

AN EXAMINATION OF THE EFFECT OF SECTION 16  
OF THE CONDITIONAL SALES ACT ON THE PRINCIPLE OF  
INDEFEASIBILITY OF A CERTIFICATE OF TITLE UNDER  
THE LAND TITLES ACT

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## I. INTRODUCTION

The purpose of this memorandum is to examine firstly the effect of section 16 of The Conditional Sales Act<sup>1</sup> on the principles of indefeasibility of a certificate of title under the Torrens system of land registration embodied in section 63 and 65 of The Land Titles Act<sup>2</sup> and secondly the provisions adopted by other Canadian provinces and the United States as an alternative to the position in Alberta.

The present section 16 first appeared as an amendment in 1917<sup>3</sup> to an Ordinance Respecting Hire Receipts and Conditional Sales of Goods:<sup>4</sup>

3. By inserting therein as section 4 thereof the following new section:

"4. Should any goods or chattels subject to the provisions of this Act be affixed to any realty, such goods and chattels shall notwithstanding remain so subject and shall not be realty, but the owner of such realty, or any purchaser, or any mortgagee, or other incumbrancer on such realty, shall have the right as against manufacturer, bailor, or vendor thereof, or any person claiming through or under them, to retain the said goods and chattels upon payment of the amount due and owing therein."

Its present form is:<sup>5</sup>

16. If any goods or chattels that are subject to this Act are affixed to realty, such

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<sup>1</sup>R.S.A. 1970, c. 61.

<sup>2</sup>R.S.A. 1970, c. 198.

<sup>3</sup>S.A. 1917, c. 3, s. 32(3).

<sup>4</sup>C.O. 1898, c. 44.

<sup>5</sup>R.S.A. 1970, c. 61, s. 16.

goods and chattels remain so subject and are not realty, but the owner of the realty or a purchaser of, or a mortgagee or other encumbrancee on the realty has the right as against the manufacturer, bailor or seller thereof or a person claiming through or under them to retain the said goods and chattels on payment of the amount due and owing on the goods and chattels.

## II. EXPOSITION

### A. The Common Law Position

In order to understand the effect of section 16, an examination of the conditional seller's position at common law is instructive. The common law position applies to chattel mortgages since there is no analogous provision in The Bills of Sale Act<sup>6</sup> and to a conditional seller not entitled to the benefit of section 16 for failure to perfect his interest under The Conditional Sales Act.<sup>7</sup>

Where a chattel that is subject to a conditional sale agreement subsequently becomes affixed to realty so as to constitute a part of the realty itself as a fixture, at strict common law the conditional seller loses his security interest in the chattel and it passes to the owner or mortgagee of the realty; whether such owner or mortgagee was prior or subsequent to the date of affixation and notwithstanding that the conditional seller may not have consented to the goods losing their character as personal chattels. The leading

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<sup>6</sup>R.S.A. 1970, c. 29.

<sup>7</sup>R.S.A. 1970, c. 61, s. 4 (registration) or s. 11 (affixation); Whitney v. Bruce (1903) 2 O.W.R. 625.

English cases are Hobson v. Gorringe<sup>8</sup> and Reynolds v. Ashby and Son.<sup>9</sup> Both were followed by the Supreme Court of Canada in The Berlin Interior Hardwood Co. Ltd. v. The Colonial Investment and Loan Co.<sup>10</sup>

#### B. The Effect of Section 16

A provision such as the present section 16 was first enacted in 1917 to alter the strict common law position and protect the conditional seller by providing that notwithstanding the chattel has become affixed to the realty it remains subject to the seller's rights although the owner or mortgagee of the realty has the right to retain the same on payment of the amount owing.<sup>11</sup>

##### (1) Prior Owners and Mortgagees of the Realty

The effect of section 16 is to preserve the conditional seller's security in the affixed chattel as against a prior

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<sup>8</sup> [1897] 1 Ch. 182 (C.A.).

<sup>9</sup> [1904] A.C. 466 (H.L.).

<sup>10</sup> [1918] 1 W.W.R. 378 (S.C.C.); see also as to prior mortgagee D'Augieney v. Brunswick-Balke Collender Co. [1917] 1 W.W.R. 1331 (Alta. S.C.) at 1334.

<sup>11</sup> The 1916 Alberta case of The Assiniboia Land Co. Ltd. v. Acres (1916) 9 W.W.R. 368 (Alta. S.C.T.D.), aff'd. (1916) 10 W.W.R. 355 (S.C. en Banc) illustrates the mischief caused by the application of the common law which the enactment attempted to remove; see also dicta from the judgment of Middleton J. in Liquid Carbonic Co. Ltd. v. Rountree (1923) 540 L.R. 75 (Ont. C.A.) at 76 where he sets out the background of the analogous Ontario provisions.

owner<sup>12</sup> or mortgagee<sup>13</sup> of the realty.

