

## RECENT PPSA REFORM INITIATIVES IN CANADA

By

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*The Canadian Conference on Personal Property Security Law has recently released a report making 21 recommendations for amending the provincial Personal Property Security Acts. This article discusses five of the recommendations, selected for their likely interest to an Australian readership: (1) refinancing purchase money security interests; (2) the time for determining priorities; (3) licences as collateral; (4) payment of debts and transfers of negotiable property; and (5) mandatory serial number registration. The CCPPSL Report's discussion of these and other issues should be of interest to Australian lawmakers as they work towards implementation of the recommendations contained in the Whittaker Report.*

### 1. Introduction

Australia's Personal Property Securities Act<sup>1</sup> ("PPSA") has been in force for just over five years, but already there is a major law reform project under way. The project stems from the statutory review which was provided for in s.343 of the Act (the "Whittaker Report").<sup>2</sup> The Whittaker Report is 530 pages long and it makes 349 recommendations for amending the statute and the register. The length of the report speaks to the shortcomings of the original statute and the problems the government had getting the legislation right the first time round. Two years have passed since the Whittaker Report was published and the government is yet to release proposed amendments. These delays indicate how hard it is to enact PPS laws in the first place and also to achieve timely personal property security law reforms.

The position is no better in Canada. There has been no meaningful PPSL reform in any of the provinces for the past 10 years. There is a law reform body called the Uniform Law Conference

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<sup>1</sup> Personal Property Securities Act 2009 (Cth).

<sup>2</sup> Bruce Whittaker, *Review of the Personal Property Securities Act 2009: Final Report* (Commonwealth of Australia, 2015), available at [www.ag.gov.au](http://www.ag.gov.au).

of Canada (“ULCC”), which has federal and provincial government representation. The ULCC’s agenda used to include the PPSAs, but for various reasons, the PPSAs have dropped off the radar. There is also a body known as the Canadian Conference on Personal Property Security Law (“CCPPSL”). The CCPPSL’s membership includes all the provincial and territory registrars or their representatives and a group of 6 academics who work in the PPSA field. PPS law reform used to be a substantial item on the CCPPSL agenda, but in recent years, meetings have been largely taken up with registration issues.

There was something of a sea-change two years ago, when the CCPPSL meeting voted to set up a Working Group to suggest PPSA amendments and improvements. The Working Group comprises the 6 academic members of the CCPPSL and a British Columbia government representative. The group held regular tele-conferences over the following twelve months and drafted a report which was presented to the CCPPSL at its 2017 meeting.<sup>3</sup> The report makes 22 proposals for reform, all of which the CCPPSL ratified. The next steps will involve passing the report on to governments and lobbying for its implementation. In the meantime, the Alberta Law Reform Institute (ALRI) has recently been given a reference on PPS law reform and work on that project is expected to start shortly. The CCPPSL Report will presumably be central to the ALRI project.

On the other side of the country, the Ontario government made a renewed commitment two years ago to business law reform in general and personal property security law reform in particular.<sup>4</sup> Last year the government established a Business Law Advisory Council to review the province’s corporate and commercial laws and to provide advice on reform priorities. The Council released its first report in the Fall of last year and it makes a number of recommendations for PPS law

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<sup>3</sup> *Report to the Canadian Conference on Personal Property Security Law on Proposals for Changes to the Personal Property Security Acts* (prepared by a Working Group of the Canadian Conference on Personal Property Security Law for Presentation at the CCPPSL Annual Meeting in Edmonton, Alberta, 21-23 June 2017), available at <https://drive.google.com/file/d/0B8ORoQ6WDuOFVHNfRmxCX19nWVWk/view?usp=sharing>. The Working Group comprised: Professor Ron Cuming (University of Saskatchewan (convenor)); Professor Clayton Bangsund (University of Saskatchewan); Professor Tamara Buckwold (University of Alberta); Cynthia Callahan-Maureen (Government of British Columbia); Professor Anthony Duggan (editor); Professor; Catherine Walsh (McGill University); and Professor Rod Wood (University of Alberta).

<sup>4</sup> See *Ontario Business Law Agenda Priority Findings and Recommendations Report* (June, 2015) available at [www.ontariocanada.com/registry/view.do](http://www.ontariocanada.com/registry/view.do). A list of the Report’s PPSA-related recommendations appears in Appendix B.1 of this paper.

reform.<sup>5</sup> In its future work, the Council can be expected to give the CCPPSL Working Group's report close consideration.

So, in summary, PPS law reform in Australia and Canada is alive and well, even though it may be a little sluggish. In the balance of this paper, I will discuss the following five items in the CCPPSL Report: (1) refinancing purchase-money security interests (pmsis); (2) the time for determining priorities; (3) licences as collateral; (4) payment of debts and transfers of negotiable property; and (5) mandatory serial-number registration. These are the items on the current Canadian reform agenda which I think are most likely to interest an Australian audience.<sup>6</sup>

## **2. Selected Canadian PPSA reform proposals**

### **(a) Refinancing pmsis**

The CCPPSL Report makes a number of recommendations relating to the definition of “purchase-money security interest”, aimed at clarifying the following points: (1) whether a security interest retains its pmsi status if it secures not only a pmsi obligation, but a non-pmsi obligation as well (the “cross collateralization” issue); (2) whether a secured party which refinances a pmsi obligation itself acquires a pmsi (the “pmsi refinancing” issue); and (3) how repayments are to be allocated where the debtor has outstanding obligations to the secured party on several accounts (the “allocation of payments” issue). These measures, which all derive from Revised Article 9,<sup>7</sup> have already been adopted in Australia (PPSA, s.14(3)-(5)), but the Canadian proposals are different in a number of respects. For one thing, the Revised Article 9-Australian allocation of payments provision only applies where at least one of the obligations is a pmsi. By contrast, the proposed Canadian provision is not tied to the pmsi context. Instead, it applies to all cases where the debtor (grantor) owes more than one obligation to the same secured party, whether or not any of the obligations is a purchase-money obligation. For another thing, the proposed Canadian

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<sup>5</sup> Business Law Advisory Council, *Report to the Minister of Government and Consumer Services* (Draft version released Fall, 2016; final version released 3 February 2017), available at [www.ontariocanada.com/registry/view.do](http://www.ontariocanada.com/registry/view.do). A list of the Report's PPSA-related recommendations appears in Appendix B.2 of this paper.

<sup>6</sup> A complete list of the CCPPSL's proposals appears in Appendix A of this paper.

<sup>7</sup> United States Uniform Commercial Code, s.9-103(e) and (f).

approach to the pmsi refinancing issue is better thought out than the Revised Article 9-Australian PPSA provisions.

