

IS THE PERSONAL PROPERTY SECURITY ACT IN NEED OF REFORM?

The Alberta Law Reform Institute [ALRI] recommends that Alberta's *Personal Property Security Act* [PPSA] should be updated. The PPSA has not kept pace with the increase in electronic commerce or updates to personal property security legislation in other Canadian provinces. ALRI recommends that Alberta should implement the recommendations proposed by the Canadian Conference on Personal Property Security Law [CCPPSL] in 2017. Parallel changes to the Civil Enforcement Act are also recommended.

ALRI would like your feedback on the recommendations to update the PPSA by **June 1, 2021**. ALRI's Report for Discussion is available at bit.ly/3baUve2.

WHY IS CHANGE NEEDED?

Professors Tamara Buckwold and Roderick Wood, acknowledged experts in secured transactions law authored ALRI's Report for Discussion, Personal Property Security Law

Alberta's PPSA came into force in 1990. Although the PPSA significantly improved the law, the past 30 years have revealed several instances where improvements should be made.

In some cases, reform is needed due to advances in technology. When the PPSA was first enacted, electronic banking and electronic commerce were in their infancy. The CCPPSL recommendations facilitate the move to paperless transactions.

In other cases, judicial decisions have revealed ambiguities in the legislation that have produced uncertainty.

Finally, the PPSA simply did not anticipate the kinds of disputes that would be litigated in the future and did not provide rules for their resolution.

Every Canadian province and territory, except for Quebec, has a PPSA. Although there are minor variations across jurisdictions, these statutes are substantially uniform which facilitates interprovincial commerce.

Other provinces are updating their legislation and Alberta needs to keep pace.

The Canadian Conference on Personal Property Security Law is an organization of provincial and territorial government officials and academics. It has played a leading role in the design of the PPSA model that is used in Alberta. The 2017 CCPPSL Report recommended several changes and updates. These recommendations have been fully adopted in Saskatchewan and partially adopted in British Columbia and Ontario. It is important for Alberta's PPSA to keep pace with these changes.

CHANGES IN OTHER PROVINCES



WHAT CHANGES ARE RECOMMENDED FOR ALBERTA?

The key recommendations for PPSA reform are:

- The rules that govern negotiable property are rationalized and expanded to address electronic transfer of funds.
- The concept of electronic chattel paper is introduced to facilitate paperless transactions where this form of property is sold or used as collateral.
- The rules that govern purchase-money security interests are clarified and expanded to provide greater guidance on this crucial form of financing. The changes enhance the ability of secured parties to claim purchase-money security interests in inventory, and preserve purchase-money security interest status in a refinancing.
- The rules governing the transfer of collateral to buyers and others are rationalized and improved.
- Secured financing is facilitated through amendments that clarify that valuable assets such as licences may be used as collateral, that eliminate red tape requirements that unnecessarily increase the administrative costs of secured finance, and that improve the ability of secured parties to take steps to protect their interest.
- The rights of account debtors asserting set-off against secured parties are clarified and strengthened.
- A number of uncertainties in the rules that determine priorities between secured parties and other competing claimants are clarified so as to produce greater certainty and predictability.
- The choice of law rules are revised, and the method for determining the location of the debtor is changed so as to align with the new approach adopted in British Columbia, Saskatchewan and Ontario. This produces greater certainty in the law and avoids the deleterious effects of forum shopping that will inevitably arise if provinces and territories employ different choice of law rules.
- The registration provisions are improved to better achieve the underlying goals of the registry system, namely the publication of information in a manner that will allow effective risk-assessment by affected parties.

Changes to some of the PPSA priority rules mean that the parallel rules in the Civil Enforcement Act should also be changed. At the same time, it makes sense fix a number of problems in the civil enforcement priority rules to better align the two sets of rules.

A complete list of recommendations follows.

RECOMMENDATION 1

The Alberta Personal Property Security Act [PPSA] should be amended to implement the reforms proposed in the Report of the Canadian Conference on Personal Property Security Law, and to provide a proper interface between the priority rules of the PPSA and the Civil Enforcement Act.

RECOMMENDATION 2

The choice of law rules identifying the law that governs “the effect of perfection or non-perfection” of a security interest should make it clear the law identified also governs the priority of the security interest.

