

THE 9TH ANNUAL REAL ESTATE LAW SUMMIT
The Law Society of Upper Canada
April 18, 2012

PPSA Issues and Real Estate – Priorities and Enforcement

Joe Conte¹
Pallett Valo LLP

The author feels that he must begin this paper with a clear disclaimer. He does not practice in the field of real estate law and thus has no direct knowledge of the nuances and peculiarities that this practice might entail. However, he has come to learn that some real estate practitioners seem unprepared to deal with personal property issues that arise in the course of their practice.

In many situations, whether readily apparent or not, real estate practitioners will likely need to consider and assess personal property law and security rules in order to best serve the interests of their clients. This paper attempts to point out some of these situations and explore certain important elements of the Ontario personal property security regime of which real estate lawyers should be aware. The author does not purport to provide a complete treatise on personal property law and security, but rather to explore only those pertinent areas which may be of interest to real estate practitioners and that they might come across in the course of their practice.

To begin with, it is hoped that a basic understanding of the personal property security registration system, as contrasted with the real property regime, will aid in the analysis to take place.

¹ Joe Conte is Senior Counsel with Pallett Valo LLP and currently acts as the head of its Business Law Practice Group. Having previously acted for many years as lead Canadian counsel in the commercial finance industry, he has extensive experience in secured lending transactions dealing with the legislation relevant to personal property security as it exists both in Ontario and elsewhere in Canada. Joe would like to thank Bram Kaufman, an associate with Pallett Valo, for his assistance in preparing the initial drafts for this paper.

Personal Property Security Registration System

The Personal Property Registry (“PPR”) in Ontario has been established under the provisions of the *Personal Property Security Act*² (the “PPSA”) and provides for a system whose purpose is to provide notice (if one cares to enquire) of the purported existence of a secured transaction. No underlying agreements, instruments or documents, other than the prescribed forms of notice, are accepted for registration. Registration alone does not constitute constructive notice of the validity, enforceability or substance of a secured transaction and is meant only to enable further enquiry.³ Finally, the PPR is not a title registry.

As may be discerned from the foregoing, the existence, purpose and structure of the PPR lies in stark contrast to the real property registry, the details of which real estate practitioners are most familiar with. The provisions of the *Land Titles Act*⁴ and the *Land Registration Reform Act*⁵ govern most of the land in Ontario. The land titles system records the interests that affect a particular parcel of land, which includes an owner recording its ownership rights in the land and a secured creditor recording its security interest for the purpose of securing the payment of a debt or the performance of an obligation of a debtor.⁶ Interests under the land titles system that are no longer active for whatever reason are cancelled and deleted from the system.⁷ Accordingly, if someone was to search the land titles system, the registered owner and charges affecting a

² *Personal Property Security Act*, R.S.O. 1990, c. P.10.

³ The 2012 Annotated Ontario Personal Property Security Act, Prof. Richard H. McLaren, Thomson Canada Limited (2011) at page 342. See also PPSA, *supra* note 2, at section 46(5).

⁴ *Land Titles Act*, R.S.O. 1990, c. L.5.

⁵ *Land Registration Reform Act*, R.S.O. 1990, c. L.4.

⁶ Margaret Sims, “Registration Systems: Back to Basics” (3 February 2010).

⁷ *Ibid.*

particular piece of land would be immediately apparent.⁸ The registration of documents and instruments under this regime are carefully checked for form and legal validity. Under this system, the title register is therefore a register of title, guaranteed by the provincial government's Land Titles Assurance Fund, subject to certain statutory exceptions.⁹ Even in the few cases where the more antiquated *Registry Act*¹⁰ still applies, the registration system records documents evidencing title interests, but in contrast to the Land Titles system, does not provide a statement of ownership or a government guarantee of title.¹¹

Personal Property Security

The purpose of the PPSA is to establish a comprehensive framework (rather than a complete code) for the taking of security in personal property and to establish a mechanism for determining priority between competing creditors. As stated above, neither the PPSA nor the PPR conveys or gives evidence of ownership or title to personal property and, in fact, the PPSA specifically operates regardless of title.¹² It does so recognising the impracticalities of keeping an accurate and comprehensive record of ownership of all forms of personal property and in the acknowledgment of its drafters' stated policy and purpose to favour function over form.