Consider the following example:

**Example 1.** On Date 1, SP1 takes a security interest in all Debtor's present and after-acquired property and registers a financing statement. On Date 2, SP2 supplies Debtor with a printing press on retention of title terms and registers a financing statement. On Date 3, SP3 makes Debtor a loan to pay out SP2 and takes a security interest in the printing press. On Date 4, Debtor defaults, and SP1 and SP3 both claim the printing press. Who has priority?

The answer depends on whether SP3's security interest is a pmsi and, if so, whether, the special priority rules for pmsis apply.<sup>8</sup>

As a matter of policy, there is a strong case for giving SP3 pmsi-status and priority over SP1. For one thing, taking this step encourages refinancings and potentially reduces the cost of credit to the refinancing debtor. For another thing, in a case like Example 1, giving SP3 priority over SP1 does not prejudice SP1 because, before Date 3, SP1 was subordinate to SP2 anyway. In other words, SP3's appearance on the scene does not change the priorities; it simply changes the identity of the party to which SP1 is subordinate.

But this justification only applies if SP2 had priority over SP1 before Date 3. Assume for example, that SP2's security interest is not a pmsi, or that SP2 failed to perfect its security

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<sup>8</sup> See, e.g., Personal Property Security Act 1993, S.S. 1993, c.P-6.2 "(Saskatchewan PPSA)", s.2(1)(jj), "purchase money security interest" and s.34 (priority rules for purchase money security interests). In summary, the statute defines "purchase money security interest" in part to mean " 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". Section 34(3) provides that a purchase money security interest in inventory has priority over a prior non-purchase money security interest in the same collateral provided that: (1) the purchase money security interest is perfected when the debtor obtains possession of the collateral; and (2) the pmsi holder gives notice of its pmsi to any prior registered secured party claiming a security interest in the same collateral. Section 34(2) provides that a purchase money security interest in collateral other than inventory (e.g., equipment) has priority over a prior non-purchase money security interest in the same collateral provided that the security interest is perfected no later than 15 days after the debtor obtains possession of the collateral.

interest. In these circumstances, it would be wrong in principle to give SP3 priority over SP1 because then SP3 would be in a better position, relative to SP1, than SP2 was and SP1 would be correspondingly prejudiced.<sup>9</sup>

In any event, it is unclear under the law, as it presently stands, whether SP3 can claim pmsi status. Saskatchewan PPSA, s.2(1)(jj) defines “purchase money security interest” to mean, in part, “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”. There is a similar, if not identical, provision in all the other PPSAs. Applying this wording to the facts of Example 1, SP3 does not have a pmsi because Debtor already owned the printing press, in substance, if not form, on Date 3 and so the value SP3 provided was not for the purpose of enabling Debtor to acquire rights in the press. Some Canadian courts have come up with creative interpretations of the pmsi definition in support of the conclusion that SP3 does, after all, have a pmsi, but the correctness of these cases has been questioned on conceptual grounds and also as a matter of statutory interpretation.<sup>10</sup>

Even if SP3 does have a pmsi, to qualify for super-priority, it must comply with the timely perfection requirements prescribed by the pmsi priority rules. Saskatchewan PPSA, s.34(2) provides, in effect, that where the collateral is equipment, the pmsi-holder must perfect its security interest within 15 days after the debtor obtains possession of the collateral. There is a similar provision in all the other PPSAs. In the typical case, the refinancing transaction will take place long after the expiration of this grace period and so the pmsi-holder will almost certainly be out of time when and if it perfects its security interest.

Some Canadian courts have got round this difficulty by reading the grace period as running, not from the date the debtor took actual possession of the collateral, but from the date the debtor

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<sup>9</sup> See *MacPhee Chevrolet Buick GMC Cadillac Ltd v. SWS Fuels Ltd* 2011 NSCA 35 (NSCA), where the court, motivated primarily by this concern, read the pmsi priority rules narrowly to deny a pmsi refinancier priority.

<sup>10</sup> See, e.g. *Unisource Canada Inc. v. Laurentian Bank of Canada* (2000) 47 OR (3d) 616 (ONCA), where on facts roughly comparable to Example 1, the Ontario Court of Appeal held that SP3’s security interest was a pmsi because: (1) before SP3’s intervention, title to the collateral was reserved in SP2; (2) following SP3’s intervention, title passed to Debtor subject to SP3’s security interest, thus enlarging Debtor’s rights in the collateral; and (3) therefore SP3 gave value for the purpose of enabling Debtor to acquire new rights. See also *Battlefords Credit Union Ltd v. Ilnicki* (1991) 82 DLR (4<sup>th</sup>) 69 (SKCA). For criticism of these cases, see Anthony Duggan, “Hard Cases, Equity and the PPSA” (2000) 34 *Canadian Business Law Journal* 129. See also *New Zealand Bloodstock Leasing Ltd v. Jenkins* [2007] NZHC 336 at [58].

came into possession in its capacity as debtor to SP3.<sup>11</sup> But other courts have refused to read the provision this way and so the position is unsettled.<sup>12</sup>

The Australian PPSA, following the Revised Article 9 lead, provides that a security interest does not lose its pmsi status only because the pmsi obligation is refinanced.<sup>13</sup> This seems to suggest that if a pmsi obligation is refinanced, the refinancing institution itself has a pmsi. But, even if that interpretation is correct, the refinancier still does not qualify for super-priority unless it complies with the timely perfection requirements in PPSA, s.62, and the statute does not address this issue.<sup>14</sup>

To cut a long story short, the CCPSL Working Group has developed a set of provisions aimed at meeting these difficulties. Specifically, the aim is to:

- make it clear that a pmsi refinancier itself has pmsi status;
- but that the pmsi refinancier has priority only if the original pmsi-holder had the same priority.

More generally, the aim is to facilitate the refinancing of pmsi obligations, but without prejudice to SP1. This aim is achieved by deeming that the discharge of the original pmsi obligation results in a statutory assignment of the pmsi security interest from the original secured party to the refinancing secured party. The refinancing secured party is a successor in interest to the pmsi of the original secured party. This does not create a new pmsi and so it does not in any way change the priorities as they stood before the refinancing occurred. The proposed new provisions, drafted by Professor Ron Cuming, are as follows:

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<sup>11</sup> See, e.g., *Farm Credit Corporation v. Gannon* [1993] 6 WWT736 (SKQB); *Unisource Canada Inc. v. Laurentian Bank of Canada* (2000) 47 OR (3d) 616 (Ontario CA).

