


Review of the law on Personal Property Securities

An International Comparison

July 2006





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Authors: **Craig Wappett, Piper Alderman, Australia**
Laurie Mayne, Mayne Wetherell, New Zealand
Professor Tony Duggan, Faculty of Law, University of Toronto, Canada

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The authors also wish to pay tribute to the longstanding efforts of the late Professor David Allan AM in promoting reform of personal property securities law in Australia.

TABLE OF CONTENTS

Glossary

ADI	Authorised deposit-taking institution.
Article 9	Article 9 of the UCC. Unless otherwise indicated, a reference to Article 9 means the 1998 revision known as Revised Article 9. References to old Article 9 mean the pre-1998 version.
British Columbia PPSA	*Personal Property Security Act 1996* (British Columbia).
Bond Bill	The draft Personal Property Security Bill prepared for and discussed at a workshop held at Bond University in April 2002.
Canadian PPSAs	The Personal Property Security Acts of the various Canadian provinces and territories.
New Zealand PPSA	*Personal Property Securities Act 1999* (New Zealand).
Ontario PPSA	*Personal Property Security Act 1990* (Ontario).
PPSA Legislation	The New Zealand PPSA, British Columbia PPSA and Saskatchewan PPSA.
Saskatchewan PPSA	*Personal Property Security Act 1993* (Saskatchewan).
UCC	*Uniform Commercial Code* of the United States.

An International Comparison of Personal Property Securities Legislation

1. Introduction

1.1 Background

In April 2006 the Standing Committee of Attorneys-General issued an Options Paper concerning a review of the law on personal property securities.

1.2 What this paper does

This paper compares and identifies the substantive differences between the *Personal Property Securities Act 1999* (New Zealand), the *Personal Property Security Act 1996* (British Columbia), the *Personal Property Security Act 1993* (Saskatchewan) and the draft Personal Property Security Bill prepared for and discussed at the personal property securities workshop held at Bond University in April 2002.[1] It also comments on the key points of difference between the PPSA Legislation on the one hand and Article 9 of the *Uniform Commercial Code* of the United States on the other.

A comparative table of sections to the New Zealand PPSA against the British Columbia PPSA, the Saskatchewan PPSA and the Bond Bill and copies of each of the New Zealand PPSA, British Columbia PPSA, Saskatchewan PPSA, the Bond Bill and Article 9 can be accessed at *www.ag.gov.au/pps*.

Except for the general overview in part 2 and the specific comparative commentary in parts 3, 4 and 5, this paper does not analyse the workings or individual provisions of the PPSA Legislation, the Bond Bill or Article 9 or how this legislation differs from the prior law of the jurisdictions in which the PPSA Legislation or Article 9 has been enacted. [2]

1.3 Brief history of the linkage between the legislation/proposals being compared

The *Uniform Commercial Code* of the United States represents a comprehensive statement of almost the entire commercial law of the United States. Article 9 of the UCC relates to secured transactions.

The UCC was originally promulgated by the National Conference of Commissioners on Uniform State Laws and the American Law Institute in 1951. It

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1 As to the background of this workshop and the Bond Bill, see Bond Law Review (Special Issue: Proceedings of a Workshop on Personal Property Security), Volume 14, Number 1, Bond University Law School, December 2002.

2 In relation to the PPSA Legislation this type of analysis can be found in a number of texts including: L Widdup and L Mayne, *Personal Property Securities Act – a conceptual approach* (Revised Edition), LexisNexis, Wellington, 2002; M Gedye, RCC Cuming and RJ Wood, *Personal Property Securities in New Zealand*, Thomson Brookers, Wellington, 2002; and RCC Cuming, C Walsh and RJ Wood, *Personal Property Security Law*, Irwin Law, Toronto, 2005. In relation to Article 9 refer to the Official Comments included in the official version of Revised Article 9 published by the American Law Institute and the National Conference of Commissioners on Uniform State Laws.

has been amended on a number of occasions. Very substantial amendments were made in 1972 and 1998. Article 9 is the law in every State of the United States.

Personal Property Security Acts, broadly based on the same concepts as Article 9 (see part 2 below), were subsequently enacted in each of the common law provinces and territories of Canada (ie. every province and territory except Quebec), commencing with Ontario in 1967. The Canadian PPSAs are fairly similar to each other but there are some substantive differences particularly between Ontario and the other provinces and territories.

The New Zealand PPSA is modelled on the Saskatchewan PPSA although there are a number of substantive differences and many more differences of style (see parts 2 and 3 below) between them. [3]

The Bond Bill is based on and closely follows the British Columbia PPSA and the Saskatchewan PPSA. It also adopts a number of innovations from the New Zealand PPSA.

2. General overview of how Article 9/PPSA Legislation works

Before providing a general overview of how Article 9 and the PPSA Legislation works it may be useful to draw attention to some commonly used terms: [4]

- "collateral" is the secured property;
- a "debtor" is a person owing payment or performance of an obligation that is secured by personal property whether or not that person has rights in that personal property. A debtor also includes a transferor of an account receivable or chattel paper, a commercial consignee and, under the PPSA Legislation, a lessee under a lease for a term of more than one year;
- a "financing statement" is the information provided to the security registry to perfect a security interest. It is in effect a notice of the security interest;
- "filing" refers to the process of filing or registering a financing statement; and
- a "PMSI" is a purchase money security interest which is taken by the seller of goods to secure payment of the price, or by the lender of the money used to pay for them. Examples of a purchase money security interest include the interest of the owner of goods under a hire-purchase agreement or finance lease, the interest of a lender under a mortgage taken to secure repayment of a loan (the mortgage being taken over the specific asset acquired using the loan moneys), and the interest of a supplier under a retention of title arrangement.

To avoid repetition, this part refers only to Article 9 except where there is a significantly different approach taken in the PPSA Legislation. A more detailed commentary on the substantive differences between Article 9 and the PPSA Legislation appears in part 5.

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[3] While the New Zealand PPSA is modelled on the Saskatchewan PPSA, many of the operational features of the New Zealand Personal Property Security Registry are based on the equivalent registry in the Canadian province of New Brunswick.

[4] These are not the exact definitions used in the legislation (the definitions vary somewhat between jurisdictions), rather they are descriptions of certain terms commonly used.

2.1 **The uniformity and flexibility principles**

With the exception of certain excluded transactions, Article 9 applies to:

- a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract;
- an agricultural lien;
- a sale of accounts, chattel paper, payment intangibles, or promissory notes;
- a consignment;
- reservation of title arrangements; and
- the interest of a lessor under a lease. [5]

The broad application of this legislation is known as the *uniformity principle.*

Subject to specified qualifications, a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors. This is known as the *flexibility principle*. It does not abolish traditional forms of security but it does make the distinctions between them redundant.

Under Article 9 a generic form of security agreement can be used which does not need to satisfy any particular form or content requirements. The flexibility principle eliminates the need for differing types of security documentation based on the type of property to be secured or the nature of the debtor. This allows all forms of security interest created by the debtor to be incorporated in one document. Under Article 9 it is enough for the parties to grant "security" over property rather mortgaging, assigning, charging or pledging it.

Generally speaking the rights and duties of parties to a secured transaction and affected third parties are determined without reference to who has title to the collateral.[6] Title may still be relevant for other legal purposes unrelated to Article 9.

2.2 **Categorisation of secured property**

Article 9 categorises secured property not according to its legal form but according to the purpose for which an asset given as security is held by the debtor.

A particular type of personal property will fall within one of these principal categories:

- goods;
- instruments;

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5 ss.1-201, 9-109 and 9-202, UCC. Article 9, s.1-201 provides that a seller or lessor of goods may acquire a "security interest" by complying with Article 9. The PPSA Legislation expressly provides that a lease for a term of more than one year is a security interest.

6 s.9-202, UCC.

- documents of title;
- intangibles and accounts;
- securities;
- chattel paper; and
- money.

Goods are further divided into three sub-categories:

- inventory, that is, goods held for resale or raw materials held for processing into finished products. Special rules apply to security in inventory to reflect the fact that it is constantly changing and being turned over. Since the life of an item of inventory is short-lived, the security holder needs to be able to extend its security interest to proceeds. A security interest in inventory cannot prevail against a buyer in the ordinary course of business, for the security holder knows that the goods are to be resold and that it is only from the proceeds of resale that it can be repaid. The security interest extends to the proceeds from the sale of inventory;

- equipment, which includes goods held by the end user for business purposes. Separate rules apply to security in equipment since the security holder has no reason to suppose that it will be resold and can legitimately expect to assert its filed security interest over the claims of subsequent third parties; and

- consumer goods, that is, goods used or bought for use primarily for personal, family or household purposes. These constitute a separate category under Article 9 primarily to exclude certain security interests in consumer goods from the filing system.[7] Consumer secured transactions are typically one-off affairs not involving large amounts, and the American view is that it is undesirable to clutter up the register with them. Under the PPSA Legislation the definition is used not to exclude consumer transactions but to give a higher level of protection to consumer debtors and those who deal with consumer collateral.

Particular goods may fall within each of these sub-categories but only one sub-category will apply at any point in time.

Chattel paper is a “writing” evidencing both a debt obligation and a security interest in specific goods. It is a category of collateral separate from the goods to which it relates and this distinguishes chattel paper from documents of title. Leases and hire purchase agreements are examples of chattel paper. A security holder who takes a security interest in chattel paper does not have a direct security interest in the goods. Instead it has a security interest in the payment obligation of the lessee or hirer and a security interest in the lessor or owner’s security interest in the goods.

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[7] ss.9-309(1), 9-311(a) and (b) UCC. s.9-311 also exempts from the filing provisions of Article 9 certain transactions for which a particular system of security interest filing or title has been established under US federal or state law.

Some of the other principal categories of personal property also have a number of specified sub-categories for the purposes of various provisions in the legislation.

