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**Province of  
British Columbia**

**Consultation Paper on  
Land-Related Interests and the  
*Personal Property Security Act***

**LAW REFORM  
COMMISSION OF  
BRITISH COLUMBIA**

MINISTRY OF ATTORNEY GENERAL



**Consultation Paper No. 72**

**Land-Related Interests and the**  
*Personal Property Security Act*

This Consultation Paper is circulated for criticism and comment. It does not represent the final views of the Commission.

It would be appreciated if comments could be submitted by May 31, 1994.

Comments we receive are treated as public documents, although you may request confidentiality.

January, 1994

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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*Introductory Note*

This paper discusses ideas and suggestions for changing the law.

Public consultation is an important part of preparing sound recommendations for changing the law. The Commission will not make its final recommendations for changes in the law in the topic under review in this paper until the public has a chance to comment.

We would like to have your views, criticism and advice. If the paper does not address your particular concerns, please tell us.

Public consultation ends May 31, 1994. If you wish to comment, you should do so as soon as possible.

Please direct your comments to the following address:

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**A. Characterization of Real and Personal Property**

Our legal system classifies most property as either real property or personal property. This corresponds broadly to the distinction between property that is land and property that is not land.<sup>1</sup> Both kinds of property can come in various types and forms, but personal property offers the greatest variety.

An item of personal property may be purely intangible such as a debt owed by one person to another. It may also consist of an item of intangible wealth linked somehow to a document that evidences its ownership.<sup>2</sup> Personal property may also be wholly tangible, such as an automobile or a pencil.

What purpose is served by classifying an item of wealth as either real or personal property? In many cases nothing will turn on the distinction. But in many cases it can be important. For example, Tom and Sharon contemplate a transaction for the disposition of Tom's home to Sharon. Their transaction may have to meet certain writing requirements to be enforceable. The *Law and Equity Act*<sup>3</sup> requires that most agreements for a "disposition"<sup>4</sup> of real property must be evidenced in writing if they are to be enforceable. Thus, if Tom and Sharon have not put their transaction in writing and the home is a conventional house, their agreement is not

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1. It also corresponds to the distinction in civil law between immoveable and moveable property.
  2. The strength of that link may vary according to the nature of the intangible and commercial practice. In the case of money the link is a strong one. \$10 worth of purchasing power (as an intangible) is virtually locked up in the \$10 bill that covers it. For most practical purposes, the purchasing power cannot be separated from the currency in which it is embodied. An example of a weaker link is a cheque written to cover a debt. For some purposes the cheque can be transferred as if it were money, but if it is dishonoured it simply becomes a worthless piece of paper, although the underlying debt which it represents remains alive and can be sued on by a person entitled to do so.
  3. R.S.C.B. 1979, c. 224, s. 54.
  4. This term is defined by the *Interpretation Act*, R.S.B.C. 1979, c. 206. S. 29 provides: "Dispose" means to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things.
- S. 28(4) provides:  
Where a word or expression is defined in an enactment other parts of speech and grammatical forms of the same word or expression have corresponding meanings.

**CHAPTER I: INTRODUCTION**

enforceable because it concerns land. On the other hand, if the home is a motor home it is personal property and the lack of writing would not bar the enforcement of the transaction between the parties.<sup>5</sup>

After Tom and Sharon have completed their transaction there may be a change of possession of the home, and this may be sufficient to prevent Tom from engaging in any further dealings with the home. On the other hand, there may be no change in possession that deprives Tom of the badges of full ownership of the home. In that case Sharon must take additional steps if she is to ensure that the interest in the home she has acquired under the transaction takes priority over any similar interest that Tom may purport to grant, subsequently, to a third party.

The law may require that Sharon register her interest, or notice of it, under one of the two registration systems<sup>6</sup> established under the *Land Title Act*<sup>7</sup> and the *Personal Property Security Act*.<sup>8</sup> If the home is real property, Sharon must register the interest she has acquired in a Land Title Office. If the home is personal property, it may or not be amenable to registration in the Personal Property Registry, depending on the nature of the disposition.<sup>9</sup>

The key point that emerges from the example is that it is often necessary for parties to characterize accurately the subject matter of their dealings as real property or personal property in order to know which system of law applies to their dealings and, in particular, which registration system is the appropriate one to regulate them.

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5. Where the disposition creates a security interest in personal property and Tom remains in possession of the motor home, Sharon's security interest would be enforceable against a third party only where writing requirements set out in s. 10(1)(b) of the *Personal Property Security Act*, *infra*, n. 8 are satisfied.

6. For some kinds of property a filing must occur under both registration systems.

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

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

9. If the interest that Sharon acquired is a security interest in the motor home, then her interest is registrable in the Personal Property Registry [PPR] in all cases. If, however, the disposition of the motor home is an absolute sale or transfer, registration in the PPR is not necessary (although it may be necessary to record the transfer in a different registry for motor licensing purposes). The only absolute transfer required to be recorded in the PPR is that of a money obligation that is not in any way embodied in a document.

## B. Problems in Characterization

Characterizing property as either real property or personal property is not free of difficulty. Two main areas of concern can be identified. First, the dividing line between real and personal property is not always clear-cut. There are some assets which can be very difficult to characterize, in the sense that they have attributes of both real and personal property. The characterization may be wholly ambiguous, or it may tend to shift according to the context in which it arises.<sup>10</sup>

The second area of difficulty emerges where the characterization of an asset as real property or personal property is relatively clear but yields unsatisfactory results. This will be the case where the characterization is based on historical forces in the evolution of the law but no longer reflects the needs of a modern commercial society. A good example is the common law rule that a lease of land is personal property. Fortunately, this anomaly was cured by legislation many years ago and it is now clear that a lease of land is treated like any other interest in land.<sup>11</sup> Another instance where common law characterization may be questioned is in relation to fixtures.<sup>12</sup>

## C. The Reference

Early in 1992 the Attorney General requested the Law Reform Commission to examine the “relationship between the *Personal Property Security Act* and the *Land Title Act* in their application to property that may have characteristics both of land and personal property.”<sup>13</sup>

This request has its origins in concerns that had been voiced, mainly in connection with fixtures, respecting the operation of the *Personal Property Security Act* and its interface with the *Land Title Act*. These concerns, initially put to government officials, led to the broader topic being referred to the Law Reform Commission.

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10. Payments of money that are intimately linked to interests in land such as rent or mortgage payments illustrate this kind of ambiguity. See Chapters III and IV.

11. Note however the extent to which the principles of contract law apply to leases, particularly with regard to the consequences of breach. See, e.g., Law Reform Commission of British Columbia, *Report on the Commercial Tenancy Act* (LRC 108, 1989).

12. See Chapter II.

13. The full terms of reference are set out as Appendix B to this Paper. In paragraph 4 the terms of reference indicate that particular attention should be given to certain issues that arise in relation to fixtures.

## CHAPTER I: INTRODUCTION

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 areas of concern with greater precision. Professor MacDougall was also asked to conduct research in relation to these issues and to bring forward a range of possible modifications to the legislation for consideration by the Commission.

### D. The Interim Report

Early in 1993 the Law Reform Commission submitted an Interim Report dealing with one aspect of the reference. The terms of reference for this study made it clear that fixtures were a matter of particular concern, and this was reinforced by preliminary consultation with the Bar. These consultations also made it clear that, of the several issues that arise in relation to fixtures, some were viewed as more urgently calling for action than others. With this in mind, we identified three issues that had been raised in relation to fixtures as being particularly urgent and addressed them as a matter of priority. Our Interim Report, *Fixtures and the Personal Property Security Act*, was devoted to these issues.<sup>14</sup>

After the Interim Report was submitted, two outstanding issues remained in relation to fixtures. They are covered in this Consultation Paper.

### E. This Paper

#### 1. REMAINING ISSUES

Our consultation and research has identified three types of asset on which the law should be altered or made to speak more clearly. This is not to say that this exhausts the issues on which the interface between the PPSA and the *Land Title Act* might be examined. They do, however, appear to be the only ones which raise practical as opposed to theoretical concerns.

In the balance of this Consultation Paper we examine the remaining issues that concern fixtures. These include the question whether the concept of fixture should be modified to exclude certain kinds of equipment. We also examine the issue of priority to “building components” in particular circumstances. Chapter II of this paper is concerned with fixtures.

In Chapter III we turn to issues surrounding the assignment of payments of money connected with land and their proper

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14. The recommendations made in the Interim Report are described in Appendix C.

**CHAPTER I: INTRODUCTION**

characterization. Chapter IV is concerned with securities which have an underlying land component.

**2. THIS PAPER IS DISTRIBUTED FOR  
THE PURPOSES OF CONSULTATION**

This Consultation Paper is being distributed to obtain views and comments on our tentative proposals and the issues that surround them. The proposals are summarized in Chapter V. Please forward any comments you may have on them, or any other aspect of the paper, to the Law Reform Commission.

**A. Fixtures Generally**

An example of property which displays characteristics of both real and personal property is the fixture. 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>

Whether an article has become a fixture depends upon the degree and mode of annexation.<sup>2</sup> *Stack v. T. Eaton Co.* set out five general rules to be applied in determining whether something had become a fixture:<sup>3</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. 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.

3. (1902) 4 O.L.R. 335, 338 (Div. Ct.) *per* Meredith C.J.

It is relatively simple to set out tests for identifying fixtures, but the application of those tests to particular facts can be difficult. 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>4</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. The various “rules” still leave much scope to the intention and purpose of the parties concerning the annexation.<sup>5</sup>

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>6</sup> there will always be a large grey area.<sup>7</sup>

A simple example illustrates issues that arise in relation to fixtures. 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>8</sup> The furnace has none of the characteristics of land.

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

5. In fact, the “rules” are not necessarily internally consistent. 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: *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. 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. *See AMIC Mortgage Investment Corp. v. Investors Group Trust Co.*, (1985) 40 Alta. L.R. 71 (C.A.). 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: *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.).

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

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

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

## CHAPTER II: FIXTURES REVISITED

Later, however, the furnace will be installed in a building. At the time the furnace becomes “affixed” 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?