<sup>12</sup> *MacPhee Chevrolet Buick GMC Cadillac Ltd v. SWS Fuels Ltd* 2011 NSCA 35 (NSCA).

<sup>13</sup> Australian PPSA, s.14(5).

<sup>14</sup> See Anthony Duggan and David Brown, *Australian Personal Property Securities Law* (2nd ed., LexisNexis Australia, Sydney, 2016), at para.8.31.

When refinancing [a pmsi] obligation . . . occurs pursuant to a refinancing agreement between the debtor and a secured party other than the secured party who provided the credit or value referred to [above], and

(a) the original registration relating to the purchase money security interest securing the obligation is amended to identify the secured party named in the refinancing agreement as a secured party; or

(b) before expiry or discharge of the original registration relating to the security interest a registration relating to the purchase money security interest is effected disclosing the secured party named in the refinancing agreement as the secured party, or the security interest is otherwise perfected;

the purchase money security interest is deemed for priority purposes to have been assigned to the secured party who provided value to the debtor pursuant to the refinancing agreement.

. . .

A purchase money security interest that is deemed to have been assigned [as provided above] has the same priority it had immediately prior to the deemed assignment with respect to a competing security interest but, where [paragraph (b) of the above provision] applies, is subordinate to advances made or contracted for by the holder of a perfected competing security interest after expiry or discharge of the original registration relating to the purchase money security interest and before written notice of the deemed assignment is given to the holder.

**(b) Time for determining priorities**

Consider the following example:

**Example 2.** On Date 1, SP1 takes a security interest in all Debtor’s present and after-acquired personal property and registers a financing statement. On Date 2, SP2 takes a security interest in Debtor’s farm equipment and registers a financing statement. Both

registrations contain a materially misleading error and so they are invalid.<sup>15</sup> On Date 3, Debtor defaults against SP1 and SP1 appoints a receiver. On Date 4, SP2 registers a new financing statement without the invalidating error. SP1 and SP2 both claim Debtor's equipment. Who has priority?

There is Canadian (and New Zealand) case law to the effect that the time for judging priorities in a case like Example 2 is the date either competing party took steps to enforce its security interest. In Example 2, this is Date 3, when SP1 appointed the receiver.<sup>16</sup> On Date 3, SP1 and SP2 were both unperfected and so the governing priority rule turns on the order their security interests attached.<sup>17</sup> On this basis, SP1 has priority over SP2 and SP2's Date 4 registration is ineffective. In Australia, the Whittaker Report has recommended enacting a provision to codify this approach, in other words freezing the priorities at the date of the first enforcement action.<sup>18</sup>

The main policy argument in support of this approach is that it protects SP1's reliance interest: SP1 may have spent considerable time and money on the receivership in the belief that it held a first-ranking security interest. SP1 may have held this belief because, for example, it was not aware that its registration was invalid, or because it knew that SP2's registration was invalid. In summary, SP1 may be prejudiced if, after having commenced enforcement action, SP2 can recapture priority with a late registration.

The opposing argument is that SP1 has only itself to blame for its predicament because SP1 could have protected itself by checking that its registration was valid before initiating the receivership. Giving SP1 priority in a case like Example 2 amounts to rewarding SP1 for its own carelessness. Moreover, taking this approach is arguably inconsistent with the thinking behind the PPSA's overall priorities scheme: "the priority of a security interest depends on the fact and time of attachment and perfection. Seizure of collateral or a corresponding enforcement step does not affect the debtor's interest in the property and is not a factor in the operation of any priority

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<sup>15</sup> See, e.g., Saskatchewan PPSA, s.43(6).

<sup>16</sup> *Sperry v. Canadian Imperial Bank of Commerce* (1985) 17 DLR (4<sup>th</sup>) 236 (ONCA); *John Deere Credit Inc. v. Standard Oilfield Services Inc.* (2000) 16 CBR (4<sup>th</sup>) 227 (ABQB); *Gibbston Downs Wines Limited and RDF Finance No.2 Limited v. Perpetual Trust Limited* [2012] NZHC 1022.

<sup>17</sup> See, e.g., Saskatchewan PPSA, s.35(1)(c).

<sup>18</sup> Whittaker Report, *supra* note 2 at para.7.7.1.



rule”.<sup>19</sup> Supporters of this opposing view argue that the proper date for determining the priorities is not the enforcement date (Date 3, in Example 2), but the date following realization of the collateral when the enforcing secured party is required to distribute the realization proceeds. The implication of this approach is that, in a case like Example 2, SP2’s Date 4 registration is valid and so SP2 has priority over SP1 because a perfected security interest has priority over an unperfected security interest in the same collateral.<sup>20</sup>

The CCPPSL Report discusses these competing views and their practical implications at some length. At the 2017 CCPPSL meeting, participants unanimously supported the second approach and so this is the recommendation that will go forward to governments. The proposed new provision reads as follows:

The priority status of a security interest in relation to another security interest in the same collateral as provided in this or any other Act is not affected by enforcement measures taken by the holder of the other security interest.

One advantage of this approach is that it avoids potentially difficult inquiries into what constitutes “enforcement” for the purposes of the first approach. The case law to date establishes that the appointment of a receiver is enforcement for this purpose, but the courts have not yet developed the law beyond this point. Adoption of the CCPPSL Report’s recommended approach would save the costs of litigating the issue.

### **(c) Using licences as collateral**

Consider the following example:

**Example 3:** Debtor runs a commercial fishing business and holds a fishing licence from the relevant government authority. SP (secured party) makes a loan to Debtor and takes a security interest in all Debtor’s present and after-acquired personal property. Debtor ends up in financial difficulty and SP appoints a receiver. The receiver is keen to sell Debtor’s

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<sup>19</sup> CCPPSL Report, *supra* note 3 at p.44.

<sup>20</sup> See, e.g., Saskatchewan PPSA, s.35(1)(b).

business on a going-concern basis because this will bring in a higher return than the piecemeal sale of Debtor's assets. But the business is worthless without the licence.

In a leading Canadian case, *Saulnier v. RBC*,<sup>21</sup> the court held that a fishing licence is a property right by analogy to a *profit a prendre*.<sup>22</sup> The problem with this approach is that many licences lack *profit a prendre* characteristics (for example taxi licences, and nursing home licences) and the same is true of licence-related entitlements, such as quotas. The same is also true of contractual licences, such as intellectual property licences. In summary, *Saulnier* created more uncertainty than it resolved: while it is now settled that a licence is property if it can be analogized to a *profit a prendre*, there is considerable doubt whether other statutory or contractual licences qualify. This uncertainty may inhibit the use of licences as collateral and, consequently it may affect the cost and availability of credit to firms in regulated industries and also to firms operating businesses under an intellectual property or other contractual licence.

