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CORPORATE COMMERCIAL

Chapter 4

The Personal Property Security Act of Manitoba

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A. INTRODUCTION

The aim, scope and object of personal property security acts in Canada is reasonably summed up in an excerpt from page 3 of Catzman, *Personal Property Security Law* in Ontario, which has been quoted with approval in many judicial decisions:

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

In *Royal Bank of Canada v. Sparrow Electric Corp.* (1997) SCC the first case where the Supreme Court of Canada had an opportunity to review and comment on the purpose and operation of the personal property security acts, Gonthier J. wrote:

> *More recently, provincial legislatures have moved to protect secured creditors generally through the enactment of personal property security legislation... These statutory regimes have been implemented to increase certainty and predictability in secured transactions through the creation of a coherent system of priorities... The benefits of such certainty in commercial transactions, on basic economic principles, are intended to accrue to the health of the economy in general.*

In *Credit Suisse Canada v. 1133 Yonge Street Holding* (1998) Ont. C.A., the court said the following respecting the purpose of the personal property security acts:

> *It is not the purpose of the P.P.S.A. to render security transactions inflexible or, indeed, to prevent the parties from agreeing to security structures which may well accomplish the same kind of protection that older forms of security - such as a floating charge - seek to provide. The purpose of the P.P.S.A. is to establish and clarify priorities and notions of attachment and perfection which relate to the registration and operation of security documents. What academics have suggested, and the courts have confirmed, is that attempts to interpret the P.P.S.A. and the regime it establishes in terms of the old forms of security are not helpful, and that those old forms and their concepts do not govern how the P.P.S.A. regime should unfold.*

The three groups with which the PPSA is primarily concerned have been explained by Darcy L. MacPherson, "Financial Leasing in Common Law Canada" as part of a Report on Financial Leasing and its Unification by UNIDROIT, prepared for the 18th International Congress of Comparative Law (2011), Volume XVI, Issues 1 and 2, Uniform Law Review 83 at 89):

> *In one sense, the PPSA can be explained as a series of policy choices that balance the interests of three sets of parties. On the one hand, the PPSA seeks to protect subsequent acquirers of property that is subject to a security interest. As mentioned above, the common-law rules of property could work significant injustice to such acquirers if the rules were strictly applied. On the other hand, if the PPSA were to overly favour the interests of a third-party acquirer of property, the credit markets – which rely extensively on credit providers being granted an interest in the property of debtors – could potentially grind to a halt, because the property interest granted to the credit provider would not give sufficient certainty for the provider to grant credit to the debtor. Therefore, many of the provisions of the PPSA to be discussed try to resolve the tension between protecting the availability of credit in the market by protecting the security interest granted to the credit provider, on the one hand, and by protecting the finality of transactions of general commercial transactions – such as sales to third-party purchasers – by ending the security interest of the secured party in the original collateral, on the other hand.*
>
> *Finally, the third group involved in the area of secured transactions, and whose interests are therefore sought to be protected by at least certain provisions of the PPSA, is the debtor who grants the security interest to the credit provider. For example, the requirement that all actions taken by the secured party pursuant to the security agreement must be taken in a commercially reasonable manner means that the debtor can prevent commercially unreasonable behavior by the secured party.*

1. Defined Terms in Article and in the *PPSA*

For ease of reference, in the remainder of this article:

- "PPR" means *The Personal Property Registry of Manitoba*;
- "Old PPSA" or "Old Manitoba PPSA" means *The Personal Property Security Act* (Manitoba) in force prior to the current PPSA; and
- "PPSA" means *The Personal Property Security Act* (Manitoba) passed in 1993 and proclaimed in force effective September 5, 2000, as amended from time to time (most significantly, in 2008 with the introduction of *The Securities Transfer Act* (Manitoba)).

The following are important terms used in the *PPSA*:

- **Collateral** - personal property that is subject to a security interest (the interest granted by the debtor to the secured party).
- **Debtor** - the person or entity who owes payment or performance of an obligation that is being secured and who gives an interest in personal property as a security interest. For certain purposes under the PPSA, "debtor" may also include guarantors of a secured obligation of the primary debtor. In some cases, a debtor may be an owner of the pledged collateral without having any obligation to perform the secured obligation (e.g., where a trustee holding property for the true or beneficial owner owes performance of the secured obligations - that is, where the trustee owes performance, but the true or beneficial owner(s) do not owe performance - both the trustee and the true or beneficial owner(s) are "debtors").
- **Financing statement** - the data contained on the government form filed in or electronically transmitted to the *PPR* whereby a secured party gives notice to others of the secured party's claim of a security interest in the collateral.
- **Goods, chattel paper, document of title, instrument, money, security, investment property, intangibles** – the PPSA contains specific definitions of these various types of personal property.
- **Personal property** - refers back to other definitions by indicating that it includes goods, chattel paper, documents of title, instruments, money, investment property and intangibles (sometimes for PPSA purposes, personal property includes "things" which are physically attached to or derived from real estate, such as real estate lease rentals, crops while they are growing and before they are threshed and "fixtures"). In *Chartier v. MNP Ltd*, 2013 MBCA 41 (CanLII), (leave to SCC dismissed) it was held that the right of an "off title" bankrupt spouse to veto a disposition of the homestead under *The Homesteads Act* (in this case, someone was willing to pay value to induce the off-title spouse to release her veto right) was personal property within the definition of property found in *section 2* of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 and that it vested in the trustee upon an assignment in bankruptcy.
- **Priority** – (not defined in the PPSA) any debtor may grant multiple security interests in any piece of collateral. Priority determines which security interest gets the first opportunity to sell the property to recover the amount owing to them. If and once the first secured party is repaid in full, any remaining funds from the sale of the collateral will be applied to the obligation owing to the secured party in the second priority position. The process will be repeated until either: (a) the value of the collateral is fully exhausted or (b) all the obligations owing to all secured parties in the collateral are satisfied in full. The higher a secured party's priority, the more likely that secured party will get paid.

- **Proceeds** - personal property derived directly or indirectly from any dealing with collateral and includes the right to an insurance payment for loss or damage to collateral.
- **Purchase money security interest ("PMSI")** - a special form of security interest that can attain a special priority position over other non-PMSI security interests in collateral. A PMSI is an interest claimed by a secured party who is providing a loan or credit to allow the debtor to acquire collateral. A secured party that supplies inventory or equipment on credit terms would have a PMSI in that inventory or equipment, and a secured party that provides funds to a debtor to allow the debtor to acquire collateral will also have a PMSI in that acquired collateral.
- **Registry or PPR** - the central computerized registry where a financing statement is filed or electronically transmitted, and where searches are conducted.
- **Secured party** - the person who has or holds a security interest
- **Security agreement** - the agreement that creates the interest in the collateral.
- **Security interest** - an interest in personal property (also called the "collateral") granted by a debtor to a secured party that secures payment or performance of an obligation.

The goods held by the debtor become the collateral to which the security interest of a secured party applies. Goods (generally, tangible personal property) are held by the debtor as consumer goods, or inventory or equipment, defined below. There are several situations in the PPSA where it is important to know whether the goods held by the debtor are "consumer goods", "inventory" or "equipment". The time of determining whether the goods held as collateral are "consumer goods", "inventory" or "equipment" is when the security interest "attaches" to the goods [*s. 2(2)*].

- **Consumer goods** - means goods acquired or used by the buyer or members of the buyer's family, primarily for personal, household or family purposes of the buyer or the buyer's family.
- **Inventory** - means goods that are

  (a) held by a person for sale or lease, or leased by that person as lessor,

  (b) furnished or are to be furnished under a contract of service,

  (c) raw materials or work in progress, or

  (d) materials used or consumed in a business.
- **Equipment** - means goods that are held by a debtor other than as inventory or consumer goods.

The same asset could be classified as consumer goods or inventory or equipment, depending on how the asset is held. For example, a laptop computer owned by a retail store and sold to the general public would be held by the retail store as inventory. If the laptop computer was sold to a commercial business, for use in its general office, the laptop computer would be held by the commercial business as equipment. Alternatively, if the laptop computer was sold to an individual for use in their home, the laptop computer would be held by the individual as consumer goods.

All PPSAs refer to attachment and perfection. Those concepts are not defined in *section 1* of the PPSA. Noted below are very simplified definitions:

- **Attachment** - the term describing when all events necessary for the creation of a security interest have taken place. The time of attachment is when rights, duties and obligations between the debtor and secured party arise respecting the collateral. Therefore, attachment describes when the rights arise between the secured and the debtor [generally, see *s. 10* and *s. 12*].
- **Perfecting step** – The PPSA provides for several types of perfecting steps or occurrences, the two main ones being (a) possession of the collateral by the secured party or its agent [see *s. 24*] or (b) registration of a financing statement in the PPR [see *s. 25*]. The latter is far more common than the former.
- **Perfection -** the term used to define the time when the secured party has, pursuant to the PPSA, obtained the greatest bundle of rights with respect to the collateral that the PPSA allows. Perfection describes the time when the secured party's security interest in the collateral is best protected with respect to the claims by third parties. Perfection is achieved when there is both: (a) attachment and (b) perfecting step, regardless of the order in which they occur [see *s. 19*].

2. History of Manitoba PPSA and Other Jurisdiction PPSAs

The Old Manitoba PPSA was the second PPSA proclaimed in force in Canada. The first PPSA was in Ontario (in 1976), and the Old Manitoba PPSA was proclaimed in force on September 1, 1978. These are referred to in writings on the topic as "First Generation" PPSAs. A new Ontario PPSA was proclaimed in force in 1989, but it differs in significant areas from all other Canadian PPSAs.

Saskatchewan was the third PPSA jurisdiction, with the first Saskatchewan PPSA proclaimed in force in 1981. The Yukon followed Saskatchewan's PPSA, and these are referred to in writings on the topic as "Second Generation" PPSAs.

The current Manitoba *PPSA* is based primarily on a Model Western Canada PPSA developed in the late 1980s and used as the basis for the PPSAs in place in B.C. and Alberta (in 1990), Saskatchewan (by the introduction of a new PPSA in force in 1995), New Brunswick (1995), Nova Scotia (1997), P.E.I. (1998) and Newfoundland (2000). These are referred to in writings

on the topic as "Third Generation" PPSAs. The N.W.T and Nunavut (2001) also have statutes based on the Third-Generation versions of the PPSA. The current Manitoba PPSA does not follow the new 1989 *Ontario PPSA,* although there are a few provisions of the PPSA where the Ontario PPSA version of provisions is used.

The PPSA elaborates upon many provisions of the Old Manitoba PPSA, and adds some new provisions (the result is nearly a doubling of the size of the legislation). As a result of those elaborations and new provisions, and due to a change in drafting style for Manitoba legislation since the 1970s, there are very few provisions of the Old PPSA that are not changed in some way in the PPSA.

The current PPSA was passed in July, 1993 and was proclaimed in force effective September 5, 2000. It was significantly amended in 2008 with the introduction of *The Securities Transfer Act* (Manitoba).

3. Interpretation

The PPSA s primacy over all other Manitoba statutes except *The Consumer Protection Act* (Manitoba) and *The Farm Machinery and Equipment Act* (Manitoba) or other provisions in any Manitoba statute for the protection of consumers [*s. 69*]; see T-D Bank v. East Central Feeder Cooperative Ltd. 2001 2 P.P.S.A.C. (3d) 283, CarswellOnt 1858 OSCJ]. However, it has been held that there must be a direct conflict between the provisions of the PPSA and the other legislation before section 69 will be invoked [*G.M.S. Securities v. Rich-Wood Kitchens* (1995) Ont. C.A.; *Agricultural Credit Corp. of Sask. v. Featherstone* (1996) Sask.Q.B.].

The law relating to contracts of sale governs the sale aspects of the transaction [*s. 15*]. The principles of the common law, equity and the law merchant supplement the PPSA and continue to apply except insofar as they are inconsistent with the provisions of the PPSA [*s. 65(2)*].

B. SCOPE OF PPSA

1. General Application

The starting point is the definition of security interest and *section 3*:

> *"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 interests 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 secures payment or performance of an obligation;*
>
> *3(1) Subject to section 4, this Act applies*
>
> *(a) to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral; and*
>
> *(b) without restricting the generality of clause (a), to a chattel mortgage, conditional sale, fixed charge, floating charge, pledge, trust indenture, trust receipt, assignment, consignment, lease, trust and transfer of chattel paper, where it secures payment or performance of an obligation.*
>
> *3(2) Subject to section 4 and subsection 55(1), this Act applies to a transfer of an account or chattel paper, a lease for a term of more than one year and a commercial consignment that does not secure payment or performance of an obligation.*

a) Consensual Transactions

The Canadian PPSAs apply to consensual transactions in which the parties intend that personal property will serve as security for repayment of monetary obligations or performance of some other obligation or there is an arrangement between parties that falls within (b) of the definition of security interest and within *section 3(2)*. If there is no consensual transaction, then generally, there is no application of the PPSA. However, as a matter of government policy, certain non-consensual liens or security interests in personal property may be recorded against a debtor's name with respect

to certain types of debts owed by the person, including support payments and amounts owed for taxes. Additionally, under *The Garage Keepers Act of Manitoba*, a vehicle service business may give up its possessory lien in a repaired – but unpaid for – vehicle, and in lieu thereof, record a lien against the debtor's name (and usually the vehicle), by way of serial number in the *PPR*.

b) Substance Without Regard to Form

The Canadian PPSAs require parties to look to the "substance" of a transaction rather than the form of document. The need to categorize security devices was an important element of pre-PPSA law due to the specific statutes involved, but under the PPSAs what a document is called does not determine if the PPSA applies to it.

The PPSAs create a "substance test" where, if in a transaction Party A grants or recognizes that another person has an interest in Party A's assets in order to secure payment or performance of an obligation, the PPSA will apply to the transaction:

- *Haibeck v. No. 40 Taurus Ventures* (1991) BCSC;
- *356447 v. CIBC* (1998) BCCA;
- *Maniel v. Maniel* (1996) SKQB;
- *Key West Ford Sales Ltd. v. Rounis* (1998) BCSC;
- *Re Giffen* (1998) SCC;
- *Skybridge Holidays Inc. (Trustee of)* (1998) BCSC;
- *Re Sims Battle Brewster & Associates Inc.* (1999) ABQB;
- *T-D Bank v. East Central Feeder Cooperative Ltd.* (2001) 2 P.P.S.A.C. (3d) 283, CarswellOnt 1858,) OSCJ;
- *Coutinho & Ferrostaal GmbH v. Tracomex (Canada) Ltd.* (2015) BCSC;
- *Avina v. Sea Senor (Ship)*, (2016) BCSC;
- *E Construction Ltd v. Sprague-Rosser Contracting Co Ltd*, (2017) ABQB (citing *Skybridge*).

Skybridge makes clear that at least for the general application of the PPSA, a debtor-creditor relationship is expected. On this point, see also *Input Capital Corp. v. Gustafson* (2018) SKQB at *paras. 59-70*. The case was later reversed on other grounds by the Court of Appeal (*Input Capital Corp. v. Gustafson*, 2019 SKCA 78 (CanLII)).

However, an obligation need not be monetary (though debtor-creditor relationships, usually are), and may be an option to purchase. See *Hydrodig Canada Inc. v. 101202529 Saskatchewan Ltd.*, (2019) SKQB at *para. 13*:

> *The explicit addition of the term "performance" confirms that the obligation in question need not be monetary or need not be monetary in the sense of a predetermined sum. Indeterminate, conditional, and secondary obligations also qualify so long as the obligation has become determinate when the secured party seeks to enforce its security interest.*

It is also notable that a non-arm's length party (such as a sole or majority shareholder of a corporation) may also take security from the corporation, and, generally, absent fraud, this will be respected, and the non-arm's length party will be permitted to assert the security interest. See *Unique Lighting v. Green Services* (2019) ONSC.

c) Without Regard to Person Who Has Title

Pre-PPSA priority determination focused on who held title. The Canadian PPSAs now make that irrelevant. However, title may still be important in non-PPSA matters, such as in determining priority disputes under the *Bank Act,* S.C. 1991, c. 46, landlord and tenant matters and in bankruptcy.

The courts have held that the question of who has – or who doesn't have – title to or ownership of personal property may be irrelevant in some situations such as the determination of the existence of a security interest under the PPSAs (see, for example, *Coutinho & Ferrostaal GmbH v. Tracomex (Canada) Ltd.* (2015) BCSC), while in other situations, who has title to or ownership of personalty becomes very significant. An example of the latter situation can be found in a Manitoba Court of Queen's Bench case (*Manitoba Public Insurance Corporation v. Myerion et al.*, 2014 MBQB 159 (CanLII)), in which the court held that an unpaid motor vehicle vendor who had retained ownership of the vehicle pending payment to it (typically called a conditional sale arrangement) was vicariously liable under *The Manitoba Highway Traffic Act* for loss caused by the negligent purchaser who carelessly operated the sold and purchased motor vehicle and who had, under its arrangement with its vendor, been given the right to possession of the vehicle.

d) Without Regard to Notice of Interest

Pre-PPSA law allowed actual notice of another interest to affect priority claims. Under the PPSAs notice other than as provided in the *PPSA* by filing a financing statement is not as important an element in determining priority as it was in pre-PPSA statutes and under the common law:

- *National Trailer Convoy v. Bank of Montreal* (1980) 1 P.P.S.A.C. 87, 10 B.L.R. 196 (Ont. H.C.J.);
- *Robert Simpson Co. Ltd. v. Shadlock et al* (1981) ONSC;
- *Sperry Inc. v. Canadian Imperial Bank of Commerce* (1982) ONHCJ affirmed on appeal *Sperry Inc. v. Canadian Imperial Bank of Commerce et al* (1985) ONCA;
- *B.M.P. & Daughters Investment Corp. v. 941242 Ontario Ltd*. (1992) ONCJ.GD;

- *Northland Bank v. Flin Flon Mines* (1987) SKQB aff'd in *1987 SKCA*;
- *Strathcona Brewing Co. v. Eldee Investment Corp.*, 1994 CanLII 8925 (AB QB);
- *Canadian Imperial Bank of Commerce v. A.K. Construction (1988) Ltd.* (1995) ABQB.

Although the doctrine of actual notice is not imported into the PPSA, there are several provisions in the PPSA that refer to "notice" or "knowledge" as factors in dealing with the initial perfection of a security interest, the maintaining of a security interest and priorities. [See the conflict of laws provisions in *ss. 5 to 8*, future advance priority rules in *s. 35(6)*, and some of the PMSI priority rules in *s. 34*].

Also, with respect to fraud, if:

(i) a secured party (the "first secured party") has knowledge of the interest of another secured party (the "second secured party"); and

(ii) leads a second secured party to believe that the second secured party will not require protection as against the first secured party; and

(iii) the first secured party then takes advantage of the lack of action to gain registration priority over the second secured party;

the first secured party will not be entitled to priority.

An Act of the legislature will not be allowed to be used as an instrument of fraud [*Carson Restaurants International Ltd. v. A-1 United Restaurant Supply Ltd.* 1988 CanLII 5019 (SK QB)].

2. Extended Application

The PPSAs of the various provinces also apply to a number of transactions that are not true security agreements notwithstanding the fact that they do not secure payment or performance of an obligation. For a variety of policy reasons, most PPSA jurisdictions have determined that these transactions shall be "deemed" security interests and fall within most of the provisions of the PPSA. The default and remedy provisions in Part 6 of the PPSA do not apply to these transactions [*s. 55(1)(a)*] by virtue of not being true security documents; it is felt only true security agreements securing payment or performance of an obligation should be subject to the default and remedy provisions of Part 6. This does not mean that there can never be enforcement of these deemed security interests; rather, it means that the rules of enforcement set out in Part 6 of the PPSA will not apply to deemed security interests. Noted below are the three types of "deemed" security interests under the PPSA.

a) Lease for a Term of More Than One Year

The First Generation PPSAs applied only to leases that were intended as security, meaning that generally, where an asset was leased from a lessor to a lessee on the basis that the lessee would return the goods to the lessor at the end of the lease term

(with the lessor then (typically) re-leasing the goods to someone else), the PPSA did not apply. The determination of the intention of the parties has been the subject matter of many cases - probably the second most litigated issue under the PPSAs. The Second and Third Generation PPSAs have tried to address this issue by making the PPSAs apply to leases even if they are not intended as security. Ontario has not followed the other jurisdictions; all that Ontario has done is change the phrase "intended as security" to "that secures payment or performance of an obligation" in the hope that the subjective determination of "intention" will not be as prevalent.

The rationale for inclusion of leases for a term of more than one year goes beyond trying to reduce litigation. From a third party's perspective when dealing with a lessee, it is difficult to objectively ascertain which personal property is owned, which property is subject to leases intended as security, and which property is subject to true leases.

What the PPSA now does is treat them no differently other than in an enforcement situation. Registration is required to protect the interest of the lessor under leases for a term of more than one year and to give notice to third parties and establish priorities.

The PPSA *section 1* definition:

> *"lease for a term of more than one year" includes a lease*
>
> *(a) for an indefinite term and includes a lease for an indefinite term that is determinable by one or both of the parties within one year from the date of its execution,*
>
> *(b) initially for a term of one year or less than one year where the lessee, with the consent of the lessor, retains uninterrupted or substantially uninterrupted possession of the leased goods for a period in excess of one year after the day the lessee, with the consent of the lessor, first acquired possession of them, but the lease does not become a lease for a term of more than one year until the lessee's possession extends for more than one year, and*
>
> *(c) for a term of one year or less, where*
>
> *(i) the lease provides that it is automatically renewable or that it is renewable at the option of one of the parties or by agreement of the parties for one or more terms, and*
>
> *(ii) the total of the terms, including the original term, may exceed one year,*
>
> *but does not include a lease*
>
> *(d) involving a lessor who is not regularly engaged in the business of leasing goods,*
>
> *(e) of household furnishings or appliances as part of a lease of land where the goods are incidental to the use and enjoyment of the land, or*
>
> *(f) of prescribed kinds of goods, regardless of the length of the lease term;*

Who is a lessor who is not regularly engaged in the business of leasing goods as set out in subsection (d) above? For some cases that consider this concept see:

- *Fast Labour Solutions (Edmonton) Limited v. Kramer's Technical Services Inc.* (2016) ABCA;
- *David Morris Fine Cars Ltd. v. North Sky Trading Inc. Estate* (1996) ABCA;
- *Planwest Consultants v. Milltimber Holdings* (1995) ABQB;
- *East Central Development Corp. v. Freightliner Truck Sales (Regina) Ltd.* (1997) SKQB.

In *Fast Labour Solutions (Edmonton) Limited v. Kramer's Technical Services Inc.*, for example, the Court held that where a lessor leases equipment to a subsidiary, even on a more or less occasional basis, the lessor needs to register its interest under the *PPR* to establish its ownership priority rights:

> *[13] In drafting the Personal Property Security Act there were many borderline situations that had to be considered. True financing leases that secure payment or performance of an obligation must be registered. Short term or temporary leases do not warrant registration. For example, a company renting cars for a few days could not reasonably be required to register its interest every time a new renter came along. But longer leases were within the mischief of the statute, because they create false impressions about the ownership of the collateral. The line was drawn at leases over one year; s. 1(1)(tt) of the Act deems them to be security interests whether or not they secure payment or performance of an obligation. An exception was then made in s. 1(1)(z) for occasional lessors who are not regularly engaged in the business of leasing goods. The statute, essentially, places the risks arising from leases over one year by parties not generally in the business of leasing assets on the third party dealing with the debtor in possession of those assets. Those are the provisions engaged by this appeal.*
>
> *[14] The core issue then is whether Kramer's Iowa "regularly engaged in the business of leasing goods". The Act does not require that the owner of the goods only be in the business of leasing goods, or that it primarily be in the business of leasing goods. So long as the owner "regularly engages" in the leasing of goods, the section is engaged. The case law establishes that the frequency of leasing is not determinative of whether the claimant is in the business of leasing. As long as leasing is a regular part of the business, it will be caught by the statute, even if leasing is not the predominant or a significant part of the business: David Morris Fine Cars Ltd. v North Sky Trading Inc. (trustee of), 1996 ABCA 134 at para. 12, 38 Alta LR (3d) 428, 184 AR 291.*

> *[15] A company can be in the "business" of leasing goods even if it never makes a profit, and perhaps never intends to make a profit out of the leasing transaction itself: National Bank of Canada v Merit Energy Ltd. (2001), 2001 CanLII 61013 (AB QB), 294 AR 1 at para. 55, 27 CBR (4th) 283. Having regard to the overall purposes of the Act, one indicia of a "business" is that the lease is for a commercial purpose, and is part of an overall business strategy. Thus, the common scenario of having a "holding company" which owns all the assets of the enterprise, and then leases them to an associated "operating company" would fall within the provision, even if the lease rates were set on a "flow-through" basis, without any expectation of profit. This sort of "creditor proofing" is a legitimate business strategy, but it requires registration to be effective against third parties. Indeed, this is exactly the kind of situation where third parties dealing with the operating company might be misled because possession of the assets has been separated from title to those assets.*

The exclusion does not apply, and therefore, even if the main business of the lessor is elsewhere, as long as leasing is some part of the lessor's business, registration of the lease is required where the lease otherwise fits the definition of a "lease for a term of more than one year".

Where all three of the following are true, a trustee in bankruptcy or execution creditor will have no claim on the goods leased under a lease for more than year:

- the lease at issue was terminated in accordance with its terms prior to the date of the claim; and
- the goods at issue were returned to the lessor prior to the date of the claim; and
- enforcement proceedings have been completed [*Wells Fargo Foothill Canada ULC v. Big Eagle Hydro-Vac Inc*. (2015) ABQB].

Generally, the priority competition between two or more security interests is not affected by repossession, except as specifically provided for under the *PPSA*.

If a lease for more than one year is not properly registered by financing statement, even though the lessor never intended to transfer title to the lessee, the lessor may lose the leased property to a properly registered security interest in the property [*s. 35*] or the trustee in bankruptcy [*s. 20*] [*Re Giffen* (1998) SCC; *1777575 Alberta Ltd v. Sprung Instant Structures Ltd.* (2014) ABQB; *Sprung Instant Structures Ltd. v. 1064391 Alberta Ltd.* (2016) ABQB].

However, a trustee under a bankruptcy proposal is not a trustee in bankruptcy for the purposes of *section 20*. See *Contech Enterprises Inc. (Re),* 2015 BCSC 129 and *Contech Enterprises Ltd. v. Vegherb, LLC,* 2015 BCCA 99.

b) Commercial Consignments

As with leases, the First Generation PPSAs applied only to consignments intended as security. A consignment arrangement is essentially one where a wholesaler, manufacturer or other person (the "supplier" or "consignor") would supply goods to a second person (the "consignee") for resale without ever transferring ownership in the goods to the consignee. The essence of a consignment transaction is that title in the goods moves from the supplier/consignor to the customer of the consignee, with the consignee never having title to the goods and being merely a conduit through which the sale was made as agent of the consignor. [*Access Cash International Inc. v. Elliot Lake and North Shore Corp. for Business Development*, [2000] O.J. No. 3012; *Farm Credit Corp. v. Valley Beef Producers Co-operative Ltd.*, (2001) SKQB aff'd by *2002 SKCA 100*.] This method of selling is often used when the consignee does not have cash or financing to buy goods from the consignor.

Although not subject to as many cases as leases intended as security, the concerns regarding the determination of intention and protecting third parties dealing with a consignee were the same as applied to leases. Therefore, when the Second and Third Generation PPSAs changed how leases were treated they also changed how consignments were treated.

The *PPSA* defines a "commercial consignment" as being where both the consignee and the supplier/consignor are dealing in the ordinary course of business with the goods of the type consigned. The definition specifically excludes an agreement under which goods are delivered to an auctioneer for sale or to a consignee for sale, lease or other disposition if the consignee is generally known to creditors of the consignee to be selling or leasing goods of others.

The latter exception goes towards one of the reasons for including consignments, that is, the "hidden" nature of the consignor's interest from third parties dealing with the consignee. If the consignee is generally known to its creditors to be selling or leasing goods of others, then it is not "hidden" and there is no reason to have the consignment subject to the PPSA. However, the knowledge element will be the subject matter of litigation [*Canadian Imperial Bank of Commerce v. Westfield Industries Ltd.* (1990) SKQB; *Royal Bank of Canada v. Autotran Manufacturing Ltd.* (1992) SKCA; *Community Futures Development v. Spargo* (2000) BCSC]. It should be noted that specific knowledge of the consignment at issue is not required; rather, it is general knowledge concerning the consignee's relationship with suppliers that is relevant.

c) Transfer of an Account or Chattel Paper

The purpose of bringing into the PPSAs the non-security transfers of accounts and chattel paper was to ensure that all major methods of inventory and accounts receivable financing were caught by the *PPSA*. Some methods of financing involve absolute assignments rather than assignments acting as security, but it is difficult for a third party to determine which is which, and it is desirable to have one set of priority

rules apply to both. Examples of an absolute transfer being within the PPSAs can be found in:

- *Canadian Western Bank v. Gescan Ltd.* (1991) ABQB;
- *Agent's Equity Inc. v. Hope Estate* (1996) ONSC;
- *TCE Capital Corp. v. Kolenc (Trustee of)* (1999) ONSC;
- *Access Mortgage Corporation (2004) Limited v. Arres Capital Inc* (2018) Alta. at *paras. 52-59.*

Section 41 of the PPSA sets out some special rules that apply to an assignment of chattel paper or intangibles (which includes accounts) and should be kept in mind when dealing with such assignments. For example, *section 41(7)* deals with the right of an account debtor to pay the assignor until notified of the assignment [*Dimmitt & Owens Financial Inc. v. Big V Pharmacies Co*. (1998), 14 P.P.S.A.C. (2d) 47 (Ont. Gen. Div.). (1998) Ont.] and *section 41(2)(b)* makes the assignee subject to defences or claims the account debtor may have against the assignor [*Alberta Treasury Branches v. Macleod Dixon* (2000) ABQB 529]. While the decision was overturned on other grounds [*Alberta Treasury Branches v. MacLeod Dixon* (2001) Alta. C.A.], there was no reference to section 41 in the judgment.

Because the PPSA's application to transfers of account and chattel paper can catch many non-financing transactions, *section 4* (c), (d), (e), (f), (g) and (h) of the PPSA establish certain exclusions to the operation of the Act relating to several types of assignments.

3. Lease/Consignment That Secures Payment or Performance of an Obligation

The application of the *PPSA* to a lease for a term of more than one year and to commercial consignments removes to a great extent the need to determine if a lease or consignment is one that secured payment or performance of an obligation. This determination will only be necessary when:

- The lease is for one year or less or is otherwise excluded by virtue of the PPSA definition of a "lease for a term of more than one year." If it secures payment or performance of an obligation the lease will be subject to the PPSA; or
- The consignment is not a "commercial consignment." If the consignment secures payment or performance of an obligation the consignment will be subject to the PPSA; or
- Dealing with enforcement of the lease or consignment, because a lease or consignment that secures payment or performance of an obligation will have the provisions of Part 6 *of* the PPSA apply to it. Otherwise, the Part 6 rules will not apply; or

- The distinction between true leases and financing leases is important for other statutes, such as taxing statutes or the applicability of the *Companies' Creditors Arrangement Act* R.S.C., 1985, c. C-36 [*Smith Brothers Contracting Ltd. (Re) (Trustee of)*, 1998 CanLII 3844 (BC SC)].

The First Generation PPSAs referred to leases and consignments "intended as security," and most of the early cases deal with this concept. While shortly after the passage of the subsequent PPSAs those cases served as the basis for the analysis of determining if a lease or consignment "secures payment or performance of an obligation", there were cases that pointed out the changes in the legislation between the current language and prior language, often to clarify that intention is less important than the objective effect of the document. The objective effect is determined by asking if a reasonable person would conclude that the effect of the document is such as to fall within the *PPSA*. There are many cases on this issue, with there being substantially more cases on leases than consignments. This article will not review these cases, but will rather set out some of the principles developed in the analysis that apply to leases or consignments.

The basic principles about whether a lease or consignment secures payment or performance of an obligation thus creating a security interest can be found in the *Re Speedrack Ltd.* (1980), 33 C.B.R. (N.S.) 209, 11 B.L.R. 220, 1 P.P.S.A.C. 109 (Ont. S.C.) decision. Almost all other cases refer back, if not quote directly from, this decision. For a recent example of this, see *Crate Marine*, 2015 ONSC 3338 (CanLII). The *Re Speedrack* decision established that it is necessary to determine the essence of the transaction, and extrinsic evidence can be used to determine the role of the parties, the intent of the parties and the effect of the transaction.

The many cases dealing with whether a lease is "intended as security" refer to the following questions to be considered:

- Is the lessee in financial difficulty? If so, then the lease is more likely a "financing lease."
- Is the lessor solely in the business of leasing, with a stock of product to lease? If so, then the lease is more likely to be a true lease.
- Do the documents imply anything other than a lease?
- Is there an option to purchase for an amount other than the fair value of the leased goods at the time the option is exercised? If there is no option, or an option for the fair market value, then the payments under the lease are compensation for usage (a true lease) rather than towards payment of the purchase price (a financing lease/sale).

For a longer and more recent list of factors that distinguish "true lease" from a financing device, see *Connacher Oil and Gas Limited (Re),* 2017 ABQB 769 (CanLII). For another example of the application of the *Connacher* factors, see *Edmonton Kenworth Ltd v. Kos*, 2018 ABQB 439 (CanLII) at para. 23.

The distinction between "true leases", on the one hand, and "security leases" on the other may not be relevant in certain cases where a private receiver is appointed under the *Bankruptcy and Insolvency Act* (as opposed to the appointment of a trustee in bankruptcy), and where *Part 5 Registration* of the PPSA is not engaged. At the same time, the distinction is relevant under the *Companies' Creditors Arrangement Act*. See *Integris Credit Union v. Mercedes-Benz Financial Services Canada Corporation* (2016) BCCA; *Connacher Oil and Gas Limited (Re),* 2017 ABQB 769.

4. Application to Hybrid Interests – Real and Personal Property

The *PPSA* definition of "security interest" requires that the security interest be in personal property. The PPSAs are not intended to apply to security interests in real property; however, there are certain hybrid interests which contain elements of both real and personal property and they need to be touched on to determine how the PPSAs deal with them. Examples of the types of hybrid interests are:

- A lease of real property is a "chattel real" and falls within the catch-all definition of "intangibles" [*C.T.L. Uniforms v. ACIM Industries* (1981) ONCA]. But a security assignment, charge or mortgage of all of the rights of a landlord under a realty lease and a security assignment, charge or mortgage (or a mortgage or security by way of sublease) of the rights of a tenant under a realty lease are not governed by the PPSA;
- A summer cottage built on leased land is "personal" property and subject to the PPSA [*Assiniboine Credit Union Limited v. Canadian Imperial Bank of Commerce and Manitoba, Government of,* 1984 CanLII 3721 (MB CA); *Clark v. Royal Bank of Canada*, 1987 CanLII 4964 (SK QB)];
- Prepaid rent under a lease of real property is not personal property of the tenant once paid, but a security deposit is still personal property of the payor [*York Realty Inc v. Alignvest Private Debt Ltd,* 2015 ABCA 355 (CanLII)];
- An absolute assignment of proceeds of a mortgage, where that assignment is properly perfected under the PPSA, has priority over claims to those proceeds made by a subsequent assignee or transferee of the mortgage [*Royal Bank v. Kleemola* 1991 CanLII 12052 (MB QB)]. This decision may now be considered incorrect by reason of the exclusion of assignments of real property mortgage secured debt under *section 4(f)* of the PPSA.
- Recent case law out of the Ontario Court of Appeal (*Third Eye Capital Corporation v. Ressources Dianor Inc.* 2018 decided that mining claims were interests in land, and that the royalty payments associated therewith would move with the land. The Court of Appeal concluded that the royalty rights were a land interest. This was further confirmed by a subsequent judgment in the Court of Appeal in the same case (*Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.* (2019) ONCA).

However, this would mean that in the usual course, when ownership of the mining claims changed hands, the royalty claim would follow the mining claims and be an encumbrance upon them in the hands of new and successive owners. Given that the royalty stream would be similar to a stream of real property rental payments (which are acknowledged to be personal property), caution is warranted when dealing with mining claim property issues.

a) Fixtures, But Excluding Building Materials

Fixtures are items of personal property that become affixed to land. The *PPSA* definition of fixtures is not helpful other than that it excludes building materials. It is still necessary to look to the common law as to what constitutes a fixture and when personal property becomes a fixture. It should be noted that, for the purpose of the PPSA, fixtures are considered personal property by virtue of fixtures being included in the definition of "goods."

The common law recognizes two types of fixtures in a realty landlord and tenant situation. There are "true" fixtures that attach to realty and lose their character as chattels and are not recoverable by any tenant. The other type is "tenant" or "trade" fixtures that are annexed by a tenant during the term of the lease of the land and may be removed by the tenant. Upon being removed they cease to be fixtures. The PPSA fixture provisions apply to both true and trade fixtures [*Deloitte & Touche Inc. v. 1035839 Ontario Inc.* (1996) ONSC and appeal dismissed *1998 ONCA*.].

The PPSA definition of "fixtures" excludes "building materials" (as defined) because goods that are "building materials" become an integral part of the land and lose the character of being personal property under any circumstances. If goods become building materials then they will be governed by the real property statutes (including *The Builders' Liens Act*) and priority rules. The First Generation PPSAs did not have a definition of building materials and there were several cases that dealt with that concept. The Third Generation PPSAs now have a definition for building materials, and it should be noted that the definition acts to reverse some of the cases dealing with building materials under the First Generation PPSAs.

An Ontario case, *Toronto Dominion Bank v. Hockey Academy Inc.* (2016) ONSC, points out that fixtures are only treated as such as between landlord and tenant if the lease contract treats them that way. If the interpretation of the lease is such that the tenant retains title to the materials, even though the materials at issue would otherwise be fixtures, they will not be treated as fixtures for the purposes of a priority competition between the landlord and the lender/secured party.

There are special filing requirements (such as making a "fixture filing" against land) and priority rules regarding fixtures that will be covered later in this chapter. Those provisions, act to reverse the common law rule that goods affixed to land become real property and are governed by real property laws. The PPSAs set out special rules

that govern fixtures and, as a result, the common law rules are abrogated to the extent that there are rules established in the PPSAs.

b) Real Property Mortgage or Lease as Security

A mortgage and a lease of real property contain two elements: there is the interest in the land being mortgaged or leased and there is also an interest in the payment obligation (mortgage principal and interest or rent payments). The latter interest is personal property (either an account or an intangible). As noted, the interest in a payment obligation secured by a real property mortgage may be or be very much akin to personal property, but for assignment purposes, it does not appear to be governed by the PPSA (*s. 4(f)*). The following is a summary of the treatment of these types of interests in the Canadian PPSAs:

- All PPSAs exclude the creation or transfer of an interest in land, including a lease of real property.
- The Ontario PPSA applies to a right to payment under a mortgage, which is excluded under all other PPSAs. However, the Ontario PPSA has filing requirements that the secured party must make against land regarding claims in payments under mortgages.
- The *Ontario PPSA*, the *Yukon PPSA* and the *Manitoba PPSA* still apply to a transfer of rental payments under a lease of land. This is excluded in all other PPSAs. However, the Ontario PPSA and the Manitoba PPSA [*s. 35(10)*] have filing requirements that the secured party must make against land regarding claims in payments under leases.
- In British Columbia, whether a rental payment on a lease of real property "runs with the land" depends on the intentions of the parties to the transfer of the land. See *McDonald v. Bode Estate* (2017) BCSC aff'd on appeal *2018 BCCA*.
- Crops before they are threshed are part of the realty, but a security interest in them may be created before harvesting (in anticipation) of the crops being detached from the soil, trees or bushes.

5. Government Quotas or Licences

There have been a number of cases that have dealt with whether governmental quotas or licenses are "personal property" in which a security interest may be granted. This issue is important because the debtor's holding of the quota or license may be the single most important feature in the debtor's business (for example, a liquor license, a farm related production quota, a nursing home license, a taxi-cab license).

On one side are a number of Ontario decisions finding that discretionary quotas or licences are not personal property

- *National Trust v. Bouckhuyt* (1987) ONCA (tobacco quota);

- *209991 Ontario Ltd. v. Canadian Imperial Bank of Commerce* (1988), 39 B.L.R. 44, 24 C.P.C. (2d) 248 (Ont. H.C.J.);
- *Canadian Imperial Bank of Commerce v. Hallahan*, (1990) ONCA (milk quota);
- *Ontario Dairy Cow Leasing Ltd. v. Ontario Milk Marketing Board*, [1993] O.J. No. 464 (Court of Appeal), overruling [1990] O.J. No. 1864 (milk quota);
- *Bank of Montreal v. Bale (Gen. Div.)* (#1 in1991 - trial; aff'd 1992 ONCA leave to SCC refused 1993) (milk quota);
- *Tuboly v. Kalocsai*, [1995] O.J. No. 1138 (General Division) (chicken quota);
- *Green Gables Manor (Bankrupt), Re* (1998), 68 O.T.C. 241 (Ont. GD).