The 1965 Alberta case of Canadian Propane Consolidated Ltd. v. Hill<sup>14</sup> is interesting in that it apparently reaches the result and intended effect of section 16 without ever referring to it. Although Farthing J.'s statement of the common law was probably not correct, it is clear that the result was correct under the provisions of section 16.

(2) Subsequent Owners and Mortgagees of the Realty

Section 16 also purports to preserve the conditional seller's property and security in the affixed chattel as against "subsequent" purchasers, mortgagees or other encumbrances of the realty. However, sections 63 and 65 of The Land Titles Act,<sup>15</sup> which embody the principles of indefeasibility of the Torrens system of land titles, broadly provide that a bona fide purchaser or mortgagee of realty for value without notice is entitled to rely on the conclusiveness of the certificate of title as it appears in the Land Titles Office absolutely free and clear of all interests not registered therein. There are, of course, exceptions to the indefeasibility principle and the effect of unregistered instruments but these are not pertinent to the topic under examination.

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<sup>12</sup>Allen General Supplies Ltd. v. Ritchie [1934] 3 D.L.R. 296 (Ont. S.C.).

<sup>13</sup>Warner v. Foster [1934] 3 D.L.R. 665 (Ont. C.A.).

<sup>14</sup>(1965) 52 W.W.R. 184 (Alta. S.C.).

<sup>15</sup>R.S.A. 1970, c. 198.

Therefore, there is an apparent conflict between the provisions of section 16 of The Conditional Sales Act and the principles of indefeasibility of a certificate of title embodied in sections 63 and 65 of The Land Titles Act. The effect of section 16 is to maintain chattels sold under a conditional sale agreement as chattels notwithstanding that they may have become affixed to realty so as to constitute, at common law, part of the realty itself as fixtures. A bona fide purchaser or mortgagee of the realty may find that an apparent fixture is subject to a conditional sale agreement and therefore still a chattel. The purchaser or mortgagee would either be required to pay the balance owing in order to keep the fixture or allow the conditional seller to remove it. This provision would operate notwithstanding there was no indication on the certificate of title as to the existence of the conditional sale agreement at the time of purchase or granting of the mortgage. Moreover, such an interest could not appear on the certificate of title by way of caveat or otherwise because section 16 provides that the chattels "are not realty" and therefore do not constitute an interest in land.<sup>16</sup>

There is only one Alberta case that has dealt with this conflict and the effect of section 16 on a subsequent bona fide purchaser or mortgagee for value without notice. In Re Burtex Industries Ltd. (in Bankruptcy); Elleker v. Farmers and Merchants Trust Co. Ltd. et al<sup>17</sup> a company purchased machinery by way of conditional sale, the agreement being duly registered by the plaintiff conditional seller. Subsequently, the company granted a land mortgage to the

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<sup>16</sup>The Land Titles Act, R.S.A. 1970, c. 198, s. 136.

<sup>17</sup>(1964) 47 W.W.R. 96.

defendant mortgagee. Although the fact situation was complicated by a subsequent chattel mortgage and later second land mortgage, the gist of the situation was that the plaintiff conditional seller failed to renew the registration within the statutory three year period (although it was subsequently renewed under the curative provisions of section 13). The defendant mortgagee commenced foreclosure proceedings and the issue arose as to who was entitled to the machinery as between the conditional seller and the subsequent mortgagee of the realty.

Mr. Justice Milvain of the Alberta Supreme Court quoted section 16 and then continued

If the conditional sales contract had been renewed within the statutory period of three years, there would, in my opinion, be no doubt but that the terms of sec. 16 would govern the situation. (at 99).

Although Mr. Justice Milvain did not elaborate further it is clear that he meant that the effect of section 16 would be that the conditional seller would be entitled to the machinery as against the subsequent mortgagee. Support is found in his comments immediately following:

I am further of the view that the failure to renew did not change the situation as between Columbia Machine Inc. [the conditional seller] and Farmers & Merchants [the subsequent first mortgagees] or Armstrongs [the subsequent second mortgagees] or Roy Burkinshaw [the chattel mortgagee]. In my view, none of these people qualified as mortgagees or purchasers in good faith and for valuable consideration "as defined in sec. 7 of the Act" or as "third persons whose rights accrued by reason of the omission [to renew]" as contemplated by sec. 13 of the Act. I reach this conclusion in view of the fact that all three of the above claimants acquired no rights except subsequent to the conditional sales agreement and

at a time when its powers were undiminished through failure to renew, the renewal requirement and having arisen until after such claimants obtained their rights. (at 99)

