

THE NEW PROVINCIAL CHATTEL SECURITY LAW REGIMES

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In 1967, Ontario adopted the Personal Property Security Act 1967, which was a Canadian adaptation of Article 9 of the American Uniform Commercial Code. Since then the four Western provinces have adopted similar legislation and more provinces are expected to follow suit in the foreseeable future. This article describes the history of the personal property security legislation in some detail as well as successive efforts by the Canadian Bar Association, the Uniform Law Conference of Canada and, more recently, the Western provinces to promote harmonization of legislation among the provinces; it assesses the operational impact of the legislation; and it discusses some key policy issues and problems that are common to all the Acts. The author concludes that the new legislation is now solidly entrenched in Canada. However, he regrets the fact that it has taken so long to reach this point and that many important differences remain between the Ontario Act and the legislation adopted in the Western provinces.

L'Ontario a adopté en 1967 la Personal Property Security Act 1967, adaptation canadienne de l'article 9 du Code commercial uniforme américain. Depuis cette date les quatre provinces de l'ouest ont adopté des lois semblables et d'autres provinces feront sans doute de même dans un avenir plus ou moins proche. Dans cet article l'auteur décrit de façon assez détaillée l'histoire de la législation, de même que les efforts répétés de l'Association du barreau canadien, de la Conférence sur l'uniformisation des lois au Canada et, plus récemment, des provinces de l'ouest pour promouvoir l'harmonisation du droit entre les diverses provinces; il évalue l'influence du fonctionnement de la législation et examine, en plus de quelques questions majeures en matière de principes, les problèmes communs à toutes les lois. Il en conclut que la nouvelle législation s'est maintenant solidement implantée au Canada mais il regrette qu'il ait pris si longtemps pour en arriver là et qu'il y ait encore de nombreuses différences importantes entre la loi ontarienne et la législation adoptée dans les provinces de l'ouest.

Introduction

In 1966 the author published an article in this Review¹ on the Draft Ontario Personal Property Security Act. Much has happened during the intervening twenty-five years. The draft Act was enacted by the Ontario legislature in 1967² and has since been replaced by a much revised Act.³ The four

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¹ J.S. Ziegel, The Draft Ontario Personal Property Security Act (1966), 44 Can. Bar Rev. 104.

² S.O. 1976, c. 73.

³ S.O. 1989, c. 16.

Western provinces⁴ and the Yukon Territory⁵ have also adopted personal property security legislation, not identical in form but based on the same concepts and organizational principles as the Ontario Act. There are strong indications that New Brunswick⁶ and the North West Territories⁷ will enact similar legislation in the reasonably near future. At one time or another Prince Edward Island, Nova Scotia and Newfoundland have also indicated interest in joining the new chattel security club. Quebec has debated since 1975 the feasibility of adopting a strongly modified version of Article 9 as part of the revision of the Civil Code, and such a version is expected to be adopted by the National Assembly over the coming year.⁸

There have also been persistent efforts to secure greater harmonization and uniformity among the enacting jurisdictions. A Model Uniform Personal Property Security Act (MUPPSA) was sponsored by the Canadian Bar Association in 1970 and was replaced by the Uniform Personal Property Security Act 1982 (UPPSA) in 1982. In 1988 the four Western provinces sponsored a Model Western Canada Personal Property Security Act (WCPPSA), and this has been gaining support outside the Western Provinces as well.⁹

The Canadian developments have encouraged comparable efforts overseas in other common law jurisdictions. In England the Crowther Committee recommended in 1971 a complete overhaul of English chattel security law along Article 9 lines.¹⁰ Its voice has recently been augmented by that of Professor Aubrey Diamond in a report commissioned by the Department of Trade and Industry.¹¹ Still more recently, the New Zealand Law Commission recommended the adoption of a New Zealand Personal Property Securities (*sic*) Act similar to the Act adopted by British Columbia

⁴ See S.A. 1988, c. P-4.05 as am.; S.B.C. 1989, c. 36, as am.; R.S.M. 1987, c. P35; S.S. 1979-80, c. P-6.1, as am. The history of these enactments is described in Part II of this article.

⁵ R.S.Y.T. c. P-3.2, as am.

⁶ See *infra*, Part II, C. *The Maritime Provinces*.

⁷ The Canadian Conference on Personal Property Security Law ("Canadian Conference" or CCPPSL) was so advised by the Yukon Territory's representative at the Conference's organizational meeting in Edmonton on June 3-4, 1991. On the organization and objects of the Conference, see *infra*, Part II.

⁸ See *infra*, Part II, D. *Quebec*.

⁹ The details of these efforts at harmonization of provincial legislation are also described in Part II.

¹⁰ Report of the Committee on Consumer Credit, Part IV (Cmd. 4596, 1971). See further R.M. Goode, *The Modernization of Personal Property Security Law* (1984), 100 *Law Q. Rev.* 234.

¹¹ Report on Reform of the Law Relating to Mortgages, Charges, and Other Interests over Property Other Than Land (DTI, London, January 1989).

in 1989.¹² Inspired by the same reform urge, the Commonwealth of Australia and the New South Wales and Victoria Law Reform Commissions agreed in 1990 to combine their resources with a view to producing a uniform act suitable for adoption in each of these jurisdictions.¹³

It will be seen then that there is much to discuss. This article, however, will focus on the Canadian developments.¹⁴ My goal is not to present an exhaustive picture but is more limited in scope. It is to enable the reader to gain some appreciation of what has been accomplished to date, to indicate the operating experience in those Provinces that have adopted the new legislation, and to describe the principal problems encountered along the way—those that have been resolved as well as those awaiting resolution, if indeed a completely satisfactory resolution is possible at all.

I. *How It All Began*

Modern economies use vast quantities of credit for governmental, business and consumer purposes.¹⁵ Leaving aside the special characteristics of governmental borrowing, the credit may be in the form of loans ("lender's credit") or it may be made available at the point of sale ("seller's credit"). It may be in a fixed amount or of a revolving character. It may be for a short period (sixty days or less) or for a medium or long term. Whatever the character of the credit, the creditor must always contemplate the possibility of the loan not being repaid. If the credit is in small amounts and the risk of loss easily diversifiable among thousands of accounts (as is true of large credit card issuers), the creditor may not be unduly perturbed. If the amount is substantial then the creditor has a strong incentive to at least consider the desirability of reducing any potential loss by requiring some form of security, from the debtor or from another party. The granting of security also confers other important benefits on the creditor.¹⁶

¹² See Law Commission, Report No. 8, A Personal Property Securities Act for New Zealand (April 1989). See also J.H. Farrar, New Zealand Considers A Personal Property Security Act (1990), 16 C.B.L.J. 328.

¹³ The writer and Professor R.C.C. Cuming of the University of Saskatchewan are honorary consultants to the project. For earlier proposals and recommendations to modernize Australia's chattel security law, see D. Allan (1989), 15 Mon. U.L. Rev. 338, esp. at p. 340.

¹⁴ As one addicted to writing in this area I have freely drawn in this survey on my earlier publications on the topic.

¹⁵ Two statistics will indicate the magnitude of the amounts involved. At the end of 1990, business loans outstanding by Canadian banks amounted to \$85,503m; the amount outstanding for personal loans came to \$65,929m (Canadian Bankers Association, Bank Facts 1991, pp. 10, 13). These figures do not include the amount outstanding for residential mortgage loans, which was \$102,365m, *ibid.*, p. 12. It may safely be assumed that a large proportion of the business and personal loans was secured by some type of personal property.

¹⁶ J.R. Varley, Receivership: The Contest between Secured and General Creditors, in M.A. Springman and E. Gertner, Debtor-Creditor Law: Practice and Doctrine (1985), 424, pp. 434-435.

However, provincial common law has tended to lag behind economic developments in responding to the need for an efficient and responsive body of chattel security law. The earliest security device for personalty known to the common law (and also to other legal systems) was the possessory pledge. It was supplemented from about the sixteenth century onwards by the chattel mortgage, then commonly referred to as a bill of sale. However, because of the secrecy surrounding its execution, the absence of a registration system and its association with insolvent debtors, the chattel mortgage remained suspect for centuries thereafter.

Until the nineteenth century this inhibited development was of no great consequence since there was no pressing need for new sources of credit. The advent of the industrial revolution changed all this and quickly generated a burgeoning demand, first, for commercial and business credit and, later, consumer credit. In many common law jurisdictions the legislatures were slow to appreciate the significance of the new developments. In Canada, provincial legislation tended to take the form of onerous registration and affidavit requirements and this, together with other restrictions, greatly complicated the taking of non-possessory security.¹⁷ To their abiding credit, English equity courts responded much more sympathetically than did the English Parliament and laid the groundwork for key features of modern financing techniques—the creation of a security interest in present and after-acquired property covering present and future advances,¹⁸ the acceptance of the legitimacy of accounts receivable financing¹⁹ and, not least, the concept of a fixed and floating charge securing all the assets of an undertaking.

In Canada, prior to the current period, the principal developments were the introduction of further registration requirements to cover each of the principal security devices (conditional sales, chattel mortgages, assignment of book debts and corporate securities), so that provincial chattel security law became still more segmented, complex, and obscure. The situation was worse in the United States.²⁰ Not only did legislation differ widely from state to state (a feature that also described the position among

¹⁷ Registration requirements for conditional sales were less onerous than for chattel mortgages and, later, for assignment of book debts and creation of corporate securities but they still provided many pitfalls. See J.S. Ziegel, *Uniformity of Legislation—The Conditional Sales Experience* (1961), 39 Can. Bar Rev. 165. A much more favourable environment existed at the federal level with respect to the taking by banks of security under what, prior to 1980, was s. 88 of the Bank Act and is now s. 178 of the Act. The apparent simplicity of the Bank Act security was to have an enduring effect which still colours banking attitudes in considering the much needed revision of s. 178. See further, *infra*, the text accompanying footnotes 146-168.

¹⁸ *Holroyd v. Marshall* (1862), X H.L.C. 191, 11 E.R. 999 (H.L.).

¹⁹ *Tailby v. Official Receiver* (1888), 13 A.C. 523.

²⁰ The details will be found in Grant Gilmore's magisterial work, *Security Interests in Personal Property*, vol. I, Part I (1965).

the Canadian provinces), but American courts added some very debilitating doctrines of their own which greatly added to the cost and unpredictability of secured financing.²¹

Thus matters stood when in the early 1940s the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Legislation (NCCUSL) sponsored a joint project to revise and modernize the many uniform or model acts on commercial law topics drafted during the preceding half century. The result was the creation of a remarkable product, the Uniform Commercial Code, the first official version of which was launched in 1952 and revised in subsequent years.²² From 1958 onwards the Code quickly attracted many adherents. The Code is now in force in all of the common law states and the District of Columbia, and much of it is also in force in Louisiana, a civil law jurisdiction.

The chaotic state of state chattel security law became a major target for the United States reformers. By a stroke of remarkable good fortune, two leading scholars, Grant Gilmore at Yale and Allison Dunham at the University of Chicago, working independently of each other,²³ reached the common conclusion that an entirely new approach was called for. They then became Joint Reporters of what later became Article 9 of the Code. Article 9 is by a wide margin the most innovative part of the Code and, from an international perspective, has become the most influential.

The distinctive feature of Article 9 is that it abolishes the pre-Code distinctions between the multiplicity of common law, equitable and statutory security devices and replaces them with the generic concept of a "security agreement"²⁵ creating a "security interest".²⁶ This radical solution derived from the drafters' profound insight²⁷ that all security interests serve the same function—to secure payment or performance of an obligation—and

²¹ The most notorious was the rule in *Benedict v. Ratner* (1925), 268 U.S. 353.

²² The current Official Text of the Code is dated 1990 and all references hereafter are to this version. Over the past ten years, every Article of the Code has been revised or is in the course of revision. Also, two new Articles have been added, Art. 4A on Electronic Fund Transfers (1989), and Art. 2A on Personal Property Leasing (1987).

²³ See Gilmore, *op. cit.*, footnote 20, para. 9.2. Professor Karl Llewellyn, the Chief Reporter of the Code, had also independently reached the same conclusion but it is not clear how far he was actually involved in the drafting of Art. 9.

²⁴ Art. 9 was extensively revised in 1972 and moderately so in 1978 and 1987. In 1989 the joint sponsors of the Code established an Art. 9 Study Committee to determine whether Art. 9 and related provisions of the Code were in need of revision and, if they were of this opinion, to recommend the nature and substance of the revisions. The Study Committee published an Interim Report in April 1991 and expects to publish a final report in mid-1992. (I am indebted to C.W. Mooney, Jr., the Joint Reporter to the Committee, for supplying me with a copy of the Interim Report).

²⁵ UCC 9-105(1)(1).

²⁶ UCC 1-201(37).

²⁷ Implemented in UCC 9-102(1).

that there was no justification for the retention of the old divisions and the large baggage of discrete rules and doctrines that accompanied them. Instead, they could be replaced by a common set of prescriptions covering the successive stages in the life of a security interest—its creation and perfection and the consequences of non-perfection, the rules governing priorities between competing security interests in the same collateral and, if the debtor defaults, the enforcement of the security interest. Article 9 retains some important distinctions but they are based on functional and not historical or doctrinal considerations.

Canada has benefitted on many previous occasions from American precedents in the commercial and consumer law areas. However, the adaptation of Article 9 to provincial needs took place much more quickly, at least at first, than most observers would have predicted in the 1950s. Ontario deserves the credit for leading the way. As described in my earlier article,²⁸ the initiative came about because a committee of the Commercial Law Subsection of the Ontario Branch of the Canadian Bar Association,²⁹ which had been struck to revise the four basic registration statutes, recognized that Article 9 offered a far superior solution. They then set about to draft a Canadian counterpart, the Draft Ontario Personal Property Security Act, which was first unveiled for public scrutiny in 1964. The draft bill adopted the basic concepts and organizing principles of Article 9 but departed from Article 9 on numerous points of detail and, with respect to the registration requirements, on a question of principle.³⁰ In terms of drafting style, the draft bill was much more succinct and easier to read than its American counterpart. This feature undoubtedly played an important role in easing the importation of Article 9 into Canada.

II. *The Post-1966 Canadian Developments*

I must now resume the narrative from where the 1966 article let off. In view of the complexity of the Canadian developments, the reader may find it easier to follow them if they are subdivided by province and region.