In the wake of *Saulnier*, two provinces, Saskatchewan and British Columbia, enacted provisions to make it clear that a statutory licence may be used as collateral, subject to any restrictions in the statute (for example, that any transfer must have the licensing authority's approval) and that, similarly, a contractual licence may be used as collateral subject to any restrictions in the contract (for example, that any transfer requires the licensor's consent).<sup>23</sup> None of the other provinces has followed suit and the CCPSL Report recommends that they should do so. The proposed amendments read as follows:

2(1)(w) "intangible" means personal property that is not goods, chattel paper, a document of title, an instrument, money or an investment property, and includes a licence;

(z) "licence" means a right, whether or not exclusive, to:

(i) manufacture, produce, sell, transport, grow, harvest or otherwise deal with personal property;

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<sup>21</sup> [2008] 3 SCR 166.

<sup>22</sup> For a fuller account of the case and a critique, see Anthony Duggan, "In The Wake of the Bingo Queen: Are Licences Property?" (2009) 47 *Canadian Business Law Journal* 225. See also Duggan and Brown, *supra* note 14 at para.2.42 and 2.45-2.48.

<sup>23</sup> Saskatchewan PPSA, ss 2(w), "intangible", 2(z), "licence", 57(3), 59 (18); Personal Property Security Act RSBC 1996, c.359, ss i(1), "intangible", "licence", 58(2)(e), 59(18) and 61(4).

- (ii) provide services; or
- (iii) acquire personal property

that is transferrable by the licensee with or without restriction or the consent of the licensor, and for the purposes of this provision a licence that is transferrable includes a licence that is subject to cancellation and reissuance by the licensor to another party at the request of either the licensee or the secured party.

57(3) Where the collateral is a licence, the secured party may seize the collateral by giving notice to:

- (a) the debtor; and
- (b) the grantor or successor to the grantor of the licence.

59(18) Notwithstanding any other provision of this Part, where the collateral is a licence, the collateral may be disposed of only in accordance with the terms and conditions under which the licence was granted or which otherwise pertain to it.

61(8) Despite any other provision of this Part:

- (a) if the collateral is a licence, the licence may be retained, held or disposed of under this section only in accordance with
  - (i) the terms and conditions of the licence, and
  - (ii) the terms and conditions that, by law or contract, apply to the licence.

The Australian PPSA does make provision for the use of licences as collateral,<sup>24</sup> but the provisions are extraordinarily complex and they are hedged about with so many restrictions that their usefulness has to be questioned.<sup>25</sup> The underlying policy concerns are the same in Canada and Australia and Australia could learn from Canada in this context by substantially simplifying the

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<sup>24</sup> Australian PPSA, s.10. See also ss 112(3), 128(6).

<sup>25</sup> See Duggan and Brown, *supra* note 14 at para.2.44.

PPSA licence provisions along the lines of the CCPPSL proposed model. It is worth noting that the Whittaker Report was also critical of the Australian licence provisions.<sup>26</sup>

One noteworthy feature of the CCPPSL's proposed definition of "licence" is the closing statement that "a licence that is transferrable includes a licence that is subject to cancellation and reissuance by the licensor to another party at the request of either the licensee or the secured party." In Canada, it is quite common to find licensing regimes where the licence is expressed to be non-transferrable, but where the licensing authority will, on the application of the licence-holder, cancel the licence and issue a new licence to a third party nominated by the original licence-holder. This is a *de facto* form of transfer and the purpose of the wording quoted above is to avoid doubt as to whether licences of this type are personal property for the purposes of the statute.

#### **(d)Payment of debts and transfers of negotiable property**

The Canadian PPSAs include priority rules which apply where the collateral is money (currency), an instrument (cheques and the like) or a negotiable document of title. These are all forms of negotiable property and the aim is to ensure that security interests do not interfere with their free circulation. For example, Saskatchewan PPSA, s.31(1) provides that a holder of money has priority over a perfected security interest if the holder: (1) acquires the money without knowledge that it is subject to a security interest; or (2) is a holder for value, regardless of their state of knowledge. Section 31(4) provides that the purchaser of an instrument has priority over a perfected security interest if the purchaser: (1) gave value; (2) acquired the instrument without knowledge of the security interest; and (3) took possession of the instrument.<sup>27</sup> Section 31(5) provides that a holder to whom a negotiable document of title has been negotiated has priority over a perfected security interest if the holder: (1) gave value; and (2) acquired the document of title without knowledge of the security interest.<sup>28</sup> In addition, in all provinces except Ontario, there are special rules for debtor-initiated payments (funds transfers) where the payment is made by instrument or by a debit, a transfer order, or a written authorization or the like executed by the

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<sup>26</sup> See Whittaker Report, *supra* note 2 at para.4.4.6, recommending that the federal, state and territory governments reconsider the provisions allowing governments to remove licences from the scope of the Act.

<sup>27</sup> For the purposes of this provision, a purchaser who acquired the instrument in the ordinary course of the transferor's business has knowledge only if the purchaser acquired its interest with knowledge that the transaction violates the terms of the security agreement: Saskatchewan PPSA, s.31(6).

<sup>28</sup> The knowledge requirement here is the same as for instruments: PPSA, s.31(6).

debtor when the payment is made.<sup>29</sup> For example, s.31(2) of the Saskatchewan PPSA provides that a creditor who receives payment of a debt through a debtor-initiated payment has priority over a security interest in: (1) the funds paid; (2) the intangible (account) that was the source of the payment; and (3) any instrument used to effect the payment, whether or not the creditor had knowledge of the security interest at the time of the payment.

The CCPSL Report identifies three main concerns with these provisions. First, with the exception of Saskatchewan and Manitoba, the debtor-initiated payment provisions do not apply to payments made by electronic funds transfer.<sup>30</sup> Secondly, the debtor-initiated payment provisions apply only to payments made to a creditor in satisfaction of a debt and there is no specific rule for a transfer of funds to a person who is not a creditor. Third, apart from the debtor-initiated payment provision in s.31(2), the section only applies where the security interest is perfected. The applicable priority rule for unperfected security interests is in another part of the statute. In Saskatchewan, the governing provision is s.20(3), which provides in part that a security interest in a document of title, an instrument or money is subordinate to the interest of a transferee who: (1) is not a secured party; (2) gives value; and (3) acquires the interest without knowledge of the security interest. The separation of the rules for perfected and unperfected security interests is inconvenient for the reader. But, more importantly, it gives rise to presumably unintended anomalies. For example, a transferee who receives money as a gift takes free of a perfected security interest provided they had no knowledge of the security interest, but does not take free of an unperfected security interest. Likewise, if the collateral is money or an instrument and the security interest is perfected, the transferee will prevail only if they take possession, but possession is not a pre-requisite to defeating an unperfected security interest. In the same connection, if the collateral is a negotiable document of title, possession is not a requirement even if the security interest is perfected. As the Report indicates, “there is no good policy reason [for treating] negotiable documents of title differently [from] instruments”.<sup>31</sup>

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<sup>29</sup> Saskatchewan PPSA, s.31(3), “debtor-initiated payment”.

