

FIXTURES AND THE PPSA: OF THE WOODEN HORSE OF TROY, CREDITORS IN THE WEEDS AND STATUTORY AMBUSH

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The adoption of Personal Property Security Acts (PPSA) in many Canadian jurisdictions has brought with it a much enhanced ability to take a personal property security interest in fixtures, traditionally a category of real property. Although the fixture section of the PPSA attempts some balancing of the competing demands of real property and personal property interests, the concessions to the latter can cause uncertainty for those with stakes in the former. The uncertainty arises because of secrecy of personal property interests, the scope of allowable personal property interests and circularity of priorities. These problems became evident in the United States, under the original version of Article 9 of the Uniform Commercial Code, on which the PPSA fixture section is modelled. As a consequence of these problems, a new fixture section was introduced in the United States in 1972, a step which would be beneficial for Canadian PPSA jurisdictions to follow.

L'adoption, dans de nombreuses provinces et un territoire canadien, de la Loi sur les sûretés mobilières a permis d'obtenir beaucoup plus facilement une sûreté mobilière pour les accessoires fixes, traditionnellement considérés comme biens immobiliers. Quoique l'article de la Loi concernant les accessoires fixes cherche à établir un certain équilibre entre les droits concurrents sur les biens immobiliers et sur les biens mobiliers, les concessions faites en faveur de ces derniers peuvent mettre ceux qui ont des prétentions dans les autres dans une situation incertaine. Cette incertitude provient à la fois de la non-divulcation des sûretés mobilières, de l'étendue des sûretés mobilières permises et du caractère circulaire des priorités. Ces problèmes se sont manifestés aux États-Unis dans l'application du premier article 9 du Code uniforme commercial (Uniform Commercial Code), dont est inspiré l'article de la Loi sur les sûretés. Pour cette raison, un nouvel article sur les accessoires fixes a été présenté aux États-Unis en 1972, mesure qu'auraient avantage à prendre les provinces et le territoire canadien qui ont adopté la Loi.

Introduction

The Personal Property Security Act ("PPSA") has provided to those jurisdictions that have adopted it¹ a comparatively simple, straightforward and efficient

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The author wishes to express his appreciation to Douglas R. Stollery, Edmonton, for his comments on an earlier version of this article.

¹ The PPSAs in force on 1 March 1993 are as follows: Alberta, S.A. 1988, c. P-4.05, as amended; British Columbia, S.B.C. 1989, c. 36, as amended; Manitoba, R.S.M. 1987, c. P35; Ontario, R.S.O. 1990, c. P.10; Saskatchewan, S.S. 1979-80, c. P-6.1, as amended; Yukon, R.S.Y. 1986, c. 130, as amended. Manitoba and Saskatchewan plan to replace their existing PPSAs this year (1993) with PPSAs which will largely imitate Alberta's and British Columbia's (what will be called the Western Model PPSA). New Brunswick and

method for regulating interests in personal property. Despite protestations from some who had grown accustomed to the older, more complex systems, there is general satisfaction with the aims and methods of the PPSAs. That is true, at least so far as the PPSAs confine themselves to personal property. This article concerns itself with the problems that are created when the PPSAs venture outside personal property and regulate interests in a type of real property, namely fixtures. Here, as will be discussed, the PPSA is the source of secrecy, unfairness and omission.² American law, in the form of Article 9 of the Uniform Commercial Code ("UCC"), which served as a model for the fixtures provisions in the PPSAs, has long since replaced the problematic fixtures regime with one which gives more fairness and certainty to all parties, especially real property interest holders. It is only because of an historical accident that Canadian jurisdictions adopted and preserve in the PPSAs the earlier, problematic United States rules on fixtures. It is the thesis of this article that Canadian jurisdictions ought to learn from the United States experience and reform the fixtures provisions of the PPSAs. The article discusses the problems with the present PPSA approach and suggests possible solutions, solutions based in many cases on the newer UCC approach.³

I. *The Scheme of the Act*

A chattel may become attached or affixed to land so as to become part of the land, part of real property. When this occurs the chattel becomes a "fixture". The question of when or whether goods have become fixtures is a student's nightmare and a theoretician's dream. It is an absorbing issue which has been dealt with often by many writers but is outside the scope of this article.⁴ Given

the Northwest Territories plan to adopt PPSAs this year based on the Western Model PPSA. The Northwest Territories' PPSA will probably not be proclaimed immediately. Prince Edward Island has a PPSA already passed, SPEI 1990, c. 42. The Island PPSA is similar to the existing Saskatchewan PPSA. Because of cost considerations, there are no immediate plans to proclaim the Island PPSA. Quebec's Code Civil du Quebec, which comes into force on 1 January 1994, has provisions similar to the PPSA. Newfoundland and Labrador has expressed a general desire to adopt a PPSA. There are, apparently, no plans in Nova Scotia for a PPSA. This paper will make reference only to PPSA provisions actually in force on 1 March 1993.

² Michael E. Burke, *Fixture Financing under the PPSA: The Ongoing Conflict between Realty and Fixture-Secured Interests* (1986), 24 Osgoode Hall Law J. 547, takes a critical look at the fixture provisions of the PPSA, emphasising different aspects of the problem than does this article.

³ The author wrote a report for the Law Reform Commission of British Columbia recommending such a step be taken: Report to the Law Reform Commission of British Columbia on Fixtures and the PPSA, May 1992. The Law Reform Commission did not want British Columbia to act alone and be out of step with other Canadian PPSA jurisdictions and, therefore, recommended relatively minor changes to the PPSA. See Law Reform Commission of British Columbia, *Fixtures and the Personal Property Security Act: Interim Report* (January, 1993).

⁴ See, for example, A.H. Oosterhoff and W.B. Rayner (ed.), *Anger and Honsberger Law of Real Property* (2nd ed., 1985), v. 2, chapter 21; M. Haley, *The Law and Fixtures: When Is a Chattel not a Chattel?* (1985), 135 New Law J. 539 and 588; D.L. Campbell, *Fixtures and Improvements Including the Rights of Conditional Vendors and Chattel*

the complexities involved, it is not surprising that the drafters of the PPSA, in including fixtures within the scope of the Acts,⁵ did not attempt a comprehensive definition of fixtures.⁶

The PPSA allows that which the common law did not permit, namely the taking of a personal property security interest in real property. The inclusion of fixtures in a personal property security regime is not new to the PPSA. The predecessor statutes⁷ allowed the existence of a personal property security interest in fixtures in certain limited cases, such as when the goods that had become fixtures were financed or sold by the secured party. In this sense the PPSA was less of a "shock" for Canadian jurisdictions than for some United States jurisdictions when they adopted Article 9 of the UCC in the absence of similar provisions in prior conditional sales legislation.⁸ The predecessor Canadian legislation, however, allowed only limited interests in fixtures. It did

Mortgagees, [1965] Special Lectures of the Law Society of Upper Canada: The Lease in Modern Business 45; W.B. Rayner and R.H. McLaren, *Falconbridge on Mortgages*, (4th ed., 1977), pp. 19-29; R.H. McLaren, *Secured Transactions in Personal Property in Canada* (2nd ed., 1989), v. 1, section 5.03[4]; Burke, *loc. cit.*, footnote 2, at pp. 552-564; Alphonse Squillante, *The Law of Fixtures: Common Law and Uniform Commercial Code* (1986-87), 15 Hofstra Law Rev. 191 and 535.

⁵ In an effort to avoid some of the difficulties of characterisation as fixtures, some PPSAs explicitly exclude from the scope of fixtures what are called "building materials". Some jurisdictions have defined the term: Alberta, s. 1(1)(d); B.C., s. 1(1)"building materials"; Saskatchewan, s. 2(d); Yukon, s. 1(1)"building materials". Yukon's definition, which is typical, says that "building materials" includes "goods that are or become so incorporated or built into a building that their removal would necessarily involve the removal or destruction of some other part of the building". It then goes on to exclude certain easily severable goods and machinery. Even where "building materials" is defined, it will not always be clear what comes within the definition of building materials: *Charles A. Hare Ltd. v. Payn* (1982), 2 P.P.S.A.C. 93 (Ont. H.C.); *City of Port Colborne v. Port Colborne Yacht Harbour & Marine Ltd.* (1990), 71 O.R. (2d) 225 (Ont. Dist. Ct.); *Re Pezzack and Irving Bank Canada* (1989), 69 O.R. (2d) 536 (Ont. H.C.); *Leslie & Palmer Co. v. Hydrogrowers Corp.* (1986), 5 P.P.S.A.C. 292 (Ont. Dist. Ct.); *Rockett Lumber and Building Supplies Ltd. v. Papageorgiou* (1974), 30 C.B.R. (N.S.) 183 (Ont. Co. Ct.).

Aside from building materials (where that is a defined term), the common law defines what is a fixture: *Cormier v. Federal Business Development Bank* (1983), 3 P.P.S.A.C. 161, at p. 170 (Ont. Co. Ct.).

⁶ Some writers have argued that there should be a statutory definition of "fixture" - for example, Vincent Nathan, *Priorities in Fixture Collateral in Ohio: A Proposal for Reform* (1973), 34 Ohio State Law J. 719, at pp. 740ff. While it can be said with certainty of many things that they are fixtures (and are probably always going to be fixtures) at common law - for example, plumbing items, ceiling lights, furnaces (but even then not always: *Midland-Ross of Canada Ltd. v. Bachan Aerospace of Canada* (1983), 3 P.P.S.A.C. 21 (Ont. Master)) - other items are going to be problematic - for example, carpets, chairs, shelves, appliances; see *Amic Mortgage Investment Corp. v. Investors Group Trust Ltd.* (1985), 40 Alta. L.R. (2d) 71 (Alta. C.A.).

⁷ Each jurisdiction typically had separate statutes on assignment of book accounts, conditional sales and chattel mortgages.