Finally, Mr. Justice Milvain found that, in any event, the machinery had not become affixed to the realty so as to constitute a part thereof as a fixture:

However, I am further of the opinion that the machinery never did lose its character as chattel property under the applicable doctrines of law that apply outside the terms of sec. 16 of The Conditional Sales Act. (at 99)

After examining the nature of the machinery and its placement on the property and the law relating to fixtures applicable thereto, he states at 101-102):

In the case at bar I do not think the machinery ever became a part of the realty. In my view, the decree of affixation was clearly done for the better enjoyment of the machines, as machines and not with the intent and for the purpose of improving the freehold. The property is obviously in an industrial district where it could be placed to many and varied uses. In fact, the bankrupt company acquired the property and building for a purpose other than block making—namely, that of manufacturing light coated aggregates. The method of installation is such as to indicate the structure protecting the machinery is nothing more than a flimsy lean-to of the main building which could be removed without damage to main building as it was opened to permit placing of the machinery.

I am of the view that those who contend that chattels have ceased to be such, have a heavy onus to meet unless the obvious degree of fixation indicates an intent to improve the freehold.

I therefore answer the question by saying that none of the chattels became part of the realty.

It is arguable, of course, that in light of Mr. Justice Milvain's finding that the machinery had not become a fixture, his remarks with respect to section 16 were merely obiter and



that it is unclear what the true effect of the section is in relation to a subsequent bona fide purchaser or mortgagee for value without notice. The conflict has been considered in other jurisdictions, however, and support for Milvain J.'s view of the effect of section 16 in Hoppe v. Manners<sup>18</sup> and Greater Winnipeg Gas Co. v. Petersen.<sup>19</sup>

### III. ANALYSIS OF THE EXISTING LAW-- STATEMENT OF DEFECTS

#### A. Prior Owners and Mortgagees

Goode and Ziegel argue that there is no reason why an existing owner or mortgagee of realty should be enriched at the conditional seller's expense by the affixation of goods for which he neither bargained nor paid, and his claims should therefore be subordinated to those of the conditional seller.<sup>20</sup> It is clear that this is proper where the owner of the realty is also the conditional purchaser and a provision such as section 16 was undoubtedly enacted to alter the common law position which would defeat the conditional seller's security upon affixation. However, it is arguable that even an existing owner or mortgagee who is not the conditional purchaser should also be protected. Goldenberg provides:<sup>21</sup>

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<sup>18</sup> [1931] 2 D.L.R. 253 (Ont. C.A.) at 257.

<sup>19</sup> (1968) 65 W.W.R. 500 (Man. C.A.) at 508.

<sup>20</sup> Goode and Ziegel, "Hire-Purchase and Conditional Sale--A Comparative Survey of Commonwealth and American Law" (1965) *The British Institute of International and Comparative Law* at 174.

<sup>21</sup> Goldenberg, "Conditional Sale Agreements" (1959) 2 *Can. Bar J.* 309 at 326.

The section is also objectionable because it imposes obligations on persons who—had they had a choice in the matter—would never have accepted the obligation. A man buys a house, or mortgages a house, and then installs a heating unit, or some new plumbing fixtures, or builds in new kitchen cabinets with an electric stove, refrigerator, garburator, and some one or more of the many things that now go into a kitchen. All this is—let us say—subject to a lien contract. The man then defaults in his payments on account of the house, or the mortgage, as well as under the lien. The lienholder then can step in and remove everything that was subject to his lien, and in the process of doing so, must do some damage to the house. The vendor or mortgagee of the house has then the option of paying up for the things that were installed and which he did not want or letting the house be damaged. All this is done by law in order to protect a conditional sales vendor, and one cannot help but feel that possibly the protection has been extended too far. The remedy of an unpaid vendor of goods that have become attached to realty ought to be confined to his rights under The Mechanics' Lien Act. Under that Act the security is against the interest of the lien purchaser in the realty—as it should be—and if the unpaid purchaser defaults, the vendor may realize only as against that interest. The rights of the real owner of the realty or the prior mortgagee are not affected thereby.

#### B. Subsequent Purchasers and Mortgagees

Subsequent purchasers and mortgagees of the realty, however, are in a different position. They may be misled by the presence of the fixtures on the premises and should be in a position to ascertain simply whether or not they are subject to a conditional sale agreement. The principles of indefeasibility of a certificate of title are detracted from by the provisions of section 16 which cast a burden upon a subsequent purchaser or mortgagee to search beyond the Land Titles Office in order to determine the status of title to the realty and its fixtures and charges thereon. The problem is aptly stated by Orde J.A. in Hoppe v. Manners:<sup>22</sup>

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<sup>22</sup> [1931] 2 D.L.R. 253 (Ont. C.A.) at 256 in reference to section 8 of the Ontario Act which was similar to our present section 16.