2.3 The filing system

Article 9 provides for a filing system based on the concept of "notice filing" in a debtor name indexed register. Under the PPSA Legislation the register is also indexed by serial number in respect of goods defined as serial numbered goods; for example, cars, boats and certain agricultural equipment. The general idea is to confine the particulars that need to be filed to a minimum, leaving the searcher to obtain any further details it needs from the security holder shown on the register. A financing statement is filed against the name of the debtor, and under the PPSA Legislation if the collateral is serial numbered goods, also against the serial number. A separate financing statement for each item of property or transaction is unnecessary. A single financing statement can be used for any number of security interests and the security holder can, with the consent of the debtor, file a financing statement to indicate the intention to take security. If the security agreement is concluded and value is given priority dates from the time of filing not the time of the transaction.

A financing statement need only contain a general description of the secured property and is not mandatory to register, but failure to register has priority consequences (see part 2.4 below).

2.4 Priorities and tracing

Article 9 adopts a set of priority rules based on what is most likely to produce a fair commercial result, rather than the location of the legal title or equitable rules of tracing. As a general rule, the first to file gains priority regardless of whether there is notice of other unregistered interests. In a number of cases a security holder with actual or notional possession or control of the collateral will prevail over the first party to register a financing statement.

If there are two or more security interests in the same property, the usual rule is that priority is given to the security holder who first files for registration. Where only one of the security interests is registered, priority goes to the registered interest. Where neither is registered, priority is determined in accordance with the order of attachment (see part 2.6 regarding the concepts of attachment and perfection). There is an exception for PMSIs. Subject to certain conditions, the holder of a perfected PMSI takes priority over an earlier perfected all assets security interest in the same goods. There are also special rules relating to fixtures, accessions and commingled goods.[8]

The priority of a creditor over subsequently perfected security interests generally extends to further advances. This priority can be waived or modified by means of a subordination agreement. The extension of priority to future advances displaces the common law principles of tacking.

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[8] Queensland Law Reform Commission, Discussion Paper 39 and Law Commission of Victoria, Discussion Paper 28, *Personal Property Securities Law: A Blueprint for Reform*, 1992 at pages 34 to 36.

Under Article 9, where property the subject of a perfected security interest is sold (whether with or without the secured creditor's consent), perfection extends to the proceeds of sale in the hands of the debtor, so long as they remain identifiable. This result is automatic. There is no need for the security agreement to stipulate that the security interest continues in the proceeds. The security holder may agree to release the asset from the security interest altogether, and where the sale takes place with the security holder's consent, a question may arise as to whether this was the intention. In the absence of proof to the contrary, it is presumed that no release was intended. Where the collateral is sold for cash and the cash is used to purchase other property, the original security interest continues in the new property, but a fresh financing statement must be filed in certain circumstances.

Where collateral is sold without the security holder's consent, as a general rule, the security interest continues notwithstanding the disposition, and the security holder will be entitled to seize the property from the third party purchaser. However, the legislation favours the "ordinary course" third party purchaser over the holder of a registered security interest, so that the general rule may be displaced if the security holder has consented to the debtor dealing with the collateral. There is also an exception which applies in favour of purchasers of negotiable instruments, negotiable documents of title, chattel paper and investment securities.

2.5 **Remedies**

Article 9 provides for a secured creditor's remedies on default, regardless of the form of the security interest. The remedies include the right to:

- realise the collateral;
- retain the collateral in full satisfaction of the debt (in effect, foreclosure); or
- ignore the security and sue on the debt.

There are also rules governing the sale of collateral, and accounting for the proceeds. In particular, any surplus remaining after satisfaction of the secured creditor's debt must be paid to the debtor (assuming there are no other security interests in the property). The debtor may exercise a right of redemption at any time before sale of the property by tendering payment of the outstanding balance of the debt together with the creditor's enforcement expenses.

2.6 **The concepts of attachment and perfection**

The central concepts of Article 9 are attachment and perfection. These concepts establish the existence of security interests and the rights and priorities of secured parties in the same property of a debtor.

Attachment is the time when collateral becomes subject to the security interest. A security interest will attach subject to three tests:

- value is given. Value means any consideration sufficient to support a simple contract, including a prior debt or liability;

- the debtor must have rights in the property or the power to transfer rights in the property to a security holder.[9] The extent of the debtor's rights in the property may range from full legal and beneficial ownership of the property to some lesser form of right such as the right of possession; and

- the security holder obtains possession or control of the property or the debtor has an authenticated (ie. signed) security agreement that includes a description of the collateral.[10]

While a security interest will attach upon satisfaction of the above three tests, the parties may also agree to postpone the time of attachment. Once the security interest attaches to property, it will continue in the property until the security interest is discharged or until the debtor disposes of or otherwise deals with the property in a manner which the security holder has authorised, either expressly or by implication.

A security interest is perfected when it has attached and when the security holder has taken all steps required for perfection under Article 9. These steps generally include the filing of a financing statement or taking possession or control of the collateral.[11] The perfection of a security interest places it in a position of priority with respect to third parties who may claim an interest in the same property.

Under Article 9 the order of occurrence of attachment and the steps required for perfection is not important so long as they all occur.

2.7 **The relevance of the floating charge**

The pre-Article 9 law in the United States did not recognise the concept of a floating charge. Indeed this was one of the factors leading to the adoption of Article 9.[12] In contrast, the pre–PPSA jurisprudence in both Canada and New Zealand did recognise the floating charge.

PPSA Legislation does not abolish floating charges,[13] but it makes the prior law's distinction between fixed and floating charges irrelevant. PPSA Legislation permits the creation of what might be described as a statutory fixed charge over circulating assets. The debtor can deal with inventory and other circulating assets in the ordinary course of business and the security holder's interest is protected by the extension of the security interest to the proceeds of such property.

Using the New Zealand PPSA by way of illustration, s.43 of that Act expressly allows a security interest to be taken in after-acquired property. The New Zealand PPSA treats such an interest no differently to a security interest over existing property. The security agreement may still use floating charge terminology, and such arrangements are clearly within the scope of the PPSA Legislation, but floating security interests are governed by the rules in the legislation and not by the

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9 s.9-203(b), UCC.

10 s.9-203(b)(3), UCC.

11 ss.9-309, 9-310, UCC. Note that some security interests are perfected merely by attachment: s.9-309, UCC.

12 JS Ziegel, "*Floating Charges and OPPSA: A Basic Misunderstanding*" (1994) 24 Canadian Business Law Journal at page 477.

13 s.17(3), New Zealand PPSA expressly provides that a "security interest" includes a floating charge.

prior floating charge case law. The detailed statutory priority rules contained in the PPSA Legislation address priority questions without reverting to rules based on legal versus equitable interests or fixed versus floating charges and the concept of crystallisation. [14]

Sections 40 and 44 of the New Zealand PPSA essentially abolish the prior law's distinction between fixed and floating changes. Even if a draftsperson continues to describe a charge as floating, the charge will "attach" pursuant to s.40 and not pursuant to some subsequent crystallising event or as a result of specific appropriation by the debtor. For the avoidance of doubt, this is confirmed by s.40(4), which states that "a reference in a security agreement to a floating charge is not an agreement that the security interest…attaches at a later time."[15]

There is one exception to the time of attachment provided by s.40. Where the parties have agreed that the security interest will attach at a later time, the agreement is effective. Section 40(4) ensures there can be no argument that by using a floating charge the parties have impliedly agreed that the charge will not attach until crystallisation. Crystallisation is no longer relevant to determine whether the secured party's proprietary interest has attached to the collateral unless the parties expressly specify otherwise. Section 40 determines the question of attachment.

Similar provisions to ss.40, 43 and 44 of the New Zealand PPSA are found in the British Columbia PPSA, Saskatchewan PPSA and the Bond Bill.[16]

3. How is the New Zealand PPSA different from the Bond Bill, British Columbia PPSA and Saskatchewan PPSA?

3.1 Application of the Act

3.1.1 Deemed security interests

The New Zealand PPSA, in common with the Saskatchewan PPSA, the British Columbia PPSA and the Bond Bill, include within the definition of "security interest" the following interests in property:

- interests created or provided for by a transfer of accounts receivable or chattel paper;
- interests created or provided for by a lease for a term of more than one year; and
- commercial consignments.[17]

These interests are considered "security interests" under the relevant Act (and subject to the priority rules in the Act), whether or not such transfer, lease or consignment is in substance a security interest. They are commonly referred to as "deemed security interests".

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14 Drawn from commentary in Gedye, Cuming and Wood, op.cit. at pages 10 to 13.

15 Ibid.

16 ss.12 and 13, British Columbia PPSA and Saskatchewan PPSA and ss.17 and 18, Bond Bill.

17 s.17(1)(b), New Zealand PPSA.

The original Canadian PPSA legislation did not include leases for a term of more than one year as a security interest caught by the operation of the Act, and the Ontario PPSA still does not include such a concept. However leases which in substance operate as a security device are within the ambit of the Ontario PPSA. Uncertainty as to which leases are caught has given rise to a considerable amount of litigation in Ontario and the Ontario division of the Canadian Bar Association has consistently sought the inclusion of a provision along the lines of that found in all of the other Canadian provinces and territories (ie. stating that a lease for more than one year is covered).

The policy behind the Saskatchewan PPSA (and consequently the New Zealand PPSA) deeming such leases and consignments to be security interests has been stated as being:

> "True consignments and leases have one feature in common with security agreements. They create a potential for deception of innocent third parties who deal with the lessee or consignor, as the case may be, in the belief that no one else has a claim to the property involved.
>
> Any modern personal property security legislation must embody a system designed to protect innocent third parties who might otherwise suffer loss as a result of dealing with a person who has given a security interest in his property. The commission has concluded that a system which avoids deception in cases where security transactions are involved can be employed with equal effectiveness in cases where certain types of non-security agreements create the same type of deception. It is totally unrealistic to attempt to bring within the scope of the Act every kind of transaction in which deception results from a separation of interest and appearance of interest. However, it is realistic to include in the registration and perfection system of the Act certain types of transactions which, because of their commercial importance, are likely to continue to produce significant disruption if left out. The Commission has concluded that long-term leases and certain types of true consignment agreements fall within this category."[18]

3.1.2 **Fixtures**[19]

The Saskatchewan PPSA, the British Columbia PPSA and the Bond Bill have regimes dealing with fixtures, whereas the New Zealand PPSA does not contain such provisions.

