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British Columbia**

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

**LAW REFORM
COMMISSION OF
BRITISH COLUMBIA**

MINISTRY OF ATTORNEY GENERAL

**LAW REFORM COMMISSION
OF BRITISH COLUMBIA**

REPORT ON

**LAND-RELATED INTERESTS AND THE
*PERSONAL PROPERTY SECURITY ACT***

“The Commission is to take and keep under review all the law of the Province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law...”

Law Reform Commission Act
Statutes of British Columbia, 1969

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

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

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

**REPORT ON LAND-RELATED INTERESTS AND THE
*PERSONAL PROPERTY SECURITY ACT***

This Report brings forward recommendations arising out of a project referred to the Law Reform Commission in 1992. The reference was broadly directed at the interface between the *Personal Property Security Act* and real property law. In 1993, an Interim Report was submitted that addressed some of the issues in relation to fixtures that were thought to be most urgent. In this Report remaining issues concerning fixtures are examined as well as concerns surrounding rights to payments of money connected with land and instruments linked to an interest in land. The recommendations made in this Report should clarify and improve the law.

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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.¹ 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.² 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, **A** and **B** contemplate a transaction for the disposition of **A**'s home to **B**. Their transaction may have to meet certain writing requirements to be enforceable. The *Law and Equity Act*³ requires that most agreements for a “disposition”⁴ of real property must be evidenced in writing if they are to be enforceable. Thus, if **A** and **B** have not put their transaction in writing and the home is a conventional house, their agreement is not 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.⁵

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

The law may require that **B**'s interest, or notice of it, be registered under one of the two registration systems⁶ established under the *Land Title Act*⁷ and the *Personal Property Security Act*.⁸ If the home is real property, **B** must register the interest 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.⁹

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.

5. Where the disposition creates a security interest in personal property and **A** remains in possession of the motor home, **B**'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 an Appendix to this Report.

9. If the interest that **B** acquired is a security interest in the motor home, then the 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.

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.

Characterizing property as either real property or personal property is not free of difficulty. 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.¹⁰

B. 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.”

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.

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.

C. 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.¹¹

After the Interim Report was submitted, two outstanding issues remained in relation to fixtures. They have been dealt with in this final phase of the project.

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. LRC 130, 1993.

D. The Consultation Paper

Our consultation and research 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 purely theoretical concerns. In a Consultation Paper issued in January 1994 we examined the remaining issues that concern fixtures, the proper characterization of the assignment of money payments connected with land, and securities which have an underlying land component.

The Consultation Paper was distributed to obtain views and comments on the tentative proposals set out in it. The response received was very helpful in shaping our final recommendations and we are grateful to all those who commented on the Consultation Paper.

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.¹

Whether an article has become a fixture depends upon the degree and mode of annexation.² 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.³ 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.⁴

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 fixtures⁵ there will always be a large grey area.⁶

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*.⁷ The furnace has none of the characteristics of land.

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

1. The correctness of the label “fixture” when applied to an item that can be attached or removed has provoked some discussion. See Anger and Honsberger, *Law of Real Property* (2nd ed., 1985) 1009. A fixture that is removed for some temporary purpose such as repair retains its character as “land,” even while removed.

2. *Stack v. T. Eaton Co.*, (1902) 4 O.L.R. 335, 338 (Div. Ct.) *per* Meredith C.J. set out five general rules to be applied in determining whether something had become a fixture:

(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.

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

4. 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: *Daly 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.).

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

6. *E.g.* carpets and shelves.

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

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 a security interest to register a notice of it on the title to the land.⁸ The fact and timing of that registration may affect the secured party's priority in any competition with a person whose interest in the goods is based on an interest in the land itself. The full text of section 36 is set out in Appendix A to this Report.⁹

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

8. S. 49.

9. A more detailed explanation of its operation and the priority rules it establishes was set out in the Consultation Paper at Appendix D.