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 vanishes and no new security interest in the furnace alone can 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



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a security interest to register a notice of it on the title to the land.<sup>9</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 Consultation Paper and a more detailed explanation of its operation and the priority rules it establishes is to be found in Appendix D.

### B. Building Components as Fixtures

Some kinds of fixtures are very closely tied to an improvement on land. 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. 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. This may be a defensible result where the mortgage lender's financing is not geared to the acquisition of new fixtures, particularly where the PPSA secured party expressly lent money on the security of the fixture or 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 the collateral claimed by a financier under a general security agreement which provides for a security interest in all of the debtor's present and after-acquired personal property without identifying the fixture. 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

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9. S. 49.

elevator and whichever party succeeds in this competition their security will be somewhat enlarged.

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 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.

### C. Commercial Apparatus and the Constructively Affixed Chattel

It is also possible to identify examples where the operation of section 36 gives the mortgagee of land a priority that, in functional terms, may be difficult to justify.

D wishes to enter the business of manufacturing flower pots from recycled newspapers.<sup>10</sup> D acquires some land on which stands an empty building. The acquisition involves the assumption of an existing mortgage in favour of ML2. D purchases and installs equipment needed for the manufacturing process including tanks, pumps and pot formers. These items are attached to the building and to each other. D also purchases a forklift truck to move raw materials within the building.

Once the manufacturing begins, D finds that more money is needed. Credit is extended by SP2 who takes a security interest in all of D's equipment used in the manufacturing business. D becomes insolvent and a competition arises between ML2 and SP2 over the equipment.

The court holds that all of the items of equipment that were attached to the land did not retain their identity as chattels, but had become fixtures. It also holds that the forklift truck, as an integral part of the manufacturing operation, has been constructively affixed, and is also a fixture. Because SP2's interest attached after the equipment became fixtures, section 36(5) of the PPSA gives priority to ML2.

Have the legitimate expectations of the parties been met in this example?

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10. This example is an adaptation of the facts in *L & R Canadian Enterprises Ltd. v. Nuform Industries Ltd.*, (1985) 58 B.C.L.R. 79 (S.C.).

## CHAPTER II: FIXTURES REVISITED

On one hand it might be argued that SP2 deserves no sympathy since it did not take steps that might have been taken to protect its position. Specifically, the fact that various items of equipment were attached to the real property should have alerted SP2 to the possibility that they were fixtures and vulnerable to a claim by an existing mortgagee. It was open to SP2 to seek ML2's consent to the security interest or a disclaimer of an interest in the equipment.<sup>11</sup> These steps were not taken.

Even if SP2 had the ability to (at least partially) protect its position, does it necessarily follow that giving priority to ML2 is the best result in policy terms? What interest is being protected by giving ML2 this priority? It seems only to give a windfall to ML2. Whether or not the items of production equipment were fixtures is a question on which a court might decide either way with only a slight variation in facts. A holding that the forklift truck was constructively affixed to the land was, however, a bolt from the blue. It is difficult to see how any secured party can foresee and guard against this kind of possibility. A more defensible result would be to give SP2 priority to all the equipment.

### D. Analysis

The apparent difficulty raised by these examples is easily identified. The common law concept of “fixture” (which the PPSA adopts with only a few modifications) embraces goods that can vary dramatically in their identification with the land. The examples of the elevator and the forklift truck stand at the extreme and opposite ends of a spectrum yet the law, including the PPSA, insist on treating them alike. There is no obvious reason why the concept of fixture should not be re-examined with two questions in mind:

1. Does the concept of fixture embrace too much? Should some kinds of property retain their character as personal property, whatever the purpose or degree of their attachment to land?
2. Should a more refined concept of fixture be developed which recognizes two or more categories of fixture, for particular purposes?

### E. Toward a Refined Concept of Fixture

#### 1. COMMERCIAL APPARATUS DEFINED

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

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11. This would have given SP2 priority under s. 36(5)(a)(i) and (ii).

CHAPTER II: FIXTURES REVISITED

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 is 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.

This suggestion struck us as one that is worth pursuing, although it clearly presents a formidable challenge. It should be noted that no attempt has been made in any North American version of the PPSA to define “fixture.” This is undoubtedly a reflection of the complexity of the common law tests which must be applied to determine whether or not a particular item of property is a fixture. Any attempt to restate accurately and comprehensively all that is embraced by “fixture” as that concept has been developed in the decided cases has been seen as a hopeless task. The more limited task of identifying and defining with some precision a group of assets which should not be treated as fixtures, while less daunting, still requires careful thought.

A useful starting point is to identify the expression to be defined. Our correspondent suggested “industrial equipment.” Pre-PPSA security legislation used “trade machinery”<sup>12</sup> to identify a similar concept. For the purposes of the current exercise we have settled on the expression “commercial apparatus” as sufficiently general and devoid of baggage to suit our purposes.

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12. The (now repealed) *Chattel Mortgage Act*, R.S.B.C. 1979, c. 48, s. 1 contained the following definitions:

- “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.

## CHAPTER II: FIXTURES REVISITED

We made a number of attempts to formulate a definition of commercial apparatus but all lacked a desirable degree of precision in their application to particular property.

Rather than trying to strike an unsatisfactory balance between generality and particularity in the drafting of a single definition of commercial apparatus, we explored a device frequently used in drafting taxation legislation in describing property that is or is not taxable.<sup>13</sup> This technique is to provide a definition of high generality which is supplemented with an extensive list of particular items that satisfy the definition. That approach is embodied in the following group of proposals which we put forward for discussion.

The Commission proposes:

1. *Reforming legislation should adopt the expression “commercial apparatus” as a pivotal concept.*

2. *Reforming legislation should provide a definition of commercial apparatus similar to the following:*

*“Commercial apparatus” means machinery, equipment or apparatus that is used directly in the manufacture, production, processing, storage, handling, packaging, display, transportation, transmission or distribution of property or in the provision of a service.*

3. *Reforming legislation should set out a schedule containing extensive examples of goods that are “commercial apparatus” and provide that the schedule may be consulted for the purpose of interpreting that expression. The Lieutenant-Governor-in-Council should be empowered to amend the schedule by adding further examples.*

We have included as Appendix E to this Consultation Paper a list which illustrates the approach that might be taken to developing a schedule of examples to supplement the definition of commercial apparatus. What we have done is identify a variety of sectors of economic activity and then within each of those sectors identify particular items of equipment that, if affixed to land, might be held to be fixtures. Within each sector of economic activity no attempt has been made to be exhaustive. At some point it is necessary to say that the courts and parties have been given enough guidance, and further examples within individual categories would be overkill.

We do not pretend that the various sectors of economic activity identified for inclusion in the schedule is exhaustive and further development of the list is contemplated

## 2. THE LEGAL SIGNIFICANCE OF “COMMERCIAL APPARATUS”

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13. See, e.g., *Assessment Act*, R.S.B.C. 1979, c. 21.

## CHAPTER II: FIXTURES REVISITED

Once it has been determined that a particular item of property falls within the definition of “commercial apparatus,” what legal consequences should flow from that? The basic aim is to modify the links that may bind commercial apparatus to land law. Three options are explored below:

*(a) Treat Commercial Apparatus as Personal Property for the Purposes of a Conflict Between a PPSA Security Interest and a Mortgage or Other Land-Based Security Interest*

This option would involve the least deviation from the current law. It would, in the forklift/production equipment example, provide an appropriate result by allowing the PPSA secured party to defeat the mortgagee of land. It would not, however, touch a competition between the secured party and a subsequent purchaser of land so their rights would continue to be regulated by whether or not the secured party filed under section 49 of the PPSA. The purchaser of land might still end up with the forklift.

*(b) Treat Commercial Apparatus as Personal Property for all Purposes*

This is the most radical legal consequence that can be attached to the status of commercial apparatus. It would solve the problem raised by the example because a competing interest based on an interest in land could simply not arise. A mortgage of Blackacre or a conveyance of Blackacre would no longer transfer, by operation of law, an interest in an item of commercial apparatus that was affixed to the land.

This approach would undoubtedly lead to some changes in conveyancing practices since it would now be necessary to ensure that the transfer of commercial apparatus is separately documented or is otherwise clearly identified and conveyed as personal property. It may also require a separate investigation of the purported owner's title with respect to commercial apparatus since legal ownership of the land would no longer automatically provide an assurance of the landowner's title to commercial apparatus that would otherwise pass as a fixture. These steps, however, are probably already adopted by many lawyers as good conveyancing practice, given the uncertainty that surrounds the question of when a chattel attached to land becomes, in law, a fixture.

*(c) Treat Commercial Apparatus as Personal Property for the Purposes of Any Conflict Between a PPSA Security Interest and Any Interest Based on an Interest in Land*

This approach attempts to steer a middle course. It would ensure that the PPSA security interest in an item of commercial apparatus would always prevail over a claim to the same item based on an interest in land, but it would leave intact the principle that, as between vendor and

## CHAPTER II: FIXTURES REVISITED

purchaser, a conveyance of land also conveys the vendor's interest in any item of commercial apparatus affixed to the land that would otherwise be characterized as a fixture. The prudent purchaser, however, would still have to conduct a search of the Personal Property Registry for security interests in that apparatus that would have priority.

### *(d) Our Preference*

Our tentative preference is to adopt the second option, that is to totally sever any possible link between commercial apparatus and land and alter the law so that commercial apparatus is regarded, for all purposes, as personal property. This strikes us as the cleanest solution and the one which, in principle at least, is most in tune with the concerns of the Bar.

It is our sense that one reason fixtures seem to give rise to a degree of discomfort not found with respect to other kinds of collateral is the dual characterization it receives under the PPSA and the fact that to resolve priority conflicts involving fixtures it is necessary to resort to the set of meta-rules provided in section 36. To bring a large class of collateral wholly within the PPSA to be dealt with according to a single set of PPSA rules should minimize this discomfort.