It is, of course, elementary that the intention of the Legislature must be found in the language of its enactments, but I wonder, if the members of the Legislature had been told that the possible result of the passage of this section would be to render it unsafe hereafter when buying a house to trust to the Registry Act, and that a purchaser might find himself saddled with a heavy liability to some one of whom he had never heard, whether they would have passed the section in its present form.

In effect, the provisions of section 16 constitute a hidden trap for a subsequent purchaser or mortgagee of realty.<sup>23</sup> It is even a worse trap where the conditional seller has perfected his interest by attaching his name to the chattel (pursuant to section 11 of The Conditional Sales Act<sup>24</sup>) rather than registering the agreement at Central Registry. Subsequent purchasers or mortgagees cannot possibly satisfy themselves that there is no lien against some of the very many chattels that are incorporated into a house.<sup>25</sup> For example, a chattel incorporated into the house may have passed through the hands of more than one party, one of whom bought it under a conditional sale agreement,

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<sup>23</sup>As well, an existing mortgagee may be induced to make further advances by reason of a subsequent fixture, and it seems reasonable as regards such an advance he should be given priority over the conditional seller if he had no notice of the seller's interest. Indeed, the present Ontario Act contains an express provision to this effect: R.S.O. 1970, c. 76, s. 14(4).

<sup>24</sup>R.S.A. 1970, c. 61.

<sup>25</sup>For an excellent discussion of the problems involved in Central Registry searches see "Panel on Bills of Sale, Chattel Mortgages and Conditional Sale Agreement" (1958) 4 Alta. Law Rev. 273 at 297.

and it would be registered under that man's name--a name the subsequent purchaser or mortgagee of the realty knows nothing about. Another problem is where the thirty day time limit for registration of the conditional sale agreement may not have expired at the time the search was made, and subsequent registration within this "grace period" will be retroactive to protect the conditional seller.<sup>26</sup> Finally, even if a search at Central Registry does not reveal any existing conditional sale agreements pertaining to any of the fixtures, there is nothing to prove that the present owner of the realty is the owner of the fixtures. The search at Central Registry is not like a search at the Land Titles Office where there is positive evidence of title.

Another problem arising under section 16 is that "building materials" are not expressly excluded from its operation, as they are in all other provincial jurisdictions in Canada. Theoretically at least, a conditional seller of lumber or bricks that subsequently become incorporated into a building could commence seizure proceedings under The Seizures Act<sup>27</sup> rather than be restricted to his remedies under The Builders' Lien Act.<sup>28</sup>

At this point mention should be made of what is apparently the current practice employed by practitioners in Edmonton. A brief discussion with a few members of the practicing bar disclosed that the cautious practitioner,

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<sup>26</sup>Klimove v. G.M.A.C. and Dubuc (1955) 14 W.W.R. 463 (Alta. S.C.A.D.).

<sup>27</sup>R.S.A. 1970, c. 338.

<sup>28</sup>R.S.A. 1970, c. 35.

acting on behalf of a purchaser or mortgagee of realty, will search Central Registry for the major fixtures in a residential property, but it is impossible to search for them all. The result is that the practitioner may well end up paying out of his own funds the balance owing on an article under a conditional sale agreement because his search did not reveal its existence. Clearly this is an uncertain and somewhat unsatisfactory state of affairs.

#### IV. ALTERNATIVES

The alternative solution lies in requiring the conditional seller to file notice of his interest at the Land Titles Office where the realty itself is registered. In this way subsequent purchasers and mortgagees of realty are given adequate notice of the interest while still protecting the conditional seller. Such an alternative has been or is in the course of being adopted in most provincial jurisdictions in Canada.

##### A. British Columbia

The Conditional Sales Act<sup>29</sup> provides that where the chattels (other than building materials) become affixed to realty, they do not become part thereof but remain subject to the seller's rights but the prior or subsequent owner or mortgagee of the realty may keep them upon paying the amount due. In addition to the registration required by the Act, the conditional seller must file notice in the proper land registry office not later than twenty days after the commencement of the affixing of the goods to the land. Such filing

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<sup>29</sup>S.B.C. 1961, c. 9, s. 12; see Appendix I.

is deemed actual notice to both existing and subsequent interests in the realty. Failure to file such notice results in the conditional seller losing his priority in the affixed goods.<sup>30</sup>

B. Saskatchewan

The Conditional Sales Act<sup>31</sup> also provides for the filing of notice of the conditional sale agreement under The Land Titles Act not later than thirty days after the commencement of the affixing of the goods to the land. Such filing is deemed actual notice to both prior and subsequent owners, mortgagees or other encumbrances of the realty.