⁸ See Michael Brannen, *Business Issues: Fixtures and the PPSA* (1989), 53 Saskatchewan Law Rev. 285, at p. 288.

not allow a person who had not directly financed the acquisition of the fixture to take an interest.⁹ Nor did it allow the acquisition of a personal property security interest in a fixture after it had become a fixture.

The PPSAs typically broadened the scope for a personal property security interest in fixtures in the following ways:

- (1) a fixture can now secure something other than its purchase price;
- (2) a wider range of creditors other than the seller or the financier of the fixture can obtain a security interest in the fixture;
- (3) the security interest in the fixture can be of infinite duration;
- (4) there is no deadline for registration in the personal property registry of an interest in fixtures;
- (5) in some cases a security interest in fixtures need not be registered in the personal property registry in order to have priority over real property interests;
- (6) a security interest can be taken in goods that have already become fixtures.

The approach of the PPSA to fixtures is quite complex. The Act sets up two schemes - one to regulate competing personal property security interests in fixtures and another to regulate competition between a personal property security interest and a real property interest. The competition between secured parties is regulated by rules like those for security interests in any other type of collateral.¹⁰ Priority is given to a perfected security interest over an unperfected security interest and special rules are established to deal with competition between perfected security interests.

The fixture section of the PPSA¹¹ deals with the means of determining priority between a personal property security interest and an interest in the land. It states¹² that a security interest in goods that attaches before the goods become fixtures has priority over a claim to the goods made by a person with an interest in the land. The security interest need not be that of the seller or the financier of the goods that become fixtures. All that is required to obtain this priority is attachment of the security interest. Perfection is not a requirement.

A secured party can, however, find its interest subordinated to real property interests if the real property interest holders are subsequent purchasers for

⁹ In the absence of an assignment. Examples of the more restrictive approach can be found in The Conditional Sales Act, R.S.O. 1970, c. 76, s. 10; Sale of Goods on Condition Act, R.S.B.C. 1979, c. 373, s. 11.

¹⁰ This is similar to the UCC. See *Cain v. Country Club Delicatessen of Saybrook, Inc.*, 203 A.2d 441 (Conn. Super. Ct., 1964).

¹¹ Section 36 in all jurisdictions except Ontario where it is now s. 34 and Yukon, s. 35.

¹² Alberta, s. 36(2); B.C., s. 36(3); Manitoba, s. 36(2); Ontario, s. 34(1)(a); Sask., s. 36(1)(a); Yukon, s. 35(1)(a)ss. All the fixture sections are, of course, subject to agreements between parties to the contrary: for example, *Royal Bank of Canada v. Farm Credit Corporation* (1988), 8 P.P.S.A.C. 208 (Ont. H.C.).

value¹³ or are pre-existing creditors who make subsequent advances.¹⁴ The secured party can only preserve its priority against these real property interest holders if it files a notice of its fixture interest ("fixture notice") in the land registry.¹⁵

If the security interest in goods attaches after the goods become fixtures then the fixture section states¹⁶ that that interest is subordinate to the interest of a person who (1) has an interest in the land either (depending on the jurisdiction) at the time the goods become fixtures or when the security interest attaches and (2) has not consented to the security interest or disclaimed an interest in the goods or fixtures. The security interest is also subordinate to a person who acquires an interest in the land after the goods become fixtures (or after the security interest attaches) if the interest is acquired without fraud and before a fixture notice is filed.¹⁷

The fixture section, thus, attempts to balance the interests of those with an interest in the land and those with a security interest in the fixtures as goods. Security interests that attach before the goods become fixtures are given preferential treatment, but not as against parties who acquire subsequent interests in the land for value or who make subsequent advances under a mortgage unless a notice of the security interest is filed in the land registry. Security interests that attach after the goods are already fixtures are in a much weaker position, the idea being that the fixtures are already subject to the real property interests and the secured party should have to get the consent of the holders of those interests in the land if it expects to get priority over them.

¹³ The ambiguities of the use of the words "prior" and "subsequent" are discussed in Burke, *loc. cit.*, footnote 2, at pp. 574ff.

¹⁴ And, in some cases, judgment creditors and lien holders. See Alberta, s. 36(3); B.C., s. 36(4); Manitoba, s. 36(4); Ontario, s. 34(2); Sask., s. 36(2); Yukon, s. 35(2)

¹⁵ The fixture notice provision is: Alberta, s. 49; B.C., s. 49; Manitoba, s. 53; Ontario, s. 54; Sask., s. 54; Yukon, s. 43. There are many little problems associated with fixture notices and, indeed, with the method of perfecting a security interest in fixtures. There is a treatment of some of these in Burke, *loc. cit.*, note 2, at pp. 564-572; and in B. MacDougall, Report to the Law Reform Commission of British Columbia on Fixtures and the PPSA, May 1992, *passim*.

¹⁶ Alberta, s. 36(4); B.C., s. 36(5); Manitoba, s. 36(3), Ontario, s. 34(1)(b); Sask., s. 36(1)(b); Yukon, s. 35(1)(b).

¹⁷ The priority rules in the fixture section cover what David Gray Carlson, *Fixture Priorities* (1982-83), 4 Cardozo Law Rev. 381, at p. 385, describes as the "six possible temporal patterns" which are based on the three key events in a conflict situation: (a) accrual of the competing real estate interest, whether a judicial lien, a mortgage, or a purchase; (b) affixation of the personal property to the real estate; and (c) attachment of the security interest to the collateral. The six patterns are:

1. Mortgage - Attachment - Affixation
2. Mortgage - Affixation - Attachment
3. Attachment - Mortgage - Affixation
4. Affixation - Mortgage - Attachment
5. Attachment - Affixation - Mortgage
6. Affixation - Attachment - Mortgage

The remainder of the fixture section deals with the rights a secured party has to remove goods which have become fixtures. Such removal will affect real property interest holders because of the diminution in the value of the land and possible collateral damage that might occur as a result of the removal. Most jurisdictions set out the general principle that the removal is to cause as little damage or injury as possible to the property or inconvenience to the occupier.¹⁸ Reimbursement must be made for damage to the land caused by the removal of the goods but not reimbursement for diminution in the value of the land caused by the absence of the goods removed or by the necessity of replacement.¹⁹ The section provides certain safeguards to real property interest holders including the requirement that a secured party give adequate security for reimbursement²⁰ and the opportunity for subordinate real property interest holders to redeem the fixtures.²¹

All the PPSAs contain provisions dealing with whether the PPSA is to prevail over other legislation.²² On the whole the PPSA prevails, even over statutes that govern interests in the land.²³ The pre-eminence of the PPSA has obvious significance for real property interest holders. It means that looking to land registries alone will not be sufficient to tell the whole story of real property encumbrancing. This is significant where the real property registries have provided an efficient, certain system for dealing with land.²⁴ Using the land registries is now less certain because all the problems of dealing with the PPSA are imported to some extent into land dealings, whenever there are fixtures involved. It is now common practice in some law firms not to give opinions on priorities under the PPSA because of uncertainty with respect to priorities. It is reasonable to suppose that the giving of opinions on land encumbrancing will be affected because of the PPSA's intrusion into real property law through fixtures.

¹⁸ Alberta, s. 36(7); B.C., s. 36(8); Sask., s. 36(4); Yukon, s. 35(13).

¹⁹ Alberta, s. 36(8); B.C., s. 36(9); Manitoba, s. 36(5); Ontario, s. 34(3); Sask., s. 36(5); Yukon, s. 35(8).

²⁰ Alberta, s. 36(9); B.C., s. 36(10); Manitoba, s. 36(5); Ontario, s. 34(4); Sask., s. 36(6); Yukon, s. 35(9).

²¹ Alberta, s. 36(11); B.C., s. 36(12); Manitoba, s. 36(6); Ontario, s. 34(7); Sask., s. 36(8); Yukon, s. 35(12).

²² Alberta, s. 72; B.C., ss. 73 and 74; Manitoba, s. 69; Ontario, s. 73; Sask., s. 69; Yukon, s. 70.

²³ The exception is in BC, where priority is generally given to the Land Title Act over the PPSA, s. 74. However, even in B.C., that pre-eminence of the Land Title Act does not apply to s. 36 (the fixture section) or to s. 49 (the fixture notice section), s. 74(2).

²⁴ Especially in Western Canada.

II. *The UCC - 1962 and 1972*

The PPSAs are modelled on the 1962 version of the UCC.²⁵ Article 9 of the UCC was substantially amended in 1972,²⁶ after Ontario had already adopted its PPSA in 1967. The section dealing with fixtures, section 9-313, was fundamentally altered in 1972 to reduce the effect of security interests on holders of interests in real estate. This represented a retreat from the generosity of the 1962 UCC towards secured parties back to more solicitousness for holders of interests in fixtures through interests in real property.²⁷ Many states did not adopt the 1962 UCC section 9-313²⁸ or adopted it with substantial amendments²⁹ because of the perceived over generosity for secured parties and the uncertainties that were created for holders of interests in the land.³⁰ The 1962 UCC resulted largely from an adoption, with modifications, of section 7 of the

²⁵ National Conference of Commissioners on Uniform State Laws, *Uniform Commercial Code: 1962 Official Text with Comments*, Philadelphia: American Law Institute, 1963.

²⁶ National Conference of Commissioners on Uniform State Laws, *Uniform Commercial Code: 1972 Official Text with Comments and Appendix*, Philadelphia: American Law Institute, 1973.