The Commission proposes:

*4. Reforming legislation should provide that commercial apparatus is conclusively deemed to be personal property for all intents and purposes, including the creation or transfer of an interest in it, whether or not*

*(a) the apparatus has been affixed to land; or*

*(b) any person intended that the apparatus should become part of the land.*

### *(e) Transition Issues*

The adoption of a policy that commercial apparatus should be treated as personal property for all purposes requires that issues surrounding the transition from the old law to the new be approached with particular care. We believe the basic transition rule should reflect the policy that no person should be deprived of an existing interest in commercial apparatus by the introduction of a new law that modifies the concept of fixture.

The Commission proposes:

*5. Reforming legislation should contain transition provisions that reflect the principle that where, immediately before the time the legislation came into force a person had, by virtue of an interest in land, an interest in commercial apparatus, the priority of that person's interest in the commercial apparatus as against any competing interest must be determined without reference to the legislation.*

## CHAPTER II: FIXTURES REVISITED

We concede that this approach to transition does have the disadvantage that it will remain operative for a considerable length of time and it may be many years before all interests in commercial apparatus that arose as a consequence of acquiring an interest in land to which the apparatus was affixed have vanished. During this period the old law must be kept alive for the limited purpose of serving those interests with a consequent degree of “untidiness” in the legal system. It may be there are particular circumstances in which the new law can be allowed to operate retrospectively without harming any important interests. We would welcome comments on what those circumstances might be.

Transition rules might also speak expressly to the status of prior dispositions<sup>14</sup> to ensure that their effect is defined with reference to the old law rather than the new.

The Commission proposes:

*6. Reforming legislation should contain a provision which clarifies that where a disposition of land takes effect before the date reforming legislation comes into force the question of whether the disposition includes commercial apparatus must be determined without reference to the legislation.*

Wills may raise special problems. What should be the result when a will is made before reforming legislation comes into force but the testator dies after that date? The basic rule is that a will speaks from and takes effect from the testator's death. This suggests that a gift of the land would not necessarily carry with it commercial apparatus affixed to the land that would otherwise have passed. Nothing in the preceding proposal alters the effect of the basic rule for wills, although the testator's will may have been made in reliance on the prior law concerning commercial apparatus and fixtures.

In a case like this, however, the question is most likely to be resolved by approaching the issue as one of interpreting the will to ascertain the testator's intent respecting the commercial apparatus. The principal concern is that executors and the courts might regard the new law as providing a “default” interpretation and we are not sure this is appropriate. Reforming legislation might well define a default interpretation based on the law in force at the time the will was made. It might include a provision along the following lines:

A gift of land in a will made before (the reforming legislation) by a testator who dies after (reforming legislation) includes the testator's interest in items of commercial apparatus that would, apart from (the reforming legislation), be characterized as fixtures, unless a contrary intention appears in the will.

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14. See Chapter I, note 4 as to the meaning of “disposition.”



We invite comment on whether such a provision would be a useful feature of new legislation.

## F. Priority to Building Components

The series of proposals in the preceding section was a response to the inappropriate priority results that can arise in a competition between a land-based interest and a personal property-based interest over a certain group of fixtures. Our paradigm was the production equipment/forklift example. Our approach to reform is not to modify any priority rules in the PPSA but, rather, alter the way this group of fixtures is characterized so as to eliminate the competition.

We now turn to the second variety of priority competition that concerns us, the one which brings the land-based interest and the personal property-based interest into conflict over building components. “Building components” is the expression we have adopted to describe goods that are an integral part of an improvement on land and that serve or enhance it but which are of a type that are severable from the land. Examples of building components include elevators and devices for heating and air conditioning. The example given earlier in this Chapter concerning the replacement of the aging freight elevator provides the paradigm for the priority competition that concerns us.

Our task is to identify a change in the law that ensures the real property-based interest receives an appropriate priority in circumstances similar to those outlined in the example. One approach to reform is suggested by our proposals concerning commercial apparatus. It would be possible, in theory, to define a class of “building components” and stipulate that they are to be dealt with totally as real property once they became attached to the land. Thus they would be removed from the ambit of section 36; no new PPSA-based security interest could arise and any such security interest existing at the time the item became affixed would evaporate.

This course is not open. The reality is that building components are very frequently the subject of separate financing with the financier retaining a purchase money security interest in the building components even after they have become affixed to land.<sup>15</sup> Any change in the law that interfered with this financing practice or interfered with the special priority enjoyed by those who provide the purchase money for the acquisition of building components would be highly disruptive and unacceptable.

If building components are to remain within the priority structure of section 36, then the focus of reform must be an examination and

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15. This practice predates the PPSA by many years. See *Sale of Goods on Condition Act*, R.S.B.C. 1979, c. 373.

modification of that structure. Within that approach there may still be room for a definition of building components, although it may also be possible to achieve the desired result without attempting a definition. Both approaches are explored below.

### 1. A PRIORITY RULE CONFINED TO “BUILDING COMPONENTS”

This approach contemplates an addition to section 36 of the PPSA that provides a special priority rule with respect to a security interest in building components. It would stipulate that a security interest (other than a purchase money security interest) in building components is subordinate to the interest of a person who has an interest in the land at the time the building components were affixed to the land. This new priority rule would reverse the application of section 36(3) in this context.

“Building components” is a pivotal concept in that rule and defining it presents the same kind of challenge that arose with respect to “commercial apparatus.” We believe the same strategy might be employed in defining this concept. The statute could contain a basic definition along the following lines:

“building components” means goods that are an integral part of an improvement on land and that serve or enhance the improvement but does not include anything that is building materials.<sup>16</sup>

That general definition would, as before, be supplemented by a schedule of examples of goods that are building components which could be consulted for the purpose of interpreting the general definition. See Appendix F to this paper for an illustration of what the schedule might cover.

### 2. A PRIORITY RULE THAT DOES NOT REQUIRE A DEFINITION OF BUILDING COMPONENTS

The rule outlined above reverses the effect of section 36(3) so far as it applies to building components as defined. An alternative approach might be to reverse the effect of section 36(3) with respect to all fixtures except where the security interest is for purchase money. It is important to note that this approach is feasible only if the proposal concerning commercial apparatus is adopted. If the notion of fixture continues to embrace things like production machinery and the constructively affixed forklift, the financier who relies on a broadly based security agreement claiming an interest in “equipment” or “all the debtor’s present and after acquired personal property” has a legitimate claim to priority of the kind

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16. “Building materials” is a defined term in the PPSA. If this approach is adopted the definition of building materials might require some modification since in its present form it stipulates that it does not include certain things that are building components.

## CHAPTER II: FIXTURES REVISITED

found in section 36(3) with respect to the items we have described as commercial apparatus.

But if “commercial apparatus” is removed from consideration, and the rights of purchase money secured parties are preserved, it is legitimate to ask what is left besides building components? What fixtures are there in which a security interest might attach before they become fixtures and which are deserving of priority over a land-based claim? No doubt it is possible to come up with fanciful examples, but it must be remembered that the *Personal Property Security Act* is intended to operate in a pragmatic and functional way that recognizes and facilitates commercial financing in the real world.

Once commercial apparatus has been removed from consideration, the only kind of collateral left of any commercial importance on which section 36(3) can operate may be building components. If this proposition is accepted, the sensible course may be to modify that provision directly to give proper recognition to the land-based claim.

This alternative, therefore, is to amend section 36(3) in a way which confines the priority rule it currently embodies to a purchase money security interest but subordinates any other security interest to the land-based claim.

### 3. OUR PREFERENCE

We welcome all comment on the building components issue. A threshold question commentators might wish to address is whether section 36(3) in its current form provides an unjustified priority for the PPSA secured party. We believe it does, but views on that question may differ. Submissions directed to that threshold issue are invited.

Assuming some alteration of priorities respecting building components is called for, we have identified two possible approaches to reform. There may be other approaches which also deserve to be canvassed and we would welcome having them drawn to our attention.

Of the two approaches explored, our preference is for the second. It is the simplest solution and may prove to be the least disruptive. It requires, however, that the concept of fixture be narrowed by excluding commercial apparatus as described in our previous proposals. If that is not done, then pursuing the option which involves creating a definition of “building components” would be the preferred option.

The Commission proposes:

*7. The PPSA be amended in section 36 to reflect the principle that only a purchase money security interest in goods that attaches before or at the time the goods become fixtures has priority*

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*with respect to the goods over an interest in the goods arising from an interest in the land to which they are attached.*<sup>17</sup>

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17. The principal amendment would be to subsection (3) with consequential amendments to subsections (4),(5) and (6). Those provisions, amended as suggested might read as follows, with additions italicized and deletions [bracketed]:

(3) Except as provided in this section and in section 30, a *purchase money* 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* [a claim to the goods made by a person with an interest in the land].

(4) A *purchase money* 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 *purchase money* security interest is filed in accordance with section 49.

(5) *A security interest in goods that attaches after the goods become fixtures and a security interest in goods, other than a purchase money security interest, that attaches before or at the time the goods become fixtures* [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.

(6) *A purchase money security interest referred to in subsection (3) and a security interest referred to in subsection (5)* [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.

#### 4. TRANSITION ISSUES

Again, we believe the proper policy is that a reform measure, in whatever form adopted, should be given no retrospective effect. In particular, any revised priority should not apply to a security interest in goods that became a fixture before the measure came into force.

The Commission proposes

*8. The amendments contemplated by proposal 7 should not apply to a security interest in goods that became fixtures before the amendments came into force.*

#### G. Legislative Distribution

Only the last of the proposals set out earlier in this Chapter is specific as to the statute in which it is to be implemented. The other proposals speak somewhat vaguely on this issue of “reforming legislation.” These proposals could also be dealt with in the *Personal Property Security Act* but we believe a good case can be made for bringing them forward in legislation of more general application. What is proposed is, after all, a change to the general law concerning property that transcends personal property or secured transactions.

The *Law and Equity Act* is frequently used as a vehicle for changes in the law of general application. We believe in this case, however, that the *Property Law Act* might provide a more suitable vehicle. We suggest that the first group of proposals be implemented through additions to the *Property Law Act* and, to the extent that these changes should be flagged for the purposes of the *Personal Property Security Act*, that be done through appropriate cross references.