In the Bond Bill, these provisions are included in s.41. The main purpose of s.41 is to establish priority and enforcement rules to resolve the competing claims of a PPSA fixtures financier and third parties with an interest in the underlying land.

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[18] *Proposals for a Saskatchewan Personal Property Security Act*, Law Reform Commission of Saskatchewan, Report to the Attorney-General, 19 July 1977, pages 7 and 8.

[19] Based on commentary on fixtures security interests in C Walsh, *An Introduction to the New Brunswick Personal Property Security Act*, Faculty of Law, University of New Brunswick, 1995, pages 175 to 178.

The mutual exclusivity of the real property and personal property registry systems means that a priority contest cannot be resolved solely based on the provisions of the PPSA legislation. Section 41 specifies when a fixtures financier must register its interest in the relevant Land Titles Office in order to gain or maintain priority against third party land interests. The priority regime in s.41 distinguishes between a security interest in fixtures that attaches before the goods become fixtures and one that attaches after they become fixtures.

Enforcement of a security interest in fixtures may require detaching the collateral from the land. This could cause some damage to the land. Section 41 of the Bond Bill addresses the manner of enforcement and the circumstances in which the fixtures financier is obliged to compensate the land interest holder for incidental damage.

The term “fixtures” is defined in the Bond Bill (Schedule 1 – Definitions) as not including building materials.

> “‘Building materials’ means materials that are incorporated into a building and includes goods attached to a building so that their removal:
>
> (a) would necessarily involve the dislocation or destruction of some other part of the building and cause substantial damage to the building, apart from the loss of value of the building resulting from the removal; or
>
> (b) would result in the weakening of the structure of the building or the exposure of the building to weather damage or deterioration,
>
> but does not include:
>
> (c) heating, air conditioning or conveyancing devices; or
>
> (d) machinery installed in a building or on land for use in carrying on an activity inside the building or on the land.”
>
> “Building’ means a structure, erection, mine or work built, constructed or opened on or in land.”

The intention is not to include goods as "fixtures" if they form an integral part of a building such that trying to distinguish them from the land is practically impossible.

The items excluded from "building materials" in paragraphs (c) and (d) above are often the subject of financing arrangements that are separate from the land to which they might become attached.

Where a fixtures security interest attaches to goods before they become fixtures, that security interest will have priority under s.41(2) over an existing third party interest in the land whether or not the fixtures interest is registered in the relevant Land Titles Office.

The fixtures financier is preferred on the basis that the existing land interest cannot be prejudiced by the absence of the registration against the land

since they did not rely on the fixtures being part of the land when they acquired their interest.

Once the goods are affixed, the potential exists for misleading third parties who subsequently acquire an interest in the land on the basis that all outstanding interests are disclosed on the Land Titles Office records. In these circumstances, the fixtures interest is subordinated to the subsequent purchaser and mortgagee who acquires and registers an interest in the land before notice of the fixtures interest is noted on the relevant Land Titles Office registry. Under s.41(4) of the Bond Bill, an existing mortgagee of the land is also protected to the extent of advances made after the goods become fixtures but before the fixtures interest is registered in the relevant Land Titles Office, or where the mortgagee has obtained an order for the sale of the mortgaged land during that period.

Section 41 of the Bond Bill is based on substantially identical provisions in the British Columbia PPSA and Saskatchewan PPSA. Including similar provisions in the New Zealand PPSA was considered at the time of its introduction, but eventually this did not happen. As a result, under the New Zealand PPSA, if a security interest is taken in personal property that later becomes a fixture, the common law renders the personal property part of the land to which it becomes affixed and the secured party loses its interest in that chattel.

3.1.3 Crops, livestock, trees, wool

Application of the Act

Although the New Zealand PPSA does not have a regime relating to fixtures, the definition of "goods" under the New Zealand PPSA specifically includes "crops, the unborn young of animals, trees that have been severed and petroleum or minerals that have been extracted". [20] "Crops" is defined as:

> "crops, whether matured or otherwise, and whether naturally grown or planted, attached to land by roots or forming part of trees or plants attached to land, but does not include trees". [21]

When the New Zealand PPSA refers to crops, it does not mean crops that have been harvested and are no longer attached to the land. (Such crops are, however, goods and the New Zealand PPSA applies as it does to other goods.) Similarly, the definition of goods includes the unborn young of animals, clarifying that a security interest may attach to the unborn young of animals prior to the young being born. (Once the young are born, they are "goods" in the ordinary sense, and the New Zealand PPSA also applies.)

Trees are not goods until they have been severed, and minerals and petroleum do not become goods until they are extracted from the earth. Until severed or extracted, those trees, minerals and petroleum are

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[20] s.16(1), New Zealand PPSA.

[21] Ibid.

considered part of the land of which they are part, and a separate security interest cannot attach under the New Zealand PPSA.

The Bond Bill (in common with the Saskatchewan PPSA and the British Columbia PPSA) provides that a debtor has no rights in any of the following:

- crops until they become growing crops;
- the young of animals until they are conceived;
- minerals or hydrocarbons until they are extracted;
- trees, other than crops, until they are severed; and
- wool until the wool has started to grow.[22]

The consequence is that the secured party's security interest does not attach at least until the event in question occurs.

Super-priority for value given to produce or harvest

The Saskatchewan PPSA, the British Columbia PPSA and the Bond Bill each contain a super-priority in respect of crops (and, in the Bond Bill, in respect of wool, fowl, cattle and fish) that is similar to the super-priority given to PMSIs in other goods. No such provision is contained in the New Zealand PPSA.

Under s.39(11) of the Bond Bill, a perfected security interest in crops or their proceeds that is given for value to enable the debtor to produce or harvest the crops and that is given while the crops are growing crops or during a period of six months immediately before the crops become growing crops, has priority over any other security interest in the same collateral.

Competing interests in land

The Saskatchewan PPSA, the British Columbia PPSA and the Bond Bill give a secured party who has a security interest in crops priority over a person who has an interest in the land,[23] provided that:

- the secured party must file a notice in the Land Titles Office in order to maintain this priority against a subsequent purchaser or mortgagee of the land; and
- the interest of a creditor with an existing registered interest in land will take priority, except in relation to PMSI interests in crops (and

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[22] Wool is not specifically provided for in the New Zealand PPSA, the Saskatchewan PPSA or the British Columbia PPSA – presumably it would be considered part of the relevant sheep and not capable of being separate property until it is severed.

[23] s.42, Bond Bill; s.37, Saskatchewan PPSA; s.37, British Columbia PPSA. In the Bond Bill, this also applies to wool – s.44.

other interests having "super-priority" as described above) where those interests are registered within a 15 day timeframe.

The New Zealand PPSA provides that a perfected security interest in crops is not extinguished by a subsequent sale, lease, mortgage or other encumbrance of the land. Registration of the interest in the crops in the Land Titles Office in New Zealand is not required (and, in fact, is not possible), provided that the interest is perfected under the New Zealand PPSA. Existing rights of a lessor or mortgagee in land will prevail over security interests in crops (including PMSIs) where the rights existed at the time the security interest was created and the lessor or mortgagee had not consented to the security interest.

Limitation on future advances

The Bond Bill (in common with the Saskatchewan PPSA and the British Columbia PPSA) places a limitation on the ability of a secured party to take an after-acquired interest in growing crops. A security interest will not attach under an after-acquired property clause in crops that become growing crops more than one year after the security interest is entered into.[24]

This restriction is a policy decision, and in connection with the Saskatchewan PPSA was to "ensure that agricultural producers are not forced by harsh economic circumstances to encumber their income from crop production for long periods into the future". [25]

A similar restriction to the above was previously part of New Zealand law,[26] but was not incorporated in the New Zealand PPSA.

3.1.4 Accounts receivable and set off

Rules for assignments of accounts receivable

The Bond Bill provides rules relating to the legal consequences of the assignment of an intangible or chattel paper, such as the effect of modification or substitution of the underlying contract, and payments by the account debtor before that debtor receives notice of the assignment.[27]

These provisions correspond to provisions in the Saskatchewan PPSA and the British Columbia PPSA, but the New Zealand PPSA has no such provisions. To a large extent, similar concepts are already part of New Zealand law under both the common law and the *Property Law Act 1952* (New Zealand).

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24 s.18(2)(a), Bond Bill; s.13(2), (3), Saskatchewan PPSA; s.13(2), British Columbia PPSA.

25 RCC Cuming and RJ Wood, *Saskatchewan and Manitoba Personal Property Security Acts Handbook*, 1994, page 128.

26 s.36, *Chattels Transfer Act 1924* (New Zealand).

27 s.47, Bond Bill.

Ability to set off against deposit accounts

Rights of set off are specifically excluded from the New Zealand PPSA and the Bond Bill,[28] but not the Saskatchewan PPSA. Set off is likely not to be a security interest in any case because it will either arise by operation of law (and therefore be excluded) or will be a contractual set off that relates to purely personal rights to set one obligation against another, and does not create any interest in the other party's monetary claim.[29]

Unlike the New Zealand PPSA, the Saskatchewan PPSA and the British Columbia PPSA, the Bond Bill states that an authorised deposit-taking institution may take a security interest in a deposit account maintained with that ADI. The Bond Bill also deals with the circumstances in which a secured party has a perfected security interest in a deposit account. This is similar to Article 9 but unlike Article 9 the Bond Bill does not incorporate a specific priority regime for security interests in deposit accounts (refer to part 5.4 below) although it does provide that an ADI's right of set off over a deposit account is ineffective against a secured party that holds a perfected security interest in that account in certain circumstances.[30]

3.2 Priority Rules

3.2.1 Effect of liquidation / bankruptcy

Effectiveness of unperfected interests

PPSA Legislation does not make registration mandatory but failure to register has clear priority consequences. A separate issue is the effect of an unregistered security interest in insolvency.

Under the New Zealand PPSA an unperfected security interest is enforceable in the insolvency of the debtor against a liquidator or the Official Assignee. This is not the case under the Bond Bill. This position is also inconsistent with the position under Article 9 in the United States and all the Canadian PPSAs, including British Columbia and Saskatchewan as well as current insolvency laws in the United States, Australia and the United Kingdom.