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 answer to the question whether section 36 achieves the correct result is less clear-cut. Example:

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

In this example, both **ML** and **SP** assert an interest in the new elevator. Neither took their security on the basis that **D** would be acquiring a new elevator and the security of whichever party succeeds in this competition 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 favouring 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. E q u i p m e n t a n d t h e 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. An example:

D wishes to enter the business of manufacturing flower pots from recycled newspapers.¹⁰ **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 none of the items of equipment that were attached to the land had retained 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?

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.¹¹ 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, insists on treating them alike. In the Consultation Paper we re-examined the concept of fixture 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. Commercial Apparatus

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

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

A possibility examined in the Consultation Paper was that the law could identify a category of property that might be referred to as “commercial apparatus.” The kinds of items that might be embraced by this expression are 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. It was tentatively proposed that property characterized as “commercial apparatus” be treated as personal property, for all purposes, whatever the nature or degree of its attachment to land.

Three benefits were seen as flowing from such an innovation:

- borrowers would be able to use a larger range of equipment as collateral for secured financing
- unnecessary litigation would be discouraged¹²
- the operation of the land title system would be enhanced¹³

A disadvantage of the approach is that defining “commercial apparatus” presents a formidable challenge.¹⁴

The Consultation Paper set out a tentative proposal for changing the law in the way described above. The details of the proposal included a strategy for defining “commercial apparatus.”¹⁵ The responses to that proposal, while sympathetic to its aims, were largely negative. It was seen as introducing a change in the law that would be too large and disruptive for the gains it would yield.

The Commission, while it continues to believe the proposal has merit, is disinclined to carry it forward in the light of the opposition it has attracted. We, therefore, make no recommendations that address this issue.

F. Priority to Building Components

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

12. Many items of industrial equipment stand on the hazy border between real property and personal property and the failure of the law to speak clearly as to their status produces unnecessary litigation.

13. 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.

14. 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.

But, this exercise is not wholly new. Pre-PPSA security legislation used “trade machinery” to identify a similar concept. 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.

15. The strategy was much the same as that adopted for defining “building components” described below.

The second variety of priority competition that concerns us is one which brings the land-based interest and the personal property-based interest into conflict over building components. “Building components” is the expression we adopt to describe goods that are an integral part of an improvement on land, 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 this type of priority competition.

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 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. Essentially, adopting this approach would allow the “classic” legal position to prevail with respect to these assets.

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.¹⁶ 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 modification of that structure.

We believe the approach that should be adopted is to add a further provision to section 36 of the PPSA to provide 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.

The Commission recommends:

1. *Section 36 of the PPSA be amended by adding a new subsection that provides that a security interest (other than a purchase money security interest) in a building component is subordinate to the interest of a person who has an interest in the land at the time the building component becomes a fixture and who is not by conduct or agreement precluded from asserting priority.*

“Building component” is a pivotal concept in the recommendation and defining it presents a challenge. Any attempt to formulate a simple definition lacks a desirable degree of precision in its application to particular property. Rather than trying to strike an unsatisfactory balance between generality and particularity in the drafting of a single definition of “building component,” we explored a device frequently used in drafting taxation legislation in describing property that is or is not taxable.¹⁷ 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 recommendations.

The Commission recommends:

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

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

CHAPTER II: FIXTURES REVISITED

2. *The PPSA should provide a definition of “building component” similar to the following:*

“building component” means goods that are an integral part of a building and that serve or enhance the building but does not include anything that is building materials,

3. *The PPSA should set out a schedule containing examples of goods that are “building components” 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.*

This reform measure should be given no retrospective effect. The revised priority should not apply to a security interest in goods that became fixtures before the measure came into force.

The Commission recommends:

4. *The amendment contemplated by recommendation 1 should not apply to a security interest in goods that became fixtures before the amendments came into force.*

These recommendations are carried through with greater rigor in the draft legislation that forms part of the last Chapter of this Report. Certain consequential amendments will also be required.

It is important to note in closing that nothing in the amendments recommended would relieve any secured party from the requirement to file a notice under section 49 to preserve whatever priority it may enjoy against persons who may subsequently acquire an interest in the real property. Nor do they impair the ability of parties to create a security interest in goods after they have been attached to land.