A. *Ontario*

Although enacted in 1967, most of the Personal Property Security Act did not come into force until April 1, 1976. There were two reasons for the long delay. The first was that the registry officials wanted to ensure that registrations under the old registrations Acts had either expired or were renewed under the new Act so that lawyers would not have to contend

²⁸ Ziegel, *loc. cit.*, footnote 1.

²⁹ The Committee later became an Advisory Committee on the legislation to the Attorney-General and is popularly referred to as the Catzman Committee, after the name of its long time chairman, Fred M. Catzman of Toronto.

³⁰ Ziegel, *loc. cit.*, footnote 1, at p. 124.

with two separate bodies of law after proclamation date. The other, and still more important, reason was that Ontario had decided to introduce a fully computerized as well as centralized registry system. The province was the first jurisdiction in North America to adopt a comprehensive computerized registry system and it took much longer to sort out all the wrinkles than had been anticipated.

There had been important Article 9 developments in the United States since the drafting of the Ontario Act, and it was clear from the beginning that the Act contained controversial features that were likely to create difficulties. The government therefore readily agreed to the revival of the Catzman Committee in 1976, this time in an advisory capacity to the Minister of Consumer and Commercial Relations.³¹ The Committee's ultimate goal was a review of the whole Act in light of intervening events. First, however, the Committee was called upon to address two major practical problems that had generated difficult litigation.

On the recommendation of the Ontario Law Reform Commission corporate securities were excluded from the scope of the 1967 Act and therefore remained subject to the provisions of the Corporation Securities Registration Act (CSRA).³² However, the demarcation line between the two Acts was far from clear³³ and lawyers also found it highly inconvenient to have to cope with two separate and incompatible regimes if they wanted to obtain comprehensive security from a corporation. A further difficulty was that there were no rules to resolve conflicts between the perfection and priority provisions of the two Acts. It quickly became clear to the Catzman Committee that the proper solution was to repeal the CSRA and to integrate corporate securities with the Personal Property Security Act. A comprehensive bill to accomplish these objectives was circulated by the Committee in the Fall of 1980.³⁴ However, because of time constraints, the government elected to proceed with an interim solution pending the completion of the Committee's total review of the Act.³⁵

The other difficulty concerned the dividing line between realty interests and interests governed by the PPSA so far as it involved an assignment

³¹ Responsibility for the Act had moved from the Attorney-General to the Minister after adoption of the Act in 1967.

³² R.S.O. 1980, c. 94. The Act has now been repealed.

³³ See, *inter alia*, *Re Rollies' Sports and Marine (1974) Ltd.* (1981), 14 B.L.R. 41 (Ont. H.C.); *Re Turf World Irrigation Ltd.* (1979), 7 B.L.R. 215 (Ont. H.C.); *Euroclean Canada Inc. v. Forest Glade Investments Ltd.* (1985), 16 D.L.R. (4th) 289 (Ont. C.A.).

³⁴ Ministry of Consumer and Commercial Relations, Draft Bill: Act to Amend the Personal Property Security Act (Toronto, 1980).

³⁵ See S.O. 1981, c. 2, s. 1, adding s. 66a to the parent Act, and the decision in *Euroclean Canada Inc. v. Forest Glade Investments Ltd.*, *supra*, footnote 33, interpreting the effect of s. 66a. See further J.S. Ziegel (1981-82), 6 C.B.L.J. 107, at pp. 116-118, and (1984), 9 C.B.L.J. 367; J.R. Varley (1985), 10 C.B.L.J. 482.

of rents under a lease or an assignment of monies owing under a realty mortgage.³⁶ This problem too was addressed by amending the Act.³⁷

The Catzman Committee completed its review of the Act in 1983 and recommended the adoption of a completely revised Personal Property Security Act in Ontario.³⁸ Though not a carbon copy of it, the Committee's accompanying draft bill was much influenced³⁹ by the Uniform Personal Property Security Act 1982 (UPPSA 1982), whose provisions will be discussed hereafter. Key features of the draft bill included the repeal of the CSRA, the extension of the Act to commercial consignment agreements and leases for more than a year whether or not the consignment or lease amounted to a true security agreement, abolition of the requirement that a financing statement must be registered within thirty days of the execution of the security agreement, and adoption of a variable registration period.

The Committee's report attracted many submissions and these were carefully considered by the Committee over the next year.⁴⁰ The Committee adopted some of the recommendations involving technical improvements but, after much internal discussion, rejected the objections to the extension of the Act to straight consignments and one-year-plus leases. The ball was now in the government's court. Unhappily, the Ministry's officials did not agree with all of the Committee's recommendations. In particular they did not agree with the proposed expansion of the scope of the Act. On the other hand, the officials proposed adding provisions to the draft bill, some of which, in the Committee's view, would seriously have compromised important principles of the bill.⁴¹ The Minister of the day decided to support his officials. Bill 151, the Personal Property Security Act, 1988, was introduced on June 8, 1988, and was enacted the following year as the Personal Property Security Act 1989. The 1989 Act included some further changes⁴² but, for the most part, the Act reflected the version of the draft bill favoured by the Ministry's officials. The new Act came into effect on October 9, 1991.

³⁶ See *CTL Uniforms Ltd. v. Acim Industries Ltd.* (1981), 123 D.L.R. (3d) 702, affd. 132 D.L.R. (3d) 92n (Ont. C.A.); *Re Urman* (1982), 3 D.L.R. (4th) 631 (Ont. C.A.), revg. (1981), 128 D.L.R. (3d) 33 (Ont. H.C.); B. Geva, *Security Interests in Secured Obligations: Re Urman* (1982), 60 Can. Bar Rev. 151.

³⁷ S.O. 1981, c. 58, s. 1, adding new ss. 3(1)(e) and 36a to parent Act.

³⁸ See Report of the Minister's Advisory Committee on the Personal Property Security Act (Toronto, June 1984).

³⁹ See J.S. Ziegel, *Recent and Prospective Developments in the Personal Property Security Law Area* (1985), 10 C.B.L.J. 131, esp. at p. 135.

⁴⁰ See Supplementary Report of the Minister's Advisory Committee on the Personal Property Security Act (Toronto, Jan. 1986).

⁴¹ For the details see J.S. Ziegel, *Protecting the Integrity of the Ontario Personal Property Security Act (1987-88)*, 13 C.B.L.J. 359.

⁴² See J.S. Ziegel (1989), 15 C.B.L.J. 108, at pp. 112-114.

B. The Western Provinces

1. Manitoba

Manitoba was the first of the Western provinces to adopt PPS legislation, and it did so in 1973⁴³ although the Act did not become fully effective until September 1, 1978. The Manitoba Act is a blend of the original Ontario Act and the Model Uniform Act of 1970⁴⁴ but with a pronounced tendency to follow the Uniform Act on important issues where the two differed.⁴⁵ Thus the Manitoba Act adopted the principle of notice filing in all cases, abolished a time filing requirement, extended the scope of the Act to include corporate securities, permitted perfection by registration for all types of collateral where a floating charge was involved, and made the Act binding on the Crown.

The Manitoba Act has not been amended since its adoption in 1973. However, a Manitoba committee has recommended adoption of the Model Western Provinces Act, discussed hereafter,⁴⁶ and it is understood that the question is being actively considered by the Manitoba government.⁴⁷

2. Saskatchewan

Like Manitoba, Saskatchewan evinced early interest in PPS legislation⁴⁸ but no substantial progress was made in implementing this goal until July 1977 when the Saskatchewan Law Reform Commission published an excellent report,⁴⁹ prepared by Professor Cuming of the University of Saskatchewan in Saskatoon, recommending adoption of a Saskatchewan Act in terms of the draft bill contained in the report. An exposure bill was introduced in the Saskatchewan legislature in 1979⁵⁰ and was rein-

⁴³ S.M. 1973, c. 5, CCSM, c. P.35. See now R.S.M. 1987, c. P.35 and Man. Reg. 327/87. For a brief history of the Manitoba Act, see J.S. Ziegel, *The Manitoba Personal Property Security Act*, in Isaac Pitblado *Lectures on Continuing Legal Education* 1974, 25, pp. 28-29.

⁴⁴ On which see, *infra*, Part II, E. *Harmonization of Provincial Legislation*.

⁴⁵ See the table in Ziegel, *op. cit.*, footnote 43, p. 45.

⁴⁶ *Infra*, the text accompanying footnotes 102-107.

⁴⁷ I am indebted for this information to Professor Arthur Braid of the Faculty of Law, University of Manitoba. Professor Braid is a member of the committee.

⁴⁸ See Symposium (1965), 30 Sask. Bar Rev. 203. A former attorney general, Darrel Heald, was so enthusiastic about the prospects of reforming the Saskatchewan law that in 1966 he told the writer he would like to establish a royal commission to make specific proposals! Ross Thatcher, the Saskatchewan premier, scotched the idea.

⁴⁹ Saskatchewan Law Reform Commission, *Proposals for a Saskatchewan Personal Property Security Act* (Saskatoon, July 1977).

⁵⁰ Bill 65 of 1979.

troduced and adopted the following year.⁵¹ The Saskatchewan Act has been described as "second generation" PPS.⁵² This is an apt description since the Act is much more than a carbon copy of the 1967 Ontario Act or the Model 1970 Act. The Act incorporates many of the changes adopted in the 1972 revision of Article 9 and other changes approved by or discussed in the MUPPSA Committee subsequent to 1970, and also adds important new features and refinements of its own.⁵³

Saskatchewan is not resting on its laurels. As explained hereafter, Professor Cuming has played a very active role in promoting the Model Western Provinces Act and has recently prepared a report for the Saskatchewan Law Reform Commission⁵⁴ recommending the enactment of a revised Saskatchewan Act in line with the recently adopted Alberta and British Columbia Acts.

3. *Alberta and British Columbia*

It is convenient to treat Alberta and British Columbia together, not because the protracted histories of their PPS legislation are the same, but because both provinces did eventually end up having a substantially identical Act.

In Alberta's case, support for modern chattel security legislation was first officially expressed in a discussion document published by the Attorney General's Department in 1978.⁵⁵ This was followed, two years later, by an exposure bill,⁵⁶ which was then allowed to lapse. Bill 98 was an amalgam of the provisions of the recently adopted Saskatchewan Act and the contemporary version of the revised Uniform Act.⁵⁷ Another bill was introduced in 1985,⁵⁸ but also failed to secure final passage. The third attempt was more successful. In 1988 Alberta adopted the Personal Property

⁵¹ Bill 42, 1979-80. See now S.S. 1979-80, c. P-6.1, as am. by 1980-81, c. 72, and 1983, c. 11, s. 61.

⁵² See R.C.C. Cuming, *Second Generation Personal Property Security Legislation in Canada* (1981-82), 46 Sask. L. Rev. 5; cf. J.S. Ziegel, *Personal Property Security Legislation Comes to Saskatchewan* (1978-79), 3 C.B.L.J. 463.

⁵³ Acknowledgment should also be made of the fine work done by Georgina Jackson, the first registrar under the Act, in establishing the registry and developing a refined model of the Ontario system. (Ms. Jackson later went into private practice and has recently been appointed to the Saskatchewan Court of Appeal).

⁵⁴ Law Reform Commission of Saskatchewan, *Tentative Proposals for a New Personal Property Security Act* (Saskatoon, Dec. 1990).

⁵⁵ See Alberta, Dept. of the Attorney General, Office of the Director of Legal Research and Analysis, *Proposals for a Personal Property Security Act*, Discussion Paper (30 Nov. 1978).

⁵⁶ Bill 98, 1980.

⁵⁷ See (1980-81), 5 C.B.L.J. 238, at p. 240.

⁵⁸ Bill 73, 1985. See R.C.C. Cuming, *Alberta Moves toward Enactment of a Personal Property Security Act* (1985), 11 C.B.L.J. 82.

Security Act,⁵⁹ which came into effect on October 1, 1990. A substantial number of amendments to the 1988 Act were added in 1990 and these were followed by a smaller number of amendments in 1991.⁶⁰

British Columbia's journey towards modern legislation began in 1975 with the publication of a report by the British Columbia Law Reform Commission recommending the adoption of a modestly amended version of the 1970 Model Uniform Act.⁶¹ This was followed three years later by a draft bill published by the Ministry of Consumer and Corporate Affairs, but the initiative was not sustained. Another decade elapsed before the government brought forward a new draft Act.⁶² This effort was more successful and the Draft Act, with some changes, was enacted in 1989.⁶³

The Alberta and British Columbia Acts are essentially based on the Model Western Provinces Act (but are not identical to each other) and therefore differ to the same extent from the revised Ontario Act.⁶⁴

C. The Maritime Provinces

Given their small population and modest sized economies, it is understandable that the Maritime provinces were willing to bide their time before deciding whether to join the other common law jurisdictions in the adoption of the new legislation. In the 1980s expressions of interest were given in Prince Edward Island, Nova Scotia and Newfoundland,⁶⁵ but these have so far not led to concrete results. The recent New Brunswick

⁵⁹ S.A. 1988, c. P-4.05.

⁶⁰ S.A. 1990, c. 31, and S.A. 1991, c. 21, s. 29. For a collection of articles on the Alberta Act see *Alberta Law Review*, An Introduction to the Personal Property Security Act (Edmonton, 1990).

⁶¹ Law Reform Commission of British Columbia, Report on Debtor-Creditor Relationships (Project No. 2), Part 5—Personal Property Security (Vancouver, L.R.C. 23, 1975).

⁶² See Ministry of Finance and Corporate Relations, Draft Personal Property Security Act and Draft Personal Property Security Act: Commentary (both undated but distributed in 1988).

⁶³ S.B.C. 1989, c. 36. As in Alberta's case, substantial amendments were added in 1990. See S.B.C. 1990, c. 11 and S.B.C. 1990, c. 25.

⁶⁴ For a summary of the major differences, see J.S. Ziegel (1989), 15 C.B.L.J. 108, at pp. 109-112, and see also J.S. Ziegel, The Draft B.C. Personal Property Security Act (1989), 47 Advocate 281. An excellent Handbook on the B.C. Act, very similar to the Handbooks on the Saskatchewan and Alberta Acts prepared by him and R.J. Wood, has been published by Prof. Cuming. See R.C.C. Cuming, *British Columbia Personal Property Security Act Handbook* (1990).

