

**LAW REFORM COMMISSION  
OF BRITISH COLUMBIA**

**FIXTURES AND THE  
*PERSONAL PROPERTY  
SECURITY ACT***

**(INTERIM REPORT)**

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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**TO THE HONOURABLE COLIN GABELMANN  
ATTORNEY GENERAL OF THE PROVINCE OF BRITISH COLUMBIA:**

The Law Reform Commission of British Columbia has the honour to present the following:

**REPORT ON**  
**FIXTURES AND THE**  
*PERSONAL PROPERTY SECURITY ACT*

This is an Interim Report which brings forward recommendations on a particular portion of a larger project referred to the Law Reform Commission early in 1992. The reference was broadly directed at the interface between the *Personal Property Security Act* and real property law, but it also identified the treatment of fixtures under the *Personal Property Security Act* as a matter which called for particular attention. This aspect of the reference has been given priority.

Apart from two issues which the Commission has identified as requiring further study, the conclusion in this Report is that the general approach to fixtures taken by the *Personal Property Security Act* is satisfactory and the focus of any law reform measures should be to clarify the operation of the Act where that appears to be necessary. Recommendations are made accordingly.

January 14, 1993

Arthur L. Close, Q.C.  
Chairman



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### A. Fixtures Generally

Early in 1992 the Attorney General requested the Law Reform Commission to examine the “relationship between the *Personal Property Security Act*<sup>1</sup> and the *Land Title Act*<sup>2</sup> in their application to property that may have characteristics both of land and of personal property.”<sup>3</sup> An example of property which displays both characteristics is the “fixture” and the terms of reference for this study requested that particular attention be given to certain issues that arise in relation to fixtures.<sup>4</sup>

A simple example illustrates the basic idea of the fixture and some of the issues it raises. A newly manufactured item of tangible property, such as a furnace, is indisputably personal property. When it is sold by the manufacturer to a furnace dealer, the transaction is governed by the *Sale of Goods Act*.<sup>5</sup> It has none of the characteristics of land.

Later, however, the furnace will be installed in a building. At the time the furnace becomes “affixed”<sup>6</sup> its legal character changes. In law the furnace loses its identity as an item of personal property. It becomes part of the “land” to which it is attached. Still later, the furnace may become worn out and require replacement. When it is detached from the land for sale to a scrap dealer it may again assume the character of personal property.

These rules operate simply and fairly so long as there are no competing interests in either the land or the furnace which must be accommodated. But matters are not always that simple. The owner may mortgage the land to a lender. This may occur either before or after the furnace is installed. The owner may also create a separate security interest in the furnace in favour of a second lender. Again, this might occur either before or after the furnace is installed. How is a competition over the furnace between these two secured lenders to be resolved?

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1. S.B.C. 1989, c. 36. Selected provisions of the Act are set out in Appendix A to this Report.

2. R.S.B.C. 1979, c. 219.

3. The full terms of reference are set out as Appendix B to this Report.

4. *Ibid.* para. 4.

5. R.S.B.C. 1979, c. 370.

6. “Affixation” is a term usually employed to describe the connection or attachment of the item to the land.

## CHAPTER I: BACKGROUND

The “classic” rules of real property mandate an answer which invariably favours the lender who took the mortgage on the land. Once the furnace becomes part of the land, any existing security in it vanished and no new security interest in the furnace alone could be created.

The classic position has obvious drawbacks. The owner of the land cannot use the fixtures as collateral in a separate financing transaction - even if that transaction is the one that allows the land owner to acquire the fixture in the first place. It may also deprive the owner of a valuable source of collateral that would support an extension of credit for other purposes. This suggests the need for a scheme which modifies the classic position in a way which permits the land owner to use fixtures as a separate asset base for the purpose of obtaining financing.

An innovation of this kind would result in a legal position where particular items of property are treated as land, in some circumstances and for some purposes, and as personal property in other circumstances and for other purposes. “Land” and “personal property” are both legal concepts which carry their own body of rules. These rules may collide when interests come into competition. This raises the need for a set of meta-rules to define the result when there is a clash between the systems of primary rules. A properly functioning set of meta-rules would permit fixture-based financing while, at the same time, recognize the legitimate expectations of persons whose interests in fixtures are based on an interest in the land itself. Section 36 of the *Personal Property Security Act* (PPSA) purports to provide such a set of meta-rules.

Briefly stated, section 36 modifies the common law rule that goods which become attached to land become part of that land. This allows a security interest in the goods to exist independently of an interest in the land. The PPSA provides machinery which permits the holder of such a security interest to register a notice of it on the title to the land.<sup>7</sup> The fact and timing of that registration may affect the secured party's priority in any competition with a person whose interest in the goods is based on an interest in the land itself. The full text of section 36 is set out in Appendix A to this Report and a more detailed explanation of its operation and the priority rules it establishes is to be found in Appendix C.

## B. Concerns in Relation to Fixtures

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7. S. 49.

## CHAPTER I: BACKGROUND

The provisions of the *Personal Property Security Act* in relation to fixtures have given rise to a certain amount of controversy in this province.<sup>8</sup> These concerns emanate almost entirely from lawyers in the province engaged in business law and real property transactions. Some of the concerns were clearly based on disagreements with the policy of the PPSA in relation to fixtures. The concerns of others focused more on drafting and what is perceived to be the uncertainty of outcome in particular circumstances.<sup>9</sup> These concerns, initially put to government officials, led to the reference of this topic to the Law Reform Commission.

To assist us in this reference the Commission engaged a consultant, Professor Bruce MacDougall, of the Faculty of Law, University of British Columbia. At our request, Professor MacDougall spent a good deal of time consulting with members of the commercial and real property bar to identify their concerns with greater precision. Professor MacDougall was also asked to identify and bring forward a range of possible modifications to the PPSA that respond to the concerns.

In May 1992 Professor MacDougall submitted to us a report which embodied the results of his consultation and some possibilities for reform.<sup>10</sup> The MacDougall Report was reproduced and circulated among key practitioners and legal academics with an invitation to comment.<sup>11</sup>

### C. This Report

The recommendations made in this Report have been largely shaped by the consultation process described. An important consideration, however, has been to maintain uniformity with comparable legislation in other provinces. The British Columbia PPSA is virtually identical to that in force in Alberta and this version is what is sometimes referred to as the “Western Canadian Model PPSA.”<sup>12</sup> It is under active consideration for adoption in Saskatchewan, Manitoba, the Northwest Territories and New Brunswick.

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8. This does not appear to be the experience of other Canadian PPSA jurisdictions where the fixture provisions have not given rise to similar concerns.

9. Virtually all of the latter concerns are apprehended rather than actual, and are based on conjecture about what might happen rather than actual cases that have led to undesirable results.

10. Two alternative groups of proposals were put forward in the Report. The first group envisaged comprehensive changes based on the 1972 revisions to the corresponding provisions of Article 9 of the Uniform Commercial Code. The second group of proposals described a series of ad hoc amendments to section 36 intended to clarify its operation without altering it in any fundamental way.

11. Reaction to the first group of MacDougall proposals, *ibid.*, was generally negative.

12. A body has come into being to act as a clearing house for work on, and refinements to, the Model Act - the Canadian Conference on Personal Property Security Law.

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Uniformity in commercial law matters is not easily achieved and once achieved should not be lightly abandoned.

Our general conclusion is that the state of the PPSA, so far as it concerns fixtures, is generally satisfactory. Section 36, in particular, achieves a careful balancing of interests. With two possible exceptions,<sup>13</sup> we do not believe any major changes in theory, structure or approach to the treatment of fixtures in the PPSA is called for.

This does not mean, however, that the PPSA has reached a state of near-perfection as some of its defenders seem to suggest. In particular, achieving a proper structure of definitions and legislative statements concerning the application of the PPSA to fixtures has not been free of difficulty. Our principal recommendations in this Report, therefore, focus on ways of achieving a smoother integration of fixtures into the overall structure of the Act and addressing some perceived drafting ambiguities that have led to serious concerns. These recommendations emerge in the following chapter.

There are two issues which we have identified as appropriate for “further study.” These issues are described in Appendix E. To have pursued both or either of these with a view to formulating a final position would have significantly delayed the production of this Report. Submissions in relation to these issues would be welcome.

It should be stressed also that this Report covers only one aspect of a larger project. The importance placed on the fixtures issue by the bar and the prominence given to it in the terms of reference from the Attorney General led us to proceed on it as a matter of priority. This is an interim report.

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13. See Appendix E.

## A. Definition Issues

### 1. THE PROBLEM

The *Personal Property Security Act* applies to more than personal property. It applies to fixtures and growing crops which are interests in land. It also applies to a licence (essentially a right to harvest timber) which, if it is property at all,<sup>1</sup> is probably also an interest in land. The *Personal Property Security Act* contains an elaborate structure of definitions some of which use the expression “personal property” (a term that is not defined in the PPSA itself) as a unit of reckoning. In some cases, the drafter of the PPSA has had regard to the limitations of the concept of “personal property” and linked that term with other kinds of property embraced by the Act. Paragraph (a) of the definition of “proceeds” therefore speaks of “personal property, fixtures and crops.”<sup>2</sup> In other places, however, the drafter has used “personal property” in contexts which suggest that it was meant to include fixtures and crops.<sup>3</sup>

A critical omission of this kind is to be found in the definition of collateral in section 1:

“collateral” means personal property that is subject to a security interest;

This definition, when read into section 12 of the Act, raises the possibility that a security interest can never attach to a fixture<sup>4</sup> because a fixture is not personal property.

An attempt was made to repair this omission in a 1991 amendment to the PPSA Regulations which set out the following definition:<sup>5</sup>

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1. A “licence” is a statutory permit to harvest timber on Crown land. Analytically it may be a mere “personal right” rather than property.

2. Why the drafter omitted licences from this recitation is not clear.

3. See e.g. section 18(6).

4. S. 12 provides that a security interest attaches when “the debtor has rights in the collateral” and “collateral” is defined only with reference to personal property, which does not include fixtures.

5. B.C. Reg. 67/91 Reg. 1(4). S. 76(1)(l) of the PPSA allows the making of a regulation “defining a word or expression used in this Act.” The absence of any definition of personal property in the PPSA itself left government free to provide such a definition by regulation. The comparable legislation of both Alberta and Ontario does contain a definition of “personal property” which either directly or indirectly embraces fixtures. The Ontario *Personal Property Security Act*, R.S.O. 1990, c. P-10, s. 1 does this directly by mentioning fixtures as one element in a list of enumerated types of property that constitute “personal property.” The Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05, s. 1, achieves this indirectly. Its definition of “personal property” includes a reference to “goods” which in turn (like the British Columbia PPSA) is defined to include fixtures.

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“personal property”, in the *Personal Property Security Act* and in this Regulation includes fixtures and crops.