The Commission proposes:

*9. Proposals 1 to 6 be implemented through appropriate amendments to the Property Law Act.*

#### H. Summary

Proposals 1 to 6 focus on the concept of “commercial apparatus.” In virtually every case, commercial apparatus will be equipment of some kind. Most things which fall within the concept of commercial apparatus would never become attached to land and the issue of whether a particular item became a fixture would not normally arise. Even where some attachment to the land takes place, the tests currently applied do not necessarily lead to a conclusion that the goods become, in law, part of the land.

Whether or not a particular item of goods is characterized as commercial apparatus is significant only if, on affixation, those goods

## CHAPTER II: FIXTURES REVISITED

would otherwise become fixtures. In that instance the effect of the reforms proposed is that these goods retain their character as personal property and that no rights in them can arise by virtue of an interest in the land to which they may be attached.<sup>18</sup> Competing rights would be governed wholly by the relevant provisions of the PPSA, and the portions of section 36 that concern priority to fixtures would cease to have any application to this category of goods.<sup>19</sup>

While the proposals concerning commercial apparatus do not call for any change to the priority structure of section 36 of the PPSA, the proposal inspired by our concerns respecting building components do. The change we propose would affect the priority of secured parties who take a security interest in goods that attaches before or at the time the goods are attached to land. Where that secured party is a holder of a purchase money security interest, its priority is unchanged, but the holders of other security interests would now be subordinated to interests in the goods that arise from an existing interest in the land to which they become attached.

Nothing in the proposed amendments would relieve the secured party (purchase money secured or not) from the requirement to file a notice under section 49 to preserve whatever priority they enjoy against persons who may subsequently acquire an interest in the real property. The proposal also does not impair the ability of parties to create a security interest in goods after they have been attached to land.

### I. General Policy Questions

The proposals made in this Chapter operate against a background of more general policy questions. Implicit in the proposals are our tentative conclusions on these questions, but for completeness we set them out

1. Does section 36 of the PPSA, in its current form, give an unfair priority to land-based interests with respect to property we have described as “commercial apparatus”?

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18. Consequently, no filing under s. 49 is necessary to preserve the priority of a security interest in commercial apparatus against a person who subsequently acquires an interest in the land to which the apparatus may become attached.

19. Certain subsections of s. 36 impose duties on secured parties with respect to goods that are attached to land whether or not those goods are fixtures. *See, e.g.*, subsections (8), (11) and (13) of s. 36. In this regard, subsection (9) might be revised so it applies to all goods that are attached to the land. In its current form it appears to apply only to goods that become fixtures.

**CHAPTER II: FIXTURES REVISITED**

2. Is this unfairness sufficiently serious to justify legislative intervention?
3. Should commercial apparatus that would otherwise be characterized as a fixture continue to be treated like other fixtures under the PPSA?
4. Should commercial apparatus be totally assimilated to personal property whether or not it is affixed to land? If not, what alternative approach is preferable?
5. How should commercial apparatus be defined? Is the approach of a general definition supplemented by scheduled examples a useful one? What alternatives might be considered?
6. Does the operation of section 36 in its current form place the holder of a land-based interest at an unfair disadvantage when claiming rights in building components?
7. Is this unfairness sufficiently serious to warrant legislative intervention?
8. What technique should be adopted to give the holder of a land-based interest an appropriate priority to building components?
9. Should an attempt be made to define “building components?” If so, what approach should be adopted?
10. Is the assumption correct that if commercial apparatus is removed from the ambit of section 36, building components are the only collateral of any commercial significance that will remain subject to that provision?
11. Is the correct approach to transition that reforming legislation should not operate retrospectively? Are there any justifiable exceptions to this policy? Are special rules for wills desirable?

Comment on these general policy questions is particularly invited.

**A. Money Payments and the PPSA**

The right to receive a payment is a form of property that poses special difficulties. Most of these difficulties can be traced to the intangible nature of money payments. For example, a right to receive money has no particular location in space and this makes it difficult to apply legal rules that may require a distinction to be drawn whether property is in one place as opposed to another. For tangible forms of property, many legal issues are resolved through the concept of possession. Possession is an elusive concept when applied to intangible rights. Fortunately, the *Personal Property Security Act* and the legislation which preceded it have long provided guidance in defining rights and resolving conflicts surrounding claims to money payments.

The term adopted by the PPSA to describe this kind of property is “account.” It is defined in the Act as follows:

“Account” means a monetary obligation not evidenced by chattel paper, an instrument or a security, whether or not the obligation has been earned by performance.

The PPSA regulates virtually all competing claims to an account. This is so whether the claims arose through the creation of a security interest in the account or through the absolute transfer of the account to another person.<sup>1</sup> In purporting to resolve competitions between competing (non security) transferees of an account, the PPSA goes beyond the way in which it applies to tangible property. The PPSA does not, for example, attempt to resolve competitions between competing transferees of goods.<sup>2</sup> This aspect of the PPSA requires some understanding of the general law in this area and the way in which it deals with competing assignments of personal property.

Where there are competing assignments of tangible personal property the usual rule is that the first assignee has priority. Thus if Tom sells his horse to Sharon and then purports to sell the same horse to Greg, Sharon will normally have priority over Greg to the horse.<sup>3</sup>

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1. See s. 3. Transfers of some kinds of accounts are excluded from the operation of the PPSA. See ss. 4(e), 4(h), 4(i).

2. Presumably this is because an absolute transfer of goods will usually be accompanied by a change of possession and competitions are less likely to arise since a purported transferor who does not have possession is much less likely to find a willing transferee. The same is not true of accounts.

3. Greg might receive priority only where there are facts or circumstances which would stop Sharon from claiming her priority.



### CHAPTER III: PAYMENTS OF MONEY CONNECTED WITH LAND

The common law priority rules respecting competing assignments of an account operate somewhat differently. Here the rule is that the first assignee to give notice to the account debtor takes priority. This is known as the rule in *Dearle v. Hall*,<sup>4</sup> named after the case in which it was first laid down.

For example, Peter owes Tom \$100.

- Day 1: Tom assigns the right to receive payment of Peter's debt to Sharon.
- Day 2: Tom assigns the same account to Greg.
- Day 3: Greg notifies Peter of his assignment.
- Day 4: Sharon notifies Peter of her assignment.

In this example, the rule in *Dearle v. Hall* would give Greg priority since he was the first assignee to notify Peter, the account debtor.

A major result of bringing absolute transfers of accounts within the PPSA is to oust the rule in *Dearle v. Hall* as a rule of priority. Under the PPSA, notice to the debtor is replaced by registration in the Personal Property Registry. The PPSA would give priority to the first of either Sharon or Greg that registers the transfer in the Personal Property Registry.

The treatment of accounts under the PPSA is, generally speaking, satisfactory. Some concern does arise, however, with respect to accounts that are intimately associated with an interest in land. These include

- rent that is payable under a tenancy agreement
- payments due under a mortgage of land
- payments due under an agreement for the sale of land.

The core of the concern goes to a purported attempt to assign the account in isolation from the associated interest in land. How far does or should the law permit the two elements to be separated? If they are separated, should the assignment of the account be treated as an assignment of personal property or an assignment of land?

## B. Assignments of Rent

### 1. RENT ASSIGNMENTS GENERALLY

The issues arise most clearly in relation to an assignment of rents since this appears to be the most common transaction. There are competing views whether, at common law, rent is real property or personal property. Authorities can be cited in support of both points of

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4. *Dearle v. Hall*, (1823) 3 Russ. 1; 38 E.R. 475.

### CHAPTER III: PAYMENTS OF MONEY CONNECTED WITH LAND

view. The real property characterization seems to be based on a historical point of view. At common law rent issues from the land:<sup>5</sup>

[T]he governing idea is that the land is bound to pay the rent ... we may almost go to the length of saying that the land pays it through (the tenant).

The contrary view sees the obligation to pay rent as arising out of the tenant's covenant in the tenancy agreement, a contractual basis consistent with personal property notions. The modern, and we believe better, view is to regard rent as personal property. But how far this view is reflected in current British Columbia law and practice is another matter.

## 2. THE CURRENT BRITISH COLUMBIA POSITION

The *Personal Property Security Act* expressly excludes assignments of rent from its ambit. Section 4 provides:

Except as otherwise expressly provided in this Act, this Act does not apply to the following: ...

- (g) the creation or transfer of an interest in a right to payment that arises in connection with an interest in land, including an interest in rental payments payable under a lease of land.

The position of rent assignments in relation to real property law is highly ambiguous. In practice, assignments of rent are accepted for registration in the Land Title Offices of the province and the regulations that govern transfer forms to be used in the Land Title system refer to “an assignment of rents that is not part of a mortgage.”<sup>6</sup> The difficulty is that both the *Land Title Act* and the *Property Law Act* are silent on the question of rent assignments and provide no guidance whatever on the legal effect or consequences of registering an assignment in the Land Title Office.

It is likely, therefore, that in British Columbia priority among competing rent assignments is to be determined with reference to the rule in *Dearle v. Hall*<sup>7</sup> and the priority will go to the first transferee to notify the tenant of the assignment. The effect of registering the assignment in the Land Title Office is highly speculative.<sup>8</sup>

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5. Pollock and Maitland, *The History of English Law*, Vol II, 131 (2nd ed.) 1898.

6. *Land Title (Transfer Forms) Regulation*, B.C. Reg. 53/90 at s. 9(2)(a).

7. This rule was discussed in the text at n. 4.

8. Two possibilities might be argued. First, registration might strengthen the assignee's hand in any dispute with a subsequent assignee of the reversion who claimed that the assignment carried with it a right to rent. Second, registration of an assignment of rent might satisfy the requirements of s. 94 of the *Bankruptcy and Insolvency Act*, 1993, and permit the assignee to maintain the validity of the assignment in the face of a bankruptcy

### 3. OTHER PROVINCES

In other Canadian provinces where PPSA type legislation has been introduced a greater measure of certainty appears to have been achieved, although divergent views as to the proper treatment of rent have clearly emerged.

#### (a) Ontario

The Ontario *Personal Property Security Act*<sup>9</sup> governs assignments of payments arising out of interests in land so long as there is no assignment of the associated real property interest. Section 4(1)(e) provides:

4 (1) This Act does not apply, ...

