Regulation, passed in 2000.

²⁷³ Regulation, *supra* note 4, s 20.

proponents of the dual-search requirement). It is also problematic to place the wrong name in the financing statement. Both of the following are thus true:

- (i) The PPSA makes an error in the name of the debtor in the security agreement problematic;
- (ii) The language of the Regulation with respect to the name of the debtor in the financing statement is largely based on the language of the PPSA with respect to the name of the debtor in the security agreement.

Thus, it follows that the name of the debtor as provided in both the security agreement, on the one hand, and the financing statement on the other should be generally subject to the same requirements. Furthermore, if this is accurate, then it also follows that the secured party registrant has access to the security agreement, which the searcher would not. Therefore, it is even more appropriate that the onus be on the registrant to register all of the correct information. The single-search requirement better achieves this than does the dual-search requirement.

Seventh, the collateral description requirements in the Regulation also support this conclusion. These provisions are reproduced below:

19 Collateral to which a financing statement relates shall be described

- (a) according to section 20, if the collateral consists of goods that are not serial numbered goods;
- (b) according to section 21, if the collateral consists of consumer goods that are serial numbered goods; or
- (c) according to section 20 or 21, if the collateral consists of serial numbered goods that are equipment or inventory.

20 For collateral that is to be described under this section, the financing statement shall set out the following information under the heading "General Collateral Description"

- (a) a description of the collateral by item or kind;
- (b) a statement that a security interest is taken in all of the debtor's present and after-acquired property; or
- (c) a statement that a security interest is taken in all of the debtor's present and after-acquired property except for specified items or kinds of personal property.

21(1) For collateral that is to be described under this section, the financing statement shall set out for each item, under the heading "Serial Numbered Goods",

- (a) the serial number;
- (b) the applicable category from the list of categories included in the definition "serial numbered goods" in section 1;
- (c) the model year; and
- (d) a general description of the item.

21(2) For the purpose of subsection (1), the serial number of a serial numbered good is

- (a) for a motor vehicle other than a combine or tractor, the vehicle identification number marked on, or attached to, the body frame by the manufacturer;
- (b) for a combine, tractor, mobile home or trailer, the serial number marked on, or attached to, the chassis by the manufacturer;
- (c) for a boat that can be registered, recorded or licensed under the Canada Shipping Act (Canada), the registration, recording or licence number assigned to the boat under that Act;
- (d) for a boat not referred to in clause (c), the serial number marked on, or attached to, the boat by the manufacturer;
- (e) for an outboard motor for a boat, the serial number marked on, or attached to, the outboard motor by the manufacturer;
- (f) for an aircraft that must be registered under the Aeronautics Act (Canada) or regulations made under that Act in order to be operated in Canada, the registration marks assigned to the airframe by the Department of Transport (Canada);
- (g) for an aircraft that must be registered under the law of a state, other than Canada, that is a party to the Convention on International Civil Aviation, 1944 (Chicago), the registration marks assigned to the airframe by the relevant licensing authority; and
- (h) for an aircraft not referred to in clause (f) or (g), the serial number marked on, or attached to, the airframe by the manufacturer.

21(3) Where collateral referred to in clause (2)(a), (b), (d), (e) or (h) does not have a serial number or vehicle identification number marked on, or attached to it by the manufacturer, the serial number is any number of at least six characters that is marked on, or attached to, the collateral.²⁷⁴

Three interrelated elements flow from these provisions. First, these are requirements with which only the registrant can reasonably be expected to comply. Many searchers will be unaware of the categorization of the serial numbered goods at the time of the attachment of the security interest.²⁷⁵ This categorization determines the requirements on the registrant. The registrant, on the other hand, should know this. Therefore, the onus should properly be on the registrant. Second, the collateral description requirements are mandatory. Each of the above provisions uses the term “shall”.²⁷⁶ Third, none of these requirements is dependent upon the incorrect name being placed elsewhere in the financing statement. The term “name” is not even present in the collateral description requirements. Therefore, since the name requirements are mandatory, as are the collateral description requirements,

²⁷⁴ *Ibid*, ss 19-21.