Many practitioners regarded this as an unsatisfactory solution. In particular, it led to fears that every mortgage of real property which also extended to fixtures would have to be the subject of a separate filing under the PPSA as to the fixtures (with perhaps a further filing in the Land Title Office) in order to fully protect the interest. The response was a further regulation much more complicated than its predecessor which in its attempt to clarify matters, in the view of many, only appears to obscure the position more thoroughly:<sup>6</sup>

1. (4) Except as otherwise provided in subsection (4.1) and notwithstanding that the fixture or crop remains part of the land to which it is affixed or attached and that a dealing with land is a dealing with the fixtures and crops affixed or attached to the land, “personal property” in the *Personal Property Security Act* and this regulation is conclusively deemed to include a fixture or crop for all purposes related to a security interest in the fixture or crop including, without limitation, the validity, attachment, perfection, priority, subordination, enforceability or realization of, or other dealing with, that security interest.

1. (4.1) Subsection (4) does not apply

- (a) for any purpose other than a purpose of the *Personal Property Security Act* and this regulation,
- (b) to an interest which is created by words that also create or transfer an interest in the land to which the fixture or crop is affixed or attached, or
- (c) to the creation of an interest in a fixture or crop by the granting of a lease of the land to which the fixture or crop is affixed or attached.

1. (4.2) For the purpose of interpreting subsection (4.1)(b) words that create an interest in a fixture or crop are not “words that also create or transfer an interest in the land to which the fixture or crop is affixed or attached” solely because the words creating the interest in the fixture or crop are contained in a document which also contains other words that create or transfer an interest in the land.

We set out this regulation in full, not with the expectation that the reader will understand it, but merely to illustrate the morass into which the drafter has been led on this question.

In British Columbia, the complicated regulation might be repealed and replaced by definitional changes modeled on the Alberta or Ontario legislation.<sup>7</sup> That alone, however, would give rise to the same set of concerns which greeted the first version of the regulation -- that it swept more into the PPSA than was intended. A

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6. B.C. Reg. 215/91.

7. See n. 5, *supra*.

change of this kind in the definitions would have to be matched by a provision which somehow makes it clear that the Act has no application to an interest in fixtures which arises purely as a result of a dealing with an interest in land. The net effect of embracing this approach would be to transfer the solution embodied in the regulation into the Act itself with the hope, but no guarantee, that the drafting could be improved.

## 2. FINDING A SOLUTION

### *(a) Scope of the Problem*

The search for alternatives led us to examine the various contexts in which the expression “personal property” is actually used in the PPSA. This was done through a computer assisted search of the text of the Act and amending legislation. Interestingly, the expression does not occur that frequently and the possibility that the Act in using “personal property” might have inadvertently excluded fixtures from the application of a particular provision is less serious than it might first appear. Moreover, in some of the most important cases the drafter has expressly addressed the status of fixtures as the definitions of both “goods” and “proceeds” illustrates:

“goods” means tangible personal property, fixtures, crops and...

“proceeds” means

(a) identifiable or traceable personal property, fixtures and crops...

This leaves only a handful of provisions in which the drafter appears to have used “personal property” as a convenient compendious expression for *all* property regulated by the PPSA. They are:<sup>8</sup>

**Section 1 - “collateral”:** As noted above, this term is defined to mean “personal property” that is subject to a security agreement.

**Section 10:** In section 10 “personal property” is used to stipulate the contents of a statement which must appear in the security agreement if the agreement is to meet the writing requirements that will make it effective against third parties.

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8. The definition of “intangible” also contains a reference to personal property, in the compendious sense, but the expression is linked with “goods” which is defined to include fixtures. The structure of the definition (so far as fixtures are concerned) operates to exclude from “personal property” something that was never included in it, so no problem is created.

**Section 18:** Section 18 permits various persons to obtain information and particulars concerning a security agreement from the secured parties. These include “a person with an interest in personal property of the debtor.” The expression “personal property” also appears in the context of provisions that are concerned with identifying the property that is collateral under a particular security agreement.

**Section 55:** Section 55 describes the application of Part 5 of the PPSA which is concerned with rights and remedies on default. Subsections (4), (5), (5.1) and (6) are aimed at simplifying enforcement where the same obligation is secured by both an interest in land and a security interest to which the PPSA applies. In these provisions “personal property” is used in contradistinction to the land.

Identifying precisely how the term “personal property” is used in the Act allows us to examine several possible solutions more closely.

*(b) Wider use of the “personal property, fixtures and crops” Formulation*

Two definitions (“goods” and “proceeds”) link “personal property” with fixtures and crops. We believe that this approach should also be taken with respect to the definition of “collateral.” The current definition should be replaced by one which refers to personal property, fixtures and crops.<sup>9</sup>

This strategy, however, does not work well in the other provisions where the term “personal property” is used repeatedly. Adopting it on a wider basis would only add further bulk to a piece of legislation which many regard as “over-drafted” in its current form. We believe other approaches are preferable.

*(c) Redraft to Eliminate References to “personal property”*

One or more of these provisions might simply be redrafted to eliminate the references to “personal property” in favour of other defined terms in the Act. Section 55, in particular, lends itself to this

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9. As to crops see subheading 3, *infra*.

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treatment. In subsection (4) the opening flush might be amended to refer to “a security interest in collateral to which this Act applies...” This would permit subsequent references to be to the “collateral” rather than “personal property.”<sup>10</sup>

Similar drafting solutions may be possible for sections 10 and 18 but they are less obvious. A different solution is available for these sections.

*(d) Define “personal property” for the Purposes of  
Particular Sections*

The solution we suggest for sections 10 and 18 is to include in each of them a definition subsection which provides an “extended” definition of personal property. A subsection which sets out one or more definitions that apply to that section only is a common feature of the drafting of the PPSA. Very often, the content of these special definitions is identical.<sup>11</sup> A subsection might be added to each of sections 10 and 18 stating that:

(x) In this section “personal property” includes fixtures and crops.

This would be consistent with the solution the PPSA adopts to resolve similar problems when they arise.

We believe that a definition that is tightly targeted on two sections is unlikely to raise the kinds of concerns that the original definition of personal property in the regulations created. It is clearly intended to have a very limited and narrow effect.

It should be noted that this approach will require that caution be exercised by those who may be drafting amendments to the PPSA in the future. It would likely raise a presumption that when “personal property” is used in other sections, the common law

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10. Section 55(4) currently provides:

- (4) Subject to any other enactment or applicable law to the contrary, where the same obligation is secured by an interest in land and a security interest to which this Act applies, the secured party may
- (a) proceed under this Part as to the personal property, or
  - (b) proceed as to both the land and the personal property as if the personal property were land, in which case
    - (i) the secured party's rights, remedies and duties in respect of the land apply to the personal property with necessary modifications as if the personal property were land, and
    - (ii) this Part does not apply.

11. For example, no less than 11 sections of the PPSA contain a subsection which provides that “in this section ‘secured party’ includes a receiver.” See ss. 17, 36-38, 55-60, 63 and 69.

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meaning is intended. Every future drafter who uses the expression will have to consider whether either the common law or the extended meaning of personal property is intended and, in the latter case, ensure that the amendment includes an appropriate definition.

### 3. CROPS AND OTHER INTERESTS

Regulation 215/91 also covers crops. A legislative solution to the fixtures problem which results in the repeal of the regulation will affect how the PPSA applies to crops. Whatever approach is adopted to ensure that the concept of a PPSA security interest in fixtures fits comfortably into the conceptual structure of the Act, it is clear that crops must be given a parallel treatment. The issues are identical.

If one or more of the recommendations we are making is to be adopted, it would also be sensible to review the position of licences. It is doubtful whether a licence is personal property and the various provisions that use “personal property” in a compendious way probably do not apply to a licence that is subject to a security agreement. This may yield anomalous results.<sup>12</sup> Virtually all of the suggestions we have made respecting the need to clarify the application of the PPSA to fixtures are also applicable to licences. Moreover, if licences are to be more fully integrated into the definitions of the Act some reconsideration of the definition of proceeds is called for. As the definition currently stands a licence could never be “proceeds.”

### 4. RECOMMENDATIONS

Our formal recommendations in this aspect of the fixtures reference are set out below. They go somewhat beyond the terms we had originally set for ourselves in that our recommendations, of necessity, extend to crops and we have provided optional recommendations concerning licences where they raise analogous issues. The portions of the recommendations that relate to licences have been square bracketed for convenient reference.

The Commission recommends:

1. Subsections (4), (4.1) and (4.2) of section 1 of the *Personal Property Security Regulation* as amended by B.C. Reg. 215/91 be deleted.<sup>13</sup>

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12. E.g., a copy of a security agreement covering a licence may not be the subject of a demand under s. 18(2)(a).

13. The expression “personal property” also appears in the Regulations so the repeal of this definition will require some further amendment to them. We have not been able to do a computer search on the regulations to identify the particular provisions that call for attention, but our recommendations concerning the PPSA itself should provide adequate guidance on dealing with them.

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2. In the *Personal Property Security Act* the definition of “collateral” be deleted and the following substituted:

“collateral” means personal property, fixtures, [licences,] and crops that are subject to a security interest;

3. Subsection (4) of section 55 be deleted and a provision comparable to the following substituted:

(4) Subject to any other enactment or applicable law to the contrary, where the same obligation is secured by an interest in land and a security interest in collateral to which this Act applies, the secured party may

- (a) proceed under this Part as to the collateral, or
- (b) proceed as to both the land and the collateral as if the collateral were land, in which case
  - (i) the secured party's rights, remedies and duties in respect of the land apply to the collateral with necessary modifications as if the collateral were land, and
  - (ii) this Part does not apply.

4. Subsections (5) and (5.1) of section 55 be amended by deleting “personal property” wherever it occurs and substituting “collateral.”

5. The provision comparable to the following be added as section 10 (1.1) and section 18 (1.1):

(1.1) In this section “personal property” includes fixtures, [licences] and crops.

**B. Section 36(3): “person with an interest in the land”**

In addition to the concern addressed by the previous recommendations, one other concern was voiced with such frequency and urgency by those consulted that we felt it should be addressed in this Report. This concern revolves around the final words of section 36(3). That subsection states:

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(3) Except as provided in this section or in section 30, 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.

Suppose a lender has both a mortgage (an“interest in the land”) and an interest recognized under the PPSA. Does section 36(3) prevent the lender from relying on the PPSA interest? There is no policy reason why section 36(3) should have that effect. Undoubtedly the drafters of the PPSA intended that section 36(3) give priority only over that of a “person” whose interest in the goods arises only because the goods are, in law, part of the land. If that person also asserts a claim to the fixture based on a separate interest in the personal property of the debtor, section 36(3) has no application even though the person also has an interest in the land. The competition would be resolved by other priority rules contained in the PPSA. This is the result that would flow from an interpretation of section 36(3) that aimed to give effect to its purpose.

A literal reading of this provision, however, could lead to an interpretation that yields a different result -- so long as a person has an interest in the land, that person will never be able to get priority in the goods, as goods, as against a person who does not have an interest in the land and whose security interest in the goods attached before or at the time the goods became fixtures. The language of section 37(3) raises an identical concern with respect to crops.

We believe that sections 36(3) and 37(3) should be revised to ensure that the “purposive” interpretation prevails. A number of formulations were suggested by those who raised this concern. The one which commends itself to us is set out below.