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.¹ 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.² 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 **A** sells a horse to **B** and then purports to sell the same horse to **C**, **B** will normally have priority over **C** to the horse.³

The 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*,⁴ named after the case in which it was first laid down.

For example, **D** owes **A** \$100.

- Day 1: **A** assigns the right to receive payment of **D**'s debt to **B**.
- Day 2: **A** assigns the same account to **C**.
- Day 3: **C** notifies **D** of the assignment to **C**.
- Day 4: **B** notifies **D** of the assignment to **B**.

In this example, the rule in *Dearle v. Hall* would give **C** priority since **C** was the first assignee to notify **D**, 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

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. **C** might receive priority only where there are facts or circumstances which would stop **B** from claiming priority.

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

Personal Property Registry. The PPSA would give priority to the first of either **B** or **C** to register 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 view. The real property characterization seems to be based on a historical point of view. At common law rent issues from the land:⁵

[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

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

that is not part of a mortgage.”⁶ 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.

There is a very real possibility that in British Columbia priority among competing rent assignments is to be determined with reference to the rule in *Dearle v. Hall*⁷ 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.⁸

3. REFORM

If the rule in *Dearle v. Hall*, as it applies to the assignment of rental payments, were to be ousted in favour of priority rule tied to registration, which system should govern? There appear to be three options, each having some precedent in Canadian law. First, the transaction might be designated as one to which only the PPSA applies.⁹ Second the transaction might be characterized as one involving a real property interest, leaving priorities to be regulated by the land title system.¹⁰ Third, the transaction might be treated as a hybrid that invokes elements of both systems.¹¹ The approaches taken in various Canadian jurisdictions were extensively canvassed in the Consultation Paper.

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 an acceptable model that provides clear priority rules where a competing interest arises out of a transfer of real property.

Certainty is also achieved, however, by assimilating these interests to real property, so the choice is clear.

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. In discussions with knowledgeable individuals from provinces that have adopted diverging policies, views were sought on why one approach had been chosen in preference to another. 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.

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 rental payments. 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 of the assignor.

9. This seems to be the position taken in Manitoba's new *Personal Property Security Act*, S.M. 1993, c. 14 s. 4(f). It 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. This was also the position under Saskatchewan's former PPSA, S.S. 1979-80, c. P-6.1, except that the rights of a transferee of the reversion were dealt with, in s. 22, by a priority rule in the following terms:

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.

10. This is the Saskatchewan position since 1993 when rental payments were expressly excluded from the PPSA, and the *Land Titles Act*, R.S.S. 1978, c. L-5, was amended to assimilate their assignment to real property interests. See, *Personal Property Security Act*, S.S. 1993, c. P-6.2, ss. 4(f), 81.

11. This is the Ontario position. The *Personal Property Security Act*, R.S.O. 1990, c. P10, governs assignments of payments arising out of interests in land so long as there is no assignment of the associated real property interest but the Act permits the registration of a notice of the security interest in the payment in the proper land registry office. The significance of that registration is 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.

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.

It is our conclusion that the balance of convenience lies with assimilating assignments of rental payments to 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.

This was the solution tentatively adopted in our Consultation Paper and it was almost unanimously endorsed by our respondents.

The Commission recommends:

5. *Transfers of rental payments should continue to be excluded from the PPSA.*
6. *The Property Law Act should be amended:*
 - (a) *to confirm that an assignment of rents may be registered in a Land Title Office as if the interest that arises pursuant to the assignment is an interest in land, and*
 - (b) *to provide that where a competition arises among successive holders of rights in rents, the priority of an interest that arises pursuant to an assignment of rents must be determined as if the interest is an interest in land.*

C. Other Land-related Payments

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 origins are 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 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 emerging 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.

An alternative vehicle (to a mortgage) for creating a 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.¹² 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.

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,¹³ tend to single out rental payments for 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 assignments of these payments are to be treated as if they are real property and competing interests in them regulated by our land title legislation.