- (e) to the creation or assignment of an interest in real property, including a mortgage, charge or lease of real property, other than,
  - (i) an interest in a fixture, or
  - (ii) an assignment of a right to payment under a mortgage, charge or lease where the assignment does not convey or transfer the assignor's interest in the real property;

Rights to payment described in section 4(1)(e)(ii) are subject to two provisions of the Act. First, section 54 permits the registration of a notice of the security interest in the payment in the proper land registry office.<sup>10</sup> The significance of that registration is spelled out in section 36 which provides that the security interest in the payment is subordinate to the interest of a person who acquires the underlying real property interest and registers before registration of the notice of the security interest in the payment. The Ontario PPSA creates for payments connected with land a scheme analogous to that which governs fixtures.

#### (b) Manitoba

Manitoba's *Personal Property Security Act*, as originally enacted<sup>11</sup>, was silent on the status of payments of money connected with land. Early in 1993 a wholly new *Personal Property Security Act* was introduced.<sup>12</sup> The new act is similar to British Columbia's PPSA in most respects but departs from it in relation to money payments. Here, Manitoba has moved in the direction of the Ontario scheme. Section 4 provides that:

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of the assignor.

9. R.S.O. 1990, c. P10.

10. This is the same provision that provides for the registration of notice of a security interest in a fixture and is comparable to s. 49 of the British Columbia PPSA.

11. R.S.M. 1987, c. P35.

12. 1993, Bill 14, given first reading on March 5, 1993.

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4. ...[T]his Act does not apply to ...

- (f) the creation or transfer of a right to payment that arises in connection with an interest in or a lease of land other than a transfer of rental payments under a lease of land and a right to payment evidenced by a security or instrument.

It will be noted that the new Manitoba provision is narrower than its Ontario counterpart in that it does not embrace money payable under a mortgage or a charge on land. The new Manitoba legislation provides no guidance as to the relative priorities between the holder of a security interest in rent and a person who subsequently acquires an interest in the reversion.<sup>13</sup>

(c) *Alberta*

Alberta has taken an opposite tack from Manitoba and Ontario. Its *Personal Property Security Act*<sup>14</sup> excludes rental payments in terms similar to 4(g) of the British Columbia Act. Alberta does not, however, leave the question of the status of rental payments wholly at large. Recent legislation has assimilated, at least some, rental payments, to real property interests.<sup>15</sup>

(d) *Saskatchewan*

(i) *Up to 1993*

Until very recently, Saskatchewan's PPSA<sup>16</sup> embraced rental payments. It adopted the Ontario/Manitoba pattern of stipulating an exception to the provision that excludes real property interests from the Act.<sup>17</sup> The rights of a transferee of the reversion were dealt with by a priority rule in the following terms:<sup>18</sup>

A security interest in rental payments is subordinate to the interest of a person who acquires, without fraud under a transaction to which *The Land Titles Act* applies, an interest in the lease providing for the rental payments.

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13. Under the Ontario legislation this is expressly dealt with by s. 36.

14. S.A. 1988 c. P-4.05.

15. See the amendments to the *Law of Property Act* contained in Alberta's *Miscellaneous Statutes Act, 1992*, S.A. 1992, c. 21, s. 22(1) adding s. 59.2 to the *Law of Property Act*. The amendments appear to address only the status of rental payments where the owner of the reversion is a corporation.

16. S.S. 1979-80, c. P-6.1.

17. *Ibid.*, s. 4(f).

18. *Ibid.*, s. 22.

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While this rule embodies a policy similar to that of the Ontario statute, it is less fully worked through.

*(ii) 1993 Legislation*

In 1993 a new *Personal Property Security Act* was introduced in Saskatchewan.<sup>19</sup> So far as rental payments are concerned, the new Act adopts a policy diametrically opposed to that of its predecessor. The exception for rental payments has disappeared from section 4(f), thus excluding rental payments from the ambit of the Act. Complementary amendments have been made to Saskatchewan's *Land Title Act* as follows:

**124.3** (1) In this section:

- (a) "assignee" includes a secured party;
- (b) "assignment" includes a security agreement;
- (c) "easement" includes an easement pursuant to *The Public Utilities Easements Act*, *The Pipe Lines Act* or the *National Energy Board Act* (Canada);
- (d) "lessee" includes a holder of an easement;
- (e) "rents" means:
  - (i) amounts payable or to be paid pursuant to a lease, including a lease mentioned in section 134; or
  - (ii) amounts payable for or to be paid pursuant to an easement.

(2) For the purposes of determining priority among successive holders of rights in rents, an interest that arises pursuant to an assignment of rents is deemed to be an interest in land.

(3) A caveat relating to an interest that arises pursuant to an assignment of rents may be filed.

...

(6) After an assignment of rents is made, a lessee may pay rents to the grantor of the lease or the easement:

- (a) before the lessee receives a notice in writing that:
  - (i) states that the rents payable or to become payable by the lessee are to be made to an identified assignee of the rents; and
  - (ii) describes the lease or easement with sufficient particularity to identify the rents; or
- (b) after the lessee requests the assignee to furnish proof of the assignment and the assignee fails to furnish that proof within 15 days after the date of the request.

(7) Payment of rents by a lessee to an assignee in accordance with a notice described in clause (6)(a) discharges the obligation of the lessee to the extent of the payment.

Thus Saskatchewan has adopted a policy of assimilating rental payments, almost wholly, to land.

*(e) New Brunswick*

#### CHAPTER III: PAYMENTS OF MONEY CONNECTED WITH LAND

Legislation recently introduced in New Brunswick deals with rental payments in much the same way as the new Saskatchewan legislation, including appropriate amendments to its real property legislation.<sup>20</sup>

#### 4. CONCLUSION AND PROPOSAL

We have no doubt there is a need to clarify the current position in British Columbia with respect to rental payments. The rights of successive assignees currently appear to be regulated by the rule in *Dearle v. Hall*. This is overlaid by the practice (not sanctioned by any legislation of which we are aware) of accepting these assignments for registration in the Land Title Office. What approach should be adopted? The approach taken in Ontario is an attractive and elegant one. If rental payments are to be characterized as personal property the Ontario legislation provides a model which is superior to those created under the new Manitoba legislation or the older Saskatchewan legislation.

Certainty is also achieved, however, by the new Saskatchewan legislation, so we are presented with a clear choice.

It cannot be said that a definite trend has emerged in Canada, one way or the other, concerning the proper treatment of rental payments. The most recent Acts do, however, suggest a slight preference for treating rental payments as real property and allowing the priority rules that flow from that characterization to govern.

At a recent meeting of the Canadian Conference on Personal Property Security Law these divergent approaches were raised with representatives from both Saskatchewan and Manitoba and their views were sought on why one approach had been chosen in preference to another in a particular jurisdiction. In both cases the answer was the same. The particular choice, albeit a different one in each province, was largely driven by the concerns of practitioners and what was perceived to be the “convenience” of a particular solution. The choice made in each case did not appear to reflect a preference of one policy over another.

In British Columbia, the concerns of the Bar and considerations of convenience seem to point to a particular solution. First, our consultation in relation to fixtures discloses that large numbers of practitioners are uncomfortable with the concept of an asset that has the attributes of both real and personal property and which carries with it the necessity for a meta-rule like section 36 to reconcile the competing systems. It is our sense that an extension of this approach, such as that found in the Ontario PPSA, to other types of assets would not be welcome.

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20. *Personal Property Security Act*, Bill No. 50 (1993); *An Act Respecting the Personal Property Security Act*, Bill No. 51 (1993).

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It is our provisional view that the balance of convenience lies with characterizing rental payments as real property and allowing priority issues to be dealt with under the *Land Title Act*. This approach would conform most closely to current practice since the Land Title Offices currently accept assignments for registration. It may simply end up achieving what many practitioners already believe the law is.

The Commission proposes:

10. *Transfers of rental payments should continue to be excluded from the PPSA.*

11. *The Property Law Act should be amended to stipulate that an interest that arises under an assignment of rent is an interest in land.*

Comment is invited on whether assignments of rent should be governed wholly by real property laws. If not, should the scheme of the Ontario PPSA be adopted?

### C. Assignment of Payments under a Mortgage

The exclusion of rent payments from British Columbia's *Personal Property Security Act* is relatively clear since they are referred to expressly in section 4(g). The status of a purported assignment of payments due under a mortgage is less clear. These payments are not mentioned in paragraph (g) in express terms and their status must be determined in the light of the more general language used – “the creation or transfer of an interest in a right to payment that arises in connection with an interest in land.”

Is every payment that may be secured by a mortgage of land necessarily one that fits that description? The description is most apt when the mortgage document itself is an embodiment of the debt (and of the rights to payment under it) as well as the security over land. But the obligation which gives rise to the payment may exist quite independently of the mortgage. The mortgage may not be given until some time after the right to the payment has come into existence, perhaps because the lender has made a subsequent demand for security. Can it be said that this is a right to payment that arises in connection with an interest in land?

The kind of mortgage familiar to most people is typified by the residential purchase-money mortgage in which the obligation to pay and the real property interest, the security over land, are embodied in the same document. Here it seems reasonably clear that this is a “right to payment that arises in connection with an interest in land” and is excluded from the PPSA by section 4(g).

What about the other rights to payment, secured by a mortgage, whose origin is not so clearly linked to the land? The answer may turn, at least in part, on how far or in what circumstances the right to the

### CHAPTER III: PAYMENTS OF MONEY CONNECTED WITH LAND

payment can be assigned or charged separately from the mortgage. This is a complex question and the cases do not speak with a single voice. The better view seems to be that a purported transfer of the right to payment only will normally carry with it the associated security over land.

This suggests that the “default rule” for rights to money payments secured by a mortgage should be that they are excluded from the PPSA leaving priority to them to be determined by the priority of the mortgage. An exception to this default rule may be required where the right to the payment has been embodied in an “instrument” or a “security.” Here, special considerations arise. These are discussed in Chapter IV.