C. Manitoba

The Lien Notes Act<sup>32</sup> provides that where any "machinery", the subject of a lien note, etc., is affixed to realty, it remains subject to the seller's rights, but the owner may retain the same on payment of the balance due. In effect, "machinery" under a conditional sale agreement is dealt with the same as all chattels are in Alberta. The problems that arise are the same.<sup>33</sup>

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<sup>30</sup>See LaSalle Recreations Ltd. v. Canadian Camdex Investments Ltd. (1969) 4 D.L.R. (3d) 549 (B.C.C.A.) where an existing mortgagee gained priority over a conditional seller who failed to register under section 12.

<sup>31</sup>R.S.S. 1965, c. 393, s. 19; see Appendix II.

<sup>32</sup>R.S.M. 1970, c. L-140, s. 10; see Appendix III.

<sup>33</sup>See Foran, (1962) 34 Man. B. News 81.

However, Manitoba has enacted, but not yet proclaimed, Uniformity legislation entitled The Personal Property Security Act.<sup>34</sup> Under this Act, a seller of chattels (other than building materials) under a conditional sale or chattel mortgage that subsequently becomes affixed to realty has priority over existing owners and mortgagees of the realty but he must file notice of the conditional sale agreement at the Land Titles Office in order to maintain his priority over subsequent purchasers and mortgagees.

D. Ontario

The Conditional Sales Act<sup>35</sup> provides that where goods (other than building materials) become affixed to realty, they remain subject to the conditional seller's rights but the owner or subsequent purchaser or mortgagee of the realty can retain them on payment of the amount due. Provision is made for the filing of notice of the conditional sale agreement in the proper registry or land titles office. This filing, however, is permissive only and Goldenberg argues that the conditional seller's security is protected even if not so filed.<sup>36</sup>

Ontario has also enacted (but not yet proclaimed) Uniformity legislation entitled The Personal Property Security Act.<sup>37</sup>

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<sup>34</sup>S.M. 1973, c. 5; see Appendix III.

<sup>35</sup>R.S.O. 1970, c. 76, ss. 10 and 14; see Appendix IV.

<sup>36</sup>(1959) 2 Can. Bar J. 309 at 327.

<sup>37</sup>R.S.O. 1970, c. 344; see Appendix IV.

E. New Brunswick

The Conditional Sales Act<sup>38</sup> provides that if goods (other than building materials) become affixed to realty they shall remain subject to the seller's rights provided the seller files a notice in the Registry Office in the county in which the land is situate.

F. Newfoundland

The Conditional Sales Act<sup>39</sup> also provides for filing of notice of a conditional sale agreement under The Registration of Deeds Act not later than thirty days after the commencement of the affixing of the goods so as to maintain the conditional seller's priority over both prior and subsequent interests in the realty.

G. Nova Scotia and Prince Edward Island

The question of fixtures is not dealt with in either the Nova Scotia<sup>40</sup> or Prince Edward Island<sup>41</sup> conditional sales legislation. Presumably the common law position would apply and a conditional seller would lose his security interest in the goods once they become affixed to the realty.

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<sup>38</sup>R.S.N.B. 1952, c. 34, s. 16; see Appendix V.

<sup>39</sup>R.S. Nfld. 1970, c. 56, s. 14; see Appendix VI.

<sup>40</sup>R.S.N.S. 1967, c. 48; however, adoption of the Uniformity legislation is proposed.

<sup>41</sup>R.S.P.E.I. 1951, c. 28.



## H. United States

Section 9-313 of The Uniform Commercial Code<sup>42</sup> provides for the filing of the agreement against title to the realty so as to protect the secured party's interest as against subsequent interests in the realty. As against prior interests, however, the secured party is protected even without such filing. The definition of "security interest"<sup>43</sup> is broad enough to include both conditional sales and chattel mortgages.<sup>44</sup>

## V. GENERAL CONSIDERATIONS

### A. Repeal of Section 16

It is, of course, possible to repeal section 16 entirely thereby restoring the common law position in Alberta as it presently applies to chattel mortgages. The conditional seller can protect himself in other ways, for example, by taking a mortgage on the realty itself. However, this method of protection can become prohibitive when the amount secured is insufficient to justify the legal costs of acquiring the land mortgage. In such a situation a conditional seller would be forced to run the risk of losing his security interest in the goods once they have become affixed as does the chattel mortgagee today.

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<sup>42</sup>See Appendix VII.