Personal property is broadly defined in the PPSA as consisting of chattel paper, documents of title, goods, instruments, intangibles, money and investment property, and (of particular importance for this paper) includes fixtures but does not include building materials that have been affixed to real property.¹³ Further, goods are defined in the PPSA as tangible personal

⁸ *Ibid.*

⁹ Title Searching & Conveyancing in Ontario (Sixth Edition), Marguerite E. Moore, Lexis Nexis Canada Inc. (2010) at page 19.

¹⁰ *Registry Act*, R.S.O. 1990, c. R.20.

¹¹ *Supra* note 9 at page 17.

¹² *Supra* note 2 at section 2.

¹³ *Ibid* at section 1(1).

property other than chattel paper, documents of title, instruments, money and investment property, and (again, of particular importance) includes fixtures, growing crops, the unborn young of animals, timber to be cut, and minerals and hydrocarbons to be extracted.¹⁴ However, the PPSA does not apply, subject to certain specific exceptions discussed in the next paragraph, to the *creation or assignment of an interest in real property* [emphasis added], including a mortgage, charge or lease of real property.¹⁵

Despite not applying to the creation or assignment of an interest in real property, the PPSA does specifically apply to *an interest in fixtures*¹⁶ and to an *assignment of a right to payment under a mortgage, charge or lease where the assignment does not convey or transfer the assignor's interest in the real property* [emphasis added].¹⁷ As a result of these specific inclusive provisions as well as the very broad application of the PPSA itself to chattels in general, there are several situations in which real and personal property interests may intersect, and this can lead to confusion regarding the character of the property in question and the proper order of priority of interests in that property.

Chattels

Despite not being a real estate practitioner, the author understands that many real estate contracts deal with acquiring or conveying interests in personal property, often referred to as chattels. For example, an agreement of purchase and sale of real estate may also include an agreement to convey certain appliances, window coverings, furniture, equipment or other items of personal property.

At first instance, it is important to recognize that any purported conveyance of rights to

¹⁴ *Ibid.*

¹⁵ *Ibid* at section 4(1)(e).

¹⁶ *Ibid* at section 4(1)(e)(i).

¹⁷ *Ibid* at section 4(1)(e)(ii).

personal property will involve an analysis as to whether a third party has adequate security obtained under the PPSA which may affect the conveyance. As stated, but subject to specific rules, some of which are to be discussed below, the PPSA governs the taking of security and determination of priority rights over all forms of personal property, regardless of whether the property is attached to or conveyed along with other forms of property (such as real property).

The general priority rule¹⁸ set out in the PPSA, in simplified terms, states that priority between security interest is to be determined first by order of registration, and if one or more of the competing interests are not registered, then by order of perfection¹⁹, and if no interests are perfected, then by order of attachment²⁰. Thus, at least as between secured creditors, the PPSA provides a method of determining priorities regardless of whether registration under the PPR has occurred or not. This means, then, that a search of the PPR may not reveal all relevant interests affecting a conveyance of rights in personal property. How is a practitioner expected to deal with this uncertainty?

Well, if the conveyance is a sale in the ordinary course of business (which, by its terms, excludes private sales), the bona fide buyer for value takes it interest free of any security interests, perfected or not, unless it has prior knowledge of the security and that the sale would constitute a default of the security.²¹ Note that I have used the term ‘buyer’ as opposed to ‘purchaser’ and this distinction will be more fully explained later in this paper.

If the conveyance is not a sale in the ordinary course of business, then my best advice would be (especially where the chattels conveyed are valuable or important to the transaction):

¹⁸ *Ibid* at section 30(1).

¹⁹ In simple terms the concept of ‘perfection’, as described in relation to a security interest under the PPSA, requires attachment and either registration of the interest under the PPR or possession (or control) over the collateral. *Ibid* at section 19.