²⁷ On the 1972 UCC, see Carl W. Funk, *The Proposed Revision of Article 9 of the Uniform Commercial Code* (1971), 26 *Bus. Law.* 1465 and 27 *Bus. Law.* 321; Panel of Robert Haydock, Homer Kripke, Peter Coogan and John Edmonds, *A Second Look at the Amendments to Article 9 of the Uniform Commercial Code* (1974), 29 *Bus. Law.* 973, 982-989; Squillante, *loc. cit.*, footnote 4; Special Project - The Priority Rules of Article Nine (1976-77), 62 *Cornell Law Rev.* 834, at pp. 918-927. There is some criticism of the 1972 UCC in David Lloyd, *Proposed Article 9 Revisions: A New Way to Read 9-313 - Fixtures Complicated* (1973), 6 *UCC Law J.* 146.

²⁸ California.

²⁹ For example, Arizona, Idaho, Florida, Ohio, Iowa, South Dakota, and others with lesser variations. It is interesting to speculate why states where the selling of land is such an important economic activity - such as California and Florida - responded most negatively to the 1962 UCC. For more detailed information on state variations to the UCC, see CCH's *Secured Transactions Guide*.

³⁰ Note on this issue: B. Clark, *The Law of Secured Transactions under the Uniform Commercial Code* (1980); Preston Cockey, Jr., *Fixture Liens under Chapter 9 of the Uniform Commercial Code in Florida* (1968-69), 21 *Univ. of Florida Law Rev.* 229; Nathan, *loc. cit.*, footnote 6; William Henning, *The Impact of Revised Article 9 on Missouri's Fixture Financing Scheme* (1983), 48 *Missouri Law Rev.* 63; William Hawkland, *The Proposed Amendments to Article 9 of the UCC - Part 3: Fixtures*, [1972] *Commercial Law Journal* 43; Peter Coogan and Albert Clovis, *The Uniform Commercial Code and Real Estate Law: Problems for both the Real Estate Lawyer and the Chattel Security Lawyer* (1962-63), 38 *Indiana Law J.* 535; Morris Shanker, *An Integrated Financing System for Purchase Money Collateral: A Proposed Solution to the Fixture Problem under Section 9-313 of the Uniform Commercial Code* (1963-64), 73 *Yale Law J.* 788; Morris Shanker, *A Further Critique of the Fixture Section of the Uniform Commercial Code* (1964), 6 *Boston Coll. Ind. and Comm. Law Rev.* 61; Peter Coogan, *Security Interests in Fixtures under the Uniform Commercial Code* (1961-62), 75 *Harvard Law Rev.* 1319; Homer Kripke, *Fixtures under the Uniform Commercial Code* (1964), 64 *Columbia Law Rev.* 44. For a well-reasoned, less critical view, see Fairfax Leary, Jr., and Paul Ricci, *Fixing Up the Fixture Section of the U.C.C.* (1968-69), 42 *Temple Law Quarterly* 355. This article also contains a very good historical treatment of the historical development of the 1962 UCC.

Uniform Conditional Sales Act ("UCSA") which a few states, in particular New York, had adopted. According to Grant Gilmore:³¹

It was never suggested by anyone that what had worked well in New York and most other UCSA states would not work equally well if the Code were adopted in Massachusetts or Ohio or California (none of which had enacted UCSA). There is an element of mystery in why, when the Code was in fact adopted in Massachusetts, Ohio and California, the Article 9 treatment of fixtures should suddenly have seemed, to many, unworkable and, to some, wrong as a matter of policy.

Under the 1972 UCC, there is introduced the concept of a "fixture filing" which is a filing in a land registry covering the goods which are or will become fixtures.³² Section 9-313 permits the creation of security interests in goods which are already fixtures and the continuation of security interests in goods which become fixtures.³³ Subsection 9-313(4) gives a *perfected* security interest in fixtures priority over a conflicting interest of a holder of an interest in land where:

(a) the interest in land antedates the security interest which is a purchase money security interest ("PMSI") which is perfected by a fixture filing before the goods become fixtures or within 10 days thereafter,

(b) the security interest is perfected by a fixture filing before the interest in land is of record,

(c) the security interest is in goods which are "readily removable factory or office machines or readily removable replacements of domestic appliances which are consumer goods" and the security interest is perfected before the goods become fixtures,³⁴ or

(d) the conflicting interest is a lien on the real estate obtained after the security interest was perfected.

To fall within (a) or (b) the debtor must have an interest of record in the land registry. Perfection of a security interest is essential to have any priority at all. Because of problems of characterising goods as fixtures or non-fixtures, most secured parties will perfect in the personal property registry (by a regular filing) and in the land registry (by a fixture filing). Even if the secured party falls within section 9-313(4)(a) - that is, the security interest is a PMSI - the secured party will not have priority over a construction mortgagee, if the construction mortgage is recorded before the goods become fixtures if the goods become fixtures before the completion of the construction.³⁵ Section 9-313(5) allows a security interest in fixtures, whether perfected or unperfected, to have priority over interests of individuals with interests in land where the holder of the land

³¹ Grant Gilmore, *Security Interests in Personal Property* (1965), p. 803.

³² Section 9-313(1)(b).

³³ Section 9-313(2).

³⁴ Note that under the 1972 UCC a PMSI in consumer goods may be perfected without the secured party doing anything: s. 9-302(1)(d).

³⁵ Section 9-313(6).

interest consents or where the debtor has the right to remove the goods.³⁶ While still permitting a wide range of security interests in goods that are or become fixtures, the 1972 UCC gives generous protection to real property interest holders.

It is the theme of this paper that as Canadian jurisdictions followed the United States in adopting the 1962 UCC, so they should follow the United States in adopting an approach closer to the 1972 UCC. The same problems that existed in section 9-313 of the 1962 UCC exist in the present fixture provisions of the PPSAs. There is nothing sufficiently different in Canadian real property law or in the PPSA to cause one to suppose that the concerns raised by the 1962 UCC can safely be ignored here.

III. *Secrecy Issues*

A. *Priority by Virtue of Attachment Only*

The PPSA does not require that a security interest in goods be perfected or otherwise registered anywhere in order for it to have priority against an existing interest in the land.³⁷ All that is required is that the security interest have attached. The thinking behind this is that requiring perfection under the PPSA is the step one takes to ensure priority against other secured parties or individuals such as judgment creditors or trustees in bankruptcy. Real property interest holders are outside the scheme of the PPSAs and therefore perfection is irrelevant to establish one's position as against them.³⁸ Furthermore, there is the idea that the real property interest holder is having its interest gratuitously enriched by the secured party's financing and the secured party ought not to have to do much to preserve its position against the real property interest holder. In *C.I.B.C. v. Nelson*,³⁹ Maurice J said:

Section 36(1)(a) favours the fixture financier over the owner of the land; on the basis the financier has enabled new value to be added to the land on which he should have first claim. The owner of the land is not entitled to be enriched at the expense of the financier.

³⁶ This latter provision deals with the issue which caused concern under the 1962 UCC, that is, the nature of security interests in tenants' fixtures. The special problems raised by the PPSA for tenants' fixtures is discussed in Burke, *loc. cit.*, footnote 2, 587-593. See, on trade fixtures, Jeffrey Bowen, *Trade Fixture - Secured Transactions under New York's Uniform Commercial Code* (1979-80), 44 Albany Law Rev. 165; Kripke, *loc. cit.*, footnote 31, at pp. 65-69; McLaren, *op. cit.*, footnote 4, pp. 5-98 - 5-100.

³⁷ Alberta, s. 36(2); B.C., s. 36(3); Manitoba, s. 36(2); Ontario, s. 34(1)(a); Sask., s. 36(1)(a); Yukon, s. 35(1)(a).

³⁸ This reasoning is implicit in what R. Cuming and R. Wood say on s. 36, p. 217 in their book *British Columbia Personal Property Security Act Handbook* (1990). However, a similar approach is taken to accessions in the PPSA where the opposing interests are not those of real property interest holders. See the accessions sections: Alberta, s. 38; B.C., s. 38; Manitoba, s. 37; Ontario, s. 35; Sask., s. 37; Yukon, s. 36.

³⁹ (1988), 68 Sask. R. 278, at p. 280 (Sask. Q.B.).

Subsequent individuals who obtain interests in the land or existing mortgagees who make further advances or obtain an order for sale and foreclosure have their interests protected by virtue of the requirement of a fixture notice.

This approach is not as equitable as the drafters must have thought. Under the fixture section, when attached but unperfected security interests can have priority, there is no place for a real property interest holder to turn to ascertain who in fact has attached security interests. This is the problem of secrecy.⁴⁰ Security interests can exist that affect real property interest holders who have no way of ascertaining these security interests. It is not the case that giving priority to secured parties over existing real property interest holders has no real impact on real property interest holders. The argument is that real property interest holders have already advanced their money and so cannot be hurt in relation to fixtures that are added after their interests come into existence. There are instances where real property interest holders will be affected even in the absence of advancing more money. Such interest holders can be lulled into a false sense of security by the presence of new fixtures on the land which do not appear to be subject to security interests.⁴¹ A mortgagee might withhold on foreclosure proceedings, not knowing the true state of affairs. Furthermore, there are situations where a purchaser will insist that a vendor have cleared from the property title all interests not subordinate to the vendor's before the sale is completed. A vendor will be unable to do this if security interests can remain secret. It is odd that the fixture section makes so much turn on the time of attachment, a legal event which is usually a secret matter between secured party and debtor, rather than say the moment of perfection or even affixation, both of which are public.⁴² In *Manning v. Furnasman Heating Ltd.*,⁴³ Scollin J. expressed his disbelief that owners of land could be taken unawares or be affected by security interests which were not registered or of which they had no notice. He said:⁴⁴

... if s. 36(2) is applicable to the circumstances of the [landowners] Mannings, the automatic priority which is hatched in the privacy of attachment, and which is guaranteed indefinitely against the existing owner of the property, is nothing less than statutory ambush.

If section 36(2) were to apply, then, according to Scollin J, "[w]hile [the secured party] Furnasman lay in the weeds", the Mannings would be "passive landowners on whom the law springs an undiscoverable trap."⁴⁵ The only way for a real

⁴⁰ Clark, *op. cit.*, footnote 30, pp. 9-24, calls this "one of the real weaknesses of the 1962 Code".