Those decisions have been subject to considerable criticism as not reflecting commercial reality.

On the other side are some recent cases that find such quotas and licences are personal property

- *Re Foster* (1992) ONSC;
- *Saskatoon Auction Mart v. Finesse Holsteins* (1992) SKQB;
- *Bank of Montreal v. Bale* (#2 in1994) ONSC;
- *Sugarman v. Duca Community Trust Limited*, (1999) ONCA.

This is especially true if the law recognizes a right to a property-like interest granted by the licence [*Saulnier v. Royal Bank of Canada* (2008), SCC].

In *D'eon Fisheries Ltd. (Re),* 2016 NSCA 30 the Court of Appeal finds that the fishing licence, as it existed from time to time, included the quota. There is no separate concept of quota and the appellants have a valid security under the PPSA in Nova Scotia against the licence that the court says includes the quota.

C. EXCLUSIONS OF THE OPERATION OF THE PPSA

1. Section 4 Exclusions

Section 4 of the PPSA enumerates the following specific exceptions to the operation of the Act:

a) Lien, Charge or Other Interest Given by Rule of Law or Statute

Because the PPSAs in general apply to consensual transactions, security interests arising by operation of law are not within the PPSAs. *Section 4(a)* provides that the PPSA does not apply to a lien, charge or other interest given by rule of law or statute in force in Manitoba, unless the statute expressly provides that this Act applies.

Statutory liens are not the same as consensually created security interests recognized and governed by the PPSA. However, a statutory lien and a security interest, generally, perform the same function. That is, they give some assurance to a creditor that the creditor will be paid what is due to it by giving the creditor an "interest" in the debtor's personal property. See *section 32* for the rules governing the relationship between statutory liens and security interests.

Section 32 contains an exception to this exclusion as it deals with the priority of a lien on goods over a security interest in the goods if the lien arose as a result of furnishing materials or services in connection with goods in the ordinary course of business of the person furnishing the materials or services. It should be noted that if the lien is created by statute and the statute provides a contrary priority rule, then section 32 is not applicable. It is also clear that in order to be able to assert such a lien, the statutory requirements of the lien under its own statute must be complied with. See *Business Development Bank of Canada v. Beckerland Farms Inc.* 2019 SKQB 239 (a non-PPSA case) at *para. 16*.

Section 32 does not apply to consensual liens. These are subject to the more general priority regime of the PPSA. See *Cansearch Resources Ltd v. Regent Resources Ltd*, 2017 ABQB 535, in which the security interest holder attempted (unsuccessfully) to argue that what was in substance a consensual agreement to create a security interest, was a repairperson's (or "artisan's") lien.

Therefore, other than the priority determination of “artisan” or “repairers” liens in *section 32*, the PPSA does not apply to regulate liens created at common law or by custom, usage or statute. The regulation of those liens is by the common law, custom, usage or statute creating the lien. Issues respecting the creation, perfection, priority (other than in s. 32) and enforcement of liens will not be within the PPSA and parties must look to the common law, custom, usage or statute dealing with the lien in order to deal with those matters [*Exeter Public Utilities Commission v. Danbrie Moulded Plastics*

Ltd. 1995 CanLII 10627 ONSC; *Everingham Brothers Ltd. (In Bankruptcy) (Re), Indexed as: Bulut v. Brampton (City)* 2000 CanLII 5709 (ON CA) leave to appeal to SCC dismissed.].

The exclusion in *section 4(a)* is not limited to only liens, but also encompasses charges or other interests given by rule of law or statute. In *Ellingsen (Trustee of) v. Hallmark Ford Sales Ltd* 2000 BCCA 458 the court determined that a remedial constructive trust remedy for unjust enrichment was a trust given by rule of law and, as a result, fell within the section 4(a) exclusion.

A properly taken solicitor's lien (either at common law or under the *Solicitors Act* (Ontario)) may take precedence over a perfected security interest under the PPSA. We say "may" for three reasons. **First**, there is limited case law on this point (see *Dalcor Inc. v. Unimac Group Ltd., et al,* 2017 ONSC 945 (CanLII); *King Road Paving and Landscaping Inc. v. Plati*, 2017 ONSC 557 (CanLII). **Second**, the case law used to support this position in the latter case does not appear to deal with this issue. **Third**, even though the Court points out that a solicitor's lien is available at common law, it also relies on specific Ontario statutory provisions. As a result, this precedent will need to be applied with caution in Manitoba.

A lawyer's undertaking to another person, though it be a form of security, does not override the provisions of the PPSA (see *Napora (Re),* 2018 BCSC 398 at *para. 21*), although if the requirements of the PPSA are followed, the undertaking could conceivably constitute a security agreement. An appeal of the judgment in the case was dismissed. See *Law Society of British Columbia v. Brito,* 2018 BCCA 407. The effect of other statutory regimes and priority over property of a debtor when two different statutory regimes are asserted by different parties depends on the wording of the relevant statutes. See *Great Northern Insulation Services Ltd. v. King Road Paving and Landscaping Inc.,* 2019 ONSC 3671. In the footnotes in the case, the Court specifically held that the result was different from earlier jurisprudence, because there was no PPSA security interest asserted (at note 49) The case before the Divisional Court involved a charging order arising from a solicitor's lien against a trust claim arising out of the *Construction Act* (Ontario).

In *General Motors v. Trillium Motor World Ltd.*, 2019 ONSC 520, the Court determined that the Ontario equivalent to *paragraph 4(a)* of the Manitoba PPSA would apply to exempt a payment of costs ordered by the Court under the *Class Proceedings Act* (Ontario) (paras. 41-63). However, care should be taken in applying this case in the Manitoba context. There are at two reasons for this. First, the wording of the *Ontario PPSA* is not identical to its Manitoba counterpart on this point. Therefore, caution is called for. Second, the court draws analogies to the Ontario *Solicitors Act*. It is beyond the scope of this chapter to discuss the differences that a Manitoba court might find in these statutory regimes relevant to the potential application of *paragraph 4(a)* of the Manitoba PPSA.

There is also some jurisprudence out of BC and Saskatchewan that suggests that there are circumstances where, despite the absence of an agreement between the

parties, there may be a security interest at play. In one case, a combination of court orders in a family litigation may inspire a need to perfect the interest of the transferee spouse. On this point, see *Sangha v. Sangha*, 2018 BCSC 731 where the former husband was ordered to deliver his share certificates to the former wife to perfect her security interest (a charge on his shares to secure payment of a family law compensation order against him in *Sangha v. Sangha*, 2017 BCSC 2289). In the second case, a statutory scheme which gives an employee who is due unpaid wages a right to a security interest to enforce the debt against the employer was acknowledged. See *Mitchelson v. 101306439 Saskatchewan Ltd.,* 2019 SKQB 224. The application of this scheme on the facts was not determined on the application, because the ownership of the assets at issue was unclear so the matter was ordered to be set down for trial.

This jurisprudence should be approached with caution in the Manitoba context, although the authors would not go so far as to suggest that the result in either case was incorrect.

b) Insurance Matters

Section 4(b) provides that the PPSA does not apply to the creation or transfer of an interest or claim in or under a policy of insurance except the transfer of a right to money or other value payable under a policy of insurance as indemnity or compensation for loss of or damage to collateral. The exception regarding a transfer of right to money as compensation for loss of or damage to collateral is linked to the definition of "proceeds" and is necessary to allow the security interest in damaged collateral to flow through and apply to the insurance for that damage. All other insurance interests are outside the PPSA. *Section 4(b.1)* provides that the PPSA does not apply to the transfer of an interest or claim in or under a contract of annuity, other than a contract of annuity held by a securities intermediary in a securities account.

c) Wages, Salaries, Etc.

Section 4(c) provides that the PPSA does not apply to the creation or transfer of an interest in present or future wages, salary, pay, commission or any other compensation for labour or personal services, other than fees for professional services. However, see *Access Mortgage Corporation (2004) Limited v. Arres Capital Inc*, 2018 ABQB 1034 (CanLII) at paras. 67-69, where there are fees earned that are not "akin to the payment of wages" (para. 69), the exception of section 4(c) may not apply.

The exception for fees for professional services is necessary to allow lawyers, accountants, dentists, doctors, architects, engineers, etc. to grant security interests in accounts receivable generated by them (their "professional" fees).

d) Unearned Right to Payment

Section 4(d) provides that the PPSA does not apply to a transfer of an unearned right to payment under a contract to a transferee who is to perform the transferor's obligations under the contract. This exclusion is inserted because the transferee only

earns the right to payment by performing the transferor's obligations under the contract; as a result, there is little possibility that a third party will be deceived that a transferor still has rights under the contract in which it might grant a security interest. Due to there being little likelihood of third parties being deceived, the PPSA does not require registration of this form of assignment.

e) Land Interest

Section 4(e) provides that the PPSA does not apply to the creation or transfer of an interest in land including a lease.

f) Payment in Connection with an Interest in Land

Section 4(f) provides that the PPSA does not apply to the creation or transfer of a right to payment that arises in connection with an interest in or a lease of land, other than a transfer of rental payments payable under a lease of land and a right to payment evidenced by investment property or an instrument. However, this can be quite complex. For some of the jurisprudence on this issue, see:

- *Credit Suisse Canada v. 1133 Yonge Street Holdings Ltd.,* 1998 CanLII 6857 (ON CA);
- *Heritage Capital Corp. v. Equitable Trust Co.,* 2016 SCC 19;
- *Harbouredge Mortgage Investment Corporation v. Powell Associates Ltd,* 2016 NBQB 178.

The last of these cases points out that, in general, rental payments will be paid by cheque and placed in a bank account. At the point the rental payment is no longer a future obligation, and has transferred into a cheque that is negotiable at a financial institution, the relevant law has moved from the real property regime to the regime applicable to personal property, that is, the PPSA (see *Harbouredge Mortgage* at para. 21).

Cautious practitioners should attempt to comply with both real and personal property registration/notice requirements for security assignments of a realty landlord's rights to rentals and other landlord rights and entitlements, at least until this matter is clarified judicially or by the legislature.

g) Sale of Accounts/Chattel Paper as Part of Sale of Business

Section 4(g) provides that the PPSA does not apply to a sale of accounts or chattel paper as part of a sale of a business out of which they arose, unless the vendor remains in apparent control of the business after the sale. The reason for the exclusion is that it is not likely that any third party would believe that the vendor remains the owner of the accounts or chattel paper upon a sale of the business. Because there is little chance of a third party believing that a vendor has an interest in the sold account or chattel paper that is no longer in the apparent control of the

vendor, the PPSA does not require registration in order to protect the purchaser's interest in the account or chattel paper.

h) Transfer of Account to Facilitate Collection

Section 4(h) provides that the PPSA does not apply to a transfer of accounts made solely to facilitate the collection of accounts for the transferor (for example, to a collection agent).

i) Damages in Tort

Section 4(i) provides that the PPSA does not apply to the creation or transfer of a right to damages in tort (such as that contained in an insurance contract whereby the insurance company obtains a right to the insured's damage claim).

j) Assignment for General Benefit of Creditors

Section 4(j) provides that the PPSA does not apply to an assignment for the general benefit of creditors made pursuant to an Act of the Parliament of Canada relating to insolvency. This covers situations where assets are turned over to a trustee or liquidator for realization and distribution among creditors, such as in a bankruptcy or proposal under the *Bankruptcy and Insolvency Act* (Canada) or the *Companies' Creditors Arrangements Act* (Canada) or a liquidation under the governing legislation of a corporation, a bank or a trust company.

k) Security Interest Governed by Federal Law

Section 4(k) provides that the PPSA does not apply to a security agreement governed by a statute of the Parliament of Canada that deals with the rights of parties to the agreement or the rights of third parties affected by a security interest created by the agreement, including an agreement governed by *Part VIII* of the *Bank Act* (Canada) and a mortgage under the *Canada Shipping Act, 2001*.

The exclusion is intended to make it clear that secured rights created under federal legislation will not also fall within the PPSA and thereby allow the secured party holding a federal security interest to "cherry pick" the most favourable priority and enforcement provisions as between the PPSA and the federal legislation. By virtue of the exclusion, the secured party holding the federal interest is limited to what is in the federal statute creating the interest. Of course, it is still possible for the secured party holding a federal security interest to take separate documentation that will be governed by the PPSA.

The most common federal interest within *section 4(k)* that Manitoba lawyers will have to deal with is *Bank Act* (Canada) security. Part VIII of the *Bank Act* in *sections 425 – 436* grants banks the ability to lend funds to certain types of borrowers and to take a special type of security on certain specific types of assets, with a special type of filing made in one of the Bank of Canada offices (depending on the location of the party giving the *Bank Act* security). The concept of a special type of security was first

introduced into the *Bank Act* in 1890 as a means to assist banks in financing the development of Canada's natural resources, but by virtue of amendments over the last 100 years the special security has been expanded beyond assisting in the development of natural resources.

The *Part VIII Bank Act* special security is very beneficial to banks because it is generally only available to banks, and non-banks cannot use it, thus giving banks a form of competitive advantage over non-bank lenders. In addition, the *Bank Act* security is one system that is effective across Canada, so a bank does not have to be concerned with differing provincial systems of taking security. Until the development of PPSAs, the *Part VIII Bank Act* special security was the most effective way for a bank to secure itself on a customer's inventory.

The constitutional validity of the *Bank Act* security has been challenged as infringing on the provinces' authority in property and civil rights matters in the province, but the *Bank Act* authority has been consistently upheld as a necessary feature of banking, which is within the federal powers under the constitution.

Except for the 2012 *Bank Act* (Canada) amendments referred to below, there are no provisions in the *PPSA* or the *Bank Act* to settle priority disputes between a PPSA security interest and a *Bank Act* interest. The *Bank Act* indicates that a *section 427* security is prior only to rights subsequently acquired in, on or in respect of the property covered by the section 427 security. If a PPSA security interest was created and perfected prior to a *Bank Act* interest, the PPSA interest will have priority.

The 1994 decision of the Saskatchewan Court of Appeal in *Agricultural Credit Corporation of Saskatchewan v. Royal Bank of Canada*, outlines three rules to follow when determining priority between a *Bank Act* security and a PPSA security interest:

- set aside the PPSA and determine priority as if the PPSA did not exist;
- determine priority pursuant to the *Bank Act* provisions; and
- where appropriate, apply the first-in-time priority rule.

However, if a debtor has no interest in the collateral (for example, by paying no amount of the purchase price under a conditional sales contract) then a bank cannot obtain any interest under *section 427* of the *Bank Act* because the bank's interest is based on "title" and the debtor has no title to pass to the bank See:

- *Rogerson Lumber Co. Ltd. v. Four Seasons Chalet Ltd. and Bank of Montreal et al* (1980) ONCA;
- *Bank of Nova Scotia v. International Harvester Credit Corp. of Canada Ltd. (C.A.)* (1990) ONCA;
- *Kawai Canada Music Ltd. v. Electronic Keyboard Centre and Kawai Piano and Organ (Encore Music Ltd.),* 1993 ABCA 102.

Note also the 2012 amendments to the *Bank Act* (*s. 428*) which confirm that *Bank Act* security will have priority over PPSA security interests where the PPSA security interests are unperfected at the time that the *Bank Act* security interest was filed. This specifically overturns earlier SCC precedent [*Bank of Montreal v. Innovation Credit Union*, 2010 SCC 47]. The SCC had held that prior, attached but unperfected (the concepts of both attachment and perfection will be dealt with in more detail below) security interests would defeat later *Bank Act* security interests. The amendments do not affect prior perfected security under the PPSA, which will still defeat later *Bank Act* interests.

Thus, if your client is considering acquiring a security interest in someone's personal property (which is personal property which could be subject to security under *section 427* of the *Bank Act* (Canada)), you should search in the appropriate registry (not the Manitoba *PPR*) to see whether or not such *Bank Act* security has - or has not - been given. This is of course in addition to any provincial searches, in the PPR and otherwise.

2. Other Federal Interests

There are several other federal statutes that will make the *PPSA* inapplicable or, if the PPSA provisions are in conflict with federal provisions, the federal provisions will have paramountcy over the PPSA provisions. The most common examples are:

a) Income Tax - Garnishment Provisions

Section 224 of the *Income Tax* Act creates a special form of garnishment right for Canada Revenue Agency which is outside the PPSA.

b) Bankruptcy and Insolvency Act

Generally the *Bankruptcy and Insolvency Act* (the "BIA") respects the impacts of provincial legislation used to create security interest [BIA, *s. 72(1)*]. Therefore, as a general matter, the doctrine of paramountcy does not arise often. However, the doctrine applies to supersede the *PPSA* in the following two areas:

1. If there is an operational conflict between the *BIA* and *section 20* of the PPSA respecting subordination of unperfected security interests, the *BIA* will prevail:
    - *Sinco Trucking Ltd. v. Paccar Financial Services Ltd.* (1989) SKCA;
    - *Maliteare v. Royal Bank of Canada* (1987) SKQB;
    - *1064521 Ontario Ltd. (Re)* (1998) ONSC;
    - *International Harvester Credit Corp. of Canada v. Bell's Dairy Ltd. (Trustee of)* (1986) SKCA;
    - *Agent's Equity Inc v. Hope Estate* (1996) ONSC;
    - *Giffen (Re)* (1998) SCC.

2. Amendments to the *Bankruptcy and Insolvency Act* in 1992 introduced special rights to suppliers in *section 81.1* of the BIA and special rights to farmers, fishermen and aquaculturists in *section 81.2* of the BIA. The provisions were introduced in an effort to provide some protection to those parties. Any protection to those parties must be done at the expense of other parties, including secured creditors.

Provincial legislation (including the PPSA in certain jurisdictions) can provide certain exemptions from seizure, including in insolvency situations. See, for example, *MacFarlane (Re),* 2019 NSSC 201; *Godbout (Re),* 2019 NSSC 315. But note that the provisions on which the cases turned have no equivalent in Manitoba.

c) *Indian Act*

The *Indian Act* applies to supersede the real property statutes and the PPSAs respecting land or personal property of a status Indian or a band situated on a reserve. The *Indian Act* indicates that such property is not subject to charge or seizure by a person who is not a band member unless certain other provisions of the *Indian Act* are followed, including the obtaining of governmental approval or band resolutions [*s. 89* and *s. 90* of the *Indian Act* and *Kingsclear Indian Band v. J.E. Brooks & Associates* (1991) NBCA].

3. Trusts

The finding of a trust relationship does not necessarily determine whether there is or is not a security interest. See *Manning Jamison Ltd. et al. v. Registrar of Travel Services,* 1999 BCCA 185 which is the appeal of *Skybridge Holidays Inc. (Trustee of),* 1998 CanLII 5525 (BC SC). At *paragraph 19* quoting paragraph 8 of the chambers judge's judgment:

> *[8] The fact that the travellers' interest is a beneficial interest in a trust does not determine the issue. The PPSA is explicit that a trust interest is a security interest if the purpose is to secure payment or performance of an obligation. The substantive nature of the trust is critical.*

In the case, none of the parties intended to create a security agreement for PPSA purposes, and the parties' intentions is one of the factors relevant to determining the substance of a transaction, an approach which, if there had been a disguised use of the trust as a security instrument, would have revealed that fact (see *para. 26*). If a trust relationship is set up to ensure payment or performance of an obligation, it is a security interest like any other caught by PPSA *section 3(1)*.

On the other hand, if the trust relationship is not intended to secure payment or performance of an obligation, the relationship may also act to exclude the provisions of the PPSAs from being operative as against the trustee, on the basis that the property held in trust is not property of the trustee and, thus, is not available to be granted by the trustee to a secured party.

Federal and provincial governments have, over the last twenty-five years, moved to establish statutory trusts to ensure that the government or others will have priority over security

interests. The courts have also shown a willingness to find a constructive or resulting trust relationship so as to avoid what they feel are unfair consequences if a trust is not found to exist. The willingness of courts to find constructive or resulting trusts, however, removes at least some of the certainty as to priority that the PPSA has tried to introduce. These concerns have been expressed in several cases:

Percival Mercury Sales Ltd. (Percival Auto Rentals Ltd.) v. Touche Ross Limited, 1984 CanLII 2730 (SK QB), where the trial judge pointed out that the Saskatchewan equivalent of *section 65(2)* of the Manitoba PPSA indicates that the common law, equity and law merchant apply except insofar as they are inconsistent with the express provisions of the PPSA. The judge found that a constructive trust was inconsistent with specific provisions of the Saskatchewan PPSA and went on to state in *paragraph 11* that:

> *[11] ...An attempt to impose constructive trusts in situations governed by the Act would only lead to uncertainty in business transactions, something the Act seeks to avoid for the benefit of both lenders and borrowers.*

Royal Bank of Canada v. 216200 Alberta Ltd., 1986 CanLII 3219 (SK CA), where the court stated in *paragraph 26* that:

> *(t)he scheme of the Act is to register the security interest.... Any scheme which permits trust classes or devices outside the Act will cause commercial uncertainty and produce disruption in commercial transactions...*

CIBC v. Melnitzer (Trustee of) [1993] O.J. No. 3021, 23 C.B.R. (3d) 161, 1 E.T.R. (2d) 1 (ON Gen Div.) aff'd *1997 CanLII 14523* ONCA also referred to the limitation in *section 72* of the Ontario PPSA [equivalent to *s. 65(2)* pf the Manitoba PPSA] on the applicability of the principles of common law and equity if they are inconsistent with express provisions of the PPSA. At paragraph 145, Mr. Justice Killeen said:

> *Section 72 was enacted to fill in the gaps of the P.P.S.A. in the sense of supplementing and augmenting its purposes when a specific provision, or provisions, was silent on an interstitial point....As it seems to me, the drafters of the P.P.S.A. did not intend to have its perfection-of-interests system overridden or emasculated by an endless series of ad hoc rulings in individualized settings. Respect must be maintained for the perfection system no matter how harsh its application may appear to be in a given isolated case.*

See also *KBA Canada, Inc. v. Supreme Graphics Limited* 2014 BCCA 117.

4. Conflict of Laws

Another method for a security interest to be excluded from the operation of the PPSAs is by virtue of the PPSA conflict of laws rules. *Sections 5 to 8.1* of the PPSA provide a set of choice of law and perfection rules applicable to security interests. These provisions specify choice of laws rules about the validity, perfection and priority of security interests, as well as procedural and substantive issues relating to enforcement. However, the PPSA provisions

are not exhaustive, and it may be still necessary to refer to the common law conflict of laws rules.

The common law conflict of laws rules generally favour the law where the property is situated (the *lex situs*) to govern property matters. If the matter deals with a contract, then the common law generally applies the proper law of the contract that is the law of the jurisdiction with which the contract has the most significant connection or the law that the parties to the contract stipulated in the contract that they wish to apply to the contract.

The common law rules create some difficulty when dealing with personal property security transactions. The *lex situs* is often difficult to determine for intangible or moveable property, and the proper law of contract is not of assistance if a court does not recognize a foreign court's jurisdiction or a foreign jurisdiction's laws.

The PPSA conflict of laws provisions have been created to address some of the difficulties experienced in using the common law conflict of laws rules; however, the PPSA does not provide a complete code of all conflict rules. Should the PPSA not address a particular conflict of laws issue, then the common law conflict of laws rules will still apply.

a) Goods or Possessory Security Interest

Section 5(1) of the PPSA indicates that the validity, perfection and priority of certain types of security interests are governed by the laws of the jurisdiction where the collateral is situated when the security interest attaches. Another section of this chapter will deal in more detail with the concept of "attachment," but attachment essentially occurs when there are contractual rights between the secured party and the debtor.

Section 5(1) applies to a security interest in goods or a possessory security interest (where the secured creditor takes possession of the collateral) in an instrument (such as a promissory note), a negotiable document of title (such as a warehouse receipt), money and chattel paper (such as a chattel mortgage or a conditional sales contract plus the security interest created by it, where the creditor uses it as collateral for a separate loan, where the creditor on the first loan is the debtor on the second loan).

It should be noted that *section 5(1)* is subject to the other provisions of the PPSA. Therefore, other PPSA conflict of laws provisions dealing with certain specific types of collateral or situations may take precedence over section 5(1).

b) Where Goods Come into Manitoba

Section 5(3) of the PPSA deals with the law governing perfection respecting goods that are moving into Manitoba from another jurisdiction. A similar provision can be found in all PPSAs and the Uniform Commercial Code (UCC) Article 9 in the United States, so the movement of goods from Manitoba to another jurisdiction in North America will likely be subject to similar provisions.

Section 5(3) of the Manitoba PPSA allows for the perfected status in another jurisdiction to continue after the goods are brought into Manitoba provided that the security interest is perfected within certain time or "grace" periods. The perfection in Manitoba would usually be by filing a financing statement in the Manitoba *PPR*, but another effective but rare method of perfection would be if the secured party had possession of the collateral. Because the situations are rare where a secured party would possess the collateral rather than allowing continuing possession by the debtor, throughout the rest of this part of the chapter it is assumed that perfection of the security interest in Manitoba will be by filing a financing statement.

If perfection occurs within the time periods set out in *section 5(3)*, then the perfection is considered to have occurred at the date of perfection in the first jurisdiction. For Manitoba perfection purposes it is effectively, a "back-dating" of the perfection to the time of perfection in the other jurisdiction [See *Searcy (Trustee of),* 1991 CanLII 1289 (BC SC); *General Motors Acceptance Corp. v. Midway Chrysler Plymouth* 1987 CanLII 7888 (MB QB)].

The policy reason for this provision is that, without the provision, the out-of-province secured party would not have to make any filing in Manitoba to give notice of its interest to Manitobans because, under *section 5(1)* of the Manitoba PPSA, perfection is governed by that other jurisdiction. This is not fair to Manitobans who may deal with those goods after they are relocated to Manitoba. To require immediate registration by the secured party from the other jurisdiction would also be unfair because the secured party may have no control over the movement of the goods. A compromise to try to be fair to all parties is that the out-of-province secured party is allowed a certain amount of time, or a "grace period," to perfect the security interest in Manitoba.

The grace period within which the financing statement must be filed in Manitoba to maintain the continuity of perfection is set out in *section 5(3)* of the PPSA:

> ***Perfection when goods previously perfected***
>
> 5(3) *A security interest in goods perfected under the law of the jurisdiction in which the goods are situated at the time the security interest attaches but before the goods are brought into the province remains perfected in the province if it is perfected in the province,*
>
> *(a) not later than 60 days after the goods are brought into the province;*
>
> *(b) not later than 15 days after the day the secured party has knowledge that the goods have been brought into the province; or*
>
> *(c) before perfection ceases under the law of the jurisdiction in which the goods were situated when the security interest attached;*
>
> *whichever is earliest, but the security interest is subordinate to the interest of a buyer or lessee of the goods who acquires the interest without knowledge of the*

security interest and before it is perfected in the province under section 24 or section 25.

The security interest must be perfected in the province where the goods have been moved by the earliest of the options in order to keep the perfection date of the original jurisdiction.

If the perfection of the security interest in Manitoba takes place within the grace period set out in *section 5(3)(a-c),* the secured interest will be deemed to have been perfected in Manitoba at the date of perfection in the first jurisdiction, and thus will generally have priority over any party in Manitoba who obtains any form of interest in the goods, even if that interest was obtained during the grace period when there was no financing statement filing in the Manitoba *PPR* that would be disclosed if a search had been done. That is so UNLESS a buyer or lessee of the goods acquires their interest in the goods without knowledge of the security interest of the secured party and before the collateral is repossessed or seized under *section 24* or a financing statement is registered as set out in *section 25*.

In the event that the registration of the financing statement is not made within the grace period, the security interest will be considered to be unperfected from the moment the goods entered Manitoba until such time as it may otherwise become perfected (for example, by filing a new financing statement in Manitoba after the grace period has expired.) See:

- *Demos v. Niagara Finance* (1980), 1 PPSAC 96 (available on Westlaw) (Man Co Ct);
- *Trans Canada Credit Corp. v. Bachand* (1980) ONCA;
- *Re Bedard (1983),* 3 P.P.S.A.C. 29. ONSC;
- *Bank of Nova Scotia v. Gaudreau* (1984), 4 P.P.S.A.C. 158, 27 B.L.R. 101, (ONHC.);
- *Royal Bank of Canada v. Anderson (Bankrupt)*, (1986) SKQB;
- *Key State Bank v. Voz* (1989) ONSC (Dist. Ct.);
- *Royal Bank v. Pattison Bros. Agro* (1990) SKQB;
- *Alves Worms Ltd. v. Ford Credit Canada* (1995) 10 P.P.S.A.C. (2d) 25 (Ont. Gen. Div.);
- *Associates Commercial Corp. v. Scotia Leasing Ltd.* (1995), 24 B.L.R. (2d) 310 (Ont. Gen. Div.).

The "back-dated" perfection date protection to an out-of-province secured party under *section 5(3)* will not apply as against a buyer or lessee of the goods who acquires their interest without knowledge of the out-of-province secured party's security interest and before that is perfected in Manitoba by possession, repossession or seizure of the collateral under *section 24* or registration of the financing statement

under *section 25*. In those circumstances, even though an out-of-province secured party may eventually file the financing statement in Manitoba within the grace period, if the buyer or lessee of the goods acquired the interest in the goods before the registration, the out-of-province secured party's interest is subordinate. The statutory language is found in the closing words of *subsection 5(3)*. This is a policy decision to protect innocent buyers or lessees of the goods who have no knowledge of the out-of-province secured party's security interest. That policy presumes that the party more able to bear the loss would be the out-of-province secured party rather than the Manitoba buyer or lessee of the goods See *Holland v. Chrysler Canada Ltd.*, (1992) ABQB.

In other words, in *subsections 5(1)* and *5(3)* (subject to *section 6* and *section 7,* discussed more below), there are two priority competitions that are being considered.

In the first, the competition is between an out-of-province secured party who registered properly in the other, earlier jurisdiction (SP1), and a later secured party who registers properly in Manitoba, (SP2). Assume the debtor moves the collateral to Manitoba. The section protects the out-of-province secured party (SP1) who registers properly in Manitoba before the end of the grace period by offering continuous perfection all the way back to the original registration in the earlier jurisdiction. Thus, SP1 beats SP2. If SP1's registration in Manitoba occurs after the end of the grace period, then any other secured party (SP2) who properly registered against the collateral while it is in Manitoba before SP1 registers outside the grace period will have priority over the SP1.

The second alternative does not involve two secured parties, but only one (SP1) versus an innocent third party purchaser or lessee (3P) who buys or leases the collateral from the debtor without knowledge of SP1's security interest. Assume that SP1 registers in a jurisdiction other than Manitoba, and the debtor moves the collateral to Manitoba. The debtor then sells or leases the collateral to 3P. 3P is unaware of the security interest of SP1. Whether SP1 registers during or after the grace period is irrelevant on these facts. If the interest of 3P is created before SP1 registers the security interest in Manitoba, then the interest of 3P takes priority over the interest of SP1.

There is some recent case law to suggest that simply bringing the asset into the new jurisdiction is not necessarily sufficient to engage the equivalent in Ontario to *section 5(3)* under the *Manitoba Act*. See *Hughes (Re)* 2016 ONSC 6832. The asset was in Ontario, but the debtor continued to spend the majority of his time in Alberta. Therefore, an Ontario Registrar in Bankruptcy held that despite the fact that the asset was in Ontario, it had never been "brought into the jurisdiction" within the meaning of section 5(3).

c) Where Parties Understand Goods Will be Moved

Section 6 of the PPSA deals with situations where the goods are intended by both the secured party and debtor to be kept in a jurisdiction other than the jurisdiction where the goods are located at the time the security interest attaches. If such an intention exists, and the goods are removed to that other jurisdiction not later than thirty days after the security interest attaches, the validity, perfection and priority of the security interest is governed by the law of the jurisdiction where the goods are intended to be kept rather than the jurisdiction in which attachment of the security interest in the goods occurs.

An example of a situation where *section 6* would apply would be where goods are purchased in Ontario by a debtor on credit terms from a secured party but both the secured party and the debtor understand that the goods will be kept in Saskatchewan. If section 6 did not exist, the governing law would be Ontario because, under *section 5(1)*, Ontario was the jurisdiction where the goods were located when attachment took place. However, note that section 5(1) is subject to section 6, and *section* 6 recognizes that the choice of Ontario law is not appropriate in this situation. Because the parties both understand that the goods will be kept in Saskatchewan, and the goods are moved to Saskatchewan within the prescribed time of not later than 30 days after the security interest attaches in Ontario, then, section 6 means that Saskatchewan law will govern the validity, perfection and effect of perfection or non-perfection of the security interest in the goods.

d) Mobile Goods, Intangibles and Non-possessory Interest

Section 7 of the PPSA indicates that the validity, perfection and priority of security interests in certain types of collateral are to be governed by the laws (including the conflict of laws rules) of the jurisdiction where the debtor is located when the security interest attaches. The types of security interests covered by section 7 are:

- A security interest in an intangible. This is because an intangible has no physical presence and it is desirable to have a single jurisdiction indicated for registration and search purposes;
- A security interest in goods that are of a type that are normally used in more than one jurisdiction, if the goods are equipment or inventory leased or held for lease by a debtor to others. These are often referred to as "mobile" goods (or "planes, trains, and automobiles" collateral), which may have a constantly changing location. Section 7 establishes a rule to fix only one governing jurisdiction for these mobile goods. This avoids both the necessity of perfecting the secured interest in each jurisdiction where the goods might be used and the necessity of searching in each jurisdiction where the goods might be located from time to time. See:
    - *Westman Equipment Corporation v. Royal Bank of Canada* (1982) MBQB;

- *Trailmobile Canada Ltd. v. Kindersley Transport Ltd*. (1986) SKQB;
- *Ens Toyota Ltd. v. Megill Stephenson Co. Ltd.* (1989) SKQB;
- *Juckes (Trustee of) v. Holiday Chevrolet Oldsmobile (1983) Ltd.* (1990) SKQB;
- *Advance Diamond Drilling Ltd. v. National Bank Leasing Inc. (cited as Ernst&Young Inc. v. National Bank Leasing Inc.)* 1992 BCSC;
- *Canadian Imperial Bank of Commerce v. A.K. Construction (1988) Ltd.* (1996) ABQB, Master Funduk;
- *Gimli Auto Ltd. v. BDO Dunwoody Ltd., Trustee and Canada Campers Inc.* (1998) ABCA.

- A non-possessory security interest in an instrument, a negotiable document of title, money and chattel paper. This is to be contrasted with *section 5(1)* discussed above which deals with a possessory security interest (where perfection is by the possession of the collateral [*s. 24*]. When dealing with a possessory security interest, it is possible to determine the location of the collateral when attachment takes place because the secured party takes possession of the collateral. When dealing with a non-possessory security interest (being one where there is perfection by the registration of a financing statement [*s. 25*], it may not be possible to determine with certainty, the location of an instrument, a negotiable document of title, money and chattel paper when the security interest attaches.

Section 7(1) of the PPSA outlines some rules to determine where a debtor is located for the purposes of section 7 and section 7.1. Essentially, for a business debtor it is the place of business of the debtor, and if the debtor has more than one place of business, it is the jurisdiction in which the debtor's executive office is located. If the debtor has no place of business, it is the jurisdiction in which the debtor's principal residence is located.

e) Where Debtor Relocates or Transfers an Interest

One of the rationales for the choice of law provisions in *section 7(2)* is to reduce the number of jurisdictions in which registration is required, or searches must be made, with respect to the security interests referred to in section 7(2). If the debtor relocates to a different jurisdiction than the one the debtor was in when a security interest attaches, or if the debtor transfers an interest in the collateral to a person located in another jurisdiction, then logically there should be a requirement for a secured party to make registrations in that new jurisdiction within certain time periods so that any future searches that occur against the debtor in the jurisdiction of the new location of the debtor, or against the transferee in the transferee's jurisdiction, will disclose the secured party's security interest.

The time periods specified in *section 7(3)* of the PPSA are very similar to the ones used when goods are moved into Manitoba as outlined in *section 5(3)* of the PPSA, discussed above, and are:

- not later than 60 days after the day the debtor relocates or transfers an interest in the collateral to a person located in the other jurisdiction;
- not later than 15 days after the day the secured party has knowledge that the debtor has relocated or transferred an interest in the collateral to a person located in the other jurisdiction; or
- before the day that perfection ceases under the law under the first jurisdiction;

whichever is earliest. [*Juckes (Trustee of) v. Holiday Chevrolet Oldsmobile (1983) Ltd.* (1990) SKQB.].

f) Investment Property

Section 7.1 of the PPSA provides that the validity of a security interest in investment property is determined at the time the security interest attaches and the jurisdiction of the governing law depends upon the **type** of investment property (a security entitlement or a securities account or a futures contract or a futures account) and in the case of securities, the **form** of the investment property (certificated or uncertificated security - that is, whether a physical security certificate exists for the security). Similarly, the perfection, effect of perfection or non-perfection, and the priority of a security interest in investment property may be governed by the laws of different jurisdictions, depending upon the type of investment property and the location of the debtor, the issuer, or the securities intermediary.

Section 7.1(3) of the PPSA outlines some rules with regard to determining where a debtor, an issuer, or a securities intermediary is considered to be located. For the location of a debtor, reference is made to *section 7(1)* (discussed at section (d) above, relating to mobile goods), and for an issuer or a securities intermediary, reference is made to rules in *The Securities Transfer Act* (Manitoba).

In the event a debtor, an issuer, or a securities intermediary relocates to another jurisdiction, there are similar provisions and time periods which are applicable to allow a secured party to continue its perfected security position, as provided at *section 7.1(6)* and *section 7.1(7)* of the PPSA. The time periods are 60 days after relocation and 15 days after a secured party has knowledge of the relocation, whichever is earlier, and those periods are identical to the periods specified at *section 5(3)* and *section 7(3)* of the PPSA, discussed above.

g) Procedural and Substantive Enforcement Issues

Section 8 of the PPSA deals with rights of enforcement between the debtor and the secured party and does not apply to priority contests.

Section 8 makes a distinction between procedural and substantive matters. When dealing with procedural matters, there are two choice of law rules depending on the nature of the collateral. Procedural matters affecting the enforcement of a secured party's rights against collateral will be governed by the law of the *lex fori* where the enforcement is sought [*s. 8(1)(a)*].

Substantive issues involved in the enforcement of the secured party's rights against collateral are governed by the proper law of the contract between the secured party and debtor [*s. 8(1)(b)*]. Substantive matters include rules pertaining to the creation or loss of the right to realize on the collateral, as opposed to the procedural steps necessary to enforce rights See *Cardel Leasing Ltd. v. Maxmenko* (1991), 2 P.P.S.A.C. (2d) 302, 1991 CarswellOnt 633 (Ont. Gen. Div.)]. In that case, Cardel leased a vehicle to Maxmenko. The lease agreement provided that the agreement would be governed by the laws of Ontario. There was a proviso that any provision which contravened the laws of the jurisdiction where the contract was to be performed would be deemed not to be part of the agreement. In B.C., where Mr. Maxmenko resided, there was a "seize or sue" provision. Mr. Maxmenko argued that because Cardel had repossessed the car, it could not sue. Adams, J. held that because the contract was performed in B.C., the proviso in the agreement made the 'sue' provisions of the agreement unenforceable. He said the following at paragraph 7:

> *Where the parties to a contract expressly stipulate that an agreement shall be governed by a particular law, that law will generally be the proper law of the contract. See Vita Food Products Inc. v. Unus Shipping Co., supra, at p. 290. This freedom of choice, however, is subject to certain limitations. As Lord Wright in the Vita Food Products case observed, the selection must be bona fide and legal and there must be no reason for avoiding the choice on the ground of public policy. As an example, Professor Castel points out in his treatise that where a law is expressly chosen to evade the provisions of the system of law with which the transaction, objectively, is most closely connected, that choice will be disregarded. See J.G. Castel, Canadian Conflict of Laws (2nd ed., 1986) at p. 531.*

5. Transitional Matters

Section 73 and *section 74* of the PPSA outline a variety of transitional rules that, in a few instances, direct that certain issues are not to be determined by the current PPSA, thereby creating a form of exclusion from the Act. To understand the exclusions, it is necessary to understand two terms:

- **pre-reform law** means the law in force immediately **before** September 1, 1978, which is the coming into force date of the Old PPSA (in effect from September 1, 1978 to September 4, 2000, inclusive);

- **prior law** means the Old PPSA which was in effect from September 1, 1978 to September 4, 2000, inclusive. The current *PPSA* came into force on September 5, 2000.

Section 73(7) indicates that **pre-reform law** (law before September 1, 1978) will determine the order of priorities between a pre-reform security interest (being security agreements entered into prior to September 1, 1978) and any other security interest no matter when it is created. It also provides that priority between a pre-reform law security interest and a third party will be determined by **pre-reform law**.