⁶⁵ In the summer of 1985, the Honorable James Russell circulated a draft bill for comment, and an exposure bill was introduced in the Prince Edward Island legislature on 28 April 1988. See Bill No. 61 of 1988. Nothing seems to have emerged from either of these initiatives. Both documents were based on UPPSA 1982. An earlier incarnation of the Nova Scotia Law Reform Commission also published a study in the early 1980s, with similar results.

developments look much more promising.⁶⁶ In May 1987 the New Brunswick Law Society reported to the Minister of Justice "that the time had come"⁶⁷ for New Brunswick to adopt PPS legislation and that there was no advantage to New Brunswick awaiting the outcome of experience elsewhere.⁶⁷ The Minister agreed "wholeheartedly" and Professor Catherine Walsh of the University of New Brunswick Law School was commissioned to prepare a report. The report was published in August 1991. Professor Walsh recommended the adoption of a slightly modified version of the Model Western Provinces Act in preference to the revised Ontario Act. She did so on several grounds. She felt that the WPMA offered more detailed direction on many issues and, where there were policy differences, she preferred the WPMA as offering a better solution. "Most importantly", in her view, the WPMA best promotes the prospects of interjurisdictional harmonization among the Provinces.⁶⁸

D. *Quebec*

Quebec's Civil Code's approach to the creation of consensual security interests in movables differs fundamentally from the common law's approach, but there is a striking similarity in overall result between the current Quebec position and the pre-PPSA position in the common law provinces. Quebec law suffers from the same complexity and uncertainty and the same multiplicity of real and simulated security devices and codal and non-codal legislation as dogged the common law provinces. However, Quebec has reached this position by a different route. The Civil Code is basically hostile to non-possessory security interests in movables, and it has required successive amendments as well as the use of judicially sanctioned simulated sale agreements to relax the rigidities of the codal regime.⁶⁹ The common law provinces, on the other hand, began with a generally liberal body of common law and equitable rules on which there was superimposed a complex and, generally speaking, restrictive statutory regime of registration requirements. The role therefore of the personal property security legislation was less to rewrite the common law and equitable rules (although they required harmonization and integration) than to dismantle the cumbersome statutory superstructure and to replace it with a much simpler and modern registration system. The challenge facing

⁶⁶ The account that follows is based on C. Walsh, *The Proposed New Brunswick Personal Property Security Act*, New Brunswick Geographic Information Corp. (Aug. 1991).

⁶⁷ *Ibid.*, Introductory Notes, p. 5.

⁶⁸ *Ibid.*, p. 6.

⁶⁹ Cf. G. E. LeDain, *Security upon Moveable Property in the Province of Quebec* (1956), 2 McGill L.J. 77, at pp. 77-78: "The development in Quebec of the law and practice in this field has been a curious mixture of commercial improvisation within the limits of a fairly static body of civil law principles." This was written in 1956; Quebec law has changed substantially since then.

Quebec is almost exactly the reverse of the problems that faced the pre-PPSA common law jurisdictions.

The Civil Code begins⁷⁰ with the basic postulate that "the property of a debtor is the common pledge of his creditors, and where they claim together they share rateably unless there are among them legal causes of preference".⁷¹ The only "legal causes of preference" recognized in the case of movables are those spelled out under the general title of *privileges* in article 1983. This only includes one type of consensual security interest in movables—a possessory pawn or pledge.⁷² The Civil Code does not permit a mortgage on movables (*hypothèque*)⁷³ because of the importance attached to possession as a presumptive root of title for movables⁷⁴ and the mischief that would be caused to this principle if non-possessory security interests were to be recognized in the absence of appropriate registration requirements.

However, article 1983 by itself gives a very incomplete picture and current Quebec law⁷⁵ recognizes the following real or apparent exceptions. Conditional sale agreements were always excluded because a retention of title clause is not seen as the creation by the buyer of a security interest in *the buyer's* property.⁷⁶ The security assignment of a book debt, on the other hand, was regarded as a valid pledge provided notice of the pledge or assignment was given to the account debtor. However, this concession did not apply to the future assignment of a debt or to a general assignment of receivables. Sales law principles⁷⁷ were also used successfully to bypass

⁷⁰ There are many excellent descriptions and analyses of the Quebec position. The account that follows relies heavily on the article by LeDain, *ibid.*, and on M. Boodman, *The Scope of the Quebec Commercial Pledge* (1991), 18 C.B.L.J. 276 and R.A. Macdonald, *The Modernization of Personal Property Security Law: A Quebec Perspective* (1985), 10 C.B.L.J. 182. For an outstanding treatment of the whole topic, see R.A. Macdonald, *Privileges and other Preferences upon Moveable Property in Quebec: Their Impact upon the Rights and Recourses of Execution Creditors*, in M.A. Springman and E. Gertner (eds.), *Debtor-Creditor Law: Practice and Doctrine* (1985). I have also benefitted greatly from several conversations with Prof. Macdonald but neither he nor the other sources mentioned are responsible for the accuracy of my presentation.

⁷¹ C.C., art. 1981.

⁷² C.C., art. 1969.

⁷³ C.C., art. 2022: "Les meubles n'ont pas de suite par hypothèque."

⁷⁴ See C.C., art. 2268.1, enshrining the well known rule, "en fait de meubles possession vaut titre".

⁷⁵ Chartered banks operating in Quebec also had access to the successive provisions in the federal Bank Act (notably s. 88, now s. 178), permitting non-possessory security interests in designated types of moveables.

⁷⁶ The same is true of equipment leases, hire-purchase agreements, and consignment agreements.

⁷⁷ Notably the rule in C.C., art. 1025 that ownership in a thing certain and determinate can pass by consent alone without the necessity of delivery. Cf. LeDain, *loc. cit.*, footnote 69, at pp. 82-83.

the prohibition against the creation of non-possessory security interests by the conclusion of sale and repurchase agreements or sales with a right of purchase (*ventes à remerées*), with the "seller" being permitted to remain in possession so long as the seller was not in default.

These exceptions were not sufficient to satisfy commercial needs and over the past 85 years the Quebec legislature has had to intervene intermittently to enlarge the list, although the statutory changes were not characterized as exceptions. The Special Corporate Powers Act,⁷⁸ first adopted in 1914, permitted the creation of trust deeds pledging all of a corporate debtor's present and future movables and immovables as security for the issuance of corporate obligations. Amendments to the Civil Code adopted in 1940⁷⁹ permitted the non-possessory pledge by farmers of livestock and farm produce. These were followed over the next forty-four years by further amendments permitting security assignments of book debts⁸⁰ and non-possessory commercial pledges of equipment⁸¹ and, most recently, of inventory.⁸² In all these cases a registration requirement is a condition of the validity of the non-possessory security interest, but the requirements and the places of registration differ for each of the security interests.

Given the complexity of the current Quebec law, it is not surprising that the desirability of rationalizing and integrating the many disparate provisions has attracted the attention of Quebec scholars and law reformers for more than twenty years.⁸³ Article 9 of the Uniform Commercial Code and its provincial counterparts in Canada have been studied sympathetically, and these precedents have exerted considerable influence.⁸⁴ However, it is now also clear that the provisions on security in movables in the revised Civil Code will fall significantly short of an Article 9 type regime even allowing for differences in drafting style, terminology and organization to accommodate civilian traditions.

⁷⁸ R.S.Q. 1977, c. P-16.

⁷⁹ C.C., art. 1979a.

⁸⁰ C.C., art. 1571d, added in 1969.

⁸¹ C.C., art. 1979e, added in 1962.

⁸² This took the form of amendments to the Bills of Lading Act, R.S.Q. 1977, c. C-53, and was added in 1984. See R.A. Macdonald, *Inventory Financing in Quebec after 1984* (1984), 9 C.B.L.J. 193.

⁸³ See, *inter alia*, Y. Caron, *L'article 9 du Code uniforme de commerce peut-il être exporté? Point de vue d'un juriste québécois*, in J.S. Ziegel and W.F. Foster (eds.), *Aspects of Comparative Commercial Law* (1969), p. 374; R.A. Macdonald and R.L. Simmonds, *The Financing of Moveables: Law Reform in Quebec and Ontario*, 1981 Meredith Memorial Lectures 246; R.A. Macdonald, *Modernization of Personal Property Security Law: A Quebec Perspective* (1985), 10 C.B.L.J. 182.

⁸⁴ Cf. Caron, *ibid.*, p. 394, "mises à part les difficultés de langage et de style, le droit substantif [de l'Article 9] contenu dans ce texte de loi nous est généralement acceptable . . .".

Bill 125, which is currently before the National Assembly and is expected to be enacted in the near future,⁸⁵ provides for the integration of seven types of security devices over movables currently in use in Quebec. They will be replaced by the generic concept of an *hypothèque* given to secure repayment of a loan. The contractual *hypothèque* will not apply to three types of claim: (i) priority claims; (ii) legal hypothecs; and (iii) quasi-securities. "Priority claims" (article 2807) will have superpriority status and will cover law costs, including lawyers' fees, improvers' liens, and government tax claims. Priority claims are not regarded as security interests because they are not rights *in rem* and only subsist as long as the movables remain in the debtor's patrimony. Legal hypothecs (article 2888) will cover provincial tax claims (in addition to those covered in article 2807), an unpaid seller's privilege, the claims of co-partitioners, and registered judgment debts, formerly known as judicial hypothecs. These are true security interests but arise solely by operation of law. Most important, "quasi-securities" embrace conditional sale agreements and installment sale agreements with a title retention clause,⁸⁶ sales subject to a resolutory condition, and financial leases of movables. In other words, sales and lease agreements will be outside the new hypothecary regime, although most of the agreements will be subject to the same registration requirements as apply to hypothecs. The basis of their exclusion appears to rest in the drafters' unwillingness to accept the concept that an owner can have a security interest in her own moveables.⁸⁷

E. Harmonization of Provincial Legislation

As the preceding survey will have shown, the common law provinces have been in no rush to adopt personal property security legislation. Even now, twenty-four years after the adoption of the original Ontario Act, only one of the Maritime jurisdictions is close to enacting such legislation. Even more significant is the fact that the provinces which have acted have adopted versions of the legislation which differ markedly in detail from one another and in several cases on important questions of substance and principle.

⁸⁵ Bill 125, Civil Code of Quebec, 1st Sess., 34 Legisl. Que., arts. 2269-2789 (preferences and hypothecs) and arts. 2918-3052 (publicity of rights). The textual account that follows is an updated version of the writer's earlier account in (1989), 15 C.B.L.J. 108, at pp. 114-115. For an authoritative description, see R.A. Macdonald, *The Counter-Reformation of Secured Transactions Law in Quebec* (1991), 19 C.B.L.J. 239, which only became available to the author after the completion of his article.

⁸⁶ The term conditional sale agreement is used in a different sense in Quebec law from its popular meaning in common law Canada and refers to an agreement with a resolutory clause revesting title in the seller on the happening of prescribed events.

⁸⁷ The difficulty is a familiar one to common law lawyers and is overcome in the provincial PPS legislation by requiring the courts to focus on the substance of the transaction and to ignore the locus of title. See, for example, Ont. Act, s. 2.

This difficulty was not unforeseen. As early as 1963, the Commercial Law Section of the Canadian Bar Association struck a special committee chaired by the Honourable R.L. Kellock, a former member of the Supreme Court of Canada,⁸⁸ to report on the advisability of a uniform personal property security Act (UPPSA) and, if a uniform act was deemed advisable, to report on the form and content of such an Act.⁸⁹ The Committee reported in 1964 that federal and provincial chattel security law was badly in need of modernization, rationalisation and integration, and it warmly endorsed the principles of the draft Ontario bill that had been published earlier that year. However, at the particular request of the Catzman Committee, the Committee deferred embarking on in its own detailed analysis of the draft bill until it had been enacted in Ontario.⁹⁰

As previously noted, the draft bill was enacted in 1967 and the CBA Committee thereupon proceeded with its study of the Ontario Act. It submitted the first draft of a uniform Act later that year, and a later and more comprehensive draft in August 1969.⁹¹ This included the following departures from the Ontario Act. Corporate securities were included in the scope of the draft Act as were consignment agreements and chattel lease agreements for more than a year. The Committee also recommended that if provincial requirements for the registration of absolute bills of sale were retained, then such requirements should be integrated in the Uniform Act. The draft Act also contained innovative provisions spelling out the consequences of English style floating charges being included in the Act.⁹² Other recommendations were that notice filing should be permitted in all cases to perfect a security interest by registration and that it should be possible to file a financing statement at any time.⁹³ In its introductory report the Committee also emphasized the need for modernizing the many federal provisions governing security interests and of harmonizing them with provincial law.

⁸⁸ The author was the first secretary of the Committee. Mr. Kellock resigned from the Committee in 1966 and the author replaced him as chairman. Professor R.C.C. Cuming became the new secretary. All regions of Canada were represented on the Committee and meetings of the Committee were also attended by observers from the Canadian Bar Association, the Uniform Law Conference of Canada, and the Attorney General's Department of Ontario.

⁸⁹ The description that follows is based on Committee on a Uniform Personal Property Security Act, Commercial Law Section, Canadian Bar Association, Draft Uniform Personal Property Security Act, August 1969 version, Introduction by J.S. Ziegel (mimeo.).

⁹⁰ The Catzman Committee was concerned that any suggestions for improvements to the draft bill, however friendly, might delay its adoption in Ontario.

⁹¹ *Supra*, footnote 89.

⁹² Draft Act, ss. 9(2), 12(2), 25(e), 55(2a) and 55(11).

⁹³ It will be recalled that s. 47(3) of the Ontario Act required a copy of the security agreement (later changed to a financing statement) to be registered within thirty days of the execution of the security agreement. Judicial leave was required under s. 64 for late filing.