<sup>43</sup>U.C.C. 1-201.

<sup>44</sup>See (1961) 8 U.C.L.A. Law Review 806 at 939-941 for a discussion of the Code provisions.

## B. Retention of the Principle of Section 16

If the protection of the conditional seller is to be retained, there appears to be no reason why such protection should not be extended to chattel mortgagees as well. Although theoretically different concepts, the result of a party electing to sell a chattel by way of conditional sale or chattel mortgage is to maintain security in the chattel until payment in full of the purchase price. Such extension has been incorporated into the uniform Personal Property Security legislation<sup>45</sup> and in the United States Uniform Commercial Code.

If the protection of the seller is to be maintained, it is clear that the protection of his interest must be balanced with that of a party interested in the realty. It is equally clear that due to the problems and uncertainty associated with searching Central Registry, the better approach is to cast the onus upon the conditional seller to file notice of his interest against the title to the realty at the Land Titles Office. All of the legislation in the field has adopted this approach.

## C. Definition of Fixtures

None of the legislative provisions examined have attempted to define the term "fixtures", opting instead to leave that question to be decided by the well-settled common law principles.

## D. Building Materials

As mentioned previously, section 16 does not exclude

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<sup>45</sup>Man. S.M. 1973, c. 5; Ont: R.S.O. 1970, c. 344.

from its operation chattels which subsequently become "building materials"--e.g., lumber or bricks--and the failure to do so could conceivably cause problems. All of the legislation examined expressly exclude "building materials" from their operation, limiting the seller to his remedies under legislation similar to Alberta's Builders' Lien Act.<sup>46</sup>

Goldenberg summarizes the provisions:<sup>47</sup>

The provinces of British Columbia, Saskatchewan and Newfoundland have enacted new provisions relating to goods sold under conditional sales contracts and which become affixed to the land. They are all patterned after similar provisions in the Uniform Act and do not differ very much from one another. By these statutes a conditional sales vendor loses his right to a lien upon any chattels which become affixed to land in such a manner as to constitute them building materials. The Acts give a special definition to the words "building materials", which is as follows:

"building materials includes goods that become incorporated or built into a building that their removal therefrom would necessarily involve the removal or destruction of some other part of the building and thereby cause substantial damage to the building apart from the value of the goods removed . . ."

This would cover lumber, bricks or stone used in building a house. It would cover plumbing or heating pipes built into walls so that the walls would have to be destroyed in order to remove them. It could cover some of the newly developed built-in appliances which are now featured in new homes.

The definition section then goes on to exclude certain things from its general application. It says:

". . . but does not include goods that are severable from the land merely by unscrewing, unbolting, unclamping or uncoupling, or by some other method of disconnection, and does not include machinery installed in a building for use in the carrying on of an industry where the only substantial

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<sup>46</sup>R.S.A. 1970, c. 35.

<sup>47</sup>(1959) 2 Can. Bar. J. 309 at 327-329.

damage, apart from the value of the machinery removed, that would necessarily be caused to the building in removing the machinery therefrom is that arising from the removal or destruction of the bed or casing on or in which the machinery is set and the making or enlargement of an opening in the walls of the building sufficient for the removal of the machinery.”

This definition, therefore, excludes such items as furnaces, electric light and plumbing fixtures, and the like, and liens can be registered against them. It also excludes industrial machinery, so that liens can be registered with respect to that kind of thing.

One can foresee a great many disputes on the question as to whether or not a chattel is or is not building material. It is a long section—it takes 158 words to say what the two words “building materials” mean. The question has been considered in an Ontario case, and what was said in that case is very helpful and useful. In *Alexander vs. McGillivray*, 41 O.W.N. 406, O.E. Lennox, Assistant Master at bottom of page 497 said:

“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 closely interlinked and identified with the other materials generally described as building material, that they must for all practical purposes be considered as building materials within the meaning of sec. 8. It would seem that, in determining this question, similar principles must be applied as in dealing with the question of fixtures. The degree and the object of the annexation must be considered. No doubt the distinction here should not be so finely drawn as in the case of fixtures, but the underlying principle is the same.

“Both the degree and object of annexation are important factors in the present case. Each bath was fitted into a recess in the wall, built in the exact size to permit the bath to be placed in it. It rested in cement and after the bath was placed in position the walls around were covered first with the brown coat of plaster, then with the finishing putty coat, the plaster actually overlapping the flanges on the two ends and inner side of the bath. In short it seems more appropriate to say the bathroom was built around the equipment, than that the equipment was fitted into the bathroom.”