The Commission recommends:

6. The *Personal Property Security Act* be revised by enacting amended sections 36((3) and 37(3) similar to the following:

36. (3) Except as provided in this section or in section 30, a security interest in goods that attaches before or at the time the goods become fixtures has priority with respect to the goods over *an interest in the goods arising from an interest in the land to which they are attached.*

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37. (3) Except as provided in this section, a security interest in crops has priority with respect to the crops over *an interest in the crops arising from an interest in the land on which they are grown.*

[emphasis added]

### **C. Fraud and Notice**

Rarely does the PPSA mention actual knowledge or fraud as an element which can affect the existence or priority of interests or rights. Sections 36(4) and 36(5)(b) are exceptions in that they speak of a person acting “without fraud” and of an interest being “acquired without fraud.” The reference to these concepts has concerned a number of practitioners in the real estate bar because, it is argued, it could lead to the application in the PPSA context of the doctrine of notice as set out in the controversial case of *Lloyds Bank of Canada v. Lumberton Mills Ltd.*<sup>14</sup>

In that case a debenture which prohibited the creation of prior charges was registered in the office of the Registrar of Companies. Was it binding on another party who subsequently was given the right to a general lien on equipment by the same company which had executed the debenture? The Court of Appeal held that the lien holder should be taken to have constructive notice of the debenture and its prohibition.

It was accepted that constructive notice could not exist on any basis other than registration. Esson J.A. noted that it was a dangerous doctrine because it is “contrary to the truth,” the gist of it being that a person who does not know the true facts will be held to be in the same position as if the facts were known. Esson J.A. continued:<sup>15</sup>

The question in such cases is, in essence, in what circumstances the failure to inquire will import notice of the facts which would have been learned had inquiry been made. Here, the inquiry which could have been made was to search in the office of the registrar. Had that been done, Coast would have learned of the prohibitions against creating prior charges. I conclude, on the basis of the authorities dealing with the equitable doctrine, that Coast must be held to have had constructive notice of the contents of the debenture.

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14. (1988) 32 B.C.L.R. (2d) 67 (C.A.)

15. *Ibid* at 90.

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No statutory provision, it was held, modified the equitable doctrine.

The fear expressed is that a person who has, or intends to acquire, an interest in the land might be affected not only by a notice filed under section 49 but also by any actual notice or by constructive notice the person may be deemed to have by virtue of a financing statement registered in the personal property registry.

To address this concern sections 29(3) and (4) of the *Land Title Act*<sup>16</sup> were enacted. Section 29 provides:

29. (1) Except in the case of fraud in which he has participated, no person contracting or dealing with or taking or proposing to take from a registered owner

- (a) a transfer of land; or
- (b) a charge on land, or a transfer or assignment or subcharge of the charge,

shall be affected by a notice, express, implied, or constructive, of an unregistered interest affecting the land or charge other than

- (c) an interest, the registration of which is pending;
- (d) a lease or agreement for lease for a period not exceeding 3 years where there is actual occupation under the lease or agreement; or
- (e) the title of a person against which the indefeasible title is void under section 23(3),

notwithstanding a rule of law or equity to the contrary.

(2) For the purpose of this section 'registered owner' includes a person who has made an application for registration and becomes a registered owner as a result of that application.

(3) Subject to section 49 of the *Personal Property Security Act*, no person contracting or dealing with, taking from or proposing to take from a registered owner, an estate or interest in land, or a transfer or assignment of an estate or interest in land, is affected by a financing statement registered under that Act whether or not he had express, constructive or implied notice or knowledge of the registration.

(4) The fact that the person who is contracting with, dealing with, taking from or proposing to take from a registered owner under subsection (1) had knowledge of a financing statement registered under the *Personal Property Security Act*, or that the person could have obtained knowledge of the financing statement by searching the personal property registry established under that Act, is not evidence of fraud or bad faith for the purposes of subsection (1).

Those provisions go some way to alleviate the concern about the *Lumberton* decision. They deal expressly with the issue of constructive notice by virtue of registration of a financing statement.

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16. R.C.B.C. 1979, c. 219 *am.* S.B.C. 1982, c. 60, s. 7; S.B.C. 1990, c. 11, s. 69.

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A similar concern underlies section 47 of the PPSA. Until 1992 that provision read as follows:

47. Registration of a financing statement in the registry is not express, constructive or implied notice or knowledge of its contents to any person.

In 1992 it was amended and now provides:<sup>17</sup>

47. Registration of a financing statement in the registry does not by itself constitute express, constructive or implied notice to any person of, or express, constructive or implied knowledge on the part of, any person of

- (a) the financing statement or its contents, or
- (b) the security interest perfected by the financing statement or the contents of any security agreement.

The effect of the 1992 amendment is to extend the scope of the “thing” of which no constructive notice may be taken from the financing statement to include the underlying security interest and agreement.

We believe that section 29 of the *Land Title Act* should be amended to enlarge its scope in a similar fashion. It would provide even greater comfort if it included not only a reference to financing statements but also to security agreements. It is usually in the security agreements and not in the financing statements that restrictions and prohibitions will be found.

The Commission recommends:

7. The *Land Title Act* be amended by replacing subsections (3) and (4) of section 29 with provisions similar to the following:

- (3) Subject to section 49 of the *Personal Property Security Act*, no person contracting or dealing with, taking from or proposing to take from a registered owner, an estate or interest in land, or a transfer or assignment of an estate or interest in land, is affected by
- (a) a financing statement registered under that Act,
  - (b) the security interest perfected by the financing statement, or
  - (c) the contents of the security agreement

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<sup>17</sup>. *Personal Property Security Amendment Act, 1992*, S.B.C. 1992, c. 48, s. 8.

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whether or not that person had express, constructive or implied notice or knowledge of the registration.

(4) The fact that a person who is contracting with, dealing with, taking from or proposing to take from a registered owner under subsection (1) had knowledge of

- (a) a financing statement registered under the *Personal Property Security Act*, or
- (b) the security interest perfected by the financing statement, or
- (c) the contents of the security agreement

or that the person could have obtained knowledge of the financing statement or the existence of the security interest or security agreement by searching the personal property registry established under that Act, is not evidence of fraud or bad faith for the purposes of subsection (1).

**D. Conclusion and Summary of Recommendations**

Except for two issues that we believe require further consideration, it is our conclusion that the PPSA strikes a fair balance among the needs and legitimate expectations of secured financiers (whether they rely on land or personal property), owners and others with interests in land. It is undeniable that the PPSA gives a land owner the power to create an effective security interest in fixtures in circumstances where that was not possible before. Some view this flexibility as a significant erosion of the rights of those whose interests in fixtures arise under real property law.

It may be true that such a person enjoys a less favourable position under the new regime, but it cannot be said that a mortgage lender (land) loses any right to a fixture that had been acquired as a result of the mortgage. What the new regime does is to prevent that mortgage lender from automatically getting a prior right to new fixtures as a debtor acquires them irrespective of the fact that some other financier may regard them as collateral under a security agreement.

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It flows from our endorsement of the general theory of section 36 that any reform measures should be directed toward insuring that its theory and purpose are carried out most effectively. A number of potential changes to the PPSA have been suggested to us. Many of these suggestions have merit although they do not strike us as requiring urgent or immediate action. We believe the most sensible course is to draw these to the attention of the Canadian Conference on Personal Property Security Law<sup>18</sup> for their review.

As discussed in this and the preceding Chapter, two of the concerns expressed do suggest a need for immediate action and recommendations are set out below. A minor amendment to the *Land Title Act* is also set out.

The Commission recommends that:

1. Subsections (4), (4.1) and (4.2) of section 1 of the *Personal Property Security Regulation* as amended by B.C. Reg. 215/91 be deleted.<sup>19</sup>

2. In the *Personal Property Security Act* the definition of “collateral” be deleted and the following substituted:

“collateral” means personal property, fixtures, [licences,]<sup>20</sup> and crops that are subject to a security interest;

3. Subsection (4) of section 55 be deleted and a provision comparable to the following substituted:

(4) Subject to any other enactment or applicable law to the contrary, where the same obligation is secured by an interest in land and a security interest in collateral to which this Act applies, the secured party may

- (a) proceed under this Part as to the collateral, or
- (b) proceed as to both the land and the collateral as if the collateral were land, in which case

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18. See n. 12 of Chapter I.

19. See n. 13 *supra* as to the use of the expression “personal property” in the regulations.

20. The position of licences and the status of our recommendations in relation to them is discussed *supra* at p. 12.

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- (i) the secured party's rights, remedies and duties in respect of the land apply to the collateral with necessary modifications as if the collateral were land, and
  - (ii) this Part does not apply.
- 4. Subsections (5) and (5.1) of section 55 be amended by deleting “personal property” where ever it occurs and substituting “collateral.”
- 5. The provision comparable to the following be added as section 10 (1.1) and section 18 (1.1):
  - (1.1) In this section “personal property” includes fixtures, [licences] and crops,
- 6. The *Personal Property Security Act* be revised by enacting amended sections 36((3) and 37(3) similar to the following:
  - 36. (3) Except as provided in this section or in section 30, a security interest in goods that attaches before or at the time the goods become fixtures has priority with respect to the goods over *an interest in the goods arising from an interest in the land to which they are attached.*
  - 37. (3) Except as provided in this section, a security interest in crops has priority with respect to the crops over *an interest in the crops arising from an interest in the land on which they are grown.*

[emphasis added]
- 7. The *Land Title Act* be amended by replacing subsections (3) and (4) of section 29 with provisions similar to the following:
  - (3) Subject to section 49 of the *Personal Property Security Act*, no person contracting or dealing with, taking from or proposing to take from a registered owner, an estate or interest in land, or a transfer or assignment of an estate or interest in land, is affected by

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(a) a financing statement registered under that Act,  
(b) the security interest perfected by the financing statement, or  
(c) the contents of the security agreement whether or not that person had express, constructive or implied notice or knowledge of the registration.

(4) The fact that a person who is contracting with, dealing with, taking from or proposing to take from a registered owner under subsection (1) had knowledge of

(a) a financing statement registered under the *Personal Property Security Act*, or  
(b) the security interest perfected by the financing statement, or  
(c) the contents of the security agreement or that the person could have obtained knowledge of the financing statement or the existence of the security interest or security agreement by searching the personal property registry established under that Act, is not evidence of fraud or bad faith for the purposes of subsection (1).

## E. Acknowledgements

We would like to acknowledge the valuable contribution of Professor Bruce MacDougall who continues to assist us as a consultant on this project. We stress, however, that the conclusions and recommendations set out are the Commission's own and are not necessarily shared by Professor MacDougall. A variety of individuals have provided response and input. This includes the members of the Consultative Committee constituted by the Minister of Finance and Corporate Relations to advise on the *Personal Property Security Act* and individual members of the Canadian Conference on Personal Property Law who took the time to write. Our thanks go to all of them.

As work on this reference moves forward into its next phase, we look forward to working with these various bodies and individuals in the same spirit of happy cooperation that characterized the initial phase.