The draft Act was widely circulated and the Committee submitted a new draft Act in 1970. This was adopted by the Commercial Law Section, and subsequently became known as the Model Uniform Personal Property Security Act (MUPPSA).⁹⁴ Regrettably MUPPSA was forced to abandon some of the most innovative features in the 1969 version because of heavy opposition from influential quarters. Non-security and "one-year-plus" leases were no longer included and all but one of the floating charge provisions were deleted.⁹⁵ A little surprisingly the notice filing feature was also opposed,⁹⁶ and MUPPSA compromised by giving adopting jurisdictions the option of permitting notice filing in all cases or restricting it to accounts receivable and inventory financing.⁹⁷

The Uniform Law Conference of Canada was not a sponsor of MUPPSA but thought it desirable to adopt its own Uniform Personal Property Security Act. Such an Act—an amalgam of the Ontario Act and MUPPSA—was adopted in 1971 with little fanfare and even less discussion.⁹⁸

The MUPPSA Committee was not content to rest on its admittedly modest laurels. The Committee was revived in 1976 to see what changes were desirable to MUPPSA in light of the Canadian developments since 1970 and having regard to the important changes incorporated in the 1972 Official Text of Article 9.⁹⁹ The Committee met regularly over the next five years and in 1981 submitted for approval a completely revised uniform Act. That same year the Uniform Law Conference of Canada agreed to co-sponsor the revised uniform Act. It was approved in 1982 by both sponsoring organizations, and thereafter came to be known as the "Uniform Personal Property Security Act, 1982" (UPPSA 1982). UPPSA 1982 was a considerably more detailed and comprehensive effort than was MUPPSA,

⁹⁴ See J.S. Ziegel, *The Model Uniform Personal Property Security Act* (1971), 76 *Can. Banker* 16.

⁹⁵ The critics thought that the provisions were "unnecessary, even dangerous"! The exception involved s. 25(1)(e), which provided that a security interest in the nature of a floating charge could be perfected by registration. This was an important provision since the Ontario Act (s. 24) only permitted perfection by registration of a security interest in chattel paper, goods, intangibles or documents of title.

⁹⁶ It was opposed by the Ontario Commercial Law Subsection of the Canadian Bar Association and the Uniform Law Conference of Canada on the ground that the security agreement should always be available for public scrutiny. The same sentiments were later expressed by Alberta practitioners and were among the reasons that accounted for Alberta's delay in adopting PPS legislation.

⁹⁷ MUPPSA, s. 47. S. 47(2) of the Ontario Act only permitted the use of financing statements where the collateral consisted of "goods to be held for sale or lease".

⁹⁸ For the provisions of the Act see Uniform Law Conference of Canada, *Consolidated Uniform Acts* (1979), p. 35-1.

⁹⁹ The account that follows is based on the author's Comments in (1980), 5 C.L.J. 238, at pp. 242-243 (1982-83), and 7 C.B.L.J. 494, and on J.S. Ziegel and R.C.C. Cuming, *The Modernization of Canadian Personal Property Security Law* (1981), 36 U.T.L.J. 249.

and it addressed important questions that had not been answered in MUPPSA. It also reversed the important compromises which MUPPSA had been forced to make with respect to the exclusion of non-security consignment agreements and one-year-plus chattel leases. The details will be found elsewhere.¹⁰⁰ The Canadian Bar Association and the Uniform Law Conference established a small joint editorial committee, consisting of three persons nominated by each sponsor, to monitor the progress of UPPSA 1982 and to recommend such changes in it as appeared desirable in light of future developments. Regrettably, because of inadequate communications between its sponsors, the committee only functioned for two years and was then disbanded.¹⁰¹

Worse news was to follow. During its short life span the Joint Editorial Committee wrote Dr. Robert Elgie, Ontario's Minister of Consumer and Commercial Relations, urging him to encourage the Catzman Committee to adhere as closely as possible to UPPSA 1982 in its review of the Ontario Act which was then in full swing. However, he replied saying that he did not feel he could tell the Catzman Committee how to go about its work. Still later, at the Annual Workshop on Commercial and Consumer Law held at the University of Toronto in 1986, Dr. Elgie's successor, Monte Kwinter, deeply offended some of the participants from Western Canada by telling them, in response to an after dinner question, words to the effect that Ontario was too important commercially to be bound by a uniform Act.

This ill-considered reply, in combination with the earlier events, persuaded Ron Cuming and some of the other Prairie representatives who had been active in the MUPPSA Committee that "Ontario was not particularly interested in harmonization and was determined to go its own way",¹⁰² and that the Western Provinces would likewise be best advised to pursue their own interests. The result was the establishment of the Western Canada Personal Property Security Act Committee (WCPPSAC) in 1986. The Committee held annual meetings thereafter, and in 1989 approved a Model Western Canada Personal Property Security Act (WCPPSA). The WCPPSA is based on the Saskatchewan Act but also incorporates elements of the revised Ontario Act, UPPSA 1982, and other changes

¹⁰⁰ See J.S. Ziegel, *The Uniform Personal Property Security Act 1982* (1982-83), 7 C.B.L.J. 494, esp. at pp. 496-497.

¹⁰¹ The Committee's disbandment came about because of a misunderstanding between the executive secretaries of the two sponsoring organizations. Each understood the other to say that the other's organization was no longer interested in co-sponsoring the Committee, which then led each of the organizations to lose interest in sponsoring the Committee on its own.

¹⁰² Law Reform Commission of Saskatchewan, *Tentative Proposals for a Uniform Personal Property Security Act*, Introduction, p. 3 (Dec. 1990).

agreed upon by the WCPPSAC.¹⁰³ As previously noted, the WCPPSA has been substantially adopted in British Columbia and in Alberta and has been recommended for adoption in New Brunswick and Saskatchewan.

Meetings of the WCPPSA Committee had also been attended by representatives from New Brunswick and Ontario, and at least on one occasion by one representative from Nova Scotia. This encouraged the Committee to believe that it could serve a useful role in converting itself into a national body. Accordingly, at a meeting held in Edmonton on June 3-4, 1991, there was established the Canadian Conference on Personal Property Security Law (hereafter Canadian Conference or CCPSL) whose founding members were drawn from the four Western Provinces, Ontario, New Brunswick, Canada, the Northwest Territories, and the Yukon.¹⁰⁴ The Conference's constitution also entitles the other provinces, including Quebec, to become "jurisdictional" members of the Conference.¹⁰⁵ The Conference's objects¹⁰⁶ correspond very closely to the objects which the MUPPSA Committee had pursued during its lifetime but will, one must hope, achieve a higher degree of success. This is an issue to which I return below.¹⁰⁷

III. Operational Impact of the New Legislation

PPS legislation has now been in force in one or more provinces for fifteen years and it is appropriate to assess its impact. Has it achieved its goals?

¹⁰³ The writer understands that no formal minutes were kept of the WCPPSAC meetings and he is not aware of any published document describing the sources of the WCPPSA and the various changes made to it during the course of its evolution. However, a fair answer can be obtained to both these questions by consulting the table of concordance in Tentative Proposals, *ibid.*, unnumbered pages following the table of contents. See now also R.C.C. Cuming, *Personal Property Security Law: The New Kids on the Block* (1991), 19 C.B.L.J. 191, which only became available to the writer after completion of this article.

¹⁰⁴ I am indebted to Ron Cuming and Geoffrey Ho, both founding members of the Conference, for supplying me with a copy of the Constitution of the Conference, Minutes of the June 3-4, 1991 meeting and other helpful documents, as well as much oral information.

¹⁰⁵ Constitution, art. II(1)(b).

¹⁰⁶ Art. I of the Constitution provides that the objects of the Conference are to:

1. Act as a successor to the Western Canada Personal Property Security (sic) Committee.
2. Encourage and facilitate harmonization and compatibility of the provincial, territorial and federal personal property security law.
3. Provide a mechanism through which standardization of personal property registry requirements and procedures can be pursued and through which interjurisdictional cooperation can be facilitated.
4. Provide a forum in which new developments in the area of personal property security law and related registration matters can be examined.
5. Facilitate the exchange of views and experience of persons working in the area of personal property security law and registration.

¹⁰⁷ *Infra*, Part IV, Section F.

Who are the winners and losers? What new problems has it generated? I will discuss some of the problems hereafter. Here I wish only to speak in general terms about the impact of the new legislation. No systematic study has so far been made of this question¹⁰⁸ and the observations that follow are only exploratory in character.

A large number of constituencies are affected by the legislation. These include secured and unsecured creditors, buyers of collateral which may be subject to a security interest, execution creditors of the debtor, the registries that operate the registration systems, the judges and courts that must interpret and apply the legislation, and of course the debtors who provide the security interests.

Undoubtedly secured creditors benefit most from the legislation. Overall the provincial Acts probably create the most favourable climate for secured creditors in the Commonwealth, even more favourable than the climate enjoyed by American secured creditors under Article 9.

A single security agreement enables a secured creditor to obtain a security interest in all of a business debtor's collateral, present and future, covering present and future advances.¹⁰⁹ Equitable interests have been abolished.¹¹⁰ The equitable floating charge has been converted into a full fledged security interest which attaches immediately to the collateral unless the parties have agreed to postpone the time for attachment.¹¹¹ Perfection of a security interest by registration is just as simple. It only requires the filing of a one-page financing statement in a central registry office which, in the case of non-consumer goods, can be filed at any time and remains valid for the period designated in the financing statement.¹¹² The secured party is given an explicit and automatic right to claim the proceeds from the disposition of collateral, whether or not the disposition was authorized and regardless of whether, in the case of cash collateral, the proceeds have been paid into a separate account.¹¹³

¹⁰⁸ A partial exception is the empirical survey conducted by the author and David Denomme in the summer of 1988 among the members of the Business Law Section of the Ontario Branch of the Canadian Bar Association. The results are in course of publication in the Canadian Business Law Journal under the title of How Ontario Lawyers View the Personal Property Security Act: An Empirical Survey.

¹⁰⁹ See, for example, Ont. Act, ss. 9(1), 12(1), 13. There are restrictions with respect to after-acquired property clauses affecting crops and consumer goods, *ibid.*, s. 12(2).

¹¹⁰ The Acts do not so expressly provide but it is implicit in their structure, history and objects, and in the scope provisions. See Ont. Act, ss. 2 (applying the Act to every security agreement creating a security interest in personal property or a fixture) and 9(1) (except as otherwise provided, a security agreement is effective according to its terms between the parties to it and against third parties).

¹¹¹ Ont. Act, s. 11(2). See also *infra*, Part V, Section C.

¹¹² Ont. Act, ss. 45(3)—(4) and 51(1).

¹¹³ See Ont. Act, s. 25 and *cf.* B.C. Act, s. 28 and UCC 9-307.

Under the "first to file" rule the security interest enjoys priority over all other security interests perfected later in time by registration and can only be trumped, in the case of inventory, by a purchase money security interest of which the prior secured party is given timely notice.¹¹⁴ Enforcement of the security interest has also been greatly simplified and standardized and, in theory at any rate, the secured party can proceed without any need for judicial intervention.¹¹⁵ If there is a deficiency after realization of the collateral, the secured party is entitled to sue for it without having to rely on a deficiency clause in the security agreement.¹¹⁶

Secured creditors' lawyers greatly appreciate these and other features of the new legislation, as appears from an empirical survey of Ontario business lawyers conducted by the author and David Denomme in 1988.¹¹⁷ When asked to indicate what they regarded as the most beneficial changes brought about by the personal property security legislation, 44.8% of the respondents said it was the simplicity of the legislation, its ease of operation, and the fast registration system.¹¹⁸ 33.7% gave primacy to the creation of the central registration system.¹¹⁹

Despite these very favourable responses, not all secured creditors benefit equally from the legislation. Secured creditors must master the Act and learn to comply with its rules, especially those involving the perfection of security interests. Large secured creditors, notably the banks, other financial intermediaries, and captive finance companies of large vehicle manufacturers should experience little difficulty complying with the rules.¹²⁰ However, there is considerable evidence that smaller secured creditors encounter significant difficulties, usually because of failure to obtain timely legal advice.¹²¹

What of debtors? In one sense they too should benefit from the legislation because the secured creditor's lower costs in obtaining and

¹¹⁴ Ont. Act, ss. 30(1).1 and 33(1).

¹¹⁵ Ont. Act, Part V, s. 62, and cf. s. 67(1).

¹¹⁶ Ont. Act, s. 64(3).

¹¹⁷ *Supra*, footnote 108.

¹¹⁸ *Ibid.*, replies to Question 6.

¹¹⁹ Under the pre-PPSA law, except in one case (corporate securities), registrations were effected manually, were county or city based, and depended on the debtor's place of residence or the locale where the collateral was kept. Such a system made effective searches difficult and in many cases very costly.

¹²⁰ However, even they can fall victim to the stringent requirements for accurate description of the debtor's name in the financing statement. See *infra*, Part IV, Section D.

¹²¹ For random examples of such cases, see *CIBC v. Otto Tim Enterprises* (1991), 79 D.L.R. (4th) 67 (Ont. Gen. Div.); *Pickles Tents & Awnings Ltd. v. Joseph Group of Companies*, [1981] 6 W.W.R. 300 (Man. C.A.); *Terra Power Tractor Co. v. Touche Ross Ltd.* (1985), 42 Sask. Rep. 102 (Sask. Q.B.); *Royal Bank of Canada v. Dawson Motors (Guelph) Ltd.* (1981), 15 B.L.R. 83 (Ont. Co. Ct.).

perfecting its security interest should lead to lower credit costs to the debtor. So far there is no documented evidence of this occurring, which is not to say that it does not happen.¹²² To the extent that the legal availability of security is an important element in the creditor's decision to extend credit, credit should be more readily available under the new legislation than it was under the old chattel security regime but this too is difficult to document accurately. On balance, we would probably conclude that even if it is difficult to quantify the benefit to debtors the legislation has not harmed them either—unless one belongs to the school of moralists which believes it is mischievous to allow a business debtor to pledge every stitch of the assets it now owns or may own in the future.

Unsecured creditors may well feel that the gains of secured creditors under the very permissive new chattel security regimes are at their expense since the easy accessibility of security must mean that the debtor is left without a cushion of free assets with which to satisfy unsecured creditors' claims.¹²³ Their concern is a legitimate one, but the suggestion that unsecured creditors fared better under the old regimes is not. They were just as vulnerable under the pre-PPSA rules. The principal difference between the two regimes is that it was easier to challenge security interests under the prior and much more burdensome registration requirements. Still, there is mounting evidence that the various classes of unsecured creditors are no longer content to be relegated to the bottom of the priority list and that they will seek legislative assistance to improve their status.¹²⁴

The provincial registries have undoubtedly benefitted substantially from the new legislation, and without suffering the criticisms to which secured creditors' claims are often exposed. In all the PPSA jurisdictions the registries have been centralized and computerized. One security register replaces the four or more registries that were common under the old system. Registrations

¹²² So many ingredients go into the make up of interest costs and loan charges that it would be difficult to isolate the fraction of the aggregate cost ascribable to the cost of obtaining and perfecting the security interest.