Section 73(8) provides that **prior law**, (the Old PPSA –September 1, 1978 – September 4, 2000) will determine the order of priorities among **prior security interests** as defined in *section 73(1).* Prior law will also determine the order of priorities between a **prior security interest** and a third party where the third party interest arose before the current PPSA came into force on September 5, 2000.

Section 73(9) provides that if there is a priority dispute between a security interest arising after September 4, 2000 and a **prior security interest**, the current PPSA will determine that priority dispute. [*Transamerica Commercial Finance Corp Canada v. Karpes* (1994) BCSC].

A security interest under **pre-reform law** or **prior law** that is covered by an unexpired filing or registration under a system existing prior to the current PPSA will be considered to be perfected when the requirements of the perfection of that interest under the prior registration law have been met, generally, whether or not the requirements for protection of the security interest under the current PPSA have been met [*Sleeping Giant Investments Inc. v. Southey Farm Supply Ltd.* (1996) SKQB]. Although a subsequent appeal of the decision was dismissed, it was dismissed by reference to the then-current law in the relevant jurisdiction (in the case, Saskatchewan). Thus, when considering pre-reform law security interests, it is nonetheless important to be aware of current law. Nonetheless, the general rule remains that the reform law remains relevant and governing.

Of course, as time progresses, the importance of these transitional provisions will lessen. But given the length of some registrations, it is likely to be quite some time before students and practitioners can safely ignore these provisions altogether.

D. SECURITY AGREEMENT

1. Definition and Statutory Requirements

A security agreement is defined in the *PPSA* as "an agreement that creates or provides for a security interest." It is the substance of a security agreement that is important, and not its form.

A security agreement does not have to be in writing to be effective between the debtor and the secured party [*977380 Ontario Inc. v. Roy's Towing Co*. (1997), 13 P.P.S.A.C. (2d) 201 (Ont. Gen. Div.); *MacDermid Lamarsh v. D'Lugos* 1997 CanLII 11179 (SK QB)]; however, if the secured party is not in possession of the collateral, it will be necessary to have a written security agreement signed by the debtor in order for the security interest to be enforceable by the secured party against third parties. This is specifically dealt with in *section 10* of the PPSA, which provides:

> *10(1) Subject to subsection (2) and section 12.1, a security interest is enforceable against a third party only if*
>
> *(a) the collateral is not a certificated security and is in the possession of the secured party;*
>
> *(b) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under section 68 of The Securities Transfer Act pursuant to the debtor's security agreement;*
>
> *(c) the collateral is investment property and the secured party has control under section 1.1 pursuant to the debtor's security agreement; or*
>
> *(d) the debtor has signed a security agreement that contains:*
>
> > *(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".*

> *10(2) For the purpose of clause (1)(a), a secured party is deemed not to have taken possession of collateral that is in the apparent possession or control of the debtor or the debtor's agent.*

In *Pickles Tents & Awnings Ltd. v. Joseph Group of Companies* 1981 CanLII 2841 (MB CA), the majority of the Manitoba Court of Appeal found that an invoice reserving title but not signed by the buyer, or a letter from the representative of the buyer who was not an authorized signing officer did not constitute a security agreement. Matas, J.A. found that:

> *[37] …While undue formality is not to be imposed under the [Personal Property] Security Act, I would expect minimum compliance with general requirements in respect of documents executed by a corporation. In this case, the letter falls short of the minimum.*

A series of documents may be considered, when taken together, to form a security agreement. As stated by the trial judge in *Re 1153496 Ontario Ltd. cited as Dor-O-Matic of Canada Inc. (re),* 1996 CanLII 7965 (ON SC):

> *I have no difficulty in concluding that a security agreement need not be restricted to a single document. Nothing in the definition of the term narrows its scope in such a fashion, or, indeed, even to something written.*

What a document is called does not determine if it is a security agreement. In *Mid-Canada Radio Communications Ltd. v. Mechanical Services (1979) Ltd.* 1984 CanLII 2283 (SK QB) it was held that signed "lease purchase quotations" were security agreements because a security interest was created by them. In *Gujral v. Miller* 1994 CanLII 2820 (BC SC), it was held that an "option and loan agreement" respecting shares in a corporation was a security agreement creating a security interest in the shares.

A document that by its terms requires some part of it to be completed in order for it to become a "conditional sales contract" is not a security agreement if that part of it is not completed. This was the situation in *Manning v. Furnasman Heating Ltd.* 1985 CanLII 3736 (MB CA), where it was found that a "Proposal" remained as a mere proposal unless the instructions to complete the back of the form were followed in order to turn the document into a conditional sales contract.

The court may also look at multiple documents to create a security agreement. As long as one of the documents is signed, a signed security agreement for the purposes of attachment may be found. See *2441472 Ontario Inc. v. Collicutt Energy Services Corp.*, 2016 ONSC 566 (CanLII). However, the matter was appealed (See *2441472 Ontario Inc. v. Collicutt Energy Services,* 2017 ONCA 452 (CanLII), and the Court of Appeal based its order on the type of order (interlocutory or final), rather than consider the correctness of the view of the judge below with respect to the Act.

The Court of Appeal's decision included the following comments:

> *[18] In his reasons for dismissing the motion for discharge of the respondent's PPSA registrations, the motion judge engaged in an analysis of whether or not a valid security interest existed. He considered whether an agreement between the parties gave rise to a security interest. He purported to find that there was a valid security agreement between the parties, and dismissed the motion.*
>
> *[19] However, in the absence of explicit language from the motion judge finally determining the enforceability of any agreement between the parties, I am not persuaded that the motion judge did so. While he referred to documents passing between the parties, he only did so in support of his conclusion that there was no basis to discharge the PPSA registration. The motion judge simply expressed his reasoning for dismissing the motion. The formal order does not contain any final determinations, nor is there a disposition section in the reasons which purports to do so. The formal order simply dismisses the motion.*
>
> *[20] Moreover, the validity of the PPSA registration is not the real issue in dispute between the parties. The real issue is who owes what to whom in relation to the equipment and its alleged deficiencies. The existence of, or basis for, a security interest in the equipment is not addressed in the statement of claim or in the statement of defence and counterclaim. Collicutt's counterclaim claims, amongst other relief, damages for breach of contract. The issue of the enforcement of the net debt, if any, owed to Collicutt is derivative to, and not determinative of, the real issue.*

The Court of Appeal seems to be alleging that the judge below did not finally determine the effect of the *Ontario PPSA* on the facts of the case. As a result, the precedential value of the judgment below may be lessened.

One issue is how much of an interest in collateral must a debtor have in order to grant a security interest. The majority of the Man. C.A. in *Pickles Tents & Awnings Ltd. v. Joseph Group of Companies* (1981) looked at the attachment provisions in section 12 of the Old PPSA and the phrase "debtor has rights in the collateral" and found that it refers to something less than the debtor having title to the property. The majority found that the buyer's interest in the collateral was enough to create a security interest. Matas, J.A. stated:

> *[48] It would appear that, although Pickles did not have title to the goods (in the traditional sense) when it acquired them from Colonial, it had a sufficient interest in the goods (i.e., rights in the collateral) to substantiate the security agreement in favour of the bank…*

A security agreement can, if properly worded, create an equitable mortgage of real property [*Sifton Credit Union Ltd. v. Barber*, 1986 CanLII 4793 (MB QB); *Re 1153496 Ontario Ltd. cited as Dor-O-Matic of Canada Inc. (re),* 1996 CanLII 7965 (ON SC).

2. Effectiveness

Section 9 of the PPSA indicates that, except as provided in the Act or any other Manitoba statute, a security agreement is effective according to its terms. In commenting on the *Ontario PPSA* equivalent to section 9, the Ontario Court of Appeal in *Credit Suisse Canada v. 1133 Yonge Street Holdings Ltd.*, 1998 CanLII 6857 (ON CA) has stated that:

> *By these provisions, the PPSA has preserved the principle of freedom of contract as between the parties in securities transactions, subject to any restrictions appearing in the PPSA itself or in other provincial legislation:*

On the importance of contractual terms vis-à-vis a security interest, see also *Can Trans Xpress Inc. v. Invoice Payment System Corporation*, 2015 ONSC 2227. The restrictions on the effectiveness of the security agreement may be found in the *PPSA*, other statutes, or the common law. See *Input Capital Corp. v. Gustafson*, 2018 SKQB 154. The case was later reversed on other grounds by the Court of Appeal. The Court of Appeal disagreed with the trial judge's holding that unconscionability was made out on the facts on the case. See *Input Capital Corp. v. Gustafson*, 2019 SKCA 78.

Section 9 is stated to be specifically subject to other provisions in the PPSA. Two other relevant provisions are *sections 10* and *47*. Section 10 has been previously referred to, but is important because if the secured party is not in possession of the collateral and there is no written security agreement signed by the debtor, the security interest is not enforceable against third parties. See:

- *Ens Toyota Ltd. v. Megill Stephenson Co. Ltd.*, 1989 CanLII 5093 (SK QB);
- *Osman Auction Inc. v. Murray*, 1991 CanLII 5973 (AB QB);
- *Toronto Dominion Bank v. Flexi-Coil Ltd.,* 1993 CanLII 9036 (SK QB).

Because attachment is dependent on the contract between the parties, rectification of that contract is possible if the elements needed for rectification are present. See *Tremblay (Re)*, 2018 ABQB 158 (CanLII). The rectified agreement may then fulfil the requirements of attachment. If registration is done correctly (independent of the problems with the agreement), this rectification may then alter the perfection status of the security interest. Perfection is discussed below.

Section 47 states that registration of a financing statement in the *PPR* is not constructive notice or knowledge of its existence or contents to any person. Under other prior statutes involving public notification (which the PPR is designed to provide), there was an assumption that a person had notice of everything in the public registry. This was known as "constructive notice." In other words, some other statutes assume that if information is publicly available, the person to whom the information would be pertinent will be aware of that information. In some sections of the PPSA (see, for example, *s. 30*) knowledge can be relevant to the determination of priority contests. However, *section 47* means that one can only act on actual knowledge, as opposed to constructive knowledge.

However, there are cases where knowledge is imputed to one or more of the parties on the basis of other information of which the party was clearly already aware, and which would lead a reasonable person to have inquired further. On this point, see, for example:

- *E Dehr Delivery Ltd v. Dehr,* 2018 ABQB 846 (CanLII) at paras. 63-67; and
- *Third Eye Capital Corporation v. Ranch Energy Corporation*, 2019 ABQB 780 (CanLII) at paras. 28-43.

This is generally based on the particular circumstances of the parties, and not the information contained in the public registry. This case law also suggests that what a reasonable personable would have "taken cognizance of" given their actual knowledge is also relevant. [See also, PPSA, *s. 2(1)(a)*].

3. Special Matters

a) Delivery of Copy

Section 11 and *section 43(13)* of the PPSA require the secured party, without charge to the debtor, to deliver to the debtor one copy of the security agreement within 10 days after the execution of the security agreement, and to provide to the debtor a copy of the financing statement filed or a confirmation of filing within 20 days unless the debtor expressly waives the delivery of a copy of the financing statement or confirmation.

b) After-Acquired Property

Section 13 specifically provides that a security agreement may cover after-acquired property. In other words, a secured party can take from a debtor tomorrow's collateral as part of today's security interest. In other words, if the security agreement is signed in 2012 and contains appropriate language, property acquired by the debtor in 2016 can be caught by the earlier security interest.

Some cases that deal with the effective use of after-acquired property clauses are:

- *Roynat Inc. v. United Rescue Services Ltd. and General Motors Acceptance Corporation of Canada Ltd*. (1982) MBCA;
- *Regal Feeds Ltd. v. Waldner* (1985) MBQB;
- *Bank of Nova Scotia v. Royal Bank of Canada and Farm-Rite Equipment Ltd. (Receivership)* (1987) SKCA;
- *Orr & Co. v. Saskatchewan Economic Development Corp.* (1994) SKCA;
- *Affinity International Inc. v. Alliance International Inc.* (1994) MBQB.

c) Future Advances

Section 14 provides that a security agreement may secure future advances. *Section 35(5)* provides that, generally, the priority of a security interest will cover all

advances, including future advances. The ability to secure future advances, taken together with the after-acquired property section and the one notice filing system established by the PPSA, provide the potential for flexible long-term open-ended financing, especially for inventory suppliers [*Agricultural Credit Corporation of Saskatchewan v. Royal Bank of Canada* (1994) SKCA].

d) Acceleration Provisions

Section 16 states that where a security agreement provides that a secured party may accelerate payment or performance by the debtor if the secured party considers that it is insecure or that the collateral is in jeopardy, the contractual provision shall be construed to mean that the secured party has the right to accelerate payment only if the secured party believes, and has commercially reasonable grounds to believe, that the collateral is or is about to be placed in jeopardy, or that the prospect of payment or performance is or is about to be impaired. In the event that a secured party accelerates payment or performance without the belief, on commercially reasonable grounds, that the collateral is or is about to be placed in jeopardy or that the prospect of payment or performance is or is about to be impaired, the enforcement by the secured party will likely be found to not comply with the requirements of Part 6 of the PPSA. The debtor and other persons have recourse to the courts in the event that a secured party's enforcement does not comply with the PPSA, and punitive damages have been awarded by a court when a secured party was found by the court to have had no commercially reasonable grounds to enforce a security interest [*Loewen v. Superior Acceptance Corp. Ltd*. (1997) BCSC]. If a loan is a demand or "at pleasure" loan, the demand for repayment of the entire loan is not an acceleration clause under *section 16*, because the creditor is entitled to demand repayment of the entire loan at any time [*3Pawsoft Enterprise Inc. v. Global Chinese Press Inc.* (2014) BCSC].

e) Charges by Secured Party

Reasonable expenses incurred by a secured party in the custody and preservation of collateral that is in its possession are chargeable to the debtor and are secured by the collateral [*s. 17(3)(a)*]. The secured party may also charge for responses for demands for information [*s. 18(17)*]. The reasonable expenses of collection, seizing, repossessing, holding, repairing, processing or preparing for disposition and disposing of the collateral, and any other reasonable expense incurred by the secured party, may be deducted from the proceeds of realization of the collateral [*s. 57(3)*, *s. 59(2)(a)* and *s. 59(7)(d)*].

In the event that a secured party wants to be covered for expenses other than as set forth in sections 17, 18, 57 and 59 of the PPSA, it must deal with the right to such expenses in the security agreement [*MacDougall & Son Transport Ltd. v. Continental Bank of Canada* (1983), 23 B.L.R. 287, 3 P.P.S.A.C. 103 (Ont. Dist. Ct.); *Chancery Equipment Leasing Services Inc. v. Henry* (1994) SKQB].

f) Waiver or Variation of Rights

The PPSA in *section 56(3)* prohibits the waiver or variation of certain rights of the debtor or obligations of the secured party. The provisions of the PPSA that cannot be waived or varied are:

- the secured party's duties and obligations when in possession of the collateral [*s. 17* and *s. 17.1*];
- the seizure of collateral by the secured party [*s. 58*];
- the methods of disposition of collateral after seizure by the secured party [*s. 59(3)*];
- the secured party's right to delay disposition [*s. 59(5)*];
- the provision of notice prior to disposition of seized collateral [*s. 59(6)*];
- the distribution of any surplus after disposition of seized collateral [*s. 60(2)*];
- the provision of an accounting [*s. 60(3)*];
- the compulsory disposition of consumer goods [*s. 61(1)*];
- the secured party's elections to retain collateral [*s. 61(2)*];
- objections to the secured party's retention of collateral [*s. 61(3)*];
- the redemption of collateral or reinstatement of the security agreement [*s. 62*];
- court orders available regarding compliance with the PPSA [*s. 63*].

g) Receiver

Section 64 of the PPSA indicates that a security agreement may provide for the appointment of a receiver and the rights and duties of the receiver. Those rights and duties will be subject to the provisions of the PPSA or any other Act. Section 64 also sets out various duties and responsibilities of a receiver, and provides that any interested party may apply to court to appoint a receiver.

h) Default

Most of the enforcement provisions of the *PPSA* require default to have occurred prior to those provisions becoming operative. The PPSA defines default as meaning the failure to pay or otherwise perform the obligation secured when due, or the occurrence of an event or set of circumstances whereupon, under the terms of the security agreement, the security becomes enforceable. Therefore, if the secured party wishes to rely on any event of default other than non-payment or non-performance, such event must be specifically outlined in the security agreement.

i) Remedies

The PPSA provides that, after the debtor is in default under a security agreement, the secured party has the rights and remedies provided in the security agreement [*s. 56(2)(a)(i)*], in addition to any other rights and remedies set forth in the PPSA or otherwise. As a result, the drafter of a security agreement can indicate the types of remedies available to the secured party, which may vary depending on the nature of the transaction and the type of collateral.

E. ATTACHMENT

1. What is Attachment and When Does it Occur

Attachment is a term introduced by the *PPSA* that is consistent across the jurisdictions and it describes when all events necessary for the creation of a security interest have taken place. The time of attachment is when rights, duties and obligations between the debtor and secured party arise respecting the collateral. It is necessary to distinguish the concept of attachment from the concept of perfection. Attachment generally deals with the rights of the immediate parties to the security agreement (the debtor and secured party) with respect to the collateral. Perfection is a description of the status that, once achieved by the secured party, is more concerned with defining the rights of the secured party *vis-a-vis* other parties' interests in the collateral. However, in order to have perfection, there must be attachment.

Section 12 of the PPSA sets out three necessary elements of attachment when dealing with the rights of the debtor and secured party as between them. All of the elements must be present, although in no particular order.

The first element is the giving of value. Value is defined in the *PPSA* as "consideration sufficient to support a simple contract, and includes an antecedent debt or antecedent liability." A contractual promise to give value at a later date is sufficient, meaning that cash or other value need not necessarily be received before attachment for this element to be satisfied. For example, if a lender promises to lend money to a debtor in 10 days, value has been given today for the purposes of the PPSA. However, if the provision of the money is in the sole discretion of the lender, this will not be "value" until the discretion is exercised.

For the purposes of both attachment and priority (discussed more below), however, a debtor may sign a security agreement in favour of the secured party. If, at any time prior to conflict with the asserted interest (for a discussion of the date of conflict, see *Sperry Inc. v. Canadian Imperial Bank of Commerce et al* (1985) ONCA, and the discussion of this point, below), the secured party provides "value" (such as evidence of indebtedness) owing to the secured party, priority will have been established. Assuming that the debtor has rights in the collateral described in the agreement, the fact that the agreement was entered into prior to the arising of the indebtedness is irrelevant. See *section 19*; see also *Coleman Management Services Limited v. M.M.H. Prestige Homes Inc.*, 2018 NLSC 45 at paras. 50-60. An appeal of this decision was dismissed. The cross-appeal was in essence found to be moot given the decision with respect to the main appeal. See *Coleman Management Services Limited v. M.M.H. Prestige Homes Inc.*, 2019 NLCA 45 at paras. 21, 32 and 35.

The second element is the debtor obtaining some rights in the collateral (although it does not have to be full legal title). A right of use of property (such as a lease or conditional sale) would be sufficient. Other than the five situations outlined in *sections 12(2)* and *(3)*, the Act does not give any guidance as to the nature of the "rights" which the debtor must have in the collateral to support the security interest. The cases have determined that the debtor does not require full legal ownership to satisfy the "rights in the collateral" requirement

- *Pickles Tents & Awnings Ltd. v. Joseph Group of Companies* (1981) MBCA;
- *Euroclean Canada Inc. v. Forest Glade Investments Ltd.* (1985) ONCA;
- *Orr & Co. v. Saskatchewan Economic Development Corp*. (1994) SKQB affirmed on appeal at *Orr and Co. v. Saskatchewan Economic Development Corp.,* 1994 CanLII 4602 (SK CA);
- *Gray v. The Royal Bank of Canada* (1997) BCSC.

Also, where the individual is listed as the registered owner of the collateral, this will generally, if not always, be sufficient. See, for example, *Langham Credit Union Ltd. v. Clayton* (2002) SKQB, and *Saskatchewan (Seizure of Criminal Property Act, Director) v. Harris* (2018) SKQB (which was not decided under the PPSA, but relied heavily on it).

The third element is that the security interest becomes enforceable as between the parties to the security agreement. While the elements under *section 12* create attachment, it is important to remember that the elements for enforceability of a security agreement under *section 10* must be considered as well. These requirements ensure that the security interest is enforceable both as between the secured party and the debtor, on the one hand (which has one set of requirements), and with respect to third parties (which has additional requirements).

For most forms of collateral (absent possession of the collateral by the secured party), the major element for enforceability as against third parties (not necessary between debtor and secured party) is that there be a security agreement signed by the debtor [see *s. 10(1)(d)*]. If the security agreement is signed by the wrong party, the security interest may not be enforceable against third parties. See *ACAT Global v. Bondyra* (2016) ONSC.

The statutory language does not seem to require specific naming of property, as long as the collateral description allows a reasonable person to determine whether the particular piece of personal property is meant to be included or excluded as collateral. For a similar sentiment, saying that the description must help third parties to know the collateral over which a security interest is claimed, see *Coleman Management Services Limited v. M.M.H. Prestige Homes Inc.,* 2018 NLSC 45 at para. 95. An appeal of this decision was dismissed. The cross-appeal was in essence found to be moot given the decision with respect to the main appeal. *Coleman Management Services Limited v. M.M.H. Prestige Homes Inc.*, 2019 NLCA 45 at paras. 21, 32 and 35.

However, despite this broad language, there is common law to suggest that contributions to a registered retirement savings plan (RRSP) must be specifically referred to in order to have proper attachment under the PPSA. See *Okanagan Court Bailiffs Inc. v. TD Waterhouse Canada Inc.* (2015) BCSC; *Whaling (Re) (In Bankruptcy)* (1998) ONCA. This is based largely on the negative tax consequences for the RRSP beneficiary if the RRSP is pledged. Therefore, the argument goes, this should only occur with explicit notification.

The time of attachment may be postponed by specific agreement as between the debtor and secured party, in which case attachment occurs at the time specified in the security agreement. The First Generation PPSAs did not have this provision [*s. 12(1)(c)*]. Rather, those

acts had as one of the elements of attachment that the parties intend the security interest to attach. This was too subjective, with the result that the later generation PPSAs changed so that now in order to delay attachment the parties must specifically agree to a delay in attachment. As indicated by the Supreme Court of Canada at paragraph 54 in *Royal Bank v. Sparrow Electric Corp.* (1997):

> *Generally speaking, therefore, absent an express intention to the contrary, a security interest in all present and after-acquired personal property will attach when that agreement is executed by the parties.*

2. Relevance of Attachment

Section 19 requires that there be attachment in order to have a perfected security interest (that is, a security interest enforceable by the secured party against third parties).

The time of attachment is used in some of the conflict of law provisions of the *PPSA* to establish the law applicable to the validity, perfection and priority of a security interest.

The special priority rules in the PPSA relating to fixtures and accessions rely on time of attachment.

If there is a dispute among competing security interests, and none of those security interests have been perfected, priority will be determined by the order of attachment of the security interests [*s. 35(1)(c)*].

The timing of the determination of whether goods are "consumer goods," "inventory" or "equipment" is based on the use of the goods by the debtor at the time the security interest attaches to the goods [*s. 2(2)*].

Some of the temporary perfection time periods outlined in the PPSA start from the date of attachment of the security interest. The concept of "temporary perfection" is dealt with later in this chapter.

3. After-Acquired Property

Section 13 of the PPSA provides that a security agreement may cover after-acquired property if there is attachment under *section 12*.

However, the security interest will not attach to an after-acquired crop that becomes a growing crop more than one year after the security agreement is entered into unless the security interest in the crop is given in conjunction with a lease, agreement for sale or mortgage of the land on which the crop will be growing.

As well, the security interest will not attach to most types of after-acquired consumer goods. This is designed to control the use of "blanket" or "dragnet" clauses in secured consumer credit transactions under which a security interest may be granted in all of the debtor's present and after-acquired personal property, including necessaries. But *section 13(2)* outlines certain types of consumer goods that can be covered in an after-acquired property clause.

The security interest in after-acquired property does not attach until the debtor acquires rights in that collateral, but if the security agreement has a properly worded after-acquired property clause and perfection has occurred (such as by registration of a financing statement), then priority in after-acquired goods is determined by the date of perfection and not the date of the attachment to the property. See:

- *Irving A. Burton Ltd. v. Canadian Imperial Bank of Commerce [sub nom. Re Huxley Catering* (1982) ONCA;
- *Roynat Inc. v. United Rescue Services Ltd. and General Motors Acceptance Corporation of Canada Ltd* (1982) MBCA;
- *Regal Feeds Ltd. v. Waldner* (1985) MBQB;
- *Affinity International Inc. v. Alliance International Inc.* (1994) MBQB.

4. Future Advances

Sometimes, all the funds of a secured loan are not advanced at the beginning of the loan period. Some of the funds are to be advanced at a subsequent time. These funds are known as "future advances."

The starting point is *section 14(1)* of the PPSA, which provides that a security agreement or a related agreement may provide for future advances. The ability to secure future advances, taken together with the after-acquired property provisions and the one notice filing system established by the PPSA, provides the potential for flexible long term open ended financing.

The priority of future advances with respect to third party claims is dealt with in *section 35(5)* and *(6)* of the PPSA. Generally, the priority of a security interest under the PPSA will apply to all advances, including future advances, unless the provisions of section 35(6) apply to limit a secured party's priority to future advances in very specific situations as against certain types of intervening creditors (usually an execution creditor) who has seized the collateral. The priority is limited only to certain advances made prior to certain events, or advances that are legally required to be made, or advances made to cover reasonable costs and expenses.

5. Returned or Repossessed Goods

Section 29 of the PPSA is a specific priority provision that applies in certain circumstances. An example is when a secured party has a security interest in the goods of the debtor who treats those goods as inventory for sales in the ordinary course of business. Assume the debtor sells the goods to a buyer in the ordinary course of business, but takes from the buyer a security interest with respect to the unpaid purchase price. The buyer defaults in payment of the purchase price and the debtor seizes the goods from the buyer. Under the provisions of *section 30* of the PPSA, the buyer would obtain the goods from the debtor free and clear of the security interest of the secured party; however, when the debtor seizes the goods from the buyer, the secured party should once again obtain a security interest in those repossessed goods.

In order to allow the secured party to obtain a security interest in the repossessed goods it is necessary to have the secured party interest in the goods "reattach" when they are seized by the debtor. The reattachment of the security interest is dealt with in *subsections 29(1)* and *(3).* The special perfection and priority rules that apply to returned or repossessed goods are dealt with later in this chapter.

6. Proceeds

Proceeds are defined in the *PPSA* as:

> *(a) identifiable or traceable personal property, fixtures and crops*
>
> *(i) derived directly or indirectly from any dealing with collateral or the proceeds of collateral, and*
>
> *(ii) in which the debtor acquires an interest,*
>
> *(b) a right to an insurance payment or any other payment as indemnity or compensation for loss of or damage to the collateral or proceeds of the collateral;*
>
> *(c) a payment made in total or partial discharge or redemption of an intangible, chattel papers, instrument or investment property; and*
>
> *(d) rights arising out of, or property collected on, or distributed on account of, collateral that is investment property.*

If the collateral is dealt with, *section 28(1)* of the PPSA provides that the security interest will extend to the proceeds of that dealing. Although not expressly stated, the statutory extension of the security interest to proceeds must be an attached security interest at the time the proceeds arise if the security interest in the original collateral was attached when the proceeds arose.

The proceeds to which a security interest will extend are not limited to money generated by a sale. Proceeds could include:

- replacement equipment for the original collateral [*Hongkong Bank of Canada v. National Bank of Canada* (1990) HCJ ONSC];
- a trade-in vehicle [*Chrysler Credit Canada Ltd. v. Royal Bank of Canada and Clarkson Gordon Ltd.*, (1986) SKCA]; or
- a replacement herd of cattle purchased with the money obtained on a sale of cattle that were the original collateral [*Agricultural Credit Corp. of Sask. v. Pettyjohn* (1991) SKCA].

Proceeds specifically include insurance moneys paid respecting loss of or damage to the collateral [see (b) of *PPSA* definition of proceeds and *Re Paul* (1986) ONSC], and that is why there is an exception for those types of insurance payments from *section 4(b)* that excludes from the PPSA an interest or claim under a policy of insurance.

Section 28(1) indicates that the security interest will continue in the collateral and also extend to the proceeds, but places a limitation of an amount equal to the fair market value of the collateral at the time of the dealing by the debtor.

There are two ways that a security interest will not continue in the collateral when there is some dealing or other activity which gives rise to proceeds:

1. The secured party has expressly or impliedly authorized the dealing with the collateral [see *s. 28(1)(a)* of the PPSA].

Canadian Commercial Bank v. Tisdale Farm Equipment Ltd., 1984 CanLII 2337 (SK QB), [1984] 6 W.W.R. 122 (Sask. Q.B.) aff'd *1985 CanLII 2883* (SK CA). The bank provided to the debtor a written consent to the sale of two combines on the condition that it receive a payment of approximately $50,000.00 owed under the terms of a Security Agreement, before discharging its security interest. The buyer of the equipment was aware of that condition, but made payment directly to the debtor who, did not pay the bank. Maher J. held that the authority given to deal with the security was subject to the express condition that the sum of approximately $50,000.00 from the proceeds of any dealing be paid to the bank. The bank's security interest, accordingly, continued in the original collateral (combines). The Court of Appeal for Saskatchewan indicated that knowledge by the buyer of a security interest is not material in determining authorization pursuant to section 28(1) of the Act.

Paccar Financial Services Ltd. v. Chubey, 1992 CanLII 12838 (MB QB). A conditional authorization is not an authorization which causes the security interest in collateral to cease unless all conditions of the authorization have been met.

UB Networks (Canada) Ltd. v. Ameritel Inc. et al., 1996 CanLII 18053 (MB QB).

Lanson v. Saskatchewan Valley Credit Union Ltd., 1998 CanLII 13670 (SK QB). The judge wrote "section 28(1) of the Act, as I read it, requires an intention to surrender the security interest in the collateral. That intention is combined with an intention to rely upon a claim on the proceeds received from the disposition of the collateral for payment of the debt. Security is given up in the original collateral. The authorization may be expressed or implied, but the intent to authorize must first exist."

Bank of Montreal v. L.S. Walker Machine Tools Inc. 2000 CarswellOnt 862, 15 P.P.S.A.C. (2d) 236 (ON.S.C.) a debtor in the manufacturing business sold a piece of capital equipment that was used in its production process. The court held that the sale of the equipment was not part of the debtor's general commercial practice and therefore, the sale was not within the ordinary course of business. Under section 31, if materials or services have been furnished in respect of goods that are subject to a security interest and it was done in the ordinary course of business, then the party providing those services and retaining possession of the goods will have priority over a perfected security interest.

Royal Bank of Canada v. Ag-Com Trading Inc., [2001] O.J. No. 474.

Canadian Imperial Bank of Commerce v. Lush, 2001 CanLII 24324 (NB QB) overturned and sent back for new trial by *Canadian Imperial Bank of Commerce v. Lush*, 2002 NBCA 58 (CanLII).

Lloydminster Credit Union Limited v. 324007 Alberta Ltd, 2011 SKCA 93 (CanLII) considering *Lanson*, *Paccar* and *Tisdale Farm* decisions, says at paragraphs 25 – 27:

> *[25] In Lanson and Severson v. Saskatchewan Valley Credit Union Ltd. 1998 CanLII 12399 (SK CA), 172 Sask. R. 106 (C.A.), the secured party loaned $16,000 to the debtor to purchase a mobile home and registered a security interest in the home. The secured party knew that the debtor would either rent or sell the home, and the secured party's only concern was that he would be paid from the sale proceeds. Relying on Ronald C.C. Cuming and Roderick J. Wood, Saskatchewan and Manitoba Personal Property Security Acts Handbook (N.p., Carswell, 1994) at 198-99, the Court drew a distinction between "a conditional authorization" and "an authorized sale subject to conditions that the proceeds be remitted to the secured party" (at para. 11).*
>
> *[26] The Court in Lanson found that the secured party's consent to sale, conditional on remitting the proceeds to the secured party, was sufficient to extinguish the security interest and allow the buyer to take the mobile home free of it. See also: Bank of Montreal v. L.S. Walker Machine Tools Inc. (2000), 15 P.P.S.A.C. (2d) 236 (Ont. S.C.J.) where the Court follows the same type of analysis and reaches the same conclusion. Paccar Financial Services v. Chubey, 1992 CanLII 12838 (MB QB), [1992] 2 W.W.R. 751 (Man. Q.B.) takes a different approach, but I note that it does not refer to Lanson and relies upon Canadian Commercial Bank v. Tisdale Farm Equipment Ltd., 1984 CanLII 2337 (SK QB), [1984] 6 W.W.R. 122 (Sask. Q.B.), aff'd 1985 CanLII 2883 (SK CA), [1987] 1 W.W.R. 574 (Sask. C.A.). Lanson confines the ratio of Tisdale to those situations where the buyer knows that the secured party has imposed a condition on the sale. It has been suggested that Paccar should not be followed (see: Ronald C.C. Cuming, Cathrine Walsh & Roderick J. Wood, Personal Property Security Law (Toronto: Irwin Law, 2005) at 285, footnote 28).*
>
> *[27] According to the law of secured transactions, when a secured party consents to the sale of collateral, subject to a condition that the proceeds of sale be paid to the secured party, the security interest continues in the proceeds, but it is extinguished in the collateral. The issue is: if the security interest is extinguished in the collateral, can the secured creditor, nonetheless, pursue an agent of the debtor, e.g., an auctioneer, in conversion?*

Hunter Helicopters Inc. v. Islands Timberlands Limited Partnership, 2019 BCSC 832 (CanLII).

2. If the dealing falls within the provisions of *section 30*, the buyer or lessee of the collateral may obtain the collateral free and clear of the interest of the debtor's secured party or, in some cases, any secured party.

An important feature of proceeds is that they must be identifiable or traceable. These are two separate concepts.

The identification of proceeds should generally not be difficult. For example, if an automobile was the original collateral and it was sold in return for a cheque and a trade-in, so long as it is possible to point to that cheque and the trade-in, the requirement of identification is satisfied. The deposit of the cheque into a bank account should not, in itself, result in the loss of identification. The deposit is a dealing with the proceeds (the cheque) resulting in the creation of an account which becomes proceeds (for example, proceeds of proceeds). If the amount of the cheque is the only credit in the account, identification is simple. However, if the cheque is deposited into an account and is commingled with other credits in the account there may be a loss of identification and at that time tracing principles must be employed to determine what portion of the bank account is proceeds.

The PPSA does not provide any assistance in determining how to "trace" proceeds; that task has been left to the courts. The Ontario courts and a Manitoba decision under the Old PPSA have determined that a fiduciary relationship must exist between the debtor and the secured party before any tracing rules can be applied regarding proceeds. The necessity of having a fiduciary relationship has been rejected by decisions in Saskatchewan and is now expressly rejected in Manitoba by the provisions of *section 2(3)* of the current PPSA.

The decision in *Agricultural Credit Corp. of Saskatchewan v. Pettyjohn*, 1991 CanLII 7979 (SK CA) established a "close and substantial connection" test when dealing with the tracing of proceeds. The headnote to the case states:

> *A close and substantial connection may be established through a series of transactions in which one set of chattels replaces another of the same kind or function in the affairs of the debtor. This connection is sufficient to invoke tracing remedy, irrespective of the form of the transactions. This is an appropriate extension of the tracing rules because it is consistent with the spirit of the Act, which supports bringing the law up to date with commercial practices.*

The close and substantial connection test has been accepted and used in *River Industries Ltd. (Re Companies' Creditors Act),* 1992 CanLII 318 (BC SC) and *Flexi-coil Ltd v. Kindersley District Credit Union Ltd.*, 1993 CanLII 6650 (SK CA). The headnote in the *Flexi-Coil* decision states:

> *A secured party's right to identifiable and traceable proceeds under the P.P.S.A. is not dependent on finding a fiduciary duty between the debtor and secured party, nor does the commingling of funds in a bank account mean the funds are untraceable. Tracing rules under the P.P.S.A. are not simply based on equity and common law rules but are uniquely designed to achieve the flexibility and certainty required by the P.P.S.A. The courts, in invoking the right to trace, should use the equity and common law rules as a base, but seek solutions based on the Act and its underlying principles.*

The right to trace proceeds will not be of assistance to a secured party if there is a PPSA provision that specifically deals with an issue. [For example, *ss. 31(2) and (3)*. See *Belarus Equipment of Canada Ltd. v. C & M Equipment (Brooks) Ltd.*, 1994 CanLII 9049 (AB QB)].

It should be noted that the provisions of *section 10(3)* set out that a security interest in proceeds is enforceable against a third party whether or not the security agreement contains a description of the proceeds.

Finally, it should be further noted that unlike some PPSAs, Manitoba's *PPSA* does not require a secured party to indicate in its financing statement that it claims proceeds, as a secured party is automatically entitled to a perfected security interest in proceeds of the original collateral, provided that the security interest is perfected against the original collateral. It is of course possible for the parties to bargain to exclude proceeds, and if that is done, then the collateral description in the secured party's financing statement should specifically exclude proceeds.

F. PERFECTION

1. What is Perfection and When Does it Occur?

Perfection is a term used in the PPSAs to define the time when the secured party has obtained the greatest bundle of rights available to the particular creditor under the *PPSA* with respect to the collateral. Attachment generally describes when the rights arise between the secured party and the debtor, and perfection describes the time when the secured party's security interest in the collateral gains the best possible protection under the PPSAs with respect to the claims by third parties. Perfection does not mean that a secured party has "perfect" protection from other claims in the collateral. It simply means that the best possible position under the PPSA has been achieved. If one were to explain perfection as a mathematical equation, it would be as follows: "Attachment plus perfecting step equals a perfected security interest."

The PPSAs provide that a security interest is perfected when it attaches and every other step required for perfection under the *PPSA* is completed, regardless of the order of occurrence. It is possible to have the steps necessary for perfection (for example, the registration of a financing statement) occur prior to the actual attachment of the security interest [*Royal Bank of Canada v. Tenneco Canada Inc. (Ont.H.C.J.),* 1990 CanLII 6678 (ON SC); *Hillhurst Hardware (1979) Ltd. v. Canadian Imperial Bank of Commerce,* 1999 ABQB 937 (CanLII)]. In those circumstances, upon the attachment taking place there is a perfected security interest.

2. Relevance of Perfection

The time of the perfecting step will generally determine priority under the PPSAs, as long as the security interest is perfected (attachment plus perfecting step) prior to the date of conflict with other rights asserted in the collateral. For example, *section 20* of the PPSA sets out an extensive listing of the types of interests to which an unperfected security interest will be subordinate, that is, will lose a priority competition. Those interests include an execution creditor, a trustee in bankruptcy and a transferee for value. *Section 35* of the PPSA outlines a general priority determination rule, with a perfected security interest having priority over an unperfected security interest, and the priority among perfected security interests being based on the date of the perfecting step (generally - or usually - either registration of a financing statement or the possession by the secured party of the collateral).

It is clear that the determination of whether the security interest is perfected or not occurs as of the date of conflict [*Sperry Inc. v. Canadian Imperial Bank of Commerce et al* (1985) ONCA]. While there was some ambiguity in the early cases in terms of a precise formulation of the date of conflict, in the view of the authors, the date of conflict occurs when any party other than the debtor asserts rights to the collateral that would be inconsistent with the rights of any secured party. In the view of the authors, this approach is consistent with the provisions of the PPSA and in particular, *section 20.*

One last note, the failure to perfect properly does not affect the underlying obligation to repay the loan monies advanced to the debtor. See *CIBC v. Marko,* 2017 ONSC 1113 (CanLII). In the case, the secured party had provided funds on behalf of the debtor to the vendor of the property. The vendor, prior to the debtor acquiring ownership of the chattel, went bankrupt. The debtor alleged that the error made by the secured party in failing to register properly against the chattel meant that the secured party was liable to the debtor. The Court disagreed, holding that the obligation to ensure ownership by the debtor lies with the debtor, not with the secured party. Even though the debtor never received the chattel, the loan was still enforceable, by the secured party as against the debtor.

3. Methods of Perfection

The most usual methods of perfection are: perfection by possession, perfection by registration and temporary perfection. *Section 27* of the PPSA provides five alternative methods for perfecting a security interest in goods held by a bailee.

The best method of perfecting a security interest in what the *PPSA* defines as "investment property," consisting of investments not represented by certificates (and typically held in a "pool" and electronically recorded for the benefit of the investor) is perfection by the entering into of a "control agreement" amongst the investor (as the debtor), the secured party and the person or firm which manages/controls the investment "pool." A properly crafted "control agreement" will, in the appropriate circumstances, provide the debtor with some degree of freedom to direct the investment activity of the investment "pool" manager with respect to the debtor's investments, and yet will still give certain assurances and comfort to the secured party that its collateral (the debtor's rights to its investments in the investment "pool") are not wantonly dissipated.

a) Possession

Section 24 of the PPSA allows perfection by possession of collateral that is chattel paper, goods, an instrument, a negotiable document of title or money, but only while the possession, repossession or seizure is pursuant to a right given by the security agreement or the PPSA itself.