⁴¹ Nathan, *loc. cit.*, footnote 6, at p. 732.

⁴² See Stan Goodkin, *The Ambiguous Statutory Machinery Pertaining to Fixtures under the Uniform Commercial Code: Whether the New 9-313 Effectively Eliminates Prior Criticism of the Old 9-313* (1973), 27 *Arkansas Law Rev.* 482, at pp. 494-495.

⁴³ (1985), 4 PPSAC 246 (Man. Q.B.); *aff'd* on other grounds (1985), 5 P.P.S.A.C. 67 (Man. C.A.). See further *infra*, at pp. 510-511.

⁴⁴ *Ibid.*, at p. 252.

⁴⁵ *Ibid.*, at p. 253. Note that Scollin J. found other ways to protect the Mannings. See section C. *Contractors' Security Interests, infra*.

property interest holder to defeat attached but unregistered security interests is for that person to take its own personal property security interest and then perfect it. Requiring such a step of a real property interest holder to ensure the inviolability of its real property priority is, to say the least, startling and, in any event, is not feasible.

A requirement that a security interest be perfected in order to have priority over a registered real property interest would eliminate much of the problem of secrecy. Such a requirement would not impose an undue burden on secured parties. Secured parties who do not perfect are at risk of losing any priority they might have to another secured party who does perfect. All secured parties should, therefore, in practice perfect their interests. Another common reason in the United States for perfecting in the usual way (as well as making a fixture filing) is that it is often impossible to say with certainty of many things whether or not they are fixtures. All possible filings are necessary to cover all eventualities.⁴⁶

Furthermore, the situation with respect to priority for security interests in fixtures ought not to be dissimilar to that for PMSIs. The rationale behind giving a PMSI priority over other security interests is that without the financing of the PMSI holder, none of the secured parties would have had an interest at all. The value of the collateral of the other security interest holders (who have taken interests in after-acquired property) is in a sense being gratuitously enriched. However, the PMSI provisions of the PPSAs require the holder of the PMSI to perfect and sometimes notify other secured parties if it wants this superpriority.⁴⁷ A similar logic can be applied to the status of a security interest when the conflicting interest is that of an existing real property interest holder. If the security interest is to have priority, should not its holder have to make public its interest or give notice to holders of existing interests. In the United States, the argument against this position is that it is relatively easy to determine to whom notice of a PMSI should be given, but that "the real estate records are a jungle" and therefore it would be more difficult to determine to whom notice should be given.⁴⁸ Such logic does not apply in Canada where real estate records are generally not a jungle, particularly the further west one goes.

The concern about undisclosed security interests in fixtures having priority over real property interests will often arise in the context of replacement of fixtures. The fixture section of the PPSA is not well equipped to deal with the problem of security interests in replacement fixtures. Neither the provisions

⁴⁶ See Mark S. Scarberry, *Fixtures in Bankruptcy* (1986-87), 16 *Capital Univ. Law Rev.* 403; Peter Coogan, *Fixtures - Uniformity in Words or in Fact?* (1964-65), 113 *Univ. of Penn. Law Rev.* 1186. Coogan points out that double filing may not be sufficient if the goods are characterised as building materials. See also Irving Gordon, *Credit Sales of Installed Equipment - The Uniform Commercial Code's Uneasy Truce between Realty and Chattel Financing Interests* (1969-70), 64 *Northwestern Univ. Law Rev.* 651, at pp. 672-679.

⁴⁷ Alberta, s. 34; B.C., s. 34; Manitoba, s. 34; Ontario, s. 33; Sask., s. 34; Yukon, s. 33.

⁴⁸ See *Gilmore, op. cit.*, footnote 31, p. 835.

dealing with goods that become fixtures nor the provisions dealing with security interests in existing fixtures take account of replacement fixtures. The PPSA assumes that a person with a security interest in an item that is used to replace an existing fixture should have priority over a person with an existing interest in the land because the new fixture will enhance the value of the land. Fixtures will rarely be replaced unless the old fixture is worn out and of little value.⁴⁹ However, assuming the old fixture had some value, the person with the interest in the land now has priority for less money than before the fixture was replaced, even though the land as a whole is enhanced in value as a result of the replacement. Furthermore, over time the new fixture will deteriorate and decline in value (like the old one it replaced).⁵⁰ By the time the person with an interest in the land comes to realise on its interest in the land, the value of the replacement fixture may have deteriorated so that it is actually worth the same or less than the original fixture - but the person with an interest in the land is in a worse position because its interest in the replacement fixture is subordinate to the secured party's.⁵¹ It must be remembered that all this is going on in secret, behind the back, as it were, of the holder of the interest in land. There is no place that a real property interest holder can check to establish with any confidence what its exact position is.⁵²

The problem of secrecy existed in the 1962 UCC and was the cause of concern.⁵³ The 1972 UCC amendment sought to prevent a security interest from affecting an interest in land in any way unless it was perfected somehow, usually by a filing.⁵⁴ The PPSAs would be much improved if they adopted this reform from the United States.

⁴⁹ See Nathan, *loc. cit.*, footnote 6, at p. 727. See also Grant Gilmore, *The Purchase Money Security* (1961-62), 76 *Harvard Law Rev.* 1333.

⁵⁰ Shanker, *loc. cit.*, footnote 30, is of the view that the whole problem is simply one of waste and the mortgagees have appropriate remedies under that doctrine.

⁵¹ Gilmore, *op. cit.*, footnote 31, p. 836, looks at the issue of wrongful replacement of a fixture.

⁵² Another question on which the PPSA is largely silent is the question of a replacement of a replacement. Should the secured party with the priority to the original replacement have priority over a replacement to that of the real property interest holder (assuming both are subordinate to the secured party who has the security interest in the new replacement)?

⁵³ In addition to the writers already cited elsewhere in this article, see Jack Gervin, Jr., *The Law of Fixtures in Tennessee: A Consideration of the Common Law and Fixture-Related Provisions of the Uniform Commercial Code* (1974-75), 42 *Tennessee Law Rev.* 354, at p. 393. For cases illustrating the secrecy of the operation of the 1962 UCC, see *House v. Long*, 426 S.W. 2d 814 (Ark. Sup. Ct., 1968); *Babson Credit Plan, Inc. v. Cordele Production Credit Assoc.*, 246 S.E. 2d 354 (Ga. C.A., 1978); *Hartford National Bank and Trust Co. v. Godin*, 398 A. 2d 286 (Vt. Sup. Ct., 1979); *Honea v. Laco Auto Leasing Inc.* 454 P. 2d 782 (N.M.C.A., 1969); *Karp Bros., Inc. v. West Ward Savings & Loan Assoc. of Shamokin, Pennsylvania*, 8 UCC Rep. 257 (Penn. Sup. Ct., 1970); *Denis v. Shirl-Re Realty Corp.*, 4 UCC Rep. (N.Y. Sup. Ct., 1967); *General Electric Credit Corp. v. Pennsylvania Bank & Trust Co.*, 11 UCC Rep. (Penn. Ct. of Common Pleas, 1972); *In re Royer's Bakery, Inc.*, 1 UCC Rep. (U.S. Dist. Ct., E.D. Pa., 1963).

⁵⁴ See discussion on the UCC, *supra*.

Deciding on a requirement of perfection is not the end of the matter. There remains the question of where a registration should be made. It could be in the personal property registry, but if the goal is to disrupt the land registry system as little as possible, then registration in the land registry is more desirable. Secured parties will probably register in both the personal property registry and the land registry to protect themselves against both real property interest holders and other secured parties. Also double registration would be usual because of the uncertainty in many cases as to whether collateral is a fixture or not.

B. Fixturing

The fixtures provisions of the PPSA seem to have been drafted with mortgages in mind. The assumption appears to be that the debtor will be the owner of the property and the competition for priority will be as between secured parties and mortgagees. However, the PPSA, unlike Article 9 of the 1972 UCC, does not make the operation of the fixture section contingent in any way on the debtor being the owner of the land or indeed having any interest in the land. This leads to another aspect of the secrecy problem. Even if there is a requirement of perfection in order for a security interest to have priority over a real property interest, the secured party's debtor may not be the landowner and may not have any registered interest in the land.⁵⁵ The operation of the fixture section can cause concern where the owner of the land is a landlord and the debtor is a tenant or where the debtor is a contractor who installs fixtures subject to security interests given by the contractor. This section of the article looks at the first of those scenarios.

The question in relation to tenants will in practice most often arise where the landlord and the tenant contemplate an arrangement for fixturing the premises. The landlord may give the tenant an allowance to purchase various fixtures for the leased premises. The idea is that upon the termination of the lease the fixtures will remain with the property. Fixturing usually occurs where there are rented offices or small independent stores in commercial premises. Fixturing facilitates the payment by tenants of a higher rent on the incentive of a fixturing allowance as a sort of rebate. The initial (high) rent is used as the base for establishing the rent in future years (when there is no rebate by fixturing allowance). The landlord (and the landlord's mortgagees who may in fact have provided the money for fixturing) could find that as soon as the tenant acquires or affixes the fixtures purchased with the landlord's money, the tenant's secured party gets a security interest in the fixture. Because the landlord (and the landlord's mortgagees) will have an existing interest in the real property, the secured party will have a prior security interest in the fixtures and the secured

⁵⁵ This situation presents obvious problems for secured parties as well. In some cases the secured party will want to file fixture notices to protect itself but does not know where its debtor (a contractor, for example) will actually affix the collateral which the secured party has financed. The secured party cannot file a fixture notice without knowing against what land it is to be filed. On this matter see Robert Kratovil, *The Uniform Commercial Code and the Real Property Lawyer* (1968-69), 18 *De Paul Law Rev.* 101.

party need not even perfect its interest. There is little a landlord can do in this situation to be confident that its interests will not be subordinated to the holder of a security interest. The landlord could obtain representations and warranties from the lessee but a representation and warranty given by the lessee does not directly affect the secured party. Even if the fixture section were amended to require perfection, the landlord (or more usually the landlord's mortgagees) would not necessarily be aware of the existence of the security interest if it were registered against the tenant's (that is, the debtor's) name.