¹²³ The thesis that secured credit is a zero sum game and that what secured creditors gain on the roundabout unsecured creditors lose on the swing has been cogently argued by Professor Alan Schwartz of Yale University Law School. See A. Schwartz, *Security Interests and Bankruptcy Priorities* (1981), 10 J. Leg. Stud. 1; A. Schwartz, *The Continuing Puzzle of Secured Debt* (1984), 37 Vand. L. Rev. 1051; J.S. Ziegel, *The New Personal Property Security Regimes: Have We Gone Too Far?* (1990), 28 Alta. L. Rev. 739, esp. at pp. 748 *et seq.*

¹²⁴ For some of the ameliorative solutions, actual or proposed, see Ziegel, *ibid.*, at pp. 752-757. Bill C-22, 3rd Sess., 34 Parl., 40 Eliz. II, 1991, the Bankruptcy Amendment Act, currently before the federal Parliament, contains important provisions for the relief of various classes of unsecured creditors. See Part I (establishment of Wage Claim Payment Act), s. 81.1 (rights of unpaid supplier to recover goods within thirty days of delivery), and s. 87 (provision for perfection of Crown lien claims and ranking with consensual security interests). These and other provisions are further discussed, *infra*, Part IV, E. *The Interface of Provincial Chattel Security Law and Federal Insolvency Law.*

and searches are much simpler and faster than before. "On-line" searching facilities are available in British Columbia and Ontario and, in British Columbia, electronic registrations can now also be made from users' premises.¹²⁵ These features have greatly enhanced public confidence in the reliability of the new registry systems and have led to a much larger number of registrations and searches than were recorded under the old system.¹²⁶ Cash strapped provincial treasuries also gain because it may be safely assumed that the Personal Property Security Registry is a money maker.

Finally, what of the judges and courts that must interpret and apply the legislation?¹²⁷ The score card is uneven. Many members of the judiciary, at both trial and appellate levels, have performed beautifully and have shown a keen understanding of the principles and concepts underlying the Acts. Other judges, unhappily, have had substantial difficulties making the conversion and have either failed to see the wood for the trees or are still wedded to the pre-PPSA concepts; in between there are numbers of only fair performances.

Several factors explain this somewhat disappointing picture. Despite the legislation's apparent simplicity of language, its abstractness and broad generality often conceal ambiguities. As a result judges who, like most practitioners, are not specialists in this branch of commercial law, have difficulties finding their bearings.¹²⁸ Indeed, the specialists themselves may often disagree on the proper interpretation of a section or its interaction

¹²⁵ In British Columbia registrations can also be made electronically from private premises. Similar facilities are expected to be made available in Ontario in the near future. See Ont., Bill 126, The Electronic Registration Act (Ministry of Consumer and Commercial Relations Statutes), 1991, 1st Reading, June 13, 1991. For a general description of the computerized registry systems, see R.C.C. Cuming, *Computerization of Personal Property Security Registries: What the Canadian Experience Presages for the United States* (1991), 23 UCC L.J. 331.

¹²⁶ During the fiscal year 1990-91, there were approximately 2 million registrations in the Ontario PPS Registry and 900,000 searches. Minutes, Can. Conference, *op. cit.*, footnote 104, p. 8. Exact gross revenues were not available to the writer, but the amount will not have been less than \$10 million.

In April 1991, registrations and searches under the B.C. Act were between 50,000 and 60,000 each and revenue from PPS and pre-PPSA registrations and searches for the 1990-91 fiscal year amounted to \$9,080,360. Summary of B.C. statistics made available at Canadian Conference, *ibid.*, and Minutes, pp. 8-9. (I am indebted to Geoffrey Ho for making a copy of the statistics available to me).

¹²⁷ Carswell publishes the Personal Property Security Act Cases (PPSAC) which is a good but not exhaustive collection of cases, edited by Professors McLaren and de Jong, both of the University of Western Ontario. For a critical overview of the case law during its gestative period, see R.C.C. Cuming, *Judicial Treatment of the Saskatchewan Personal Property Security Act* (1987), 51 Sask. L. Rev. 129, and J.S. Ziegel, *The Quickening Pace of Jurisprudence Under the Ontario Personal Property Security Act* (1979-80), 4 C.B.L.J. 54.

¹²⁸ Fortunately, not many judges claim to be as baffled as Monnin J.A. (subsequently C.J.M.), who wrote in a dissenting judgment: "I agree with P.D. Ferg Co. Ct. J. when

with other parts of the Act. It is tempting to argue that an amendment to the legislation will put things right, but it may make matters worse. Some judges incline to an inspired reading of the statutory language if they feel a literal application will lead to an unfair result.¹²⁹ If it happens often enough the drafters should heed the judicial voices and ask themselves whether conceptual purity is not being pursued at too high a price.

Some observers may feel that the solution is to develop more specialist courts, or at least to appoint more judges with strong commercial law backgrounds. The first alternative is clearly unrealistic in all but the largest Canadian cities; the second is more feasible but presents acute logistical problems at the trial court level. Experience to date also suggests that there is no predictable correlation between a judge's background and his or her understanding of the new legislation. It appears therefore that human factors will continue to loom large in the interpretation and application of the PPS Acts.

IV. *Problems and Issues*

I have so far described the evolution and current status of PPS legislation in Canada and offered some reflections on its operational impact. However, I have said very little about some of the problems and issues affecting the design of the legislation or its relationship with other important branches of commercial law. In this part of the article I wish to convey the flavour of some of these aspects if for no other reason than to show that the twin goals of modernization and rationalization do not provide automatic solutions to the many policy questions generated by the legislation.

A. *Scope of the Legislation*

It is intrinsic to the objectives of the legislation that it should embrace all consensual security interests unless there are very persuasive reasons why particular types of transactions should be excluded. Canadian drafters have generally been loyal to this principle and the provincial Acts contain very few exceptions.¹³⁰ As previously noted, the original Ontario Act excluded corporate securities from its scope. This exclusion was based on a recommendation of the Ontario Law Reform Commission and resulted from trust company concerns that the inclusion of corporate securities would

he stated, 'I must confess that I find the terms, language and concepts expressed in that relatively new [Manitoba] Act somewhat mind-boggling'." *Pickles Tents and Awnings Ltd. v. Joseph Group of Companies Inc.*, *supra*, footnote 121, at p. 304.

¹²⁹ The problem arises most frequently when courts have to consider the consequences of non-compliance with registration requirements where there is no evidence of anyone actually having been prejudiced by the error. See discussion of the Saskatchewan cases in Cuming, *loc. cit.*, footnote 127, at pp. 136-140.

¹³⁰ See, for example, Ont. Act, s. 4, and B.C. Act, s. 4. Note that in both cases the majority of exclusions involve non-consensual or non-security transactions.

create difficulties for them as trustees under bond and debenture issues that had not been properly addressed in the Act. It may be that the trust companies were unduly apprehensive. In any event, their concerns have been taken care of and corporate securities are included in the revised Ontario Act,¹³¹ as indeed they are also in the other provincial Acts.

It could be argued that consumer transactions, other than those involving motor vehicles, could safely be excluded. They appear to give rise to very little third party litigation and many instalment vendors of consumer durables do not find it cost effective to file a financing statement.¹³² Happily, the provincial Acts have resisted this reasoning and consumer transactions are not excluded from the scope provisions or from the perfection requirements. Paradoxically, the Western provinces have followed Saskatchewan's lead¹³³ in excluding wage assignments from the scope of the Act.¹³⁴ The exclusion was clearly inspired by credit union pressures;¹³⁵ nevertheless the exclusion is anomalous and sets a bad precedent.

The real debate in the 1980s involved the desirability of extending the legislation to non-security commercial consignments and chattel leases for more than a year. The arguments that favour their inclusion are very powerful.¹³⁶ Commercial consignments are merely a form of inventory financing although admittedly without obliging the consignee to buy the goods. However, so far as the world is concerned, the external appearances and consequential risks for third parties are the same as in a regular security relationship.¹³⁷ The arguments in the case of medium and longer term equipment leases are even stronger. Such leases have grown enormously in volume and value since the 1960s and are in most cases simply an

¹³¹ Ont. Act, s. 2(a).

¹³² UCC 9-301(1)(d) dispenses with the need to file a financing statement to perfect a purchase money security interest in consumer goods. However, the secured party runs the risk of losing its security interest unless a financing statement has been filed if a consumer buyer purchases the collateral from the debtor in good faith and without knowledge of the security interest. See UCC 9-307(2).

¹³³ See Sask. Act, s. 4(c). Manitoba's exclusion was earlier but was not the model that was followed by the other Western provinces.

¹³⁴ Neither the original nor the revised Ontario Act contains such an exclusion.

¹³⁵ I have so been told. In Ontario the Catzman Committee was presented with a similar request by the Ontario credit unions but recommended against excluding wage assignments from the Act. The advice was heeded.

¹³⁶ For the arguments favouring the inclusion of one-year-plus leases, see R.C.C. Cuming, True Leases and Security Leases under Canadian Personal Property Security Acts (1982-83), 7 C.B.L.J. 251, and J.S. Ziegel, Should Canada Adopt an Article 2A Type Law on Personal Property Leasing? (1990), 16 C.B.L.J. 369, esp. at p. 386 *et seq.*

¹³⁷ The risks were well recognized in the 19th century with the adoption of factors legislation in England and in most of the Canadian provinces. The legislation is still in force. Some American states also required a sign outside the consignee's premises indicating that the trader held goods on consignment, and this concept is partially retained in the Uniform Commercial Code. See UCC 9-326.

alternative financing instrument for the acquisition of industrial, commercial and consumer goods for use.¹³⁸ Given the functional equivalence between a purchase security interest and a finance lease covering the same goods, why should the one be regulated by the PPS legislation and the other not? There was another important reason that favoured the inclusion of one-year-plus leases. The distinction between a security and non-security lease is elusive and often depends on the eye of the beholder. The statutory provisions in those jurisdictions that maintain the distinction provide little guidance and there is much disagreement among judges about the applicable criteria.¹³⁹

Those who opposed the inclusion of one-year-plus leases in Canada did so on the ground that it would convert the PPS Acts into "security and registration" Acts and thus muddy and confuse the purpose of the original legislation. This reasoning overlooked the fact that from the beginning the provincial Acts have applied to absolute as well as security assignments of receivables and that they now also apply to straight transfers of chattel paper.¹⁴⁰ This shows that the legislation was never confined to "pure" security interests. The opponents also argued that lessors should be free to decide for themselves whether they wished to register a non-security lease and to suffer the consequences if they decide wrongly.¹⁴¹

The inclusion of both non-security commercial consignments and leases for more than a year was recommended in the 1969 draft Uniform Act,¹⁴² and the recommendation was endorsed in the 1975 report of the British Columbia Law Reform Commission. Saskatchewan took the lead in actually implementing these recommendations and it was followed shortly afterwards

¹³⁸ For some of the relevant statistics, see Ziegel, *loc. cit.*, footnote 136, at pp. 371-373 and accompanying notes. Such leases are commonly referred to as "finance leases". This is not a term of art but is usually understood to mean a lease covering the expected useful life of the equipment and during the period of which the lessor will recover its full investment from the rentals and other amounts payable under the terms of the lease, and where the lessee in addition assumes full responsibility for the maintenance, repair and insurance of the goods.

¹³⁹ The case law is discussed in the articles by Cuming and Ziegel, *loc. cit.*, footnote 136. The original Ontario Act confused matters more because s. 2(a) invited courts to apply a substance test *and* to consider the parties' intention! The intention test has been deleted in the 1989 Ontario Act. UCC 1-201(37) (definition of security interest) provided substantially more guidance but American courts did not find it very helpful. The Code section was extensively revised in 1987 in conjunction with the adoption of Article 2A on Personal Property Leasing.

¹⁴⁰ See, for example, 1989 Ont. Act, s. 2(b).

¹⁴¹ The 1989 Ont. Act, s. 46(5)(b), encourages the filing of non-security leases by providing that registration of a financing statement does not create a presumption that the Act applies to the transaction. The Americans have addressed the problem about the difficulty of distinguishing between security and non-security leases by extensively revising UCC 1-201(37) and providing a much more complete (but not exhaustive) set of criteria.

¹⁴² *Supra*, the text accompanying footnotes 91-93.

by UPPSA 1982. Had the Catzman Committee had its way the revised Ontario Act would have followed the same route despite the objections raised by lessor companies and members of the Ontario Bar.¹⁴³

As previously noted,¹⁴⁴ for reasons that remain unclear the Ontario Government officials sided with the objectors and the recommendations were not implemented.¹⁴⁵ As a result there remains this key difference between the Model Western Act and the Ontario Act.¹⁴⁶

B. The Section 178 Bank Act Imbroglio

The federal security device in the Bank Act,¹⁴⁷ popularly referred to as the Section 178 security interest, has long been hailed for its distinctive contribution to Canadian chattel security law and for enabling Canadian banks to provide operating capital to large sections of Canadian business against the security of inventory and, in some cases, equipment or installations with a minimum of formality and at low cost. Within limits the accolades were well deserved, given the absence of competing inventory security devices under provincial law¹⁴⁸ and the persistence of the antiquated chattel mortgage legislation. The picture has changed radically however since the introduction of the PPS Acts and it raises the stark policy question whether Section 178 still serves a useful purpose.¹⁴⁹

¹⁴³ It is not clear to what extent the objectors represented the general views of the commercial bar. In the Ziegel-Denomme study, *op. cit.*, footnote 108, a number of questions were included concerning non-security chattel leases. 53.3% of the respondents said they supported the Catzman Committee's recommendations, 8.1% of the respondents gave a non-committal "maybe" answer, and a substantial number, 24.3%, held no opinion. If the latter group is excluded, it appears that 70.4% of the respondents supported the Committee's recommendations. 32.5% of the respondents also said that they "often" registered a financing statement for chattel leases of more than one year's duration, 17.0% said they did so "sometimes", and 40.8% indicated that the question was not relevant for them.

¹⁴⁴ *Supra*, at p. 688.