The Commission recommends:

7. *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) *payments secured by a mortgage of land.*
8. *The amendments to the Property Law Act described in recommendations 5 and 6 should also apply to an interest that arises under an assignment of a payment referred to in recommendation 7.*

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

13. The Ontario scheme described at n. 11 *supra* governs the right to payment under a “mortgage, charge or lease.”

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:¹

“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,² including the creation of a security interest, is usually carried out through a physical transfer of the document itself, with such endorsement as the form of the document may require.³

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. 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

1. S. 1.

2. See s. 24(1).

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.

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 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”⁴ which will provide for a security interest in the mortgage portfolio, the issue of debentures representing units of the borrower's debt obligation,⁵ 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 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.⁶

The emphasized portions of the definitions of security and instrument seem to have been drafted with this kind of transaction in mind and they serve it reasonably well. Their application to certain other kinds of transaction, however, creates a number of difficulties.

C. Securities and Instruments Covering Payments Linked to an Interest in Land

The difficulty arising out of the current definition of “instrument” and “security” centres on the situation where the same money obligation is covered by a negotiable document (either an instrument or security) and also arises out of, or is secured by, a mortgage. The following are examples of these kinds of situations:

Example 1

A lends \$10,000 to **B**. The loan is evidenced by an instrument (a negotiable promissory note payable on demand). Some time later **A** feels insecure and demands additional security. **B** gives a mortgage of Blackacre as this additional security.

Example 2

A loans **B** the money which enables **B** to purchase Blackacre. The loan is secured by a mortgage of Blackacre which provides for repayment in monthly instalments. After **B**'s pattern of payments proves to be irregular, **A** demands and receives a series of instruments (cheques) covering **B**'s instalments for two years.

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.

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.

These examples raise a similar problem in that **A** might choose to deal with the instruments separately from the related real property interest in further transactions.

A might, for example, create one or more security interests in the instruments involved in the examples. **A** might also create one or more security interests in the mortgages. **A** might also purport to assign the actual rights to the payments separately from the instruments or the mortgages.

The way in which the PPSA, in its current form, applies to these examples is not totally clear. What is the combined effect of the definitions of “instrument” and “security,” section 4(g) and section 2(2)?

- Is “similar document” in the closing flush of the definition of “instrument” to be read *eiusdem generis* with “bond and debenture”; and are those terms (undefined in the PPSA) to be read broadly or narrowly?
- If the documents in the examples are excluded from the definition of “instrument” does it necessarily follow that they are excluded from the PPSA? Section 4(g) provides:

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 rental payments payable under a lease of land,⁷

Section 4(g) should not exclude the note in example 1 because the debt did not “arise in connection with an interest in land.” But if the promissory note does not satisfy the definition of “instrument,” what is it? It does not automatically cease to be personal property. It might as easily be characterized as 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. This characterization would have undesirable priority consequences.

- Section 4(g) excludes from the PPSA “the creation or transfer of a right to payment that arises...” Does this necessarily exclude an *instrument* that embodies such a right to payment (as distinct from the payment itself)? The PPSA treats instruments as a distinct species of collateral.
- Even if section 4(g) excludes from the PPSA the documents in example 2 are they brought back into the PPSA by section 2(2)? It 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 exception respecting documents registered (or pending) at the LTO is not likely to be relevant to the cheques of example 2. But section 2(2) only applies if the document is an “instrument” or “security” and the documents in example 2 may not meet that requirement as the definitions are currently framed.

The proposals set out in the Consultation Paper attempted to clarify the situation in two ways. First, a proposal was made (now carried forward as recommendations 5 to 8) that the law be clarified to ensure that streams of payments such as those in examples 2 are treated in a fashion analogous to interests in

7. Our recommendation 7 would add to s. 4(g) payments secured by a mortgage and payments arising under an agreement for sale as further exclusions.

land so as to allow these assignments to be registered under the *Land Title Act* and allow the priorities of that system to govern.

The Consultation Paper also proposed amendments to the definitions of “instrument” and “security” to ensure that a writing that would otherwise be an instrument or security is not excluded from the definition by reason only that the underlying obligation is also secured by a mortgage. This was to ensure that for PPSA purposes documents like those in the examples attract the priority rules appropriate to “instruments” and not some other kind of collateral. It would also ensure that section 2(2) applies to bring into the PPSA (absent any LTO registration) documents like those in examples 2 that are arguably excluded by section 4(g).