²⁰ The concept of ‘attachment’ of a security interest under the PPSA requires only that the debtor have rights in the collateral, signs a security agreement identifying the collateral and that the secured party gives value. Registration is not required for a security interest to have ‘attached’. *Ibid* at section 11(2).

²¹ *Ibid* at section 28(1).

search the PPR; obtain releases or estoppel certificates from secured creditors which are registered and appear to have an interest in the chattel(s) conveyed; and obtain independent representations and warranties from the vendor in respect of its ability to convey clear title of the personal property in the conveyance transaction, together with an indemnity in respect of future damages sustained or arising from a breach of those representations and warranties. Remember also to include the usual exclusion to any opinion stating that, as there is no title registry for personal property, no opinion is given as to validity or enforceability of title to, or any other rights in, the personal property conveyed.

Fixtures and Building Materials

Matters concerning fixtures and building materials are ones which may be of particular importance to real estate practitioners. As discussed previously, the definition of personal property pursuant to the PPSA includes fixtures but excludes building materials that have been affixed to real property. Neither “fixtures” nor “building materials” is defined by the PPSA. Thus, legal practitioners must look to common-law principles to provide guidance.

a) Fixtures

To determine whether a chattel falls into the category of a fixture, the courts have examined the degree of annexation of the chattel to the property. “Chattels affixed to the land even slightly are to be considered as part of the land unless the circumstances show they were intended to continue as chattels. The onus to prove that the objects were intended to continue as chattels is on the party making the assertion.”²²

Again, fixtures are expressly included in section 1(1) of the PPSA in the definitions of

²² *Rombar Corp v. 1098434 Ontario Ltd.*, [1997] O.J. No. 4410 at para. 5 (Ont. Gen. Div.).

both “personal property” and “goods”. Goods that are or have become fixtures are subject to special priority rules vis-à-vis a competing real property interest in the land to which the goods are affixed, such as the owner, landlord or financier of that land.

Section 34(1)²³ of the PPSA governs interests in fixtures and states:

Fixtures

34. (1) A security interest in goods that attached,

(a) before the goods became a fixture, has priority as to the fixture over the claim of any person who has an interest in the real property; or

(b) after the goods became a fixture, has priority as to the fixture over the claim of any person who subsequently acquired an interest in the real property, but not over any person who had a registered interest in the real property at the time the security interest in the goods attached and who has not consented in writing to the security interest or disclaimed an interest in the fixture.

Accordingly, a security interest in fixtures that attached before or at the same time that the goods became a fixture has priority over pre-existing real estate interests, while a security interest in fixtures that attached after the goods become a fixture is only given priority to real estate interests that were subsequently acquired unless those holding pre-existing real property interests have either consented to the fixture interest or disclaimed their interest in the fixture.

Section 34(2)²⁴ goes on to state:

Exceptions

(2) A security interest mentioned in subsection (1) is subordinate to the interest of,

(a) a subsequent purchaser for value of an interest in the real property; or

(b) a creditor with a prior encumbrance of record on the real property to the extent that the creditor makes subsequent advances,

if the subsequent purchase or subsequent advance under a prior encumbrance of record is made or contracted for without knowledge of the security interest and before notice of it is registered in accordance with section 54.

Thus, to be certain that a security interest in fixtures has priority over these subsequent real property interests, a registration in the land registry (commonly referred to as a ‘fixture filing’)

²³ *Supra* note 2 at section 34(1).

²⁴ *Ibid* at section 34(2).

must be made under section 54(1)²⁵ before the subsequent real property interest holder acquires its interest without notice. Failure to make a fixture filing will limit the secured party's priority rights only as against pre-existing real property interests at the time of attachment under section 34(1)(a), while the secured party's interest will be found to be subordinate to the interests of a subsequent purchaser²⁶ or mortgagee for value in any circumstance, and a mortgagee who makes an advance under a prior encumbrance after the goods have become fixtures, unless these have prior knowledge of the security interest.