It might be argued that the doctrine of *nemo dat quod non habet* applies so that the tenant can give no more than it has received from the landlord. The tenant, however, unquestionably has sufficient rights in the property of the leased premises to grant a security interest in the leased property pursuant to the PPSA. What if the tenant defaults in its payments to the secured party and the secured party attempts to seize the leased collateral in realization of its security interest? It does seem incredible that the secured party would do this, but there is nothing in the PPSA to preclude this step. So long as the landlord's (and the mortgagee's) interests are existing when the secured party's interest attaches, the fixtures section says clearly that the security interest "has priority" as to the fixture. The PPSA is a statutory rejection of *nemo dat quod non habet*.⁵⁶ The Act does not appear to limit the tenant's secured party's priority. A landlord could perhaps protect itself by taking its own security interest in the property of the tenant. However, this does seem peculiar when the landlord is the owner of the fixtures. While there are parallels elsewhere in the PPSA for owners to register interests in their property,⁵⁷ the landlord is dealing in real property and should on principle not have to be concerned with a personal property registry. In any event most PPSAs exclude from their scope leases of real property⁵⁸ and so the landlord might not be able to register an interest in its own fixtures.⁵⁹

The invidious position of the landlord appears to be accidental. Grant Gilmore makes it clear in the context of the 1962 UCC that "[c]ertainly nothing in section 9-313 recognizes that the landowner who is not the debtor is a special case. He is simply one of the 'persons who have interests in the real estate' as to whom the subsequent fixture interest takes an automatic priority".⁶⁰ Gilmore

⁵⁶ Furthermore, by setting up a statutory system of establishing priorities and bringing such non-security interest transactions as consignments, leases and certain assignments into the scope of the PPSA, a strong signal is sent that *nemo dat quod non habet* is not a governing principle. (See: Alberta, s. 1(1)(qq)(ii), s. 3(2); B.C., s. 1(1)"security interest"; Manitoba, s. 2(b) and (c); Ontario, s. 2(b); Sask., s. 2(nn), s. 3; Yukon, s. 1(1)"security interest", s. 2(b).)

⁵⁷ For instance, conditional sellers have to register and in some provinces lessors of personal property. See the sections set out in the previous footnote.

⁵⁸ Alberta, s. 4(f); B.C., s. 4(f); Ontario, s. 4(1)(e); Sask., s. 4(f); Yukon, s. 3(i).

⁵⁹ It is easier to see how a mortgagee could be wearing two hats - one as real property interest holder and another as secured party. It might be able to get an advantage over other mortgagees by virtue of being a secured party. It is more difficult to see why a landlord should ever have to use a security interest to get priority over secured parties to property which belongs to the landlord and in which the landlord has not given a security interest.

⁶⁰ Gilmore, *op. cit.*, footnote 31, p. 833.

notes that section 7 of the UCSA provided for a notice to be given to the landowner. But, he continues:⁶¹

This provision of s. 7 was not carried over into s. 9-313 at any stage of the drafting, nor, so far as the author's memory goes, was any thought ever given to the problem of the landowner who is not the debtor. That is, it is not true that the problem was considered and resolved as a matter of policy against the landowner; the problem was simply lost from sight.

The PPSAs thus incorporate a policy relating to landowners which is a historical accident of the 1962 UCC. The fixturing problem would not arise under the 1972 UCC because secured parties cannot get priority over existing real property interest holders except in limited circumstances if there is a PMSI in the goods that become fixtures. That exception would not apply with fixturing because it is the landlord who supplies the money for the tenant to acquire the goods that become fixtures and so the secured parties must have their interests in the goods that become fixtures by virtue of a general (that is, non-PMSI) security interest.

C. Contractors' Security Interests

Besides the fixturing situation, the secrecy problem can arise where the debtor is a contractor.⁶² The owner of land has a contractor build a house for her. The contractor gets the furnace for the house from a supplier. The supplier takes a security interest in the furnace to ensure it is paid by the contractor. Suppose that the owner pays the contractor for the work done on the house but the contractor defaults on his payments to the supplier. The landowner may have no knowledge of the fact that her interest will be subject to that of a secured party who has been given the interest by the contractor. Even if the contractor acts in breach of an agreement with the landowner in giving a security interest to a contractor, this agreement would not affect the secured party's rights. The landowner may pay the contractor before or without knowing of the secured party who has an interest in the fixture through the contractor. Once again, then, there is the problem of secrecy.

This situation arose in *Manning v. Furnasman Heating Ltd.*⁶³ In that case, the Manitoba Court of Appeal upheld the decision of Scollin J., but on grounds that are not of immediate interest. The judgment of Scollin J. does, however, speak to the matters with which this article is concerned. According to Scollin J., "[t]he wooden horse of Troy came into the new home of Mr. and Mrs. Manning in the guise of a gas furnace".⁶⁴ He discussed the secrecy of Furnasman's security interest.⁶⁵

⁶¹ *Ibid.* See also Daniel Fenton Adams, *Security Interests in Fixtures under Mississippi's Uniform Commercial Code* (1976), 47 Mississippi Law J. 831, at pp. 866-867; Gordon, *loc. cit.*, footnote 46, at pp. 667-672. Arguments against the 1962 UCC being problematic in this area have been made by Leary, Jr., and Ricci, *loc. cit.*, footnote 30, at pp. 391-397.

⁶² See Burke, *loc. cit.*, footnote 2, at pp. 593-602.

⁶³ *Supra*, footnote 43.

⁶⁴ *Ibid.*, at p. 248 (Sask. Q.B.).

⁶⁵ *Ibid.*, at p. 250.

No innocent third party, such as the Mannings, was alerted to any actual or potential claim by Furnasman. There was no registration or filing to define the claim so as to caution transferees of the equipment.

Scollin J. held that section 30⁶⁶ could not benefit the Mannings because their contractor was not in the business of selling heating equipment. Fortunately for the Mannings, Scollin J. found that Furnasman's security interest did not attach before the goods became a fixture, and therefore the Mannings were not subordinate to Furnasman.

Scollin J., however, had another ground on which to find for the Mannings. He applied section 22(1)(b) of the Manitoba Act, which states that an unperfected security interest in goods is subordinate to a transferee of the goods for value where the transfer is not in the ordinary course of business of the transferor. Furnasman's security interest was unperfected when the builder transferred the goods to the Mannings.⁶⁷ This decision saved the day for the Mannings but is not a wholly satisfactory result because it means that a security interest such as Furnasman's does not disappear. It still exists in a subordinated position. Furthermore, section 22(1)(b) does not explicitly protect anybody except the transferee, a situation which could cause uncertainty for a party such as a secured creditor of the transferee.⁶⁸

To avoid the possible unfairness of the contractor situation, British Columbia and Alberta have adopted a section 30(1) which contains definitions of "buyer of goods" and "seller" that bring the owner of the land in the above fact situation within the definition of "buyer of goods" and the supplier within the definition of "seller" for the purposes of section 30.⁶⁹ This provision ensures

⁶⁶ The section that allows buyers in the ordinary course of business to take free of security interests given by their sellers. This is s. 28 in Ontario, s. 29 in Yukon, and s. 30 in the other jurisdictions.

⁶⁷ Other provinces have similar provisions: Alberta, s. 20(1)(c); B.C., s. 20(c); Ontario, s. 20(1)(c); Sask., s. 20(1)(e); Yukon, s. 19(1)(e).

⁶⁸ The judge also made the somewhat puzzling finding that Furnasman had not given any notice of its security interest to the Mannings and therefore had waived it. Equating absence of notice of a security interest with a waiver or estoppel is a somewhat alarming proposition that could cause havoc in secured transactions if it were correct, which it cannot be.

⁶⁹ B.C.'s section 30(1) provides:

(1) In this section

'buyer of goods' includes a person who obtains vested rights in goods under a contract to which the person is a party as a consequence of the goods becoming a fixture or accession to property in which the person has an interest;

'seller' includes a person who supplies goods that become a fixture or accession under a contract with a buyer of goods or under a contract with a person who is a party to a contract with the buyer;

'the ordinary course of business of the seller' includes the supply of goods in the ordinary course of business as part of a contract for services and materials."

Burke, *loc. cit.*, footnote 2, at pp. 593-602, surveys the (often clever) ways in which a court could avoid the unfairness without the direct solution of the Alberta and B.C. PPSAs. Oddly Mr Burke does not comment on Scollin J.'s use of s. 22(1)(b) in *Manning* as a solution to the problem.

that the landowner, that is, the transferee, in the above situation is a protected ordinary course buyer within section 30. Other jurisdictions might benefit from having such a provision. If the landowner is protected as a buyer in the ordinary course of business, then she need not concern herself about the problems of secrecy in relation to the security interest. If an approach based on the 1972 UCC were adopted, the problem disappears. A contractor does not have an interest in the land and therefore the landowner cannot be subject to the secured party's interest given by the contractor.⁷⁰

D. Security Interests that Attach at the Time the Goods Become Fixtures

Many of the foregoing situations involving potential secrecy arise where a security interest attaches to goods that become fixtures only at the time of affixation. Is this situation to be analogised to the provisions where the security interest attaches before affixation (giving the secured party priority), or to the provisions governing security interests that attach after affixation (giving the real property interest holder priority)? In the Western Model PPSAs, the rules governing security interests that attach before affixation are made to govern this situation of attachment at affixation.⁷¹ The other PPSAs leave open the question as to what happens when the security interest attaches at the same time as the goods become fixtures.⁷² *Manning v. Furnasman Heating Ltd.*⁷³ decided that there should be no priority for a security interest that attaches at the same time as the goods become fixtures. According to the Manitoba Court of Queen's Bench, that situation is assimilated to the provisions dealing with a security interest that attaches after the goods become fixtures.