For examples of cases of possession that do not fit *section 24* see *Beltline Real Estate Holdings Ltd v. Domicile Interiors Ltd,* 2017 ABCA 407 (CanLII), and *Pereira (Re)*, 2019 ABQB 617 (CanLII) (rev'ing *Pereira (Re),* 2019 ABQB 386 (CanLII) Master. The need for the right of possession, repossession or seizure to be provided for in the security agreement or the PPSA itself explains the inclusion of section 7.11 in the sample agreement in the Precedents to this chapter.

Section 24 is made subject to *section 19* in order to make it clear that attachment must also take place in order for there to be perfection. Examples of the types of collateral that cannot be perfected by possession would be security interests in a document of title that is not negotiable, an account or an intangible. Of course, the latter two examples would be difficult to "possess" in the traditional sense in any event.

A concept similar to possession is the concept of "control" for investment property.

Investment property is defined under *section 1* of the PPSA as being a security, security entitlement, securities account, futures contract or futures account (each of which is also defined in section 1). Pursuant to *section 24.1,* a security interest in investment property may be perfected by control of the collateral under *section 1.1*, which section refers to control in the manner provided for in *The Securities Transfer Act* (Manitoba).

And note that with respect to securities, control may be accomplished in different manners, depending on whether the security is certificated (that is, evidenced by a physical certificate) or uncertificated (that is, just a book entry (computer or otherwise) noting the existence and ownership of the security. For a certificated security, also note *section 24(3)* of the PPSA which provides that a secured party may perfect a security interest in a certificated security by taking delivery of the certificated security under *section 68* of *The Securities Transfer Act* (Manitoba).

There have been some courts dealing with First and Second Generation PPSAs that have held that perfection by possession may be achieved by repossession of the collateral in an enforcement situation. But there are other cases that have determined that collateral held by a secured party through a repossession is not a perfection by possession. The *PPSA* allows for perfection by possession to be by repossession or seizure, but only if the repossession or seizure is pursuant to a right given by the security agreement or the PPSA. In this regard, the current PPSA follows Ontario rather than the other PPSAs. Under the other PPSAs, perfection by repossession or seizure is not possible.

It is not possible to have perfection by possession of collateral that remains in the actual or apparent possession or control of the debtor or the debtor's agent. The possession must be by the secured party or by another person acting on behalf of the secured party. If perfection is to be by possession it must be actual physical possession in order to give notice to all persons dealing with the collateral of the secured party's interest. Constructive possession will not be adequate [*Re Darzinskas*, 1981 CanLII 1803 (ON SC); *UB Networks (Canada) Ltd. v. Ameritel Inc. et al.,* 1996 CanLII 18053 (MB QB)].

Generally, perfection by possession lasts only while the secured party, or some other person on behalf of the secured party, is actually holding the collateral. Once possession of the collateral is lost or given up, the perfection will cease [*CIBC v. Melnitzer (Trustee of)* [1993] O.J. No. 3021, 23 C.B.R. (3d) 161, 1 E.T.R. (2d) 1 (ON Gen Div.) aff'd *1997 CanLII 14523* ONCA*; Coutinho & Ferrostaal GmbH v. Tracomex (Canada) Ltd.,* 2015 BCSC 787 (CanLII)]. This general rule is subject to the provisions in the PPSAs dealing with continuity of perfection and temporary perfection, both of which may allow the secured party to give up possession of collateral and remain perfected in certain limited circumstances or until certain events take place (such as perfection by registration) within set time limits.

b) Registration

Section 25 of the PPSA indicates that a registration of a financing statement perfects a security interest in any type of collateral. This provision is also subject to *section 19* to make it clear that attachment must take place for there to be perfection. In most circumstances, perfection will be by registration of a financing statement because it is simple and normally the secured party and the debtor do not want the collateral to be held by the secured party because the debtor wishes to continue to use the collateral for personal or business purposes. However, except where the collateral description in a security agreement extends to future or after-acquired assets, if the registration uses the name of a debtor who has no rights in the collateral at the time of registration, the registration will generally be invalid [*994814 Ontario Inc. v. RSL Canada Inc.*, 2006 CanLII 15893 (ON CA); *Royal Bank of Canada v. Komtech Enterprises Limited,* 2014 ONSC 3647 (CanLII),].

c) Temporary Perfection

Temporary perfection describes situations under the PPSAs where a security interest will be deemed to be perfected even without registration or possession. It is "temporary" because it will last for a limited period of time and is to allow the secured party to either make a registration of a financing statement or obtain possession of the collateral. If the secured party's registration of the financing statement or obtaining of possession of the collateral does not take place before the temporary perfection time period ends, then the security interest will generally cease to be perfected.

Noted below are some of the situations where temporary perfection is allowed:

- There are a number of provisions throughout the PPSA which reflect that a PMSI will obtain a special priority position if the perfection relating to it takes place within a certain period of time following the attachment of a security interest and, in some circumstances, other events also take place (such as the provision of notice to other secured parties). In certain situations the provisions are not dealing with "temporary perfection" because the perfected status of the security interest is not lost by virtue of a failure to register a financing statement or do other acts within a specific period of time; rather, what is lost is the special priority position accorded to a PMSI if the perfection or other acts are not done within the time periods set forth in the various sections of the PPSA.
- The conflict of laws sections of the PPSA have temporary perfection provisions dealing with goods moving into Manitoba, a debtor changing jurisdiction or a debtor transferring certain types of collateral to a transferee in another jurisdiction.
- *Section 26* of the PPSA provides for temporary perfection of a security interest in specific types of collateral that were initially perfected by possession but

commercial necessity requires the secured party give up possession of the collateral to the debtor for the purpose of some activity with the collateral. *Section 26* only applies if the perfection by the secured party is by possession. If the perfection is by registration of a financing statement, this provision does not apply, (thus a good reason to perfect a security interest by registration rather than possession). *Section 26(1)(a)* applies with respect to an instrument or a certificated security that is delivered by the secured party to the debtor for the purpose of ultimate sale or exchange, for presentation, collection or renewal, or for registration of a transfer. *Section 26(1)(b)* applies to a negotiable document of title, or to goods held by a bailee that are not covered by a negotiable document of title, where the secured party makes the negotiable document of title or goods available to the debtor for ultimate sale or resale, for loading, unloading, shipping, or for manufacturing, processing, packaging or otherwise dealing with the goods prior to sale or exchange.

- This chapter previously referred to the provisions of *section 29* of the PPSA dealing with the reattachment to goods that are returned to, or repossessed by, the debtor. *Section 29(4)* allows a secured party of the debtor a temporary perfection period following the return or repossession to make a filing against the debtor or obtain possession of the returned or repossessed collateral in order to become "re-perfected."

4. Continuity of Perfection

Due to the importance of being and remaining perfected, it is important to have special rules to allow for continuity of perfection when certain events take place.

a) Change in Method of Perfection

Section 23(1) of the PPSA provides that if a security interest is perfected under the PPSA and is again perfected in some other way under the Act without an intermediate period when it is unperfected, the security interest is continuously perfected for the purpose of the Act. The result of section 23(1) is that when determining priorities, the continuously perfected security interest will be measured by reaching back to the time of the action which originally perfected the security interest [see also *s. 35(2)*].

b) Proceeds

Section 28 of the PPSA provides that in situations where the security interest in original goods is perfected by registration, the security interest in the proceeds remains continuously perfected so long as the registration remains effective. The provisions of *section 35(3)* confirm that the time of perfection of the security interest in original collateral will be the time of perfection of its proceeds. If there is no perfected security interest in the original collateral, there can be no perfected security interest in the proceeds [*Re Paul,* 1986 CanLII 2473 (ON SC).].

c) Transfer by Debtor of Interest in Collateral

When there is a transfer by the debtor of collateral it is necessary to address whether the secured party's security interest will continue in the transferred collateral and what protection will be given to third parties who may deal with the transferred collateral after the transfer. The concerns can best be illustrated by an example. Assume the debtor has granted a security interest in collateral to secured party 1(SP1). The debtor transfers the collateral to a third party (3P). The 3P grants a security interest in the transferred collateral to secured party 2(SP2). In conducting a search of the 3P, SP2 will find no record of a financing statement filing against the 3P by SP1. Who should get priority over the transferred collateral - SP1 or SP2? Without a provision to deal with this situation the integrity of the *PPR* would be adversely affected. *Section 51* sets out certain rules governing this situation, where there are no proceeds involved, and where SP1's security interest does not disappear on and by virtue of the sale (e.g., where the debtor sells the collateral to a 3P in the ordinary course of the debtor's business).

Section 51 of the PPSA, and the equivalent provisions in the other Third Generation PPSAs, do not technically create a "continuity" of perfection because those provisions do not indicate that the security interest of secured party 1 becomes "unperfected." The provisions indicate that the security interest of secured party 1 will be subordinate to certain other interests. This is to be contrasted to the Old Manitoba PPSA and the existing Ontario PPSA, where the equivalent provisions indicate that the security interest of secured party 1 becomes "unperfected" if a registration is not made against the transferee within a specific period of time. Being "unperfected" would expose secured party 1 to many more interests that would obtain priority over it.

Section 51(1) deals with a situation where the secured party consents to the transfer of collateral and *section 51(2)* deals with a situation where the secured party does not consent to the transfer of collateral.

In situations where the secured party has consented to the transfer of collateral, the secured party has 15 days after the transfer to amend the financing statement registration made in the *PPR* to disclose the name of the transferee as a debtor, or for the secured party to take possession of the transferred collateral. If the filing by the secured party is not made within the 15 day time period the secured party will be subordinate to the following interests:

- An interest, other than a security interest in the collateral, arising after the expiry of the 15-day period but before the time that the secured party amends the financing statement registration or takes possession of the collateral. It is important to note that the initial transferee from the debtor is not protected.
- A perfected security interest in the transferred collateral that is registered or perfected after the end of the 15-day time period but before the secured party

amends the financing statement registration to disclose the new debtor or takes possession of the collateral.

- A perfected security interest in the transferred collateral that is registered or perfected after the transfer and before the expiry of the 15-day period if the secured party has not, prior to the end of the 15-day period, amended the financing statement registration to disclose the name of the transferee as a new debtor or taken possession of the collateral.

Where the secured party has not consented to the transfer it would not be fair to the secured party to have the 15-day time period run from the date of the transfer. So *section 51(2)* provides that the 15-day time period starts running from the date that the secured party has knowledge of information required to register a financing change statement disclosing the transferee as a new debtor. In all other respects, the provisions of section 51(2) are similar to the provisions of *section 51(1)*. *Section 2(1)* of the PPSA contains rules to use to determine when a secured party has "knowledge."

The provisions of *subsection 35(8)* and *subsection 35(9)* deal with the status of an existing secured party who has made an appropriate financing statement registration against the transferee in all assets of the transferee (including after-acquired property), before the date of the transfer. Again, the secured party of the debtor transferr0ing the collateral has a 15-day period to amend the financing statement to disclose the name of the transferee as a new debtor or to take possession of the collateral.

The interaction between *section 50(3)* (with respect to forcing the discharge of a registration) and *section 51* (with respect to following the collateral into the hands of a transferee for enforcement purposes) is somewhat unclear. The Saskatchewan courts say that a transferee can be a "debtor" for the purposes of section 51, without being "debtor" for the purposes of section 50. See *Input Capital Corp. v. Thomas*, 2018 SKQB 72 (CanLII) (2018) Sask. Although the Court of Appeal took a different view on a number of points from the trial judge (including whether, as a policy matter, the combination of ss. 50 and 51 could allow unscrupulous debtors, acting in concert with transferees, to defeat otherwise valid security interests, CA, para. 61) the Court of Appeal (*Input Capital Corp. v. Thomas* (2020) Sask. CA) did acknowledge that the term debtor under s-s. 50(3) should be given "a broad and flexible meaning" (at paras. 54 and 60).

d) Change of Name

The policy concerns that arise when a debtor transfers collateral also exist when the debtor's name changes. A party searching the debtor's new name would not learn of the interest of a secured party that filed under the debtor's old name. *Section 51(2)* imposes the obligation on that secured party to amend the registration within 15 days of learning of the debtor's new name or risk having their security interest become subordinate to an interest arising, registered or perfected in the period after those 15

days and before the secured party amends the registration. This is similar to the way the PPSA deals with a transfer of collateral with the consent of the secured party.

e) Renewal or Reinstatement of Registration

Registrations of a financing statement in the *PPR* will be for a stated period of time, but there may be a renewal of that registration [*s. 44(2)*], and there will be continuity of perfection if the renewal filing is made before the expiry of the term of the initial filing or any renewal term.

In the event that the renewal does not take place prior to the expiry of the registration, or there is a discharge of the financing statement registration without authorization or in error, the provisions of *section 35(7)* of the PPSA provide limited protection to a secured party. In the event that the secured party makes a new financing statement filing no later than 30 days after the lapse or discharge, then the lapse or discharge will not affect the priority status of the security interest in relation to a competing perfected security interest that immediately before the lapse or discharge had a subordinate priority position, except to the extent that the competing security interest secures advances made or contracted for after the lapse or discharge and before the re-registration.

In the event that the secured party's new financing statement filing does not take place within the 30 days as set out in *section 35(7),* this special priority protection is lost [*Strathcona Brewing Co. v. Eldee Investment Corp.,* 1994 CanLII 8925 (AB QB)]. The new financing statement filing will not protect the secured party against interests that arise after the lapse or discharge and before the new filing. For example, a new competing secured party or an existing competing perfected security interest respecting advances made or contracted for after the lapse or discharge and before the new filing could take priority.

Notwithstanding this "drop dead" time limit, a court may subsequently re-instate the secured party's priority based on the *PPSA* incorporating equitable principles

[See *CFI Trust v. Royal Bank of Canada,* 2013 BCSC 1715 (CanLII) and *section 63*].

f) Conflict of Laws Situations

The conflict of laws provisions of the PPSA outline certain temporary perfection time periods where, if a registration of a financing statement takes place in the new jurisdiction within those time periods, it will result in the priority of the original registration in a different jurisdiction being continued and effective in Manitoba from the date of the original perfection in that other jurisdiction [See discussion about *section 5(3)* earlier in the chapter].

When dealing with mobile goods or intangibles or the other types of personal property dealt with in *section 7*, there are temporary perfection time periods that apply when the debtor relocates to another jurisdiction or when the debtor transfers the mobile goods or intangibles to a person located in another jurisdiction.

g) Returned or Repossessed Goods

Section 29 allows for continuity of perfection in situations where a secured party has a security interest in goods of a debtor, the debtor sells those goods and then, for some reason, the goods are returned to the debtor or are seized or repossessed by the debtor. In those circumstances, the security interest of the secured party in the goods reattaches and the perfection of the security interest and the time of registration is determined as if the goods had not been sold by the debtor [*s. 29(2)*].

A similar continuity of perfection provision applies in *section 29(3)* and *section 29(4)* when dealing with the perfection in the returned, seized or repossessed goods if a secured party is the holder of an account or chattel paper created upon the sale or lease of those goods.

h) Transferee of Security Interest

In the event that the secured party transfers a security interest in the collateral to another party, then that other party will become the secured party and the continuity of perfection of the transferor/secured party will pass on to the transferee/new secured party [*s. 23(2)*]. The provisions of *section 45* outline rules regarding the registration for these types of transfers. The registration is not mandatory, but it is generally in the interest of the transferee/new secured party to have registration take place so that it is disclosed as a secured party in the *PPR* for the purpose of receiving notices that it is entitled or obligated to receive under the PPSA, and to ensure that it is the party on record entitled to amend or discharge the registration.

5. Personal Property Registry System

The PPSAs introduced a "notice filing" system of registration to achieve perfection by registration. The notice filing system is not a "title" system whereby title to property is recorded (as with land in the Land Titles Offices) or a "document filing" system as was the case before the PPSAs. The *PPR* is the public office for providing public disclosure by registration of security interests or deemed security interests falling within the scope of the PPSA. The document filed or electronically transmitted to provide the notice is a financing statement.

Part 5 of the PPSA [*ss. 42 to 54*] deals with the PPR and registrations.

a) Registrar and Operation of PPR

Section 42 continues the PPR and the office of the Registrar of the PPR as they existed under the Old PPSA.

The *PPR* has essentially two functions - to accept registration of financing statements and to conduct searches. Of course, fees must be paid for those services, and the Registrar may refuse to register a financing statement or issue a search result until the fee is paid or arrangements for payment of the fees are made (for example, accounts being established with the PPR by law firms and secured parties).

The Registrar has the powers and duties set out in *section 42(3) and (4)* of the PPSA and the *Regulations*, including the authority to refuse to register a financing statement, to refuse to accept requests for search results, and to suspend the operation of other functions of the *PPR* for such period as the Registrar considers necessary or advisable when, in the Registrar's opinion, circumstances are such that it is not practical to provide one or more services,. These powers are particularly important considering that the PPR is fully computerized and the computerized system may develop difficulties which require the PPR to suspend its operations.

Because the time of the registration of a financing statement is very important in determining priority, *section 43(2)* of the PPSA sets out a test to determine the order of registration.

> *43(2) Registration of a financing statement is effective from the date and time assigned to it in the Registry and where two or more financing statements are assigned the same date and time, the order of registration is determined by reference to the registration numbers assigned to them in the Registry, with the lower number having the earlier registration.*

You should note that, under the provisions of *section 43(2)*, the registration number is not used to determine priorities unless the financing statements were filed at the same date and time.

The effective length of time of a registration is dealt with in *section 44(1).* It provides that a secured party may indicate the period of time for which the registration is to be in effect when making the financing statement filing. Filing fees are graduated based on requested registration periods with longer periods paying higher filing fees.

The definition of a financing statement contemplates that a financing statement may be filed by presenting a printed form to the *PPR* for filing or may be filed by transmission of data to the PPR (this is known as "electronic registration").

Section 46(1) of the PPSA provides that where a document is registered with the PPR (whether by paper or electronically), the Registrar may have the document photographed or otherwise reproduced. Currently, all documents filed in paper form with the PPR are microfilmed. Copies of the microfilmed documents and a copy of the electronically filed information can be obtained in a certified and an uncertified format. A certification of the Registrar is receivable in evidence as a true copy of the document without proof of the signature or official position of the Registrar [*s. 48(3)*].

There are specific provisions in Part 5 of the PPSA respecting the renewal of registrations [*s. 44(2)*], the amendment of registrations [*s. 44(3)* and *s. 44(4)*], the registration of a transfer of a security interest by a secured party [*s. 45(1)* and *s. 45(5)*], the filing of subordinations where one secured party agrees to subordinate its security interest to that of another secured party [*s. 45(6)*], the removal of information from the PPR [*s. 46(2)*] and the registration to take place when a debtor transfers the collateral [*s. 51*].

b) Financing Statements and LTO Filings

The *PPR* is a computerized system where information placed on a financing statement or electronically transmitted to the PPR is stored in a computer. Computers are only as good as they are programmed to be, and the information fed into them ("garbage in - garbage out"). Therefore, *Personal Property Registry Regulation 80/2000* sets out explicit rules for the proper completion of a financing statement and must be reviewed in detail if you are involved in making filings under the *PPSA*. This fits within the *section 43(1)* provisions indicating that a financing statement may be submitted for registration at the PPR "as prescribed."

The Registrar may reject a financing statement when, in the opinion of the Registrar, it does not comply with the PPSA or a Regulation under the PPSA, but the Registrar shall give reasons for the rejection [*s. 43(11)* and *s. 43(12)*].

In 2015, the Legislature added *Part 6.1* to the PPSA dealing with "vexatious registrations". If the registry office determines that a proposed or existing registration is "vexatious," it can refuse to accept the registration, or, discharge an existing registration. "Vexatious" means that a proposed or existing registration is intended to embarrass or harass a person named in the financing statement and does not relate to an existing or real security interest.

In other words, if a person without a valid security interest in the property registers a financing statement in an attempt to make life more difficult for the named 'debtor,' this is likely to be "vexatious" [*s. 71.1(1)*]. However, in the view of the current authors, if a potential lender decided to register a financing against a proposed debtor where the parties were negotiating a transaction where a financing statement would be expected to be registered (such as a secured loan), then the fact that the financing simply was registered before the negotiations were complete would not make the registration "vexatious." However, if the negotiations broke down and no transaction was concluded between the parties, the registrant would have to remove the registration within a reasonable time to avoid it becoming vexatious.

A financing statement may be registered before or after a security agreement is made, and before or after a security interest attaches [*s. 43(4)*]. A registration may relate to one or more security agreements [*s. 43(5)* and *Agricultural Credit Corporation of Saskatchewan v. Royal Bank of Canada*, 1994 CanLII 3866 (SK CA)].

The debtor does not have to sign a financing statement, but the secured party is required to provide a copy to the debtor of either the financing statement reproduced on paper or a statement confirming registration of the financing statement and issued by the *PPR*, all not later than 20 days after it is registered or issued unless the debtor waives in writing that entitlement.

Earlier in this chapter there were references to a "fixture filing" made in Land Titles Offices (LTO) in order to protect the interests of a secured party in fixtures as against other parties dealing with the land. *Section 49* of the PPSA outlines matters relating

to a fixture filing as well as the filings required to be made regarding a growing crop [*s. 37*] or a right to payment under a lease of real property [*s. 35(10)*]. Again, the form of notice to be filed is prescribed by regulations, and a notation of it will be made by the LTO on the title to the land by a memorandum. The provisions of *section 49* also deal with the filing of notices of renewal, amendment, transfer, discharge or subordination relating to the filings made against the land.

c) Searches

Under *section 48(1)* of the PPSA, any person may request from the *PPR* one or more of the following:

- a search according to the name of a debtor;
- a search according to the serial number of goods of a kind that is prescribed by the PPSA as serial numbered goods;
- a search according to a registration number;
- a printed result of a search referred to above;
- a copy or certified copy of any printed registered document.

It is essential when ordering searches to order a search of the proper name or serial number. If the incorrect name or incorrect serial number is searched, any registrations made against the correct name or correct serial number may not be disclosed. Conversely, if a registration is made against the incorrect name or incorrect serial number, and a party searches the correct name or correct serial number, the search result may not disclose the registration made against the incorrect name or incorrect serial number. In this latter circumstance, it is likely that the error by the registering party would not be curable (to be discussed later in this chapter), with the result that the security interest will be considered to be unperfected.

In Manitoba, it is necessary for a registering party who claims a security interest in "serial numbered goods" to accurately register both the debtor's name and the goods (in particular, specifying the correct serial number). A registration which is accurate with respect to only one or the other but not both does not perfect the security interest. See paragraph 32 in *Bankruptcy of Ramon Presbitero Arnuco*, 2015 MBQB 36 (CanLII) [Arnuco] *"... if the registration does not match the exact specification in the rules, either as to name or to the VIN, then the registration is ipso facto "invalid". It is irrelevant as to what searches may or may not be reasonable". See also*; *Hoskins (Re)*, 2014 CanLII 2318 (NL SC).

d) PPR Errors and Compensation

Sections 52 - 54 of the PPSA set out the procedures for a person to bring an action against the Government of Manitoba to recover loss or damage suffered by that person because of an error or omission in the operation of the *PPR*, though not for

an error made by the registrant. In order to make such a claim it must result from reliance on a printed search result or from the failure of the Registrar to register a printed financing statement unless the operation of the PPR has been suspended or the Registrar has rejected the financing statement for not complying with the *PPSA* or *Regulations*.

The Government of Manitoba will not be liable for a loss suffered by verbal advice given by an agent or employee of the province respecting the PPSA, regulations made under the PPSA, or the operation of the PPR, unless the person bringing the action proves that the agent or employee did not act in good faith. In addition, the Government of Manitoba is not liable for failure to register or to register correctly electronic data directly transmitted to the database of the PPR.

Claims or actions against the government must be commenced within specific time periods, and there are limits to the amounts of the claims. The PPSA provisions also allow for subrogation in favour of the government for any damages that are paid, and indicate that a payment of a claim may be made without action being brought when the Minister of Finance is authorized to do so by the Minister in charge of the PPR, based on a report of the Registrar setting forth the facts and the opinion of the Registrar that the claim is just and reasonable.

e) Demands for Amendment or Discharge

Section 50 of the PPSA allows a debtor, or any person with an interest in property that falls within the description of collateral contained in a financing statement, to give a written demand to the secured party in the following circumstances:

- the obligations under the security agreement to which a financing statement relates are performed;
- the secured party agrees to release part or all of the collateral described in the financing statement;
- the description of the collateral contained in the financing statement includes an item or kind of property that is not collateral under a security agreement between the secured party and the debtor; or
- no security agreement exists between the secured party and the debtor.

The demand may request the secured party to discharge or amend the financing statement filing, which must be done within 20 days. On application by a secured party, a court may order that a registration be maintained on any condition and for any period of time (but no longer than the effective period of time indicated on the financing statement when the registration was made), or may order that the registration be discharged or amended [*356447 British Columbia Ltd. v. Canadian Imperial Bank of Commerce*, 1998 CanLII 6244 (BC CA)]. Where a secured party fails to comply with the demand or give the Registrar an order of a court confirming that the registration is to be maintained, the person giving the demand may register the

prescribed financing statement on providing to the Registrar satisfactory proof that demand has been given to the secured party.

The right of a person giving the demand to proceed and make the registration if there is a failure to comply does not apply to a security interest under a debenture or trust indenture filed before September 1, 1978 [*s. 50(8)(a)*] or a trust indenture where the financing statement filed indicates it is with respect to a trust indenture [*s. 50(8)(b)*].

Section 49 contains provisions outlining the same procedures for the removal of registrations made in the Land Titles Offices regarding fixtures, crops and rights of payment under leases of land [*s. 49(6) to s. 49(12)*]. The provisions of section 49 are similar to *section 50*.

f) Lapsed Registrations

In the event that a renewal of a financing statement registration does not take place prior to the expiry of the registration, or there is a discharge of the financing statement registration without authorization or error, the reinstatement provisions of *section 35(7),* discussed earlier, provide limited protection to a secured party. The Old PPSA allowed a late renewal by court order. Except as explained above, the PPSA does not give the court any authority to make orders for late renewal.

g) Curative Provisions

The single largest litigated area in the PPSA jurisdictions relates to the provisions dealing with the curing of a defect, irregularity, omission or error in a financing statement or in the registration of a financing statement.

The curative provisions in the First Generation PPSAs are significantly different when compared to the curative provisions in the Second and Third Generation PPSAs and the Ontario PPSA after amendment in 1989. The First Generation PPSAs set forth a subjective test that required the person challenging the registration of a financing statement to establish that a defect, irregularity or error misled that person. The First Generation PPSA's curative provision also did not assist where the difficulty with a financing statement was an omission. The subjective nature of those First Generation PPSA curative provisions created inconsistency in the application of the curative provisions. The same error in a financing statement may be curable in one instance because no one was actually misled, but in another instance, it was not curable because someone had been misled. This inconsistency resulted in the policy decision to move to an objective test in the Second and Third Generation PPSAs and the Ontario PPSA amendment in 1989.

The starting point in the PPSA is *section 43(6)*:

> *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.*

It is important to note that a defect, irregularity, omission or error does not affect the validity unless the party challenging the financing statement registration can establish that the defect, irregularity, omission or error is seriously misleading although *section 43(9)* states that it is not necessary to prove that anyone was actually misled by a defect, irregularity, omission or error. The test is objective.

There are also specific curative provisions with respect to an error in the name of a debtor [*s. 43(7)*] and with respect to consumer goods described as serial numbered goods [*s. 43(8)*].

In the event that the difficulty with a financing statement is the failure to provide a description of an item or kind of collateral, that difficulty will not affect the validity of the financing statement registration with respect to any other collateral [*s. 43(10)*].

If a curative provision cannot be used, the consequences are severe; the security interest will not be considered to be perfected, and will be subordinate to a perfected security interest [*s. 35(1)(b)*] and those parties outlined in *section 20* (e.g. an execution creditor, transferee or trustee in bankruptcy).

Leading cases dealing with the objective curative provisions are:

- *Kelln (Trustee of) v. Strasbourg Credit Union Ltd*., 1992 CanLII 8316 (SK CA);
- *Re Lambert (In Bankruptcy)*, 1994 CanLII 10576 ON CA), leave to appeal to SCC refused, [1994] S.C.C.A. No. 555;
- *Case Power & Equipment v. M.S.T. Trucking Co*., 1994 ABCA 274 (CanLII) (sub nom. *Case Power & Equipment v. 366551 Alberta Inc. (Receiver of)* (1994);
- *Coates v. General Motors Acceptance Corporation of Canada Ltd*., 1999 CanLII 5426 (BC SC);
- *Gold Key Pontiac Buick (1984) Ltd. v. 464750 BC Ltd. (Trustee of),* 2000 BCCA 435 (CanLII);
- *GMAC Leaseco Ltd. v. Moncton Motor Home & Sales Inc. (Trustee of)* 2003 NBCA 26 (CanLII) sub nom *Stevenson v. GMAC Leaseco Ltd.;*
- *Bankruptcy of Rosa Argentina Gonzalez*, 2017 MBQB 178 (CanLII);
- *Toyota Credit Canada Inc. v. MNP Ltd.*, 2018 MBQB 57 (CanLII) (In the Matter of the Bankruptcy of Rosa Argentina Gonzalez).

These cases do not agree on this basic question: Must the registration include both the name of Debtor and the serial number for serial numbered equipment without seriously misleading errors? Alternatively, is a correct version of either of the two sufficient?

Three of four Atlantic PPSAs (PEI, Nova Scotia, New Brunswick) have decided statutorily that both (without a seriously misleading error) are necessary to win a

priority competition with another perfected security interest, while Alberta seems to agree through jurisprudence. The weight of Saskatchewan's judicial authority would suggest the same result, though there was some early jurisprudence that took the opposite view.

Prior to 2017, Manitoba had had only one case; *Bankruptcy of Ramon Presbitero Arnuco*, 2015 MBQB 36 (CanLII) [Arnuco], decided by a Registrar, that found that an error in either the name of the debtor or the serial number of the serial numbered good is a seriously misleading error and thus invalidates the priority of a security interest under the wording of *section 43(8)*.

In 2018, the Manitoba Court of Queen's Bench adopted a similar approach when it refused to follow the *Gold Key Pontiac Buick (1984) Ltd. v. 464750 BC Ltd. (Trustee of),* 2000 BCCA 435 (CanLII) decision, stating in *Toyota Credit Canada Inc. v. MNP Ltd.*, 2018 MBQB 57 (CanLII) at para. 17:

> *[17] As pointed out by the registrar in his reasons for distinguishing the result in Gold Key, that British Columbia decision did not in any way address the section in the British Columbia legislation equivalent to s. 43(8) in Manitoba's legislation and how its decision is consistent with the requirements of that section.*
>
> *[18] Despite the fact that the respondent here was actually aware of the financing statement because of the search of the serial number, I agree with the respondent that on the basis of the wording of s. 43(8) the registrar is correct in his conclusion. In other words, because the search of the correct name of Rosa Argentina Gonzalez did not disclose an exact or similar match, this result was seriously misleading and the registration is invalidated as a result of the operation of s. 43(8).*
>
> *[19] Section 43(8) clearly states that the registration is invalid where "a seriously misleading defect, irregularity, omission or error" appears in either the name of the debtor or the serial number of the collateral. In light of this statutory provision, the knowledge of the respondent concerning the existence of the financing statement in this context is irrelevant and cannot not operate so as to validate the registration.*
>
> *[20] I agree with the registrar's observation that to conclude otherwise would be to replace the "or" in s. 43(8) with an "and". As he notes at para. 38 of his decision, it is up to the legislature, not the courts, to draft the wording of this kind of legislation.*
>
> *[21] Accordingly, and for essentially the same reasons stated by the registrar in his decision, I conclude that the failure of the applicant to have used the full name of the debtor in the financing statement as prescribed by the regulations constitutes a defect that is "seriously misleading" and therefore invalidates its registration. Furthermore, the applicant's claim to a secured claim is not saved by it having registered against the correct serial number of the automobile.*

The case of *Kobi's Auto Ltd. v. 5174245 Manitoba Ltd. et al.,* 2017 MBQB 38 (CanLII) would seem to support this approach, or at least does not contradict it. An appeal of the decision (*Kobi's Auto Ltd v. 5174245 Manitoba Ltd et al,* 2018 MBCA 134 (CanLII) was successful. The Court of Appeal focused on non-compliance with *The Garage Keepers Act.* While the Court of Appeal does not suggest a dual-search requirement, it does say the following at paragraph 55 (emphasis added):

> *[55] In my judgment, the judge overlooked the significance of the fact that Tartan was not relying on a PPR search as its way of notifying the vehicle's owner of the sale. Campbell was clear in his evidence that, once notice was published in The Manitoba Gazette, Tartan was of the belief that it had complied with sections 10* and *12* of the *GKA*. *The PPR search was done solely for the purpose, as it should be, of complying with the requirements of section 11(2)* of the *GKA which is focussed on a different audience—security holders.*

The interesting part of this is that it is similar to the suggestion in *Re Lambert (In Bankruptcy)*, 1994 CanLII 10576 (ON CA), leave to appeal to SCC refused, [1994] S.C.C.A. No. 555 that the Registry under the PPSA is designed to provide information to limited groups, not all persons who may seek information from the *PPR*. To be clear, the authors of this paper do not believe that this is likely to represent a trend, especially, because the Court held that a lack of proper registration in the PPR was irrelevant to lienholder rights (para. 45). However, the similarity of this reasoning to one of the bases for the holding in *Re Lambert*, may lead to an argument that Manitoba is or should be a dual-search jurisdiction.

In the 2017 case of *Bankruptcy of Christine Marie Rose Fauvelle,* 2017 MBQB 179 (CanLII), Registrar Berthaudin held that if a search of the proper name (or presumably, a serial number, based on his decision in *Bankruptcy of Rosa Argentina Gonzalez*, appealed to Justice Toews and discussed as *Toyota Credit Canada Inc. v. MNP Ltd.*, above) would reveal the registration as a similar or an inexact match, this means that the error is NOT "seriously misleading", similar to *Coates v. General Motors Acceptance Corporation of Canada Ltd.,* 1999 CanLII 5426 (BC SC).

In the end, in the view of the authors, *Re Fauvelle* and *Toyota Credit Canada Inc. v. MNP* are collectively convincing that Manitoba is in fact a single-search jurisdiction. This means that the registrant has to get both the name of the debtor and the serial number of the serial number goods, if required, correct on the financing statement in a way that is not seriously misleading (meaning that a search of either piece of correct information will reveal the financing statement as a match).

Recently, in *Re: Losier,* 2018 NBQB 138, (available on WestLaw, but not on CanLII as of this writing) a Deputy Registrar in Bankruptcy in New Brunswick was confronted with a situation where there were two related debtors listed on a registration. Both debtors later went bankrupt. The creditor had registered the correct serial number of the collateral. But there were errors in the names of both debtors. A search of the name of one of the debtors led to the registration being disclosed as a "similar" match.

The search of the name of the other debtor did not disclose the registration. Based on subsection 43(8) of the *New Brunswick PPSA* (which is less proscriptive than its Manitoba counterpart), the registration was invalid. At paragraph 27 of the decision:

> *27….section 43(8) requires the names of all debtors who own or have an interest in the collateral be included in the financing statement. Failure to include all the names of those who have an interest in the security would result in the uncertainty and potential for litigation that the PPSA is meant to prevent….*

Once the registration was found to be invalid, it was invalid as against both debtors. The trustee in bankruptcy therefore took the vehicle.

In the view of the authors, it is an open question as to whether or not the use of separate financing statements in the name of each debtor would have changed the result. For example, any registration against the second debtor would have been invalid. But if the registration against the first debtor had been made without reference to the second, would it have been invalid? There is an argument that it would be invalid, because in Manitoba, *paragraph 43(8)(a)* would seem to indicate so, even though there does seem to be an irrational result here because the second debtor was listed in a way that was not seriously misleading.

Registrants in Manitoba would do well – until this is clarified by higher judicial authority or by the legislature – to ensure accuracy in both a debtor's (or debtors', as the case may be) name(s) and in the relevant serial numbered goods descriptions including serial numbers and additional serial numbered goods prescribed information.

If the proper corporate name of the debtor is in both languages, then the registration should be in both languages as well. If the search of the proper corporate name would not show the registration, it is invalid in New Brunswick. This is true even if using the English or French portion of the name only would disclose the registration. See *Harbouredge Mortgage Investment Corporation v. Powell Associates Ltd,* 2016 NBQB 178.

As mentioned above, Ontario in *Re Lambert (In Bankruptcy)* and British Columbia in *Gold Key*, do not agree with their Atlantic counterparts, arguing that the correct serial number (or a serial number without a seriously misleading error) is sufficient to satisfy the equivalent of *Manitoba's s. 43(6)* Ontario and British Columbia are dual search jurisdictions, meaning that as long as the correct serial number will reveal the registration, the registration will be valid. Both cases listed above involved an incorrect name but a correct serial number. There is no case of which the authors are aware where a correct name "saved" an incorrect and required serial number. This would clearly undermine the serial number goods regime.

Newfoundland and Labrador, the Northwest Territories, Nunavut, and the Yukon have not resolved this issue either statutorily or in the case law.

There is also *Seversen v. Leslie*, 2016 SKQB 309 (CanLII) a case that says any information that may be included in a registration but is not searchable in the *PPR* (here, a model number) cannot be "seriously misleading", as long as the searchable material (the serial number) is correct.

G. PRIORITIES

1. Effect of Non-Perfection

A failure to perfect a security interest under the PPSAs does not affect its existence in law or the relationship between the debtor and secured party. A failure to properly perfect, or to continue a perfected security interest does affect the relationship between the secured party and third parties.

Section 20 of the PPSA sets out the parties to which an unperfected security interest will be subordinate (meaning that the security interest will lose the priority competition). This section does not deal with establishing the priority between competing security interests. The section indicates that an unperfected security interest will be subordinate to certain other parties whether or not those other parties have a security interest under the PPSA.

However, timing is an issue. It is important to remember that the provisions of *section 20* apply not only to a secured party that has failed to perfect properly, but also to a secured party that has initially properly perfected but then fails to maintain the perfection. There is some jurisprudence that suggests that if a security interest is perfected at the relevant time (as defined by s. 20), the section does not apply, even if the security interest later becomes unperfected. See *E Dehr Delivery Ltd v. Dehr,* (2016) Alta. Master; and *Seversen v. Leslie*, (2016) Sask. This jurisprudence says that in a section 20 priority contest between a secured party and a subsequent purchaser for value, the status of the security interest (as perfected or not) is crystallized as of the date of the sale transaction for value.

A similar result was reached in *1889072 Ontario Limited v. Globealive Wireless Management Corp. et al,* 2016 ONSC 3578 (CanLII) where the issue arose between a perfected security interest (which by virtue of a postponement agreement, did not have any current right to recovery) and a judgment creditor under the equivalent of *section 20(a)(iii)* of the Manitoba PPSA.

Also, in *Bankruptcy of Tammy Lynn Lloyd*, 2016 MBQB 66 (CanLII) sub nom *Falcon Auto Leasing Inc. v. Lloyd (Trustee of)*, the creditor held an unperfected security interest in collateral. The debtor became bankrupt. On the same day as the bankruptcy, the trustee in bankruptcy sent notice to all creditors including the creditor at issue, who then registered properly under the PPSA on the same day as the bankruptcy. The creditor then claimed that since the security interest was perfected on the same day as the bankruptcy (admittedly after the bankruptcy), that according *section 20(b)(i),* this should be allowed. The Registrar decided otherwise, because if the creditor could change its position after receiving notice, this would violate the *Bankruptcy and Insolvency Act*. In other words, once the notice of the bankruptcy is received, the status of the security interest (as perfected or not) is crystallized.

a) Against Debtor

The non-perfection of a security interest will generally not affect the ability of a secured party to enforce the contract against the debtor, and to proceed and realize upon the collateral held by the debtor.

b) Against Person Who Assumes Control by Legal Process

Section 20(a) of the PPSA indicates that an unperfected security interest in collateral will be subordinate to the interests of:

- a person who causes the collateral to be seized under legal process to enforce a judgment, including execution, attachment or garnishment, or who has obtained a charging order or equitable execution affecting or relating to the collateral, or a representative of creditors for the purpose of enforcing the rights of such persons;
- a sheriff who seizes the collateral under *The Executions Act*; and
- a judgment creditor entitled by law to participate in the distribution of property seized under legal process, or its proceeds, as provided in *The Executions Act.*

In effect, the parties falling within *section 20(a)* are treated as though they held a perfected security interest in any priority dispute with an unperfected security interest. Two things are required:

- **a legal process** - the concept of "legal process" is not defined in the PPSA and *section 20(a)* only sets out examples, such as execution, attachment, garnishment and seizure by a sheriff. The phrase "legal process" was considered in *Rogerson Lumber Co. Ltd. v. Four Seasons Chalet Ltd. and Bank of Montreal et al.,* 1980 CanLII 1687 (ON CA) where it was held that:

  > *…"By legal process" does not mean "by lawful means." It means "by a process available through the operation of law," such as by seizure under a writ of execution. By way of illustration, a landlord's distress carried out by his bailiff would not come within the term "legal process"…*

The appointment by a secured party of a private receiver and the seizure of collateral under powers contained in a security agreement does not constitute seizure under "legal process" [*Bank of Nova Scotia v. Royal Bank of Canada and Farm-Rite Equipment Ltd. (Receivership),* (1987) SKCA].