The analysis with respect to the specified types of fixtures identified as growing crops, timber to be cut, unextracted minerals and hydrocarbons will also be determined in the same manner as above and a mechanism for registration under section 54(1) is provided for these classes of goods as well. Obviously, once harvested, cut or extracted, these goods stand separate and apart from the real property and any secured interests over these items are governed solely as chattels by the provisions of the PPSA.

Practically speaking, then, when acting for a real estate purchaser or new mortgagee, the land registry system may be relied upon since, unless a search of the land registry reveals a fixture filing, the acquisition of the new interest will, if made for value and without notice of any security interest, take its interest in any fixtures to the real property in priority to existing security interests over that fixture. If a fixtures filing is found and an interest in the fixtures are required by the client, inquiries can be made and a waiver or postponement can be sought from the secured creditor.

²⁵ *Ibid* at section 54(1).

²⁶ The term 'purchase' is defined under the PPSA to include taking by sale, lease, negotiation, mortgage, pledge, lien, gift or any other consensual transaction creating an interest in personal property. *Ibid* at section 1(1). In using the term 'purchaser' in this section, 34(2)(a), the PPSA is preserving this same broad meaning which may be summarized for the purposes of this paper as one who takes a commercial interest of any kind in property. Elsewhere and in contrast, the PPSA uses the term 'buyer' (e.g., *Ibid* at section 28(1)), a much narrower term implying one who acquires title or ownership to goods, as part of a transaction to which the *Sale of Goods Act*, R.S.O. 1990, c. S.1, might apply.

Though you may also choose to conduct a personal property security search against the intended vendor or mortgagor, it should be noted that in doing so, you may be providing your client with notice of a prior security interest, thus losing the benefit of the exception found in section 34(2)(a) of the PPSA.

However, in the situation when acting as counsel for a vendor, mortgagor or existing mortgagee, the situation may be quite different and could be seen as much more complex. In those cases, pursuant to section 34(1)(a) of the PPSA, the rights of a secured party over fixtures may have rights ahead of the client's interests if the security interest *attached* before the goods became fixtures. Unfortunately, there is no definitive way to determine these rights. As already noted, attachment of a security interest does not require registration and a search of the personal property registry will only reveal those registrations which have, in fact, been registered.

Fortunately, the circumstances in which this could become problematic are limited and, in the case of the existing mortgagee, may indeed be irrelevant. Presumably (and in conformity with the policy rationale behind section 34 of the PPSA) an existing mortgagee should be satisfied with the state and value of the real property before the fixture and its value is added and thus the fixture financier should have priority in recognition of the new value created. If subsequent advances are made, these are protected by the provisions of section 34(2)(b). However, perhaps in rare circumstances, the existing mortgagee may not be making further advances but may be relying on the new value to be added by the addition of the fixture and, in these circumstances, a waiver or postponement should be sought if the secured party is known, and representations and indemnities can also be obtained from the mortgagor in the same manner as described in the previous section of this paper.

In the other cases mentioned, presumably, a vendor or mortgagor should know what security

interests have been granted by it and exist in respect of its own property and thus this situation should not be an issue. Certainly and in any event, once the sale is completed or fresh mortgage funds are advanced, the purchaser or mortgagee will be sheltered under the provisions of section 34(2).

b) Building Materials

As discussed above, the definition of personal property specifically excludes building materials which have been affixed to real property. Absent this exclusion, these goods would be considered, as fixtures, in the analysis appearing in the previous section of this paper. However, as a result of this exclusion, it is important as part of the analysis to determine whether a fixture (or other good) is, in fact, excluded from the ambit of the PPSA by reason that it is (i) a building material and (ii) affixed to real property. Note that the test is two pronged.

The second part of the test is simple to determine: a loose brick in a brickyard or on a job site is a good to which the PPSA applies until it is used in the construction of a building and becomes affixed to real property. Put another way, if the good is a fixture, it has already met the second part of the test. However, the first part of the test is not so simple.