E. Date for Filing--Grace Period--Renewal Statements

Goldenberg provides:<sup>48</sup>

Registration must be effected in British Columbia within twenty days (s. 14(4)) and in Newfoundland (s. 14 (4)) and Saskatchewan (s. 17 (4)) within thirty days

"after the commencement of the affixing of the goods to the land."

How is a conditional sale vendor ever to establish that date? There are very many articles that are sold without the vendor having any reason to expect that they will ever be affixed to land, and is such a vendor to lose his lien unless he has it filed or registered in the Land Titles Office within thirty days

"after the commencement of the affixing of the goods to the land".

How is a vendor ever to know that his goods are being affixed to land. Is a vendor to maintain a constant system of inspection?

The provisions of the Uniformity legislation are preferable in that they provide for filing with respect to goods that are "or that may become fixtures".<sup>49</sup> The effect is to allow the seller to protect himself immediately and remove the problems envisaged by Goldenberg.

In relation to the date of filing, the problem of a "grace period" for registration also arises. Under The Conditional Sales Act in Alberta registration within the grace period is retroactive.<sup>50</sup> It is conceivable, therefore, that the filing of notice at the Land Titles Office would also be retroactive thereby defeating to some extent the purpose of the legislation. If a time limit for filing is to be

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<sup>48</sup>Supra, n. 47, at 329-330.

<sup>49</sup>See for example Man: S.M. 1973, c. 5, s. 52(2).

<sup>50</sup>Klimove v. G.M.A.C. and Dubus (1955) 14 W.W.R. 463 (Alta. S.C.A.D.).

provided at all, an express provision to the effect that such filing is effective only from the actual date of filing is preferred.<sup>51</sup> In effect, the provisions for a time limit and curative provision for late filing, as found in many statutes,<sup>52</sup> are surplusage.

Finally, the problem of renewal statements must be considered. Whereas the registration of a conditional sale agreement lapses if not renewed within three years, a filing of notice at the Land Titles Office would not. British Columbia<sup>53</sup> and the Uniformity legislation<sup>54</sup> provide for the filing of a renewal statement at the Land Titles Office within a stated period of time.

F. Removal: Duty with Respect to Injury to the Land

At present, a conditional seller would be entitled to remove a fixture by following the provisions of The Seizures Act.<sup>55</sup> The Canadian legislation examined provides that a conditional seller who has perfected his interest in the fixture can remove it but will be liable for any injury caused to the realty beyond that necessarily incidental to its removal.<sup>56</sup>

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<sup>51</sup>This type of provision is found in The Bills of Sale Act, R.S.A. 1970, c. 29, s. 3(2).

<sup>52</sup>For example, The Bills of Sale Act.

<sup>53</sup>S.B.C. 1973, c. 19, s. 5.

<sup>54</sup>Man: S.M. 1973, c. 5, s. 52(2); Ont.: R.S.O. 1970, c. 344, s. 53.

<sup>55</sup>R.S.A. 1970, c. 338.

<sup>56</sup>B.C.: S.B.C. 1961, c. 9, s. 12(9); Sask.: R.S.S. 1965, c. 393, s. 19(15); New Bruns.: R.S.N.B. 1952, c. 34, s. 16(14); Nfld: R.S. Nfld. 1970, c. 56, s. 14(14).

The provision on the Uniform Commercial Code<sup>57</sup> provides that a secured party may remove his collateral from the real estate whether or not the removal causes any material injury to the land, but that he must reimburse any owner or encumbrancer of the realty who is not the debtor for the cost of repair of any physical injury so caused, unless otherwise agreed. Moreover, such persons may refuse permission to remove the fixture until the secured party gives adequate security for the performance of this delegation. However, they are not entitled to be compensated for any diminution in value of the real estate caused by the absence of the goods or by any necessity for replacing them. The Uniformity legislation has adopted the American position.<sup>58</sup> In actual practice the problems caused by removal may not arise very often since a subsequent purchaser or mortgagee of the realty would almost always require the secured party's interest to be satisfied or security given before completion.

## VI. CONCLUSION

In the interests of protecting both the interests of a conditional seller and chattel mortgagee and those of owners, mortgagees and other encumbrances of realty, it is clear that the position adopted by the majority of the provinces is preferable to the present position in Alberta.

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<sup>57</sup>U.C.C. s. 9-313(5).

<sup>58</sup>Man.: S.M. 1973, c. 5, s. 36(5); Ont.: R.S.O. 1970, c. 344, s. 36(4).