The reason for treating security interests that attach at the time the goods become fixtures the same way as security interests that attach before the goods become fixtures is to deal with the situation where, say, a tenant has a supplier supply and install a furnace in the leased premises.⁷⁴ The tenant buys the furnace from the supplier on credit and the supplier enters into a security agreement with the tenant in which the collateral is the furnace. Often the particular furnace in which the tenant (and the landlord) is to get rights does not become ascertained until it is actually installed. The tenant, therefore, has no rights in the particular furnace until the furnace becomes ascertained goods, that is, at the time the furnace becomes a fixture. The supplier would lose priority in the furnace to the landlord if this situation were analogised with the situation where the security interest attaches after the goods are already fixtures.⁷⁵

⁷⁰ Unless the security interest is in goods listed in s. 9-313(4)(c).

⁷¹ Alberta, s. 36(2); B.C., s. 36(3).

⁷² Manitoba s. 36(2); Ontario s. 34(1); Sask., s. 36(1); Yukon, s. 35(1).

⁷³ *Supra*, note 43.

⁷⁴ We will assume that the landlord rightly expects to retain the furnace at the end of the tenancy.

⁷⁵ This situation could also involve the landowner as the debtor and the landowner's mortgagee as the real property interest holder.

The drafters of the Western Model PPSA apparently thought that the situation was sufficiently analogous to the situation where the creditor gets its security interest in the goods before they become fixtures that there should be no difference for the secured party's priority position just because the security interest did not attach until the time the goods become fixtures. Thus, the interest of the secured party prevails. When the facts are as in *Manning v. Furnasman Heating Ltd.*⁷⁶ (where contractors were involved), this approach can result in surprise and unfairness for landowners, as Scollin J. noted in his judgment.⁷⁷

Faced with these two directly conflicting interests a choice must be made as to whether the interests of the secured party or the *Manning*-type landowner should be preferred. The middle ground is to say nothing as in most PPSAs⁷⁸ and let the courts resolve it. This course promotes uncertainty and litigation. As between a landowner and a secured party, the secured party has more control over the situation. It is the secured party who knows of the security agreement with the debtor (tenant or contractor) and it is the secured party who can control when the debtor gets rights in the goods that become fixtures. It is odd therefore to have the landowner bear the negative consequences of the problematic situation. The result reached by Scollin J. on this issue is sensible and might be put in statutory form to prevent litigation in other provinces.⁷⁹ Of course, under the 1972 UCC the situation would not arise because the time of attachment is not the determining factor for establishing priorities. An adoption of the 1972 UCC approach would eliminate the issue.

IV. *The Scope of a Personal Property Security Interest: Taking an Interest in Existing Fixtures*

Probably the greatest innovation of the PPSA fixture sections over the prior legislation is the ability under the PPSA to take a personal property security interest in goods that have already become fixtures. This ability represents a major conceptual alteration. Something that would clearly be identified at common law as real property may now be subject to new personal property interests. This is very different from the situation where the security interest in fixtures arose or attached before the goods became fixtures. There, the secured party, when entering into the security agreement and preparing for its interests to attach, really was dealing with personal property. To allow its interest to continue as a personal property security interest once the goods become real property serves, in many cases, the interests of fairness. To permit the security interest to attach to an existing fixture would seem to be an innovation that could be justified only if it were logical or satisfied some demand from creditors.

⁷⁶ *Supra*, footnote 43.

⁷⁷ See section C. *Contractors' Security Interests*, *supra*.

⁷⁸ Except Alberta and B.C.

⁷⁹ Another good reason to put the result in statutory form is to prevent the logic of the judgment from preventing the result reached. The logic was criticised in Burke, *loc. cit.*, footnote 2, at pp. 601-602.

There does not appear to be any real demand by creditors for the ability to take such security interests.⁸⁰ Creditors will usually be interested in security interests in fixtures only when they have a PMSI. There can be no PMSI in something that is already a fixture. The 1962 UCC was criticised for this innovation. It has been explained as a concession to Pennsylvania lawyers because of the peculiarities of their real estate law.⁸¹ The inclusion in the PPSAs reflects no legal or commercial necessities.

The PPSA provisions dealing with the taking of security interests in goods that are already fixtures are admittedly very limited in the priority they give to the secured party.⁸² They are subordinate to existing real property interests, unless the real property interest holders consent otherwise. Despite this limited scope for a security interest in goods that are already fixtures, there is still a fear that the PPSA changes real property to the extent of making that which was always considered real property something other than real property or something not quite real property. Such a concern is actually well founded - at least in light of the historical background to the UCC. In adopting the fixtures provisions of the UCC in 1962, the Americans were quite familiar with the notion that a fixture constituted a sort of third type of property between personal property and real property.⁸³ Barkley Clark called this classification of property "The Sacred Triumvirate".⁸⁴ Canadian law makers probably were not familiar with the significance of what they were doing in tacitly adopting this United States approach to property classification when adopting the UCC provisions into the PPSA. Although the ability to take a personal property security interest in existing fixtures remains in the 1972 UCC, absent a cogent reason or demand for such an ability it ought not to exist. An existing fixture is real property and an interest in it can be obtained through real property law.

V. Purchase Money Issues

A. Limiting Security Interests in Fixtures to PMSIs

A security interest in fixtures may be obtained by a creditor simply as a part of a general security agreement. The general security agreement will as a matter of course include fixtures as part of the collateral. The secured party and the

⁸⁰ There are, it must be said, a couple of cases from the United States where a secured party took a security interest in goods that were already fixtures: *State Bank v. Kahn*, 296 N.Y.S. 2d 391 (Sup. Ct., 1969); *Sunshine v. Sanray Floor Covering Corp.*, 315 N.Y.S. 2d 937 (Sup. Ct., 1970). In the latter case, the secured party did not intend that its interest attach only after the goods were already fixtures.

⁸¹ Adams, *loc. cit.*, footnote 61, at p. 845.

⁸² Alberta, s. 36(4); B.C., s. 36(5); Manitoba, s. 36(3); Ontario, s. 34(1)(b); Sask., s. 36(1)(b); Yukon, s. 35(1)(b).

⁸³ Brannen, *loc. cit.*, footnote 8, at p. 288, says that "[a] tripartite classification of property is essential if the PPSA is to work properly." The tripartite division of property was only accepted in some U.S. jurisdictions prior to the adoption of the UCC. See Coogan, *loc. cit.*, footnote 31, at 1319; Kripke, *loc. cit.*, footnote 31.

⁸⁴ Clark, *op. cit.*, footnote 30, p. 9-25.

debtor may not be particularly aware of the fact or the significance of the fact that they have just secured an interest in what was not historically characterized as personal property. Is it justifiable to allow such a casual interest to arise when it causes such disruptive consequences for real property interest holders who have certainly intended to secure an interest in real property? It is defensible to intrude security interests in what has traditionally been seen as real property (that is, fixtures) only where it is generally and demonstrably fair and appropriate for there to be security interests.

The situations in which it is most appropriate that a creditor be able to take a security interest in goods that become a fixture are where the creditor has provided the means by which the debtor has obtained its interest or right in the fixture; in other words, if the secured party has a PMSI.⁸⁵ Arguably security interests in fixtures should be confined to PMSIs. The special and direct connection of the creditor to the fixture makes legitimate the disruption to the integrity of the concept of fixture as real property. Many of the problems discussed in this paper arise as a result of the potential existence of non-PMSI security interests in fixtures. While some continuing interest (and even a senior interest) in fixtures is appropriate for holders of PMSIs, it is the possibility of other types of security interests that causes alarm to the real property bar. Even as unlikely a critic of the UCC as Grant Gilmore has said: "It is one of the oddities of the Article 9 drafting that the fixture interest which is entitled to priority under section 9-313 is not required to be a purchase-money security interest as that term is defined in s. 9-107."⁸⁶ Gilmore justified the "oddity" by saying that a non-PMSI interest in fixtures would be rare. But, if such an interest is to be rare and unjustifiable, why have it in the first place?⁸⁷

By limiting security interests in fixtures to those creditors who have assisted the debtor in getting his or her interest in the fixture, the scope for unfairness to real property interest holders is diminished. Mortgagees and others with interests in land would have to take into account the possibility of security interests in the fixtures given to those who have assisted in the debtor's acquisition of the fixtures, but would not have to be concerned about secured parties with general security agreements that include after-acquired fixtures. While this would still require discounting by mortgagees, it constitutes a more restrictive and more predictable discounting requirement than is presently the case.

The interests of the vendor of the fixture and any other person who has provided financing towards the debtor's acquisition of rights in the fixture are interests which legitimately deserve to be preserved and protected once the goods become fixtures. Neither the debtor nor the person who has an interest in the debtor's land (assuming the debtor owns the land) would get any interest

⁸⁵ On PMSIs, see Gilmore, *loc. cit.*, footnote 49. The PMSI sections of the PPSAs are: Alberta, s. 34; B.C., s. 34; Manitoba, s. 34; Ontario, s. 33; Sask., s. 34; Yukon, s. 33.

⁸⁶ Gilmore, *ibid.*, p. 821.