As “building materials” is not a defined term in the PPSA, legal practitioners must look to the common law. According to *Charles A. Hare Ltd. v. Payn*,²⁷

when the term “building materials” is used, the ordinary ingredients such as lumber, mortar, brick and stone are the first to suggest themselves as logical illustrations ... But on further consideration there are a great many other things that go into the construction of a building which do not come under these headings, which nevertheless are integral parts of the whole construction, as compared with other articles which are mere adjuncts or appendages. In determining what is building material it is necessary to consider the entire construction. Certain equipment that by itself would appear to come under the classification of a chattel, may in the general construction of a building become so

²⁷ *Charles A. Hare Ltd. v. Payn*, [1982] O.J. No. 2519.

closely interlinked and identified with other materials generally described as building material, that they must for all practical purposes be considered as building materials.²⁸

To provide further clarity, the term “building materials” is defined in other provincial *Personal Property Security Acts*. For example, pursuant to British Columbia’s *Personal Property Security Act*,²⁹ “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.³⁰

Though outside the scope of this paper, the author notes that, as the PPSA does not apply to building materials once affixed, creditors who supply building materials which become affixed to the real property have the protection of the *Construction Lien Act*.³¹ The rules governing priority between mortgage lenders and construction lien creditors are set out in section 78 of the *Construction Lien Act*. Generally, liens arising from an improvement have priority over all conveyances, mortgages, or other agreements affecting the owner’s interest in the premises that arose after the lien was registered.³²

However, for the purposes of the PPSA, suffice to say that if a fixture is also a building material, it will be outside the scope of the Act and considered part of the real property and will be transferred with, and affected by valid charges and interests against, title to the real property.

²⁸ *Ibid* at para. 21.

²⁹ *Personal Property Security Act*, RSBC 1996, c 359.

³⁰ *Ibid.* at section 1(1).

³¹ *Construction Lien Act*, R.S.O. 1990, c. C.30.

³² *Ibid* at section 78.

c) The Rich-Wood Kitchens Case

The case of *Rich-Wood Kitchens Ltd. v. National Trust Co.*³³ is an excellent illustration of both the distinction between building materials and fixtures and also the complexities which can arise in disputes involving fixture security holders competing with those holding interests in the real property to which the fixtures have been attached. In this case, a financier of kitchen cabinets (Rich-Wood) was found to have a security interest attach subsequent to a first mortgage but prior to the registration of a subsequent mortgage. At first instance, it was found that the kitchen cabinets were not building materials but were in fact fixtures to which the PPSA applied. The fixture security was registered under the PPSA but not in the land registry until after the subsequent mortgage was registered. The facts were further complicated by the fact that the first mortgagee (National Trust) made a subsequent advance after the fixture interest attached.

The priorities circularity arose since, under section 34(1)(a), Rich-Wood's fixture interest was found to be in priority to National Trust's first mortgage (except, under section 34(2)(b), in respect of its subsequent advance), but subordinate to the subsequent mortgagee (G.M.S.) under section 34(2)(a) who, in turn, was subordinate to National Trust as first mortgagee under the real property system. The Ontario Court of Appeal found that National Trust, having usurped Rich-Wood's right to remove the fixture collateral by conducting a power of sale, was liable to Rich-Wood for the amount of its claim, but then stood in the place of Rich-Wood, behind the subsequent mortgagee. Thus, on the facts of this case, both the fixture filer (Rich-Wood) and the subsequent mortgagee (G.M.S.) were paid the full amount of their claim while the first mortgagee (National Trust) incurred a small loss while recovering the fixture debt in the shoes of Rich-Wood.

³³ (1988) 8 P.P.S.A.C. 131 (Ont H.C.), *affirmed* (1991) 1 P.P.S.A.C. (2d) 233, 2 O.R. (3d) 58 (Ont. Div. Ct.), *reversed* (1995) 8 P.P.S.A.C. (2d) 228, 21 O.R. (3d) 761 (Ont. C.A.).