- **an assumption of control** - it would appear from the wording of *section 20(a)* that the execution process need not be fully completed in order for the execution creditor to have a priority over the unperfected security interest. The execution creditor must simply assume control of the collateral. The taking of action to be able to assume control of collateral may not be good enough; there must be actual assumption of control. See:

- *Bank of Montreal v. Osborne et al*. (1983), 3 P.P.S.A.C. 227;
- *Canada Mortgage & Housing Corp. v. Apostolou*, 1995 CanLII 7152 (ON SC);
- *Re Burton and Petrone, Hatherly, Hornak & Associates et al.*, 1985 CanLII 2247 (ON SC);
- *Erjo Investments Ltd. v. Michener Allen Auctioneering Ltd.*, 2004 SKCA 34 (CanLII), (2004), Sask. CA (although Saskatchewan permits a judgment creditor to register a writ of execution in the *PPR* which Manitoba does not).

However, payment of garnished wages into court [*Jennery K.R. Tracey Construction Co*. (1985), 5 P.P.S.A.C. 15 (Sask. Q.B.)] or actual seizure by a sheriff [*Bodnard v. Capital Office Systems Inc* (1992), 3 PPSAC (2d) 71 (Sask CA)] will be enough control.

There is a special protection with regard to a PMSI. This special protection is found in *section 22(1)* of the PPSA, which provides that if a PMSI is perfected within certain time periods it will obtain priority over the interests of the parties noted in *section 20(a)*. We will return to consider the rules with respect to PMSIs in further detail below.

A person that assumes control of collateral by legal process will not have priority over an existing perfected security interest in that collateral [*Rehm v. DSG Communications Inc.*, 1995 CanLII 6081 (SK QB); *C & W Oilfield Const. & Rental Ltd. v. Panther Petroleum Ltd.*, 1996 CanLII 6713 (SK QB)].

c) Against Trustee in Bankruptcy

Section 20(b) of the PPSA indicates that an unperfected security interest in collateral will not be effective against a trustee in bankruptcy or a liquidator appointed under the *Winding-up and Restructuring Act* (Canada). The trustee in bankruptcy or liquidator will be acting on behalf of all unsecured creditors of the debtor, who will obtain priority over the interests of an unperfected secured party. The unperfected secured party will become one of the unsecured parties and will share *pari passu* with those other unsecured creditors.

You should note the specific reference in *section 20(b)* to timing. The security interest must be unperfected at the time the winding-up order is made or at the date of the bankruptcy. In a bankruptcy situation, the date of the bankruptcy may be a variety of dates. When dealing with a voluntary bankruptcy, it will be the date that the bankrupt person files the assignment into bankruptcy with the appropriate government office [*Copeland, Re*, 2001 CanLII 28482 (ONSC)]. When dealing with an involuntary bankruptcy, it will be the date of the receiving order resulting from a successful petition by a creditor under the *Bankruptcy and Insolvency Act (*Canada). When dealing with a situation where there has been an unsuccessful attempt by an insolvent person to make a proposal to creditors under the provisions of *section 57(a)* of the *Bankruptcy and Insolvency Act* (Canada), then the date of bankruptcy will be the date of the refusal of a proposal.

As noted above there is a special protection for a PMSI interest in *section 22(1)*, of the PPSA which provides that if a PMSI is perfected within certain time periods it will obtain priority over the interests of the parties noted in *section 20(b).* Essentially, to claim the special protection offered by a PMSI, the secured party has 15 days after certain events to complete certain procedural steps. If the events referred to in *sections 20(a) or 20(b)* occur during the 15-day window for the PMSI procedural steps, the secured party still gets the full 15 days. If the procedural steps are completed within the 15-day window, the special protections of the PMSI still apply.

When reviewing cases on *section 20(b)* or its equivalent in other PPSAs, you should be aware that the Old Manitoba PPSA and the Ontario PPSA prior to amendment in 1989 had a qualification to the rights of persons who represented creditors. The qualification was that the subordination of the unperfected security interest only arose if at least one creditor was without knowledge of the unperfected interest. This qualification was the subject matter of considerable litigation, and does not appear in the current PPSA or in any other PPSAs.

d) Against Transferee for Value

Section 20(c) of the PPSA makes an unperfected security interest in goods, chattel paper, a document of title, an instrument or an intangible or money subordinate to the interest of a transferee who acquires the interest under a transaction that is not a security agreement, gives value, and acquires the interest without knowledge of the security interest. The knowledge referred to in *section 20(c)(iii)* does not have to be actual knowledge; knowledge can be implied if the buyer is aware of facts that might lead it to suspect that the goods are subject to a security interest [*Associates Commercial Corp. v. Scotia Leasing Ltd*. (1994), 24 B.L.R. (2d) 310 (Ont. Gen. Div.)]. *Section 2(1)* of the PPSA sets out certain rules to be used to determine when a person, partnership, corporation, association and government are considered to "know" or "have knowledge."

e) Against Those Entitled to Priority Under PPSA

Section 35(1)(b) of the PPSA indicates that a perfected security interest has priority over an unperfected security interest [*MacDermid Lamarsh v. D'Lugos*, 1997 CanLII 11179 (SK QB; *Kosolofsky v. Pasta D'Aurum (Canada) Inc. sub nom Vizza v. Kosolofsky*, 2000 SKQB 164 (CanLII].

2. General Priority Rule

Section 35(1) of the PPSA establishes the general, or residual, rule for resolving competing PPSA claims in the same collateral if there is no special priority rule in the PPSA that governs the situation. Priority under the residual rule will be determined by the order of the occurrence of the following:

- the registration of a financing statement without regard to the date of attachment of the security interest;

- perfection by possession of the collateral under *section 24* without regard to the date of attachment of the security interest; or
- perfection under the temporary perfection provisions in *section 5*, *section 7, section 26*, *section 28*, *section 29* or *section 74* of the PPSA;

whichever is earliest. Further, a perfected security interest has priority over an unperfected security interest. If none of the competing secured parties have perfected their security interest, then as between those unperfected security interests the date of attachment determines priority [*Sperry Inc. v. Canadian Imperial Bank of Commerce et al*, 1985 CanLII 1934 (ON CA)]. In the event that unperfected security interests are found to attach at the same time, then they will share rateably in the collateral [*Ontario Dairy Cow Leasing v. Ltd. v. Ontario Milk Marketing Board,* [1993] O.J. No. 464 (Court of Appeal), overruling [1990] O.J. No. 1864)].

A key element is that the residual rule is only applicable if there is no special priority rule in the PPSA that governs the situation [*Michie v. First Vancouver Factors,* 1998 CanLII 3588 (BC SC)].

With respect to investment property, which includes securities, specific note should be made of the provisions of *section 35.1* of the PPSA (which were put in place in 2008 with the introduction of *The Securities Transfer Act* (Manitoba)); the rules in which govern the priority among conflicting security interests in the same investment property. In the case of investment property, "control" (as defined in the PPSA at *section 1.1,* with reference to *The Securities Transfer Act* (Manitoba)) is important. A security interest of a secured party which has control of investment property has priority over a security interest of a secured party that does not have control of the investment property [*s. 35.1(2)*]. A security interest in a certificated security in registered form that is perfected by taking delivery under *subsection 24(3)* and not by control under *section 24.1* has priority over a conflicting security interest perfected by a method other than control [*s. 35.1(3)*]. Generally, conflicting security interests of secured parties each of which has control, rank according to priority in time of obtaining control [*s. 35.1(4)*].

Because registration is key for perfection and determining priorities, it is important to register quickly [*National Trailer Convoy v. Bank of Montreal* (1980)1 P.P.S.A.C. 87,10 B.L.R. 196 (Ont. H.C.J.); *Robert Simpson Co. Ltd. v. Shadlock et al.* (1981) ONSC; *Sperry Inc. v. Canadian Imperial Bank of Commerce et al* (1985) ONCA aff'ing *Sperry Inc. v. Canadian Imperial Bank of Commerce* (1982) ONHCJ; *Canadian Imperial Bank of Commerce v. Otto Timm Enterprises Ltd.*, 1995 CanLII 3511 (ON CA)].

As indicated previously, the knowledge by a secured party of other security interests will not be a factor in determining priorities under *section 35*. However, it has been found that knowledge combined with conduct that is taken in bad faith or fraudulently may affect priorities [*Carson Restaurants International Ltd. v. A-1 United Restaurant Supply Ltd.* 1988 CanLII 5019 (SK QB) and *Strathcona Brewing Co. v. Eldee Investment Corp.*, 1994 CanLII 8925 (AB QB)].

If a security interest is in goods that are equipment and are of a kind prescribed as serial numbered goods (as opposed to inventory where a serial number is not required or

consumer goods where a serial number is always required, see *s. 43(8)*), then there will not be proper perfection by registration as against other secured parties who register with reference to the applicable serial number or buyers of the goods until such time as a financing statement relating to the security interest contains a description of the goods by serial number [*s. 35(4)* and *Commcorp Financial Services Inc. v. R & R Investments Corp.*, 1995 CanLII 9132 (AB QB)]. This is consistent with the policy under all PPSAs to give greater protection to any person dealing with those kinds of goods who conducts a search by serial number rather than the name of the debtor.

3. Purchaser or Lessee Protections

All PPSAs contain provisions that allow certain buyers or lessees acquiring an interest in goods from a seller or lessor in certain circumstances to acquire that interest free of any security interest that the seller or lessor may have granted to a secured party. Those provisions are necessary in order for normal commerce to operate smoothly, because without them buyers and lessees would have to conduct *PPR* searches and get releases from every secured party that may have an interest in the goods being acquired. The primary protection afforded under the PPSA is in *section 30*, and is to a buyer or a lessee of goods sold or leased in the ordinary course of business of the seller or lessor. Those parties take free of any perfected or unperfected security interest given by the seller or the lessor, even if the secured party has not expressly or impliedly authorized the dealing [*Ford Motor Credit Co. of Canada Ltd. v. Centre Motors of Brampton Ltd.*, 1982 CanLII 1926 (ON SC) also cited on CanLII as *Ford Motor Credit Co. of Canada Ltd. v. Centre Motors of Brampton Ltd.,* 1982 CanLII 3146 (ON SC)]. It is important to note that section 30 applies only to goods and generally only affects the security interest given by the seller or lessor. See:

- *Royal Bank of Canada v. Wheaton Pontiac Buick Cadillac GMC Ltd. and Deschner,* 1990 CanLII 7474 (SK QB);
- *General Motors Acceptance Corp of Canada v. Owens,* [1993] AWLD 678 (ABQB);
- *Ensign Pacific Lease Ltd. v. Lumar Auto Sales*, 1998 CanLII 6632 (BC SC).

The *section 30* protection applies whether or not the buyer or lessee knows of the security interest, unless the buyer or lessee of the goods also knows that the sale or lease constitutes a breach of the security agreement under which the security interest was created. See:

- *Canada North Group Inc (Companies' Creditors Arrangement Act),* 2019 ABQB 307 (CanLII) at *paras. 102-112;*
- *Willi v. Don Shearer Ltd.*, 1993 CanLII 1213 (BC CA) Aff'ing *Willi v. Don Shearer Ltd,* 1992 CanLII 2010 (BC SC);
- *Estevan Credit Union Ltd. v. Dyer Ford Sales Ltd.,* 1992 CanLII 8037 (SK QB);
- *General Motors Acceptance Corp of Canada v. Owens*, [1993] AWLD 678 (ABQB);

- *Chrysler Credit Canada Ltd. v. MVL Leasing Ltd.* (1993), 5 P.P.S.A.C. (2d) 92 (Ont. Gen. Div.);
- *Royal Bank of Canada (The) v. Gatekeeper Leasing Ltd,* 1993 CanLII 866 (BC SC);
- *Royal Bank v. Bank of Nova Scotia* (1994) Ont.;
- *Saskatchewan Wheat Pool v. Smith*, 1996 CanLII 7136 (SK QB).

A significant number of cases deal with what constitutes a sale in the ordinary course of business. In *Fairline Boats Ltd. v. Leger et al.* (1980), 1 P.P.S.A.C. 218 (Ont. H.C.) it was found that the determination of whether there is a sale in the ordinary course of business depends on a finding of fact and requires a review of all of the circumstances. The court went on to review certain factors that should be considered and found that the objective of *section 30* is to permit commerce:

> *… to proceed expeditiously without the need for purchasers of goods to check into the titles of sellers in the ordinary course of business. Purchasers are allowed by our law to rely on sellers using the proceeds of sales to repay any liens on the property sold. In these days inventory is almost invariably financed, and as a result invariably subject to liens of one kind or another. To require searches and other measures to protect lenders in every transaction would stultify commercial dealings, and so the Legislature exempts buyers in the ordinary course of business from these onerous provisions, even where they know that a lien is in existence. The risk is placed on lenders of an occasional dishonest dealer who may sell some of his goods in the ordinary course of business and then fail to repay the debt because "he is in a much better position than the buyer to weigh the risks."*

The factors referred to in the *Fairline* case are set out in *Alberta Pacific Leasing Inc. v. Petro Equipment Sales Ltd.,* 1995 CanLII 9213 (AB QB) at para. 11 and following, and are:

- **transaction type** - was the sale or lease the usual or regular type of transaction that people in the seller's business engage in?
- **place of sale** - if at the seller's business premises then the transaction is likely one made in the ordinary course of business; however, if made away from the business premises, especially if made in suspicious circumstances, then it may not be in the ordinary course of business.
- **parties to the transaction** - if the buyer is an ordinary, everyday consumer, then the likelihood of the sale being in the ordinary course of business is greater than if the sale is to someone else.
- **quantity of goods sold** - if there is a larger than usual quantity of goods sold, then it may not be an ordinary course of business sale.
- **price charged** - if the price charged is in the range of the usual market price, then it is more likely to be a sale in the ordinary course of business.

- **financial position of the parties** - for example, if the seller is in financial difficulty, it is less likely to be a sale in the ordinary course of business.
- **advertising** - if the seller advertises to the public, holding itself out as conducting a certain business, then the transaction is more likely one that will be held to be in the ordinary course of business of the seller.
- **percentage of overall volume of sales** - it is not necessary for the actual seller to be usually or regularly engaged in the type of transaction for such transaction to be one that is within the ordinary course of business. Even if the sale forms a small percentage of the overall business, and is indirect and incidental to the main business of the seller, it may still be a sale in the ordinary course of business.

The onus of establishing that a sale or lease was made in the ordinary course of business of the seller or lessor is on the buyer or lessee who asserts that the security interest is at an end pursuant to *subsection 30(2)*. [*Associates Commercial Corp. of Canada v. Dependable Transportation Inc.* (1994) Carswell Ont. 779, 8 PPSAC (2) 172].

There is also recent case law that suggests that goods that are returned to a supplier prior to being paid for may, under proper circumstances, be "in the ordinary course of business" and subject to the equivalent of *subsection 30(2)*. See *Hillier's Trades Limited v. Tim-Br Marts Ltd.,* 2019 NLSC 67 (CanLII). The court uses some of the same factors listed above (such as the size of the transaction). But, others (such as any financial difficulty of the seller), are treated quite differently. In the recent case, the financial difficulty of the seller was not a disqualifying condition. In fact, the financial difficulty of the seller may alter what is "ordinary" for the seller. See *paragraph 37*. If the precipitating factor is not usual, this may mean that it is not in the ordinary course of the business of the seller. See *paragraph 46*.

Some cases outside of *section 30* have also considered the meaning of "ordinary course of business". For example, the security may allow for the debtor to deal with the collateral in the ordinary course of business, but only until default. This may not involve a sale (such as payments out of an account that is part of the collateral). On this point, see, for example,

- *Kari Holdings Inc. v. HSBC Bank Canada*, 2017 ONSC 437 (CanLII) at paras. 41-46;
- *Hunter Helicopters Inc. v. Islands Timberlands Limited Partnership,* 2019 BCSC 832 (CanLII) at paras. 117-123;
- *369413 Alberta Ltd. v. Pocklington,* 2000 ABCA 307 (CanLII).

An issue that may arise when dealing with *section 30* is whether there has been a "sale." If there has been no sale, section 30 is not operative. For a case that seems to hold that at least potentially section 30 applies more broadly, see *Hillier's Trades Limited v. Tim-Br Marts Ltd*., 2019 NLSC 67 (CanLII).

The Saskatchewan Court of Appeal in *Royal Bank of Canada v. 216200 Alberta Ltd.*, 1986 CanLII 3219 (SK CA),indicated that it is necessary to look to the rules set out in *Sale of Goods Act,* R.S.S. 1978, c. S-1 to determine if a sale has taken place. However, that decision was not

followed by the Ontario Court of Appeal in *Spittlehouse v. Northshore Marine Inc*., 1994 CanLII 1295 (ON CA), which found that:

> *In my opinion the Sale of Goods Act is not relevant or material to the resolution of our problem. Here, there was a sale with a seller and a purchaser who between them agreed that title in the goods would not pass until all purchase money was paid. The agreement between them states "The dealer agrees to sell and the buyer agrees to purchase" and refers "to the equipment being purchased" and that such equipment "is being sold." It cannot be regarded as anything but a sale. The Sale of Goods Act may affect the time when property in the goods passes but it cannot change what is clearly a sale in another Act into something it is not.*

Despite this statement, there is recent case law involving the application of *section 30* (*Bank of Montreal v. Mason,* 2018 ABQB 161 (CanLII)), to suggest that the protections of the *Sale of Goods Act* can work in concert with, or be independent of section 30 (*Lysyk v. Sharma*, 2019 SKPC 9 (CanLII)), to protect a buyer in appropriate circumstances.

Section 30(7) provides some guidance with regard to what would constitute a sale or lease under *section 30*, and indicates that the sale may be for cash, by exchange for other property or on credit, but will not include a transfer of goods as security for, or in total or partial satisfaction of, a money debt or past liability [*Re 547592 Alberta Ltd*. (1995) Alta.; *Sask. Wheat Pool v. Smith* (1996) Sask.].

Where funds for a purchase are drawn on a joint account, the protections of *section 30* may be applied pragmatically to achieve the goals of the section. On this point, see *Bank of Montreal v. Mason,* 2018 ABQB 161 (CanLII).

Section 30 of the PPSA also establishes a special provision to protect a buyer of consumer goods or goods that are bought for farming [*s. 30(3)*]. That provision indicates that the buyer or lessee takes free of a perfected or unperfected security interest (no matter who has given that interest) provided that the buyer or lessee gives value for the interest acquired and buys or leases the goods without knowledge of the security interest. However, this special protection will not apply if the security interest is in a fixture (no matter the value) or in goods the purchase price of which exceeds $1,000.00 or, in the case of a lease, the fair market value of which exceeds $1,000.00 [*s. 30(4)*].

Section 30 also provides a special protection to certain buyers or lessees of goods that would allow that person to take free of the security interest that is temporarily perfected when the collateral is returned, repossessed or seized by the debtor [*s. 26(1)* and *s. 29(4)*] or where there is a transfer of the collateral by the debtor [*s. 51*]. The buyer or lessee must acquire the interest in the goods during the 15-day period of temporary perfection, must give value for the interest acquired, and must buy or lease the goods without knowledge of the security interest [*s. 30(5)*].

The last special *section 30* protection to a buyer or a lessee relates to goods that are equipment of a kind prescribed as serial numbered goods and that are subject to a security interest perfected by registration. If that equipment is sold or leased, the buyer or lessee

will take free of any security interest (not just the security interest granted by the seller or lessor) if the buyer or lessee buys or leases the goods without knowledge of the security interest and the goods are not described by serial number in the registration relating to the secured party's security interest [*s. 30(6)*]. If a principal of the buyer has seen financial statements of the debtor that make reference to secured indebtedness of the debtor, it will be difficult for the purchaser to rely on section 30(6). See *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2019 ABQB 307 (CanLII) (paras. 113-115). Especially in a major transaction, due diligence may be required. See *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2019 ABQB 307 (CanLII) (para. 115).

Section 30 does not set out all the various protections that the PPSA provides to a purchaser or lessee. Other PPSA provisions that give protections to certain types of purchasers or lessees can be found in:

- The conflict of laws provisions in *section 5(3)* [*Holland v. Chrysler Canada Ltd*. (1992) Alta.].
- *Section 20(c)* dealing with an unperfected secured party claiming a security interest in goods, chattel paper, a document of title, an instrument, an intangible or money.
- *Section 28(1)* dealing with proceeds.
- *Sections 29(3) - (7)* and *31(7)* dealing with a sale or lease of goods that creates an account or chattel paper and the interest of a transferee of an account or a transferee or purchaser of chattel paper relating to goods.
- *Section 31(1)* dealing with a holder of money.
- *Section 31(4)* dealing with a purchaser of an instrument.
- *Section 31(6)* dealing with a holder to whom a negotiable document of title is negotiated.
- *Sections 36(4)(a)* and *36(6)(b)* dealing with a person acquiring for value an interest in land having priority over a secured party's security interest in fixtures on the land.
- *Section 35(10)* dealing with a person acquiring for value a lessor's interest in a lease of land or in the leased land.
- *Section 37(4)(a)* dealing with a person acquiring for value an interest in land having priority over a secured party's security interest in crops on the land while they are growing crops.
- *Section 38(3)(a)* dealing with a person acquiring for value an interest in an accession and the other goods to which an accession is installed or affixed.
- *Sections 59(14)* and *61(8)* dealing with a person purchasing collateral from an enforcing secured party.

4. Lien of Person Furnishing Materials or Services

Section 4(a) of the PPSA excludes from the operation of the PPSA a lien given by rule of law or statute. Generally, the PPSAs will not provide rules for resolving a priority competition between security interests falling within the PPSAs and any interests outside the PPSAs, such as liens given by a rule of law or statute. However, *section 32* of the PPSA provides a special priority rule that will apply between a PPSA security interest and certain kinds of liens. The following four conditions must be met in order to have section 32 apply:

- the interest must be in the form of a lien;
- the lien must be on goods;
- the person claiming the lien must supply materials or services with respect to the goods;
- any statute that creates the lien cannot indicate that the lien will not have priority.

The Ontario court in *VFC Inc. v. Tomax Corp.*, [1998] O.J. No. 5100 (Gen. Div.), reversed on other grounds [2000] O.J. No. 5640 (Div. Ct.), leave refused [2000] O.J. No. 5642 (C.A.); dealt with the Ontario PPSA equivalent of *section 32* of the PPSA, and the court stated the following:

> *Section 31 provides a priority for what is commonly called the artisan's lien.....In doing so, the P.P.S.A. adopts the policy that claims to enhance the value of the property should take priority over an earlier security interest even though the artisan's services or materials are furnished without the knowledge or approval of the secured party....*
>
> *The lien claimant must furnish the services or materials in the ordinary course of their business. If the lienholder can meet these requirements as well as meeting the requirements of the statute or common law that provides for the lien, they will have priority over even a perfected security interest.*

Regardless of whether *section 32* of the Manitoba PPSA (or its equivalents in other Canadian jurisdictions) applies or not, the person alleging such a non-consensual lien will need to demonstrate that the party complied with the statutory or other rules regarding the creation and continuing existence of the lien.

For recent examples, see

- *Connolly v. Advantagewon Inc.,* 2015 ONCA 709 (CanLII); particularly at paras. 19-20;
- *Lovats Acceptance Corp v. Advantagewon Inc,* 2017 CanLII 9128 (ON SCSM), appeal dismissed (2018) Ont.;
- *Royal Bank of Canada v. Modo,* 2017 ONSC 1167 (CanLII);
- *Third Eye Capital Corp. v. Dianor Resources Inc.,* 2016 ONSC 6086 (CanLII), 2016 Ont. at paras. 41-52. The Ontario Court of Appeal in *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc*., 2019 ONCA 508 (CanLII) decided that the claims at issue in the last of these cases were interests in land (mentioned above).

Nonetheless, the Court of Appeal does not specifically disagree that the rules of a non-consensual lien must be adhered to, simply that the trial judge mischaracterized the underlying property right, and that therefore, the transfer of rights should be treated differently than as found by the trial judge.

However, where a court order forces the transfer of the subject-matter of a possessory lien, the claim of the lienholder may be applied against the funds achieved on the sale of the items that are subject to the lien. See *Royal Bank v. Delta Logistics*, 2017 ONSC 368 (CanLII).

The above-mentioned "statutory lien" cases emphasize the need for those claiming such a lien to carefully understand the requirements stipulated in the statute (or statutes) creating the lien, in order to qualify as a lienholder. In Manitoba, two of the more commonly encountered statutory lien regimes are:

(a) *The Garage Keepers Act,* C.C.S.M. c. G10 (see, for example, *Kobi's Auto Ltd. v. 5174245 Manitoba Ltd. et al.,* 2017 MBQB 38 (CanLII) at para. 48); and

(b) *The Warehousemen's Liens Act,* C.C.S.M., c. W20.

A somewhat less commonly encountered statutory lien is provided for in *The Threshers' Liens Act,* C.C.S.M., c. T60.

5. Purchase Money Security Interest ("PMSI")

In the absence of any special priority rules, the residual priority rule in the PPSAs would allow a secured party who had a prior perfected security interest on after-acquired property to have priority over another, but subsequent, secured party who supplies or finances the acquisition by the debtor of collateral which falls within the same type of collateral covered by the after-acquired property clause of the first registered secured party. Such a result is not desired because it shuts off the debtor from sources of new credit unless specific subordinations are always obtained, which is often difficult and sometimes impossible.

The PPSAs have special priority rules for a PMSI that, if all requirements are met, would allow a PMSI to claim priority over a prior perfected secured party who does not have a PMSI claim. The special priority for a PMSI is not unfair to the prior non-PMSI secured party because the new collateral secured to the PMSI holder increases the value (to the extent of the debtor's equity in the assets) and the pool of assets available to that prior non-PMSI secured party without that secured party granting new credit or advancing further funds.

The definition of PMSI sets out the following four situations where a PMSI will arise:

- A security interest is taken or reserved in collateral to the extent that it secures all or a part of its purchase price.
- A security interest taken or reserved in collateral by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire the rights.
- The interests of a lessor of goods under a lease for a term of more than one year.

- The interests of a consignor who delivers goods to a consignee under a commercial consignment.

The definition of PMSI specifically excludes a transaction of sale and lease back to the seller. This is a method of financing that has developed where the debtor would sell collateral to the secured party, who would then lease the collateral back to the debtor. In effect, the purchase price paid by the secured party for the collateral would be like an advance of a loan, and the lease payments by the debtor to the secured party would be like the principal and interest payments for a loan. This type of transaction is not within a PMSI because the secured party is not providing any credit or value to allow the debtor to acquire the collateral. The debtor already had the collateral, and merely sold it to the secured party and leased it back from the secured party. In other words, the point of a PMSI is that the debtor increases the pool of assets. The prior secured party should not be distressed, because the new asset would not be in the asset pool without the PMSI financier. The prior secured party is still in the best position vis-à-vis the other collateral, and is in the second position on the collateral subject to the PMSI. So, as the PMSI secured party is paid out, there is increased value for the prior secured party.

The PMSI special priority only applies in a contest between security interests in the same collateral given by the same debtor. In situations where different debtors (such as an original owner and a transferee) give security interests in the same collateral, *section 34* will not be applicable in resolving a priority dispute among the competing secured parties. Other PPSA priority rules will govern [such as *ss. 28*, *30*, *35* and *51*].

The definition of PMSI in the PPSA indicates that a reference to "purchase price" or "value" will include credit charges or interest payable in respect of the purchase or loan given to enable the debtor to acquire rights in the collateral. This is intended to make it clear that the PMSI priority is not limited to the principal amount advanced or the amount of the unpaid purchase price, but would include credit or interest charges.

As mentioned above, when dealing with the status of unperfected security interests and *section 20,* there is a special protection found in *section 22* regarding a PMSI which would protect an unperfected PMSI claim over the execution type creditors referred to in *section 20(a)*, and the trustee in bankruptcy and liquidators referred to in *section 20(b)*, provided that perfection of the PMSI claim takes place no later than 15 days after the debtor, or a third party at the request of the debtor, obtains possession of the collateral other than an intangible or, in the case of an intangible, perfection occurs within 15 days after the security interest attaches.

There are specific references to the priority of a PMSI when dealing with fixtures [*s. 36(8)*], crops [*s. 37(6)*], accessions [*s. 38(6)*] and commingled goods [*s. 39(6)*]. In the situations dealing with fixtures, crops and accessions, the PMSI will obtain priority provided that registration takes place within 15 days after the goods become fixtures, the security interest in the growing crops attaches, or after the goods become accessions (as the case may be). When dealing with commingled goods, the PMSI provisions are more complicated and should be specifically reviewed if you face a situation involving commingled goods.

In order to obtain the special priority given to a PMSI it is necessary for the secured party claiming the PMSI to do certain things required under the PPSA. Some of those are noted above, such as perfecting the security interest within a specific time period. In the event that the requirements of the PPSA are not satisfied, the PMSI will lose its special priority rights, but will retain the same priority rights of an ordinary security interest and priority will be determined by the normal *section 35* rules or any other special rules set out in the PPSA [*National Trailer Convoy v. Bank of Montreal*, (1980)1 P.P.S.A.C. 87,10 B.L.R. 196 (Ont. H.C.J.); *Roynat Inc. v. United Rescue Services Ltd. and General Motors Acceptance Corporation of Canada Ltd.,* 1982 CanLII 3926 (MB CA)].

The reason for requiring certain specific things to be done by a secured party with a PMSI in order to obtain the special priority is to give warning to other parties dealing with the debtor that the PMSI claim exists and will have a special priority. The detailed and specific requirements imposed on a PMSI claimant in order to obtain the special priority will be noted below. There are different requirements depending on the nature of the collateral.

A security agreement can claim a PMSI in certain collateral and a non-PMSI in other collateral [*Clark Equipment of Canada Ltd. and Clark Equipment Credit of Canada Ltd. v. Bank of Montreal and Maneco Equipment Co. Ltd.,* 1984 CanLII 3719 (MB CA)]. Extrinsic evidence is admissible if necessary, to prove satisfaction of the PPSA definition of a PMSI, and the evidence is not excluded by the parole evidence rule [*Canadian Imperial Bank of Commerce v. Marathon Realty Co. Ltd.,* 1987 CanLII 4910 (SK CA)].

The right to claim a PMSI will not extend to or continue in proceeds of collateral after the obligation to pay the purchase price of the item, or to repay the value given for the purpose of enabling the debtor to acquire the rights in the item, is discharged [*s. 34(9)*].

a) PMSI in Inventory

Section 34(3) of the PPSA sets out four specific requirements in order for a PMSI claim in inventory or its proceeds to have priority over any other security interest in the same collateral given by the same debtor. Those requirements are:

- the PMSI in the inventory is perfected at the time the debtor, or another person at the request of the debtor, obtains possession of the collateral;
- the secured party gives a notice (the "PMSI Notice") to any other secured party who, before the time of registration of the PMSI, had registered a financing statement containing a description that includes the same item or kind of collateral;
- the PMSI notice states that the person giving the notice expects to acquire a PMSI in inventory of the debtor, and describes the inventory by item or kind [*Toronto-Dominion Bank v. Lanzarotta Wholesale Grocers Ltd.,* 1996 CanLII 312 (ON CA).]; and
- the PMSI notice is given before the debtor, or another person at the request of the debtor, obtains possession of the collateral.

The priority is only attributable to inventory provided to the debtor after all recipients of the PMSI notice have received the PMSI notice [*Elmcrest Furniture v. Price Waterhouse*, 1985 CanLII 2783 (SK QB)]. It is clear that the procedural requirements for a PMSI must be strictly followed, given that it is an exception to the general priority scheme that would otherwise be applicable under the PPSA [*GE Commercial Distribution Finance Canada v. R.L. Hillman & Co. Inc.*, 2016 BCSC 2289 (CanLII)].

The rationale for these specific requirements in order for a PMSI in inventory or the proceeds of a sale of inventory to obtain the special priority afforded to a PMSI can be easily understood by looking to an example involving a debtor who is a manufacturer, a bank providing operating loans to the debtor and a supplier providing goods to the debtor that the debtor uses to create goods which the debtor sells.

Assume that both the bank and the supplier have obtained security from the debtor, with the bank's security being on all the debtor's assets (including after-acquired property) and the supplier's security being over the goods the supplier has provided on credit terms. Also assume that the bank's registration of a financing statement has been made before the supplier's registration of a financing statement.

The bank is providing operating financing that will revolve, and the amount of authorized lending by the bank would depend on certain "margining" requirements being satisfied. The concept of "margining" involves the bank taking the value of inventory and accounts receivable of the debtor, with the bank using those values to determine the amount that it is prepared to lend to the debtor.

For example, the bank may be prepared to lend up to an amount equal to the aggregate of 75 per cent of the amount of accounts receivable not over 90 days in age, and 50 per cent of the cost or fair market value (whichever is lower) of the inventory. Because the value of inventory, and the accounts that may be generated from the sale of inventory, are included in the calculation of the amount the bank may lend, the policy under the PPSA requires that the bank (being a prior registered secured party) receive a notice from a PMSI claimant (such as the supplier) regarding the possible loss of priority the bank may have with regard to that inventory, and the proceeds generated by a sale of that inventory, in which the supplier has a PMSI claim. By receiving the PMSI notice, the bank will know to exclude the value of the inventory supplied by the supplier when doing its "margining" calculations. Without the PMSI notice, the supplier will not get priority over the bank.

A PMSI notice is not required to be given to a secured party that has registered a financing statement after the secured party claiming a PMSI has registered a financing statement. No PMSI notice is required because the secured party claiming a PMSI will already be known to the later registering secured party, who will be aware of the priority accruing to the prior registered secured party.

b) PMSI in Collateral Other Than Inventory

If a PMSI is claimed in non-inventory items, a PMSI notice does not have to be given. The only requirement is for the PMSI claim to be perfected at or within 15 days after the day the debtor obtains possession of the collateral that is not intangibles, and in the case of intangibles the perfection must take place no later than 15 days after the security interest in the intangibles attaches. If the registration takes place within that time period, the PMSI will have priority over any other security interest in the same collateral given by the debtor.

The reason for not requiring notice when dealing with non-inventory items is that ongoing operating loan financiers will generally not be relying on collateral other than inventory or the proceeds generated by the sale of inventory (in other words, accounts receivable). Therefore, there is no need to give notice to those parties when the PMSI claim is in collateral other than inventory. However, the registration is required to take place within a certain period of time so that any party searching to determine the status of registrations will be able to learn as soon as possible of the PMSI claim.

What constitutes "possession" was discussed in the *Royal Bank of Canada v. Toronto-Dominion Leasing Ltd.* (1987) Sask., where the court referred to the definition of "debtor" as being a person who "owes payment or other performance of the obligations secured," and acknowledged the argument that possession by a debtor does not occur until money is loaned or the sales transaction consummated, which could be some time after receipt of possession. It was found that mere physical control does not necessarily constitute possession under *section 34*, and the PMSI filing time period does not begin to run until the party in possession of the equipment or consumer goods becomes a debtor obligated to pay the purchase price or the loan amount [*Guaranty Trust Co. v. CIBC* (1989) Ont.; *MacLeod v. Price Waterhouse* (1992) Sask.; *Greyvest Leasing v. CIBC* (1991) Ont.; *Associates Leasing (Canada) Ltd. v. Humboldt Flour Mills Inc.* (1998) Sask.]. The rationale for this result is that there are many situations where equipment is delivered to the debtor for the purpose of being tested before the debtor decides to make an acquisition. If the possession was considered to have taken place upon delivery of the equipment for testing, then the supplier would likely never be able to properly make a filing within the PMSI time period if the debtor decided, after the testing period, to acquire the goods.

Because of the requirement to file within a specific period of time, it is important to be aware of the provisions of *The Interpretation Act* (Manitoba) relating to the calculation of time periods. A decision of the Manitoba Court of Appeal dealt with such a situation. In *Ford Credit Canada Ltd. v. The Toronto-Dominion Bank* (1988), the court was dealing with a situation where the last day of the PMSI filing period fell on a day that the *PPR* was closed. By virtue of what is now section 19(2) of *The Interpretation Act*, the last day of the PMSI filing period was moved to the first following day on which the PPR was open.

c) Accounts

The provisions of *section 34* of the PPSA provide some special protection for certain types of interests in accounts. In dealing with this special form of protection it is necessary to understand that the term "non-proceeds security interest" or "non-proceeds purchase money security interest" means a security interest or PMSI in original collateral.

Under the provisions of *section 34(6),* a non-proceeds security interest in accounts given for new value has priority over a PMSI in the accounts that are generated as proceeds of inventory so long as the financing statement relating to the security interest in accounts is registered before the PMSI is perfected or a financing statement relating to the PMSI is registered. Without this special protection a secured party that is providing financing on accounts receivable and providing new value would lose priority to a PMSI claim in proceeds that are generated by a sale of inventory in which the PMSI priority has been properly perfected in order to obtain the "super priority" of a PMSI claimant. The policy of the section seems to be that an accounts receivable financier who has made advances prior to the PMSI transaction may be locked in and unable to extricate itself and thus should be protected from being shut out from claiming any security because the debtor has become solely involved in PMSI transactions. If the accounts receivable financier comes onto the scene after the PMSI in inventory is perfected, then there is no need for it to be protected because it had knowledge of the PMSI priority before providing financing on accounts receivable.

d) Among PMSI Claimants

It is possible to have more than one PMSI interest in the same goods. For example, a supplier selling goods and financing a part of the price and a bank lending money for the deposit required by the seller could both legitimately claim a PMSI. If there are multiple PMSI claims to the same collateral, the residual priority rule set forth in *section 35* will apply unless there is a specific PPSA section indicating another result. The general rule in section 35 will be the first PMSI to perfect will have priority [*Re Polano and Bank of Nova Scotia* (1979) Ont.].

There are two special circumstances outlined in *section 34* that will affect the priority position between PMSI claimants. One rule applies where one PMSI claimant is a seller, lessor or consignor [*s. 34(5)*], and the other rule applies where one PMSI claimant has a non-proceeds PMSI [*s. 34(7)*]. In the first case, the debate is between a lender who lends funds to acquire an asset (who takes a PMSI), on the one hand, and a seller, who essentially gives the purchaser time to pay for the asset (and is also entitled to a PMSI). In such a case, the PPSA favours the seller over the lender.

In the second case, one secured party helped the debtor purchase the first asset (and takes a PMSI). The debtor later decides to trade in the first asset on the second asset. The second asset is therefore proceeds of the first asset. Therefore, when the trade

in occurs, the PMSI of the first secured party has a PMSI in the second asset. But, the trade in is insufficient to cover the full purchase-price of the second asset. Therefore, the debtor borrows money from a second secured party to make up the difference. The second secured party is also entitled to a PMSI. But the second secured party has no interest in the first asset. Even though the first asset was sold, as a general rule, the security interest of the first secured party continues in it [*s. 28(1)(a)*]. The second secured party has no interest in the first asset. Under the general rule provided in *section 35(1),* the first secured party would win a priority contest on both assets vis-à-vis the second secured party, because the first secured party registered first. The rule in *section 34(7)* reverses this result.

6. Animals

Section 34(11) of the PPSA provides that a perfected security interest in animals or their proceeds given for value to enable the debtor to acquire food, drugs or hormones to be fed to or placed in the animal has priority over any other security interest in the same collateral given by the same debtor, other than a PMSI.

7. Fixtures

There are special provisions in the PPSAs dealing with the position of a security interest in fixtures as against parties claiming an interest in the land to which the fixtures are attached. The PPSA's fixture and crop priority provisions require that the land involved have a certificate of title issued under *The Real Property Act* so that a secured party claiming an interest in fixtures or growing crops can make a filing under *section 49* against the land to which the fixtures or growing crops are attached [*s. 36(2)* and *s. 37(2*)]. That filing is important for the purpose of some of the priority rules.

The starting point is *section 36(3)* of the PPSA, which provides that a security interest in goods that attaches before or at the time the goods become fixtures has priority with respect to the goods over a claim to the goods made by a person with an interest in the land prior to the time that the goods become fixtures. There are exceptions to this priority rule. The exceptions are set out in *section 36(4),* which indicates that a security interest in fixtures will be subordinate to the interests of the following persons who acquire an interest in the land without fraud and before the security interest in fixtures is registered on the title to the land in accordance with *section 49* (the "fixture filing"):

- a person who acquires for value an interest in the land after the goods become fixtures including an assignee for value of a person with an interest in the land at the time the goods become fixtures; and
- any person with a registered mortgage on the land who, after the goods become fixtures, makes an advance under the mortgage (but only with respect to the advance) or obtains an order for sale or foreclosure. It should be noted that *section 36(5*) introduces some special rules regarding the advancing of mortgage funds.