Thus, the proposals were intended to clarify priorities where the competing parties are claiming as collateral either the instrument/security manifestation of the obligation or its real property aspect. What the Consultation Paper did not purport to do, at least consciously, is set out any kind of meta-rule that would dictate the priority outcome where a secured party whose interests are grounded in the instrument/security aspect of the obligation is in competition with one whose rights are grounded in the real property aspect (including an assignment of the right to payment itself made independently of the instrument/security or the mortgage). A further example may help.

Example 3

A has loaned \$10,000 to **B**. The loan is documented by an instrument and a mortgage of Blackacre. **A** then borrows money from **C**, **D**, **E** and **F**.

C takes a security interest in “instruments”

D takes a security interest in “instruments”

E takes a security interest in the Mortgage of Blackacre

F takes a security interest in the Mortgage of Blackacre

A defaults on all of these loans. Who of **C**, **D**, **E**, or **F** has priority to the \$10,000 owed by **B** to **A**?

In example 3, the PPSA (amended as proposed in the Consultation Paper) should tell us who as between **C** and **D** has priority to the instrument that covers the obligation. The rules of the land title system should tell us who, as between **E** and **F**, has priority to the mortgage. Let us assume the winners of these priority battles are **C** and **E** respectively. How is a priority battle between **C** and **E** to be resolved?

There seems to be no fixed rule to tell us who, as between **C** and **E**, has priority to the underlying obligation. It is likely that the priority battle between **C** and **E** must be decided on the particular facts of the case. The following factors might be relevant:

- Are all the necessary elements present to constitute **C** to be a holder in due course?
- Which was created first - the instrument or the mortgage? Were they created contemporaneously?
- Was there any notation on the face of the mortgage or the instrument indicating the existence of the other document?
- In what order were the respective interests of **C** and **E** created?

On particular facts, a court might hold that **C** has priority, on other facts that **E** has priority. On still other facts a court might hold that **B** must pay \$10,000 to each of **C** and **E** (perhaps with a claim over against **A**).

Some responses to the Consultation Paper raised a concern that the combined effect of these proposals would be to dictate an outcome favourable to the secured party who claims instruments or securities as collateral (C in example 3). It is not clear whether this concern is based on a belief that the proposals create a new meta-rule that favours C or destroy an existing meta-rule that favours E.

We do not believe the concern is justified. The proposals concerning the definition of “instrument” and “security” generally track the drafting of all the latest versions of the PPSA. This issue does not appear to have surfaced anywhere else. Nor do we believe that any attempt should be made in legislation to stipulate a meta-rule that will dictate an outcome to priority contests of this kind. They simply do not lend themselves to an *à priori* solution.

D. Conclusion

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. 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.⁸ A document excluded from the definition on that basis will normally be registrable in the land title system.

The Commission recommends:

9. *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 [record] 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 [record].”⁹

as things excluded from the definitions.

8. *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.

9. The current definition of “security” uses the word “record” in preference to “document” to designate a writing that may or may not be within the definition. This may have been done to take advantage of the extended definition of “record” set out in the *Interpretation Act*, R.S.B.C. 1979, c. 206, s. 29, although it is the only provision of the PPSA that does so. The drafter may wish to consider questions of consistent terminology when the definition of “security” is revised.

A. Summary of Recommendations

The specific recommendations set out in this Report are as follows:

1. *Section 36 of the PPSA be amended by adding a new subsection that provides that a security interest (other than a purchase money security interest) in a building component is subordinate to the interest of a person who has an interest in the land at the time the building component becomes a fixture and who is not by conduct or agreement precluded from asserting priority.*
2. *The PPSA should provide a definition of “building component” similar to the following:*