The author believes that the better solution to this circularity problem would have been to set aside the amount of the fixture claim from the sale proceeds, deal with the balance of the realty proceeds in accordance with the real property system, and then pay the fixture amount first to National Trust (to the extent it has any claim from its subsequent advance after application of the real property portion), then to G.M.S. (also to the extent it has a claim after application of the real property portion), and only then to Rich-Wood. On the specific facts of the case at hand, this would have resulted in:

- National Trust having been paid in full out of proceeds not related to the fixture claim and having no need to claim against the fixture claim amount at all,
- G.M.S. being paid in full from a combination of realty proceeds and, to cover the resulting deficiency, the fixture claim (the latter in recognition of G.M.S.'s priority over the fixture claim under 34(2)(a) of the PPSA), and
- a loss being incurred by Rich-Wood as there were insufficient funds to satisfy all.

In the author's opinion, the Appeal Court erred in confusing Rich-Wood's claim, being as against the fixture alone, with the broader real property claims of the mortgagees. The author's solution not only gives effect to the statutory provisions and resolves any circularity, but also avoids the problem of rewarding the fixture claimant for failure to register in the land system, when the PPSA is clearly drafted in a manner intended to favour secured parties who register under that system in accordance with the provisions of section 54(1).

Assignment of Rights to payments under a Mortgage or Lease of Real Property

As already discussed, the PPSA will apply to an assignment of a right to payment under a mortgage, charge or lease where the assignment does not also convey or transfer the assignor's interest in the real property. This bare right to receive payment under a mortgage or a lease is a

“chose in action” and falls within the definition of an intangible under the PPSA.³⁴ Given that a mortgage or lease document creates a real property interest, there may be competing claims between a secured party’s interest in the right to payment under a mortgage or lease and a real property claimant’s interest.³⁵ Section 36 of the PPSA³⁶ is intended to resolve priority contests between an assignee of a lease or mortgage and a secured party with an interest in the right to payment stemming from such document.

In essence, section 36 of the PPSA protects the realty interest by using the land registry to resolve priority disputes.³⁷ Pursuant to section 36 of the PPSA, a secured creditor or assignee of rights to payment under a mortgage or lease will be required to register both under the PPSA and under the land registry system³⁸ in order to maintain priority. The interests of that secured creditor or assignee will then only be subordinate to an assignee for value of the the realty interest in the mortgage or lease if this realty interest is registered in the land registry first.³⁹ In other words, first to register under the land registry system will have priority over the personal property (right to payments) which is at issue. Here, the PPSA clearly recognizes that any dispute should be determined solely by the land registry system.⁴⁰

Thus, from a practical point of view, if one is acting for an assignee of a mortgage or lease, reliance can be made on the state of the real property registry to determine whether a personal property interest in the right to payments has priority. It will be unnecessary to conduct a PPSA search in these circumstances as the real property registry will determine the dispute.

As a practice point, however, registration in the land system alone will not be sufficient if

³⁴ *Supra* note 3 at page 85.

³⁵ *Ibid.* at page 325.

³⁶ *Supra* note 2 at section 36.

³⁷ *Supra* note 3 at page 326.

³⁸ The mechanism for registration is found in the same section as that for a fixture filing. See *Supra* note 2 at section 54(1).

³⁹ *Supra* note 3 at page 326.

⁴⁰ *Ibid.*

the interest involves a bare right to payment under a mortgage or lease. This is because the interest as described is, de facto, a personal property interest to which the PPSA alone applies and, in order to maintain priority over other personal property claims, the interest will need to be perfected under the Act. The Land system registration will preserve its priority as against other land claims, but the PPSA registration will be required to preserve its priorities as against competing personal property claims.

In most circumstances, the author expects that the documentation at issue will simultaneously extend security over property, both real and personal. For example, it is the understanding of the author that most forms of *Assignment of Rents* documents commonly found in a real estate practice convey an interest in both the lease and the rights to rent payments under that lease. In these circumstances, the PPSA provides that the secured party may proceed as to both types of property in accordance with the secured party's rights in respect of the real property, alone.⁴¹ In other words, the PPSA once again favours the real property system when simultaneous overlapping interests occur in this fashion.