#### D. Agreements for the Sale of Land

An alternative vehicle (to a mortgage) for creating purchase money security in land is for the vendor to retain legal title until the purchaser has paid in full. In British Columbia this transaction is normally documented as an “agreement for sale” which embodies the vendor’s obligation to convey legal title on full payment as well as the obligation to make the payments themselves. Agreements for sale are normally registered in the Land Title Office and appear as a charge on the vendor’s title as a “right to purchase” in favour of the purchaser.<sup>21</sup> A useful working definition of agreement for sale is found in s. 16.1(1) of the *Law and Equity Act*:

- “agreement for sale” means a contract for the sale of an interest in land under which the purchaser agrees to pay the purchase price over a period of time, in the manner stated in the contract, and on payment of which the vendor is obliged to convey the interest in land to the purchaser, but does not include a contract under which
- (a) the purchase price is payable in less than 6 months from the time the contract was entered into, and
  - (b) the purchaser is not, during the 6 month period, entitled to possession of the land that is the subject matter of the contract;

The interest the vendor retains in the property along with the rights to payment ensures that the agreement for sale functions very similarly to a purchase money mortgage.

#### E. Our Conclusion

The similarity between payments arising under most mortgages and agreements for sale, to those in relation to rent is very strong and there are compelling reasons for treating them in a similar fashion.

Other versions of Canadian Personal Property Security legislation, with the exception of Ontario, tend to single out rental payments for

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21. This should not be confused with the agreement of purchase and sale, normally referred to as an “interim agreement” which is normally a prelude to the formal conveyance of the property.



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special treatment one way or the other, but are silent on the status of payments arising under mortgages and agreements for sale. This may reflect a view that these payments would be characterized as real property in any event.

While we cannot say that view is wrong, we believe everyone's comfort level would be increased if the exclusion of these payments from the PPSA was framed in clearer terms and there is some corresponding alteration to our real property laws which clarifies that these interests are to be treated as real property and competing interests in them regulated by our land title legislation.

The Commission proposes:

12. (1) *Section 4(g) of the PPSA be revised to more clearly reflect the exclusion of*
- (a) *payments under an "agreement for sale" as defined in section 16.1 of the Law and Equity Act, and*
  - (b) *subject to any special rules<sup>22</sup> in relation to instruments or securities, payments secured by a mortgage of land.*
- (2) *The Property Law Act be amended to stipulate that an interest that arises under an assignment of a payment referred to in proposal 12(1) is an interest in land.*

If our proposal that rental payments be characterized as interests in land is not adopted, these proposals would require reconsideration. If payments under a mortgage or agreement for sale of land are to be brought within the British Columbia PPSA, the scheme of the Ontario PPSA might be adopted as a model. Comment is invited.

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22. See Chapter IV.

## CHAPTER IV

## SECURITIES AND INSTRUMENTS WITH AN UNDERLYING INTEREST IN LAND

### A. Introduction

The previous Chapter considered the position of rights to the payment of money that are connected in some fashion with land. Those payments are purely intangible in the sense that they have no documentary existence apart from any writing that might create or evidence the associated interest in land. In this Chapter we turn to rights to the payment of money that are embodied in a document, typically a “security” or an “instrument.”

Both “instrument” and “security” are defined terms in the PPSA and are subject to special rules under it. The definitions are as follows:<sup>1</sup>

“instrument” means

- (a) a bill of exchange, note or cheque within the meaning of the *Bills of Exchange Act* (Canada),
- (b) any other writing that evidences a right to payment of money and is of a type that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment, or
- (c) a letter of credit or an advice of credit if the letter of credit or advice of credit states on it that it must be surrendered on claiming payment under it,

**but does not include**

- (d) chattel paper, a document of title or a security, or
- (e) **a bond, debenture or similar document evidencing an obligation secured, in whole or in part, by a mortgage of an interest in land unless the interest being mortgaged is, itself, a mortgage of land;**

...

“security” means a share, stock, warrant, bond, debenture or similar record, whether or not in the form of a security certificate, that

- (a) is recognized in the jurisdiction in which it is issued or dealt with as evidencing a share, participation or other interest in property or an enterprise, or that evidences an obligation of the issuer, and
- (b) in the ordinary course of business is transferred
  - (i) by delivery with the necessary endorsement, assignment or registration in the records of the issuer or of an agent of the issuer, or by compliance with restrictions on transfer, or
  - (ii) by an entry in the records of a clearing agency,

**but does not include a bond, debenture or similar record evidencing an obligation secured, in whole or in part, by a mortgage of an interest in land unless the interest being mortgaged is, itself, a mortgage of land; [emphasis added]**

A characteristic feature of both of these types of document is that the right to payment is, for most purposes, regarded as being “locked up” in the document. A transfer of a right to payment,<sup>2</sup> including the creation of a security interest, is usually carried out through a physical transfer of

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1. S. 1.

2. See s. 24(1).

the document itself, with such endorsement as the form of the document may require.<sup>3</sup>

The emphasized portions of the definitions address the status of instruments or securities that may be linked to a mortgage of land. This link can arise in one of two ways. The payment may itself be secured by a mortgage of land or the right to payment may be secured by a security interest in a mortgage of land that secures the indebtedness of some third person. We examine the latter possibility first.

## B. Security Interests and Mortgages

### 1. DEBENTURES SECURED THROUGH A TRUST INDENTURE

A person who lends money, the repayment of which is secured by a mortgage against land, acquires an asset that may itself be used as security. The mortgage may be the subject matter of a further mortgage – a mortgage of a mortgage. Where a borrower creates a mortgage of a mortgage of land the transaction seems to be governed wholly by real property law. The mortgage of a mortgage is a registrable interest in land and if the borrower purports to mortgage the mortgage a second time the *Land Title Act* will determine the respective priority of the parties.

But transactions that involve a mortgage as the security itself are not always that straightforward. The PPSA becomes involved when the transaction arises in a somewhat different way. The borrower will have a “portfolio” of mortgages which is to be used as collateral to secure a series of debentures. Typically the borrower will enter into a “trust indenture”<sup>4</sup> which will provide for a security interest in the mortgage portfolio, the issue of debentures representing units of the borrower’s debt obligation,<sup>5</sup> and a trustee to act on behalf of the debenture holders.

The policy of the PPSA respecting this kind of transaction seems fairly clear. The definitions of both instrument and security have been

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3. The PPSA does provide for a non-possessory interest in a security or an instrument. *See* s. 25. A security interest perfected by registration can be defeated by certain possessory interests in the document. *See* s. 31.

4. This is a defined term in the PPSA:  
“trust indenture” means a deed, indenture or document, however designated, by the terms of which a person issues or guarantees or provides for the issue or guarantee of debt obligations secured by a security interest, and in which another person is appointed as trustee for the holders of the debt obligations issued, guaranteed or provided for under the deed, indenture or document;

5. Normally the debenture will refer only to the trust indenture and contain no reference to the mortgages that are collateral under the trust indenture.

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drawn to ensure that a debenture arising out of this kind of arrangement is not excluded from the definitions of those terms, provided it satisfies the other requirements of the relevant definition. The reference at the end of each definition to the mortgage of a mortgage ensures this.

There seems to be general agreement that this is the correct policy. The creation of security interests in debentures arising out of this kind of transaction (whether they be securities or instruments) should be governed solely by the PPSA.<sup>6</sup>

The definitions of security and instrument serve the kind of transaction described above reasonably well. Their application to certain other kinds of transaction, however, is less happy.

## 2. SECTION 2(2)

At this point it is important to note a further provision of the PPSA that purports to define the relationship between it and the *Land Title Act*. Section 2(2) provides:

(2) Notwithstanding section 4(g), this Act applies to conflicting interests in a security and in an instrument, unless the security or instrument is registered, or an application to register the security or instrument has been made, under the *Land Title Act*, in which case the *Land Title Act* applies.

The purpose of section 2(2) is difficult to explain. It has no counterpart in the legislation of other provinces. It appears to provide a default rule in areas where the two registration systems potentially collide, but the kinds of collisions the drafters had in mind are obscure.<sup>7</sup> McLaren observes:<sup>8</sup>

The B.C. Act in s. 2(2), as amended, contemplates the situation where there are conflicting interests in a security and in an instrument. The *Land Title Act* will apply where the security or instrument is registered, or an application has been made to register the security or instrument under that Act. Where no registration or application to register has been made under the *Land Title Act*,

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6. Many regard this as a correct result in terms of legal theory as well. The view is that the individual holders of debentures do not have an interest in land. All they have is a personal right to compel the trustee to realize on the security in case there is a default.

7. S. 2(2) was amended in 1992 by the *Personal Property Security Act Amendment Act*, S.B.C. 1992, c. 48, s. 2. The explanatory notes indicate that the amendment was to “clarify” the application of the provision. Formerly s. 2(2) provided:

(2) Notwithstanding section 4(g), this Act applies to conflicting interests in a security and in an instrument, except to the extent that the security or instrument evidences an obligation secured by an interest in land registered, or with respect to which an application for registration has been made, under the *Land Title Act*, in which case the *Land Title Act* applies.

8. McLaren, *Secured Transactions in Personal Property in Canada*, v. 1 at 1-44 (2nd ed., 1989).

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s. 2(2) of the P.P.S.A. provides that the P.P.S.A. will apply. The definitions of “security” and “instrument” in s. 1(1) of the Act specifically exclude the possibility that a security or an instrument may evidence an obligation secured by a mortgage of an interest in land. However, should such a situation arise, s. 2(2) could not operate to resolve the conflict.

There is one situation in which section 2(2) might apply.

### **3. SECURITY IN AN IDENTIFIED MORTGAGE**

Earlier in this Chapter we referred to a situation in which a borrower granted a mortgage of a specific mortgage to secure a debt. If, in the document that created that security interest, the underlying mortgage and the land to which it relates was accurately described and the document also met the formal requirements to bring it within the PPSA definition of “instrument” or “security,” that would be a document to which section 2(2) would potentially apply. It would be framed in a way which would make it a registrable document for the purposes of the *Land Title Act*, but because it is a mortgage of a mortgage it would not be excluded from the definition of instrument or security.

The effect of section 2(2) is that, if the debtor creates conflicting security interests in such an instrument or security, the competition is to be resolved by the PPSA. But if one of the competing parties, even the one whose interest is subordinate under the PPSA scheme, registers it under the *Land Title Act*, the priority rules of that Act would suddenly apply and that party would cease to be the subordinate one.