Several reasons might justify why an unregistered security interest should be void as against the Official Assignee or a liquidator (ie. the position under the Bond Bill, British Columbia PPSA and Saskatchewan PPSA). These include:

- the register would be a more complete and reliable source of information to assist financiers with credit decisions and for credit reporting and credit reference purposes generally. For example, creditors who have obtained a negative pledge from a debtor that the debtor will not encumber its assets will be unable to rely on

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28 s.23(c), New Zealand PPSA; s.10(1), Bond Bill.

29 Cuming and Wood, op.cit. at page 57.

30 s.47, Bond Bill.

searches of the securities register to ensure the debtor's observance of its negative pledge obligations;

- requiring registration reduces the potential for fraud;

- registration would assist liquidators to determine which securities given within prescribed time periods preceding liquidation should be set aside, and help prevent unethical creditors from backdating security agreements to escape a voidable preference period; and

- insolvency regimes commonly stipulate that receivers and liquidators must pay preferential creditors from prescribed categories of assets (specifically floating charge assets in Australia). Requiring registration would assist receivers and liquidators to determine which assets are not available to preferential creditors.

A number of issues could be raised in response to the reasons listed above. These include:

- PPSA registration has a number of features which make it an unreliable source of information about the debtor's general creditworthiness. For example, the PPSAs allow a secured party to register in advance of a security agreement. This means that registration is no more than a statement that the secured party might have a security interest in collateral of the general type the financing statement specifies. To be certain, the searcher must make follow-up inquiries with the secured party;

- requiring registration may not limit the potential for fraud, given that evidence that a security agreement is entered into is not required for registration;

- the PPSAs also allow a secured party to register subsequently to the security agreement, in which case, the secured party gets the benefit of perfection in relation to competing interests that arise after the date of registration. This weakens the viewpoint that requiring registration would assist liquidators to determine voidable preferences and reduce the possibility of creditors backdating securities; and

- an insolvency regime could determine which assets are available for preferential creditors without making the security agreement invalid (such that the security holder would still outrank unsecured creditors), and provide that preferential creditors have priority over unperfected interests.

The position in the New Zealand PPSA is based on the premise that there are only two parties who could potentially be misled by the absence of a financing statement - prospective secured creditors and prospective buyers and lessees - and that these parties are adequately protected without the need for a rule making unperfected security interests ineffective in bankruptcy.

In *Re Giffen*,[31] Iacobucci J., writing for a unanimous Supreme Court of Canada, explained the reason for the rule that an unperfected security interest is ineffective against the debtor's insolvency administrator as follows:

> "Prior to bankruptcy, unsecured creditors can make claims against the debtor through provincial judgment enforcement measures. Successful claims will rank prior to unperfected security interests pursuant to [British Columbia PPSA, s.20]. Once a bankruptcy occurs, however, all claims are frozen and the unsecured creditors must look to the trustee in bankruptcy to assert their claims. Cuming describes the purpose of s.20(b)(i)(at P.29):
>
> > 'In effect, the judgment enforcement rights of unsecured creditors are merged in the bankruptcy proceedings and the trustee is now the representative of creditors who can no longer bring their claims to 'perfected' status under provincial law. As the repository of enforcement rights, the trustee has status under s.20(b)(i) of the BC PPSA to attack the unperfected security interest.'"

The drafting of the corresponding provision in Revised Article 9 makes this policy explicit. It provides that a security interest is subordinate to the rights of a person that becomes a lien creditor before the security interest is perfected.[32] "Lien Creditor" means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes a trustee in bankruptcy.[33]

The New Zealand policy makers did not have the benefit of *Re Giffen* at the time they decided not to adopt the rule.

Damages

The Saskatchewan PPSA, the British Columbia PPSA and the Bond Bill each provide that where the interest of a lessor pursuant to a lease for a term of more than one year, or the consignor under a consignment, is ineffective against a trustee or a liquidator due to that interest being unperfected, the lessor or the consignor is deemed to have suffered, immediately before the date of bankruptcy or winding up, damages equal to the value of the goods as at the date of bankruptcy or winding up, and the amount of loss resulting from the termination of the lease or the consignment.[34] The purpose is to remove any doubts as to whether the lessor or consignor may prove as an unsecured creditor in the debtor's bankruptcy for the amount in question.

There is no corresponding provision in the New Zealand PPSA. This is because in New Zealand an unperfected interest arising under a lease or commercial consignment is still valid in the debtor's bankruptcy or liquidation and so the issue does not arise.

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31 [1998] 1 SCR 91 at para. [39].

32 s.9-317, UCC.

33 s.9-102, UCC.

34 s.25, Bond Bill; s.21, Saskatchewan PPSA; s.21, British Columbia PPSA.

3.2.2 Future advances

Under the New Zealand PPSA, all advances under a security agreement have the same ranking, including future advances. This has the effect of reversing the common law rule in *Hopkinson v Rolt*[35] under which future advances made by a mortgagee cannot be "tacked" onto the same priority as previous advances after the mortgagee becomes aware of another interest in the mortgaged property.

The Saskatchewan PPSA, the British Columbia PPSA and the Bond Bill retain the rule in *Hopkinson v Rolt* in one respect. If an unsecured creditor uses a legal process to have property seized pursuant to a judgment (such as execution, attachment or garnishment), advances made after the security holder becomes aware of the interest of the unsecured creditor or the seizure of the collateral do not have the original ranking priority.

Because of this exception, the Saskatchewan PPSA, the British Columbia PPSA and the Bond Bill also provide that, if collateral has been seized or subject to execution process, an obligation on a security holder to make further advances after the security holder becomes aware of this fact, is not binding.

3.2.3 Purchase money security interests

Notification

A PMSI taken in collateral gives the secured party a "super priority" in respect of the relevant collateral, such that the PMSI takes priority over previously perfected security interests in the same collateral.

In order to achieve this "super priority" under the New Zealand PPSA, the security holder must provide value to enable the debtor to obtain rights in the relevant collateral, and the PMSI must be perfected within particular timeframes of the debtor acquiring such rights.

The Saskatchewan PPSA, the British Columbia PPSA and the Bond Bill add one further requirement where the PMSI interest is in respect of collateral that is "inventory" of the debtor (or the proceeds of that inventory) – that is, that the security holder must have given notice, before the debtor acquires rights in the relevant collateral, to any other security holder that has previously filed a financing statement in respect of the same item or kind of collateral.

The rationale for such a notice requirement is that it is necessary to protect the first registered security holder who might otherwise make additional advances to the debtor on the mistaken assumption that the advances will be secured by a first ranking security interest.

In New Zealand, this consideration was discounted on the basis that the PMSI super priority merely reflects the rights that title-holders (such as suppliers retaining title under a "romalpa clause") would otherwise have

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[35] (1861), 9 H.L. Cas 514.

had under the previous law, and that general financiers tended, in any case, to discount the value of inventory under their all assets security.

Proceeds interests

A competition between two PMSIs may arise where one of the PMSIs is taken in the original collateral and the other PMSI attaches to the collateral as proceeds. Cuming, Walsh and Wood give the following example:

"SP1 takes a purchase money security interest in a motor vehicle which SP1 registers on 1 May. D later buys a truck from SP2 under a secured instalment credit agreement and gives SP2 the motor vehicle by way of trade-in. SP2 registers in respect of the truck on August 5". [36]

Both SP1 and SP2 have purchase money security interests in the truck. SP2's purchase money security is taken in the truck as original collateral. SP1's purchase money security interest is in the truck as proceeds of the motor vehicle. The Saskatchewan PPSA, the British Columbia PPSA and the Bond Bill have a special priority rule for this type of case. Under s.39(8) of the Bond Bill, a non-proceeds PMSI has priority over an earlier registered PMSI in the same collateral as proceeds, provided that the non-proceeds PMSI is perfected within particular timeframes of the debtor taking possession of the collateral.

The New Zealand PPSA has no such provision, with the result that, under the New Zealand PPSA, a prior registered proceeds PMSI will have priority over a non-proceeds PMSI in the relevant collateral.

3.2.4 **Returned / repossessed goods**

The Saskatchewan PPSA, the British Columbia PPSA and the Bond Bill contain another set of priority rules for which the New Zealand PPSA does not have a corresponding provision – in this case, relating to security interests in returned or repossessed goods.

Where a debtor sells or leases goods in the ordinary course of its business, the goods pass to the buyer or lessee free of any security interest that the debtor may have granted over those goods. If the sale or lease is a financing transaction such as a hire purchase or a finance lease, an account receivable or chattel paper will come into existence on the sale or lease (and will generally be transferred to another secured party of the debtor).

Section 34 of the Bond Bill and the corresponding provisions under the Saskatchewan PPSA and the British Columbia PPSA are designed to deal with the situation where the relevant goods are returned to the debtor or seized or repossessed. If the debtor has granted a general security interest over its assets, that interest will attach to the goods when they are returned to the debtor. The security holder with the interest in the chattel paper will also have an interest in the underlying goods.

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[36] Op.cit., page 355.

The relevant section effectively deems a security interest to be created in relation to returned goods in favour of the transferee of chattel paper or the account receivable. Under the New Zealand PPSA, in contrast, a transferee of chattel paper does not get a direct security interest in the relevant goods, but only a security interest in the debtor's security interest in the goods, and the Act does not deal with the competing claims of a general secured party and a transferee of chattel paper in the underlying goods.

3.3 Remedies / duties of a secured party

3.3.1 Remedies

Part 9 of the New Zealand PPSA deals with the enforcement of security interests in collateral, other than consumer goods. Enforcement of security interests in consumer goods is dealt with in the *Credit (Repossession) Act 1997* (New Zealand).

The Bond Bill has one enforcement and remedies regime in part 5 but, similarly with the New Zealand PPSA, part 5 does not seek to oust the specific enforcement provisions applicable to consumer transactions under the *Consumer Credit Code* in force in each of the Australian states and territories.