²⁷⁵ *Ibid*, s 2(2)

²⁷⁶ See Sullivan, *supra* note 243.

and neither is dependent on the other, a dual search requirement (which by definition forgives what is otherwise a seriously misleading error by the registrant) makes little sense.

As an eighth argument in favour of a single search requirement, section 43(8)²⁷⁷ makes it clear that a seriously misleading error in either (i) the serial number or (ii) the name of a debtor with rights in the collateral, results in the registration being invalid with respect to these goods.

Therefore, an approach that supports the general rule – any seriously misleading error is an error will invalidate – is to be preferred to one that does not. The single search requirement is relatively consistent with section 43(8), rather than the dual search requirement, which is less consistent the subsection..

Finally, it is interesting to note that in all three cases referred to above where there was a judicial finding by a Court of Appeal of a need for a dual search,²⁷⁸ the piece of information that was seriously misleading was not the serial number, it was the name of the debtor.²⁷⁹ A serial number search would have revealed the appropriate registration.

From the point of view of the authors, this may explain why those cases were resolved in the way that they were. By saying that a dual search was required, the Courts of Appeal were forcing searchers to use the serial number. The authors would not wish to be taken as suggesting that it is a bad idea for searchers to search using the serial number.²⁸⁰ But the flip side of this approach as a legal test means that the registrant need only get one of the two pieces of searchable information (the debtor name or the serial number) correct. As explained above, this leaves much to be desired. Furthermore, if one bases the answer to the question of “What is a reasonable search?” on the type of error made (a seriously misleading error in or absence of the serial number is treated differently than a seriously misleading error in or absence of the name of the debtor), this, in the view of the authors, has the effect of

²⁷⁷ The subsection deals with the requirements with respect to serial-numbered consumer goods

²⁷⁸ *Re: Lambert*, *supra* note 16; *Gold Key*, *supra* note 29; and *Percival Mercury Sales (CA)*, *supra* note 157.

²⁷⁹ This is not to say that all cases where the serial number was seriously misleading, the Court found that a dual search was necessary. *Case Power*, *supra* note 170, is an example where this is not true.

²⁸⁰ In fact, as discussed below, it is a counsel of perfection for lawyers to do both searches, even if not legally required.

decreasing certainty. As discussed below,²⁸¹ uncertainty decreases the effectiveness of the secured transactions system, and increases costs.

VIII. A RESOLUTION

A. Policy Concerns

The first three policy concerns of the section above can be argued either to favour a single-search requirement, or to favour a dual-search requirement. Therefore, these concerns do not resolve the matter. In the view of the authors, a number of factors favour the single-search approach. The first is that fourth element referred to above. With all due respect to the Court in *Re: Lambert*,²⁸² in the view of the authors, the *PPSA* serves the entire lending process, and is not restricted to secured lenders. As one of the authors has put the matter in a different 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 [in a discussion of *nemo dat*], the common-law rules of property could work significant injustice to such acquirers if the rules were strictly applied. On the other hand, if the *PPSA* were to *overly* favour the interests of a third-party acquirer of property, the credit markets, that 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.

Finally, the third group involved in the area of secured transactions, and 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.²⁸³

²⁸¹ Part VII.B., below.

²⁸² *Supra* note 16.

²⁸³ MacPherson, "Financial Leasing", *supra* note 3 at 89.

Therefore, the authors take the view that the in limiting themselves to potential secured parties and purchasers, the Court in *Re: Lambert* was too restrictive. There are at least four interrelated reasons for this. First, a creditor can start out being secured, and after the security is exhausted, he, she or it is then an unsecured execution creditor. So, the attempt by the Court in *Re: Lambert* to exclude execution creditors is a distinction that is difficult to sustain. Secondly, the PPSA continues the Registry.²⁸⁴ The PPSA specifically contemplates having both execution creditors and their representatives,²⁸⁵ and trustees in bankruptcy²⁸⁶ (who are the representatives of all creditors in the case of bankruptcy of the debtor²⁸⁷) within its ambit. The Registry is at the core of the PPSA system. To suggest a bifurcation in the proper use of the Registry between secured creditors and other parties whose rights are affected by the PPSA is to suggest a distinction that the PPSA itself does not make.