Where a transaction results in a document which is registrable under the *Land Title Act* it is questionable whether the PPSA should ever enter the picture. One's instinctive reaction is that rights to this interest should be governed wholly by land title priorities whether or not that interest is embodied in documentation that also satisfies a definition of instrument or security under the PPSA. In any event, given the potential of section 2(2) to make the PPSA priority irrelevant, most parties will probably want to bring the transaction under the *Land Title Act*.

We believe a strong case can be made to modify the two definitions in a way that excludes the mortgage of a mortgage of identifiable land from their scope. A more detailed proposal is set out below.

### **4. MORTGAGE OF LAND AS ADDITIONAL SECURITY FOR PAYMENT**

A second instance in which the operation of the definitions raises a question concerns the situation where a mortgage of land is given as additional security with respect to a money obligation covered by an instrument or a security. The paradigm is where the right to payment of money is embodied in a promissory note and contemporaneously, or perhaps later, a mortgage of land is created by the debtor. The mortgage may be expressed to secure the money due under the note or it may be silent on any nexus to the note, although it is understood that only one money obligation exists. The question is whether the PPSA should apply

to regulate competing security interests in the note itself or whether the existence of the mortgage should take this question out of the PPSA

The proper policy is, we think, to leave the matter of security interests in the note or security strictly to the PPSA. Any other course would suggest that secured parties could no longer rely on documentation which appears to be complete and regular on its face. The PPSA does not, however, appear to reflect this policy. Whether this is intentional or accidental is difficult to ascertain.

Returning again to the definitions of “instrument” and “security,” a document that evidences a debt obligation that is secured in a separate mortgage document would nonetheless seem to be excluded from those definitions. The clauses that embody the exclusion require only that the obligation be secured by a mortgage of an interest in land and do not distinguish between mortgages created or evidenced in the instrument or security and mortgages embodied in a separate document.

But if the promissory note in the “note plus mortgage” paradigm does not satisfy the definition of “instrument,” what is it? It does not automatically become real property. It might as easily become another form of personal property for the purposes of the PPSA. A possible, and mischievous, result is that excluding the note from the definition of instrument means that it is an “intangible.” “Intangible” is defined so as to act as a residual category of personal property to include all property that does not fall into one of the more specific types or kinds.

We believe the definitions of instrument and security should be modified so they do not exclude debt obligations covered by a writing that otherwise satisfies the definitions but which are secured by a mortgage that is documented separately.

## 5. PROPOSALS

Some test is necessary to distinguish those transactions that ought to be left to the land title system. The current test is unsatisfactory. The Alberta PPSA adopts a better approach. Its definitions of “instrument” and “security” exclude documents that create or provide for a mortgage or security in an interest in identifiable land.<sup>10</sup> A document excluded from the definition on that basis will normally be registrable in the land title system.

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9. This is a defined term:

“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;

10. *Personal Property Security Act*, S.A. 1988, c. P-4.05, ss. 1(u) and 1(oo), *am.* S.A. 1990, c. 31, ss. 2(k) and 2(s). The new Saskatchewan PPSA also adopts this approach.

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The Commission proposes:

*13. Clause (e) in the definition of “instrument” and the closing flush of the definition of “security” be modified to refer to:*

*a bond, debenture or similar document providing for or creating a mortgage or charge in respect of an interest in land where the land is specifically identified in the bond, debenture or similar document.*

*as things excluded from the definitions.*

The effect of this proposal should be to further clarify the respective roles of the PPSA and the *Land Title Act* in relation to an instrument or security that is linked in some fashion to an interest in land. These changes could usefully be supplemented by a further amendment to section 4(g) of the PPSA which makes it clear that the exclusion of payments associated with real property interests does not include a right to payment evidenced by an instrument or security.

The Commission proposes:

*14. Section 4(g) of the PPSA be replaced by a provision comparable to the following:*

*4. [Except as otherwise provided in this Act, this Act does not apply to the following:]*

*...*

- (g) the creation or transfer of an interest in a right to payment that arises in connection with an interest in land, including an interest in
  - (i) a rental payment payable under a lease of land;*
  - (ii) a payment under an “agreement for sale” as defined in section 16.1 of the Law and Equity Act, and*
  - (iii) a payment secured by a mortgage of land other than a right to payment that is evidenced by a security or an instrument.**

The drafting of section 4(g) in proposal 14 also implements proposal 12 of the previous chapter.

Implementing the changes outlined in Proposals 13 and 14 raises the question of what role, if any, section 2(2) continues to play. If all the circumstances in which it might currently be invoked now appear to be covered by other provisions, it may be appropriate to repeal it. On the other hand, perfect foresight is not always possible and many practitioners and others may find significant comfort in the retention of a default rule that covers unexpected circumstances.

Our present preference is to retain section 2(2), although we invite comments directed at its possible repeal.

## CHAPTER V PROPOSALS AND AN INVITATION TO COMMENT

### A. Proposals

The specific proposals set out in this Consultation Paper are as follows:

1. *Reforming legislation should adopt the expression “commercial apparatus” as a pivotal concept.* [page 14]

2. *Reforming legislation should provide a definition of commercial apparatus similar to the following:*

*“Commercial apparatus” means machinery, equipment or apparatus that is used directly in the manufacture, production, processing, storage, handling, packaging, display, transportation, transmission or distribution of property or in the provision of a service.* [page 14]

3. *Reforming legislation should set out a schedule containing extensive examples of goods that are “commercial apparatus” and provide that the schedule may be consulted for the purpose of interpreting that expression. The Lieutenant-Governor-in-Council should be empowered to amend the schedule by adding further examples.* [page 15]

[See Appendix E for an example of the kind of schedule that might form part of the legislation]

4. *Reforming legislation should provide that commercial apparatus is conclusively deemed to be personal property for all intents and purposes, including the creation or transfer of an interest in it, whether or not*

(a) *the apparatus has been affixed to land; or*

(b) *any person intended that the apparatus should become part of the land.* [page 17]

5. *Reforming legislation should contain transition provisions that reflect the principle that where, immediately before the time the legislation came into force a person had, by virtue of an interest in land, an interest in commercial apparatus, the priority of that person's interest in the commercial apparatus as against any competing interest must be determined without reference to the legislation.* [page 18]

6. *Reforming legislation should contain a provision which clarifies that where a disposition of land takes effect before the date reforming legislation comes into force the question of whether the disposition includes commercial apparatus must be determined without reference to the legislation.* [page 18]

7. *The PPSA be amended in section 36 to reflect the principle that only a purchase money 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.*<sup>1</sup> [page 23]

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1. The amendments required are described with greater precision in n. 17 of Chapter II.



**CHAPTER V: PROPOSALS, CONCLUSIONS AND AN INVITATION TO COMMENT**

8. *The amendments contemplated by proposal 7 should not apply to a security interest in goods that became fixtures before the amendments came into force. [page 24]*

9. *Proposals 1 to 6 be implemented through appropriate amendments to the Property Law Act. [page 24]*

10. *Transfers of rental payments should continue to be excluded from the PPSA. [page 36]*

11. *The Property Law Act should be amended to stipulate that an interest that arises under an assignment of rent is an interest in land. [page 36]*

12. (1) *Section 4(g) of the PPSA be revised<sup>2</sup> to more clearly reflect the exclusion of*

(a) *payments under an “agreement for sale” as defined in section 16.1 of the Law and Equity Act, and*

(b) *subject to any special rules in relation to instruments or securities, payments secured by a mortgage of land.*

(2) *The Property Law Act be amended to stipulate that an interest that arises under an assignment of a payment referred to in proposal 12(1) is an interest in land. [page 39]*

13. *Clause (e) in the definition of “instrument” and the closing flush of the definition of “security” be modified to refer to:*

*a bond, debenture or similar document providing for or creating a mortgage or charge in respect of an interest in land where the land is specifically identified in the bond, debenture or similar document.*

*as things excluded from the definitions. [page 46]*

14. *Section 4(g) of the PPSA be replaced by a provision comparable to the following:*

4. *[Except as otherwise provided in this Act, this Act does not apply to the following:]*

...

(g) *the creation or transfer of an interest in a right to payment that arises in connection with an interest in land, including an interest in*

(i) *a rental payment payable under a lease of land;*

(ii) *a payment under an “agreement for sale” as defined in section 16.1 of the Law and Equity Act, and*

(iii) *a payment secured by a mortgage of land*

*other than a right to payment that is evidenced by a security or an instrument. [page 46]*

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2. *Proposed drafting is set out in proposal 14.*

## **B. Invitation to Comment**

Comments are invited on all aspects of the proposals set out in this Consultation Paper. Those proposals operate against a background of more general policy questions and implicit in the proposals are our tentative conclusions on them. These questions are identified in the text or, in the case of fixtures, are gathered together at the conclusion of Chapter II. Comment on these policy questions is also invited.

The Commission's final recommendations will be developed in the light of the response to this Consultation Paper.

## **APPENDICES**

## APPENDIX A

### THE PERSONAL PROPERTY SECURITY ACT

S.B.C. 1989, c. 36

#### A. Preface

This Appendix is intended to provide only a truncated and summary overview of the *Personal Property Security Act*. Reproducing the Act in full would have added a further 50 pages to this document. The version of the Act set out in this Appendix seeks to reproduce only enough of the Act to give the reader some sense of its structure and operation, and those provisions that are directly relevant to the discussion in the text.

Preparing this Appendix involved an editorial process which operated at a number of levels. Provisions dealing with a variety of important topics were omitted entirely. These topics include the conflict of laws rules, the registration machinery, remedies, and rules concerning transition from the former legislation. Also, no attempt has been made to reproduce the provisions which concern security interests in specialized types of collateral. The provisions in this Appendix, therefore, are silent on security interests in chattel paper, documents of title and so on. Carrying this through has meant omitting entire sections or deleting subsections, clauses, paragraphs or particular words from other provisions which have been retained in part. We have also deleted provisions which deal with the application of the PPSA in particular circumstances that are not relevant to the discussion in the text.