## APPENDIX A

### **PERSONAL PROPERTY SECURITY ACT**

S.B.C. 1989, c. 36

(Selected Provisions and Regulations)

1. (1) In this Act

“building” means a structure, erection, mine or works built, constructed or opened on or in land;

“building materials” means materials that are incorporated into a building and includes goods attached to a building so that their removal

(a) would necessarily involve the dislocation or destruction of some other part of the building and cause substantial damage to the building apart from the loss of value of the building resulting from the removal, or

(b) would result in the weakening of the structure of the building or the exposure of the building to weather damage or deterioration,

but does not include

(c) heating, air conditioning or conveyancing devices, or

(d) machinery installed in a building or on land for use in carrying on an activity inside the building or on the land;

“collateral” means personal property that is subject to a security interest;

“crops” means crops, whether matured or otherwise, and whether naturally grown or planted, attached to land by roots or forming parts of trees or plants attached to land, and includes only trees that

(a) are being grown as nursery stock,

(b) are being grown for uses other than the production of lumber and wood products, or

(c) are intended to be replanted in another location for the purpose of reforestation;

“fixture” does not include building materials;

“goods” means tangible personal property, fixtures, crops and the unborn young of animals, but does not include chattel paper, a document of title, an instrument, a security, money, trees other than crops until the trees are severed, or minerals or hydrocarbons until they are extracted;

“intangible” means

(a) personal property, but does not include goods, chattel paper, a document of title, an instrument, money or a security, and

(b) a licence;

“proceeds” means

(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, ...

“purchase money security interest” means

**APPENDIX A: THE PERSONAL PROPERTY SECURITY ACT**

- (a) a security interest taken in collateral to the extent that it secures payment of all or part of its purchase price,
- (b) a security interest taken 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,

...

“security interest” means

- (a) an interest in goods, chattel paper, a security, a document of title, an instrument, money or an intangible that secures payment or performance of an obligation, but does not include the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading or its equivalent to the order of the seller or to the order of an agent of the seller, unless the parties have otherwise evidenced an intention to create or provide for a security interest in the goods, and

...

1. (3) A lease under paragraph (b) of the definition of “lease for a term of more than one year” does not become a lease for a term of more than one year until the lessee's possession extends for more than one year.

(4) Unless otherwise provided in this Act, the determination whether goods are consumer goods, inventory or equipment shall be made as of the time the security interest in the goods attaches.

(5) Proceeds are traceable whether or not there is a fiduciary relationship between the person who has a security interest in the proceeds, as provided in section 28, and the person who has rights in or has dealt with the proceeds.

10. (1) Subject to subsection (2), a security interest is only enforceable against a third party where

- (a) the collateral is in the possession of the secured party, or
- (b) the debtor has signed a security agreement that contains
  - (i) a description of the collateral by item or kind, or by reference to one or more of the following: goods, securities, instruments, documents of title, chattel paper, intangibles, money, crops or licences,
  - (ii) a statement that a security interest is taken in all of the debtor's present and after acquired personal property, or
  - (iii) 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) one or more of the following: goods, securities, instruments, documents of title, chattel paper, intangibles, money, crops or licences.

(2) For the purposes of subsection (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.

(3) Subject to subsection (6), a description is inadequate for the purposes of subsection (1) (b) if it describes the collateral as consumer goods or equipment without further reference to the kind of collateral.

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(4) A description of collateral as inventory is adequate for the purposes of subsection (1) (b) only while it is held by the debtor as inventory.

(5) A security interest in proceeds is enforceable against a third party whether or not the security agreement contains a description of the proceeds.

(6) Where personal property is excluded from a description of collateral, the excluded property may be described as consumer goods without further reference to the item or kind of property excluded.

12. (1) A security interest, including a security interest in the nature of a floating charge, attaches when

- (a) value is given,
- (b) the debtor has rights in the collateral, and
- (c) except for the purpose of enforcing rights between the parties to the security agreement, the security interest becomes enforceable under section 10,

unless the parties have specifically agreed to postpone the time for attachment in which case the security interest will attach at the time specified in the agreement.

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, by a demand in writing containing an address for reply and delivered to the secured party,

- (a) where an address is in the records of the registry,
  - (i) at the secured party's most recent address in a registered financing statement that relates to the property, or
  - (ii) at an address of the secured party, whether or not in the records of the registry, that is more recent than the address referred to in subparagraph (i), or

- (b) where no address is in the records of the registry, at the current address of the secured party,

require the secured party to send or make available to the person making the demand or, if the demand is made by the debtor, to any person at an address specified by the debtor, any of the information specified in subsection (2).

(2) The information that may be demanded under subsection (1) may be one or more of the following:

- (a) a copy of any security agreement providing for a security interest held by the secured party in the personal property of the debtor;
- (b) a statement in writing of the amount of the indebtedness and of the terms of payment of that indebtedness as of the date specified in the demand;
- (c) a written approval or correction of an itemized list of personal property attached to the demand indicating which items in the demand are collateral as of the date specified in the demand;
- (d) a written approval or correction of the amount of the indebtedness and of the terms of payment of the indebtedness as of the date specified in the demand;
- (e) sufficient information as to the location of the security agreement or a copy of it, as specified in the demand, so as to enable a person entitled to receive a copy of the security agreement to inspect it at that location.

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(3) A person with an interest in personal property of the debtor is entitled to make a demand under subsection (1) only with respect to a security agreement that provides for a security interest in the property in which that person has an interest.

(4) A person who is entitled to make a demand under subsection (1) may demand that the secured party permit the person to inspect a copy of the security agreement by giving the secured party a written demand to that effect in accordance with subsection (1).

(5) Where a secured party receives a demand under subsection (4), the secured party shall permit the person making the demand or his authorized representative to inspect, during normal business hours, the security agreement at the place specified by the secured party.

(6) Where a demand is made requiring an approval or correction referred to in subsection (2) (c) and the secured party claims a security interest in

- (a) all of the personal property of the debtor,
- (b) all the personal property of the debtor, other than a specified kind or item of personal property, or
- (c) all of a specified kind of personal property of the debtor,

the secured party may indicate this instead of approving or correcting the itemized list of the personal property.

(7) Where the secured party is a trustee under a trust indenture, he shall reply to a demand under subsection (1) or (4) within 25 days after he receives it.

(8) Any other secured party shall reply to the demand within 10 days after he receives it.

(9) Where, without reasonable excuse,

- (a) the secured party fails to comply with the demand within the specified period, or
- (b) in the case of a demand under subsection (1) the secured party's reply to the demand under subsection (1) is incomplete or incorrect,

the person making the demand, may in addition to any other remedy provided for in this Act, apply to a court for an order requiring the secured party to comply with the demand.

(10) Where a demand is made under subsection (1) or (4) and the person receiving the demand no longer has an interest in the obligation or property of the debtor that is the subject of the demand, he shall, not later than 10 days after receiving the demand, disclose

- (a) the name and address of his immediate successor in interest, and
- (b) if known to him, the current successor in interest.

(11) Where, without reasonable excuse, the person receiving the demand fails to comply with subsection (10), the person making the demand may, in addition to any other remedy provided for in this Act, apply to a court for an order requiring the person to whom the demand has been made to comply with this section.

(12) On application under subsection (9) or (11), the court may make an order requiring the secured party or the person receiving the demand to comply with the demand or to disclose the information, as the case may be.

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(13) The court may provide for the actual or possible failure of a secured party to comply with an order under subsection (12) by making one or more of the following orders either on application or as part of the order under subsection (12):

- (a) any order the court considers necessary to ensure compliance with the demand;
- (b) in the case of non-compliance by a secured party or the person receiving the demand, an order that the security interest of the secured party with respect to which the demand was made is unperfected or extinguished and that any related registration be discharged.

(14) On an application

- (a) under subsection (11), or
- (b) under this subsection made by
  - (i) the secured party referred to in subsection (9), or
  - (ii) the person referred to in subsection (10) as receiving the demand,

the court, subject to section 69 (2), may, unless the demand is made by the debtor, exempt the secured party or person receiving the demand in whole or in part from complying with subsections (8) to (10) or may extend the time for compliance.

(15) A secured party who has replied to a demand referred to in subsection (1) is estopped, for the purposes of this Act, against the person making the demand or against any other person who can reasonably be expected to rely on the reply from denying

- (a) the accuracy of the information referred to in subsection (2) (b) to (d) and contained in the reply to the demand, and
- (b) that the copy of the security agreement referred to in subsection (2) (a) that is provided in response to a demand under subsection (1) is a true copy of that security agreement,

but only to the extent that the debtor or the other person has in fact relied on

- (c) the information referred to in paragraph (a), or
- (d) the accuracy of the copy of the security agreement referred to in paragraph (b).

(16) A successor in interest referred to in subsection (10) is estopped for the purposes of this Act, against the person making the demand referred to in subsection (1) and any other person who can reasonably be expected to rely on the reply to the demand, from denying

- (a) the accuracy of the information referred to in subsection (2) (b) to (d) and contained in the reply to the demand, and
- (b) that the copy of the security agreement referred to in subsection (2) (a) that is provided in response to a demand under subsection (1) is a true copy of that security agreement,

but only to the extent that the debtor or the other person has in fact relied on

- (c) the information referred to in paragraph (a), or
- (d) the accuracy of the copy of the security agreement referred to in paragraph (b).

(17) A successor in interest is not estopped under subsection (16) where

- (a) the debtor or other person who relied on the reply knows that the interest has been transferred to the successor in interest and knows that person's identity and address, or
- (b) before making the demand, a financing change statement has been registered under section 45 disclosing the successor in interest as the secured party.

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(18) The person to whom a demand is made under this section may require payment in advance of a fee in a prescribed amount for each reply to a demand, but the debtor is entitled to make a demand and receive a reply to it without charge once every 6 months.

(19) A secured party who receives a demand that purports to be made by a person entitled to make it under subsection (1) may act as if the person is, in fact, entitled to make the demand unless the secured party knows that the person is not entitled to make it.

20. A security interest

- (a) in collateral is subordinate to the interest of
  - (i) a person who causes the collateral to be seized under legal process to enforce a judgment including execution, garnishment or attachment, or who has obtained a charging order or equitable execution affecting or relating to the collateral,
  - (ii) a sheriff who has seized or has a right to the collateral under the *Creditor Assistance Act*,
  - (iii) a judgment creditor entitled by law to participate in the distribution of property or its proceeds seized under legal process as provided in the *Creditor Assistance Act*, and
  - (iv) a representative of creditors, but only for the purposes of enforcing the rights of a person referred to in subparagraph (i),  
if that security interest is unperfected at the time
  - (v) the interest of a person referred to in subparagraph (i), (ii) or (iv) arises, or
  - (vi) the judgment creditor referred to in subparagraph (iii) delivers a writ of execution or certificate to the sheriff under section 3 of the *Creditor Assistance Act*,
- (b) in collateral is not effective against
  - (i) a trustee in bankruptcy if the security interest is unperfected at the date of the bankruptcy, or
  - (ii) a liquidator appointed under the *Winding-up Act (Canada)* if the security interest is unperfected at the date that the winding-up order is made, and
- (c) in chattel paper, a document of title, a security, an instrument, money, an intangible or goods is subordinate to the interest of a transferee who
  - (i) acquires an interest under a transaction that is not a security agreement,
  - (ii) gives value, and
  - (iii) acquires the interest without knowledge of the security interest and before the security interest is perfected.