Section 36(7) indicates that a security interest in fixtures will be subordinate to the interests of the following persons who acquire an interest in the land before the fixture filing is made:

- the interest of a creditor of the debtor who causes a writ of execution affecting the land to be transmitted to the appropriate land titles office; and
- the interests of a person who registers in the appropriate land titles office a certificate affecting the land issued under *The Judgments Act*.

The interests of a creditor or person referred to in *section 36(7)* will not take priority over a PMSI in goods in respect of which a fixture filing is made not later than 15 days after the goods become fixtures [*s. 36(8)*].

There is also a provision dealing with the priority of a security interest in goods that attaches after the goods become fixtures [*s. 36(6)*]. Such a security interest will be subordinate to the interests of a person who:

- has an interest in the land at the time the goods become fixtures and who has not consented to the security interest, has not disclaimed an interest in the goods or fixtures, has not entered into an agreement under which the person is entitled to remove the goods, or is not otherwise precluded from preventing the debtor from removing the goods [*s. 36(6)(a)*];
- acquires an interest in the land after the goods become fixtures, if the interest is acquired without fraud and before the fixture filing is made [*s. 36(6)(b)*];
- is a creditor of the debtor and causes a writ of execution affecting the land to be transmitted to the appropriate land titles office before the fixture filing is made [*s. 36(7)(a)*]; and
- a person who registers in the appropriate land titles office a certificate affecting the land issued under *The Judgments Act* before the fixture filing is made [*s. 36(7)(b)*].

There are special rights and obligations set out in *section 36* of the PPSA dealing with the seizure and removal of fixtures, some of which are:

- the secured party who has a right of removal of a fixture must exercise the right in a manner that causes no greater damage or injury to the land, and puts the occupier of the land to no greater inconvenience, than is necessarily incidental to the removal of the goods [*s. 36(9*)];
- a person with an interest in the land (other than the debtor) has the right to reimbursement for any damage to land caused by the removal of the fixtures, other than the decreased value due to the absence of the fixtures [*s. 36(10)*];
- a person entitled to reimbursement may refuse permission to remove the goods until the secured party has given adequate security [*s. 36(11*)], and the secured party may apply to court for an order concerning the adequacy of the security or other matters [*s. 36(12)*];

- a person having an interest in the land that is subordinate to the security interest in fixtures has the right to retain the goods by paying out the lesser of the amount remaining under the security agreement or the market value of the goods on removal [*s. 36(13)* and *Sawridge Manor Ltd. v. Selkirk Springs International Corp.* (1995) B.C.C.A.; *Deloitte & Touche Inc. v. 1035839 Ontario Inc.* (1998) Ont. C. A.]; and

- a secured party must notify persons who have registered interests under the land titles system, the notification to set out the intention of the secured party to remove the goods as well as other necessary information to allow the persons receiving the notice to determine if they wish to satisfy the obligation or pay the market value of the goods rather than have the goods removed from the land [*s. 36(14)* to *s. 36(16)*].

Due to the fixtures priority rules in the PPSA possibly dealing with claims of mortgagees of the land, there is a potential problem in that the PPSA priority rules may not mesh with the priority rules under other legislation affecting competing land mortgage claims (such as *The Real Property Act* and *The Mortgage Act*). The Ontario Court of Appeal had to deal with such a situation in *G.M.S. Securities v. Rich-Wood Kitchens* (1995). Such problems are often referred to as "circular priority problems", where the conflicting priority regimes offer no simple solution. Circular priority problems are really beyond this introduction.

8. Crops

The PPSA defines crops as being crops, whether matured or otherwise, and whether naturally grown or planted, attached to land by roots or forming part of trees or plants attached to land. Crops will include trees only if they are being grown as nursery stock, are being grown for uses other than for the production of lumber and wood products, or are intended to be replanted in another location for the purpose of reforestation. It is important to remember, as mentioned earlier, that *section 13(2)* limits the ability of a secured party to have a security interest attach to after-acquired crops beyond one year after the security agreement is signed.

The special priority provision dealing with crops can be split between rules dealing with the relative priority position in crops as between secured parties claiming security interests in crops [*s. 34(10)*], and the priority position as between a secured party claiming a security interest in crops and other persons claiming an interest in the land [*s. 37*]. A key element in the crop priority rules vis-a-vis persons claiming an interest in the land is that the crop priority rules will only apply while a crop is a "growing crop", that is, the crop is attached to land by roots or forming part of trees or plants attached to land. Once a crop is harvested, the special crop priority rules in *section 37* no longer apply.

The special provision in *section 34(10)* dealing with priority disputes as between two or more secured parties claiming an interest in crops states that a perfected security interest in crops or their proceeds will have priority over any other security interest (including a PMSI) provided that:

- the value is given by the secured party to enable a debtor to produce crops, although the security interest in the crops is not limited to the value given by the secured party

to enable the debtor to produce the crops [*Leu v. N.M. Paterson & Sons Ltd.* (1997) Sask; *Agricultural Financial Services v. John Hofer Farms* (2001) Alta.]; and

- the value is given by the secured party while the crops are growing crops or during a period of six months immediately before the time the crops become growing crops.

When dealing with the priority position of a security interest in growing crops as against other parties with an interest in the land, *section 37* is applicable and sets out provisions similar to the provisions relating to fixtures. The starting point in section 37 is that a security interest in growing crops has priority with respect to the crops claimed by a person with an interest in the land [*s. 37(3)*]. However, this priority is not available against interests in the land of certain parties who obtain those interests prior to the registration by the secured party having the interest in the crops against the title to the land in accordance with *section 49* (the "crop filing"), which requires registrations to be made against land on which crops are growing in order to maintain the special priority protection afforded to a secured party claiming a security interest in crops as against other parties dealing with the land.

The first exception to the crop priority rule [*s. 37(4)*] indicates that a security interest in crops will be subordinate to the interests of the following persons if they acquire the interests without fraud and before the crop filing is made:

- a person who acquires for value an interest in the land while the crops are growing crops, including a person who is an assignee for value of a person with an interest in the land while the crops are growing crops; and
- any person with a registered mortgage on the land who makes an advance under the mortgage after the crops become growing crops (but only with respect to the advance) or obtains an order for sale or foreclosure after the crops become growing crops.

The second exception [*s. 37(5)*] indicates that a security interest in crops will be subordinate to the interests of the following parties if they acquire the interest before the crop filing is made:

- the interest of a creditor of the debtor who causes a writ of execution affecting the land to be transmitted to the appropriate land titles office; and
- a person who submits for registration in the appropriate land titles office a certificate affecting the land issued under *The Judgments Act*.

The subordination set out in *section 37(5)* does not apply to a PMSI in crops or a security interest in crops referred to in *section 34(10)* if a crop filing is made for that interest not later than 15 days after the day the security interest in the crops attaches [*s. 37(6)*].

There are specific provisions that apply with regard to the seizure and removal of growing crops and they are the same as the rules that apply to fixtures, with necessary modifications [*s. 37(7)*].

9. Accessions

An accession is a good that is affixed to another good. To understand the special priority provisions dealing with accessions, it is necessary to review certain definitions in *section 38(1)* of the PPSA. "Other goods" means goods to which an accession is installed or affixed, and "the whole" means an accession and the other goods to which the accession is installed or affixed.

The starting point is that a security interest in goods that attaches before or at the time the goods become an accession has priority with respect to the goods over a claim to the goods as an accession by a person with an interest in the whole [*s. 38(2*)]. This starting point is modified by the provisions of *sections 38(3)* and *38(5)*. Under section 38(3), the security interest in accessions that attach before or at the time the goods become accessions will be subordinate to the interests of the following persons who acquire an interest without knowledge of the security interest in the accession and before that accession security interest is perfected:

- a person who acquires for value an interest in the whole after the goods become an accession including an assignee for value of a person with an interest in the whole at the time the goods become an accession; and
- a person with a security interest taken and perfected in the whole who, after the goods become an accession, makes an advance under a security agreement (but only with respect to that advance) or acquires the right to retain the whole in satisfaction of the obligation secured.

There is also a provision outlining the priority position of a security interest in goods that attaches after the goods become an accession. *Section 38(4)* indicates that such a security interest is subordinate to a person who:

- has an interest in the other goods at the time the goods become an accession and who does not consent to the security interest, does not disclaim an interest in the goods or accession, does not enter into an agreement under which the person is entitled to remove the accession, or is not otherwise precluded from preventing the debtor from removing the accession; or
- acquires an interest in the whole after the goods become an accession, if the interest is acquired without knowledge of the security interest and before the security interest in the accession is perfected.

Pursuant to *section 38(5),* the security interest in goods that become accessions will also be subject to the interests of a creditor or sheriff who has seized or caused the whole to be seized under legal process to enforce a judgment if that seizure has occurred in circumstances referred to in *section 20* and if at the date of seizure the accession security interest is not perfected [*Kulchyski v. Shuswap Ventures Corp.* (1994) B.C.]. However, the interests of the creditor or sheriff will not take priority over a PMSI in goods that is perfected not later than 15 days after the goods become an accession [*s. 38(6).*]

Section 38 also sets out rights and obligations relating to the seizure and removal of accessions which are similar to the fixture rules [*s. 38(7) to 38(14)*].

10. Commingled Goods

Section 39 of the PPSA establishes special priority rules regarding commingled goods, being goods that become a part of a product or mass if as a result of being manufactured, processed, assembled or commingled their identity is lost in the product or mass. A security interest in those goods will be treated as a perfected interest in the product or mass [*s. 39(1)* and *s. 39(3)*]. Where there is more than one perfected security interest in the product or mass, *section 39(2)* sets out how the interests of those parties will be shared, and basically indicates the sharing will be in accordance with the ratio that the obligations secured by each security interest bears to the sum of the obligations secured by all of the security interests. There are limitations regarding the amount of the obligations secured [*s. 39(4)*] and on the amount of the priority [*s. 39(5)*], which reference the value of the goods as of the date that they became part of the product or mass. There are also complicated provisions regarding the status of a perfected PMSI in goods [*s. 39(6)* and *s. 39(7)*].

11. Subordination

All of the priority rules set out in the PPSAs can be abrogated by a secured party subordinating its security interest to some other security interest. The operative provision of the PPSA is *section 40(1)*. The entering into of subordination arrangements among secured parties is due to the possibility under the PPSAs of several secured parties taking security interests in all of a debtor's assets (including after-acquired property), perfecting the interests with one filing, and for all of those security interests to act as security for future advances. There may be a desire by the various secured parties for subordination or priority agreements to be entered into as among the secured parties.

Section 40(1) states that a subordination can be done within "a security agreement or otherwise." As a result, the following methods are commonly used to reflect subordinations among secured parties:

- The subordination being specifically referred to within the security agreement. There is no privity of contract between the secured parties affected, but the secured party obtaining the benefit may enforce it even if that secured party's interest is not perfected [*s. 40(1)* and *General Motors Acceptance Corporation v. Royal Bank of Canada* (1987) Man.; *Royal Bank of Canada v. Inmont Canada* (1980) Ont.; *Hongkong Bank of* Canada *v. Shrimp Projectors* (1992) Alta.; *Euroclean Canada v. Forest Glade Investments* (1984) Ont. C.A.; *Transamerica Commercial Finance Corp. v. Imperial T.V.* (1993) Alta.; *Chiips Inc. v. Skyview Hotels Ltd.* (1994) Alta. C.A.; *Bank of Montreal v. Dynex Petroleum Ltd.* No. 1 (1995) Alta.; *Bank of Montreal v. Dynex Petroleum Ltd.* No. 2 (1997) Alta.].

- A specific subordination or priority agreement being entered into between the secured parties respecting their relative priority positions [*Alta. Treasury Branches v. MacLeod Dixon* (2001) Alta. C.A.]. Of course, subordination agreements are contractual in nature and are subject to privity issues, that is, they are generally only enforceable by the parties to them, unless an exception to privity applies. The same is true with respect to forbearance agreements, where the secured party agrees to forbearance for enforcement under certain conditions. Such forbearance will not necessarily entitle other interested parties to claim the underlying collateral. [See *600500 Alberta Ltd. v. Oil Sands One Ltd.* (2015) Alta.]

- A letter or other writing (not within the security agreement) from one secured party to the debtor or another secured party, or an oral agreement, whereby a secured party acknowledges the priority of another secured party [*Royal Bank v. Tenneco Canada Inc.* (1990) Ont.; *Royal Bank v. Gabriel of Canada* (1992) Ont.; *Furmanek v. Community Futures Development Corp. of Howe Sound* (1998) B.C.C.A.].

- The notation in the *PPR* of the subordination of the affected PPR filings.

Frequently, notation is made in the PPR of subordinations in addition to making the subordination, regardless of the method of making the subordination.

12. Other Special Priority Provisions

This article has tried to deal with the special priority provisions that might be more regularly encountered. The following are other special priority provisions that may arise in specific situations or when dealing with particular types of collateral:

- *section 27(3)* respecting a priority dispute between a security interest in a negotiable document of title in goods and a security interest in the goods;

- *section 29(6)* dealing with a priority dispute between a security interest in goods and the interests of a transferee of an account or chattel paper relating to the goods;

- *section 29(7)* dealing with a priority dispute between a buyer or lessee of goods where the goods are returned, seized or repossessed;

- *section 31(1)* respecting the priority of a holder of money;

- *sections 31(2)* and *31(3)* respecting the priority between a creditor who receives payment of a debt owing by a debtor and a secured party with an interest in (i) the funds paid, (ii) the intangible which was the source of the payment, and (iii) an instrument used to effect the payment [*Belarus Equipment of Canada Ltd. v. C & M Equipment (Brooks) Ltd.* (1994) Alta.; *Re Lynn Holdings Ltd.* (1996) B.C.C.A.; *CFI Trust v. Royal Bank of Canada* (2013) B.C.];

- *section 31(4)* respecting a purchaser of an instrument;

- *section 31(5)* respecting a holder of a negotiable instrument;

- *section 31(7)* respecting a purchaser of chattel paper; and
- *section 35(10)* respecting a security interest in a right to payment under a lease of real property.

13. Concept of "Knowledge"

Throughout the priority provisions in the PPSAs there are several references to the "knowledge" of various parties. The provisions of *section 2(1)* and *section 31(6)* of the PPSA will be of assistance in determining who must have the knowledge, and to what extent the information must be received to constitute knowledge [*Hillhurst Hardware v. CIBC* (1999) Alta]. See also *CFI Trust v. Royal Bank of Canada* (2013) B.C.

H. DUTIES, RIGHTS AND REMEDIES

The PPSAs have a number of provisions imposing on the debtor and the secured party certain duties and rights, and also creating a code of rules for enforcement of security interests.

1. Prior to Enforcement

a) Custody, Preservation and Use of Collateral

Section 17 of the PPSA sets out the rights and obligations of a secured party or a receiver in respect of collateral that is in the possession of the secured party or receiver. These rules will apply before default where the secured party has perfected the security interest by taking possession of the collateral, and will also apply after default if the collateral is seized by the secured party or receiver. For ease of reference, hereafter, secured party includes a receiver.

A secured party will be required to use reasonable care in the custody and preservation of the collateral in the possession of the secured party [*s. 17(2)*]. The duty will require the secured party to ensure that its actions, or lack of action, are customary and usual for a prudent person dealing with similar property in similar circumstances. This duty cannot be waived or varied [*s. 56(3)*], so the usual exemption clauses in security agreements which attempt to release a secured party from its own negligence will not be enforceable.

In the case of an instrument or chattel paper in the possession of the secured party, the duty will include taking necessary steps to preserve rights against other persons unless the secured party and debtor otherwise agree.

Note that in the event that the collateral is investment property, a secured party having control of the investment property may sell, transfer, use or otherwise deal with the collateral in the manner and to the extent provided in the security agreement [*s. 17.1(2)*].

Unless there is an agreement between the secured party and the debtor to the contrary, the following are implied terms to the contractual arrangement that are imposed by *section 17(3)* on a secured party having possession of collateral:

- reasonable expenses, including the cost of insurance and payment of taxes or other charges incurred in obtaining and maintaining possession of the collateral, are chargeable to the debtor and are secured by the collateral;
- the risk of loss or damage, except where caused by the negligence of the secured party, is on the debtor to the extent of any deficiency in insurance coverage;

- the secured party may hold as additional security any increase or profits, except money, resulting from the collateral, and shall apply money so received, unless remitted to the debtor, immediately upon its receipt in reduction of the obligation secured; and
- the secured party shall keep the collateral identifiable, but fungible collateral may be commingled.

If the secured party is in possession of the collateral, there might be a use made of that collateral by the secured party. *Section 17(4)* limits the use of the collateral by the secured party to being in the manner and to the extent provided in the security agreement, for the purpose of preserving the collateral or its value, or in accordance with an order of the court.

In the event that there is non-compliance by the secured party with the obligations imposed by *section 17,* the security interest is not lost but the provisions of *sections 63* and *65* of the PPSA will be applicable. Those provisions will be reviewed in more detail later in this article.

b) Provide Information

An important requirement in any "notice" filing system is the ability of those searching to obtain more detailed information with regard to the transaction for which a filing of a notice has been made. This is particularly important in the *PPR* system, where the financing statement filing contains a bare minimum of information to identify the debtor, the secured party and the nature of the collateral being claimed. No other information would necessarily be available from conducting a search of the PPR or any other public record. *Section 18* of the PPSA allows certain parties to demand from the secured party certain types of information.

Under *section 18(1)* the debtor, a creditor, a sheriff, a person with an interest in personal property of the debtor, or an authorized representative of any of them, may, in writing, demand that the secured party provide certain information to the person making the demand. The demand must set out an address for reply, and is to be delivered to the secured party at its most recent address set out in a registered financing statement, or at the current address of the secured party, if known by the person making the demand. A fee may be charged by the secured party, but a debtor is entitled to a reply without charge once every 6 months [*s. 18(17)*].

The type of information that may be requested is outlined in *section 18(2)* as being one or more of the following:

- a copy of any security agreement providing for a security interest held by the secured party in the personal property of the debtor;
- a statement in writing of the amount of the indebtedness and the terms of payment of the indebtedness as of the date specified in the demand;

- a written approval or correction of an itemized list of personal property attached to the demand indicating which items are collateral as of the date specified in the demand;
- a written approval or correction of the amount of indebtedness and of the terms of payment of the indebtedness, as of the date specified in the demand; and
- the location of the security agreement or a copy of it to enable inspection of it.

A reply to a demand is to be made by the secured party within 10 days [*s. 18(6)*]; however, if the secured party is a trustee under a trust indenture the reply time period is extended to 25 days [*s. 18(7)*]. The additional time allowed to a trustee is in recognition that the trustee will usually be acting on behalf of more than one entity and it will be necessary for the trustee to obtain the information from those entities before being in a position to respond.

It is important to remember that the information is limited to the situation as at the date specified in the demand. For example, if a secured party has a security agreement on specified collateral for a specified amount, but the financing statement filing covers all personal property, the disclosure to a demanding party of the specific debt, the specific security agreement and the specific collateral will not act to prevent that secured party from subsequently taking an additional or new security agreement covering all personal property and additional debt.

In the event that a secured party receiving a demand no longer has an interest in the obligation or property of the debtor that is the subject of the demand, that secured party must disclose within the 10 day period the name and address of the immediate successor in interest and, if known, the latest successor in interest [*s. 18(9)*]. Successors in interest of a secured party may be estopped from denying the accuracy of information provided by a previous secured party unless the party making the demand knows of the successor's interest or the successor has filed a financing statement in the *PPR* disclosing it as the successor secured party [*s. 18(15)* and *(s. 18(16)*]. This is a good reason for all successors in interest of a secured party to become the secured party of record in the PPR by making the filing contemplated by *section 45(3)* even though such a filing is not legally mandatory.

The provisions of *sections 18(8)* and *18(10) through 18(13)* outline certain remedies available to parties that have made a demand where the secured party has failed to comply with the demand or has given an incomplete or incorrect reply. The remedies include obtaining court orders to comply with the demand or disclose the information required. In certain circumstances the court may issue an order that, in the event of non-compliance with a previous order of the court to respond to a demand, the security interest of the secured party with respect to the demand will be unperfected or extinguished and any related registration of a financing statement will be

discharged [see *s. 18(12)(b)*]. The penalty provisions do allow for a secured party to apply for a court order exempting it from responding or extending the time for compliance [*s. 18(13)*].

Sections 18(14) through 18(16) outline that a secured party who responds to a demand will be estopped from denying the accuracy of the information contained in the reply or that the copy of the security agreement is a true copy of the security agreement. The estoppel will be effective against the person making the demand or any other person who can be reasonably expected to rely on the reply, to the extent that the person relies on that reply, but is limited to the information or copy supplied. The estoppel does not prevent the making of future advances or obtaining a security interest on after-acquired property if allowed by the security agreement.

Finally, *subsection 18(18)* protects a secured party who responds to a demand in the event that the person making the demand is not one of the persons entitled to obtain the information. If the secured party is unaware that the person making the demand has no right to the information, the secured party will not be liable to the debtor for unauthorized disclosure of confidential information.

c) Provide Amendments and Discharges

Section 50 of the PPSA establishes two differing sets of rules regarding the requirement of the secured party to provide discharges or amendments of a financing statement. One set deals with collateral that is exclusively consumer goods, and the other set of rules applies to non-consumer goods situations.

When dealing with consumer goods, the provisions of *section 50(2)* require the secured party to discharge the registration not later than 30 days after all obligations under the security agreement creating the security interest are performed, unless before the expiry of that 30-day period the registration would otherwise lapse. This obligation is not dependent on the secured party receiving any request or demand from the debtor to make such a discharge. The financing statement registration must, however, relate exclusively to consumer goods, and all obligations under the security agreement must be performed, before section 50(2) becomes operative.

The obligation of the secured party to discharge a financing statement regarding collateral that is not exclusively consumer goods, or a *section 49* filing against land, is dependent on the secured party receiving a demand. Those provisions have been dealt with above.

d) Transfer of Equity

Section 33(2) of the PPSA recognizes the right of a debtor to transfer the debtor's interest in the collateral even if there is a provision in the security agreement prohibiting that transfer. The right of the secured party in such a circumstance is to treat the transfer as an event of default (if there is an appropriate clause in the security agreement making such transfer an event of default) and to enforce the

security interest, which may result in seizure of the collateral from the transferee if there are no sections in the PPSA that would operate to adversely affect the secured party's rights against the transferred collateral (such as *s. 30* or *s. 51*).

e) Copy of Security Agreement and Financing Statements and Provision of Information

Section 11 of the PPSA requires the secured party to deliver to the debtor a copy of any written security agreement within 10 days after execution, and *section 18* requires a secured party to allow inspection of a copy of the security agreement to certain parties that may demand it. *Section 43(13)* of the PPSA requires the secured party to deliver to the debtor a copy of the financing statement filed or a confirmation of the filing within 20 days of the filing, unless the debtor waives in writing the entitlement. These provisions (or the general remedy provisions of *s. 65*) contain remedy provisions if those requirements are not satisfied by the secured party.

2. Secured Party Rights and Remedies on Default

The PPSAs establish a code of rights and remedies of the secured party which are not affected by the nature of the security agreement and, generally, by the nature of the collateral. By establishing a uniform system of remedies, the PPSAs attempt to escape the pre-PPSA law's lack of consistency in the remedies permitted. However, the remedy provisions of Part 6 of the PPSA will be subject to the provisions of *The Consumer Protection Act* (Manitoba) and *The Farm Machinery and Equipment Act* (Manitoba) and any provisions in a Manitoba statute for the protection of consumers to the extent that there is a conflict between the provisions of those statutes and the PPSA [*s. 69(1)*].

Generally, as a procedural matter, other than in exceptional circumstances, notice to the debtor should be given, and the remedial claim should be brought by either action or application, but not by motion [*Paccar Financial Services Ltd. v. 2026125 Ontario Limited,* 2014 ONSC 456 (CanLII)].

Also, as a jurisdictional matter, some jurisdictions (including Ontario and Nova Scotia) have resolved cases involving remedies under or related to the PPSA by the Small Claims Court. However, the case of *Hariz v. 692599 NB Ltd.,* 2019 NBQB 51 CanLII Small Claims holds that issues of collateral and priority are generally to be dealt with in the provincial superior court at first instance. The Manitoba PPSA appears to have definitions similar to those that led the New Brunswick court to deny jurisdiction. See also, *Majeau v. Condominium Corporation No. 0024327*, 2019 ABQB 603 (CanLII) at para. 21.

It is important to remember that Part 6 does not apply to the "deemed" security interests, being a transfer of an account or chattel paper, a lease for a term of more than one year or a commercial consignment, that do not secure payment or performance of an obligation [*s. 55(1)(a)* and *Hassell v. Regency Motor Cars Inc.* 1996 CanLII 3378 (BC SC); *R. Clancy Heavy Equipment Sales Ltd. v. Joe Gourley Construction Ltd.* 2000 ABQB 589 (CanLII); *Newcourt Financial Ltd. v. Frizzell* 2000 BCSC 1196 (CanLII)]. In addition, a transaction between a pledgor and a

pawnbroker will not be affected by Part 6 of the PPSA [*s. 55(1)(b)*]. If there is no security interest existing then the parties to the transaction are not subject to the obligations or entitled to the rights set out in Part 6.

The fundamental right of the secured party is to realize upon collateral to satisfy the obligation secured. In order to protect whatever equity interest the debtor has, and the interests of subordinate parties, the realization must be in good faith and on commercially reasonable terms so that the highest realizable value possible is obtained for the collateral. See *Mercedes-Benz Financial Services Canada Corporation v. 1063995 B.C. Ltd.*, 2018 BCSC 1324 (CanLII) at paras. 50-56. As a result, Part 6 attempts to balance the rights of the secured party to realize on the collateral and the rights of the debtor and subordinate parties in the collateral.

The rights and remedies dealt with in Part 6 are dependent on there being a default, which is defined in the PPSA as the failure to pay or otherwise perform the obligation secured when due, or the occurrence of an event or set of circumstances whereupon, under the terms of the security agreement, the security becomes enforceable.

Generally speaking, a secured party is not obliged to realize on its security if there is an event of default [*Montreal Trust Co. of Canada v. Sagars Investments Inc.*, 1995 CanLII 18041 (AB QB)].

All the rights and remedies referred to in Part 6 are cumulative [*s. 55(2)* and *Chrysler Credit Canada Ltd. v. Parragh*, 1994 CanLII 8929 (AB QB)]. References in Part 6 to a secured party will generally include a receiver. The security interest will not merge merely because a secured party has reduced its claim to judgment [*s. 55(4)*].

The rights and remedies available to a secured party against the debtor and the collateral upon default are only those noted in *section 56(2)(a)*, which are:

- the rights and remedies provided in the security agreement. Thus it is open to the secured party and debtor to agree upon the remedies, including the appointment of a receiver [*s. 64(1)*];
- the rights, remedies and obligations provided in Part 6, and in *sections 36 to 38* respecting fixtures, crops and accessions; and
- when the secured party is in possession of the collateral, the rights, remedies and obligations provided in *sections 17* and *17.1*.

Section 56(2)(b) indicates that the debtor has against the secured party the following rights and remedies:

- the rights and remedies provided in the security agreement;
- the rights and remedies provided by any other Act or rule of law not inconsistent with the PPSA;
- the rights and remedies provided in Part 6 and in *sections 17* and *17.1*.

The provisions of *section 56(2)(a)* are subject to *section 56(3)*, which voids any provisions whereby the secured party attempts to have the debtor waive or vary by agreement or otherwise certain provisions of the PPSA to the extent the provisions give rights to a debtor or impose obligations on a secured party [*Gujral v. Miller*, 1994 CanLII 2820 (BCSC)]. The provisions that cannot be waived or varied are listed at section 4.04, 3(f) above. In addition to section 56(3) there is *section 65(10)*, which indicates that a provision in a security agreement or any other agreement that purports to exclude a duty or onus imposed by the PPSA, or to limit liability or damages, is void unless such exclusion or limitation is specifically allowed in the PPSA.

There are many situations where a single obligation of the debtor is secured by both a security interest in personal property and a mortgage of real property. All the PPSAs contain provisions confirming that a secured party may proceed against the real and personal property separately, or may proceed against both in one action. When the secured party proceeds against both real and personal property in one action, the real property enforcement rules are stated to prevail and govern [*s. 55(5)* and *Re 1153496 Ontario Ltd.* (1996) Ont.].

Before dealing with some of the specific remedy provisions of Part 6 of the PPSA, it should be noted that there are no provisions to protect a secured party having priority over a subordinate enforcing secured party. This is because the enforcement by the subordinate secured party cannot adversely affect the prior secured party's interest. All dealings with the collateral by the enforcing subordinate secured party will remain subject to the prior secured party's interest [. *Chrysler Credit Canada Ltd. v. Royal Bank of Canada and Clarkson Gordon Ltd,.* 1986 CanLII 3258 (SK CA)]. A junior secured party has no means by which it can force a senior secured party to realize on its security, in the hope that there will be value in the collateral left once the senior secured creditor is paid. [*Holnam West Materials Ltd. v. Canadian Concrete Products Ltd.,* 1994 CanLII 9027 (AB QB)]. Of course, this is subject to the overarching standard of commercial reasonableness [*s. 65(3)*].

a) Notice Regarding Intangibles, Chattel Paper, Etc.

A security interest may be taken on obligations owed to a debtor by a third party. *Section 57* of the PPSA sets out certain specific rights of a secured party when dealing with collateral that is an intangible, chattel paper or instrument. The rights will arise on default, or earlier if the secured party and debtor agree (for example, by a specific provision in the security agreement). Section 57 authorizes the secured party to notify the third party to make payment directly to the secured party. Until that notice is received, an account debtor – someone who owes money to the debtor – may make payment to the debtor [*s. 41(7)*]. After the notice is received, the monies received by a secured party may be applied in satisfaction of obligations [*s. 57(2)(c)*], and reasonable expenses of collection may be deducted from the amounts collected [*s. 57(3)*].

b) Seizure

Section 58(2)(a) of the PPSA clearly outlines the rights of the secured party to take possession of collateral. Constructive seizure is not allowed unless the collateral is goods of a kind that cannot be readily moved from the debtor's premises or of a kind for which adequate storage facilities are not readily available [*s. 58(2)(b)*] and the secured party's security interest has been perfected by registration. In those circumstances, the secured party is allowed to dispose of the collateral on the debtor's premises, but the secured party is not to cause the person in possession of the premises any greater inconvenience or cost than is necessarily incidental to the disposal [*s. 58(2)(c)*].

It should be noted that if there is a seizure of collateral that is governed by *The Consumer Protection Act* (Manitoba) or *The Farm Machinery and Equipment Act* (Manitoba), the act of seizing may result in the secured party not having any ability to proceed and make a claim for any deficiency remaining in the amount secured after disposition. This is due to what are traditionally called "sue or seize" provisions contained in those statutes. The secured party must make a choice to sue for the amount owing or seize the collateral, but it cannot do both. The significance of the secured party being limited to seizing - and realizing upon - the collateral, is that if disposition of the collateral by the secured party does not raise sufficient funds to pay off the debt, the secured party cannot obtain a judgment and then use that judgment to seize any other assets of the debtor with a view towards selling them and covering the deficiency. Where the secured party chooses not to seize (and realize upon) the collateral, the secured party is free to sue the debtor, obtain a judgment and then, utilizing that judgment, cause a seizure to be made of all of the debtor's property (other than the collateral) and hopefully (from the point of view of the secured party) sell such other property so as to fully satisfy the debt.

However, where a separate party has seized the collateral to enforce payment of a debt under a separate regime (such as garage-keeper's or repairer's lien), there is jurisprudence from Alberta that holds that the "sue or seize" provisions do not apply when the only action by the secured creditor was to accept the excess sale proceeds when the collateral was sold by a third party under the separate regime. See *Bank of Nova Scotia v. Graves,* 2018 ABQB 107 (CanLII).

Under the PPSA there is no requirement to give notice prior to seizure except in situations dealing with the seizure of fixtures, growing crops and accessions. When dealing with those types of collateral, *sections 36*, *37* and *38*, respectively, contain provisions requiring a secured party to provide a notice of intention of the secured party to remove the fixtures, growing crops or accessions, as the case may be. The notice is to be provided to each person who appears, by the records of the Land Titles Office, to have an interest in the land (respecting crops and fixtures) or who appears on the *PPR* records to have an interest in the personal property to which the accession is attached. The reason for giving the notice is to allow any of those persons 15 days

to make a payment to the secured party of the lesser of the amount secured by the security interest having priority to the paying party's interest, or the fair market value of the goods or growing crops if the goods or crops were removed from the land or the "whole." Upon such a payment occurring, the goods or growing crops may be retained on the land or the "whole."

In all other circumstances, the PPSA does not require a pre-seizure notice. However, there are the following other bodies of law that may require a pre-seizure notice to be given:

- A requirement set out in the security agreement between the secured party and the debtor to provide notice.
- The principle that has developed at common law requiring a secured party to provide a reasonable period of time to the debtor to arrange for payment of a demand loan prior to the secured party being legally able to enforce security. However, if there is a serious degree of implausibility with respect to the allegation that the notice was not received, the Court may take a strict view of the allegation that the loan is not enforceable. See *Seven C's Investments Ltd. v. C. Keay Investments Ltd.* 2016 BCSC 6 (CanLII). In this case, the Court refused to make a credibility determination, although the undercurrent of the case suggests that the debtor was the one with the credibility problem.
- The requirement of *section 244* of the *Bankruptcy and Insolvency Act,* R.S.C., 1985, c. B-3 (Canada) that a Notice of Intention to Enforce Security (in a specific format) be provided by a secured party to a debtor where the secured party intends to enforce a security on all or substantially all of the inventory, the accounts receivable or the other property of an insolvent person that was acquired for, or used in relation to, a business carried on by the insolvent person.
- The provisions of *The Consumer Protection Act* (Manitoba) require leave of a court to enforce if the amount owing is less than 25 percent of the amount originally secured, and *The Farm Machinery and Equipment Act* (Manitoba) requires leave of the Farm Machinery Board to repossess unless the debtor consents to the repossession.
- The requirement of *section 21* of the *Farm Debt Mediation Act*, S.C. 1997, c. 21 (Canada) that a secured party who intends to enforce security given by a farmer must give the farmer 15 days written notice of that intention, and the requirements of *section 8* of *The Family Farm Protection Act* (Manitoba) prohibiting any secured party from taking action or proceeding to realize upon security whereby a farmer could be deprived of the ownership of or possession of farm land unless the secured party first obtains leave of the Court of Queen's Bench.

It is worth noting that there is jurisprudence in other jurisdictions that indicates that if the required notices (and presumably any other required procedural steps) are delivered in the incorrect order, this may render any seizure invalid. On this point, see, for example, *Banbury v. Westana Asset Management*, 2018 SKQB 214 (CanLII). Thus, where seizure is contemplated, careful consideration must be given to the potential effect of the PPSA and other statutes so as not to lose (at least temporarily) the right of the creditor to seize the collateral.

c) Disposition of Collateral

As Prof. McLaren states in *Secured Transactions in* Personal *Property in Canada* (3d ed.), Volume 3, Chapter 9, §9.02[3][e], the objective of the disposition provisions of the PPSA is:

> *to provide a simple, efficient and flexible tool to realize the maximum amount from the disposition of the collateral. To facilitate that objective, the Act has no requirement of mandatory public sale on the assumption that private sales through regular commercial channels will normally produce more money. Coincident with that proposition there are no requirements of elaborate public notice prior to disposition as to time and place of sale.*

Under the PPSA, the disposition of collateral will arise in three ways:

- the secured party may elect to sell the collateral rather than retain it;
- if the collateral is "consumer goods" and the debtor has paid at least 60 percent of the indebtedness secured and has not signed after default a statement renouncing or modifying this right, the secured party must dispose of the collateral within 90 days after taking possession [*s. 61(1)*]; or
- a disposition of collateral will be required if, pursuant to *section 61(3),* there has been an objection to the secured party retaining the collateral.

i. Manner of Disposition

The disposition of the collateral can be in its condition either before or after any commercially reasonable repair, processing or preparation for disposition [*s. 59(2)*], and may be by public sale, private sale or, if allowed by the security agreement, by lease [*s. 59(3)(d)*]. The disposition may be in whole or in part [*s. 59(3)(c)*]. However, every aspect of the disposition must be "commercially reasonable" [*s. 65(3*)].

The timing of the disposition is at the discretion of the secured party [*s. 59(5)*], subject to the appropriate notices being given [*s. 59(6)*] (on this point, see, for example, *Mercedes-Benz Financial Services Canada Corporation v. 1063995 B.C. Ltd*., (2018) B.C. at paras. 38-44), the mandatory disposition of consumer goods for which 60 percent of the purchase price has been paid [*s. 61(1)*], and the general requirement of proceeding in a commercially reasonable manner [*s. 65(3)*].

The secured party may purchase the collateral or any part thereof only at a public sale and for a price that bears a reasonable relationship to the fair market value of the collateral [*s. 59(13)*]. There is no definition of "public sale" in the PPSA, although *section 59(3)(b)* indicates it would include a public auction or closed tender. It is reasonable to assume that a public sale is a sale where everyone must be allowed to be present and make an offer.

Where there is a transfer of collateral by a secured party to a person liable to the secured party under a guarantee, endorsement, covenant or repurchase agreement, or such a person is subrogated to the rights of the secured party (for example, by a guarantor paying the debt), then the transfer is not a disposition of collateral [*s. 59(16)*].

ii. Notice

Section 59(6) of the PPSA requires the secured party to provide a notice of disposition to various parties not less than 20 days before disposition of the collateral. The giving of the notice is to allow parties with an interest in the collateral (the debtor, a creditor, a subordinate secured party) a period of time to determine if they wish to protect their interests by redeeming the collateral or reinstating the agreement. In order to make a reasoned decision, those parties must not only receive notice, but the notice must set out the necessary information to allow a reasoned decision to be made, and they must be given a period of time within which to make the decision. The period of time is the 20 days specified at section 59(6). The required contents of the notice are listed at *section 59(7)*.

The parties to receive the notice are:

- the debtor or any other person who is known by the secured party to be an owner of the collateral. For this purpose a debtor includes a guarantor of the obligation secured because the guarantor has an interest in the possible redemption of collateral, or in reviewing all aspects of the sale, to minimize the amount of the guarantor's obligation:
  - *Donnelly v. International Harvester* (1983) Ont.;
  - *Moskun v. Toronto-Dominion Bank* (1985) Ont.;
  - *Bank of Montreal v. Featherstone,* (Ont. C.A.), 1989 CanLII 4218 (ON CA);
  - *CIBC v. Moshi* (1989) Ont.;
  - *Bank of Nova Scotia v. Antoine,* 1998 CanLII 14918 (ON SC).
- a creditor or a person with a security interest in the collateral whose security interest is subordinate to that of the secured party who at or

before the giving of the notice of disposition has registered a financing statement according to the name of the debtor or according to the serial number of the collateral in the case of goods of a kind prescribed as serial numbered goods, or whose security interest was perfected by possession at the time the secured party seized or repossessed the collateral; and

- any other person with an interest in the collateral who has given a written notice to the secured party of that person's interest in the collateral before the date that the notice of disposition is given to the debtor.

The following is the required content of the notice [*s. 59(7)*]:

- a description of the collateral;
- the amount required to satisfy the obligation secured by the security interest;
- the sum in arrears, exclusive of the operation of an acceleration clause in the security agreement, and a brief description of any other default and the provision of the security agreement the breach of which resulted in the default;
- the amount of the applicable expenses referred to in *section 59(2)(a)* or, where the amount of expenses has not been determined, a reasonable estimate;
- a statement that on payment of the obligations secured and applicable expenses, any person entitled to receive the notice may redeem the collateral;
- a statement that on payment of the sums in arrears exclusive of the operation of any acceleration clause in the security agreement, and on the curing of any other default together with payment of the applicable expenses referred to in *section 59(2)(a),* the debtor may reinstate the security agreement;
- a statement that, unless the collateral is redeemed or the security agreement is reinstated, the collateral will be disposed of and the debtor may be liable for a deficiency; and
- the date, time and place of any sale by public auction, or the place to which closed tenders may be delivered and the date after which closed tenders will not be accepted, or the date after which any private disposition of the collateral is to be made.

The obligation to give a notice also applies to a receiver, and the requirement to give that notice and the contents of that notice from a receiver are outlined in *section 59(10)* and *(11)*.