3.3.2 Contracting out

One of the objectives of the PPSA Legislation is to treat all security interests over personal property, regardless of their form, in the same way. This includes providing for common remedies provisions.

The New Zealand PPSA permits contracting out of many of these remedies provisions.[37] This broad option to contract out of the various remedies provisions is not found in the British Columbia PPSA, the Saskatchewan PPSA or the Bond Bill.

The ability to contract out is the result of a policy decision that, although the New Zealand PPSA provides a code of default mechanisms applying to competing security interests, a secured party and a debtor have freedom to contract under the Act. Financiers ordinarily incorporate into their standard terms provisions under which the debtor contracts out of all its rights under the New Zealand PPSA, including the right to object to the foreclosure by the financier over the relevant secured asset (being the ability of the secured party to take the asset in satisfaction of the debt, and not be required to sell the asset or return the surplus value to the debtor or any other creditor of the debtor).

3.3.3 Enforcement

Section 109 of the New Zealand PPSA provides that a secured party with priority over all other secured parties may seize and sell the collateral. There is some uncertainty concerning the effect of s.109. It has been

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[37] s.107, New Zealand PPSA.

suggested that the intended effect was that only a first ranking secured party may enforce a security interest.[38] There is some uncertainty whether s.109 achieves this objective but the provision raises issues in respect of equal ranking security interests. There is no equivalent of s.109 in the British Columbia PPSA, the Saskatchewan PPSA or the Bond Bill and a subsequent ranking secured party may still exercise enforcement rights over an asset, provided that the proceeds of that enforcement are applied in accordance with the relevant priority rules.

3.3.4 **Duties**

The Saskatchewan PPSA, the British Columbia PPSA and the Bond Bill impose a duty on a secured party to use reasonable care in the custody and preservation of collateral where that secured party is in possession of the collateral.[39] Such an obligation is not included in the New Zealand PPSA, where the only duties imposed on secured parties are in relation to their actions on enforcement of the collateral.

3.4 **Descriptions / registration**

3.4.1 **Descriptions**

For a security interest to be enforceable against third parties under the various Personal Property Security Acts, an adequate description of the collateral being secured must be included in the security agreement. The exception to this is where the security agreement secures all of the debtor's present and after-acquired property, or all present and after-acquired property except for specified items or kinds of property.

In the New Zealand PPSA, the Saskatchewan PPSA and the British Columbia PPSA, a description of the relevant collateral that describes the collateral simply as consumer goods without further reference is stated to be an inadequate description under the relevant Acts.

A similar provision is included in the Bond Bill, but the Bond Bill also provides that, where a description refers to excluded personal property, the excluded property may be described as consumer goods without further reference to the item or kind of property being excluded.

3.4.2 **Search criteria**

The register under the New Zealand PPSA can be searched against seven search criteria:[40]

- the name of the debtor;
- the name and address of the debtor;

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38 M Gedye, "*Reflections on some practical issues which have arisen under New Zealand's Personal Property Securities Act and some lessons for Australia*", Journal of Banking and Finance Law and Practice, March 2004, page 20 at page 35.

39 s.21, Bond Bill; s.17, Saskatchewan PPSA; s.17, British Columbia PPSA.

40 s.172, New Zealand PPSA.

- the name and date of birth of the debtor;
- if the debtor is a company, its company number;
- if collateral is required or authorised by the Act or regulations to be described by serial number in a financing statement, the serial number of the collateral;
- the registration number assigned to the financing statement registration; and
- any other criteria specified in the regulations.

In contrast, the British Columbia PPSA, Saskatchewan PPSA and the Bond Bill can be searched against three search criteria:[41]

- the name of the debtor;
- the serial number of goods that are defined in the regulations as serial numbered goods; and
- the registration number of a financing statement registration.

The scope of search criteria needs to be considered in the context of the information match technology used for searching the registry. All of the Canadian provinces and territories other than Ontario use so-called "close matching" technology while New Zealand has adopted an exact matching technology.[42]

With the exact matching technology only those registrations which have an exact match with the chosen search criteria are disclosed. This affects the validity of a financing statement if it contains a defect, irregularity, omission or error that is seriously misleading.[43]

To determine whether a defect, irregularity, omission or error is "seriously misleading" it is necessary to have regard to the search criteria that can be used to search the registry. The greater the range of search criteria the more likely it is a financing statement error might be seriously misleading, particularly if exact match technology is used for the register.

3.4.3 **Duration and renewal of registration**

A financing statement under the New Zealand PPSA may be registered for a maximum term of five years, and may only be renewed during the period for which the financing statement is effective. If a security holder fails to renew before the expiry date, any new financing statement will have priority only from the date of renewal.

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41 s.54, Bond Bill; s.48(1) British Columbia PPSA; s.48(1), Saskatchewan PPSA.

42 Ontario also has exact match searching but without the same lengthy list of search criteria options available in New Zealand.

43 s.149, New Zealand PPSA. An equivalent provision appears in s.49(6), Bond Bill; s.43(6), Saskatchewan PPSA; s.43(6), British Columbia PPSA.

In contrast, under the Bond Bill, the Saskatchewan PPSA and the British Columbia PPSA, a financing statement can be registered for any length of time (although, in practice, the Canadian registration fees which are based on the duration of the specified registration period limit a security holder's willingness to have an extended time period).

The Saskatchewan PPSA, the British Columbia PPSA and the Bond Bill contain provisions where, if registration of the security interest lapses or is discharged in error, and the security holder re-registered the security interest not later than 30 days after the lapse or discharge, the lapse or discharge will not affect the priority status of the security interest in relation to a competing perfected security interest that, immediately prior to the lapse or discharge had a subordinate priority position, except to the extent that the competing security interest secured advances made or contracted for after the lapse or discharge and before the re-registration.

There may be practical difficulties with this concept, as it could require a security holder to continually check the register before further advances are made to determine whether a security holder has re-registered a security interest and regained priority.

3.5 **Other**

3.5.1 **Voidability against relevant parties**

Section 26 of the Bond Bill is another unique feature not found in the New Zealand PPSA, the Saskatchewan PPSA or the British Columbia PPSA.

Section 26 adopts a modified version of s.267 of the *Corporations Act 2001* (Cwlth) with the intention that certain security interests granted by a company in favour of a person associated with the company will be void if enforced within six months of being granted.

3.5.2 **Claims against the Crown**

Section 58 of the Bond Bill provides sovereign immunity for loss or damage suffered by a person because of:

- verbal advice given by an agent or employee of the Registrar in respect of the Act;
- regulations made under the Act; or
- the operation of the registry, unless the person who brings the action can prove that their loss or damage was suffered as a result of an agent or employee not acting in good faith.

There is no similar provision in the New Zealand PPSA, and, under the *Crown Proceedings Act 1950* (New Zealand), the Crown would be liable for loss or damage in tort, and claims may be enforced “as of right” by civil proceedings.

4. How is the Bond Bill different from the PPSAs of British Columbia and Saskatchewan?

The Bond Bill is based on and closely follows the British Columbia PPSA and the Saskatchewan PPSA. The Bond Bill also incorporates several innovations from the New Zealand PPSA. The most significant differences between the Bond Bill and the British Columbia PPSA and Saskatchewan PPSA are outlined in this part of the paper.

4.1 Definitions and drafting style

Definitions of "ADI", "deposit account" and "foreign registered ship" have been added to the Bond Bill. These are relevant to provisions dealing with security over deposit accounts[44] and the applicable law for determining the validity and perfection of security interests in foreign registered ships.[45] A definition of "organisation" borrowed from the New Zealand PPSA is also included in the Bond Bill.

A number of subtle changes of drafting style and formatting have been incorporated in the Bond Bill when compared with the British Columbia PPSA and Saskatchewan PPSA. The changes are not, in all but a few instances, substantive and this could enable advantage to be taken of the conceptual and drafting refinements made to the British Columbia PPSA and Saskatchewan PPSA and earlier Canadian PPSA models over many years.[46]

4.2 Transitional provisions

Part 7 of the Bond Bill earmarks the need for transitional provisions but does not attempt to draft them.

4.3 Acceleration for jeopardy

The Bond Bill omits s.16 of the Saskatchewan PPSA (and the equivalent British Columbia PPSA section). This section provides as follows:

> "Acceleration of payment or performance
>
> Where a security agreement provides that the secured party may accelerate payment or performance by the debtor when:
>
> the secured party considers that the collateral is in jeopardy; or
>
> the secured party is insecure or believes himself or herself to be insecure;
>
> the provision is to be construed to mean that the secured party has the right to do so only if the secured party believes, and has commercially reasonable grounds to believe, that the collateral is or is about to be placed in jeopardy or that the prospect of payment or performance is or is about to be impaired."

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44 ss.47(10) and (17) and 62(2), Bond Bill.

45 s.12(3), Bond Bill.

46 In this regard also note the commentary in parts 3 and 5.

4.4 Meaning of possession in the context of securities and instruments

Section 4 of the Bond Bill specifies when a person is deemed to be in possession of a security or instrument. This clarifies a number of issues relating to uncertificated securities and the role of issuer registers and custodians and nominees holding securities. Section 4 of the Bond Bill closely follows the drafting of s.18 of the New Zealand PPSA. There is no equivalent provision in the Saskatchewan PPSA or the British Columbia PPSA but as noted in part 5.5 of this paper, the Canadian provinces are in the process of introducing a more detailed and comprehensive regime for security interests in investment securities modelled on the UCC. The UCC approach to security interests in investment property is discussed in part 5.5. The New Zealand PPSA and the Bond Bill do not include anything similar to this.

4.5 Wool

The Bond Bill has specific provisions dealing with security interests in wool including s.44.[47]

Section 44 provides that a security interest in wool that is yet to be clipped has priority over a claim made by a person with an interest in the stock. There are also a couple of specific exceptions to this outcome set out in s.44.

4.6 Security interests in favour of certain persons void

Section 26 of the Bond Bill makes certain security interests void. Refer to part 3.5.1 for commentary on this provision.