22. (1) a purchase money security interest in

- (a) collateral, other than an intangible, that is perfected not later than 15 days after the date the debtor or a third person at the request of the debtor, obtains possession of the collateral, whichever is earlier, or
  - (b) an intangible that is perfected not later than 15 days after the day the security interest attaches
- has priority over the interests of persons referred to in section 20 (a) and (b).

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30. (1) In this section

“buyer of goods” includes a person who obtains vested rights in goods under a contract to which the person is a party as a consequence of the goods becoming a fixture or accession to property in which the person has an interest;

“seller” includes a person who supplies goods that become a fixture or accession under a contract with a buyer of goods or under a contract with a person who is party to a contract with the buyer;

“the ordinary course of business of the seller” includes the supply of goods in the ordinary course of business as part of a contract for services and materials.

(2) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest in the goods given by the seller or lessor or arising under section 28 or 29, whether or not the buyer or lessee knows of it, unless the buyer or lessee also knows that the sale or lease constitutes a breach of the security agreement under which the security interest was created.

(3) A buyer or lessee of goods that are acquired as consumer goods takes free from a perfected or unperfected security interest in the goods if the buyer or lessee

- (a) gave value for the interest acquired, and
- (b) bought or leased the goods without knowledge of the security interest.

(4) Subsection (3) does not apply to a security interest in

- (a) a fixture, or
- (b) goods the purchase price of which exceeds \$1 000 or, in the case of a lease, the market value of which exceeds \$1 000.

36. (1) In this section “secured party” includes a receiver.

(2) This section applies to land for which a certificate of title has been issued under the *Land Title Act* and to prescribed land or classes of land.

(3) Except as provided in this section and in section 30, 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.

(4) A security interest referred to in subsection (3) is subordinate to the interest of

- (a) a person who acquires for value an interest in the land after the goods become fixtures including an assignee for value of the interest of a person with an interest in the land at the time the goods become fixtures, and
- (b) any person with a registered mortgage on the land who
  - (i) makes an advance under the mortgage after the goods become fixtures, but only with respect to the advance, or
  - (ii) obtains an order for sale or foreclosure after the goods become fixtures

without fraud and before the notice of the security interest is filed in accordance with section 49.

(5) A security interest in goods that attaches after the goods become fixtures is subordinate to the interest of a person who

- (a) has an interest in the land at the time the goods become fixtures and who

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- (i) has not consented to the security interest,
  - (ii) has not disclaimed an interest in the goods or fixtures,
  - (iii) has not entered into an agreement under which a person is entitled to remove the goods, or
  - (iv) is not otherwise precluded from preventing the debtor from removing the goods, or
- (b) acquires an interest in the land after the goods become fixtures if the interest is acquired without fraud and before the notice of the security interest in the goods is filed in accordance with section 49.
- (6) A security interest referred to in subsection (3) or (5) is subordinate to the interest of a creditor of the debtor who caused to be registered under the Court Order Enforcement Act a judgment in the appropriate land title office affecting the land, after the goods become fixtures, and before the notice of the security interest is filed in accordance with section 49.
- (7) The interest of a creditor referred to in subsection (6) does not take priority over a purchase money security interest in goods a notice of which is filed in accordance with section 49 not later than 15 days after the goods are affixed to the land.
- (8) A secured party who, under this Act, has the right to remove goods from land shall exercise this right of removal in a manner that causes no greater damage or injury to the land and to other property situated on it or that puts the occupier of the land to no greater inconvenience than is necessarily incidental to the removal of the goods.
- (9) A person, other than the debtor, who has an interest in the land at the time the goods that are subject to the security interest become fixtures is entitled to reimbursement for any damages to his interest in the land caused during the removal of the goods, but is not entitled to reimbursement for diminution in the value of the land caused by the absence of the goods removed or by the necessity of replacement.
- (10) The person entitled to reimbursement under subsection (9) may refuse permission to remove the goods until the secured party has given adequate security for reimbursement.
- (11) The secured party may apply to a court for one or more of the following orders:
- (a) determining the person entitled to reimbursement under this section;
  - (b) determining the amount and kind of security to be provided by the secured party;
  - (c) designating the depository for the security;
  - (d) authorizing the removal of the goods without the provision of security for reimbursement under subsection (10).
- (12) A person having an interest in the land that is subordinate to a security interest under this section may, before the goods have been removed from the land by the secured party, retain the goods on payment to the secured party of the lesser of the following:
- (a) the amount secured by the security interest having priority over the interest;
  - (b) the market value of the goods if the goods were removed from the land.
- (13) The secured party who has a right to remove the goods from the land shall give to each person, who appears by the records of the land title office to have an interest in the land, a notice of the intention of the secured party to remove the goods and the notice shall contain

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- (a) the name and address of the secured party,
- (b) a description of the goods to be removed,
- (c) the amount required to satisfy the obligation secured by the security interest,
- (d) the market value of the goods,
- (e) a description of the land to which the goods are affixed, and
- (f) a statement of intention to remove the goods unless the amount referred to in subsection (12) is paid on or before a specified date that is not less than 15 days after the notice is given in accordance with subsection (14).

(14) A notice referred to in subsection (13) shall be given at least 15 days before removal of the goods and may be given in accordance with section 72 or by registered mail addressed to the address of the person to be notified as it appears in the records of the land title office.

(15) A person entitled to receive a notice under subsection (14) may apply to a court for an order postponing removal of the goods from the land.

37. (1) In this section “secured party” includes a receiver.

(2) This section applies to land for which a certificate of title has been issued under the Land Title Act and to prescribed land or classes of land.

(3) Except as provided in this section, a security interest in crops has priority with respect to the crops over an interest in the crops claimed by a person with an interest in the land.

(4) A security interest referred to in subsection (3) is subordinate to the interest of

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

without fraud and before the notice of the security interest in the growing crops is filed in accordance with section 49.

(5) A security interest referred to in subsection (3) is subordinate to the interest of a creditor of the debtor who causes to be registered, in accordance with the Court Order Enforcement Act, a judgment in the appropriate land title office affecting the land on which the crops are growing before the notice of the security interest is filed in accordance with section 49.

(6) The interest of a creditor referred to in subsection (5) does not take priority over a purchase money security interest in the crops, or a security interest in the crops referred to in section 34 (8), a notice of which is filed in accordance with section 49 not later than 15 days after the time the security interest in the crops attaches.

(7) Section 36 (8) to (15) applies to seizure and removal of growing crops from land.

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47. Registration of a financing statement in the registry does not by itself constitute express, constructive or implied notice to any person of, or express, constructive or implied knowledge on the part of, any person of

- (a) the financing statement or its contents, or
- (b) the security interest perfected by the financing statement or the contents of any security agreement.

49. (1) In this section

“fee” means the prescribed fee payable under the Land Title Act for the filing of notices in the land title office;

“register” has the same meaning as in the Land Title Act;

“registrar” means the registrar of titles for the land title district in which land affected by a security interest is located;

“secured party” includes an assignee referred to in subsection (6);

“security interest” means a security interest in a fixture under section 36 or growing crops under section 37.

(2) A secured party may, on application and on payment of the fee, file in the proper land title office a notice of a security interest signed by the secured party or the secured party's agent setting out

- (a) a description of the land affected by the notice that is sufficient for the registrar to identify it in his or her records,
- (b) the name and address of the debtor and the secured party,
- (c) the expiry date of the notice, if any,
- (d) a description of the collateral by which it may be readily identified, and
- (e) other prescribed information,

and the registrar shall file the notice and make an entry of it in the register.

(3) The filing of a notice under subsection (2) is notice, from the date and time the application was received by the registrar, of the security interest, to every person dealing with the land.

(4) After its expiry date, if any, a notice of a security interest is of no effect and the registrar

- (a) on the application of any person interested in the land and on payment of the fee, or
- (b) on his or her own initiative

may cancel the entry of the notice on the register.

(5) Where a secured party wishes to extend an expiry date specified in a notice filed under subsection (2), he may, on application and on payment of the fee, file a notice of extension signed by the secured party setting out

- (a) a description of the land affected by the notice that is sufficient for the registrar to identify it in his or her records,
- (b) the extended expiry date,
- (c) the filing number of the notice under subsection (2), and
- (d) other prescribed information,

and the registrar shall file the notice and make an entry of it in the register.

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(6) Where a secured party has assigned a security interest in respect of which a notice has been filed under this section, the assignee may, on application and on payment of the fee, file a notice of the assignment signed by the assignee setting out

- (a) the name and address of the assignee,
- (b) a description of the land affected by the notice that is sufficient for the registrar to identify it in his or her records,
- (c) the filing number of the notice under subsection (2), and
- (d) other prescribed information,

and the registrar shall file the notice and make an entry of it in the register.

(7) The registrar,

- (a) on receipt of a notice of cancellation signed by the secured party or the secured party's agent setting out
  - (i) a description of the land affected by the notice that is sufficient for the registrar to identify it in his or her records, and
  - (ii) the filing number of the notice under subsection (2), and
- (b) on application and payment of the fee

shall, subject to subsection (8), cancel the entry of the notice filed under subsection (2) in the register.

(8) Where a notice of cancellation under subsection (7)

- (a) is expressed to be a partial cancellation, and
- (b) contains a description of the collateral that has been released from the security interest,

the registrar shall file the notice and make an entry of it in the register.

(9) The registrar is not under any duty to inquire into or verify whether or not the signature of a person on a notice filed under subsection (7) or (8) is the signature of the secured party.

(10) Where in respect of a notice registered under this section

- (a) all of the obligations under the security agreement to which the notice relates have been performed,
- (b) the secured party has agreed to release part or all of the collateral described in the notice,
- (c) the description of the collateral contained in the notice includes an item or kind of property that is not collateral under a security agreement between the secured party and the debtor,
- (d) the security agreement to which the notice relates no longer exists between the secured party and the debtor, or
- (e) the item or kind of property described in the notice is not affixed to the land to which the notice relates,

the debtor named in the notice or any person having a registered interest in the land may give a written demand in accordance with subsection (12) to the secured party.

(11) A demand referred to in subsection (10) shall require that the secured party, not later than 40 days after the demand is given, deliver to the person making the demand a signed notice of amendment, extension or cancellation, whichever the demand specifies.

(12) The demand referred to in subsection (10) may be given

- (a) in accordance with section 72, or
- (b) by registered mail to,
  - (i) where a notice of assignment under subsection (6) has not been filed, the address of the secured party set out in a notice filed under subsection (2), or

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- (ii) where a notice of assignment under subsection (6) has been filed, the address of the secured party set out in that notice.