¹⁴⁵ In fairness to the Ontario officials, it should be added that they did not exclude the possibility of expanding the Act at a later date to include commercial consignments and one-year-plus leases. There has been a complete change of PPSA officials since then, but so far there is no evidence that their successors have had a change of heart.

¹⁴⁶ The Manitoba Act also does not include non-security consignments and chattel leases, but this position will change when Manitoba adopts the Western Provinces Model Act.

¹⁴⁷ R.S.C. 1985, c. B-1, as am.

¹⁴⁸ The wholesale conditional sale agreement was available and was regularly used by vehicle manufacturers and other suppliers of high cost durable goods to dealers, but it was not suitable for low cost items and for fungible commodities. The formalities were also substantially more onerous than for a section 88 security interest. The provincial floating charge had greater flexibility but it did not provide enough security over inventory which, because of its revolving character, could not be converted into a fixed charge prior to crystallization. See further J.S. Ziegel, *The Legal Problems of Wholesale Financing of Durable Goods in Canada* (1963), 41 Can. Bar Rev. 54.

¹⁴⁹ In the Ziegel-Denomme study, *op. cit.*, footnote 108, all but one of the banking respondents said that their banks take concurrent security under section 178 and under

Apart from this issue, Section 178 is a very imperfect instrument and has increasingly shown its age as successive decennial revisions of the Bank Act have sought to touch up its fading glamour with desperate cosmetic devices. The result is a series of provisions with aspirations of comprehensiveness but in fact very fragmentary, haphazardly thrown together, byzantine in complexity, and often unintelligible. Equally lamentable is the absence of a clear conceptual structure and the drafters' obsessions with questions of title and ownership.

These defects would be reasons enough for radical surgery. The new provincial legislation introduced another and still more pressing ground. Section 178 and the provincial regimes are mutually incompatible since they proceed from different conceptual premises.¹⁵⁰ Section 178 confers title rights on the security receiving bank¹⁵¹ and measures priorities between the bank and other competing interests by the same yardstick,¹⁵² to the extent that the Bank Act addresses the problem at all. In the PPS Acts the locus of title is inconsequential¹⁵³ and what the secured party obtains is a "security interest". Priorities between competing security interests are, for the most part, governed by the first to file rule or, in some cases, by the test of which secured creditor first perfected its security interest.¹⁵⁴

Equally important is the fact that the provincial Acts are closed systems. They only provide priority rules for security interests governed by the legislation.¹⁵⁵ The Acts do "indigenize" foreign security interests when collateral subject to a prior security interest is brought into the jurisdiction.¹⁵⁶ However, the drafters did not attempt to resolve the conflict of priorities between a Section 178 and provincially created security interests.¹⁵⁷ Nor did they anticipate banks taking a double security interest covering in part

the provincial PPS Act where a province has adopted such legislation. One major bank said it confined itself to the PPSA security where it was available.

¹⁵⁰ See R.C.C. Cuming and R.J. Wood, *Compatibility of Federal and Provincial Personal Property Security Law* (1986), 65 Can. Bar Rev. 267, and J.S. Ziegel, *Interaction of Personal Property Security Legislation and Security Interests under the Bank Act* (1986-87), 12 C.B.L.J. 73.

¹⁵¹ Section 178(2).

¹⁵² Section 179(1). The subsection has given the courts enormous difficulty and understandably so. Its ambiguity and compression is a model lesson in how a section should not be drafted.

¹⁵³ See, for example, Ont. Act, s. 2(a).

¹⁵⁴ Ont. Act., s. 30(1). The purchase money security interest is an important exception (see s. 33) to the normal priority rules. Separate priority rules are provided for fixtures, accessions and commingled goods.

¹⁵⁵ See *Rogerson Lumber Co. v. Four Seasons Chalet Ltd.* (1980), 113 D.L.R. (3d) 671 (Ont. C.A.), esp. the judgment of Arnup J.A.

¹⁵⁶ Ont. Act, ss. 5-8.

¹⁵⁷ The same was true in Ontario of the interaction between a CSRA security interest and a PPSA interest.

the same collateral, one under Section 178 and the other under provincial law, and failed to deal with this contingency as well.¹⁵⁸

These problems quickly surfaced in the PPS jurisdictions, first in Ontario, then in Saskatchewan, but with divergent results. In *Rogerson Lumber Co. Ltd. v. Four Seasons Chalet Ltd.*¹⁵⁹ a majority of the Ontario Court of Appeal held that the Ontario Act did not apply to Section 178 security interests. The Saskatchewan Court of Appeal reached a different conclusion in two subsequent decisions,¹⁶⁰ although the reasoning is difficult to follow. In a still more recent and controversial decision,¹⁶¹ the Ontario Court of Appeal held that the definition of "security interest" in the Ontario Act is broad enough to embrace a Section 178 security interest. Unfortunately, the court did not explain satisfactorily how two such incompatible security interests can coexist. So far as the second question is concerned (the effect of a bank taking both security interests in the same collateral), the case law is very sparse and a careful judgment is still needed to clarify the position.¹⁶²

What should be done to resolve these imbroglis? The lack of compatibility between Section 178 and the provincial Acts is the more important of the two issues and it has attracted the most attention. During the drafting of the revised Ontario Act the chartered banks requested that the Ontario Act be amended to make it clear that a perfected Section 178 security interest would have priority over an unperfected PPSA interest. The Catzman Committee rejected the request but persuaded the Minister to write the federal Minister of Finance urging consultation between federal and provincial officials with a view to harmonizing the two security interests. Unfortunately the Minister of Finance did not pursue the invitation. Other parties, including the MUPPSA Committee, urged a complete overhaul of Section 178, but these suggestions also went unheeded. The WCPPSA Committee took more decisive action and the Model Western Act explicitly provides that the Act does not apply to a federal security interest, including

¹⁵⁸ Banks take the double security because of the restrictive coverage of section 178.

¹⁵⁹ *Supra*, footnote 155.

¹⁶⁰ *Re Bank of Montreal and Pulsar Ventures Inc.* (1987), 42 D.L.R. (4th) 385 (Sask. C.A.), foll'd in *Re Birch Hills Credit Union Ltd. and CIBC* (1989), 52 D.L.R. (4th) 113 (Sask. C.A.). The decisions are critically discussed by Professor Cuming in (1988), 14 C.B.L.J. 315.

¹⁶¹ *Bank of Nova Scotia v. Int. Harvester Credit Corp.* (1990), 74 O.R. (2d) 738 (Ont. C.A.). See the comments by R.C.C. Cuming in (1991), 18 C.B.L.J. 118, and J.S. Ziegel in (1991), 6 B.F.L.R. 343.

¹⁶² The only reported judgment appears to be that in *Birch Hill C.U. v. CIBC* (1987), 7 PPSAC 250 (Sask. Q.B.). See Cuming and Wood, *loc. cit.*, footnote 150, at pp. 287-292, and Ziegel, *ibid.*, at pp. 354-358.

an interest under the Bank Act.¹⁶³ Ontario has been urged to follow the same course but the province has not so far shown its hand.

It will be appreciated that amending the provincial Acts is only a bandaid¹⁶⁴ and does not address the major question: what should be done about Section 178? There are at least three possible answers, short of doing nothing, which seems inconceivable. Section 178 could be revised along PPS lines to make it coherent and respectable and to harmonize it with the provincial PPS regimes. This would be feasible but it would be a challenging task to ensure complete harmonization with each of the PPS Acts. Some might also think it odd to introduce a federal PPS law for the sole (or at least primary) purpose of updating the Section 178 security.

A second solution would be simply to repeal Section 178 on the grounds that most of the common law provinces have already adopted PPS legislation and that it is only a matter of time before the remaining provinces fall into line. Repeal would also meet Quebec's long standing criticism that the conceptual structure of Section 178 is seriously at odds with civil law principles and creates much friction with them. The third solution falls short of the draconian nature of the second, but also avoids the inevitable duplication and overlap involved in the adoption of a federal PPS law. This solution would be to leave Section 178 in its current state but to suspend its operation by order in council in those provinces that have an acceptable PPS regime and one that does not discriminate against banks.¹⁶⁵ This carrot and stick solution would give the federal government the best of both worlds. The non-PPSA provinces would be given a strong incentive to update their chattel security regimes; the existing PPS jurisdictions would be deterred from dismantling the legislation. No doubt this approach to the federal-provincial interface could be considerably refined.¹⁶⁶

¹⁶³ See Alberta and B.C. Acts, s. 4(b) in both cases. Note however that s. 4(b) does not address the effect of a bank taking concurrent security interests under s. 178 of the Bank Act and under provincial law.

¹⁶⁴ And probably not a successful one at that. There appears little doubt that the federal government has the constitutional authority to amend section 178 to provide that a section 178 security interest has priority over an unperfected provincial security interest whether or not the federal interest is also perfected under provincial law. See *Tennant v. Union Bank of Canada*, [1894] A.C. 31 (P.C.).

¹⁶⁵ See Ziegel, *loc. cit.*, footnote 150, at p. 94.

¹⁶⁶ The Ziegel-Denomme study, *op. cit.*, footnote 108, included several questions about the respondents' views on the future of section 178. 56.9% of the respondents were in favour of a federal PPS Act to regulate security interests governed by federal law, 20.4% were opposed, and 22.7% had no views. A few of the respondents added individual comments indicating their awareness of the fact that a federal PPS Act would not solve all problems.

Even those respondents who supported adoption of a federal Act did not view it as the only solution. The respondents were asked whether, in the alternative, the federal government should repeal ss. 178-180 and let banking security interests be governed exclusively by provincial law. 68.4% replied yes, 9.2% said no, and 22.3% held no opinion.

The federal government's own thinking is still at an early stage. At the beginning of 1991 the Department of Finance circulated privately a *Position Paper on Revising Bank Act Security* prepared for the Department by Derrick C. Tay and several of his colleagues at Osler, Hoskin & Harcourt in Toronto. The paper recommends the adoption of a federal PPS regime to replace Section 178 and the other Bank Act security provisions. Importantly, the paper also envisages that the Act would be binding on the banks and that the banks would no longer be free to choose to be governed by federal or provincial law or to use both. It is safe to predict that this proposal will be vigorously opposed by the provinces as likely to jeopardize the viability of the provincial registries if it is adopted. The banks are by a wide margin the registries' best customers. The Tay paper gives some unconvincing reasons for the need to retain a federal PPS Act and why the federal government should not vacate the field in favour of the provinces.¹⁶⁷ The first is that banks are national institutions, that lending is a key function of their existence, and that they have been able to play both roles so successfully because of the availability of Section 178. The second reason is that the provincial PPS Acts are not uniform and (one is led to infer) the banks would have to contend with a variety of provincial Acts if they were denied the option of obtaining security under federal law. The third reason is that a provincial Act may discriminate against the banks or at any rate make their lending and security operations much more difficult. Even if one accepts the soundness of these reasons, they fall far short of justifying the need for an exclusive federal chattel security regime.

C. *The Demise of the English Style Floating Charge*

One of the most radical changes wrought by the PPS legislation—or so it must seem at first sight—is the abolition of the Anglo-Canadian equitable floating charge¹⁶⁸ and its conversion into a regular statutory security interest with all the attributes and incidents bestowed on the statutory interest. The conversion brings to an abrupt end more than a hundred years of case law and a wealth of commentaries, and relegates to legal history, so far as personal property security is concerned,¹⁶⁹ a security device

One of the unsolicited comments was particularly illuminating. The respondent pointed out that the banks hardly ever take section 178 security itself alone, that they usually take a general security interest governed by provincial law as well, and that section 178 could therefore be deleted.

¹⁶⁷ D.C. Tay *et al.*, *Position Paper on Revising Bank Act Security* (1991), pp. 31-33.

¹⁶⁸ Not to be confused with the pre-Code floating lien in American law, which could be legal or equitable and in either event gave the secured party a fixed interest in the collateral to the extent that it was recognized at all in pre-code state law.

¹⁶⁹ The fact that the PPS Acts do not, with minor exceptions, cover realty interests may create difficulties where a floating charge covers both personalty and realty interests or where provincial corporate legislation permits perfection of floating charge interests in

which still serves as the daily work horse of English banking practice. Gone too are all the learning and disputations about when a floating charge crystallizes. How did this dramatic change come about? Was it justified? What have been the practical results? These are the questions I want to address briefly in this section.¹⁷⁰

There can be no doubt that the Catzman Committee, in drafting the 1967 Ontario Act, meant floating charges to be included. This clearly emerges from the types of security agreement illustratively listed in the scope section.¹⁷¹ Surprisingly, the inclusion raised few eyebrows when the draft bill was unveiled in 1964, nor did the Catzman Committee deem it necessary to justify it. Rather, subsequent commentary focused on the effects of the absorption of floating charges with other security interests, and in particular on when a security interest "in the nature of a floating charge" is deemed to attach to the collateral.¹⁷²

Had the Catzman Committee been pressed for an answer, it would surely have been that since the overriding objective of the Act was to integrate all the existing security devices this purpose would have been defeated had floating charges been excluded. It would have led to the survival of two concurrent chattel security regimes with all the complexities and difficulties shown by the Act's exclusion of corporate securities.¹⁷³

Still, granting the legitimacy of this concern, why was the floating charge totally scuttled: why did the Act not retain the essential features of the floating charge and provide a set of rules to give effect to them? As previously noted,¹⁷⁴ the 1969 version of the Model Uniform Act did take some steps in this direction. With the benefit of hindsight, the writer is persuaded that this was a mistake and that the Catzman Committee was right not to accord floating charges a special status.

land by registration under the Act. See R.J. Wood, *The Floating Charge on Land in the Western Provinces* (publication pending in the Can. Bus. L.J.).

¹⁷⁰ For earlier discussions of the issues see, *inter alia*, A. Abel, *Has Article 9 Scuttled the Floating Charge?* in J.S. Ziegel and W.F. Foster (eds.), *Aspects of Comparative Commercial Law* (1969), ch. 27; F.M. Catzman, *Personal Property Security Law* (1976), pp. 62-66; P. Maddaugh, *Security on Personal Property in the 1980's*, in LSUC, *Special Lectures 1982: Corporate Law in the 80s* (1982), 349, p. 357 *et seq.*; J.S. Ziegel in LSUC, *Special Lectures 1985: Commercial Law: Recent Developments and Emerging Trends* (1985), 1, at pp. 11-17.

¹⁷¹ S. 2(a)(i). It also appears in the 1989 Act.