4.7 Security interests in deposit accounts

Section 47(10) to (17) of the Bond Bill contains specific provisions dealing with security interests in deposit accounts with ADIs. There are no equivalent provisions in the Saskatchewan PPSA or the British Columbia PPSA (although note the commentary in part 5.4). These provisions are intended to clarify the position with respect to set-off claims and make it clear that a deposit-taking institution can take security over its own customer's account. The common law position is unclear although "flawed asset" and set-off arrangements may achieve the same practical result as security.[48]

4.8 Grace periods and notice periods

Section 64 of the Bond Bill dealing with the disposal of collateral requires a secured party to give notice of the intended disposition within a "reasonable period" prior to the disposition. The Saskatchewan PPSA in contrast requires a similar notice to be given "not less than 20 days prior to the disposition" (s.59,

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47 Note the earlier commentary in part 3.1.3.

48 In England it now seems clear that a bank can take a mortgage or charge over a deposit with itself: *Re: Bank of Credit and Commerce International SA (No 8)* [1998] AC 214. The position in Australia is less clear because of a number of decisions which have been decided the other way: *Broad v. Commissioner of Stamp Duties* [1980] 2 NSWLR 40; *Estate Planning Associates (Australia) Pty Ltd v Commissioner of Stamp Duties* (1985) 2 NSWLR 495; and *Esanda Finance Corporation Ltd v Jackson* (1993) 11 ACLC 138.

Saskatchewan PPSA). This is one example of the less prescriptive approach taken under the Bond Bill in respect of grace periods and notice periods. The Bond Bill also states that if the *Consumer Credit Code* applies to a secured transaction the requirements of the Code prevail to the extent of any inconsistency with the Bond Bill.[49]

5. UCC Article 9 – key points of difference from the PPSA legislation in Canada and New Zealand

The Canadian PPSAs were based on the 1972 version of Article 9. The philosophy, concepts and structure are the same but there were significant differences in terms of drafting, policy on particular issues and the design of the registration system. Article 9 was substantially revised in 1998 and, though the underlying philosophy remains unchanged, the consequence has been to accentuate the differences between United States and Canadian law.

The Canadian PPSAs themselves are more or less uniform in all provinces and territories, except Ontario. This part of the paper highlights the main differences between the non-Ontario PPSAs and Article 9 with some reference also to the Ontario PPSA. Since the New Zealand PPSA closely follows the non-Ontario PPSA model, the relevant points of comparison apply also to New Zealand (except where specifically noted otherwise and subject to the differences discussed in part 3, above).

5.1 Electronic registration

In the United States, there are 50 separate state Article 9 registers, not all of which are centralised or fully electronic. By contrast, in Canada there are only 13 registers all of which are centralised.[50] In the Atlantic provinces of Canada, and in New Zealand, all registrations and searches are done electronically. The other provinces and territories of Canada still allow for both paper and electronic registrations and searches, but the vast majority of registrations and searches are done electronically.

A fully electronic system saves on administration costs because it facilitates direct user access to the registry database and eliminates the need for administrative staff to transcribe data from the financing statement to the register and from the register to the search certificate. Paper registrations create a time lag problem: there will inevitably be a delay between the date the registering party lodges the financing statement for registration and the actual entry of the particulars on the register. Article 9, s.9-516(a) provides that the communication of a record to the filing office constitutes filing (registration) which is effective immediately when the registering party lodges the financing statement with the filing office. This means that searchers bear the risk associated with the time lag. The Ontario PPSA enacts a similar rule. The non-Ontario provinces with the exception of the Atlantic provinces have enacted the opposite rule: in these jurisdictions, registration is not effective until the actual point of entry on the register. As a result, the registering party bears the risk associated with the time lag. In the Atlantic provinces – as in

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49 s.75, Bond Bill.

50 References to a "centralised" register means one register covering the entire state, province or territory as the case may be. In the United States some states still maintain separate registers for each county in the State.

New Zealand – there is no provision one way or the other. No provision is necessary because all users have direct access to the registry database and the time lag problem does not arise.

Paper registrations create a risk of transcription error (mistakes on the part of registry staff keying in information from the paper form to the database and vice versa). Revised Article 9, s.9-517 provides that the failure of a filing office to index a record correctly does not affect the effectiveness of the filed record. This provision, read in conjunction with s.9-516(a), means that transcription errors do not affect the validity of the filing so searchers bear the risk. The position in Ontario is similar except that the Ontario PPSA establishes an assurance fund to compensate a searcher who suffers loss because of a transcription error. The non-Ontario PPSAs, except in the Atlantic provinces, enact the opposite rule. In these jurisdictions, a registration is not effective until the actual point of entry; which means searchers are protected and the registering party bears the risk. There are no provisions one way or the other in the Atlantic provincial PPSAs or the New Zealand PPSA as all system users have direct access to the registry data base, and the risk of transcription errors does not arise.

5.2 Serial number registration

The Canadian PPSAs and the New Zealand PPSA provide for registration of a security interest against the debtor's name and also against serial number where the collateral comprises serial-numbered goods other than inventory. In Ontario, the serial number registration facility is limited to cars, trucks, motor cycles and snow vehicles. In the non-Ontario provinces, it extends to tractors, mobile equipment, mobile homes, boats, trailers and aircraft.

The advantage of a debtor's name index registration system is that a properly conducted search should retrieve all registered personal property security interests the debtor has created. The disadvantage is that it will not retrieve a security interest created by a prior owner. Assume B gives A a security interest in B's motor vehicle. A registers a financing statement and the entry is indexed against B's name. B later sells the vehicle to C. D is planning a transaction with C and wants to find out whether the vehicle is subject to any security interests. A search under C's name in the debtor's name index will not retrieve A's security interest because A's security interest is registered against B's name.

The advantage of a serial number registration system is that a properly conducted search should retrieve all registered security interests whether they were created by the debtor or a prior owner. The disadvantage is that a serial number registration search will not retrieve security interests the debtor has given in other collateral. In summary, debtor's name index registration gives a complete picture of personal property security interests given by a particular debtor, whereas serial number registration gives a complete picture of security interests in a particular asset. However, serial number registration is only feasible for serial numbered collateral (cars, trucks, trailers and the like). Collateral such as herds, crops, accounts and so on are not amenable to serial number registration. A comprehensive personal property security registration system must rely at least partially on debtor's name registration.

The Canadian PPSAs and New Zealand PPSA, by providing for both debtor's name index and serial number registration, aim for the benefits of both systems. By contrast, Article 9 provides only for registration against the debtor's name. The reason is because most states have enacted separate certificate of title legislation

for motor vehicles which provides for registration of both ownership and security interests against the vehicle itself. Article 9, s.9-303(c) provides that the local law of the jurisdiction under whose certificate of title the goods are covered governs perfection, the effect of perfection or non-perfection and the priority of a security interest in goods covered by a certificate of title.

5.3 Registration rules

Article 9 provides that all financing statements have a uniform life of five years, with the option to file a renewal for a further five year period.[51] The New Zealand PPSA enacts a similar rule.[52] By contrast, all the Canadian PPSAs allow the secured party to select its own registration period, from one year to infinity, with registration fees varying depending on the length of the selected term. The Ontario PPSA creates an exception where the collateral is consumer goods, in which case a maximum five year period applies.[53] The Canadian approach reduces the risk of inadvertent registration lapses.

Prior to 1998, Article 9 required the debtor's signature on a financing statement. The rule presupposed paper registration. To accommodate electronic filings, Article 9 has translated the rule into medium neutral language: it provides that the debtor must authenticate a record authorising the secured party to file.[54] There is no corresponding requirement in any of the Canadian PPSAs or in New Zealand as the process adds to the secured party's transaction costs and the need for it has not been demonstrated. The Canadian PPSAs and New Zealand PPSA empower the debtor to compel the correction or discharge of an unauthorised, inaccurate or expired financing statement. If the secured party refuses to comply, the debtor may claim damages and has a statutory right to cause a discharge or correction to be registered. These measures protect the debtor against abuse of the registration system.

Article 9, s.9-523(f) provides that at least once weekly the filing office must offer to sell or license to the public, on a non-exclusive basis, in bulk, copies of all records filed in it. In Canada, with the exception of Ontario, bulk registry data is not available for sale to the general public. The same is true in New Zealand. Furthermore, the privacy protection provision in s.173 of the New Zealand PPSA reflects a policy position which is directly at odds with bulk sales of registry data to the general public.

5.4 Security interests in deposit accounts

Old Article 9 did not apply to security interests in deposit accounts as original collateral. Revised Article 9 removes the exclusion and creates special attachment, perfection and priority rules for these security interests. Section 9-102(29) defines "deposit account" to mean "a demand, time, savings, passbook or similar account maintained with a bank." Section 9-203(b) provides that, contrary to the general rules governing attachment, a security interest in a deposit account attaches even if the security agreement is not authenticated (signed by the debtor or the

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51 s.9-514, UCC.

52 s.153, New Zealand PPSA.

53 s.55(5), Ontario PPSA.

54 s.9-502, UCC.

electronic equivalent) and does not contain an adequate collateral description. Section 9-312 establishes a new and exclusive form of perfection for security interests in deposit accounts, namely "control". A secured party has control over a deposit account if:

- the secured party is the bank with which the deposit account is maintained;
- the debtor, the secured party and the bank have agreed in an authenticated record that the bank will comply with the secured party's instructions in relation to the account; or
- the secured party becomes the bank's customer with respect to the deposit account. [55]

Section 9-327 sets out the following priority rules:

> (1) a security interest held by a party having control over the deposit account has priority over a conflicting security interest held by a secured party that does not have control;
>
> (2) subject to (3) and (4), below, security interests perfected by control rank according to priority in time of obtaining control;
>
> (3) subject to (4), below, a security interest held by a bank with which the deposit account is maintained has priority over a conflicting security interest held by another secured party; and
>
> (4) a security interest perfected by the secured party becoming the bank's customer in respect of the deposit account has priority over a security interest held by the bank with which the deposit account is maintained.

The Canadian PPSAs have always applied to security interests in deposit accounts. The PPSAs define "account" broadly to mean all intangibles in the form of a monetary obligation and the definition clearly covers deposit accounts. The normal attachment, perfection and priority rules apply to security interests in deposit accounts. In particular, there is no provision for perfection by control. A secured party, including the depository bank, can obtain a perfected security interest in the deposit account by registering a financing statement and, as a general rule, priority between competing perfected security interests will turn on the order of registration. The New Zealand PPSA is the same.