RECOMMENDATION 3

The location of a debtor should be determined as follows:

- (1) a registered organization, such as a corporation, partnership or trust, should be located in the jurisdiction in which the legally required public record of their organization, continuation or amalgamation is registered or, if created by legislation, in the legislating jurisdiction,
- (2) an individual, including a business debtor, should be located at their principal residence, and
- (3) a business entity that does not fall within either (1) or (2) should be located at its place of business or, if it has more than one place of business, in the jurisdiction of its chief executive office.

RECOMMENDATION 4

The choice of law rules that determine the validity, perfection and priority of a security interest when the debtor or the collateral moves from one jurisdiction to another should implement the following:

- (1) Perfection and priority should be governed by the law of the jurisdiction in which the collateral or the debtor, respectively, are presently located;
- (2) The rule that governs continued perfection when the debtor relocates should apply only when the debtor moves into Alberta and should not apply to the transfer of an interest in collateral;
- (3) A security interest in goods that are expected to and do move into a jurisdiction other than that in which they are originally located within 30 days of the date of attachment should be valid and perfected if valid and perfected under the law of either the original or the new jurisdiction.

RECOMMENDATION 5

The law governing the priority of a security interest in tangible chattel paper, negotiable documents of title, instruments and money should be the law of the jurisdiction where the collateral is located, regardless of whether the security interest is possessory or non-possessory.

RECOMMENDATION 6

The choice of law rules should eliminate renvoi and should apply in the same manner whether or not there is a public registry in the jurisdiction in which the debtor is located.

RECOMMENDATION 7

A purchase-money security interest [PMSI] should not lose its status if the security agreement also secures an obligation that is not a purchase-money obligation, the agreement creates a security interest in other collateral to secure the purchase-money obligation, or the purchase-money obligation has been renewed, refinanced, consolidated, or restructured.

RECOMMENDATION 8

A secured party who has been given a PMSI in inventory should be able to claim PMSI status in all the inventory that it finances to secure all of the purchase-money obligations that are incurred. This feature should only be available if the parties agree to this on or before the initial transaction.

RECOMMENDATION 9

A secured party who pays out a PMSI held by a third party should be deemed to have taken an assignment of the PMSI and should be entitled to register a financing statement in respect of it. The PMSI will retain its priority over an earlier security interest if notice of the refinancing is given to the earlier secured party.

RECOMMENDATION 10

Where a debtor owes more than one obligation to a secured party and the manner in which payments are to be allocated has not been determined by the parties, payments made by the debtor should be applied first towards unsecured obligations in the order they were incurred, next towards non-PMSIs in the order they were incurred, and finally towards PMSIs in the order they were incurred.

RECOMMENDATION 11

The special priority rule that gives a prior accounts financier priority over an inventory financier who claims a proceeds PMSI in accounts should not apply to an account in the form of a deposit with a deposit taking institution.

RECOMMENDATION 12

The priority rules governing perfected and unperfected security interests in money, funds transferred electronically, instruments, negotiable documents of title and chattel paper should be consolidated in one section of the Act and rationalized to operate consistently across forms of collateral.

RECOMMENDATION 13

A deposit-taking institution that is a creditor of its depositor should defeat a security interest in the funds or the source of funds in the depositor's account only when allocation of funds in the account to payment of a debt owed to the institution is expressly authorized by the depositor in the manner specified. This rule should not preclude the exercise of rights of set-off otherwise recognized by the Act.

RECOMMENDATION 14

The requirement that a transferee, buyer or lessee be without knowledge of a security interest to claim priority should be eliminated in the priority provisions respecting unperfected security interests, serial number goods held as equipment, and low value consumer goods.

RECOMMENDATION 15

The monetary limit that applies to the priority rule governing low-value sales and leases of consumer goods should be prescribed by regulation and should be increased from \$1,000 to \$1,500.

RECOMMENDATION 16

A person should not be considered to be a buyer of goods under the buyer protection priority rules unless property in the goods has passed to the person. The retention or reservation of title in a contract of sale should be limited in effect to the reservation of a security interest and should not delay transfer of title to the buyer pursuant to the contract.

RECOMMENDATION 17

If a security interest has priority over the interest of a buyer or lessee, the priority should extend to all advances made by the secured party including advances made after the interest of the buyer or lessee arises.

RECOMMENDATION 18

The Act should provide that a security interest in collateral is not effective against the trustee in bankruptcy or a liquidator if the security interest is unperfected at the "time of the bankruptcy" or at the "time the winding-up order is made."