<sup>30</sup> See *CFI Trust (Trustee of) v. Royal Bank of Canada* [2013] BCSC 1715 (B.C. S.Ct.); cf *Flexi-coil Ltd v. Kindersley District Credit Union Ltd* [1004] 1 WWR 1 (Sask.CA).

<sup>31</sup> CCPSL Report, *supra* note 3 at p.56.

The Report recommends redrafting the relevant provisions to remove these inconsistencies. In particular, it recommends that the PPSAs in jurisdictions other than Saskatchewan and Manitoba should be amended to include rules governing electronic funds transfers and that the legislation in all provinces “should be amended to ensure that the rules that apply to transfer of funds are the same regardless of the mechanism used to effect the transfer, whether by money, electronic funds transfer or transfer under an instrument payable to the transferee”.<sup>32</sup> The proposed new provisions are as follows:

- (1) In this section, “transferee” does not include a person who acquires a security interest in the money, the account or the instrument.
- (2) A transferee of money takes free from a perfected or unperfected security interest in the money if the transferee took possession and
  - (a) acquired the money without knowledge that it was subject to the security interest; or
  - (b) gave value, whether or not the transferee acquired the money with knowledge that it was subject to the security interest.
- (3) Subject to subsection (5), a transferee of funds received by transfer from a deposit account takes free from a perfected or unperfected security interest in the account if the transferee
  - (a) acquired the funds without knowledge that the account was subject to the security interest; or
  - (b) gave value, whether or not the transferee acquired the funds with knowledge that the account was subject to the security interest.
- (4) A transferee of an instrument drawn by a debtor and payable to the transferee takes free of a perfected or unperfected security interest in the instrument and in the account on which the instrument is drawn if the transferee took possession of the instrument and

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<sup>32</sup> CCPPSL Report, p.57.

(a) acquired the instrument without knowledge of the security interest in the instrument or the account; or

(b) gave value, whether or not the transferee had knowledge of the security interest in the instrument or the account.

(5) A deposit-taking institution that receives payment of a debt by means of a transfer from or debit to a deposit account of the debtor held by the institution takes free of a security interest in the account only if the payment:

(a) is authorized by the debtor at or after the time the debt is payable by the debtor to the institution;

(b) is effected through the use of a post-dated cheque drawn by the debtor; or

(c) is made under a written authorization executed by the debtor as part of a loan under which the debtor became indebted to the deposit-taking institution, that

(i) sets out specified amounts to be debited to or transferred from the deposit account at specified times or intervals, or

(ii) authorizes debits to or transfers from the deposit account when the credit in the deposit account exceeds an amount specified in the written authorization,

and, in clauses (a) and (c), the authorization of payment is not made by the deposit-taking institution as agent of the debtor.

(6) Nothing in subsection (5) detracts from the rights of an account debtor provided in section 41.

(7) A purchaser of an instrument or a negotiable document of title has priority over a perfected or unperfected security interest in the instrument or document of title if the purchaser:

(a) gave value for the instrument or document of title;

(b) acquired the instrument or document of title without knowledge that it is subject to a security interest; and

(c) took possession of the instrument or document of title.

(8) For the purposes of subsection (7), a purchaser of an instrument or a negotiable document of title who acquired it pursuant to a transaction entered into in the ordinary course of the transferor's business has knowledge only if the purchaser acquired the interest with knowledge that the transaction violates the terms of the security agreement that creates or provides for the security interest.

The proposed new provisions differentiate between a "transferee" and a "purchaser". As the Report goes on to explain:

The rules in subsections (2), (3) and (4) apply, respectively, to a 'transferee' of value in the form of money, electronically transferred funds or a cheque payable to the recipient. These rules are designed to operate in favour of people who receive funds from a debtor by way of payment or gift, regardless of the mode of transfer. Subsection (1) makes it clear that the term 'transferee' has a narrower meaning than the word 'purchaser'. A person who acquires a security interest in money, an account or an instrument under a security agreement is not a 'transferee' for the purposes of these provisions. However, a secured party who receives payment towards the secured debt by any of those methods is a transferee with respect to the payment ...A person who receives money as a gift takes free of a security interest in the money if he or she takes without knowledge of the security interest. A person who gives value in exchange for money takes free of a security interest regardless of whether he or she knows of the security interest. That policy is extended to transfers effected by other means under subsections (3) and (4)...The proposed amendments revise the rules that apply to purchasers of instruments and negotiable documents of title, which currently appear in separate subsections and have slightly different requirements ...Proposed subsection (7) eliminates this inconsistency ...The proposed amendments ...would allow a transferee for value of money, an instrument [or] a negotiable document of title to take priority over a perfected or unperfected security interest ...only if the transferee takes possession...This is a minor change and reflects commercial practice. A transferee of negotiable and quasi-negotiable



property who relies on an expectation of clear title will take possession as a matter of course”.<sup>33</sup>

Australian PPSA, ss 69 (“Priority of creditor who receives payment of debt”), 70 (“Priority of person who acquires a negotiable instrument”) and 72 (“Priority of holder of negotiable document of title”) correspond with Saskatchewan PPSA, subsections 31(2), (4) and (5), respectively. The rule for money (“currency”) is located elsewhere, in s.48, which provides that a holder of currency takes free of a security interest provided the holder lacked actual or constructive notice of the security interest. In common with Saskatchewan PPSA, s.31(2), the debtor-initiated payment provision in Australian PPSA, s.69 extends to electronic funds transfers and so Australia is ahead of nearly all the Canadian provinces on this front. On the other hand, in common with the current Saskatchewan and Manitoba provisions, s.69 only applies if the payment is made to a creditor in satisfaction of a debt. By contrast, the proposed new provisions in the CCPPSL Report extend to any transfer of funds, whether or not the transferee is a creditor. In common with Saskatchewan PPSA, s.31(4) and (5), Australian PPSA, sss 70 and 72 apply only where the security interest is perfected. Where the security interest is unperfected, s.43 applies instead. This provides, in part, that a buyer of personal property for value takes free of an unperfected security interest.

