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Backgrounder

LRC 103—Report on Floating Charges on Land

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A floating charge on land is a particular kind of mortgage, which, unlike traditional or “fixed” mortgages, does not bind specific property so long as the borrower remains financially healthy. Instead, the floating charge only becomes fixed on particular assets when a specified event occurs (usually this event is associated with the borrower’s financial stability). This process is referred to as *crystallization*. Floating charges are rather unusual, but they are still used in some commercial financing arrangements.

At the time this report was written, the future use of floating charges over land appeared to be at risk from the advent of the *Personal Property Security Act*, because that Act contained changes to the procedure for the registration of these charges. Previously, a floating charge, whether covering land or personal property, was registered at the Office of the Registrar of Companies in the register of corporate mortgages. It was this registration that gave the holder of the charge priority over the trustee in bankruptcy. After the *Personal Property Act* came into force, the register of corporate mortgages was abolished. Floating charges relating to personal property will be registrable under the new Act, but not those relating to land. The aim of the report is therefore to look at ways to ensure that appropriate machinery is in place for the registration of floating charges covering land and also to use the opportunity to consider the scope for reform generally.

The report concludes that there is still a need for a security device like a floating charge and it considers briefly some of the reform options. The conclusion reached is that for the time being any reform should be confined to the conventional floating charge.

An overview of the current law is provided, followed by a discussion of some of the current and future difficulties of floating charges. The main problems stem firstly from issues over registration at the Land Title Office and the Registrar of Companies and secondly with concerns over the uncertainty that a floating charge have over a fixed charge.

The report proposes a new scheme for floating charges based in two stages: before crystallization and after crystallization. Prior to crystallization the report recommends that floating charges should not be capable of registration in a Land Title Office but should be capa-

ble of registration in the Personal Property Registry, which will be created under the new *Personal Property Security Act*. After crystallization of the charge, it is recommended that the holder should be able to register a notice of the crystallized charge at a Land Titles Office in order to protect their position. It is also recommended that priority between two floating charges is determined from the dates they were registered in the Personal Property Registry. The final chapter contains draft legislation.

Further Developments

See *Land Title Act*, R.S.B.C. 1996, c. 250, s. 203.