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Backgrounder

LRC 130—Report on Fixtures and the Personal Property Security Act

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This report on fixtures and the *Personal Property Security Act* (PPSA) arose from a reference by the Attorney General to the Law Reform Commission to examine the relationship between the PPSA and the province's major land law statute, the *Land Title Act*, "in their application to property that may have characteristics of both land and personal property." The Commission identified fixtures as topic requiring immediate attention, and decided to publish this report as an interim report in the broader project.

The law divides property into two categories: land and personal property. Different rules often apply to property depending on its characterization as land or personal property. In most cases, it is not difficult to determine whether property is land (or an interest in land) or is not (and, thus, is considered personal property). But in a few cases, this neat division can be difficult to apply. Fixtures are an example of a difficult case. Fixtures are goods that have been affixed (that is, connected or attached) to land. This affixation is the key to their legal characterization. To take a simple example: a furnace is clearly personal property when it is newly manufactured. Upon its sale, however, the furnace will most likely be installed in a building. This installation affixes the furnace to the land. So long as the furnace is affixed, the law considers it to be a part of the land. Later, at the end of the furnace's productive life, it may be removed from the building and sold for scrap. At the point of its removal, the furnace becomes personal property again.

For the most part, these longstanding rules on fixtures operate without much difficulty. Complications can arise when there are competing interests in either the land or the furnace. Competing interests usually derive from a person's financing. A person may grant a lender a mortgage over the person's land or a security interest over the person's personal property. Especially in the case of businesses, both types of security will often be present, granted to different lenders. If a dispute occurs as to which lender's security has priority over the fixture, the type of legal rules applied can be determinative. Different results can flow from applying the rules governing land or those governing personal property.

The classic legal position saw the rules relating to land prevail in these circumstances. Once the property is affixed, it becomes a part of the land and any security interests based on the property's former status as personal property would vanish. This result can hamstring modern financing and business relationships, so when the PPSA was enacted in 1989, it contained provisions that struck a new balance between the rules found in the *Land Title Act* (governing land and interests in land) and in the PPSA (governing personal property). The advent of these meta-rules gave rise to some controversy, especially among lawyers. This report focuses on a series of discrete issues that were identified in consultations with the practising bar.

The first issue discussed is the varied use of the term "personal property" in different contexts, and the subsequent amendments to the PPSA to correct it. The second issue discussed relates to section 36 (3) of the PPSA, and its perceived ambiguity. A literal reading of the provision appears to imply that a person with an interest in goods affixed to land, and a completely separate interest in to the land itself would never get priority in relation to the goods. The report recommends amending ss. 36 (3) and 37 (3) to clarify the fact that an individual should be able to get priority in both goods and the land in appropriate situations.

The third and final issue discussed relates to actual notice and fraud in the *PPSA*, and how they might affect the priority of interest rights. Sections 36 (4) and 36 (5) (b) refer to a person acting "without fraud" or an interest being "acquired without fraud." This has caused concern due to the ruling in *Lloyds Bank of Canada v. Lumberton Mills Ltd*. This ruling potentially means that a person who has, or intends to acquire an interest in land might be affected not only by a notice filed under section 49, but also by any actual or constructive notice the person may be deemed to have by virtue of a financial statement registered in the personal property registry. While the *Land Title Act* deals this concern in section 29, including a reference to security agreements to further clarify the issue.

Overall the commission recommends keeping the current regime dealing with fixtures and the *Personal Property Security Act*, although it recommends a few modifications of the statutes. Also included are several appendixes including the *Personal Property Security Act*, the terms of reference, notes on the operation of section 36, the definition of fixtures under the common law and the PPSA, and the discussion of two outstanding legal issues, which were not the subject of recommendations in the report.

Further Developments

The report's recommendations have not been implemented.