Considerations for Landlords

Under the *Commercial Tenancies Act*,⁴² a landlord has the right of "distrain"⁴³ (a lien against the property of a tenant who has failed to pay rent).⁴⁴ Distrain allows a landlord to seize a tenant's property, such as equipment, sell it, and use the proceeds to recover the rent which is in arrears.⁴⁵ However, it has long been established that fixtures or trade fixtures (personal property used by tenants in a business, which can be severed from the real property and restored

⁴¹ *Supra* note 2 at section 59(6).

⁴² *Commercial Tenancies Act*, R.S.O. 1990, c. L.7.

⁴³ *Ibid* at section 31(2).

⁴⁴ *Black's Law Dictionary*, 5th ed, "distrain".

⁴⁵ *Ibid*.

to their character as chattels⁴⁶) are not distrainable at common law. Pursuant to *85987 Ontario Ltd. v. Starmark Property Management Ltd.*,⁴⁷ a trade fixture may not be distrained against because “it is as much a part of the land as any immovable fixture and as distraint runs against the tenant's property found on the land and not against the land itself, it follows that trade fixtures which are part of the land at the time of the purported distraint cannot be subject to distraint.”⁴⁸

Therefore, if a good is deemed to be a fixture, section 34 of the PPSA applies to determine priority, whether or not the priorities contest includes a landlord. If, however, the good is not considered a fixture, the priority contest between a landlord's right of distraint under the *Commercial Tenancies Act* and a secured party's right of enforcement under the PPSA is generally based upon which party acts more quickly. If a landlord exercises its right of distraint against the tenant's assets prior to a secured creditor disposing of the goods in accordance with their rights under a security document, the landlord will prevail.⁴⁹ It does not matter that the secured creditor may have registered its security interest under the PPSA. If, on the other hand, the secured creditor exercises its rights under a security document prior to the landlord exercising its right of distraint, the secured creditor takes priority over the landlord.⁵⁰ Generally speaking, where the enforcement is concurrent, the courts have stated that the landlord's distress will, in most cases, have priority over a general security interest in the same goods.⁵¹

Though well beyond the scope of this paper, it may be of some use to know as well that the secured creditor can defeat the landlord's distraint rights altogether by causing the

⁴⁶ *Ibid* “trade fixtures”.

⁴⁷ *85987 Ontario Ltd. v. Starmark Property Management Ltd.*, 12 P.P.S.A.C. (2d) 281, affirmed 42 B.L.R. (2d) 16 (Ont. C.A.).

⁴⁸ *Ibid* at para. 9.

⁴⁹ Margaret Sims and Craig A. Mills, “The Race of the Swiftest: Landlord versus the Secured Creditor” (May 2009).

⁵⁰ *Ibid*.

⁵¹ *Ibid*.

bankruptcy of the debtor (lessee), unless the landlord has fully completed its distraint prior to the bankruptcy.⁵² Once again, the urgency of not resting on one's laurels becomes paramount.

Enforcement

Under the PPSA, if a debtor defaults, a secured party has the rights and remedies provided in the security agreement and in the PPSA.⁵³ In situations where the security agreement covers both real and personal property, the secured party may proceed as to both the real and the personal property in accordance with the secured party's rights in respect of the real property.⁵⁴ In the decision in *Dor-O-Matic of Canada Ltd.*,⁵⁵ Mr. Justice Blair interpreted section 59(6) as a remedy that "provides for what, in [his] view, is tantamount to a statutory fusion of the personal property and the real property in question, permitting the secured party to proceed against both as if they formed a single piece of property and as if that single property were realty."⁵⁶ As noted above, this section may serve to resolve any questions arising from mixed property transactions.

There are also special rules regarding the removal of fixtures by a secured creditor under the PPSA. A secured creditor may, in priority to any competing but subsequent interest in the realty and upon compliance with the default enforcement provisions of the remainder of the Act, remove the fixture from the real property, but must then reimburse the real property interest holder(s) (other than the debtor) for any costs to repair damage sustained or caused by the removal.⁵⁷

⁵² *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.. B-3 at sections 70(1) and 73(4). See also *Re Stan-Don Supply (Sudbury) Ltd.* (1968), 11 C.B.R. (N.S.) 243 (Ont. H.C.) and *Re Southern Fried Foods Ltd.* (1976), 21 C.B.R. (N.S.) 267 (Ont. S.C.).