¹⁷² See Catzman, *op. cit.*, footnote 170. The question is answered in s. 11(2) of the 1989 Ont. Act and s. 12(1) of the B.C. Act. In both cases the answer is that the security interest attaches when there is a security agreement, value is given, and the debtor has rights in the collateral, "unless the parties have agreed to postpone the time for attachment, in which case the security interest attaches at the agreed time". (Ont. Act).

¹⁷³ See *supra*, the text accompanying footnotes 91-93.

¹⁷⁴ *Supra*, p. 696.

I reach this conclusion for two principal reasons. The dividing line between a fixed security interest and a floating charge has always been tenuous in Canadian law, and there was no virtue in perpetuating the uncertainty. The English theory is that a floating charge is created whenever a security interest is created in circulating capital (that is, revolving assets) and that the parties cannot change the characterization by calling the security interest a fixed charge unless the secured party polices the disposition or collection of the collateral and requires the proceeds to be paid into a separate account.¹⁷⁵ In Canada, however, a wholesale conditional sale agreement and a Section 178 security have always been regarded as fixed interests even though they involve revolving assets¹⁷⁶ and regardless of the degree of control exercised by the secured party over the disposition of the collateral. There were also strong precedents for treating a chattel mortgage on inventory and a security assignment of book debts in the same way.¹⁷⁷

The other reasons for not lamenting the demise of the old learning are that the floating charge never really met its objectives and that the interests it did protect successfully can be protected just as satisfactorily by other techniques. A floating charge is often said to trigger the following consequences. First, it enables the debtor to continue to carry on business without interference from the secured creditor before the charge crystallizes. Second, it allows third parties to deal with the debtor without worrying about whether the secured creditor authorized the transaction and without having to secure the secured creditor's consent. A third important consequence often attributed to the floating charge is that it leaves the debtor with a "free cushion" of assets with which to satisfy the debtor's unsecured creditors prior to crystallization of the charge.

The first two consequences ensue only partially since it is customary for secured debentures to contain restrictions on the debtor's ability to deal with its assets or to give further security ranking *pari passu* or in priority to the floating charge. It is now settled that a competing secured party will be bound by such restrictions if it is deemed to have notice of them, as will usually be the case where the charge has been registered.¹⁷⁸

¹⁷⁵ See the English authorities cited in McLachlin J.A.'s majority judgment in *B.C. v. Federal Business Development Corp.*, [1988] 1 W.W.R. 1 (B.C.C.A.), and *cf.* R.M. Goode, *Legal Problems of Credit and Security* (2d ed., 1988), pp. 51-58, for a discussion of the exceptions to the rule.

¹⁷⁶ I appreciate of course that conditional sale agreements fall into a separate category because of the seller's retention of title. Nevertheless, the general point remains valid.

¹⁷⁷ See, for example, *Dedrick v. Ashdown* (1888), 15 S.C.R. 227, and the other precedents cited in Lambert J.A.'s dissenting judgment in *B.C. v. Federal Business Development Corp.*, *supra*, footnote 175. See, generally, R.J. Wood, *The Floating Charge in Canada* (1989), 17 Alta. L. Rev. 191.

¹⁷⁸ See Goode, *op. cit.*, footnote 175, pp. 84 *et seq.* Professor Goode claims that such restrictions will also bind a subsequent buyer with notice of the restriction, *sed quare*.

Even if it is true that the floating charge holder cannot intervene in the conduct of the debtor's business before crystallization, it is not a meaningful restriction. What difference does it make to a debtor whether a breach of the agreement leads to instant reprisal or whether imposition of the sanction must be preceded by crystallization of the charge?

So far as consensual transactions with other third parties not involving the creation of competing security interests are concerned, it is a moot point how far they should be protected and when third parties should be required to obtain the secured party's consent. All the Canadian PPS Acts contain a range of provisions protecting buyers of goods in ordinary course and transferees of negotiable and near negotiable instruments, documents of title, and securities.¹⁷⁹ It is arguable that the sections do not go far enough¹⁸⁰ and that the language in section 25(1)(a) of the Ontario Act precluding a secured party from following collateral where the secured party has expressly or impliedly authorized dealing with the collateral could be strengthened. The important point to bear in mind however is that these issues are not peculiar to floating charges but arise whenever a choice has to be made between security of title and security of commercial transactions.

English judges at the turn of this century were much too sanguine in believing that they had succeeded in carving out a cushion of free assets for the benefit of the debtor's unsecured creditors. There is no evidence that creditors of a debtor who has given a floating charge fare better than creditors of a debtor who has given a fixed charge,¹⁸¹ and the reason is obvious. No holder of a floating charge will stand by idly and watch its security being eroded by the claims of judgment creditors and others. It will crystallize its security quickly and any victory won by the debtor's creditors will be short lived.

Finally, what have been the practical effects of the elimination of the floating charge in the PPS jurisdiction? So far as one can tell, surprisingly little. The writer is only aware of two significant cases. In the one,¹⁸² involving a contest between a trustee in bankruptcy and the floating charge holder, the Ontario Court of Appeal found that the equitable rules and

¹⁷⁹ See, for example, 1989 Ont. Act., ss. 28-29, and J.S. Ziegel (1988), 15 C.B.L.J. 242.

¹⁸⁰ In particular it may be felt that the ordinary course protection conferred under s. 28(1) of the Ontario Act should not be confined to buyers and lessees of goods but should extend to other types of collateral as well. It was extended in *Re Urman* (1984), 44 O.R. (2d) 248 (Ont. C.A.) to the sale of mortgage debts by a mortgage broker but without any discussion of the issue.

¹⁸¹ This emerges quite clearly from the complaints of unsecured creditors referred to in the Report of the Insolvency Law Review Committee, Cmnd. 8558, 1982, paras. 105-106.

¹⁸² *Re Huxley Catering Ltd.* (1982), 134 D.L.R. (3d) 369 (Ont. C.A.).

the Ontario Act yielded the same result. In the second,¹⁸³ the Act did make a difference and the secured party was able to defeat a Crown lien when it would not have succeeded had it only held a floating charge. This may disturb some readers and prove that the PPS legislation has gone too far. I would argue that the relationship between secured and unsecured creditors should not depend on the accidents of characterization but should be decided in a more principled manner.

D. Registration Problems

From a practitioner's point of view, the single most important feature of the new Acts are the registration requirements. An unperfected security interest is a very frail creature, and in the great majority of cases perfection of the security interest will be by registration of a financing statement. Hence the critical importance of the registration requirements and the sanction imposed for non-compliance.

At first glance the registration requirements could not be simpler. As previously explained, all the provincial Acts establish a centralized and computerized registry system¹⁸⁴ so that, other than in transactions involving contacts with more than one jurisdiction,¹⁸⁵ the secured party should have no difficulties knowing where to register. So far as the actual document required to be filed is concerned, the substitution of a notice filing system, involving the registration of a simple one-page financing statement, for a copy of the security agreement mandated under the pre-PPSA legislation has enormously lightened the secured party's burden. It has been made still easier by the greatly improved searching facilities, by the availability of a registrar's certificate with respect to subsisting security interests,¹⁸⁶ by the existence of a compensation fund for errors made in the registry,¹⁸⁷ and by established and emerging technologies enabling electronic searches and registrations to be made from secured creditors' premises.¹⁸⁸

Given such a favourable picture, where are the clouds? There are a number, but the most important ones are these: the "first to file" rule and the now well established doctrine that even actual knowledge of a

¹⁸³ *Royal Bank v. G.M. Homes Inc.* (1984), 4 PPSAC 116 (Sask. C.A.).

¹⁸⁴ For an excellent description of the pre-1989 Ontario system, see Henry J.'s judgment in *Fed. Bus. Dvpt. Corp. v. Registrar* (1984), 45 O.R. (2d) 780 (Ont. H.C.). An early comparison of the Ontario and Saskatchewan systems, now somewhat dated, appears in R.C.C. Cuming (1981), 46 Sask. L. Rev. 5, at pp. 21-28.

¹⁸⁵ All the PPS Acts, with the exception of Manitoba's, contain substantially the same conflict of laws rules. See, for example, Ont. Act, ss. 5-8.

¹⁸⁶ See, for example, Ont. Act, s. 43(a); B.C. Act, s. 48.

¹⁸⁷ Ont., s. 44; B.C., ss. 69(2), 52-53. The B.C. compensation provisions are substantially broader than the Ontario ones.

¹⁸⁸ The electronic links are already in place in British Columbia (see B.C. Reg. 279/90, Part 3) and are partially operational in Ontario. See *supra*, footnote 125.

prior unperfected security interest will defeat the priority of a subsequent secured party which files first,¹⁸⁹ the stringent requirements for accuracy in the financing statement¹⁹⁰ and, third, the requirements for reperfecting of the security interest when prescribed events have taken place.¹⁹¹

A common philosophy binds these rules and this is the importance of protecting the integrity of the registry system and of discouraging litigation over what a competing party knew or did not know. These are important values but many practitioners and not a few judges have been troubled by the undeserved windfall they generate for a third party, most often a trustee in bankruptcy. Does it not seem a little perverse that the trustee must rely on defective financing statements to claw back assets for the benefit of unsecured creditors?

The feature that most troubles secured creditors' lawyers is applying an objective test to determine when the secured party should be penalized for a defective financing statement.¹⁹² The Model Western Provinces Act, following Article 9, provides that a defect in the financing statement does not invalidate the statement unless it is "seriously misleading".¹⁹³ The Ontario Act, more verbosely, uses the test of whether "a reasonable person is likely to be misled materially by the error or omission".¹⁹⁴ It is clear that both tests are objective—not whether the complainant was misled but whether she or some hypothetical third party *might* have been misled.¹⁹⁵ The debate

¹⁸⁹ For instance, Ont. Act, s. 30(1).1. *Robt. Simpson Co. Ltd. v. Shadlock & Duggan* (1981), 31 O.R. (2d) 612 (Ont. H.C.) first affirmed the doctrine under the original Ontario Act. Under that Act lack of knowledge of the prior unperfected security interest was relevant with respect to the claims of execution creditors, general creditors when represented by a trustee in bankruptcy and such like, and buyers of the collateral. See 1967 Act, s. 22(1)(a)(ii), (iii), and 22(1)(b) and 22(2). The 1982 Act restricts the relevance of knowledge to buyers. See s. 20(1)(c).

¹⁹⁰ The cases are legion and account for most of the PPSA litigation. For representative examples, see *Re Owens* (1979), 26 O.R. 468 (Ont. C.A.), and *Re Gibbons* (1984), 45 O.R. (2d) 664 (Ont. C.A.), and the discussions in Cuming, *loc. cit.*, footnote 127, and J.S. Ziegel (1979), 3 C.B.L.J. 106.

¹⁹¹ For example, in the case of non-mobile goods, (i) where the collateral is brought into the province from another jurisdiction or, (ii) in the case of intangibles, where the debtor has changed the location of its chief office; or (iii) where the secured party consents to or learns that the debtor has transferred the collateral to another party or learns that the debtor has changed his/her name; and where (iv) the original registration period has expired. See Ont. Act, ss. 5(2), Ont. s. 7(2), and s. 48. The provisions in the other Acts are substantially the same.

¹⁹² The Catzman Committee, when drafting the 1989 Act, received more submissions on this point than on any other. The respondents in the Ziegel-Denomme Study, *op. cit.*, footnote 108, were more ambivalent and could not make up their minds whether the integrity of the registry system or the avoidance of undeserved windfalls was more important.

¹⁹³ B.C. Act, s. 43(6).

¹⁹⁴ S. 46(4).

¹⁹⁵ To make doubly sure that the statutory language is not misunderstood the Western Provinces Model Act contains a separate subsection to the effect that it is not necessary

over this issue would warrant less attention if the debtor name requirements in the financing statements were easy to comply with, and if every secured creditor could reasonably be expected to hire legal help in completing the statements or ensure that its in-house staff is adequately trained for the purpose. The experience to date shows otherwise. It is safe to predict that secured creditors will continue to press their case for a subjective test of misleadingness.

E. *The Interface of Provincial Chattel Security Law and Federal Insolvency Law*

The acid test of the worth of a security interest is whether it will be respected on the debtor's bankruptcy. How it will fare will depend on federal law.¹⁹⁶ In terms of the existing Bankruptcy Act¹⁹⁷ the provisions could not be more favourable.¹⁹⁸ The Act makes it abundantly clear that the debtor's bankruptcy does not freeze the secured creditor's right to realize its security and that the debtor's property vests in the trustee subject to the secured creditor's rights.¹⁹⁹ The trustee has some modest powers to require the secured creditor to value its security and to redeem the collateral for that amount, or to require the collateral to be sold if the trustee is dissatisfied with the evaluation.²⁰⁰ These provisions do not seriously detract from the secured creditor's lofty position.

It seems then that secured creditors have little to worry about, but this is not accurate. There are increasing assaults on the secured creditor's priority status at both the provincial and federal levels, and all the available signs point to more such encroachments in the future. Here is a short inventory of what has been happening. At the provincial level a substantial number of provinces have long imposed restrictions on the secured creditor's right to seize consumer and, in some jurisdictions non-consumer, collateral

to prove that any one was actually misled by the defective financing statement. See B.C. Act, s. 43(8). The Ontario Act contains no counterpart, but Bell J. had no difficulty in reaching the same result in the first reported case on the section. See *In re Weber* (1990), 73 O.R. (2d) 238 (Ont. H.C.).

¹⁹⁶ The Constitution Act, s. 91(21), assigns jurisdiction over bankruptcy and insolvency law to the federal government, but the courts have been willing to give the provinces a participatory role so long as there is no direct conflict between the federal and provincial rules. See *Donald A. Robinson v. Countrywide Factors Ltd.*, [1978] 1 S.C.R. 753 and, with respect to security interests, *Paccar Financial Services v. Sinco Trucking Ltd.* (1989), 57 D.L.R. (4th) 438 (Sask. C.A.).

¹⁹⁷ R.S.C. 1985, c. B-3.

¹⁹⁸ Hence Mr. Mendelsohn's question: "Canada: A Secured Creditor's Paradise?", in *Meredith Memorial Lectures* 1985, p. 105.

¹⁹⁹ Bankruptcy Act, ss. 69(2), 70(1) and 71(2). With the leave of the court the trustee can obtain up to a six months' stay on the secured creditor's realization rights, but in practice the courts are reluctant to grant it.