The most obvious concern with the Australian provisions is that the rule applicable to currency is in a different part of the statute from the rules applicable to other methods of payment and, more importantly, the rule is different in substance from the other rules. In particular, for s.48 to apply, the holder must have no “actual or constructive knowledge of the security interest”, whereas in s.69, the reference is to “actual knowledge that the payment was made in breach of the security agreement”, while in s.70, the reference is to “actual or constructive knowledge of the security interest” except where the interest is acquired in the ordinary course of the acquirer’s business, in which case the applicable test is “actual or constructive knowledge that the acquisition constitutes a breach of the security agreement”. It is hard to see the justification for discriminating between payment methods in this way and in these respects, the Australian PPSA stands in stark contrast to the recommendations contained in the CCPPSL Report, the aim of

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<sup>33</sup> CCPPSL Report, *supra* note 3 at pp 61-62.

which is “to ensure that the rules that apply to transfers of funds are the same regardless of the mechanism used to effect the transfer”.<sup>34</sup>

Australian PPSA, s.48 (currency) applies whether the security interest is perfected or unperfected and whether or not the holder of the currency gave value. In contrast to the Canadian provisions, it turns on the state of the holder’s knowledge even if the holder gave value. By contrast, s.70 (negotiable instruments) applies only where the security interest is perfected and only where the acquirer gives value. Additionally, the terminology in the two sections is different: s.48 refers to “the holder” of currency, whereas s.70 refers to a “person who acquires an interest”. Section 71 (negotiable documents of title), by contrast, reverts to the term “holder”. “Holder” is not defined; it may include a secured party, but presumably only if the secured party takes possession of the currency. The reference in s.70 to “a person who acquires an interest” clearly includes a secured party, but a party (including a secured party) can rely on s.70 only if it takes possession of the instrument. Section 43 applies if the security interest is unperfected and it provides that a buyer takes free regardless of their state knowledge. As in Canada, the separate treatment of perfected and unperfected security interests gives rise to discrepancies: for example, the buyer of a negotiable instrument takes free of an unperfected security interest provided the buyer gave value, but a party who acquires an interest in a negotiable instrument does not take free of a perfected security interest unless the party, in addition to giving value, lacked knowledge of the security interest in the relevant sense and took possession of the instrument. There is no obvious reason for discriminating between perfected and unperfected security interests in this way. Section 43 is limited to buyers (and lessees) and it does not apply to a person who acquires an interest in, say, a negotiable instrument otherwise than as a buyer.<sup>35</sup> So, for example, s.43 does not apply if a person receives a cheque (negotiable instrument) as a gift and there is no other provision in the statute that would cover the case. The same would be true if the security interest is perfected, because while s.70 refers to “[any] person who acquires an interest” in a negotiable instrument, the provision only applies if the acquirer “gave value for the interest”. On the other

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<sup>34</sup> CCPSL Report, *supra* note 3 at p.57 For criticism of the Australian provisions, see Duggan and Brown, *supra* note 14 at para.10.73.

<sup>35</sup> If the interest acquired is a security interest, s55(2) or (3) will apply. Section 55(2) provides that priority between unperfected security interests is determined by the order of attachment; s.55(3) provides that a perfected security interest has priority over an unperfected security interest

hand, s.48 (currency) applies whether or not the holder gave value for the currency. There is no obvious policy reason for discriminating between cheques and money in this way.

In summary, the proposed provisions in the CCPPSL Report provide a sharp contrast to the Australian provisions. They enact a more or less common set of rules for all forms of payment; they apply to both perfected and unperfected security interests; they cover both transfers for value and gifts; they employ consistent terminology; and they draw all the provisions relating to payments together in the one place. In Australia, the Whittaker Report has recommended amending s.69 to align it more closely with s.48.<sup>36</sup> But the lesson to be drawn from the CCPPSL Report is that this exercise needs to be approached systematically, rather than as a piecemeal reform, and that the aim should be to enact a common and comprehensive set of rules covering all forms of negotiable property. The CCPPSL draft provisions may be of some assistance to the Australian law-makers in achieving this objective.

#### **(e)Mandatory serial-number registration**

All the Canadian PPSAs allow for register searches against the debtor's name and also, if the collateral is serial-numbered goods, against the serial number. To facilitate serial number searches, the legislation provides for inclusion of the serial number in the secured party's financing statement. If the collateral is consumer goods, inclusion of the serial number is mandatory and non-compliance invalidates the registration.<sup>37</sup> On the other hand, if the collateral is equipment or inventory, the secured party is not required to state the serial number. The reason is that a secured party will commonly take a security interest in not just the equipment or inventory the debtor presently owns, but all the debtor's present and after-acquired equipment or inventory and, for obvious reasons, the secured party cannot include in the financing statement the serial number of collateral the debtor does not yet own.<sup>38</sup> On the other hand, if the financing statement does not include the serial number, it will be impossible for searchers to successfully

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<sup>36</sup> Whittaker Report, *supra* note 2 at para.7.6.12.

<sup>37</sup> See, e.g., Saskatchewan PPSA, s.43(6).

<sup>38</sup> See Ronald CC Cuming, Catherine Walsh and Roderick J Wood, *Personal Property Security Law* 2<sup>nd</sup> ed, Irwin Law, Toronto, 2012) at pp 351-352.

search the register by serial number and so omission of the serial number compromises the search function. Saskatchewan PPSA, ss30(6) and 35(4) were enacted with the aim of resolving this policy tension. Section 30(6) provides as follows:<sup>39</sup>

Where goods are sold or leased, the buyer or lessee takes free from any security interest in the goods that is perfected ... if:

- (a) The buyer or lessee bought or leased the goods without knowledge of the security interest; and
- (b) The goods were not described by serial number in the registration relating to the security interest.

The provision only applies if the goods are serial numbered goods held by the debtor as equipment: s.30(7).

Section 35(4) provides:

A security interest in goods that are equipment and are of a kind prescribed as serial numbered goods is not registered or perfected by registration ... unless a financing statement relating to the security interest and containing a description of the goods by serial number is registered.