RECOMMENDATION 19

When a security interest is perfected by registration before a debtor becomes bankrupt but the registration lapses or is discharged, the lapse or discharge should not affect the priority of the security interest as against the trustee in bankruptcy if the security interest is re-registered not later than 30 days after the lapse or discharge, even though the re-registration occurs after the time of bankruptcy.

RECOMMENDATION 20

The priority of a security interest in relation to another security interest in the same collateral should not be affected by enforcement measures taken by the holder of the other security interest.

RECOMMENDATION 21

An account debtor should be permitted to assert any right of set-off in relation to the account against a party claiming a security interest in the account, except where a secured party who claims an interest in the account as proceeds has given a notice of their claim to the account debtor before the security interest attaches setting out information sufficient to enable the account debtor to reasonably ascertain the account transaction to which the claim relates.

RECOMMENDATION 22

The rules for registration of serial numbers should implement the following policies:

(1) Serial number registration of serial number goods held as consumer goods should be optional rather than mandatory, and consumer goods should be afforded the same treatment as equipment in relation to priority competitions;

(2) In a priority competition over serial number goods held as equipment or consumer goods, registration of serial numbers should be required to perfect a security interest, including a PMSI, as against a competing secured party;

(3) Registration of serial numbers must be effected by registration of the serial number in the field in the financing statement labelled for the receipt of serial numbers.

RECOMMENDATION 23

The key principles of the test for seriously misleading errors should be codified in the PPSA, namely:

(1) A registration should be invalid if a registry search using the correct debtor name does not disclose the registration;

(2) A registration should be invalid if a registry search using the correct serial number does not disclose the registration in those instances where serial number registration is required for priority;

(3) The fact that a registration is disclosed other than as an exact match does not by itself mean that a registration is valid.

RECOMMENDATION 24

The special rule that requires a debtor to seek a court order for the discharge or amendment of a registration if a trust indenture is involved should be eliminated. The usual rule that gives the debtor the right to discharge or amend a registration if a secured party fails to take steps to protect its registration within 40 days should apply instead.

RECOMMENDATION 25

The concept of electronic chattel paper should be adopted. A security interest in electronic chattel paper should be enforceable against third parties if the secured party has control of it, and should be capable of being perfected by control.

RECOMMENDATION 26

The priority rules respecting chattel paper should be revised by:

(1) giving a purchaser of chattel paper priority if the chattel paper is not marked with a notation that it has been assigned to another, rather than making this priority depend on an absence of knowledge;

(2) adding perfection by control of electronic chattel paper to the residual priority rule that applies to competitions between secured parties; and

(3) giving a purchaser who takes possession of tangible chattel paper for value and in the ordinary course purchaser's business priority over a person who obtains control of electronic chattel paper in cases where tangible chattel paper and electronic chattel paper co-exist.

RECOMMENDATION 27

The definition of "intangible" should include a licence. The definition of licence should extend to a licence that is transferrable subject to restriction, including a licence that is subject to cancellation and reissuance by the licensor at the request of the licensee or secured party.

RECOMMENDATION 28

The rules governing security interests in after-acquired property should not restrict attachment of an interest in after-acquired crops.

RECOMMENDATION 29

The Act should include a provision to make it clear that a subordination agreement does not in itself create a security interest.

RECOMMENDATION 30

An enforcing secured party should be required to give notice of an intended disposition of collateral to all persons who hold a security interest in the property to be disposed of, regardless of whether their interest has priority over or is subordinate to the interest of the enforcing party.

RECOMMENDATION 31

The PPSA and CEA priority rules should be harmonized by amending the CEA to provide that a writ registered in the Personal Property Registry is generally afforded the same priority status with respect to personal property as a security interest perfected by registration.

WHAT CAN I DO TO SUPPORT, IMPROVE OR SUPPORT THESE RECOMMENDATIONS?

In a consultation phase, we welcome your comments in support of or against these changes and your suggestions for improvement. You can contact us through email at lawreform@ualberta.ca, on our website at www.alri.ualberta.ca or even scan your notes on the previous pages and send them to us.

WHAT HAPPENS NEXT?

ALRI will consider all the comments we receive. After reviewing the comments, we will make any appropriate changes to our recommendations and publish a final report. If you would like to be notified about the final report and our other publications, you may join our mailing list at www.alri.ualberta.ca.



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