⁵³ *Supra note 2* at section 59(1).

⁵⁴ *Ibid.* at section 59(6).

⁵⁵ *Dor-O-Matic of Canada Inc, Re* (1996) 28 O.R. (3d) 125 (Gen. Div. [Comm. List]).

⁵⁶ *Ibid.* at para. 11.

⁵⁷ *Supra note 2* at section 34(3).

Conclusions

As stated throughout this paper, there are many situations where interests in real and personal property intersect. The author trusts that this paper has provided some guidance to real estate practitioners in understanding and identifying those interests, determining priority and providing practical methods for dealing with uncertainties which may arise in these circumstances.

ANNEX

When first asked to participate in this conference, the author was asked to stand ready to answer the following questions. I set these out below, with my responses, for the purposes of reference and discussion.

1 When I'm acting for a purchaser, what do I need to do to make sure my client is getting clear title to the chattels and fixtures that the vendor has contracted to convey?

A *Can't 'make sure' when chattels are involved. There is no title registry for personal property (with limited exceptions; e.g., motor vehicles). Best you can do is search PPSA against purported vendor to determine if security interests are claimed and then ask for waivers or subordinations. Otherwise, rely on contract with Vendor – representations, warranties & indemnities, etc. Also consider whether indemnity is appropriate in the circumstances. On fixtures, purchaser of property takes priority generally (see s. 34(2) PPSA) unless purchaser has knowledge of security or creditor has filed notice in land system (s. 54(1) PPSA).*

2 When my client calls me a month after closing saying there's a problem because someone has written to the client threatening to take away the furnace, hot water heater, water softener etc. unless the purchaser pays up, under what circumstances can I tell the financing company to go away? And when do I have to call LawPRO?

A *If their claim is based on a registered PPSA security interest and you failed to search, you can force them to deliver proof (s.18 PPSA) and challenge any faulty security. If the chattel is actually a fixture, then a bone fide purchaser for value without notice will take in priority to any security interest whether registered or not (see s. 34(2) PPSA). In the end, if they have a first right, which generally means they will need to register under Land Titles in the case of fixtures, they win. Telling LawPRO is another matter; if you searched the PPR and found nothing, is it really negligence to miss something that's not there and nothing could have been done to avoid the situation? Consider representations, warranties and indemnities in the right circumstances. Avoid opinions on title or interests to personal property where possible. Consider whether it would be a good practice to search PPSA against vendor just*

to know what claims exist; but take into account that knowledge may defeat “innocent fixture purchaser for value” argument (see s. 34(2) PPSA).

3 When I’m acting for a lender, what do I need to do and or search to make sure my lender client is getting an enforceable mortgage and the expected priority against the chattels and fixtures?

A See the answers, above, which will apply equally as well to a mortgagee as to an owner.

4 What, if anything, can happen after the mortgage is registered, whereby the priority of the mortgage can be altered?

A Can’t answer vis-à-vis real property interest, but chattels and fixtures are affected by PPSA. For example, a personal property interest in a fixture that is attached, whether or not registered, will prime the interests of a prior registered mortgage, as discussed in the paper above. Also, rights to payments under mortgage can be transferred outside land system; but a mortgagee would normally be involved at the outset of that process.

5 When I am acting for a lender on a power of sale, what do I need to do to make sure I am giving notice to everyone with an interest in the land? E.g. do I need to look beyond the parcel page?

A If you’re trying to convey chattels with the property, see 1, above. A search of the land registry and the PPR may reveal interests in fixtures. Remember, you can only notify those capable of being found. No notice is required under the PPSA since that Act cannot give or evidence rights in land.

6 If a secured creditor is claiming priority over a mortgage, when can I tell them to go away and when do I have to call LawPRO?

A Not really a different question from 4. See answer, above.