There are similar provisions in all the Canadian PPSAs except Ontario.<sup>40</sup> The purpose is to give the secured party an incentive to include the serial number in the financing statement if the information is available at the time of the registration and, in the case of after-acquired property, to add the serial number by amending the registration as and when the information becomes available. Failure to take these steps exposes the secured party to the risk of subordination to the interests of a buyer or lessee of the collateral or a competing security interest. The provisions are limited to equipment because inclusion of the serial number is mandatory if the collateral is consumer goods. If the collateral is inventory, a buyer or lessee will typically take free of the

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<sup>40</sup> In Ontario, s.28(5) provides that where a motor vehicle held as equipment is sold other than in the ordinary course of business of the seller, the buyer takes free from any security interest given by the seller even though it is perfected by registration unless the vehicle identification number of the motor vehicle is set out in the ...financing statement or unless the buyer knew that the sale constituted a breach of the security agreement.

security interest in any event and, besides, extending the provision to inventory would place greater demands on the secured party: it would have to continually amend the registration by adding and deleting serial numbers as and when inventory is bought and sold.<sup>41</sup>

These provisions, as currently drafted, expose the secured party to a greater risk if the collateral is consumer goods than if it is equipment. If the collateral is consumer goods and the secured party omits the serial number, the registration is invalid with the result that the secured party will lose not only to a subsequent buyer or lessee of the collateral and a perfected competing security interest, but also to an execution creditor and the debtor's trustee in bankruptcy. On the other hand, if the collateral is equipment, failure to include the serial number does not affect the secured party's rights against execution creditors or a trustee in bankruptcy.

The CCPPSL Report recommends eliminating this distinction by aligning the rules for consumer goods with those for equipment. The main argument in support of this change is that while the ability to search against serial number is important for buyers (lessees) and competing secured parties because it enables them to search for security interests given by parties other than the debtor (such as a prior owner), it does not matter so much for execution creditors and trustees because they are not "reliance creditors". In other words, "unlike buyers and secured creditors, they are not at risk of extending new value in reliance on a clean search result".<sup>42</sup> A second reason in support of the change is that, in principle, it is hard to see why the consequences of omitting the serial number should be more drastic simply because the debtor happens to be holding the goods for personal use rather than for business purposes. In this connection, it has to be remembered that the serial number requirement was designed for the protection of third parties, not the debtor.<sup>43</sup> A third consideration in support of the change is that it would reduce complexity and improve transparency.<sup>44</sup>

In Australia, PPSA, s.44(1) corresponds with Saskatchewan PPSA, s.30(6). It provides, in effect, that a buyer or lessee of serial-numbered collateral takes free of a security interest perfected by

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<sup>41</sup> Cuming, Walsh and Wood, *supra* note 38 at pp 433-434.

<sup>42</sup> CCPPSL Report, *supra* note 3 at p.134.

<sup>43</sup> CCPPSL Report at p.135.

<sup>44</sup> CCPPSL Report at p.135.

registration unless the financing statement correctly discloses the serial number.<sup>45</sup> There is no Australian counterpart to Saskatchewan PPSA, s.35(4). According to the regulations, serial numbered consumer property must be described by serial number in the financing statement, whereas for serial numbered commercial property, the serial number is optional.<sup>46</sup> Section 44(1) applies where the collateral is personal property which, according to the regulations, “may, or must, be described by serial number [in the financing statement]”. This wording suggests that the provision applies whether the collateral is commercial or consumer property. But if the collateral is consumer property and the secured party omits or misstates the serial number, the result will be to invalidate the financing statement.<sup>47</sup> If the financing statement is invalid, the security interest will be unperfected. In that case, s.43(1) applies and there is no need for the buyer or lessee to rely on s.44(1).<sup>48</sup>

This point suggests that the drafters may not have been clear about the policy behind s.44(1) and its Canadian equivalents. In any event, to avoid confusion, the provision should be amended so that it applies only where the collateral is commercial property (equipment). At the same time, the Australian lawmakers might like to consider adding a provision along the lines of Saskatchewan PPSA, s.35(4) and also adopting the limitations suggested in the CCPPSL Report. The first of these measures would increase the incentive for a secured party to include the serial number in its registration assuming the information is, or becomes, available. The second measure would have the effect of more carefully targeting the consequences of non-compliance to the underlying policy objective, while at the same time providing a measure of relief to secured parties from the operation of the section.

### **3. Conclusion**

We live in an increasingly PPSA-oriented world. Some critics have disparaged the global spread of the PPSA, calling it “viral law reform”.<sup>49</sup> Whether one agrees with that characterization or not,

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<sup>45</sup> The provision does not apply if: (1) the buyer or lessee is a dealer (“holds the personal property as inventory”); or (2) the buyer or lessee was a party to the security agreement:s.44(2).

<sup>46</sup> See Duggan and Brown, *supra* note 14 at paras 6.35-6.37.

<sup>47</sup> PPSA, ss 164 and 165.

<sup>48</sup> Section 43(1) provides that a buyer or lessee of personal property for value takes free of any unperfected security interest.

<sup>49</sup> The “viral law reform” comment was made at the 2008 meeting of the International Academy of Commercial and Consumer Law in Toronto (July, 2008).

viral law reform offers significant opportunities for the sharing of knowledge and experience between PPSA jurisdictions. Australia has traditionally looked more to England than to North America for its law-making initiatives, but the arrival of the PPSA has forced it to take a larger world view. There are signs that Canada, for its part, is also starting to broaden its horizons and is looking with interest at Australian statutory and case law developments and how the Whittaker Report proposals pan out. For example, as explained earlier, the pmsi proposals in the CCPPSL Report were inspired in part by provisions already in the Australian PPSA. In Australia, the courts have made it clear that they are prepared to take account of Canadian case law developments when interpreting the local statute.<sup>50</sup> In the same spirit, it is to be hoped that the Australian lawmakers will take account of the CCPPSL Report in the course of the current PPSA reform exercise.

## **Appendix A**

### **CCPPSL PPSA Reform Proposals**

#### Proposals Relevant to All or Most Jurisdictions Including Ontario

1. Security Interests in Electronic Chattel Paper
2. Purchase-Money Security Interests and Cross-Collateralization
3. Refinancing and Purchase-Money Security Interests
4. Allocation of Payments
5. Security Interests in Statutory and Contractual Licences
6. Time for Determining the Priority of a Security Interest
7. Notice of Enforcement
8. Payment of Debts and Transfers of Negotiable Property
9. Knowledge of Buyers and Lessees of Collateral

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<sup>50</sup> See, e.g., *Hamersley Iron Pty Ltd v. Forge Group Power Pty Ltd (in liq.)* [2017] WASC 152 at paras 75-89 and cases cited there; Anthony Duggan, "Set-Off and the PPSA: A Note on *Hamersley Iron Pty Ltd v. Forge Group Power Pty Ltd (in liq.)* (2017) 35 *Companies and Securities Law Journal* (forthcoming).