Third, even though the PPSA is provincial legislation, the BIA specifically allows provincial legislation to affect the priority rights of creditors.²⁸⁸ In light of the federal legislative choice, allowing provincial legislation to affect priorities for bankruptcy purposes, for a court to suggest that an unsecured creditor or trustee in bankruptcy is not to be considered in assessing the reasonable users of the registry system seems problematic at best. Fourth, in the same vein, the Registry is a public good. For a court to limit its construction of proper searchers and searches because the court believes that the Registry is not meant to provide a broadly used public service is to limit the potential of the Registry to serve its full clientele.

Fifth, the overall approach of the PPSA is to assess the validity of the registration,²⁸⁹ not to question the validity of the search. The search does not even have to be done by the party alleging the invalidity of the registration.²⁹⁰ All the Courts of Appeal that have considered the issue believe that the test is an objective one.²⁹¹ However, this does not resolve the issue, since the

²⁸⁴ PPSA, *supra* note 2, s 42(1).

²⁸⁵ *Ibid*, ss 20(a).

²⁸⁶ *Ibid*, ss 20(b).

²⁸⁷ BIA, *supra* note 89, s 67.

²⁸⁸ *Ibid*, s 72(1).

²⁸⁹ PPSA, *supra* note 2, ss 35(4), and 43(8).

²⁹⁰ *Ibid*, s 43(9).

²⁹¹ Certain lower courts have held that the test ought to be subjective to the particular person or type of person (execution creditor, potential purchaser, secured creditor, trustee in bankruptcy) at issue in the given case. See *Fritz v Ford Credit Canada Ltd* (1992), 15 CBR

objectivity question assesses the characteristics of the court's assessment (as not being dependent on the subjective knowledge or characteristics of the searcher), rather the characteristics of the reasonable search.

The reasonable search is the one that would be conducted by a reasonable person. Would a reasonable person necessarily conduct two searches? For the authors, the answer is "no". While cautious lawyers may as a counsel of perfection do both searches, the law should not demand perfection. The very concept of "a seriously misleading" error avoids the demand for perfection. Such a demand for perfection was perhaps more evident in previous iteration of the PPSA.²⁹² Therefore, by placing the onus on the searcher (by forcing the searcher to do two searches as opposed to one), and removing the onus on the registrant to not make mistakes that would mean that a search would not reveal the registration, a dual-search requirement is an unacceptable resolution, as a matter of policy.

B. The Statutory Fix

A single search of either the name of the debtor or the correct serial number of the serial-numbered good is a "reasonable search". Perhaps more important once one piece of the proper information is input as a search criterion, if the registration does not appear as a search result, the registration is invalid. But even this does not resolve the following question: "How does the government give effect to this?" There are two options. First, Manitoba could follow the lead of the other Western provinces and wait for the appropriate set of facts to arise, and deal with the matter through the common law. Second, like the three Maritime provinces, Manitoba could deal with the issue statutorily. The authors prefer the latter option, for at least two very simple reasons. First, this option provides certainty to all users of the registry system. The more certain the system of secured credit is for all concerned, the lower the cost of credit becomes. Uncertainty is expensive for

(3d) 311, 4 PPSAC (2d) 143 (Ont Gen Div), Chadwick J; *Prenor Trust Co of Canada v 652729 Ontario Ltd* (1992), 4 PPSAC (2d) 139 (available on Westlaw Can) (Ont Gen Div), Chadwick J; *Canamsucco Road House Food Co v Lngas Ltd* (1991), 2 PPSAC (2d) 203 (Ont Gen Div), Mercier J, rev'd (1997) 12 PPSAC (2d) 227 (Ont CA); *General Motors Acceptance Corp of Canada v Stetsko* (1992), 8 OR (3d) 537, 3 PPSAC (2d) 79 (Gen Div), Maloney J; *Re Rose* (1993), 16 OR (3d) 360, 23 CBR (3d) 58 (Gen Div), Ground J, as he then was.