⁸⁷ See a similar criticism of Adams, *loc. cit.*, footnote 61, at p. 844.

in the fixtures without the credit or financing provided by the supplier or the financier. The 1972 UCC adopts an approach which distinguishes PMSIs and gives them more generous treatment. Security interests in fixtures (when there are competing interests in the land) are basically treated by the 1972 UCC section 9-313 as if they were interests in land. Perfection and priority positions are established by the land registry rules. Only PMSIs in fixtures are different⁸⁸ but even then there are limits on their privileged position. The holder of the PMSI can get priority over existing real property interest holders, but only if certain strict conditions are met.⁸⁹ Consideration might be given to limiting the PPSA's ambit, as far as fixtures go, to PMSIs in fixtures. If such a drastic step is not taken, then at least some differentiation ought to be made between PMSIs in fixtures and other security interests. Only PMSIs ought to have the ability to disrupt the expectations of real property interest holders.

B. *The Construction Mortgage*

Another aspect of the purchase money issue relates to construction mortgages. While the fixture section of the PPSAs give generous treatment to secured parties over real property interest holders, they do little to protect the real property interest holder who has a sort of real property PMSI. The PPSAs make no special provision for interests in the land held by construction mortgagees. Again this approach was adopted from the 1962 UCC.⁹⁰ The fixture sections do state that a security interest in goods that become fixtures do not have priority over subsequent advances made by mortgagees unless the secured party has filed a fixture notice.⁹¹ This provision, adopted from the 1962 UCC, is basically meant to cover the construction mortgagee, the usual mortgagee of the land who will be making subsequent advances. The PPSA approach does allow the construction mortgagee some priority (that is, if a fixture notice is not filed), but it does not give the construction mortgagee absolute priority. It does not specifically identify the construction mortgagee as a real property interest holder worthy of special concern. The construction mortgagee may well be the one who actually finances the purchase of goods that become fixtures, but it is given no automatic priority to them. It can protect itself only by checking the personal property registry for fixture notices each time it makes a new advance. Even then, the construction mortgagee could find itself subordinated to a secured party in a situation where the construction mortgagee's money allowed the acquisition of the goods that become fixtures, but before the goods are actually affixed the secured party's interest attaches. The construction mortgagee would have no way of discovering that prior interest before or after it attached. The PPSA approach appears to attempt a compromise, but it

⁸⁸ See s. 9-313(4)(a).

⁸⁹ The PMSI holder is given only a 10-day grace period (and only against owners and encumbrancers whose interests existed when the goods became fixtures) and no special preference over the construction mortgagee. See discussion earlier on the UCC.

⁹⁰ The leading case on the 1962 UCC is *House v. Long*, *supra*, footnote 53.

⁹¹ Alberta, s. 36(3); B.C., s. 36(4); Manitoba, s. 36(4); Ontario, s. 34(2); Sask., s. 36(2); Yukon, s. 35(2).

is questionable whether a construction mortgagee, who is akin to the holder of a PMSI, should be the subject of a compromise.⁹² The construction mortgagee's position is particularly invidious when the security interest to which it is subject is not a PMSI. The construction mortgagee could attempt to take a security interest and then perfect and make filings as any other secured party would, but it seems odd to require this of a mortgagee of the real property.

The 1972 UCC, in its "weightiest" reform,⁹³ took into account these concerns. It introduced the concept of the "construction mortgage".⁹⁴ According to section 9-313(6), a PMSI in fixtures is subordinate to a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. Thus, construction mortgagees do not have to be concerned, as do other persons with interests in the land, about PMSIs disturbing the general order of priority in the real estate registry, as it exists when the construction mortgage is recorded.⁹⁵ It is important to note that the priority of a construction mortgage applies only during the construction period leading to the completion of the improvement. According to White and Summers on the Uniform Commercial Code:⁹⁶

The drafters are saying only that the real estate purchase money lender, i.e., typically the bank or the insurance company standing behind the entire construction, has a greater claim as the *general* purchase money lender than does the *specific* purchase money lender who is relying on only one or a few fixtures.

The PPSAs' treatment of fixtures would be much improved if they took into account the purchase money interests more explicitly. Of security interests in fixtures, it is only the PMSI that really merits any special treatment. As for real property interests, there is no reason why the construction mortgage should not be given treatment at least as special as the PMSI.⁹⁷

⁹² See Adams, *loc. cit.*, footnote 61, at pp. 851-853. It should be noted that the situation under the 1962 UCC was more problematic in that it did not make clear what a "subsequent advance" was. See, for example, Kripke, *loc. cit.*, footnote 30, at pp. 70-74; Goodkin, *loc. cit.*, footnote 42, at pp. 503-505; Kratovil, *loc. cit.*, footnote 55, at pp. 115-118. An excellent analysis of the construction mortgage issue is in Leary, Jr., and Ricci, *loc. cit.*, footnote 30, at pp. 397-407.

⁹³ Per the General Comment on the Approach of the Review Committee for Article 9, 3 U.L.A. 7, para. A-17 (1981), cited by Carlson, *loc. cit.*, footnote 17, at p. 399.

⁹⁴ Paragraph 9-313(1)(c) says:

(c) a mortgage is a 'construction mortgage' to the extent that it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates.

⁹⁵ Gordon, *loc. cit.*, footnote 46, at p. 684, criticises the 1972 UCC approach: "The construction mortgagee is in fact given a monopoly on all the fixture financing of the debtor." He says that the 1962 UCC gave the construction mortgagee sufficient protection.

⁹⁶ (1988), p. 1158. On the PMSI generally and in relation to the construction mortgage, see Gilmore, *loc. cit.*, footnote 49.

⁹⁷ The concern will be of course that a favourable treatment for the construction mortgagee over other mortgagees would disrupt the certainty of the land registry. The discussion in the next section demonstrates a way to ensure the PPSA does not cause such disruption.

VI. Circularity

One of the inevitable results of the interaction between two registration systems is that there will be circularity problems.⁹⁸ Where there are two interests in the land and one security interest in fixtures, the holder of the security interest may fulfill requirements to give it priority over one interest in the land but not the other. This creates a circularity problem if the interest in the land which is subordinate to the security interest is, according to the land registry, prior to the interest in land which, according to the PPSA, has priority to the security interest. Where there are two security interests in fixtures, A and B, and one security interest in the land, the PPSA might set out, in the residual priority rule,⁹⁹ a rule to give one security interest priority over another, say A over B. However, the fixture section might give security interest B priority over the interest in land while security interest A does not take priority because a fixture notice has been filed by B but not by A. The complexity of these problems is compounded with more security interests and more interests in the land interacting.

These circularity problems are inevitable when there are three systems at work establishing priorities: one system for interests in the land, one system for personal property security interests generally (the PPSA, exclusive of the fixture section), and one system to regulate priorities as between those with interests in the land and those with security interest in fixtures (the fixture section). Avoidance of this type of circularity problem is only be possible in two situations: (1) if there is only one system to govern all interests in any property, or (2) if there is no overlap between the two systems such that there can never be both real property and personal property security interests in the same thing, such as fixtures. The first alternative is unworkable. Having a single system is no guarantee of lack of circularity problems. For example, as between interests exclusively concerned with the PPSA, there can arise problems particularly when there are grace periods allowed. The second alternative is possible, but would involve the harsh cure of eliminating any possibility of a security interest in goods that become fixtures.

In the context of fixtures, the circularity problem was addressed in *G.M.S. Securities Ltd. v. Rich-Wood Kitchens Ltd.*¹⁰⁰ In that case, the trial judge identified the circularity problem where a secured party had priority over a first mortgagee but not over a later mortgagee. The Ontario Divisional Court, balking at the idea that the fixture section could be permitted to give rise to a

⁹⁸ On circularity problems, see Roderick J. Woods, *Turf Wars: The Interaction between the Personal Property Security Act and the Land Titles Act*, Legal Education Society of Alberta 1992, 25th Annual Banff Refresher Course - Corporate-Commercial Law; M.S. Sutherland, *Circular Priority Systems within the Uniform Commercial Code* (1982-83), 61 *Texas Law Rev.* 517; Gilmore, *op. cit.*, footnote 31, section 39; McLaren, *op. cit.*, footnote 4, pp. 5-100 - 5-102.5.

⁹⁹ Alberta, s. 35(1)(a); B.C., s. 35(1)(a); Manitoba, s. 35(1); Ontario, s. 30(1); Sask., 35(1); Yukon, s. 34(1).

¹⁰⁰ (1988), 8 P.P.S.A.C. 131 (Ont. S.C.); (1991), 1 P.P.S.A.C. (2d) 233 (Ont. Div. Ct.)

circularity problem, defined the problem away by saying that the fixture section could only be applied once (to establish the later mortgagee's priority to the secured party), and, once applied, was "exhausted". While the court cannot be faulted for attempting to avoid circularity problems, the manner it chose is difficult to justify. There was no authority in the Ontario PPSA to support the idea that the fixture section is "in effect exhausted" after it has been applied once. The court was striving, by its own admission, not to come to a result that would disrupt the ranking of the real property interest holders as established by the Mortgages Act¹⁰¹ and the Registry Act.¹⁰²

Solutions to the *Rich-Wood* problem that would not involve side-stepping the issue as was done in the Ontario Divisional Court tend to work only for the specific facts offered.¹⁰³ One solution, as mentioned, would be to opt for one system to govern all questions of status and priority. This would eliminate overlap. The 1972 UCC comes close to adoption of this solution with its system of providing for fixture filings. Real property interest holders need not worry about most security interests in most fixtures because of the requirement that secured parties (including holders of PMSIs) register their interests in the land registries. That single registry governs and, aside from security interests in the items stipulated in s. 9-313(4)(c), no security interest not recorded in the land registry will affect them. The 1972 UCC approach does not, however, avoid all circularity problems. The fact that security interests in the items listed in s. 9-313(4)(c) do not have to be perfected in the land registry and the fact that PMSIs in fixtures are given grace periods for perfection and superpriority in some cases means the possibility of conflict and circularity has not disappeared. Nor does the 1972 UCC address the issue of potential conflict between a security interest the subject of a fixture filing versus a security interest perfected in the personal property registry when there are real property interests also involved. The 1972 UCC is an improvement on the 1962 UCC but it does not eliminate circularity problems.