There are a number of situations where a notice, or the wait until 20 days has passed after giving the notice, will not be required [*s. 59(17)*]. They include situations where:

- the collateral is perishable;
- the secured party believes on reasonable grounds that the extent to which the debtor's obligation is secured at the time of default will diminish if the collateral is not disposed of immediately after default either because the collateral will decline substantially in value or for any other reason;
- the cost of care and storage of the collateral is disproportionately large relative to its value;
- the collateral is a security or instrument that is to be disposed of by sale on an organized market that handles large volumes of transactions between many sellers and many buyers;
- the collateral is foreign currency;
- for any other reason, the court is satisfied that a notice is not required;
- after default, each person entitled to receive a notice of disposition consents in writing to the disposition of the collateral without compliance with the notice requirements; and
- if the transaction is governed by *The Consumer Protection Act* (Manitoba), the notice of seizure is given by the secured party under that Act [*s. 59(18)*].

iii. Rights of Purchaser

Section 59(14) of the PPSA provides that a purchaser acquiring from a secured party disposing of collateral will acquire the collateral free from the interests of the debtor, an interest subordinate to that of the debtor and an interest subordinate to that of the secured party. In order for that protection to be available to the purchaser it is necessary that the purchaser acquire the interest for value and in good faith, and to take possession of the collateral. There is some question as to the applicability (or execution, if it applies) of this last requirement with respect to certain types of collateral that are not generally considered to be susceptible to "possession" in the traditional sense. However, the resolution of this issue is beyond the scope of this introduction. Nonetheless, both lawyers and students should be aware of this issue if they are forced to confront section 59(14).

The protection is available to the purchaser whether or not all of the requirements of *section 59* dealing with the disposition have been complied with by the secured party [*Gray v. Mitran,* 1997 CanLII 2292 (BC CA)]. Of course, if there has been some collusion between the secured party and the purchaser in not satisfying the requirements of section 59, then the purchaser may be viewed as not acquiring the property in "good faith," and the purchaser would still be subject to the interests of the debtor, interests subordinate to that of the debtor, and interests subordinate to that of the secured party.

A purchaser is not protected from the claim of a secured party having priority over the secured party disposing of the collateral unless, under *section 28(1)(a)*, the prior secured party impliedly or expressly authorizes the sale. If section 28(1) applies to cause the prior secured party's interest to be lost in the collateral, that prior secured party's perfected security interest will continue in the proceeds of the sale [*s. 28(1)(b)*]. If paragraph 28(1)(a) does not apply, generally, the original secured party will continue to have its priority position. If the secured party neither knew about the transfer nor intended to permit it, the transfer will not be authorized [*TD Auto Finance (Canada) Inc v. Yan* 2015 ABCA 114 (CanLII)]. The provisions of *section 51* do not apply when dealing with a disposition by a secured party because section 51 is limited to a transfer of collateral by the debtor.

iv. Use of Proceeds and Surplus

The proceeds of disposition received by a secured party are to be applied in the following order [per *s. 60*]:

- To the reasonable expenses of seizing, repossessing, holding, repairing, processing or preparing for disposition, and disposing of the collateral and any other reasonable expenses incurred by the secured party [*s. 59(2)(a)*]. It has been found that the types of expenses covered by this provision are those that deal with enforcement, and do not apply to the expenses of protecting an investment [*MacDougall & Son Transport Ltd. v. Continental Bank of Canada* (1983) Ont.; *Chancery Equipment Leasing Services Inc. v. Henry,* 1994 CanLII 4784 (SKQB)].

- The satisfaction of the obligations secured by the security interest of the secured party making the disposition [*s. 59(2)(b)*]. If there are expenses that do not fit within the above noted provision, a properly worded security agreement may include those expenses as obligations secured by the security interest.

- Any surplus is to be distributed to a person who has a subordinate security interest in the collateral, and then to any other person with an interest in the surplus if that person has given a written notice thereof to the secured party before the distribution of the surplus, and lastly to

the debtor or any other person who is known by the secured party to be an owner of the collateral [*s. 60*].

The order outlined in *section 60* will not apply if the surplus is to be distributed in some other order by a relevant law (including the PPSA) requiring the distribution to be in some other order, or if all the interested parties agree to a distribution other than in the order outlined in section 60. Where there is any question as to who is entitled to receive the surplus, a secured party holding the surplus may pay the surplus into court, after which the surplus is not to be paid out except on application to the court under section 66 by a person claiming an entitlement to it [*s. 60(4*)].

The parties entitled to payment of any surplus are also entitled to make a written demand for an accounting by the secured party regarding the disposition [*s. 60(3)*]. The secured party is required to provide a written accounting not later than 30 days after receipt of the written demand. The accounting is to set out the amount received or collected on the disposition, the manner in which collateral was disposed of, the amount of expenses, the distribution of the amount received and the amount of any surplus.

v. Action for Deficiency

Section 60(5) of the PPSA indicates that the debtor is liable to pay to the secured party any deficiency that may result from the disposition of collateral; however, the liability of the debtor is subject to the provisions of the PPSA or any other statute that may limit the claim to a deficiency. The ability to claim for a deficiency may also be excluded by an agreement between the secured party and the debtor.

Text writers dealing with the First and Second Generation PPSAs expressed doubts as to whether those PPSAs gave any rights to sue for a deficiency, and those doubts were supported by a number of Ontario cases:

- *George O. Hill Supply Ltd. v. Little Norway Ski Resorts Ltd.* (1980);
- *Royal Bank of Canada v. J. Segreto Construction Ltd.* (Ont. C.A.), 1988 CanLII 4718 (ON CA);
- *CIBC v. Cassidy* (1989);
- *CIBC v. Moshi* (1989);
- *Bank of Montreal v. Featherstone,* (Ont. C.A.), 1989 CanLII 4218 (ON CA)].

As a result of the views expressed by the text writers and the Ontario cases, the Third Generation PPSAs (including the PPSA) include a specific reference in *section 60(5)* to the debtor being liable to pay to the secured party any deficiency.

An issue relating to the ability of a secured party to claim a deficiency relates to the consequences of the secured party not complying with all of the requirements of the PPSA relating to a disposition (for example, not providing a proper notice of disposition). The cases have been split on how to deal with the consequences of non-compliance with the PPSA requirements. There are several Ontario decisions that the secured party will not be allowed to claim for a deficiency if the secured party has not complied with the PPSA requirements on disposition of collateral:

- *Ford Motor Credit of Canada Ltd. v. Preuschoff* (1983) Ont.;
- *Donnelly v. International Harvester* (1983) Ont.;
- *Royal Bank of Canada v. J. Segreto Construction Ltd.* (Ont. C.A.), 1988 CanLII 4718 (ON CA);
- *CIBC v. Cassidy* (1989) Ont.;
- *Harvey Hubbell Canada Inc. v. Thornhurst Corp.* (1989) Ont.

There is another body of cases that allow a claim for a deficiency, but make it subject to a counterclaim or set-off for any damage suffered by virtue of the non-compliance by the secured party with the requirements of the PPSA regarding disposition of collateral:

- *Canadian Permanent Trust Co. v. Thomas* (1983) Sask.;
- *Moskun v. Toronto-Dominion Bank* (1985) Ont.;
- *National Bank of Canada v. Lasalle Excavating of Sudbury Ltd.* (1986) Ont.;
- *Bank of Nova Scotia v. McIvor,* 1986 CanLII 2598 (ON SC);
- *Canstar Trucking Ltd. v. Bank of Nova Scotia*, 1986 CanLII 3560 (SK QB);
- *CIBC v. Moshi* (1989) Ont.;
- *Bank of Montreal v. Featherstone,* (Ont. C.A.) 1989 CanLII 4218 (ON CA);
- *Triathlon Leasing v. Nustar* (1995) B.C.;
- *GMAC v. Cardinali* (1999) Ont.

The PPSA has dealt with this issue in *section 65(8)*, which recognizes that in any action for a deficiency the debtor may raise as a defence the failure on the part of the secured party to comply with certain provisions of the PPSA, but goes on to indicate that non-compliance will limit the right of the secured party to the deficiency only to the extent that it affects the right of the debtor to protect the debtor's interest in the collateral or makes the accurate determination of the deficiency impracticable. The realization must not be done on an improvident basis, meaning that the debtor (or guarantor) must show that the

secured party did not ensure that the amount of recovery achieved on the sale of the collateral was commercially reasonable, based on industry norms. See, *Canadian Western Bank Leasing Inc. v. SSC Ventures (No. 98) Ltd.*, 2016 BCSC 223 (CanLII) (in which it is significant to note that the court observed that the debtor and the guarantor did not present any evidence that the disposition was on a commercially unreasonable basis) and *HSBC Bank Canada v. Kupritz,* 2011 BCSC 788 (CanLII).

For recent cases on issues around the recovery of a deficiency and the notices required see *Bank of Montreal v. LeBlanc*, 2015 NSSM 47 (CanLII)*; VFS Canada Inc. v. Shas Tut Contracting Ltd.,* 2015 BCSC 2015 (CanLII). However, it is important to note that some of these provisions are different from the Manitoba equivalent, and therefore these cases should be approached with caution.

Generally, there is no duty on a secured party to delay realization on security simply because of its effects on the debtor, as long as the debtor is in default. See *Prince Edward/Lennox & Addington Community Futures Development Corporation v. Town Coffee Plus Inc., Smith and D'Souza,* 2015 ONSC 7887 (CanLII).

d) Retention of Collateral

An alternative to the secured party disposing of the collateral is the retention of the collateral in satisfaction of the obligations secured by it. In effect, the secured party is taking the collateral for its own use in replacement of the obligations secured by the collateral. This would be like a foreclosure of land subject to a real property mortgage where the mortgagee obtains title to the land but the obligation secured by the mortgage is extinguished. Of course, the secured party is not obligated to retain the collateral in satisfaction of the debt, and the secured party may wish to proceed with a disposition of the collateral as allowed by *section 59*.

It is not necessary for the secured party to first attempt to sell the collateral unless

(i) the collateral is consumer goods and
(ii) the debtor has paid at least 60 percent of the indebtedness secured and
(iii) has not signed, after default, a statement renouncing or modifying the debtor's rights under the PPSA [*s. 61(1)*].

If the transaction is a "time sale" or chattel mortgage governed by *The Consumer Protection Act* (Manitoba), section 55(6) of that Act allows retention only if the secured party is unable to sell the goods at a price sufficient to satisfy the balance owing and expenses.

If a secured party proposes to retain the collateral in satisfaction of the obligation, it is required to give notice to the following persons [*s. 61(2)*]:

- the debtor or any person who is known by the secured party to be an owner of the collateral. Note that this would not necessarily include a guarantor of the debtor as the retention only affects the collateral and does not adversely affect the guarantor's interests;
- a creditor or person with a security interest in the collateral whose interest is subordinate to that of the secured party;
- any other person with an interest in the collateral who has given written notice to the secured party of that interest.

Unlike *section 59* dealing with a disposition of collateral, the provisions of *section 61* do not outline what should be set out in the secured party's notice of intention to retain. In *Angelkovski v. Trans-Can. Foods Ltd.,* 1986 CanLII 4794 (MB QB), it was found that the notice must be in clear and precise terms so that the recipient knows that the secured party is intending to retain the collateral in satisfaction of the obligation secured. [See also *Casse v. Creditfinance Securities Ltd.* (1999) Ont., but contrast to *Yuan v. Mah Investments Ltd.,* 2001 SKQB 108 (CanLII)]. Simply informing the other party of an intention to rely on the section is insufficient. Clear language of a proposal to retain is required [*Witch's Glen Gold Inc.,* 2015 NSSC 93 (CanLII)].

It is not likely that the right of retention of collateral by the secured party will be used unless the secured party is fairly certain that the value of the collateral is equal to or exceeds the obligation secured. In order to protect the equity that is in the collateral for the benefit of the debtor and other parties, those parties entitled to notice under *section 61* may give to the secured party a notice of objection not later than 15 days after receiving the secured party's notice of intention to retain [*s. 61(3)*]. Where one individual controls a secured party and the debtor, and purports to assign part of the collateral to a third party in times of financial difficulty of the debtor, there is jurisprudence that suggests that notice may also be required. See *Hutchingame Growth Capital Corporation v. Independent Electricity System Operator* (2019) Ont. at para. 50. Upon receipt of the notice of objection, the secured party must dispose of the collateral in accordance with *section 59*.

The person making the notice of objection must be a person whose interest in the collateral would be adversely affected by the secured party's proposal to retain the collateral [*s. 61(3)*]. The secured party may request that any person (other than the debtor) that gives a notice of objection, furnish proof of that person's interest. If that person does not furnish proof within 10 days after the secured party's request, the secured party may then proceed as if no notice of objection had been received from that person [*s. 61(6)*]. Even if the person furnishes proof, the secured party may make an application to court [*s. 61(7)*] for an order that the objection is ineffective on the basis that the person made the objection for a purpose other than the protection of an interest in the collateral or proceeds of a disposition of collateral, or the fair market value of the collateral is less than the total amount owing to the secured party and the costs of disposition.

If there is no notice of objection, on the expiry of the 15-day period following the secured party's giving of the notice of intention to retain, the secured party is deemed to irrevocably elect to take the collateral in satisfaction of the obligation secured by it [*s. 61(4)*]. A consequence of this provision is that once the secured party starts the process by giving the notice of intention to retain, it cannot change its mind and seek to proceed with a disposition under *section 59* unless there is a notice of objection.

The secured party that obtains the collateral in satisfaction of the obligation secured is entitled to hold or dispose of the collateral free from all rights and interests of the debtor or any person entitled to receive notice under *section 61*, and all obligations secured to the secured party and those parties are deemed performed [*s. 61(4)*]. The secured party could then dispose or otherwise deal with the collateral without satisfying the provisions of *section 59*, and a purchaser for value in good faith who takes possession of the collateral would acquire the collateral free from the interests of the debtor, any interests subordinate to that of the debtor and any interests subordinate to that of the secured party whether or not the requirements of section 61 have been complied with by the secured party [*s. 61(8)*].

However, where it is ambiguous whether the secured party was intending to retain the collateral in full satisfaction of the obligation, the Court has the ability to deny that the secured party was implicitly asserting a right to retain. [*Edmonton Kenworth Ltd v. Kos,* 2018 ABQB 439 (CanLII) at paras. 32-38].

e) Rights of Redemption and Reinstatement

Section 62 of the PPSA contains two very significant rights available to the debtor and one right available to others: the right of redemption and the debtor's right to reinstatement. The right of redemption deals with obtaining the collateral from the secured party upon payment of all of the obligations secured by the secured party. The right of reinstatement involves returning the secured party and the debtor to the same positions they were in prior to the default that caused the secured party to seize the collateral, thus involving the secured party in returning the collateral to the debtor and the contractual terms between the secured party and the debtor continuing in place as if there had been no default. The rights of redemption and reinstatement exist at any time before the secured party or a receiver disposes of the collateral or has contracted for disposition under *section 59*, or before the secured party is deemed to irrevocably elect to retain the collateral under *section 61*.

The parties entitled to proceed with a redemption are different from the party that may proceed with a reinstatement. Any person entitled to receive notice of disposition under *section 59* may redeem the collateral by tendering fulfillment of the obligations secured by the collateral. Those parties may waive the right of redemption in writing after default [*s. 62(1)(a)*]. The only party entitled to the right of reinstatement is the debtor (not including a guarantor), and the debtor may waive this right in writing after default [*s. 62(1)(b)*].

In order to have a reinstatement, the debtor must pay the sums in arrears, exclusive of the operation of an acceleration clause in the security agreement, and must cure any other default by reason of which the secured party intends to dispose of the collateral. In situations where the obligation secured is a demand loan the payment of the amount in arrears would be the full amount owing. Therefore, the right of reinstatement is effectively not available for demand loan obligations. A party that is proceeding to redeem the collateral or reinstate the security agreement must also pay a sum equal to the reasonable expenses incurred by the secured party or receiver in seizing, repossessing, holding, repairing, processing and preparing the collateral for disposition or otherwise in enforcing the security agreement [*s. 62(1)*].

In order to avoid an abuse of the right of reinstatement by a debtor, the PPSA limits the debtor's entitlement to reinstate a security agreement to occurring not more than twice in each year [*s. 62(2)*].

f) Court Orders

Part 6 of the PPSA has several provisions giving the Manitoba Court of Queen's Bench authority in many matters that affect the enforcement rights of the secured party and the protection available to the debtor and others. These powers are more significant than the powers set out in the Old Manitoba PPSA, and are similar to the powers given to courts by all the other PPSAs.

The broadest power in Part 6 is found in *section 63*, where the court is given the power to supervise compliance with all the provisions of Part 6, as well as the provisions of *section 17* respecting the secured party's duties when in possession of the collateral, *section 36* respecting fixtures, *section 37* respecting crops and *section 38* respecting accessions. The powers of the court are extensive as set out at *section 63(2),* and include:

- making orders, including binding declarations of rights and injunctive relief, to ensure compliance [*CIBC v. Northland Trucks* (1985) Sask.; *Royal Bank of Canada v. Casselman PHBC Ltd.*, 2017 ONSC 4107 (CanLII) at para. 13;
- giving directions to any person regarding the exercise of rights or the discharge of obligations [*Polar Bear Water Distiller v. 590863* (2001) Alta.];
- relieving a person from compliance, but only on terms that are just and reasonable for all persons affected [*Citibank Canada v. Chase Manhattan Bank of Canada* (1991) Ont.];
- staying enforcement of rights:
    - *General Motors Acceptance Corp. of Canada v. Kennedy,* 1993 CanLII 8788 (SK QB)*;*
    - *Holnam West Materials Ltd. v. Canadian Concrete Products Ltd.,* 1994 CanLII 9027 (AB QB)*;*

- *Morris Industries Ltd. v. Remeshylo Farm Equipment (1988) Ltd.,* 1995 CanLII 5907 (SK QB);
- *CTF Holdings Ltd. v. Flint Motors Ltd.,* 1995 CanLII 2943 (BC SC)*;*
- *Fitzpatrick v. Brown,* 2000 SKQB 188 (CanLII)*;*

- ordering third parties (such as landlords) to allow access to the collateral [*Equirex Leasing Corp. v. Medcap Real Estate Holdings Inc.*, 2018 ONSC 3284 (CanLII); appeal dismissed *Equirex Leasing Corp. v. Medcap Real Estate Holdings Inc.*, 2019 ONCA 152 (CanLII)]. Failure of a third party to return the collateral to the secured party (on default by the debtor) may lead to a successful action in conversion at common law against the new holder of the collateral [*BMW Canada Inc. (Alphera Financial Services Canada) v. Mirzai*, 2018 ONSC 180 (CanLII)].
- making any order necessary to ensure protection of the collateral.

The parties entitled to make application under *section 63* are the debtor, a creditor of the debtor, a sheriff [*Can. Life Assurance Co. v. Kupka* (1991) Alta.] or any person with an interest in the collateral [*Henry Weiner Ltd. v. Royal Bank of Canada* (1986) Ont.; *Asklepeion Restaurants Ltd. v. 791259 Ont. Ltd.* (1996) Ont.]. The provisions of section 63 are applicable against receivers, and *section 64(7)* grants additional powers to the court relating to receivers.

Section 66 sets out an easier mechanism than existed under the Old Manitoba PPSA to obtain court assistance in dealing with priority and other disputes. Under the PPSA any interested party may apply to the court for an order determining questions of priority or entitlement to collateral, or for the direction of an action to be brought or an issue to be tried.

Finally, *section 67* of the PPSA allows the court to extend or abridge, conditionally or otherwise, the time for compliance with certain requirements under the PPSA. The application can be made before or after the time period in question has expired, and there is no stated limitation as to who can make the application. The time periods that may be extended or abridged are:

- the delivery to the debtor of a copy of the security agreement within 10 days after the security agreement is executed [*s. 11*];
- the giving of at least 15-day notice of the secured party's intention to remove fixtures or crops from land or the removal of an accession [*s. 36(14)* and *s. 38(13)*];
- the delivery to the debtor of a copy of the financing statement or confirmation of a financing statement filing within 20 days of registration [*s. 43(13)*];
- any time limit in Part 6 [*Corporate Insurance Brokers v. Marpole Properties*, 1995 CanLII 358 (BC SC)].

By the PPSA limiting the application of *section 67* to the time periods in these provisions, the court has no ability to abridge or extend any time period set forth in any other provisions of the PPSA (for example, the time periods in the conflict of laws sections, temporary perfection periods or PMSI time periods).

g) Receivers

If the secured party wants the right to appoint a receiver, then such a right must be given in the security agreement [*s. 64(1)*]. Otherwise, the ability of the secured party to have a receiver appointed will be no different than any other interested party applying to the court for an appointment of a receiver [*s. 64(7)*].

A receiver privately appointed by a secured party pursuant to the terms of the security agreement or a court appointed receiver will be subject to various controls contained in the PPSA and other statutes. A receiver will be subject to almost all the provisions of Part 6 of the PPSA, the only exceptions being [as a consequence of *s. 59(1)*]:

- *Subsections 59(3)* and *(4)* respecting the manner of disposition of collateral and the deferral of the payment for the collateral. This is in recognition of the fact that most receivers will be active in carrying on the business of the debtor and will be disposing of the collateral in the ordinary course of business; however, any disposition of the collateral outside the ordinary course of business must be done by the receiver in compliance with the Part 6 provisions unless the court orders otherwise [*s. 64(9)*].
- *Subsections 59(6) through (9)* respecting the giving of notices of disposition by the secured party. This is because there are special notice requirements on the receiver set out in *subsections 59(10)* and *(11)*. *Section 64(9)* would seem to indicate that such notices are not required when the receiver disposes of the collateral in the ordinary course of the business being operated by it, and this makes commercial sense.

A receiver will also be subject to the duties outlined in *section 64(2),* and will have to provide certain persons access to records of all receipts, expenditures and transactions involving the collateral or other property of the debtor and copies of financial statements and final accounts that the receiver is required to prepare [*ss. 64(3)* and *(4)*].

The PPSA grants to a court certain authority over receivers [*ss. 64(7)* and *(8)*]. The court may: remove, replace or discharge a receiver; give directions on any matter relating to the receivership; approve the accounts and fix the remuneration of the receiver; order the receiver or the secured party appointing the receiver to make good any default in the receiver's custody, management or disposition of the collateral; or relieve the receiver or secured party from any default. The PPSA also gives the court the catch-all authority to exercise the same authority over a privately appointed receiver that the court has over receivers appointed by the court or that it generally has over receivers.

h) Good Faith and Commercially Reasonable

All the rights, duties and obligations arising under a security agreement, the PPSA or any other applicable law are required to be exercised or discharged in good faith and in a commercially reasonable manner [*s. 65(3)*]. The consequence of a secured party not exercising or discharging duties and obligations in good faith or in a commercially reasonable manner is to subject the secured party to the claim for damages allowed by the PPSA [*ss. 65(5) through (10*)] or by any other statute, or allowed by the security agreement or at common law. The damages may involve a reduction in the amount of a deficiency that could be claimed by the secured party against a debtor, or a judgment against the secured party by a party other than the debtor to whom the duty or obligation was owed by the secured party.

The concepts of good faith and commercially reasonable are two distinct requirements. The standard of "good faith" is subjective: it is based on whether the person subject to a right, duty or obligation acted with an honest intention, and not what a "reasonable" person would have done. The knowledge by a person of another person's interest is not enough to establish that a person acted in bad faith [*s. 65(4)* and *CIBC v. A. K. Construction* (1995) Alta.]. The existence of this good faith requirement will allow the courts to avoid the "code" of priority and protections set out in the PPSA if the party given priority or protection by that code has acted in bad faith [*Bank of Nova Scotia v. Royal Bank*, 1998 CanLII 1599 (BC SC)].

The subjective duty to act in good faith should be contrasted to the requirement to exercise or discharge rights, duties and obligations in a commercially reasonable manner, which is an objective test. As stated by McLaren in *Secured Transactions in Personal Property in Canada* (3d ed.), Volume 3, Chapter 9, §9.02[1], the determination of whether a person's conduct was commercially reasonable will be based on "the actions of the reasonably prudent business person in similar circumstances." The similar circumstances would include matters such as the time of year, the location, nature, quantity and condition of the collateral, and prevailing market conditions. The determination of what constitutes commercially reasonable actions will be a question of fact to be determined in each case by the courts. In cases dealing with the secured party's disposition of collateral, a general principle appears to be developing that the commercially reasonable test is that the secured party must take reasonable care that the proper value of the collateral is obtained [*Copp v. Medi-Dent Service* (1990) Ont.; *GMAC v. Cardinali* (1999) Ont.] and that the duty is not to actually obtain the best possible price but rather to do everything reasonable to get the best possible price [*Greyvest Leasing Inc. v. Merkur* (1994) Ont.]. However, there is jurisprudence to suggest that if the security agreement is sufficiently clear, the duty of commercial reasonableness does not apply to guarantors. See *Toronto-Dominion Bank v. 1737929 Ontario Inc. (c.o.b. as "Florida Fitness"),* 2011 ONSC 5528 (CanLII) and *Agriculture Financial Services Corporation v. Luthra*, 2017 ABQB 403 (CanLII). There is also jurisprudence to the contrary. See *Canadian Western Bank Leasing Inc. v. Blue Hill Excavating Inc.,* 2018 SKQB 173 (CanLII) at paras. 15-22. An appeal from this decision

was dismissed. See *Canadian Western Bank Leasing Inc. v. Blue Hill Excavating Inc.,* (2019) Sask. C.A. How a Manitoba court would resolve this debate is unclear.

However, courts will generally enforce guarantees in accordance with their terms. See *Hawrish v. Bank of Montreal*, 1969 CanLII 2 (SCC), [1969] SCR 515 (not a PPSA case). This is true even where the alleged guarantors claim material change to the primary debtor, or that the obligations of the primary debtor that were in existence at the time of the signing of the guarantee had all been discharged and later obligations (without mentioning the guarantee) were entered into. See *Edmonton Kenworth Ltd v. Kos*, 2018 ABQB 439 (CanLII) at paras. 48-78. Nonetheless, the same case holds that summary judgment should not generally be granted on a guarantee before the deficiency of the primary debtor on the debt is known. On the facts of the case, this is due at least in part to the fact that the primary debtor may challenge the commercial reasonableness of the delay in realization (at paras. 79-84).

Also, there is direct jurisprudence that suggests that summary judgment should be available as against a guarantor where the court finds that it can reject a claim of improvident realization without the need for a trial. See *Canadian Western Bank Leasing Inc. v. Blue Hill Excavating Inc.*, (2018) Sask. at para. 38. An appeal from this decision was dismissed. See *Canadian Western Bank Leasing Inc. v. Blue Hill Excavating Inc.,* (2019) Sask. C.A.

Commercial reasonableness should be judged at the time that the secured party was acting and based on the information reasonably available to the secured party, based on the testimony of experts in most cases. Commercial reasonableness should not be judged with hindsight bias. See *Canadian Western Bank v. Quigley*, 2019 BCSC 1020 (CanLII).

Some other cases dealing with the "commercially reasonable" concept are:

- *Donnelly v. International Harvester Credit Corp.* (1983) Ont.;
- *Royal Bank of Canada v. Michaels* (1983) Man.;
- *Re Station de L'Eleveur St-Redempteur* (1984) Ont.;
- *Bank of Montreal v. Judges* (1991) Ont.;
- *Doran v. Hare* (1994) Ont.;
- *Coward v. Rich* (1995) Ont.

A brief word is needed here with respect to the concept of "marshalling." Though drawn from the law of property, it is applicable to the PPSA. Where one secured party has a right to Asset A and Asset B, and a second secured party has a right only to Asset B, and a debtor defaults with respect to both, the first secured party must realize on Asset A before Asset B, in order to leave as much value as possible for the second secured party. However, this does not allow the second secured party to force the first secured party to realize on its security in order to discover whether there is any

residual value for the second secured party [*Holnam West Materials Ltd. v. Canadian Concrete Products Ltd.*,1994 CanLII 9027 (AB QB)]. In other words, marshalling is about the order of enforcement by the secured creditor with priority, not whether the secured creditor with priority *must* enforce.

i) Damages for Secured Party Failure

Subsections 65(5) through (10) of the PPSA create a general remedy to obtain damages from a person who fails to discharge any duty or obligation under the PPSA. These provisions are in addition to, and not in substitution for, any remedy that the parties may have under the common law [*Osman Auction Inc. v. Murray*, 1994 CanLII 8911 (AB QB)], or that they have contracted for in the security agreement, or that they have under any other statute. *Subsection 65(10)* makes void any attempt to limit the liability of, or the amount of damages recoverable from, a person who fails to discharge a duty or obligation imposed by the PPSA.

The liability of the secured party will be for the loss or damage that was reasonably foreseeable as likely to result from the failure to discharge the duty or obligations. The damages may include punitive damages [*Loewen v. Superior Acceptance Corp.*, 1997 CanLII 2062 (BC SC)]. In addition, the PPSA sets out in *subsections 65(6)* and *(7)* that a level of deemed damages (set out in the regulations as $200) will arise where there is a failure to comply with the following obligations:

- delivery to the debtor of a copy of the financing statement or the confirmation of the financing statement filing within 20 days after the filing [*s. 43(13)*];
- the giving of amendments or discharges under *sections 49* and *50*;
- where the collateral is consumer goods, the provisions of *section 17* respecting the secured party's obligations when in possession of collateral, *section 18* respecting the secured party's obligations to provide information, *section 59* respecting the disposition of collateral, *section 60* respecting the use of surplus funds received from the disposition and accounting for the proceeds, and *section 61* respecting the retention of collateral by the secured party.

Although non-compliance with the requirements of the PPSA by the secured party will not affect the ability of the secured party to bring action for a deficiency, *section 65(8)* allows the debtor to raise the non-compliance as a defence that would limit the right to the deficiency to the extent that the non-compliance by the secured party affected the debtor's rights to protect the debtor's interest in the collateral or to make the accurate determination of the deficiency impracticable. The onus will be on the secured party to show that the non-compliance did not make the accurate determination of the deficiency impracticable or, where the collateral is consumer goods, did not affect the debtor's ability to protect the debtor's interest in the collateral [*s. 65(9)*].

I. PRECEDENTS

1. Security Agreement

SECURITY AGREEMENT

THIS AGREEMENT made as of the day of , 201 .

FROM

(herein called the "Debtor")

- TO -

(herein called the "Secured Party")

WHEREAS the Debtor has agreed to grant to the Secured Party a security interest in the assets of the Debtor described herein;

NOW THEREFORE, for good and valuable consideration (the receipt and sufficiency of which is hereby acknowledged by the Debtor), the Debtor hereby agrees as follows:

ARTICLE 1 - DEFINITIONS

1.01 Definitions. In this Agreement, the following terms shall have the following meanings:

(a) "Act" means *The Personal Property Security Act* (Manitoba), as amended from time to time.

(b) "Agreement" means this Security Agreement and any and all amendments thereto.

(c) "Collateral" means all of the assets of the Debtor subject to the security interest herein created as described in Section 3.01 hereof, and includes "Collateral" of any successors to the Debtor as provided in Section 18.02 hereof.

(d) "Debtor" means , and any successor to the Debtor, including any successors formed by amalgamation of the Debtor with any other corporation or corporations.

(e) "Event of Default" means each of the events listed in Section 8.01 hereof.

(f) "Expenses" means all reasonable expenses incurred by the Secured Party in the preparation and perfection of this Agreement (including solicitor's fees and disbursements), any expense incurred by the Secured Party (including legal, accounting and Receiver fees) in protecting, seizing, collecting, realizing, borrowing on the security of, selling or obtaining payment of the Collateral or any part thereof or any other enforcement of the Secured Party's rights hereunder, all other expenses referred to in this Agreement, any expenses incurred by the Secured Party pursuant to any action under the *Bankruptcy and Insolvency Act* (Canada) and all the remuneration of any Receiver appointed hereunder or under the *Bankruptcy and Insolvency Act* (Canada).

(g) "Guarantor" means any guarantor or surety for the Debtor.

(h) "Hazardous Materials" means any oil, flammable substances, explosives, radioactive materials, hazardous wastes or substances, corrosive wastes or substances, asbestos, urea formaldehyde foam insulation, toxic wastes or substances, or other wastes, materials or pollutants of any kind which pose a hazard to the Debtor's operations or places of business or where the storage, manufacture, disposal, treatment, generation, use, handling, transport, remediation or release into the environment is prohibited, controlled or licensed under any Hazardous Materials Laws.

(i) "Hazardous Materials Laws" means any federal, provincial or municipal laws, bylaws, rules, ordinances, regulations, notices, approvals, orders, permits, standards, guidelines or policies relating to the environment, health, safety or any Hazardous Materials.

(j) "Obligations" means all obligations, indebtedness and liabilities of the Debtor to the Secured Party whether incurred prior to, at the time of or subsequent to the execution hereof, including extensions or renewals, and all other liabilities of the Debtor to the Secured Party, direct or indirect, wherever and however incurred and any ultimate unpaid balance thereof, including Expenses, future advances to the Debtor under fixed or revolving credits established from time to time, letters of credit (whether or not drawn upon) issued by the Secured Party with respect to the Debtor, and the obligation and liability of the Debtor under any contract or guarantee now or hereafter in existence whereby the Debtor guarantees payment of the debts, liabilities and obligations of a third party to the Secured Party.

(k) "Receivables" means all debts, accounts, claims, money and choses in action now or hereafter due or owing to or owned by the Debtor; all securities, mortgages, bills, notes and other documents now held or owned, or which may be hereafter taken, held or owned, by or on behalf of the Debtor, in respect of the debts, accounts, claims, money and choses in action or any part thereof; and all books, documents and papers recording, evidencing or relating to the debts, accounts, claims, money and choses in action or any part thereof.

(l) "Receiver" means a receiver or a manager or a receiver-manager appointed by the Secured Party pursuant to Section 9.01 hereof.

(m) "Secured Party" means , and any successor to, or assignee or transferee of, the Secured Party.

(n) "Securities" has the same meaning as "security" set out in the Act, and also includes shares, share rights, share capital or securities of any type.

1.02 PPSA Terms. Unless otherwise specifically limited in this Agreement, the terms "account", "chattel paper", "equipment", "fixture", "goods", "instrument", "intangible", "inventory", "investment property", "money", "personal property", "proceeds", "purchase money security interest" and "value" whenever used herein shall have their respective meanings as set out in the Act, and "serial numbered goods" whenever used herein shall have the meaning as set out in any regulations to the Act.

ARTICLE 2 - CREATION OF SECURITY INTEREST

2.01 Grant of Security. The Debtor hereby grants to the Secured Party a continuing security interest in the Collateral.

2.02 General and Continuing Security. The security interest granted hereby is intended to be a general and continuing security for the payment and performance of all Obligations.

ARTICLE 3 - COLLATERAL

3.01 Collateral. The assets subject to the security interest created herein are all the Debtor's undertaking and all its business, property and assets of whatever nature and kind and wherever situated, both present and future, including the serial numbered goods described in Schedule "A" hereto and all accessories installed in or affixed or attached or appertaining to any of the foregoing or any property added to Schedule "A" as agreed between the parties hereto, and also including all proceeds relating to any such undertaking, business, property or assets; however, the Collateral shall not include the last day of any term of years reserved by any lease, verbal or written, or any agreement therefor now held or hereafter acquired by the Debtor but the Debtor shall stand possessed of the reversion remaining in the Debtor of any leasehold premises, for the time being demised, as aforesaid, upon trust to assign and dispose thereof as the Secured Party shall direct; and upon any sale of the leasehold premises, or any part thereof, the Secured Party for the purpose of vesting the aforesaid reversion of any such term or any renewal thereof and any purchaser or purchasers thereof shall be entitled by deed or writing to appoint such purchaser or purchasers or any other person or persons a new trustee or trustees of the aforesaid reversion of any such term or any renewal thereof in the place of the Debtor and divest the same accordingly in the new trustee or trustees so appointed freed and discharged from any obligations respecting the same.

[If not all assets are being taken as security, consider the following provision (with example descriptions) and edit accordingly]

3.01 Collateral. The assets subject to the security interest created herein are the following property and assets of the Debtor wherever situated, both present and future:

(a) Inventory: All inventory of whatever kind and wherever situated now owned or hereafter acquired or re-acquired by the Debtor including all goods, merchandise, raw materials, goods or work in process, finished goods and other tangible personal property held for sale, lease or resale or furnished or to be furnished under contracts for service or used or consumed in the business of the Debtor, together with the products and cash and non-cash proceeds thereof;

(b) Equipment: All tools, machinery, equipment, plant, furniture, chattels, fixtures, motor vehicles, parts and other tangible personal property now owned or hereafter acquired or re-acquired by the Debtor, or in which the Debtor has an interest, and all accessories installed in or affixed or attached or appertaining to any of the foregoing;

(c) Receivables: All Receivables;

(d) Intangibles: All intangible property, including all contract rights, chattel paper, goodwill, patents, trademarks, trade names, copyrights, shares, warrants, bonds, debentures, debenture stock, bills, notes, instruments, writings and other documents, intellectual or industrial property and choses in action now owned or hereafter acquired or re-acquired by the Debtor or in which the Debtor has an interest;

(e) Leaseholds, Real and Immovable Property: All real and immovable property, both freehold and leasehold, now owned or hereafter acquired by the Debtor, or in which it has an interest, together with all buildings, erections, improvements, fixtures, machinery and equipment situate thereon (whether the same form part of the real property or not), including any lease, verbal or written or any agreement therefor;

(f) Documents of Title: Any writing now or hereafter owned by the Debtor that purports to be issued by or addressed to a bailee and purports to cover such goods and chattels in the bailee's possession as are identified or fungible portions of an identified mass, whether such goods and chattels are inventory or equipment, and which writing is treated as establishing that the person in possession of such writing is entitled to receive, hold and dispose of the said writing and the goods and chattels it covers, and further, whether such writing is negotiable in form or otherwise, including bills of lading and warehouse receipts;

(g) Money: All money now or hereafter owned by the Debtor;

(h) Chattel Paper: All present and future chattel paper held by the Debtor;

(i) Instruments: All present and future instruments held by the Debtor;

(j) Investment Property: All present and future investment property held by the Debtor;

(k) Scheduled Property: All property specifically described in Schedule "A" hereto and all accessories installed in or affixed or attached or appertaining to any of the foregoing or any property added to Schedule "A" as agreed between the parties hereto;

(l) Documents: All documents, including, without limitation, all books, invoices, letters, papers and other records, in any form evidencing or relating to any of the foregoing; and

(m) Proceeds: All proceeds relating to any of the foregoing;

(n) Investment Property: "Investment property" of the Debtor, as that term is defined under *The Personal Property Security Act* (Manitoba) as amended from time to time.

however, the Collateral shall not include the last day of any term of years reserved by any lease, verbal or written, or any agreement therefor now held or hereafter acquired by the Debtor but the Debtor shall stand possessed of the reversion remaining in the Debtor of any leasehold premises, for the time being demised, as aforesaid, upon trust to assign and dispose thereof as the Secured Party shall direct; and upon any sale of the leasehold premises, or any part thereof, the Secured Party for the purpose of vesting the aforesaid reversion of any such term or any renewal thereof and any purchaser or purchasers thereof shall be entitled by deed or writing to appoint such purchaser or purchasers or any other person or persons a new trustee or trustees of the aforesaid reversion of any such term or any renewal thereof in the place of the Debtor and divest the same accordingly in the new trustee or trustees so appointed freed and discharged from any obligations respecting the same.

[NOTE: all other provisions of the Security Agreement should be reviewed and amended as necessary to reflect that only certain assets are taken as collateral].

3.02 Scope. To the extent that the granting of the security interest in the Collateral would constitute a breach or permit acceleration of any agreement, right, obligation, franchise, license or permit to which the Debtor is a party, the security interest herein shall not extend to such of the Collateral which would otherwise cause such breach or acceleration, but the Debtor shall hold the Debtor's interest in that Collateral in trust for the Secured Party, and shall assign such agreement, right, obligation, franchise, license or permit to the Secured Party or as directed by the Secured Party forthwith upon obtaining the consent of the other party thereto. The security interest granted hereby shall not extend to any agreement, right, obligation, franchise, license or permit to which the Debtor is a party or of which the Debtor has the benefit, to the extent that the creation of a security interest therein would constitute a breach of the terms of or permit any person to terminate the agreement, right, obligation, franchise, license or permit, but the Debtor shall hold its interest therein in trust for the Secured Party and shall assign all rights therein to the Secured Party forthwith upon obtaining the consent of the other party thereto. The Debtor agrees that it shall, upon the request of the Secured Party, use all reasonable efforts to obtain any consent required to permit any agreement, right, obligation, franchise, license or permit to be subjected to the security interest hereby created.

3.03 Intellectual Property. Until the occurrence of an Event of Default, the grant of the security interest in such of the Collateral which is intellectual property shall not affect the Debtor's right to commercially exploit the intellectual property, to enforce the Debtor's rights therein or with respect thereto against third parties in any court or other forum or to claim and be entitled to receive any damages with respect to any infringement thereof.