²⁰⁰ *Ibid.*, ss. 128(1), (3), 129(1), and 130.

or to sue for a deficiency if the collateral has been repossessed.²⁰¹ At the judicial level the courts have imposed reasonable notice requirements for the enforcement of demand debentures²⁰² and, in some cases, other types of security agreement,²⁰³ even though the agreement itself does not entitle the debtor to receive notice.

Still more troubling from the secured creditor's point of view is the well established practice of provincial and federal governments conferring superpriority status on their own, usually unregistered, tax and other claims against the debtor and fortifying them with the creation of first liens and deemed trusts in their favour.²⁰⁴ Fortunately for secured creditors the federal government has heeded the widespread complaints about the disruptive effects of deemed trusts and superpriority claims, and the Bankruptcy Bill²⁰⁵ currently before Parliament reduces their scope significantly. New section 67(2) abolishes all provincial and federal statutory deemed trusts that would not enjoy this status in the absence of the legislation. However, this rule does not apply to deductions required to be made and remitted by a debtor under the Income Tax Act, the Canada Pension Plan, the Unemployment Act and comparable provincial provisions.²⁰⁶ So far as Crown lien claims²⁰⁷

²⁰¹ For the details, see R.C.C. Cuming (1973), 8 U.B.C. L. Rev. 61; J.S. Ziegel (1973), 36 Mod. L. Rev. 479; B.C. Law Reform Commission, Working Paper No. 4.

²⁰² This doctrine derives its authority from Estey J.'s judgment in *R.E. Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726, and has given rise to much costly litigation in lower courts.

²⁰³ See McKinlay J.A.'s judgment in *Kavcar Investments Ltd. v. Aetna Financial Services Ltd.* (1989), 62 D.L.R. (4th) 277 (Ont. C.A.), and earlier authorities cited there.

²⁰⁴ For a review of the earlier case law, see W.A. Bogart, *Statutory Claims and Personal Property Security Legislation: A Proposal* (1983), 8 C.B.L.J. 129. In *B.C. v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, (1989), 59 D.L.R. (4th) 726, the Supreme Court of Canada held the statutory provisions were not true trusts but were transparent attempts to circumvent the preferred creditors' ranking in s. 136 of the Bankruptcy Act. As a result of the Supreme Court's decision secured creditors now have an added incentive to put the debtor into bankruptcy and this recourse has been upheld as not amounting to an abuse of the bankruptcy process: *Bank of Montreal v. Scott Road Enterprises Ltd.* (1989), 57 D.L.R. (4th) 623 (B.C.C.A.).

Both the B.C. and Ontario Acts contain provisions for the registration of Crown claims, but they differ in scope and character. See B.C. Act, ss. 110(2) and (5) and Ont. Act, s. 30(7).

Evolving environmental legislation, federal and provincial, also imposes heavy burdens on secured lenders to clean up environmentally hazardous sites where the lender or its receiver is in possession of the debtor's premises. See, for example, *Panamericana de Bienes Y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, Alta. C.A. June 12, 1991, revg. (1989), 80 C.B.R. (N.S.) 84 (Alta. Q.B.); *Can. Trust Corp. v. Bulora Corp.* (1980), 34 C.B.R. (N.S.) 145 (Ont. H.C.), aff'd (1981), 39 C.B.R. (N.S.) 152 (Ont. C.A.).

²⁰⁵ Bill C-22, 1991. See, *supra*, footnote 124.

²⁰⁶ *Ibid.*, s. 67(3).

²⁰⁷ Referred to in new s. 87 as a "security" provided by federal or provincial legislation. "Security" is not defined in Bill C-22 but appears as part of the definition of "secured creditor" in s. 2 of the Bankruptcy Act.

are concerned, these are subject to some complex provisions, the intent of which appears to be that, with some important exceptions,²⁰⁸ future Crown liens will not be valid in bankruptcy unless the lien has been registered prior to the debtor's bankruptcy pursuant to a prescribed system of registration. Even when registered such interests are subordinate to security interests that have been previously perfected and are only valid in respect of amounts owing at the time of registration.²⁰⁹

However, the benefits conferred under Bill C-22 are offset by important encroachments on future secured creditors' rights. The bill contains a much revised version of the commercial Proposals provisions of existing Part III of the Bankruptcy Act. As a result secured creditors will be included in the range of creditors affected by a proposal and will be subject to a far reaching stay of proceedings,²¹⁰ which may be even broader in scope than the order that may be made under section 11 of the Companies' Creditors Arrangement Act.²¹¹ The latter Act will not be repealed, at least not immediately,²¹² and in future debtors will have a choice of proceeding either under the CCAA or under the new Part III.

Bill C-22 contains several other important restrictions on secured creditors' rights that need to be mentioned briefly. First, the bill confers a new right on unpaid suppliers of goods²¹³ to bankrupt business debtors that entitles them to demand their return from the trustee if the demand is made within thirty days of delivery and the goods are still in identifiable form and have not been resold in the meantime. The new right is given superpriority status and ranks "above every other claim or right against the purchaser in respect of those goods".²¹⁴ Secured creditors have already predicted that the introduction of this seller's "privilege" into the common law jurisdictions²¹⁵ will have a significant effect on bankers' lines of credit secured on the debtor's inventory.

Second, the judicially crafted *Lister v. Dunlop* rule is given statutory status, and in future secured creditors will be required to give the debtor

²⁰⁸ *Viz.* statutory lien claims in respect of amounts required to be collected or withheld under enumerated sections of the Income Tax Act and the Unemployment Insurance and Canada Pension Plan Acts and their provincial counterparts, *ibid.*, s. 88.

²⁰⁹ Ss. 86-88. These provisions appear in alternative versions.

²¹⁰ *Ibid.*, ss. 69(1)-(4).

²¹¹ R.S.C. 1985, c. C-36.

²¹² Bill C-22 envisages that the Act's future status will be reviewed, together with the provisions of the Bankruptcy Act, during a three year period following proclamation of the bill; *ibid.*, s. 157.

²¹³ S. 81.1.

²¹⁴ S. 81.1(5).

²¹⁵ It has long been a feature of Quebec law. See Quebec C.C. 1543 and 1988-89, and Reinhardt, Rights of Unpaid Suppliers in Insolvency—The Quebec Experience, Fasken Martineau Davis, Commercial Insolvency Bulletin, Sept. 1991, p. 6.

ten days' notice before enforcing their rights against the insolvent's property.²¹⁶ This requirement is clearly also intended to cover the appointment of a receiver and, even more significant, appears to apply to enforcement measures by the secured creditor against *any* part of the debtor's property however small in relation to the debtor's total assets. Finally, Bill C-22 establishes a supervisory regime for all privately appointed receivers and imposes good faith and reasonable diligence standards on their conduct.²¹⁷ The latter provisions are not likely to ruffle many feathers since comparable provisions already appear in the Canada Business Corporations Act²¹⁸ and in many of the provincial PPS Acts.

The lessons to be drawn from this cursory examination of recent (and in some cases not so recent) developments is plain. Secured creditors can no longer take their insulated status for granted. They are being besieged on many sides. The contractual and statutory model of secured creditors' rights reflected in the PPS Acts presents a seriously incomplete picture. If the process of attrition continues, secured creditors may well wonder whether the new provincial legislation, despite its many merits, has not given them a pyrrhic victory.

F. *More About Harmonization of Provincial and Federal Legislation*

In earlier parts of this article I have described in some detail the efforts made over the past twenty-seven years to secure uniformity, and if not uniformity at least substantial harmonization, among the common law provinces adopting PPS legislation. I have also described, in abbreviated form, the conspicuous gaps that separate Section 178 of the Bank Act from the new provincial chattel security law regimes and the long delay in seriously addressing this problem.

In this section I wish to offer a short critique of these developments, or the lack of them. Turning first to the provincial picture, although it is infinitely better than the federal one, it leaves little room for complacency. Twenty-four years after the adoption of the first Ontario Act, the Maritime provinces still have to enact any type of PPS legislation. Among the other common law jurisdictions four very different versions of the legislation exist at the present time. Even if we assume that Manitoba and Saskatchewan and all the Maritime provinces adopt the Western Canada version in the foreseeable future this will still leave about sixty per cent of common law Canada operating under its own, Ontario's, version. There is no evidence that Ontario is ready to fall into line with the Western Canada version.

Given the enormous efforts that have been made to promote harmonization and to draft uniform or model Acts, how do we explain these

²¹⁶ Bill C-22, s. 150(1) adding new s. 244.

²¹⁷ *Ibid.*, ss. 245-252.

²¹⁸ R.S.C. 1985, c. C-44, as am.

ragged results? Who or what is to blame? What went wrong? Why have the Americans with nine times Canada's population been able to do so much better than we have, and in a much shorter span of time?

One answer would be to say that what has happened in the chattel security area is no different from the experience in other commercial law areas falling under provincial jurisdictions.²¹⁹ This may be true, but in this case we can pinpoint the relevant factors with some particularity. One concerns the role of the sponsors of UPPSA 1982. The Canadian Bar Association was never an enthusiastic sponsor and did little to promote the Uniform Act once it had been adopted. The other sponsor, the Uniform Law Conference, showed much goodwill and did what it always does with a new uniform act—leave it up to individual provinces to decide whether or not they wish to adopt and in what form. American experience with the Uniform Commercial Code abundantly shows that uniformity rarely comes about by itself but requires many willing shoulders to the wheel—not once but on an ongoing basis—and an appropriate organization to support the workers in the field. American experience also illustrates the important role played by members of the bar, within and outside of the American Bar Association, and the close cooperation between the ABA, the American Law Institute and the National Conference of Commissioners on Uniform State Legislation. Why should similar levels of cooperation not be possible among their Canadian counterparts? Although there are intermittent exceptions, on the whole practising lawyers in Canada show very little interest in systematic and progressive development of Canadian commercial law but appear to be content to leave the initiatives to the federal and provincial governments.²²⁰

The Western Canada PPSA Committee deserves great credit for its accomplishments, both in adopting the Western Canada model act and in establishing the Canadian Conference. However, its record is also not flawless. Its founders read far too much into the Catzman Committee's activities and the discouraging responses of one or two Ontario ministers. There was no animus in the Catzman Committee against UPPSA 1982, as the writer can attest from personal knowledge.²²¹ In fact, the Committee made a conscious effort to follow UPPSA 1982 as closely as its divergent membership permitted. Had its version of the 1989 Ontario Act been adopted it would have been closer to UPPSA 1982 than are any of the versions of the Western Canada model. One must also keenly regret the fact that

²¹⁹ On this, see J.S. Ziegel, *Uniformity of Legislation: The Conditional Sales Experience* (1961), 39 *Can. Bar Rev.* 165, and *Symposium: Harmonization of Provincial Legislation in Canada: The Elusive Goal* (1986-87), 12 *C.B.L.J.* 387.

²²⁰ The author's observations are based on many years' experience in this area and on much exposure to practising lawyers' psychology.

²²¹ The writer was a member of the Committee from 1976 onwards and played an active role in the drafting of the 1989 Ontario Act.

the Western Canada Committee never attempted to liaise with the UPPSA Committee or its sponsors to advise them of its plans, to ensure continuity of effort, and to enlist their assistance in bridging the differences with Ontario. There is also cause for concern about the composition of the Canadian Conference. Practitioners are conspicuous by their absence, there are no law school representatives from central Canada, and it includes not a single member of the Catzman Committee. All these features are in sharp contrast with the much better balanced composition of the Article Nine Study Committee recently established by the sponsors of the Uniform Commercial Code.²²²

At the end of the day it must be confessed that much of the responsibility for the current confusion lies with Ontario. Ontario pioneered the introduction of Article 9 to Canada, but has failed to maintain its leadership role. In the 1960s and 1970s the Catzman Committee was very anxious to promote uniformity between the Ontario Act and the other prospective provincial acts, but did little to implement this goal. This was despite the fact that the Catzman Committee was strongly represented on the MUPPSA Committee and had many opportunities to ensure the future integrity of UPPSA 1982.

Regrettably too, the Ontario government itself has played a very ambiguous role. It was an earlier generation of Ministry officials who were responsible for the many important departures from UPPSA 1982 and, in the author's view, without sufficient reasons.²²³ It seems ironic therefore that a later group of officials from the same Ministry are now playing an active role in the Canadian Conference. One must hope that they will use their position to help bridge the important differences between the Ontario Act and the Western Provinces Model Act.

So far as the federal developments are concerned, one's concern is not over what has happened but over what has *not* happened. Even making allowances for the fact that for the past ten years Department of Finance officials have been preoccupied drafting the new financial institutions legislation, it does not explain why the Section 178 problems have been ignored for so long. A task force could have been formed representing the various interest groups so as to make sure that an acceptable solution would have been ready for inclusion in the new Bank Act currently before Parliament.²²⁴ Instead we face the prospect of a further long wait—perhaps as long as another ten years—before remedial legislation is enacted. The federal government should have been able to do much better.

One question that will surely occur to the impartial observer is whether Canada really needed so many versions of the PPS legislation when the

²²² See *supra*, footnote 24.

²²³ See Ziegel, *loc. cit.*, footnote 41.

²²⁴ See Bill C-19, 1991, introduced in Parliament on Dec. 19, 1990.

Americans have been able to get by with so relatively few. What prompted provinces such as Alberta and British Columbia to enact significant amendments so soon after the adoption of the Western Model Act? I have no simple answer but I suspect it has much to do with the drafters' irresistible urge to continue to improve an already good product and to provide solutions to problems of interpretation and application that may, just may, arise in the future. In my view, too much refinement is counterproductive and will make it that much more difficult for the average commercial lawyer to understand the Act without an excessive investment of time.²²⁵

Conclusion

It is time to conclude. Personal Property Security Law has established a strong presence in Canada. Undoubtedly it is here to stay. Many challenges lie ahead in the future. One must hope that they will be met, and met significantly better than in the past.

²²⁵ The Ziegel-Denomme Study, *op. cit.*, footnote 108, showed that even in a metropolitan centre as large as Toronto most commercial lawyers only spend a small percentage of their time drafting and negotiating chattel security agreements. 51.4% of the respondents spent less than 10% of their time on chattel security activity, 42.5% devoted between 10-50% of their time to it, and only 6.2% spent more than half of their time on it.