²⁹² Clerical errors were exempted. See *Bank of Nova Scotia v Airline Credit Union Ltd*, *supra* note 25, and associated text.

everyone, and most of all, for the consumer. Put another way, a loan is a type of investment in the borrower by the lender. It is simply an investment by way of debt, rather than an equity investment.²⁹³ A rational investor will assess the possible reward for an investment compared to the risk involved with that investment.²⁹⁴ Uncertainty with respect to the enforceability of the security interest taken by the lender would decidedly increase the risk of non-payment on the underlying promise to pay.²⁹⁵ A clear statutory statement is to the result in such a case would increase certainty.

Commonality is another issue. As mentioned above, commonality with other jurisdictions is a benefit in the area of secured transactions. Of the twelve Canadian common-law jurisdictions, five²⁹⁶ have not dealt with the issue at all; three others²⁹⁷ have decided on the issue in favour of a single search on a statutory basis; two others²⁹⁸ have decided on the issue in favour of a single search on a common-law basis; finally, two others²⁹⁹ have decided on the issue in favour of a dual search on a common-law basis. Therefore, if Manitoba is to deal with this issue (which the authors clearly think would be advisable), the clearest way to do so would be with a statutory statement. This would move Manitoba into the category with the largest number of Canadian common-law jurisdictions. This would also avoid the possibility a change to the common law over time, as happened in Saskatchewan. Finally, it would

²⁹³ J. Anthony VanDuzer, *The Essentials of Canadian Law – The Law of Partnerships and Corporations*, 3d ed, (Toronto: Irwin Law, 2009) at 40-41.

²⁹⁴ *Ibid* at 41.

²⁹⁵ It is important to remember that any secured transaction has two elements: a promise to pay on the debt or other obligation owed by the debtor, and the security interest that the debtor grants to the secured party. The promise to pay is the primary obligation. On the definition of a “primary obligation” see the judgment of Lord Justice Diplock in *Moschi v Lep Air Services Ltd*, [1972] 2 All ER 393 (HL) at 403, [1973] AC 331 [*Lep Air*, cited to All ER]. The secondary obligation is the obligation that is to be performed if the primary obligation is not performed. On the definition of secondary obligation see *Lep Air*, at *ibid*. With a secured transaction, this is to hand over property of the debtor pursuant to the security interest. One can also make an argument that there is a tertiary obligation on the debtor to pay damages should the security prove insufficient to satisfy the amount outstanding on the loan.

²⁹⁶ These are Manitoba, Newfoundland and Labrador, the Northwest Territories, the territory of Nunavut, and the Yukon Territory.

²⁹⁷ These are New Brunswick, Nova Scotia, and Prince Edward Island.

²⁹⁸ These are Saskatchewan and Alberta.

²⁹⁹ These are Ontario and British Columbia.

place the debate about this issue in the legislative branch of government, where issues of public policy are most properly tested.

In the view of the authors, the best statutory language is available from Prince Edward Island. For convenience, the language is again reproduced immediately below:

(8.1) For greater certainty, if there is a seriously misleading defect, irregularity, omission or error in the name of any of the debtors required to be included in the financing statement, other than a debtor who does not own or have rights in the collateral, the registration is invalid even if there is no seriously misleading defect, irregularity, omission or error in a serial number.

(8.2) For greater certainty, if there is a seriously misleading defect, irregularity, omission or error in the serial number that is included in the financing statement for collateral that is consumer goods of a kind that are prescribed as serial numbered goods, the registration is invalid even if there is no seriously misleading defect, irregularity, omission or error in the name of any of the debtors required to be included in the financing statement.