ARTICLE 4 - SALES IN ORDINARY COURSE OF BUSINESS

4.01 No Sale or Disposition. The Debtor shall have no right to sell or dispose of any of the Collateral in which a security interest vests in the Secured Party except for a sale in the ordinary course of business upon customary sales terms for value received and then only upon the express condition that on or before delivery to a third party the Debtor shall secure full settlement of the entire purchase price for the Collateral so sold in cash, notes, chattel paper or other property in form satisfactory to the Secured Party.

4.02 Receipt in Trust. Until the Debtor shall have made settlement with the Secured Party of the full amount due to the Secured Party with respect to all Collateral sold or disposed of by the Debtor in the ordinary course of business, the Debtor shall segregate such cash, notes, chattel paper or other property and hold the same in trust for the Secured Party and the Secured Party shall have a security interest therein. The Debtor shall be entitled to transfer such cash, notes, chattel paper or other property free of such trust if at or prior to the time of such transfer the payment due from the Debtor to the Secured Party shall be assured to the satisfaction of the Secured Party.

ARTICLE 5 - REPRESENTATIONS AND WARRANTIES OF DEBTOR

5.01 Representations and Warranties. The Debtor hereby represents and warrants, and so long as this Agreement remains in effect shall be deemed to continuously represent and warrant, to the Secured Party that:

(a) it is a corporation duly incorporated and organized and validly existing and in good standing under the laws of the jurisdiction of its incorporation; it has the corporate power to own or lease its property and to carry on the business conducted by it; it is duly qualified as a corporation to carry on the business conducted by it and to own or lease its property and is in good standing under the laws of each jurisdiction in which the nature of its business or the property owned or leased by it makes such qualification necessary; and the execution, delivery and performance hereof are within its corporate powers, have been duly authorized and do not contravene, violate or conflict with any law or the terms and provisions of its constating documents or its by-laws or any unanimous shareholders agreement or any other agreement, indenture or undertaking to which the Debtor is a party or by which it is bound; its full and correct name is as set out above; it does not have or use a French language form of its name or a combined English language and French language form of its name;

or

(a) it is a [limited] partnership validly created and organized and validly existing under the laws of the jurisdiction of its creation; it has the power to carry on the business conducted by it; it is duly qualified as a partnership to carry on the business conducted by it and is in good standing under the laws of each jurisdiction in which the nature of its business makes such qualification necessary; and the execution, delivery and performance hereof are within its powers, have been duly authorized, and do not contravene, violate or conflict with any law or the terms and provisions of its partnership agreement or any other agreement, indenture or undertaking to which the Debtor is a party or by which it is bound; it carries on its business only under the name " ", and it does not have or use a French language form of its name or a combined English language and French language form of its name; the following is a complete list of the names, addresses and, if individuals, dates of birth of the partners of the partnership:

Name	Principal Residence Address	Date of Birth

or

(a) the Debtor's full name, address and date of birth are:

Name	Principal Residence Address	Date of Birth

(b) except for those specified security and other interests set forth in Schedule "B" hereto (hereinafter, collectively, "Permitted Encumbrances"), and except for the security interest granted hereby, the Debtor is or will be the owner of, or have an interest in, the Collateral free from any adverse liens, security interests or encumbrances, and agrees that it will defend the Collateral against all claims and demands of all persons, firms or bodies corporate at any time claiming the same or any interest therein and the Debtor shall from time to time perform all of its obligations owed under or by virtue of all Permitted Encumbrances;

(c) the Debtor's places of business and executive office are located at ;

(d) the Collateral will be located at ;

(e) there is no litigation or governmental proceedings commenced or pending against or affecting the Debtor or of which any property, interests or rights of the Debtor are the subject, in which a decision adverse to the Debtor would constitute or result in a material adverse change in the business, operations, properties or assets or in the condition, financial or otherwise, of the Debtor; and the Debtor agrees to promptly notify the Secured Party of any such future litigation or governmental proceedings;

(f) it does not have any information or knowledge of any facts relating to its business, operations, properties or assets or to its condition, financial or otherwise, which, if known to the Secured Party, might reasonably be expected to deter the Secured Party from extending credit to the Debtor;

(g) all financial statements, certificates and other information concerning the Debtor's financial condition and its business operations which have been or may hereafter be furnished by the Debtor to the Secured Party shall be in all respects true and correct and shall be deemed, for all purposes, to have been furnished by the Debtor to the Secured Party for the purpose of inducing the Secured Party to extend credit to the Debtor;

(h) the Debtor's operations and places of business are in compliance with all Hazardous Materials Laws and to the Debtor's knowledge after having made due inquiry, no Hazardous Materials have at any time been transported to or from the Debtor's places of business, or used, generated, manufactured or disposed of, on, under or about the Debtor's places of business except in compliance with all Hazardous Materials Laws; and

(i) the security interest herein is given to secure the purchase price of the Collateral described in Schedule "B" hereto and a purchase money security interest is hereby granted by the Debtor to the Secured Party with respect to the Collateral described in Schedule "B" hereto.

[insert additional representations]

ARTICLE 6 - UNDERTAKINGS OF DEBTOR

6.01 Undertakings. The Debtor hereby undertakes to:

(a) promptly pay or perform all Obligations as they become due or are demanded;

(b) maintain the Collateral in good condition and repair and provide adequate storage facilities to protect the Collateral and not permit the value of the Collateral to be impaired, and to maintain the Debtor's operations and places of business in compliance with all laws, statutes, by-laws and regulations, including Hazardous Materials Laws;

(c) diligently use and operate the Collateral and carry on and conduct the business and undertaking of the Debtor in a proper and efficient manner so as to preserve and protect the Collateral and the earnings, incomes, rents, issues and profits thereof, and to ensure that no Hazardous Materials shall be at any time transported to or from the Debtor's places of business, or used, generated, manufactured or disposed of, on, under or about the Debtor's places of business, and the Debtor shall not permit any such activity except in compliance with all Hazardous Materials Laws;

(d) not (without the prior written consent of the Secured Party) create any security interest, mortgage, hypothec, charge, lien or other encumbrance upon the Collateral or any part thereof ranking or purporting to rank in priority to or pari passu with the security interest created by this Agreement, save that the Debtor may create a purchase money security interest in Collateral hereafter acquired but only if such interest is perfected and notification thereof (if required by the Act) is given to the Secured Party pursuant to the provisions of the Act;

(e) defend the title to the Collateral against all persons, firms or bodies corporate claiming any interest in the Collateral or any part thereof;

(f) not (without the prior written consent of the Secured Party) allow the Collateral or any part thereof to become an accession to other goods or be affixed to real property;

(g) not remove the Collateral or any part thereof from the location set out herein except for sales, leases, rentals, machinery demonstrations or use in the ordinary course of the Debtor's business;

(h) pay all taxes, assessments and levies or charges from any source which may be assessed against the Collateral or any part thereof or which may result in a lien against the Collateral or any part thereof;

(i) insure the Collateral for loss or destruction by fire, wind, storm, and such other perils stipulated by the Secured Party in an amount not less than the full insurable value of the Collateral or the amount from time to time hereby secured, whichever is the lesser, with appropriate endorsements providing for

loss payable firstly to the Secured Party as the Secured Party's interest shall appear, all such policies to contain the standard mortgage clause in this regard and a provision requiring thirty (30) days prior written notice by the insurer to the Secured Party of cancellation, termination, material change or non-renewal of such policies;

(j) keep, at the principal place of business of the Debtor, accurate books and records of the Collateral and furnish at the request of the Secured Party all information requested relating to the Collateral or any part thereof, and the Secured Party shall be entitled from time to time to inspect the Collateral and to take temporary custody of and make copies of all documents relating to the Collateral and the compliance or non-compliance with Hazardous Materials Laws and this Agreement, and for such purposes the Secured Party shall have access to all premises occupied by the Debtor or where the Collateral or any of it may be found;

(k) furnish to the Secured Party such financial and operating statements of the Debtor as may be requested by the Secured Party;

(l) duly observe, comply with and conform to all valid requirements of any governmental authority relative to the Debtor's undertaking and business and to any of the Collateral and all covenants, terms and conditions upon or under which the Collateral is held;

(m) duly observe, comply with and conform to all requirements of all statutes and all laws including all requirements of all governmental authorities and including all Hazardous Materials Laws;

(n) do, make and execute, from time to time at the Secured Party's request, all such financing statements, further assignments, documents, instruments, acts, matters and things as may be required by the Secured Party with respect to the Collateral or any part thereof or as may be required to give effect to this Agreement, and the Debtor hereby constitutes and appoints the Secured Party or any receiver appointed by any court of competent jurisdiction or the Secured Party as herein set out, the true and lawful attorney of the Debtor irrevocably with full power of substitution to do, make and execute all such financing statements, assignments, documents, instruments, acts, matters or things with the right to use the name of the Debtor whenever and wherever it may be deemed necessary or expedient;

(o) forthwith notify the Secured Party if there is a change of the corporate or trade name of the Debtor or any proprietor or partner thereof or any name under which it conducts business;

(p) pay to the Secured Party, on demand by the Secured Party, all Expenses;

(q) diligently preserve all its rights, licenses, powers, privileges, franchises and goodwill, and will exercise all rights of renewal or extension of any lease, concession, franchise or other right necessary to carry on and conduct the business and undertaking of the Debtor in a proper and efficient manner;

(r) forthwith notify the Secured Party of any default in any security document relating to the Collateral;

(s) forthwith notify the Secured Party of any loss or damage to the Collateral or any part thereof;

(t) forthwith notify the Secured Party of any default in any agreement, lease, licence, permit or other document relating to the business of the Debtor;

(u) forthwith notify the Secured Party of any actual or potential claim of any person (including any government or governmental body) affecting the Debtor or the Collateral;

(v) forthwith notify the Secured Party of any change in the Debtor's place of business or executive office or principal residence (if the Debtor has no place of business) or the location of any of the Collateral;

(w) forthwith notify the Secured Party in writing of:

(i) any enforcement, clean-up, removal, litigation or other governmental, regulatory, judicial or administrative action instituted, contemplated or threatened against the Debtor or the Collateral pursuant to any Hazardous Materials Laws;

(ii) all claims, actions, orders or investigations, made or threatened by any third party against the Debtor or the Collateral relating to damage, contribution, cost recovery, compensation, loss or injuries resulting from any Hazardous Materials or any breach of any Hazardous Materials Laws; and

(iii) the discovery of any Hazardous Materials or any occurrence or condition respecting the Collateral or any real property adjoining or in the vicinity of the Collateral which could subject the Debtor or the Collateral to any fines, penalties, orders or proceedings under any Hazardous Materials Laws;

(x) in respect of any premises leased or to be leased by the Debtor, obtain a written agreement from the landlord of such premises in favour of the Secured Party whereby the landlord:

(i) agrees to give notice to the Secured Party of any default by the Debtor under the lease of such premises and a reasonable opportunity to cure such default prior to the exercise of any remedies by the landlord; and

(ii) acknowledges the security interest created by this Agreement and the right of the Secured Party to enforce such security interest in priority to any claim of the landlord.

[insert additional undertakings]

ARTICLE 7 - SECURED PARTY ACTIONS

7.01 Pay Expenses. The Debtor shall pay all expenses and, upon request, take any action reasonably deemed advisable by the Secured Party to preserve the Collateral or to establish, determine priority of, perfect, continue perfected, terminate or enforce the Secured Party's interest in the Collateral or the Secured Party's rights under this Agreement.

7.02 Secured Party Action. If the Debtor fails to act as required by this Agreement the Secured Party is authorized, in the Debtor's name or otherwise, to take any such action including, without limitation, signing the Debtor's name or paying any amounts so required, and the costs shall be included in the Obligations.

7.03 Make Payments. If the Debtor shall fail to provide adequate insurance when required to do so or to pay any taxes, assessments, levies or charges which may be assessed against the Collateral or any part thereof or which may result in a lien against the Collateral or any part thereof the Secured Party may, without notice, at its option, but without any obligation or liability so to do, procure insurance or pay taxes or other charges and add the amount of any sums so expended to the balance of the Obligations or claim from the Debtor immediate reimbursement of such sums.

7.04 Investigations. The Secured Party may, at any time, inspect the Collateral and may enter upon premises where the Collateral may be located for the purpose of such inspection and the Debtor agrees to furnish all assistance and information and to perform all such acts as the Secured Party may request in connection therewith, including granting or obtaining access for the Secured Party to any premises where the Collateral may be located. The Secured Party may retain experts or other persons to conduct any such inspections and all costs and expenses of such experts or other persons shall be paid by the Debtor and, if not paid by the Debtor, shall be included in the Obligations.

7.05 Expenses of Disclosure. The Debtor agrees that the Secured Party may charge the Debtor for its reasonable costs and expenses incurred in connection with any disclosure requirements under any statute or law.

7.06 Investment Property. If the Collateral at any time includes Investment Property, including Securities, the Debtor authorizes the Secured Party to transfer or cause the transfer of the investment property or any part thereof into its own name or that of its nominee so that the Secured Party or its nominee may appear as the sole owner of record thereof; provided that, until the occurrence of an Event of Default, the Secured Party shall deliver to the Debtor all notices or other communications received by the Secured Party or its nominee as such registered owner and, upon demand and receipt of payment of any necessary expenses thereof, shall grant to the Debtor or its nominee a proxy to vote and take all action with respect to any investment property. The Debtor shall deliver to the Secured Party simultaneously with or prior to the execution and delivery of this Agreement, all certificates, instruments or other writings representing or evidencing certificated Securities. All such certificates shall be delivered in suitable form for transfer by delivery or shall be accompanied by duly executed instruments of transfer or assignment satisfactory to the Secured Party. Additionally, if the Collateral at any time includes or comprises Investment Property, the Debtor will exercise its best efforts to cause each person who holds any such Investment Property for on behalf of the Debtor to enter into a control agreement with the Secured Party, which delineates the degree to which the Debtor shall be entitled to deal with such Investment Property and in particular, under what circumstances the Debtor shall cease to be entitled to deal with any of the same at all, each such control agreement to be in form and content required by the Secured Party, acting reasonably. Further:

(a) until the occurrence of an Event of Default:

(i) the Debtor may exercise all rights to vote and to exercise all rights of conversion or retraction or other similar rights with respect to any Securities; provided that no such exercise, in the opinion of the Secured Party, will have an adverse effect on the value of the Securities and that all expenses of the Secured Party in connection therewith have been paid in full and provided further that, upon the exercise of the conversion or retraction or other right, the additional Securities resulting therefrom shall be paid or delivered to the Secured Party; and

(ii) the Debtor shall be entitled to receive all dividends (whether paid or distributed in cash, securities or other property) and interest declared and paid or distributed in respect of the Securities, and such dividends and interest as may be received by the Secured Party shall be applied against the Obligations owing by the Debtor to the Secured Party or, at Debtor's request (provided no Event of Default has occurred), shall be paid to the Debtor; and

(iii) the Secured Party shall be entitled to exercise its realization and enforcement rights under or by virtue of the control agreements which it is then a party to with respect to the Debtor's Investment Property.

(b) upon the occurrence of an Event of Default:

(i) no proxy granted by the Secured Party or its nominee to the Debtor or its nominee pursuant to this Agreement shall thereafter be effective; and

(ii) the Debtor shall have no right to vote or take any other action with respect to any Securities.

7.07 Consultants. The Debtor hereby agrees that at all times the Secured Party shall be entitled to appoint a consultant or consultants to provide such services and advice as the Secured Party may determine in its sole discretion with power to enter the Debtor's places of business, to inspect and evaluate the Collateral, to inspect and evaluate the Debtor's places of business, to make copies of the Debtor's records at the Debtor's expense, to review the Debtor's business plans and projections, to assess the viability of the Debtor's business, to monitor the conduct of the Debtor's affairs, to prepare written reports of the Debtor's affairs and to distribute such reports to the Secured Party or to other persons as the Secured Party may direct. The Debtor hereby acknowledges that any such consultant shall be an agent of the Secured Party and shall owe no duty to the Debtor. Any such consultants are to have no managerial or advisory capacity for the Debtor and will have no decision making responsibility for the Debtor. The Debtor hereby authorizes the Secured Party to provide confidential information to the consultants, and hereby consents to any of such consultants being appointed a Receiver. Such consultants may be accountants, engineers, surveyors or any other person, in the sole discretion of the Secured Party. All fees in connection with the engagement of a consultant are for the account of the Debtor, are payable by the Debtor on demand made by the Secured Party, and shall be included in the Obligations.

7.08 Continued Dealings. At any time, the Secured Party may immediately cease extending credit to the Debtor (including ceasing to honour cheques of the Debtor presented for payment), and the Debtor agrees that the Secured Party shall not be obligated to advance funds or extend credit to the Debtor.

7.09 Authorization of Inquiries. The Debtor hereby authorizes the Secured Party to make enquiries from time to time of any governmental authority with respect to the Debtor's compliance with laws, statutes, by-laws and regulations, including taxing statutes and Hazardous Materials Laws, and the Debtor agrees that the Debtor will from time to time provide to the Secured Party such written authorization as the Secured Party may require in order to facilitate the obtaining of such information.

7.10 Indemnification

(a) The Debtor shall indemnify and save harmless the Secured Party, its directors, officers, employees, agents, and successors and assigns, from any and all liabilities, actions, damages, claims, losses, costs and expenses whatsoever (including without limitation, the full amount of all legal fees, costs, charges and expenses and the costs of removal, treatment, handling, transport, storage and disposal of any Hazardous Materials and remediation of the Collateral) which may be paid, incurred or asserted against the Secured Party for, with respect to or as a direct or indirect result of the presence on or under, or the escape, seepage, leakage, spillage, discharge, emission or release from, the Collateral or into or upon any land, the atmosphere or any watercourse, body of water or wetland of any Hazardous Materials.

(b) Any amount owing by the Debtor under the indemnity in this Section 7.10 shall be included in the Obligations.

(c) The Debtor agrees that its indemnity obligations set out in this Section 7.10 shall survive the release of the security of this Agreement and the payment and satisfaction of the Obligations.

7.11 Perfection by Possession, Repossession or Seizure. The Debtor hereby grants to the Secured Party the right to perfect by possession, repossession or seizure the security interest granted hereunder in any part of the Collateral.

ARTICLE 8 - DEFAULT

8.01 Events of Default. The Debtor shall be in default under this Agreement and the whole or any part of the unpaid balance of any Obligations shall become immediately due and payable without notice or demand, and notwithstanding any time or credit allowed by any instrument evidencing any such Obligations, if any of the following events occurs:

(a) the Debtor fails to pay or perform when due any of the Obligations;

(b) the Debtor fails to perform any term, condition, provision, covenant or undertaking of this Agreement or any other agreement between the Debtor and the Secured Party;

(c) the Debtor or any of its employees or agents has made or furnished to the Secured Party an incorrect or false statement, representation or warranty to induce the Secured Party to extend credit to the Debtor under this Agreement or otherwise;

(d) the occurrence of loss, theft, damage or destruction of any part of the Collateral not covered by adequate insurance containing a loss payable clause for the protection of the Secured Party as its interests may appear;

(e) an order is made or a resolution passed for the winding-up of the Debtor or any Guarantor;

(f) a petition is filed for the winding-up of the Debtor or any Guarantor;

(g) the Debtor or any Guarantor becomes insolvent;

(h) the Debtor or any Guarantor makes an assignment for the benefit of its creditors;

(i) a bankruptcy petition is filed or presented against the Debtor or any Guarantor;

(j) the Debtor or any Guarantor makes a sale of all or substantially all of its assets or makes a bulk sale of its assets;

(k) a receiver of the Debtor or any Guarantor or of any of their respective assets, properties or undertakings be appointed under the *Bankruptcy and Insolvency Act (Canada)* or otherwise;

(l) if any proceedings with respect to the Debtor or any Guarantor are commenced under the *Companies' Creditors Arrangements Act (Canada)*;

(m) an execution, sequestration or any other process of any court becomes enforceable against the Debtor or any Guarantor or if a distress or analogous process is levied upon any of the Collateral;

(n) the Debtor amalgamates with any other corporation or corporations without the prior written consent of the Secured Party;

(o) the Debtor shall permit any sum which has been admitted as due by the Debtor or is not disputed to be due by it and which forms or is capable of being made a mortgage, charge, lien, encumbrance or security interest upon any of the Collateral, to remain unpaid for thirty (30) days after proceedings have been taken to enforce the same;

(p) the Debtor or any Guarantor ceases or threatens to cease to carry on its business or if the Debtor or any Guarantor commits or threatens to commit any act of bankruptcy;

(q) any permit, license, certification, quota or order granted to or held by the Debtor is cancelled, revoked or reduced, as the case may be, or any order against the Debtor is enforced, so as to prevent the business of the Debtor from being carried on for more than five (5) days or so as to materially adversely change the condition (financial or otherwise) of the business of the Debtor;

(r) the Secured Party, in good faith, believes that the prospect of payment or performance by the Debtor of any of the Obligations is impaired or that the Collateral, or any part thereof, is in danger of being lost, damaged or confiscated or is otherwise in jeopardy; or

(s) the Debtor (if an individual) dies or is declared incompetent by a court of competent jurisdiction.

[insert additional events of default]

ARTICLE 9 - REMEDIES

9.01 Remedies. Upon the occurrence of an Event of Default, the Secured Party shall have the rights and remedies of a secured party under the Act, or any comparable or other statutes in any other jurisdiction in which all or any part of the Collateral is located at the time the Secured Party wishes to exercise such rights and remedies, as well as under any other applicable laws, in addition to the rights and remedies provided herein or in any other instrument or paper executed by the Debtor. Without restricting the generality of the foregoing, the Secured Party shall have the following rights and remedies:

(a) the Secured Party may appoint, remove and reappoint, by instrument in writing, or may institute proceedings in any court of competent jurisdiction for the appointment of, any person, including an employee of the Secured Party, to be a receiver or a manager or a receiver-manager of all or any part of the Collateral. The Receiver shall, so far as concerns responsibility for his acts, be deemed the agent of the Debtor and not of the Secured Party, and the Secured Party shall not be responsible for any misconduct, negligence or misfeasance on the part of the Receiver, his employees or agents. Subject to the terms of his appointment, the Receiver may take possession of the Collateral, preserve the Collateral or its value, carry on the business of the Debtor, sell, lease or otherwise dispose of the Collateral or concur in any of the foregoing. In addition, the Receiver may, to the exclusion of the Debtor, enter, use and occupy all premises in which the Collateral is situated, maintain the Collateral upon such premises, borrow money and use the Collateral directly in carrying on the Debtor's business or as security for loans for any purpose, all as the

Receiver shall, in his sole discretion, determine. Except as otherwise directed by the Secured Party, all money received by the Receiver shall be received in trust for and paid to the Secured Party. The Secured Party may vest any of its other rights and powers in the Receiver, may appoint more than one Receiver, or may itself exercise the foregoing rights and powers;

(b) the Secured Party may demand that the Debtor assemble the Collateral in any convenient place designated by the Secured Party and deliver possession of all or any part of the Collateral to the Secured Party;

(c) the Secured Party may take such steps as it considers necessary or desirable to obtain possession of all or any part of the Collateral, and to that end the Debtor agrees that the Secured Party may by its servants, agents or Receiver, at any time during the day or night, enter upon lands and premises, and if necessary break into houses, buildings and other enclosures, where the Collateral may be found for the purpose of taking possession of and removing the Collateral or any part thereof;

(d) the Secured Party or its Receiver may seize, collect, realize, borrow money on the security of, release to third parties or otherwise deal with the Collateral or any part thereof in such manner, upon such terms and conditions and at such time or times as may seem to it advisable and without notice to the Debtor (except as otherwise required by any applicable law);

(e) the Secured Party may charge the Debtor for any Expenses and may add the amount of such Expenses to the Obligations;

(f) the Secured Party may elect to retain all or any part of the Collateral in satisfaction of the Obligations;

(g) the Secured Party or its Receiver may grant extensions of time and other indulgences, take and give up securities, accept compositions, grant releases and discharges, release any part of the Collateral to third parties and otherwise deal with the Debtor, debtors of the Debtor, Guarantors and others, and with the Collateral and other securities, as the Secured Party may see fit without prejudice to the liability of the Debtor or the Secured Party's or its Receiver's right to hold and realize on the Collateral;

(h) if the Secured Party or its Receiver takes possession of the Collateral, or any part thereof, in accordance with the provisions of this Agreement, the Secured Party or its Receiver shall have the right to maintain the same upon the premises on which the Collateral may then be situate, and for the purpose of such maintaining shall be entitled to the free use and enjoyment of all

necessary buildings, premises, housing, stabling, shelter and accommodation for the proper maintaining, housing and protection of the Collateral, and for its servant or servants, assistant or assistants, and the Debtor covenants and agrees to provide the same without cost or expense to the Secured Party or its Receiver until such time as the Secured Party or its Receiver shall determine in its discretion to remove, sell or otherwise dispose of the Collateral so taken possession of by it as aforesaid;

(i) to facilitate the realization of the Collateral the Secured Party or its Receiver may carry on or concur in the carrying on of all or any part of the business of the Debtor and may to the exclusion of all others, including the Debtor, enter upon, occupy and use all or any of the premises, buildings, plant and undertaking of the Debtor or occupied or used by the Debtor and use all or any of the tools, machinery and equipment of the Debtor for such time as the Secured Party or Receiver sees fit, free of charge, to manufacture or complete the manufacture of any inventory and to pack and ship the finished product, and the Secured Party or Receiver shall not be liable to the Debtor for any neglect in so doing or in respect of any rent, charges, depreciation or damages in connection with such actions;

(j) the Secured Party or its Receiver may, if it deems it necessary for the proper realization of all or any part of the Collateral, pay any encumbrance, lien, claim or charge that may exist or be threatened against the same and in every such case the amounts so paid together with costs, charges and expenses incurred in connection therewith shall be included in the Obligations, and shall bear interest at the highest rate currently charged to the Debtor under any of the Obligations at the date of payment thereof by the Secured Party; and

(k) all monies collected or received by the Secured Party or its Receiver in respect of the Collateral may be applied on account of such parts of the Obligations as the Secured Party deems best or may be held unappropriated in a separate account or in the discretion of the Secured Party may be released to the Debtor, all without prejudice to the Secured Party's claims upon the Debtor.

9.02 Rights and Remedies Cumulative. Each and every right, remedy and power granted to the Secured Party and the Receiver hereunder shall be cumulative and not alternative, and shall be in addition to any other right, remedy or power herein specifically granted and not in substitution for or in derogation of rights and remedies conferred by the Act, by any comparable or other statutes in any other jurisdiction in which all or any part of the Collateral is located at the time the Secured Party wishes to exercise such rights and remedies, or by any other applicable laws or now or hereafter existing in equity, at law, by statute or

otherwise, and every such right, remedy and power may be exercised by the Secured Party and the Receiver from time to time concurrently or independently and as often and in such order, sequence or combination as the Secured Party or the Receiver may deem expedient. Any failure or delay on the part of the Secured Party or the Receiver in exercising any such right, remedy or power, or any abandonment or discontinuance of steps to enforce the same, shall not operate as a waiver thereof or affect the right of the Secured Party and the Receiver thereafter to exercise the same, and any single or partial exercise of any such right, remedy or power shall not preclude any other or further exercise thereof or the exercise of any other right, remedy or power.

9.03 Standards of Sale. Without prejudice to the ability of the Secured Party or the Receiver to dispose of the Collateral in any other manner which is commercially reasonable, the Debtor acknowledges that a disposition of Collateral which takes place substantially in accordance with the following provisions shall be deemed to be commercially reasonable:

(a) Collateral may be disposed of in whole or in part;

(b) Collateral may be disposed of by public sale, private contract or otherwise, with or without advertising and without any other formality;

(c) any purchaser of Collateral may be the Secured Party or a person related to the Secured Party;

(d) any sale conducted by the Secured Party or by the Receiver shall be at such time and place, on such notice and in accordance with such procedures as the Secured Party or the Receiver (as applicable), in its sole discretion, may deem advantageous;

(e) a disposition of Collateral may be on such terms and conditions as to credit or otherwise as the Secured Party or the Receiver (as applicable), in its sole discretion, may deem advantageous; and

(f) the Secured Party or the Receiver (as applicable) may establish an upset or reserve bid or price in respect of the Collateral.

9.04 Deficiency. Subject to applicable law, notwithstanding any taking of possession of all or any part of the Collateral, or any other action which the Secured Party or the Receiver may take, the Debtor hereby covenants, promises and agrees to and with the Secured Party that if the sum of money realized upon any disposition of all or any part of the Collateral referred to herein shall not be sufficient to pay the whole of the Obligations due to the Secured Party at the time of such disposition, the Debtor shall and will forthwith pay or cause to be paid to the Secured Party an amount equal to the deficiency between the amount of the Obligations and the sum of money realized upon the disposition of the Collateral provided for herein, and the parties hereto agree that the Secured Party may bring action against the Debtor for

payment of the deficiency, notwithstanding any defects or irregularities of the Secured Party in enforcing hereunder.

ARTICLE 10 - RECEIVABLES

10.01 Realization on Receivables. Notwithstanding any other section or provision of this Agreement, the Secured Party may collect, realize, sell or otherwise deal with the Receivables or any part thereof in such manner, upon such terms and conditions and at such time or times, whether before or after the occurrence of an Event of Default, as may seem to it advisable and without notice to the Debtor (except in the case of a sale and then subject to the remedies provisions hereof). The Secured Party may notify any other persons of the security interest created hereby and may direct persons indebted to the Debtor to make payments to the Secured Party. All moneys collected or received by the Debtor in respect of the Receivables shall be received as trustee for the Secured Party and shall be forthwith paid over to the Secured Party. All money collected or received by the Secured Party in respect of the Receivables or other Collateral may be applied on account of such parts of the Obligations as the Secured Party deems best or in the discretion of the Secured Party may be released to the Debtor, all without prejudice to the liability of the Debtor or the Secured Party's right to hold and realize the security interest herein created in the Collateral.

ARTICLE 11 - WAIVER

11.01 Waiver of Default. The Secured Party may permit the Debtor to remedy any default without waiving the default so remedied. The Secured Party shall not be deemed to have waived any of the Secured Party's rights and remedies hereunder or under any other agreement, instrument or paper signed by the Debtor unless such waiver is in writing and is signed by the Secured Party. No delay or omission on the part of the Secured Party in exercising any right shall operate as a waiver of such right or any other right. A waiver on any one occasion shall not be construed as a bar to or waiver of any right or remedy on any future occasion.

11.02 Extension of Time. The Debtor shall not be discharged by any extension of time, additional advances, renewals and extensions, the taking of further security, releasing security, extinguishment of the security interest created herein as to all or any part of the Collateral, the failure to perfect the security interest created herein or any other act except a release or discharge of the security interest upon the full payment and performance to the Secured Party of the Obligations, including Expenses, charges, fees, costs and interest.

ARTICLE 12 - NON-LIABILITY OF THE SECURED PARTY

12.01 Non-liability of Secured Party. The Secured Party shall not be liable or accountable for any failure to seize, collect, realize, sell or obtain payment of the Collateral or any part thereof and shall not be bound to institute proceedings for the purpose of seizing, collecting, realizing or obtaining possession or payments of the same or for the purpose of preserving any rights of the Secured Party, the Debtor, a Guarantor or any other person, firm or body corporate in respect of same. The Secured Party shall also not be liable for any misconduct, negligence or misfeasance on the part of the Secured Party, the Receiver or of any employee or agent of the Secured Party or the Receiver, in the exercise of the rights and remedies herein conferred upon the Secured Party or the Receiver.

ARTICLE 13 - ASSIGNMENT AND WAIVER OF DEFENCES

13.01 Assignment by Secured Party. The Secured Party or any assignee of this Agreement may, without further notice to the Debtor, at any time assign this Agreement and the security interest evidenced thereby. The Debtor expressly agrees that, with respect to such an assignment, re-assignment or transfer of this Agreement and the security interest, the assignee or transferee shall have all of the Secured Party's rights and remedies under this Agreement whether or not they are specifically referred to in any such assignment, re-assignment or transfer, and the Debtor will not assert as a defence, counterclaim, set-off, cross-complaint, or otherwise any claim, known or unknown, which he now has or hereafter acquires against the Secured Party in any action commenced by an assignee or transferee of this Agreement and the security interest, and will pay and perform the Obligations to the assignee or transferee at its place of business as Obligations become due.

ARTICLE 14 - ADDITIONAL SECURITY

14.01 Additional Security. This Agreement is in addition to and not in substitution for any other agreement between the parties creating a security interest in all or part of the Collateral, and whether heretofore or hereafter made, and the terms of such other agreement or agreements shall be deemed to be continued unless expressly provided to the contrary in writing and signed by the Secured Party.

ARTICLE 15 - ATTACHMENT

15.01 Attachment. The Debtor hereby warrants and acknowledges that value has been given and that the parties have not agreed to postpone the time for attachment of the security interest herein.

ARTICLE 16 - NOTICES

16.01 Notice. Any notice, request, demand, consent, approval or other communication required or permitted by this Agreement shall be in writing and shall be given by one (1) of the five (5) following means: (i) personal delivery; (ii) facsimile transmission; (iii) registered mail, postage prepaid (with Acknowledgment of Receipt Card), but only if the addressee is located in Canada; (iv) regular mail, postage prepaid, but only if the addressee is located outside of Canada; or (v) electronic mail with return receipt requested. Such communication shall be addressed to the party for whom it is intended at the following addresses:

Debtor:

Fax No.

Secured Party:

Fax No.

however, any party may change its address for purposes of receipt of any such communication by giving ten (10) days prior written notice of any such change to the other party (or parties) in the manner above prescribed. The date of receipt of any such communication shall be deemed to be:

(i) if by personal delivery, the date when delivered to the addressee;

(ii) if by facsimile transmission, if legibly received or deemed to be legibly received, the date received by the addressee;

(iii) if by registered mail to an addressee located in Canada, the date of receipt by the recipient party as disclosed on the Acknowledgement of Receipt Card;

(iv) if by regular mail to an addressee located outside of Canada, the seventh (7th) Business Day (for the purposes of this Section 16.01 only, "Business Day" means every Monday through Friday other than statutory holidays recognized in Manitoba) next following the date of such mailing; and

(v) if by electronic mail, the Business Day following receipt or the Business Day two Business Days following the electronic mail from the mail system of the sender, whichever is earlier

(vi) if by means of (iii), (iv) or (v) above properly addressed to the addressee and such communication is marked return to sender by the postal system (or marked in some other similar or equivalent way), on the date the sender receives such notification from the postal system.

A facsimile transmission shall be regarded legible unless the addressee telephones the sender within two (2) hours after receipt or deemed receipt and informs the sender that it is not legible. If a personal delivery, a facsimile transmission or electronic mail is received on a day which is not a Business Day or after 4:00 p.m. (addressee's time) it shall be deemed not to have been received until 9:00 a.m. (addressee's time) on the next following Business Day. If at the date of any mailing or within three (3) Business Days thereafter there is a general interruption in the operation of the postal or internet service of Canada (or any other country's postal or internet service required to affect delivery) which does or is likely to delay the delivery by mail of such communication, it shall be served by personal delivery or facsimile transmission only.

ARTICLE 17 - RECEIPT OF COPY/WAIVER/NO RELEASE

17.01 Receipt. The Debtor hereby acknowledges receiving a copy of this Agreement.

17.02 Waiver. The Debtor hereby waives all rights to receive from the Secured Party a copy of any financing statement or confirmation statement filed or issued at any time respecting this Agreement.

17.03 No Release. This Agreement shall remain in full force and effect without regard to, and the Obligations of the Debtor under this Agreement or any other agreement made between the Debtor and the Secured Party shall not be affected or impaired by:

(a) any amendment or modification of or addition or supplement to any agreement made between the Debtor and the Secured Party;

(b) any exercise or non-exercise of any right, remedy, power or privilege in respect of this Agreement or any other agreement made between the Debtor and the Secured Party;

(c) any waiver, consent, extension, indulgence or other action, inaction or admission under or in respect of this Agreement or any other agreement made between the Debtor and the Secured Party;

(d) any default by the Debtor under, or any invalidity or unenforceability of, or any limitation of the liability of the Debtor or on the method or terms of payment under, or any irregularity or other defect in, any agreement made between the Debtor and the Secured Party;

(e) any merger, consolidation or amalgamation of the Debtor into or with any other company;

(f) any insolvency, bankruptcy, liquidation, reorganization, arrangement, composition, winding-up, dissolution or similar proceeding involving or affecting the Debtor; or

(g) any postponement or partial release or discharge of the mortgages, charges or security interests created by this Agreement in respect of all or any part of the Collateral, except as herein expressly specified.

ARTICLE 18 - ENUREMENT

18.01 Enurement. This Agreement benefits the Secured Party, its successors and assigns, and binds the Debtor and the Debtor's successors.

18.02 Amalgamation. The Debtor acknowledges and agrees that, in the event it amalgamates with any other corporation or corporations, it is the intention of the parties hereto that the term "Debtor" as used herein shall include the corporation formed by the amalgamation, that this Agreement shall bind the Debtor which executes this Agreement and the corporation formed by the amalgamation, and that the security interest granted hereby:

(a) shall extend to "Collateral" (as herein defined) owned by each of the amalgamating corporations and the amalgamated corporation at the time of amalgamation and to any "Collateral" thereafter acquired by the amalgamated corporation;

(b) shall secure all obligations, indebtedness and liabilities of each of the amalgamating corporations and the amalgamated corporation to the Secured Party;

(c) shall attach to "Collateral" owned by each corporation amalgamating with the Debtor, and owned by the amalgamated corporation, immediately at the time of amalgamation, and shall attach to after-acquired Collateral at the same time as the amalgamated corporation acquires rights therein.

ARTICLE 19 - INTERPRETATION

19.01 Severability. Each and every term, condition and provision of this Agreement is and shall be severable one from the other, and in the event that any term, condition or provision of this Agreement is at any time declared by a court of competent jurisdiction to be void, invalid or unenforceable, that event shall not extend to make void, invalid or unenforceable any other term, condition or provision of this Agreement.

19.02 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the Province of Manitoba. The parties hereby attorn to the jurisdiction of the courts of the Province of Manitoba; Provided that the Secured Party may enforce its rights under this Agreement in such provinces, states and countries as it deems fit, all parties hereto hereby for such enforcement purposes attorning to the jurisdiction of such provinces, states and countries.

19.03 Interpretation. Words in the singular shall include the plural and words in the masculine gender shall include feminine and neuter genders, and vice versa, where the context so requires.

19.04 Headings. All headings in this Agreement are inserted for convenience of reference only and shall not affect the construction and interpretation of this Agreement.

19.05 References. All references herein to the words "herein", "hereby", "hereto", "hereunder", "hereof" and words of similar import refer to this Agreement as a whole and not to any particular clause, paragraph or other subdivision hereof, unless the context otherwise requires.

19.06 Time of Essence. Time shall be of the essence of this Agreement.

19.07 Modification, Waiver, Consent. Any modification or waiver of any provision of this Agreement, or any consent to any departure by any party therefrom, shall not be effective unless such modification, waiver or consent is in writing and signed by the other party (or parties), and then such modification, waiver or consent shall be effective only in the specific instance and for the specific purpose given. Any notice to or demand on any party not specifically required of the other party (or parties) under this Agreement shall not entitle that party to any other or further notice or demand in the same, similar or other circumstances.

19.08 Further Assurances. The parties to this Agreement covenant that they shall from time to time execute such other and further instruments and documents as are or may become necessary or desirable to effectuate the intent of this Agreement.

ARTICLE 20 - EFFECTIVE DATE

20.01 Date. This Agreement shall be deemed to bear and may be referred to as bearing date the day of , 201 , and shall be valid and effectual as from that date although actually executed and delivered before, on or after that date.

ARTICLE 21 - SPECIAL CONDITIONS

21.01 Special Conditions. This Agreement shall be subject to the following special conditions:

[insert special conditions]

IN WITNESS WHEREOF the Debtor has executed this Agreement.

[For Individual:

In the presence of:	)	
	)	
	)	
	)	
_____	)	_____
Witness	)	
Name:	)	Date:
Address:	)	

For corporation:

In the presence of:	)	
	)	
	)	
	)	per: _____
_____	)	
Witness	)	per: _____
Name:	)	
Address:	)	Date:

For general partnership

In the presence of:	)	
	)	
	)	, by two of its partners
	)	
	)	per: _____
_____	)	
Witness	)	per: _____
Name:	)	
Address:	)	Date:

For limited partnership:

In the presence of:	)	
	)	
	)	, by its general partner
	)	
	)	per: _____
_____	)	
Witness	)	per: _____
Name:	)	
Address:	)	Date:

SCHEDULE "A" - List of Specific Property

[If serial numbered goods (as defined in the PPSA Regulations) are included and are classified as equipment or consumer goods, the following particulars must be listed].

Serial Number	Description

SCHEDULE "B" - Property Subject to a Purchase Money Security Interest Claim