The Revised Article 9 rules heavily favour the depository bank over competing secured creditors. The depository bank will nearly always have priority by virtue of having control in the first of the senses s.9-104(a) identifies. The bank can cede control by entering into a tripartite control agreement with the debtor and a competing secured party. Section 9-342 provides that the bank is not required to enter into a control agreement even if its customer requests or directs and there is little incentive for banks to comply voluntarily. The competing secured party can also obtain control by having the deposit account established directly in its name as the depository bank's customer. This will not be a feasible solution if the debtor

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[55] s.9-104(a), UCC.

requires regular access to the account. Part of the reason for Revised Article 9's special approach to deposit accounts was a concern that if the general rules applied, the debtor might inadvertently give away a perfected security interest in a deposit account via a security agreement covering the entire debtor's accounts or personal property.[56] The consensus in Canada seems to be in favour of retaining the current PPSA approach to security interests in deposit accounts. Reasons why Canada is unlikely to adopt the Revised Article 9 approach include:

- it gives the depository bank an unjustified competitive advantage over other secured creditors;
- existing law, including the depository bank's right of set-off, adequately protects it against interference with ordinary banking practices; and
- the concerns which motivated the Revised Article 9 approach have not been pressing ones in Canada.[57]

5.5 **Security interests in investment property**

Article 8 of the UCC deals with investment securities (such as uncertificated securities held on systems similar to the Clearing House Electronic Subregister System (CHESS) run by the ASX). It was revised in 1994 to take account of developments in methods of dealing with interests in securities and also to recognise a new form of property called a "security entitlement". "Security entitlement" means the rights and property interest of an entitlement holder with respect to a financial asset as specified in s.8-501. [58] Section 8-501 of the UCC provides that a person acquires a security entitlement if a securities intermediary:

- indicates by book entry that a financial asset has been credited to the person's securities account;
- receives a financial asset from the person or acquires a financial asset for the person and, in either case, accepts it for credit to the person's securities account; or
- becomes obligated under another law to credit a financial asset to the person's securities account.

If a person acquires a security entitlement by any of these methods, that person has the security entitlement even though the securities intermediary does not hold the financial asset.

As drafted in 1994, Article 8 of the UCC applied to both security and non-security transfers of interests in investment property. The provisions governing security interests in investment property now appear in Revised Article 9. Section 9-102 defines "investment property" to mean a security, whether certificated or uncertificated, security entitlement, securities account, commodity contract or

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56 Official Comment on Revised s.9-109, UCC.

57 RCC Cuming and C Walsh, "*Revised Article 9 of the Uniform Commercial Code: Implications for the Canadian Personal Property Security Acts*" (2002) 16 Banking and Finance Law Review 339 at 364-368.

58 s.8-102(17), UCC.

commodity account. A security interest in investment property may be perfected by filing or control.[59] A security interest in a certificated security may also be perfected by possession.[60] Control is defined in s.9-106 with reference back to s.8-106. The rules are as follows:

- a secured party has control of a certificated security in bearer form if the certificated security is delivered to the secured party;
- a secured party has control of a certificated security in registered form if the certificated security is delivered to the secured party and the certificate is endorsed to the secured party or is registered in the name of the secured party;
- a secured party has control of an uncertificated security if the uncertificated security is delivered to the secured party or the issuer has agreed that it will comply with instructions originated by the secured party without further consent by the registered owner;
- a secured party has control of a security entitlement if it becomes the entitlement holder or the securities intermediary has agreed that it will comply with entitlement orders originated by the secured party without further consent by the entitlement holder; and
- delivery of a certificated security occurs when the secured party acquires possession, or another person acquires possession on the secured party's behalf, and delivery of an uncertificated security occurs when the issuer registers the secured party, or another person on behalf of the secured party, as the registered owner.

Special rules govern the attachment and perfection of a security interest in a securities account where the securities intermediary is the secured party.[61]

Section 9-328 sets out the priority rules for security interests in investment property as follows:

- a security interest of a secured party having control of investment property has priority over a security interest of a secured party that does not have control;
- a security interest in a certificated security in registered form which is perfected by taking delivery and not by control has priority over a conflicting security interest perfected by a method other than control;
- generally speaking, conflicting security interests of secured parties each of which has control rank according to priority in time of obtaining control;
- a security interest held by a securities intermediary in a security entitlement or securities account maintained with the securities intermediary has priority over a conflicting security interest held by another secured party;

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59 s.9-312 and 9-314, UCC.

60 s.9-313(a), UCC.

61 s.9-206 and 9-310, UCC.

- a security interest held by a commodity intermediary in a commodity contract or a commodity account maintained with the commodity intermediary has priority over a conflicting security interest held by another secured party;

- conflicting security interests granted by a broker, securities intermediary or commodity intermediary which are perfected without control rank equally; and

- in all other cases, the residual priority rules apply.

Article 8, s.8-303 protects the purchaser of a certificated or uncertificated security from adverse claims, including security interests, and this provision is incorporated by reference into Article 9.[62]

The provisions in the Canadian PPSAs relating to investment securities are much more rudimentary. The legislation provides that a purchaser (including a buyer and a secured party) who acquires possession of a certificated or uncertificated security takes free from any perfected security interest if the purchaser gave value and acquired the investment security without knowledge of the security interest.[63] There is a similar provision in the New Zealand PPSA but New Zealand has gone a step further by including provisions deeming when a person is in "possession" of certificated and uncertificated securities held by a nominee or custodian.[64] However, there are currently no special attachment or perfection rules for security interests in investment property and, apart from the purchaser protection rule, no special priority rules for competing security interests in the same investment property. This is all about to change. The Canadian provinces are currently in the process of legislating to enact uniform securities transfer laws based on a model statue drafted by the Canadian securities administrators in consultation with the Uniform Law Conference of Canada. The model statute closely follows Article 8 of the UCC. The legislative package includes amendments to the PPSAs incorporating provisions governing security interests in investment property modelled on Revised Article 9. Specifically, there are amendments to the attachment rules, the perfection rules, the priority rules, and the rules governing the protection of purchasers for value and the conflict of laws provisions.[65]

5.6 Sales of accounts and payment intangibles

The Canadian PPSAs and New Zealand PPSA apply to the outright sale of accounts as well as to the transfer of accounts by way of security. "Account" is broadly defined to mean any intangible in the form of a monetary obligation. The definition includes, but is not limited to, book debts or receivables. For example, it also covers bank deposits (see part 5.4, above) and outstanding loan obligations owing to the debtor. The attachment, perfection and priority rules apply to the outright sale of accounts in the same way they apply to security transfers.

Old Article 9 also extended to the outright sale of accounts. The difference was that it defined "account" narrowly to mean book debts representing the sale or lease of

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62 s.9-331, UCC.

63 See, for example, s.31(4), Saskatchewan PPSA.

64 ss.97 and 18, New Zealand PPSA.

65 For a more detailed account, see Cuming, Walsh and Wood, op.cit. at pages 386 to 389.

goods or services and did not apply to the outright sale of other rights to payment which continued to be governed by non-UCC law. Article 9 has expanded the definition of "account" to cover receivables at large, including credit card receivables. It has also created a new sub-category of general intangible called a "payment intangible." Accounts and payment intangibles are mutually exclusive categories. A payment intangible is a monetary obligation other than a receivable, a right to payment evidenced by an instrument or chattel paper and a deposit account. An example is a commercial loan obligation. Article 9 enacts different perfection rules for the sale of accounts and payment intangibles. For the sale of accounts, perfection depends on the filing of a financing statement.[66] For the sale of payment intangibles, perfection occurs automatically on attachment and there is no need for the purchaser to file a financing statement.[67] The special rule for sales of payment intangibles is to facilitate bank loan participation and securitisation markets: it allows banks and other financial institutions to sell interests in commercial loans without the need for buyers to file financing statements to protect their interests.

It is unlikely that the Canadian provinces will adopt the Revised Article 9 approach because:

- it affects the publicity objective of the perfection requirement: potential buyers and secured parties can not be sure whether the payment intangible has already been sold to someone else;

- the purpose of the special rule is to facilitate loan participation and securitisation transactions but the provisions in question are not limited to the loan participation and securitisation context: they extend to the sale of any loan obligation except credit card receivables and the uncertain scope of the concession may be a trap for unwary players; and

- different historical considerations apply: in the United States, the special rule in Revised Article 9 for sales of payment intangibles leaves prospective buyers and secured parties no worse off than they were under old Article 9, whereas a similar provision in Canada would deprive prospective buyers and secured parties of protection they previously enjoyed.[68]

5.7 Collateral description in security agreement

The Ontario PPSA provides that a security agreement is unenforceable against third parties unless the secured party obtains possession of the collateral or the debtor signs a security agreement that contains a description of the collateral sufficient to enable it to be identified.[69] The New Zealand PPSA contains a similar provision.[70] The Ontario PPSA provides no guidance as to what constitutes a sufficient description. The New Zealand PPSA provides limited guidance in ss. 37 and 38. Section 37 provides that a description is inadequate if it describes the

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66 s.9-310, UCC.

67 s.9-309(3), UCC.

68 Cuming and Walsh, op.cit at pages 370 to 372.

69 s.11(2)(a), Ontario PPSA.

70 s.26(1), New Zealand PPSA.

collateral as equipment or consumer goods without further reference to the item or kind of collateral. Section 38 provides that a description of the collateral as inventory is adequate only while it is held by the debtor as inventory. The non-Ontario PPSAs go further. For example, the Saskatchewan PPSA allows for specific descriptions ("by item or kind"), generic descriptions ("goods", "chattel paper", "intangible", and so on) and super-generic descriptions ("all the debtor's present and after-acquired personal property" or "all the debtor's present and after-acquired personal property except …").[71]

Article 9 contains a writing requirement for security agreements similar to the Canadian PPSAs [72] and New Zealand PPSA. Old Article 9, like the Ontario PPSA, provided no guidance on what amounted to a sufficient description. Revised Article 9, s. 9-108 remedies this and provides that a description is sufficient if it reasonably identifies what is described and a description reasonably identifies the collateral if it identifies the collateral by various specified methods including specific listing, category, or Article 9 type. This is similar to the non-Ontario PPSA approach. Section 9-108 also provides that a description of the collateral as "all the debtor's assets" or "all the debtor's personal property" or the like does not reasonably identify the collateral. In other words, it prohibits super-generic descriptions in the security agreement (though not the financing statement).