- (13) The registrar, on receipt of
  - (a) a true copy of the demand,
  - (b) an affidavit of the person who gave the demand verifying that
    - (i) the demand was given in accordance with subsection (12),
    - (ii) the copy referred to in paragraph (a) is a true copy,
    - (iii) the person is not aware of any proceeding of the secured party to enforce the security interest or to oppose or refute the demand, and
    - (iv) 40 days have expired since the notice was given under subsection (12),
  - (c) the application of the person who gave the demand, and
  - (d) the fee,

shall make the appropriate entry in the register to effect the filing or cancellation requested in the demand unless the registrar has received a court order not to make the entry.

- (14) A secured party shall not charge an expense or accept a fee for compliance with a demand made under subsection (10) unless the expense or fee has been agreed to by the parties before the demand was given.

55. (3) In this section “secured party” includes a receiver.

(4) Subject to any other enactment or applicable law to the contrary, where the same obligation is secured by an interest in land and a security interest to which this Act applies, the secured party may

- (a) proceed under this Part as to the personal property, or
- (b) proceed as to both the land and the personal property as if the personal property were land, in which case
  - (i) the secured party's rights, remedies and duties in respect of the land apply to the personal property with necessary modifications as if the personal property were land, and
  - (ii) this Part does not apply.

(5) Subsection (4)(b) does not limit the rights of a secured party who has a security interest in the personal property taken before or after the security interest mentioned in subsection (4), and the secured party

- (a) has standing in proceedings taken in accordance with subsection (4) (b), and
- (b) may apply to the court for conduct of a judicially supervised sale under subsection (4) (b) and the court may grant the application.

(5.1) For the purposes of distributing the amount received from the sale of land and personal property where the price paid is not allocated to the land and personal property separately, the amount of the total price that is attributable to the personal property is that proportion of the total price that the market value of the personal property at the time of the sale bears to the market value of the land and personal property at the time of the sale.

(6) Except as provided in section 67, a security interest does not merge merely because a secured party has reduced his claim to judgment.

58. (1) In this section “secured party” includes a receiver.

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(2) Subject to subsection (3) and to sections 36 to 38, on default under a security agreement,

- (a) the secured party has unless otherwise agreed the right to take possession of the collateral or otherwise enforce the security agreement by any method permitted by law,

...

63. (1) In this section “secured party” includes a receiver.

(2) Subject to subsection (3), on application of a debtor, a creditor of a debtor, a secured party, a sheriff or a person with an interest in the collateral, a court may make one or more of the following orders:

- (a) an order, including a binding declaration of right and injunctive relief, that is necessary to ensure compliance with this Part or section 17, 36, 37 or 38;
- (b) an order giving directions to a person with respect to the exercise of his rights or the discharge of his obligations under this Part or section 17, 36, 37 or 38;
- (c) an order relieving a person from compliance with the requirements of this Part or section 17, 36, 37 or 38, but only on terms that are just and reasonable to all parties affected;
- (d) an order staying enforcement of rights provided in this Part or section 17, 36, 37 or 38;
- (e) an order necessary to ensure protection of the collateral.

(3) Nothing in subsection (2) (c) and (d) affects the application of sections 58 (3) to (5) and 67.

68. (1) The principles of the common law, equity and the law merchant, except insofar as they are inconsistent with the provisions of this Act, supplement this Act and continue to apply.

(2) All rights, duties or obligations arising under a security agreement, this Act or any other law applicable to security agreements or security interests shall be exercised or discharged in good faith and in a commercially reasonable manner.

(3) A person does not act in bad faith merely because the person acts with knowledge of the interest of some other person.

*Regulations*

1. (4) Except as otherwise provided in subsection (4.1) and notwithstanding that the fixture or crop remains part of the land to which it is affixed or attached and that a dealing with land is a dealing with the fixtures and crops affixed or attached to the land, “personal property” in the *Personal Property Security Act* and this regulation is conclusively deemed to include a fixture or crop for all purposes related to a security interest in the fixture or crop including, without limitation, the validity, attachment, perfection, priority, subordination, enforceability or realization of, or other dealing with, that security interest.

1. (4.1) Subsection (4) does not apply

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- (a) for any purpose other than a purpose of the *Personal Property Security Act* and this regulation,
- (b) to an interest which is created by words that also create or transfer an interest in the land to which the fixture or crop is affixed or attached, or
- (c) to the creation of an interest in a fixture or crop by the granting of a lease of the land to which the fixture or crop is affixed or attached.

1. (4.2) For the purpose of interpreting subsection (4.1)(b) words that create an interest in a fixture or crop are not “words that also create or transfer an interest in the land to which the fixture or crop is affixed or attached” solely because the words creating the interest in the fixture or crop are contained in a document which also contains other words that create or transfer an interest in the land.

141. (1) Where a secured party claims a security interest in goods which are or may become fixtures or in crops that are growing or to be grown, he shall cause to be filed in the appropriate land title office a notice in Form 16, setting out

- (a) the name and address of the secured party,
- (b) the full name and address of the debtor,
- (c) a description of the goods or crops by which they may readily and easily be known and distinguished,
- (d) the expiry date of the notice or a statement that it is an infinite registration, and
- (e) a description of the land to which the goods are or are to be affixed, or on which the crops are growing or to be grown, sufficient for the purpose of identification in the land title office, including a parcel identifier, if applicable,

and any such notice is to be signed by the secured party or his agent and witnessed.

141. (2) Where a secured party who has filed a notice pursuant to subsection (1) renews the notice, assigns, discharges or postpones the security interest or releases part of the collateral from the security interest, the secured party shall cause to be filed in the land title office where the notice under subsection (1) was filed a notice in Form 17, setting out

- (a) the name of the secured party,
- (b) the description of the land given in accordance with subsection (1)(e),
- (c) the date the notice was filed pursuant to subsection (1), the date of its filing and the instrument number assigned to it,
- (d) in the case of a notice of renewal, the registration life in multiples of one year or an infinite number of years,
- (e) in the case of postponement,
  - (i) the full name and address of the person to whom the interest of the secured party is being postponed, and
  - (ii) the nature and instrument number of the interest to which the interest of the secured party is being postponed,
- (f) in the case of a notice of partial cancellation releasing collateral from the security interest, particulars of the collateral deleted from the secured party's interest,
- (g) in the case of a notice of cancellation, a statement to the effect that the notice mentioned in subsection (1) is wholly cancelled and the security interest is discharged,
- (h) in the case of a notice of cancellation relating to the release of all collateral on one parcel of land, a description of that parcel of land, and
- (i) in the case of a notice of assignment,
  - (i) a statement to the effect that the notice has been assigned, and

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(ii) the name and address of the person to whom the interest is being assigned,  
and any notice filed pursuant to this subsection must be signed by the secured party or his agent and witnessed.

## APPENDIX B

### TERMS OF REFERENCE

(main study)

1. To examine the relationship between the *Personal Property Security Act* and the *Land Title Act* in their application to property that may have characteristics of both land and personal property. Such property includes fixtures, growing crops and rights to the payment of money which are secured by or arise out of interests in land.
2. To ascertain whether the two acts operate harmoniously and, in their application to property referred to in paragraph 1, strike an appropriate balance among
  - (a) the interests of secured lenders and borrowers who use both registration systems,
  - (b) the interests of other persons affected by the legislation,
  - (c) the interest of the public in achieving a rational and efficient system for the registration of security interests in property of all kinds, and
  - (d) the interest of the public in maintaining the integrity of the land title system
3. To make recommendations for changes to either or both Acts as may be necessary to achieve an appropriate balance and bring the Acts into greater harmony.
4. Without limiting the generality of paragraphs 1 to 3, to consider and make recommendations on the following issues concerning the taking of security interests in fixtures:
  - (a) to what extent and in what circumstances should the law permit the creation of a security interest in a fixture separate from the land to which it is affixed?
  - (b) where the law permits the creation of a separate security interest in a fixture,
    - (i) how should this be accommodated by the general law of real property and provisions of the *Land Title Act*?, and
    - (ii) what policies should be adopted in resolving priority competitions between the holders of security interests in fixtures only and persons whose interests in a fixture arise because they have an interest in the land to which it is affixed?

## APPENDIX C

### THE OPERATION OF SECTION 36\*

#### A. Background to Section 36

Section 36 of the PPSA operates against a common law background that regards “fixtures” as real property. The first inroad on the common law position occurred with the introduction of conditional sales legislation<sup>1</sup> which provided that goods, other than “building materials,” conditionally sold and affixed to land remained subject to the rights of the seller as fully as before being affixed<sup>2</sup> if a notice of these rights was filed in the land title office. This significantly modified the common law rule.<sup>3</sup> The approach of conditional sales legislation has been extended and more fully developed by modern personal property security legislation.

The basic structure of section 36 was taken from section 9-313 of the American *Uniform Commercial Code*, 1962 Official Text.<sup>4</sup> This version of section 9-313 was adopted, with modifications, by the 1967 Ontario *Personal Property Security Act*.<sup>5</sup> Ontario's adaptation of the section was followed in the Manitoba<sup>6</sup> and Saskatchewan<sup>7</sup> legislation as well as the *Uniform Personal Property Security Act*.<sup>8</sup> While section 36 reflects some drafting changes, its basic structure and the policies that it implements are the same as found in all of the other Canadian versions of the PPSA.

#### B. The Policies of Section 36

Section 36 is designed to permit security interests to be retained in goods that become fixtures and to permit security interests to be taken in goods even though they are fixtures at the time the security interests attach. It contemplates two quite distinct situations.

The first, and most common, is where goods are purchased under credit arrangements which provide that the seller or financier has a security interest in the goods. Section 36 embodies the conclusion that, as a matter of public policy, it is necessary to recognize that the annexation of the goods does not result in the loss of the security interest in the goods. Modern commercial practices require that the security interest in the goods be viewed as continuing in the fixtures as goods with the result

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\* We have used as our point of departure in the creation of this Appendix a memorandum prepared by Professor R.C.C. Cuming Q.C. on the treatment of fixtures under the B.C. and Alberta versions of the PPSA. We are grateful to Professor Cuming for his assistance in this regard. A modified form of the memorandum has been published as Practice Note 8 in the *Personal Property Registry Information Guide Supplementary Materials* published by the Legal Education Society of Alberta.

1. *See, Sale of Goods on Condition Act*, R.S.B.C. 1979, c. 373.

2. *Ibid.* ss. 12 and 13.

3. The common law position may also have been modified, although in a less obvious way, by chattel mortgage legislation. The *Chattel Mortgage Act*, R.S.B.C. 1979, c. 48, s. 1(1) contemplated a chattel mortgage on “trade machinery and fixtures and growing crops when separately assigned or charged” in defined circumstances (definition of “chattels”).

4. In 1972 this section was substantially rewritten to accommodate states that did not have a tradition of legislative modification of the common law rules of fixtures.

5. S.O. 1967, c. 73.

6. *Personal Property Security Act*, S.M. 1973, c. 5.

7. *Personal Property Security Act*, S.S. 1979-80, c. P-6.1.

8. *See, Proceedings: Uniform Law Conference of Canada*, 1982 at 33 and Appendix X.