“building component” means goods that are an integral part of a building and that serve or enhance the building but does not include anything that is building materials,
3. *The PPSA should set out a schedule containing examples of goods that are “building components” 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.*
4. *The amendment contemplated by recommendation 1 should not apply to a security interest in goods that became fixtures before the amendments came into force.*
5. *Transfers of rental payments should continue to be excluded from the PPSA.*
6. *The Property Law Act should be amended:*
 - (a) *to confirm that an assignment of rents may be registered in a Land Title Office as if the interest that arises pursuant to the assignment is an interest in land, and*
 - (b) *to provide that where a competition arises among successive holders of rights in rents, the priority of an interest that arises pursuant to an assignment of rents must be determined as if the interest is an interest in land.*
7. *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) *payments secured by a mortgage of land.*
8. *The amendments to the Property Law Act described in recommendations 5 and 6 should also apply to an interest that arises under an assignment of a payment referred to in recommendation 7.*
9. *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 [record] 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 [record].”

as things excluded from the definitions.

B. Draft Legislation

Set out below is draft legislation, in the form of two draft Acts, that embody the recommendations we have made in this Report. They illustrate the form legislative expression might take and provide a vehicle to address certain matters of detail that are not fully explored in the text. The draft legislation also contains some provisions to meet certain concerns raised by our respondents arising out of our *Interim Report on Fixtures*. We believe their inclusion in the draft legislation is non-contentious.

Most provisions of the draft legislation are followed by commentary relating them to specific recommendations or concerns.

PERSONAL PROPERTY SECURITY ACT AMENDMENT ACT, 1995

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

1. Section 1 of the *Personal Property Security Act*, S.B.C. 1989, c. 36, is amended in subsection (1)

(a) by adding the following definition:

“building component” means goods that are an integral part of a building and that serve or enhance the building but does not include anything that is building materials,

[Commentary: This definition implements recommendation no. 1. Along with draft ss. 1(6) to 1(8) and the schedule it provides the definitional framework for the use of this expression in the new s. 36(5A)]

(b) by deleting the definition of “building materials” and substituting:

“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,
- (b) would result in the weakening of the structure of the building or the exposure of the building to weather damage or deterioration, or
- (c) would leave the removed materials or goods in a state where they cannot practically be used for their original purpose elsewhere,

but does not include anything that is a building component or machinery installed in a building or on land for use in carrying on an activity inside the building or on the land,

[Commentary: This definition differs from the current one in two ways. The closing flush is revised to exclude “building components” rather than (as the current definition does) referring to certain items that constitute building components. Paragraph (c) is new and has been added at the suggestion of bar groups.]

(c) by deleting the definition of “fixture” and substituting:

“fixture” does not include

- (a) building materials or,
- (b) a building, other than parts and components of it that are not building materials;

[Commentary: Paragraph (b) is new and responds to concerns expressed that “fixture” should not extend to the building itself.]

(d) in the definition of “instrument” by deleting paragraph (e) and substituting:

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(e) 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;

[Commentary: This implements recommendation no. 9]

(e) in the definition of “security” by deleting all the words from “but does not include” to the end of the definition and substituting “but does not include 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;”

[Commentary: This implements recommendation no. 9]

2. Section 1 is amended by adding the following subsections:

(6) The Schedule sets out examples of goods that are “building components” and may be consulted for the purpose of interpreting the definition of that term.

(7) The Lieutenant Governor in Council may, by regulation, amend the Schedule by adding further examples.

(8) Nothing in subsection (6) or the Schedule alters the legal character of property that would, apart from those provisions, be characterized as personal property.

[Commentary: This implements recommendation no. 3. See comment to definition of “building components.”]

3. Section 4 [“this Act does not apply to”] is amended by deleting paragraph (g) and substituting:

(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;

[Commentary: This implements recommendations no. 5 and 7.]

4. Section 4 [“this Act does not apply to”] is amended by adding the following paragraph:

(g1) The creation or transfer of an interest in fixtures or crops consequent on the creation or transfer of a larger interest in the land to which the fixtures or crops are attached, whether or not the words creating or transferring the interest expressly refer to fixtures or crops;

[Commentary: This addresses a concern raised by the bar arising out of the interim Report on fixtures. The concern is that the repeal of the definitions relating to fixtures in the regulations would revive the possibility that a conveyance of land that transfers an interest in fixtures by operation of law, or which contains pro forma language that mentions fixtures, would be caught by the PPSA.]