In all cases, where a deletion is made from the Act, the deletion is indicated with ellipses [...].

#### B. Selected Provisions

##### 1. (1) In this Act

“account” means a monetary obligation not evidenced by chattel paper, an instrument or a security, whether or not the obligation has been earned by performance;

“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;

“debtor” means

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- (a) a person who owes payment or performance of an obligation secured, whether or not that person owns or has rights in the collateral, ...
- (d) a transferor of an account ...

“equipment” means goods that are held by a debtor other than as inventory or consumer goods;

“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;

“instrument” means

- (a) a bill of exchange, note or cheque within the meaning of the *Bills of Exchange Act* (Canada),
- (b) any other writing that evidences a right to payment of money and is of a type that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment, or
- (c) a letter of credit or an advice of credit if the letter of credit or advice of credit states on it that it must be surrendered on claiming payment under it,

but does not include

- (d) chattel paper, a document of title or a security, or
- (e) a bond, debenture or similar document evidencing an obligation secured, in whole or in part, by a mortgage of an interest in land unless the interest being mortgaged is, itself, a mortgage of land;

“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

- (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” means a share, stock, warrant, bond, debenture or similar record, whether or not in the form of a security certificate, that

- (a) is recognized in the jurisdiction in which it is issued or dealt with as evidencing a share, participation or other interest in property or an enterprise, or that evidences an obligation of the issuer, and
- (b) in the ordinary course of business is transferred
  - (i) by delivery with the necessary endorsement, assignment or registration in the records of the issuer or of an agent of the issuer, or by compliance with restrictions on transfer, or
  - (ii) by an entry in the records of a clearing agency,

but does not include a bond, debenture or similar record evidencing an obligation secured, in whole or in part, by a mortgage of an interest in land unless the interest being mortgaged is, itself, a mortgage of land;

“security interest” means

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- (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

...

“trust indenture” means a deed, indenture or document, however designated, by the terms of which a person issues or guarantees or provides for the issue or guarantee of debt obligations secured by a security interest, and in which another person is appointed as trustee for the holders of the debt obligations issued, guaranteed or provided for under the deed, indenture or document;

**2. (1) Subject to section 4, this Act applies**

- (a) to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, and
- (b) without limiting the generality of paragraph (a), to a chattel mortgage, a conditional sale, a floating charge, a pledge, a trust indenture, a trust receipt, an assignment, a consignment, a lease, a trust, and a transfer of chattel paper where they secure payment or performance of an obligation.

(2) Notwithstanding section 4 (g), this Act applies to conflicting interests in a security and in an instrument, unless the security or instrument is registered, or an application to register the security or instrument has been made, under the *Land Title Act*, in which case the *Land Title Act* applies.

**3.** Subject to sections 4 and 55, this Act applies to a transfer of an account ... notwithstanding that the transfer ... does not secure payment or performance of an obligation.

**4.** Except as otherwise provided in this Act, this Act does not apply to the following:

...

- (e) the transfer of an interest in an unearned right to payment under a contract to a transferee who is to perform the transferor's obligations under the contract;
- (f) the creation or transfer of an interest in land, other than an interest arising under a licence, including
  - (i) a lease, ...
- (g) the creation or transfer of an interest in a right to payment that arises in connection with an interest in land, including an interest in rental payments payable under a lease of land;
- (h) a sale of accounts or chattel paper as part of a sale of a business out of which they arose unless the vendor remains in apparent control of the business after the sale;
- (i) a transfer of accounts made solely to facilitate the collection of the accounts for the assignor;

**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

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- (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.

(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;

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- (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.
- (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.
- (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):



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- (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.
- (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.

- 19.** A security interest is perfected when
- (a) it has attached, and

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- (b) all steps required for perfection under this Act have been completed regardless of the order of occurrence.

**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).

**24.** (1) Subject to section 19, possession of the collateral by the secured party, or on the secured party's behalf by another person, perfects a security interest in

- (a) chattel paper,
- (b) goods,
- (c) an instrument,
- (d) a security,
- (e) a negotiable document of title, and
- (f) money

except where possession is a result of seizure or repossession.

**25.** Subject to section 19, registration of a financing statement perfects a security interest in collateral.

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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.

**31. (2)** A creditor who receives an instrument drawn or made by a debtor and delivered in payment of a debt owing to the creditor by that debtor has priority over a security interest in the instrument whether or not the creditor has knowledge of the security interest at the time of delivery.

(3) A purchaser of an instrument or a security has priority over a security interest in the instrument or security perfected under section 25 ... if

- (a) the purchaser gave value for the instrument or security,
- (b) the purchaser acquired the instrument or security without knowledge that it was subject to a security interest, and
- (c) in the case of a security or instrument that
  - (i) is not a security with a clearing agency, the purchaser took possession of the instrument or security, or
  - (ii) is a security with a clearing agency, an entry has been made in the records of the appropriate clearing agency indicating that the security has been transferred to the purchaser.

(5) For the purposes of subsections (3) ...

(a) a purchaser of an instrument or a security, ...  
who acquired his interest under a transaction entered into in the ordinary course of the transferor's business has knowledge only if he acquired the interest with knowledge that the transaction violates the terms of the security agreement creating or providing for the security interest.

**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.

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- (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.
- (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:

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- (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

- (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.

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

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.

(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,

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

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  
(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.

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

(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.

(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.



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

(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.

## APPENDIX B

### TERMS OF REFERENCE

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

### RECOMMENDATIONS MADE IN THE INTERIM REPORT ON FIXTURES AND THE PERSONAL PROPERTY SECURITY ACT

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.
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” 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

  - (a) a financing statement registered under that Act,

**APPENDIX C: RECOMMENDATIONS MADE IN THE INTERIM REPORT  
ON FIXTURES AND THE PERSONAL PROPERTY SECURITY 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).

## APPENDIX D

### FIXTURES: 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

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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. This Appendix also formed part of our *Interim Report on Fixtures and the PPSA*.

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.

#### APPENDIX D: FIXTURES: THE OPERATION OF SECTION 36

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 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>

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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"

(continued...)

**APPENDIX D: FIXTURES: THE OPERATION OF SECTION 36**

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:

- (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 fixtureswithout 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

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11. (...continued)

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 D: FIXTURES: THE OPERATION OF SECTION 36**

defeat the lender.<sup>12</sup> Moreover, that security interest need not be 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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12. S. 36(3).

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 E

### COMMERCIAL APPARATUS: A POSSIBLE SCHEDULE OF EXAMPLES

#### Schedule

The following goods are examples of commercial apparatus:

- equipment associated with the processing and handling of forest products including debarkers, chippers, shredders, flakers, waferizers, saws, edgers, carriages, drives, headrig systems, kilns, and dust control systems,
- equipment associated with the processing of wood pulp and the manufacture of paper products including digesters, pulpers, mixers, flowboxes, suction boxes, belts, concentrators, filters, refiners, beaters, drying trains, rolls, presses and stacks,
- equipment used in the extraction of minerals, ore, coal, gravel or hydrocarbons including derricks, kellys, power shovels, augers, water cannons, borers, scrapers, conveyers, hoists, and chutes,
- equipment used in the refining, preparation, or processing of minerals, ore, coal, gravel or hydrocarbons including crushing mills, blending hoppers, concentrators, blast furnaces, filters, converters, machining tools, saws, drills, welding equipment, lances, casting, forging, rolling, drawing and extruding machinery, distillation columns, fractionation towers, thermal and catalytic cracking units,
- equipment used in the preparation or processing of agricultural products including pulsators, sanitary traps, flow gauges, interceptor traps, vacuum pumps, freeze drying, fermenting, curing, dehydrating, pasteurizing and pickling machines, ovens, mixers, sifters, cutters, slicers, coolers, refrigerators, freezers, bottle fillers, and can handlers,
- equipment used in the operation of a retail or wholesale sales establishment including display cases, counters, cash registers display lighting, stands, racks, shelves, refrigerators, freezers, mirrors, and changerooms,
- equipment used in connection with printing and publishing including printing presses, offset machines, typesetters, colour scanners, plates, press control systems, photocopiers, folders and binders,
- equipment used in connection with broadcasting, electronic communications and electronic recording including microphones, booms, video cameras, teleprompters, audio and video monitors, studio lighting, video and audio recorders and players, receivers, turntables, mixers, consoles, amplifiers, antennae, satellite dishes, microwave equipment, transmitters, towers, cables, and teletype machines,
- data processing and storage devices including computers, terminals, printers and associated peripheral devices,
- ski lift devices including surface tows, aerial chairs, gondolas or tramways along with their supporting towers, cables, sheave assemblies, bull wheels, motors and controls,
- snow making systems except piping or associated structures;
- office equipment including photocopiers, typewriters, telecopying machines and telephones,
- storage vessels and devices such as tanks, bins, hoppers, silos, racks, shelves, coolers and freezers,

**APPENDIX E**  
**COMMERCIAL APPARATUS: A POSSIBLE SCHEDULE OF EXAMPLES**

- equipment associated with the manufacture, processing and cleaning of textiles, including looms, sewing machines, washers and dryers in laundromats and dry cleaning machines,
- equipment and apparatus associated with mechanical trades, including pipe cutting and threading machines, vices, cement mixing machines, tile cutters, torch fuel tanks, metal saws, welding equipment, hydraulic car lifts, sealed areas for painting and rustguarding and paint shakers,
- equipment used in the provision of food and food services, including ovens, stoves, mixers, sinks, deep fryers, beverage dispensers, bars, refrigerators and freezers.

## APPENDIX F

### BUILDING COMPONENTS: A POSSIBLE SCHEDULE OF EXAMPLES

[See text at page 21]

#### Schedule

The following goods are examples of building components:

- a device installed for the purpose of ventilation, heating, air conditioning, or air purification or filtration
- a device installed for the purpose of lifting passengers or freight by elevator or escalator,
- a road, airstrip, bridge, viaduct or trestle,
- a fence, railing, barrier or fixed partition wall
- a water distribution system, storm drainage system, industrial or sanitary sewer system,
- a system for power distribution, lighting, security, fire protection or central vacuuming,
- a wire, cable, fibre optic linkage, waveguide or other communication linkage.