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that, in the event of default, the security interest can be enforced against the fixtures through separation of them from the land and disposal of them as goods.<sup>9</sup>

The second situation contemplated by section 36 is where the security interest attaches to the fixtures after they have been affixed to the land. While this seems to be a significant extension of the scheme embodied in conditional sales legislation it can also be justified. It would be highly artificial to distinguish between recognizing a security interest in existing fixtures and recognizing that a security interest created before the goods becomes fixtures continues after the annexation. In both situations, what is being recognized is the right to have the fixtures removed from the land and reconverted into goods as a necessary step in the enforcement of the security interest. Moreover, the concept has precedent in the common law.<sup>10</sup>

There are practical reasons for allowing an owner (or lessee) of land to give an enforceable security interest in fixtures that person has attached to the land. The fixtures may be assets of very high value and, as such, important to the owner's ability to get business financing. The critical requirement is that mortgagees and others having an interest in the land to which the fixture is attached be fully and fairly protected. So long as this goal is achieved by section 36, objections based on form and doctrine should not be given too much weight.

### C. The Functioning of Section 36

The functioning of section 36 is best illustrated with an example:

A lender wants to take a mortgage on an existing apartment building that has installed in it air conditioning equipment and elevators (the "equipment"). It is part of the arrangement that the lender will have a security interest in all "fixtures including household appliances in the individual apartments."

How are the lender's interests to be protected in this transaction? It should be noted at the outset that some of the appliances intended to form part of the lender's security will not be fixtures according to the common law "tests." With respect to these, the transaction is one purely of a security interest in goods and the lender's position will be determined with reference to provisions of the PPSA other than section 36.<sup>11</sup>

With respect to the equipment and those appliances that are "fixtures" the lender must look to section 36. In what circumstances can the lender claim priority? The relevant subsections of section 36 provide:

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9. In this respect, s. 36 is a much more refined version of the system contained in the *Sale of Goods on Condition Act*.

10. It is possible at common law to give a contractual right to a third party exercisable against a mortgagee of land to remove trade fixtures so long as the right is exercised before the mortgagee acquires a right to possession of the land through foreclosure proceedings. See, *Ellis v. Glover & Hobson Ltd.*, [1908] 1 K.B. 388 (C.A.); *Credit Foncier v. Lindsay Walker Co.*, (1919) 48 D.L.R. 143 (Sask. C.A.). In fact, s. 36 permits only a much more limited erosion of the mortgagee's rights. A security interest in the fixtures is enforceable against a person who had an interest in the land at the date the security interest attached only if that person expressly or impliedly consented to the security interest. See, *Royal Bank of Canada v. Farm Credit Corporation*, (1988) 8 P.P.S.A.C. 206 (Ont. S.C.). Under the common law rule, the third party can exercise the right to remove trade fixtures without the consent of the mortgagee.

11. The lender will wish to search the PPS Registry to determine whether or not there are prior security interests in any of the appliances or equipment that are not "fixtures" under the common law. It will also be necessary to take account of the 15 day grace period for registration of purchase money security interests provided in s. 22 of the PPSA.

**APPENDIX C: THE OPERATION OF SECTION 36**

(3) Except as provided in this section and in section 30, 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.

(4) A security interest referred to in subsection (3) is subordinate to the interest of

- (a) a person who acquires for value an interest in the land after the goods become fixtures including an assignee for value of the interest of a person with an interest in the land at the time the goods become fixtures, and
- (b) any person with a registered mortgage on the land who
  - (i) makes an advance under the mortgage after the goods become fixtures, but only with respect to the advance, or
  - (ii) obtains an order for sale or foreclosure after the goods become fixtures

without fraud and before the notice of the security interest is filed in accordance with section 49.

(5) A security interest in goods that attaches after the goods become fixtures is subordinate to the interest of a person who

- (a) has an interest in the land at the time the goods become fixtures and who
  - (i) has not consented to the security interest,
  - (ii) has not disclaimed an interest in the goods or fixtures,
  - (iii) has not entered into an agreement under which a person is entitled to remove the goods, or
  - (iv) is not otherwise precluded from preventing the debtor from removing the goods, or
- (b) acquires an interest in the land after the goods become fixtures if the interest is acquired without fraud and before the notice of the security interest in the goods is filed in accordance with section 49.

An existing PPSA security interest in fixtures (if one exists) might have been taken either before or after the fixtures were annexed to the land. Although each of these possibilities is addressed by a separate provision, the result in both cases will turn on whether a filing has been made under section 49 by the holder of a competing PPSA security interest.

Normal lending practice will call for a search of the land title office to determine if the debtor owns the land and if there are any prior interests in the land. The search will also disclose whether any filings have been made under section 49 in relation to fixtures. If no fixture filings are found, the lender will be able to complete the transaction and claim priority as to existing fixtures. Section 36(4)(a) will ensure the lender's priority over any security interest that attached to the fixtures before they were annexed to the land. Section 36(5)(b) ensures priority over security interests that attach after annexation.

After the lender registers its mortgage, the debtor may give a security interest in the fixtures to another person (Secured Party). Even though the Secured Party does everything required by the PPSA to perfect the security interest, the lender is protected from the security interest without the need to take any steps whatever. Under section 36(5), the lender has priority unless it consented to the security interest.

It is important to note that the lender is protected in the way that has been described only with respect to goods that were affixed to the land before the lender took its mortgage. The result may be different if the mortgage is taken first and the goods are later affixed to the land. If those goods are subject to a security interest, that interest will defeat the lender.<sup>12</sup> Moreover, that security interest need not be

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<sup>12</sup>. S. 36(3).

#### APPENDIX C: THE OPERATION OF SECTION 36

registered in either the Personal Property Registry or a land title office to obtain that priority.<sup>13</sup>

### D. Other Limits on Fixture Financing

The PPSA contains a special feature designed to ensure that a land owner's interest in goods annexed to the land under contract with the owner is not jeopardized by a security interest in the fixture given by a person, other than the land owner, who annexed the goods to the land. The problem addressed could arise where the land owner enters into a construction contract that provides for the installation of fixtures that are to be supplied by the contractor. Any security interest in the goods to be affixed under the contract held by a supplier or financier of the contractor is preserved under section 36(3) of the Act without registration or notice to the land owner. It does not follow, however, that the land owner takes subject to the security interest.

Sections 30(1) sets out the following definitions:

“seller” includes a person who supplies goods that become a fixture or accession under a contract with a buyer of goods or under a contract with a person who is party to a contract with the buyer;

“the ordinary course of business of the seller” includes the supply of goods in the ordinary course of business as part of a contract for services and materials.

These definitions apply to section 30(2):

(2) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest in the goods given by the seller or lessor ..., whether or not the buyer or lessee knows of it, unless the buyer or lessee also knows that the sale or lease constitutes a breach of the security agreement under which the security interest was created.

The effect of these provisions is that the land owner is treated as having bought the goods affixed under the construction contract in the ordinary course of business with the result that the fixtures are acquired free from any security interest in them given by the contractor or by a supplier to the contractor.<sup>14</sup>

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13. It is sometimes suggested that the security interest should at least be perfected in the Personal Property Registry in order to have priority over the lender. This suggestion, however, reflects a misunderstanding of the function of section 36. “Perfection” under other PPSA provisions such as s. 35 regulates priority vis-a-vis other security interests in the fixtures as goods. S. 36 deals with priority of a security interest in fixtures as against an interest in the fixtures arising out of an interest in the land to which they are annexed. The section does not require in any context that a security interest in the fixture be perfected by registration in the Personal Property Registry in order to have priority over the holder of an interest in land.

14. If, before the goods are affixed, the land owner becomes aware that the provisions of the construction contract relating to the fixture constitutes a breach of the security agreement under which the security interest in the fixture arose the land owner's priority will be lost. The protection of section 30(1)-(2) likely extends to anyone having an interest in the land owner's interest in the land, including a mortgagee of the land. While a mortgagee is not a “buyer of goods” as defined in section 30(1), it has a derivative interest (i.e. an interest in the land owner's interest in the land) and, consequently, stands in the shoes of the land owner for priority purposes.

## APPENDIX D

### WHAT IS A FIXTURE?

#### A. At Common Law

Goods may become attached or affixed to land so as to become part of the land. When this occurs the article of goods becomes a “fixture.” The idea of goods becoming part of the land goes back centuries in the common law and is an instance of the importance the common law placed on real property. The common law rule was subject to the qualification that some fixtures could be removed, particularly those that were not essential for the enjoyment of the land.<sup>1</sup>

With the idea that a fixture could be removed came the concept of “tenant’s fixtures.” These are articles that are attached to leased premises after the term of the tenancy has begun. They may be detached and removed by the tenant<sup>2</sup> Among tenant’s fixtures that may be removable are trade fixtures. These include all sorts of items used by a tenant in a business from shelving to boilers to mills.<sup>3</sup>

Whether an article has become a fixture depends upon the degree and mode of annexation.<sup>4</sup> *Stack v. T. Eaton Co.* set out five general rules to be applied in determining whether something had become a fixture:<sup>5</sup>

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

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1. The correctness of the label “fixture” when applied to an item that can be attached or removed has provoked some discussion. Anger and Honsberger, *Law of Real Property* (2nd. ed., 1985) 1009 concludes that:

The true rule undoubtedly is that a chattel which has become affixed to the freehold loses its character of a chattel while it is affixed but, in certain circumstances, may be removed and restored to its original character of a chattel.

A fixture that is removed for some temporary purpose such as repair retains its character as “land,” even while removed.

2. The tenant may enter an agreement to the contrary. See Anger and Honsberger, *ibid* at 1045.

3. As between a landlord and a tenant, trade fixtures are subject to removal: *Thom v. Browne*, (1960) 26 D.L.R. (2d) 115 (B.C.S.C.). As between mortgagor and mortgagee, the general common law rule relating to fixtures is thought to apply: *Meux v. Jacobs*, (1875) L.R. 7 H.L. 481. Anger and Honsberger, however, suggest that in the absence of an express stipulation to the contrary, a mortgagor in possession has the right to permit trade fixtures to be put up and removed from the mortgaged premises, but this right of removal ceases when possession is taken by the mortgagee; the full effect and application of this principle is a matter of some doubt: *supra* n. 1 at 1036. See also *Ellis v. Glover & Hobson Ltd.*, [1908] 1 K.B. (C.A.).

4. Annexation itself can be a fluid concept. Things that are essential to the use of land, although not annexed to it, may be held to be “constructively annexed” and characterized as fixtures.

5. (1902) 4 O.L.R. 335, 338 (Div. Ct.) *per* Meredith C.J.

## APPENDIX D: WHAT IS A FIXTURE?

The nature of the article and the use of the premises are factors which courts have also taken into account. A test frequently used is to ask whether the article is being attached for the better enjoyment of the building or the land as opposed to the better use of the article as such.<sup>6</sup>

The various “rules” still leave much scope to the intention and purpose of the parties concerning the annexation.<sup>7</sup> The intention of the parties who affix the goods, however, is determined with reference to the degree and object of the annexation and has little to do with their subjective intention.<sup>8</sup> Two parties may agree that an item is a fixture and while this designation may be binding on them, it will not necessarily bind a third party.<sup>9</sup>

Although generally the intention of the parties plays little part in determining whether an article has become a fixture, the parties can, with some restrictions, determine their respective rights as to the ownership and removability of the fixtures.<sup>10</sup>

Various factors are taken into account to determine whether at common law something has become a fixture. These include the nature of the object, the degree of annexation, what constitutes annexation, the purpose of the premises, what constitutes better enjoyment of the premises as opposed to the better enjoyment of the article. Given the number and complexity of these factors, it should surprise no one that the law in this area is not a model of consistency and clarity. While it can be said with relative certainty of many things that they are fixtures<sup>11</sup> there will always be a large grey area.<sup>12</sup>

It is relatively simple to set out tests for identifying fixtures, but the application of those tests to particular facts can be difficult. Numerous examples are available to illustrate the eccentric operation of this body of law.