5. Section 36 is amended by adding, immediately after subsection (5), the following subsections:

(5A) A security interest in a building component is subordinate to the interest of a person who has an interest in the land at the time the building component becomes a fixture and who

- (a) has not consented to the security interest,

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- (b) has not disclaimed an interest in the building component,
- (c) has not entered into an agreement under which a person is entitled to remove the building component, or
- (d) is not otherwise precluded from preventing the debtor from removing the building component,

but the priority of a purchase money security interest in a building component shall be determined without reference to this subsection.

[Commentary: This provision implements recommendation no. 3. It sets out the special priority rule for non-PPSA security interests in “building components”]

(5B) Subsection (5A) does not apply to a security interest in a building component that became a fixture before [Date subsection (5A) comes into force].

[Commentary: This provision implements recommendation no. 4. It provides an appropriate transition rule for the application of subsection (5A)]

6. Section 36 is amended in subsection (6) by deleting “subsection (3) or (5)” and substituting “subsection (3), (5) or (5A)”.

[Commentary: This is a consequential amendment.]

7. The following is added as a Schedule to the Act

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 such as an elevator or escalator installed for the purpose of lifting passengers or freight,
- a system for security, fire detection or central vacuuming,
- a communication linkage such as a wire, cable, fibre optic linkage, or waveguide.

[Commentary: The schedule implements recommendation no. 3. See comment to definition of “building components.”]

PROPERTY LAW ACT AMENDMENT ACT, 1995

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

1. The *Property Law Act*, R.S.B.C. 1979, c. 340, is amended by adding the following as section X:

X (1) In this section:

- (a) “assignee ” includes a secured party;

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- (b) “assignment ” includes a security agreement;
- (c) “obligor” means a person obligated to pay a land-related account;
- (d) “land-related account” means an amount or amounts payable or to be paid under
 - (i) a lease of land,
 - (ii) a mortgage of land, or
 - (iii) an “agreement for sale” as defined in section 16.1 of the *Law and Equity Act*.

(2) An assignment of a land-related account may be registered in a Land Title Office as if the interest that arises pursuant to the assignment is an interest in land.

(3) Where a competition arises among successive holders of rights in a land-related account, the priority of an interest that arises pursuant to an assignment of the account must be determined as if the interest is an interest in land.

(4) An assignment of a land-related account that was registered before this section comes into force is deemed to have been registered pursuant to subsection (2).

(5) After an assignment of a land-related account is made, an obligor may pay the account to the assignor:

- (a) before the obligor receives a notice in writing that:
 - (i) states that the account payable or to become payable by the obligor is to be made to an identified assignee of the account; and
 - (ii) describes the lease, mortgage or agreement for sale with sufficient particularity to identify the account; or

(b) after the obligor 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.

(6) Payment of a land-related account by an obligor to an assignee in accordance with a notice described in subsection (5)(a) discharges the obligation of the obligor to the extent of the payment.

[Commentary: This implements recommendations no. 6 and 8.]

C. Acknowledgements

We would like to acknowledge the valuable contribution of Professor Bruce MacDougall who assisted us as a consultant on this project in its earlier stages. We stress, however, that the conclusions and recommendations set out are the Commission's own and are not necessarily shared by Professor MacDougall.

We would also like to record our indebtedness to the many individuals and groups who considered the Consultation Paper and took the time to make formal submissions and meet with us to discuss directions for revising the law. Our work owes much to the thoughtful advice, comments and constructive criticism we received through this process.

APPENDIX A

THE PERSONAL PROPERTY SECURITY ACT

S.B.C. 1989, c. 36

SELECTED PROVISIONS

[This Appendix is intended to reproduce only the provisions of the *Personal Property Security Act* that are directly relevant to this Report.]

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;

“debtor” means

- (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;

“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,

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- (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

- (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:

...

- (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;

19. A security interest is perfected when

- (a) it has attached, and
- (b) all steps required for perfection under this Act have been completed regardless of the order of occurrence.

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

...

- (c) an instrument,
- (d) a security,

...

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

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.

(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

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(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:

- (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.

49. (1) In this section

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“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,

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,

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(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.

(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.