The authors would add the following:

(8.3) For greater certainty, if there is a seriously misleading defect, irregularity, omission or error in the serial number that is included in the financing statement for collateral that is either inventory or equipment, for the purposes of the Act, the serial number is deemed not to have been included in the financing statement.

The three statutory sections laid out immediately above “cover the field”, as it were, in that the section deals with the possible combination where there is a seriously misleading error in either the name or the serial number. Proposed subsection 43(8.1) covers all seriously misleading errors in the names of debtor, regardless of whether the collateral is serial numbered good or not. Proposed subsection 43(8.2) covers seriously misleading errors in the serial number where the collateral is serial numbered consumer goods. Consistent with the current s 43(8) and s 43(10), a seriously misleading error in the serial number invalidates the registration with respect to the serial numbered collateral.

Proposed subsection 43(8.3) covers seriously misleading errors in the serial number where the collateral is serial numbered equipment and inventory. Consistent with the discussion of inventory above,³⁰⁰ the PPSA does not require the provision of a serial number where the collateral is serial numbered inventory. Proposed subsection 43(8.3) does not change this. Similarly, where the collateral is serial numbered equipment, where the

³⁰⁰ See Part IV.B.1., above.

registrant makes a seriously misleading error with respect to the serial number, the registration will be ineffective as against both:

- (i) Another proper registration including the proper serial number (subsection 35(4)); or
- (ii) A purchaser who is in fact unaware of the registration (subsection 30(6)).

Proposed subsection 43(8.3) again does not change this. If either of the parties referred to in paragraphs (i) or (ii) immediately above are involved in a priority competition with a registrant who makes a seriously misleading error with respect to the serial number, the registration with the seriously misleading error will lose the priority competition. However, where the other party in the priority competition is not one of parties referred to above, then the registration will be valid, and the security interest will be considered perfected for the purposes of the priority competition, pursuant to section 35(4) of the PPSA.

IX. CONCLUSION

Thus, in the end, the authors believe that the legislature would serve the secured credit markets well for both Manitoba lenders and borrowers if the changes suggested here were adopted. Historically, the rules regarding errors were dealt inconsistently, although a number of cases seem to suggest a dual-search requirement.

The special regime for serial numbered goods is important for a number of reasons. One of these is to solve the issue of distinguishing one piece of highly valuable, fungible collateral from another. The second is to solve the issues with highly mobile collateral in which there is an active secondary market (the “A-B-C-D” problem). The regime is a detailed set of rules about the effect of registration mistakes on the perfection of a security interest. While the regime is detailed, it is not explicit as to whether a reasonable search is of both the serial number and the name of the debtor, or alternative whether a reasonable search is of either one. A number of Canadian common-law jurisdictions have resolved the issue statutorily (all in favour of single search); other Canadian common-law jurisdictions have resolved this issue through case-law (with mixed results). The authors believe that a statutory provision mandating a single search as reasonable is the best result, while many cautious lawyers would do both searches nonetheless.

Based on the experience in other provinces, there are other options. The legislature could wait and force the courts to deal with this issue, when a case with this particular problem arose before them. The concern with this approach is clear. Different judges in different jurisdictions have arrived at different answers to this issue. Even more problematically, the various cases that arrive at these different results often arise out of similar factual situations. A statutory response is thus to be preferred. A single search requirement is, in the view of the authors, the most consistent with both the other provisions of the PPSA, and with the policy concerns that animate both the serial numbered goods regime in particular, and the PPSA as a whole. The authors then put forward suggestions as to how the legislative branch might choose to implement this suggestion. The suggested course of action would be to begin with wording similar to the statutory provision on this issue in another province, with a minor addition for completeness and clarity. The authors believe that this small change could clarify the law, create certainty, avoid future litigation, and bring Manitoba into line with a number of other jurisdictions. Overall, therefore, we believe that this would be a small but important change to the law.