10. Account Debtors' Rights
11. Effect of Future Advances on Buyers and Lessees
12. Conflict of Laws
13. Low-value transactions

Provisions Relevant to All Jurisdictions Except Ontario

14. Mandatory Serial Number Registration
15. Dual Search Criteria
16. Discharge of Unauthorized Registrations
17. Effect of Discharge of Registrations
18. Attachment and After-Acquired Crops
19. Serial Number Description in the General Collateral Field

Proposals Relevant to Specific Jurisdictions

20. Time of Perfection and Bankruptcy
21. Priority to Accounts
22. Subordination

## **Appendix B**

### **1. Ontario Business Law Agenda Report: Summary of PPSA-related Recommendations**

#### *(a) Facilitating the use of cash collateral*

Facilitating the use of cash as effective and reliable collateral is important to the economy and is necessary to meet regulatory requirements that will soon be mandated in Ontario and elsewhere. In the United States, Revised Article 9 of the Uniform Commercial Code has achieved this objective by: (1) enabling security interests in deposit accounts to be perfected by “control”; and (2) providing that when so perfected, such security interests have clear and certain priority over



competing security interests. Quebec has recently enacted similar measures. There are no corresponding provisions in Ontario's PPSA. Security interests in deposit accounts and other forms of cash collateral may be perfected only by registration and there is no special priority provision for ensuring that such security interests have priority over competing claims.

The panel agreed that the PPSA should be amended to facilitate the use of cash collateral. The panel recognized that discussions among stakeholders, including pension experts, will assist in determining the best way to achieve this outcome.

*(b) Proclaiming into force the PPSA "location of debtor" provisions to more readily determine the debtor's location*

Lenders need clear rules to determine which jurisdiction's law applies to the security agreement. In 2006 Ontario passed – but has not yet proclaimed into force – new provisions in the PPSA that more clearly define the location of the debtor for the purpose of determining which jurisdiction's law applies to the security agreement. These provisions would locate a corporate debtor in the jurisdiction of its registered office. This is a simple "bright line test" that would provide greater certainty than the current law.

*(c) Repealing the PPSA provision making it mandatory to give copies of registrations to debtors and allow the debtor to waive the right to receive a copy of the registration*

Ontario is the only jurisdiction in Canada that requires debtors to receive copies of registrations; all other provinces allow debtors to waive this right. Mailing a copy of the registration to the debtor adds significant cost to business with approximately 1.8 million registrations completed in Ontario each year. The PPSA should allow parties to security agreements to waive receipt of a copy of the registration, as is the case in the eleven other PPSA statutes in Canada.

*(d) Including licences and quotas in the PPSA definition of "intangible"*

The current law is unclear on whether a licence is "personal property" within the meaning of the PPSA and, therefore, whether a licence can be used as collateral. The Supreme Court of Canada has held that a licence allowing the licence holder to acquire physical property (e.g., a fishing licence) can be used as collateral, but not all licences result in the acquisition of physical

property. For instance, service industries such as taxi cabs and nursing homes require licences to operate and serve clients, allowing licence holders to generate economic value (despite the fact that they do not result in the direct acquisition of property).

It is also unclear whether an intellectual property licence (e.g., a patent licence) or a quota (e.g., a milk production quota) can be regarded as personal property. Saskatchewan and British Columbia have amended the PPSA definition of “intangible” to include licences and quotas, subject to any restrictions on transfer contained in the statute, contract or other instrument by which the licence was created. There should be a similar provision in the Ontario PPSA. The issue is important because the licence may be the debtor’s most valuable asset and if it can be used as collateral, it may be cheaper and easier for debtors to obtain credit.

*(e) Facilitating the use of electronic chattel paper to raise funds*

Chattel paper financing is an important method of acquisition (purchase or lease) of large ticket consumer goods and equipment, in particular, motor vehicles. In the typical case, the dealer sells the goods to the customer on secured credit terms and transfers the contract (called “chattel paper”) to a third party financial institution which takes physical possession of the paper to prevent further dealings. The transfer of the chattel paper from the dealer to the end-user, and from the dealer to the financier are both treated as creating security interests for the purposes of the PPSA.

To facilitate chattel paper financing, the PPSA enacts a special priority rule aimed at protecting the dedicated chattel paper financier. The rule gives the chattel paper financier priority over certain prior perfected security interests, but the rule only applies if the financier takes possession of chattel paper. The possession requirement inhibits the development of electronic chattel paper and it means that chattel paper financiers must continue to rely on printed forms. The costs of generating, processing and storing printed forms are substantial and these costs end up being passed down to consumers and businesses.

Revised Article 9 contains provisions aimed at facilitating the use of electronic chattel paper by allowing for perfection by control of a security interest in chattel paper and providing that a security interest in electronic chattel paper perfected by control has priority over competing security interests. There should be similar provisions in the Ontario PPSA.

*(f) Validating security over vehicle collateral, in the PPSA and RSLA, where the vehicle identification number is set out in the registration despite a debtor name error*

Registration is the main method of perfecting (or making effective against third parties) a security interest for the purposes of the PPSA. Perfection is important because an unperfected security interest is ineffective against the debtor's trustee in bankruptcy and against a third party transferee of the collateral for value. Moreover, an unperfected security interest is also subordinate to a competing perfected security interest in the same collateral and to the interest of execution creditors.

Where the collateral is a motor vehicle held as consumer goods, the secured party must include in the financing statement the debtor's name (as a general rule matching the exact name and birth date on the debtor's birth certificate) and also the Vehicle Identification Number (VIN). For example, a lessor using "Joe Smith" instead of "Joe A. Smith" would lose the goods to a bankruptcy trustee or another third party. There have been several cases where the secured party has mistakenly put the wrong debtor's name in the financing statement, but correctly stated the VIN. The Ontario courts have held that in cases like this, the correctly stated VIN cures the debtor's name error with the result that the registration remains valid. Codification of this case law in the PPSA and RSLA would assist secured parties in high volume vehicle registrations to properly register their security. This approach would also be consistent with Ontario's Used Vehicle Information Package requirements.

## **2. Ontario Business Law Advisory Council Report, Fall 2016: List of PPSA-related Recommendations**

1. The PPSA should be amended to enable security interests in cash collateral to be perfected by "control".
2. The PPSA and Repair and Storage Liens Act should codify Ontario's case law to confirm as perfected security interests and liens over a motor vehicle that is accurately described in the financing statement or claim for lien by its vehicle identification number (VIN), despite an error in the debtor's name.

3. Sections 7.2(7), 7.3(6) and 7(2) of the PPSA should be amended to rectify a technical issue in the location of debtor transitional rules.
4. The PPSA and RSLA registry system should become entirely digital for both filing and searching and should include updates to enhance the efficiency and security of the system.