For example, chairs in a theatre which are screwed to the floor have been held to be attached for their better use and enjoyment as chairs and are therefore were not fixtures.<sup>13</sup> Why the attachment of the chairs could not be seen as accomplishing a better use of the building as a theatre was not addressed by the court. Electric filament lamps have been held to be temporarily fixed only,<sup>14</sup> while “gaseliers” have been held to be fixtures because they were attached to gas pipes which would have been useless without them.<sup>15</sup>

Machinery presents particular problems in classifying property as a fixture or non-fixture. Cases can be found which consider essentially similar circumstances and

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6. *E.g., La Salle Recreations Ltd. v. Canadian Candex Investments Ltd.*, (1969) 68 W.W.R. 339 (B.C.C.A.).

7. In fact, the “rules” are not necessarily internally consistent.

8. *Hobson v. Gorringe*, [1897] 1 Ch. 182, 191 (C.A.) Anger and Honsberger, *supra* n. 1 at 1017-1019, conclude from the cases an even stronger view that the intention of the parties is irrelevant.

9. *See AMIC Mortgage Investment Corp. v. Investors Group Trust Co.*, (1985) 40 Alta. L.R. 71 (C.A.).

10. *Davy v. Lewis*, (1859) 18 U.C.Q.B. 21, 29; *Re Maple Leaf Coal Co.*, [1951] 4 D.L.R. 210 (Alta. S.C., App. Div.). If a chattel by its very nature is incapable of being affixed, it cannot be made into a fixture by the parties: *Agricultural Development Board v. Ricard*, (1927) 32 O.W.N. 140 (H.C.).

11. *E.g.* furnaces, plumbing items, ceiling lights.

12. *E.g.* carpets, chairs, shelves.

13. *Lyon & Co. v. London City and Midland Bank*, [1903] 2 K.B. 135, *cf. Berlin Interior Hardware Co. v. Colonial Investment and Loan Co.*, (1918) 38 D.L.R. 643 (Sask. S.C.).

14. *British Economical Lamp Co. v. Empire, Mile End, Ltd.*, (1913) 29 T.L.R. 386.

15. *Sewell v. Angerstein*, (1868) 18 L.T. 300.

## APPENDIX D: WHAT IS A FIXTURE?

arrive at quite different results on this issue.<sup>16</sup> A recent British Columbia case provides an extreme example of how unpredictable this exercise has become. In *L & R Canadian Enterprises Ltd. v. Nuform Industries Ltd.*<sup>17</sup> it was held that a self-propelled forklift truck was “constructively annexed” to the land on which it operated. The forklift was held to be a fixture and subject to a mortgage of the land being foreclosed (to the exclusion of the mortgagor and certain chattel mortgagees).

### B. Under the PPSA

While the PPSA contains a definition of “fixture” it is of very limited assistance:<sup>18</sup>

“fixture” does not include building materials;

This tells us that some things are not fixtures but does not tell us the things that are fixtures. Accordingly, whether in any particular situation goods attached to real property are fixtures, is determined with reference to the common law tests described above.

Certain types of goods, “building materials”, that are fixtures at common law are excluded from the operation of section 36. This expression is defined:<sup>19</sup>

“building materials” means materials that are incorporated into a building and includes goods attached to a building so that their removal

(a) would necessarily involve the dislocation or destruction of some other part of the building and cause substantial damage to the building apart from the loss of value of the building resulting from the removal, or

(b) would result in the weakening of the structure of the building or the exposure of the building to weather damage or deterioration,

but does not include

(c) heating, air conditioning or conveyancing devices, or

(d) machinery installed in a building or on land for use in carrying on an activity inside the building or on the land;

The definition of “building materials” in the Act does not affect what is and what is not a fixture at common law. While an item, such as machinery installed in a building, is not “building materials,” it does not follow that it is a fixture, a security in which is subject to the regime of section 36. If at common law it is not a fixture, section 36 is irrelevant. On the other hand, an item that falls within the definition of “building materials” may be a “fixture” at common law, but not under the PPSA. The common law governs the characterization of any interest taken in the item.

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16. In *Liscombe Falls Gold Mining Co. v. Bishop*, (1905) 35 S.C.R. 539 a stamp mill was erected for the purpose of testing ores. Various parts of the mill either rested by their own weight on the soil or were steadied by bolts, but because the whole installation could be removed without injury to the freehold, it was held to be a chattel. However, a similar means of attachment in the case of a gas engine did not prevent it from becoming a fixture in *Hobson v. Gorringe*, *supra* n. 8. even though the owner of the engine and its hirer quite clearly intended that it not become a fixture. In *Seeley v. Caldwell*, (1908) 18 O.L.R. 472 (H.C.) a number of articles of machinery were attached to a slight degree to a building, but all were detachable at slight cost and effort and without damage to the building. Notwithstanding that fact and the clear agreement between the lessor and the lessee that the machines not become part of the land, they were held to be fixtures. In *Parsons v. Hind*, (1866) 14 W.R. 860. it was held that a hydraulic press attached to the floor of a factory by means of brick and mortar remained a chattel because it was a mere convenience and not essential to the carrying on of the works at the factory.

17. (1985) 58 B.C.L.R. 79 (S.C.).

18. S. 1(1).

19. *Ibid.*



## APPENDIX E

### TWO OUTSTANDING ISSUES

#### A. Priority to Fixtures Under a General Security Agreement

When a fixture becomes attached to land that is subject to a mortgage, in the absence of any competing interest in the fixture, the lender's security is enlarged to embrace the new value represented by the fixture. One of our correspondents referred to this as "sweetening" the interest of the mortgage lender. If, however, the item in question is subject to a security interest that attached before or at the time it became a fixture, the secured party will have priority over the mortgage lender. In many cases this is a defensible result. The mortgage lender's financing was not geared to the acquisition of new fixtures. The secured party, on the other hand, may have expressly lent money on the security of the fixture or, indeed, financed its acquisition. In this kind of competition, the priority structure of section 36 achieves an acceptable result.

But not every secured party who obtains an interest in fixtures will do so by virtue of a financing that relies on the acquisition of that fixture. The fixture may well have been swept into a pool of collateral claimed by a financier under a general security agreement. By this we mean an agreement which claims a security interest in all of the debtor's present and after acquired personal property. Here the question whether section 36 achieves the correct result is less clear-cut. Example:

D is a small wholesaler of widgets. D is the registered owner of the premises out of which the business is operated. The building was acquired with financing from ML who took a mortgage on the premises. These events occurred in 1991. In 1992 D sought credit to expand the business inventory. Funds for this purpose were advanced by SP who took a security interest in all of D's present and after acquired personal property. In 1993 an aging freight elevator in the premises ceases to function. D purchases a new elevator system and causes it to be installed in the premises. In 1994 D defaults under both the mortgage of the premises and the general security agreement.

In this example, both ML and SP assert an interest in the new elevator. Neither took their security on the basis that D would be acquiring a new elevator and whichever party succeeds in this competition their security will be "sweetened" somewhat.

A person who is uninitiated in the mysteries of section 36 might well think there is no principled basis for choosing one party over the other. If anything, such an observer might see the equities slightly in favour of the real property lender, given the close connection between the elevator and the building itself. The result flowing from section 36, however, dictates an opposite result. The elevator, when D acquired it, fell into the description of collateral under SP's security agreement and that security interest attached no later than the time the elevator became a fixture. Section 36 mandates a priority for SP.

We believe that this kind of result calls for further examination. Should the PPSA stipulate that language of a kind usually used in a general security agreement is not sufficient to create a security interest in a fixture (or at least certain classes of fixture) essentially, this approach would require an "item or kind" type of description for fixtures. This issue is one we wish to explore further and preliminary comments on it would be welcome.

## B. Narrowing the Concept of “fixture”

The complexity of the common law tests which are applied to determine whether or not a particular item of property is a fixture are described in Appendix D. Given the complexity of this exercise it is not surprising that no attempt has been made in any North American version of the PPSA to define “fixture.” Any attempt to restate accurately and comprehensively all that is embraced by that concept has been seen as a hopeless task.

A more limited approach is possible. Without attempting to describe all that is embraced within the concept of fixture it is possible to identify certain items, kinds or types of property and state that they are not fixtures. An example of this approach is to be found in the British Columbia PPSA. The definition section tells us that:

“fixture” does not include building materials.

The expression “building materials” is, itself, the subject of an elaborate definition.<sup>1</sup> The effect of this is to leave building materials (which in some circumstances the law would classify as fixtures) to be governed purely by real property law so far as security in them is concerned. It might be equally possible to identify certain kinds or classes of property that, although the common law might regard them as fixtures, ought to be treated as personal property whether or not they become attached to the land.

One correspondent who wrote to us suggested that the law should identify a category of property that might be referred to as “industrial equipment.” The kinds of items that might be embraced by “industrial equipment” are pulp and paper making machines, printing presses and the like. The suggestion is that any property that comes within a definition of industrial equipment should be treated as personal property, either for the purposes of financing or, perhaps, for all purposes, whether or not this property was attached in some fashion to the land.

Many items of industrial equipment stand on the hazy boarder between real property and personal property and the failure of the law to speak clearly as to their status produces unnecessary litigation. Moreover, where there is even the slightest possibility that an item of property might be held by a court to be a fixture, the well-advised secured party will file a notice in the Land Title Office as provided in section 49. This adds expense to the financing transaction, clutters up the land title system with numbers of filings that are probably unnecessary and heightens the tension between the users of the respective registration systems.

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1. See Appendix A.

**APPENDIX E: TWO OUTSTANDING ISSUES**

Pursuing this suggestion would not be free of difficulty. Simply developing a definition of “industrial equipment” presents a formidable challenge<sup>2</sup> and transitional issues would require careful consideration.

Comments on the feasibility of pursuing this suggestion would be particularly helpful to the Commission.

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2. An early attempt is to be found in the following definitions contained in the (now repealed) *Chattel Mortgage Act*, R.S.B.C. 1979, c. 48, s. 1:

“trade machinery” means machinery used at a workshop, except

- (a) fixed motive power units such as steam engines, steam boilers and things fixed to them;
- (b) fixed power machinery such as shafts, wheels, drums and things fixed to them, used to transmit motive power to other machinery, fixed or loose; and
- (c) pipes for steam, gas and water in the workshop;

“workshop” means premises where manual labour is performed as a trade or for gain, in or incidental to the making, alteration, repair, finishing or adaptation for sale of an article or part of it.