The thinking behind the prohibition was that it should not be too easy for a commercial debtor to create all-asset security interests. The alternative view is that a detailed list of items or kinds of collateral is less likely to signal that a security interest covers all the debtor's property than a simple statement to that effect. In summary, the Revised Article 9 approach favours debtor protection over the protection of third party interests, whereas the non-Ontario PPSA approach takes the opposite tack.[73]

5.8 Scope of enforcement provisions

Revised Article 9 removes consumer transactions from the operation of the enforcement provisions. The New Zealand PPSA does likewise.[74] The Canadian PPSAs take a different tack. The enforcement provisions apply to commercial and consumer transactions alike, but the legislation provides that in the event of a conflict between the PPSA and a consumer protection statute, the consumer protection statute takes precedence.

5.9 Purchase money security interests

The Canadian PPSAs and New Zealand PPSA define a PMSI to mean:

- a security interest taken or reserved in collateral to secure payment of all or part of its price; and
- a security interest taken by a person who gives value for the purpose of enabling the debtor to acquire rights in collateral to the extent that the value is applied to acquire the rights.

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71 s.10(1), Saskatchewan PPSA.

72 s.9-203(b)(3), UCC.

73 Cuming and Walsh, op.cit. at pages 348 to 349.

74 s.105(a), New Zealand PPSA.

There is an expanded definition in Article 9 which, among other things, addresses the issues of cross-collateralisation and refinancing. The new definition confirms that a PMSI in inventory is a PMSI also to the extent that it secures a purchase money obligation incurred with respect to other inventory in which the secured party holds or held a PMSI.[75] It also provides that, except in the case of consumer transactions, PMSI status is not lost even though:

- the purchase money collateral also secures an obligation that is not a purchase money obligation;
- collateral that is not purchase money collateral also secures the purchase money obligation; and
- the purchase money obligation has been renewed, refinanced, consolidated or restructured.[76]

It has been suggested that similar changes should be made to the Canadian PPSAs, though with some modifications. The implementation of these suggestions does not seem to be imminent.[77]

There are also some key differences between Article 9, the New Zealand PPSA and the Canadian PPSAs regarding priority contests that can arise between receivables financiers and inventory financiers and the proceeds of inventory.

Accounts receivable generated by the sale of inventory are “proceeds” of the original collateral and an inventory financier with a PMSI in the inventory also has a PMSI in the proceeds. The claim of the inventory financier to the proceeds may come into conflict with the claim of a receivables financier who has perfected its security interest before the perfection of the inventory financier’s PMSI. A receivables financier will include an assignee under an absolute assignment for these purposes.

The different approaches to these priority issues are as follows:

- the receivables financer takes priority provided that it has given new value for its security interest in the receivables in question (this is the approach taken under Article 9, the British Columbia PPSA, the Saskatchewan PPSA and in the other western provinces of Canada as well as the Bond Bill);
- the inventory financier takes priority on the basis of its perfected PMSI in the proceeds (ie. the receivables) provided that it has given prior notice of its intention to take a PMSI to the receivables financier (this is the approach taken in the Atlantic provinces of Canada); and
- the inventory financier takes priority on the basis of its perfected PMSI in the receivables and no special priority rules or conditions apply (this is the approach under the Ontario PPSA and the New Zealand PPSA).

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75 s.9-103(b)(2), UCC.

76 s.9-103(f), UCC.

77 Cuming and Walsh, op.cit. 372 to 377; RCC Cuming and C Walsh, *A Discussion Paper on Potential Changes to the Model Personal Property Security Act of the Canadian Conference on Personal Property Security Law* (Uniform Law Conference of Canada, Current Working Document, 2000).

There are proposals to change the Ontario PPSA to follow the approach in the Atlantic provinces. The Ontario government is being urged to following this approach, rather than the approach the other provinces have taken on the grounds that:

- the other provinces' approach represents a significant departure from the PMSI super-priority rule; and
- the approach the Atlantic provinces have taken sufficiently protects the accounts receivable financier as well as securitisation interests.[78]

5.10 **Conflict of laws: rules governing perfection**

Under the Canadian PPSAs and New Zealand PPSA, the choice of law rules for the validity, perfection, and effect of perfection or non-perfection of a security interest are as follows:

- for ordinary goods and possessory security interests in money and documentary intangibles, the law of the place where the collateral is situated;
- for mobile goods and non-possessory security interests in intangibles, including accounts, the law of the jurisdiction where the debtor is located applies.

The old Article 9 choice of law rules were similar. Revised Article 9 takes a new approach, which can be summarised as follows:

- the perfection, effect of perfection or non-perfection and the priority of a possessory security interest is governed by the law of the place where the collateral is situated;
- for non-possessory security interests, perfection is governed by the law of the debtor's location;
- the effect of perfection or non-perfection and priority of a non-possessory security interest in tangibles is governed by the law of the place where the collateral is situated; and
- the effect of perfection or non-perfection and the priority of a security interest in intangibles is governed by the law of the debtor's location.[79]

In summary, Revised Article 9 bifurcates the law governing perfection and the law governing the effect of perfection or non-perfection and priority in the case of non-possessory security interests and it makes the law of the debtor's location the governing law in relation to perfection.

A unitary perfection rule based on the debtor's location was intended to remove the need for multiple registrations and searches where the debtor carries on interstate

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78 Ontario Bar Association, Business Law Section, Personal Property Security Law Subcommittee, submission on reform of the Personal Property Security Act (April, 2006).

79 s.9-301, UCC.

operations and the collateral is located in multiple jurisdictions. The need for the rule was pressing because the United States has 50 separate registries, not all of them centralised or fully computerised, and the rule creates a *de facto* national filing regime. A single filing in the debtor's home state is sufficient to perfect a security interest regardless of where the collateral is located or whether the debtor moves the collateral to another state. The rule means that the secured party must refile if the debtor relocates after the date of the initial filing, but the debtor's location is less likely to change than the location of the collateral – particularly if the debtor is a corporation.

There are no plans in Canada to adopt the Revised Article 9 changes because:

- there are only 13 registries in Canada and remote electronic registration and search facilities are universally available, the need is not pressing;
- the benefits of the debtor's location rule are limited in the context of international transactions unless all countries adopt the same rule; and
- the debtor's location rule requires states to surrender jurisdiction over the publicity requirements for locally situated collateral and, moreover, it may unfairly surprise searchers who may not be aware that a locally acquired interest in locally situated intangibles is subordinated to a security interest perfected in another jurisdiction.[80]

5.11 **Conflict of laws: location of debtor**

As noted above, under the Canadian PPSAs and New Zealand PPSA, the law of the debtor's location governs if the collateral is mobile goods and in the case of a non-possessory security interest in intangibles. For the purpose of these provisions, a debtor is deemed to be located at the debtor's place of business, if there is one, at the debtor's chief executive office if there is more than one place of business and otherwise at the debtor's principal place of residence. Old Article 9 incorporated a similar definition. Revised Article 9 changes the law in two main respects. First, it provides that if the debtor's home jurisdiction is outside the United States and does not provide a system for the publication of security interests, the debtor is deemed to be located in the District of Columbia.[81] This means that the security interest will not be perfected for the purposes of United States law unless a financing statement is filed in the District of Columbia. Secondly, Revised Article 9 enacts a special rule for cases where the debtor is a registered organisation. A registered organisation is an entity organised under a United States federal or state law which requires a public record to be maintained disclosing the organisation.[82] A registered organisation that is organised under the law of a state is located in that state.[83]

The purpose of deeming a registered organisation to be located in the state where it is organised for Article 9 purposes is to increase certainty and reduce filing errors: a corporation's registered office is easier to verify than the location of its chief executive office or place of business. There are indications that Canada may

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80 Cuming and Walsh, op.cit. 357 to 362.

81 s.9-307(c), UCC.

82 s.9-102(70), (76), UCC.

83 s.9-307(e), UCC.

adopt this change. The Ontario government is working on amendments to the Ontario PPSA as part of a broader business law reform project. Government representatives are working in close co-operation with the Ontario Bar Association's Business Law Section Personal Property Security Subcommittee. The Subcommittee has submitted a detailed proposal to the Minister for reform of the Ontario PPSA debtor location rules along the same lines as Revised Article 9. The Subcommittee's submission also proposes to enact rules to address the location of trusts and general partnerships. The submission was put together in consultation with representatives of the Uniform Law Conference of Canada so that, if Ontario does adopt the changes, it is likely that the other provinces will follow suit.[84]

6. Conclusion

The general concepts and principles of Article 9, the PPSA Legislation and the Bond Bill are very similar but there are some significant differences of detail and drafting. Some of the differences are deliberate policy choices made by the respective legislatures, others have arisen for historical reasons and a few may be inadvertent.

Economic and market change has also played a role. Article 9 and the PPSA Legislation has not been static. As economies and markets have developed the legislation has evolved in response to these changes. Different jurisdictions have been faster than others to react to some market developments and policy decisions have meant that different jurisdictions have sometimes reacted in different ways.

Finally, while this paper has focussed on the differences between the various PPSA models and the differences between those models and Article 9, these differences should not distract from the broadly consistent approach taken to implement modern personal property securities laws and registry systems in New Zealand, Canada and the United States. The differences, although commercially and legally significant, are around the periphery and not the core principles of the Article 9/PPSA approach to personal property securities law.

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[84] A possible sticking point is that the proposed changes are inconsistent with the choice of law rules in the United Nations Convention on the Assignment of Receivables in International Trade (2001) and, if enacted, they may preclude Canada from adopting the Convention.