Another solution is to provide a rule which would stipulate that in the event of a circularity problem, either the land registry priority system or the PPSA priority system will not be frustrated. This solution does not prevent circularity problems from arising, but, rather, specifies a rule to prevent the circularity problem from having any effect on one of the priority systems. The logical system to choose to benefit from such a rule is the land registry system. It is this conclusion that the Ontario Divisional Court in *Rich-Wood* was in fact trying to achieve. The court's hands were obviously tied for the reason that it could not appear to be legislating such a rule. The court thus engaged in some very imaginative statutory interpretation. Legislatures should take the hint. The *Rich-Wood* problem is very real and will occur again.

¹⁰¹ R.S.O. 1980, c. 296. See now R.S.O. 1990, c. M.40.

¹⁰² R.S.O. 1980, c. 445. See now R.S.O. 1990, c. R.20.

¹⁰³ See, for example, Cumming and Wood, *op. cit.*, footnote 38, pp. 219-221.

VII. Right to Remove Fixtures

The right to remove fixtures has been called the “crux” of the Article 9 provisions on fixtures.¹⁰⁴ One of the practical questions that confronts secured parties with an interest in goods that have become fixtures is what rights those parties have to remove the goods upon the default of the debtor. If there is no real property interest holder or other secured party then (assuming the debtor is the owner of the land) there is no problem in the secured party sending an agent onto the land simply to repossess the collateral.

If the secured party is not first in priority to the collateral, then the situation is more problematic. If the collateral were personal property and not property with a dual nature like fixtures, then the PPSA provides a self-contained system resolving this problem. It provides that the security interest of a prior secured party continues in the goods once they are seized and dealt with by the secured party.¹⁰⁵ The remedies provisions are based on this situation.

But if this approach is applicable to fixtures, then there arise potentially significant problems for persons with a prior interest in the land when the holder of the subordinated security interest seeks to realize on its security interest. The fixture section in the Western jurisdictions speaks¹⁰⁶ of a secured party who “has the right to remove goods from the land”. If the secured party removing the goods from the land has priority with respect to its interest in the fixture then there may be little unfairness to those with interests in the real property. However, if the secured party has a subordinated interest then the person with the prior interest in the land will be legitimately concerned about any ability the holder of the subordinated security interest has to remove the fixture from the land.¹⁰⁷ When the fixture is an item vital to the useful functioning of a building - for example, an elevator or a furnace - the value of the nominally superior interest in land is much affected if a subordinate secured party can remove the fixture.¹⁰⁸

The question, then, is when should a secured party should have the right to remove goods from land. Most PPSAs do not clearly state the scope of such a right and resort must be had to the general provisions of the PPSA on remedies.

¹⁰⁴ Goodkin, *loc. cit.*, footnote 42, at p. 500. Coburn Dewees Berry calls the right to remove fixtures “the heart and soul” of 9-313: Priority Conflicts between Fixture Secured Creditors and Real Estate Claimants (1976-77), 7 Memphis State Univ. Law Rev. 209, at p. 232.

¹⁰⁵ Alberta, s. 28(1)(a) and s.60(12); B.C., s. 28(1)(a) and s. 59(14); Manitoba, s. 27(1)(a) and s. 60(8); Ontario, s. 25(1)(a) and s. 63(9); Sask., s. 28(1)(a) and s. 59(12); Yukon, s. 26(1)(a) and s. 57(10).

¹⁰⁶ Alberta, s. 36(7); B.C., s. 36(8); Sask., s. 36(4); and Yukon, s. 35(5).

¹⁰⁷ Morris Shanker was of the view that under the 1962 UCC, a fixture could not be removed by a secured party whose interest was junior to another interest in the real estate. However, he said that if the fixture secured party had no right of removal, the UCC probably authorised the fixture secured party to employ judicial foreclosure proceedings to enforce his security interest. See *loc. cit.*, footnote 30, at p. 804. Shanker conceded that the Code was not clear on this point and clarifying amendments were needed.

¹⁰⁸ See Nathan, *loc. cit.*, footnote 6.

The enforcement rights under Part Five of the PPSA contemplate the ability of a secured party to seize and dispose of collateral subject to a prior security interest. When the security interest is subordinate to an interest of a person with an interest in the land, that latter person cannot "expect" that despite its prior interest, a subsequent security interest could give its holder the right to remove part of the land, that is, the fixture. In addition to the unfairness which the actual removal causes *vis-à-vis* the person with the interest in real property, there is uncertainty for that person as to whether its interest in real property will continue in the removed fixtures. Does the real property interest holder still have a real property interest in the removed fixtures? Surely it must, otherwise there would be no point in the security interest being "subordinate" to the interest of the person with an interest in the land. However, the PPSA does not specify how the interest of the person with an interest in the land continues in the fixtures once removed.

The Manitoba and Ontario PPSAs approach the issue somewhat differently by stating that "[i]f a secured party has an interest in a fixture that has priority over the claim of a person having an interest in real property, the secured party may, on default ..., remove the fixture" ¹⁰⁹ This approach gives security to holders of prior interests in the land that prior secured parties do not have in that the existence of the prior land interest effectively prevents the subordinate secured party from realising on the security. This result is justified in the interests of preserving the position of those with prior interests in the land. There is some balancing, however, in that if there is a *subordinate* interest in the land, it will be cleared from the fixture once it is seized and disposed of by the holder of a prior security interest (subject to the rights of the holder of a subordinate interest in the land to redeem the fixture). ¹¹⁰ It is always open to a subordinate secured party and the holder of a prior interest in the land to enter into a subordination agreement which would give the secured party the priority it needs in order to have a right of removal under the Ontario provision.

The Western Model PPSA is in most respects an improvement on the earlier Ontario-Manitoba version. However, other provinces would be well advised to follow the Ontario-Manitoba model to make clear the circumstances in which a secured party may remove fixtures. It might, however, be questioned why the Manitoba and Ontario provisions refer to a secured party having an interest in a fixture that has priority over the claim of a person having an interest in real property. Surely if there were more than one interest in real property, the secured party should have priority over them all. That undoubtedly is the intent of the Manitoba and Ontario provisions, but they are not felicitously worded. ¹¹¹

¹⁰⁹ Ontario, s. 34(3); the Manitoba wording in s. 36(5) varies only slightly.

¹¹⁰ Manitoba, s. 36(6); Ontario, s. 34(7). It should be noted that the practical effect of the redemption provision will be to reduce the impact of the fixture section on mortgagees and landlords. Many fixtures have limited value when removed from the land and so it costs mortgagees and landlords little to pay the sum stipulated by the redemption provision to retain the goods free of the security interest.

¹¹¹ The 1962 UCC says in s. 9-313(5): "When ... a secured party has priority over the claims of all persons who have interests in the real estate ..."

Conclusion

When the 1962 UCC was drafted, the treatment of fixtures was equated with that of accessions. Grant Gilmore said: "The draftsmen [of the 1962 UCC] evidently assumed that there is no substantial difference between goods which are affixed to real property ... and goods which are affixed to other goods ..." ¹¹² This equation is carried over into the PPSAs, as an examination of the fixture sections and the accessions sections ¹¹³ will quickly reveal. It soon became evident in the United States that fixtures involved a much more complex than did accessions. As two American writers have said: ¹¹⁴

When a savings and loan association financing a subdivision development in hot Arizona found that an unpaid air conditioning contractor could rip out the central air conditioning units in each house, thereby rendering them unusable, real estate financiers (banks, savings and loan associations, insurance companies, etc.) began to have second thoughts about 1962 s. 9-313.

Change came in the United States with the 1972 UCC.

It will be argued in Canada that there is no need for change because the problems are simply theoretical and that there has been little litigation on fixtures involving the PPSA since Ontario's introduction of the UCC-based legislation in 1967. Some of the problems discussed are admittedly more theoretical than practical. In practice a fixture has little value if it is removed from the land on which it is situated. Even in the United States, the practical difficulties of removal and the duty to reimburse for physical injury to the realty have had a "chilling effect" on secured parties repossessing fixtures. It has been argued that "[t]he value of the creditor's right to remove is more likely to consist of the threat of removal". ¹¹⁵ It would not, however, seem to be much of a threat if the owner of the land knows the removed fixture will have little value to the secured party who might remove it.

There is no denying the potential of the problems discussed in this article. There are problems of secrecy. Real property interest holders have difficulty discovering encumbrances to the land or may find themselves unexpectedly subordinated to personal property interests in real property. The reliability of the land registry is thrown into question. The PPSAs allow security interests in fixtures in situations when there is no proven justification or demand for them. Most PPSAs do not clearly establish when the right to remove a fixture exists. The PPSA causes circularity problems it does not deal with. Though there has been remarkably little litigation in this area in Canada, there is no questioning the potential for such problems, based on the 1962 UCC experience in the

¹¹² Gilmore, *op. cit.*, footnote 31, p. 845.

¹¹³ The accessions sections are: Alberta, s. 38; B.C., s. 38; Manitoba, s.37; Ontario, s. 35; Sask., s. 37; Yukon, s. 36.

¹¹⁴ Robert Jordan and William Warren, *Commentary to Commercial Law* (3d ed., 1992), p. 84. The authors recall that this incident was what convinced California not to adopt 1962 UCC, s. 9-313. See also *Denis v. Shirl-Re Realty Corp.*, *supra*, footnote 53, where the Bank was allowed priority to the plumbing fixtures.

¹¹⁵ Nathan, *loc. cit.*, footnote 6, at p. 728.

United States. The United States acted to forestall more problems by radically changing the fixture provisions in Article 9 in 1972. Canadian jurisdictions with PPSAs and those contemplating getting them would do well to consider preventing problems from arising by revising the fixture section of the PPSA.