## APPENDIX I

BRITISH COLUMBIA

The Conditional Sales Act, S.B.C. 1961, c. 9, s. 12  
(as amended S.B.C. 1973, c. 19, s. 15):

*Filing in Land Registry Office*

Interpretation. 12. (1) In this section

“affixed” as applied to goods, means erected upon or fixed or annexed to land in such a manner and under such circumstances as to constitute fixtures; *(U.C. Manual (law))*

“building” includes any structure, erection, mine, or work built, erected, or constructed on or in land;

“building materials” includes any goods that become so incorporated or built into a building that their removal therefrom would necessarily involve the removal or destruction of some other part of the building and thereby cause substantial damage to the building apart from the value of the goods removed, but does not include

(a) goods that are severable from the land merely by unscrewing, unbolting, unclamping, uncoupling, or some similar method of disconnection; or

(b) machinery installed in a building for use in the carrying-on of any industry, where the only substantial damage that would necessarily be caused to the building in removing the machinery therefrom, apart from the value of the machinery removed, is that arising from the removal or destruction of the bed or casing on or in which the machinery is set and the making or enlargement of an opening in the walls of the building sufficient for the removal of the machinery;

“goods” means all personal chattels capable of being affixed to land.

(2) This section does not apply in respect of building materials, and upon any goods otherwise within the scope of this section becoming affixed to land in such a manner as to constitute building materials, this section ceases to apply in respect of those goods.

Rights of  
seller where  
goods affixed  
to land.

(3) Subject to the provisions of this section, and notwithstanding the provisions of the *Land Registry Act*, where possession of goods has been delivered to the buyer, and where the goods have been affixed to land, they remain subject to the rights of the seller as fully as they were before being affixed.

Filing  
of notice  
in Land  
Registry  
Office.

(4) In addition to compliance with the provisions of sections 3, 4, 5, and 6, and not later than twenty days after the commencement of the affixing of the goods to the land, there shall be filed in the Land Registry Office of the land registration district within which the land is situate a notice in Form A, setting out



- (a) the name and address of the seller;
- (b) the name and address of the buyer;
- (c) a description of the goods by which they may be readily and easily known and distinguished;
- (d) the amount unpaid on account of the purchase price or under the terms and conditions of the hiring; and
- (e) a description of the land to which the goods are affixed or are to be affixed, sufficient for the purpose of identification in the Land Registry Office.

(5) The notice shall be signed by the seller or his agent, either before or after the goods are affixed to the land and there shall be attached to the notice a copy of the writing evidencing the conditional sale agreement, together with an affidavit of the seller or his agent in Form B verifying the notice.

(6) Upon the deposit of the notice and affidavit in the Land Registry Office, accompanied by the payment of the prescribed fee, the Registrar shall file the notice and make a reference to it by entry in the proper register against the title of the parcel of land to which the notice relates; or, if the title has not been registered, the Registrar shall file the notice and make an entry of its particulars in an index to be kept in his office, to be known as the "conditional sales index."

(7) The filing of a notice in the Land Registry Office pursuant to this section shall be deemed actual notice of the existence and provisions of the conditional sale agreement to which the notice relates to every person who is an owner of the land described in the notice or any interest in the land, or who is a purchaser, lessee, mortgagee, or other encumbrancer of the land or any interest in the land, whether or not

- (a) he is registered in the books of the Land Registry Office as such owner, purchaser, lessee, mortgagee, or encumbrancer;
- or
- (b) he became such owner, purchaser, lessee, mortgagee, or encumbrancer before or after the filing of the notice.

(8) (a) The seller is not entitled to retake possession of or to remove from the land the goods so affixed unless

- (i) he has given to each registered owner of the land within the meaning of section 2 of the *Land Registry Act* a notice in writing of his intention to retake possession of and to remove the goods; and
- (ii) each person so notified has for a period of twenty days after the giving of the notice to him, or for such longer period as any Judge of the Supreme or any County Court may fix on cause shown to his satisfaction, failed to pay the amount owing on the goods.

(b) The notice shall be signed by the seller or his agent and shall set out

- (i) the name and address of the seller;
- (ii) the name and address of the buyer;
- (iii) a description of the goods;
- (iv) the amount owing on them; and
- (v) a description of the land to which the goods are affixed;

Filing  
deemed  
actual  
notice.

Notice of  
intention  
to retake  
possession  
and remove  
goods.

and shall contain

(vi) a demand that the amount so owing shall be paid on or before a day mentioned, not less than twenty days after the giving of the notice pursuant to this subsection; and

(vii) a statement of the intention to retake possession of and to remove the goods unless the amount owing thereon is paid within the time mentioned.

(c) The notice to any person for the purposes of this subsection may be given by

(i) the delivery of the notice to him personally; or

(ii) by mailing it by prepaid registered mail addressed to him at his last-known address;

and where the notice is so mailed it shall be deemed to be given to the person to whom it is addressed at the time when it should reach its destination in the ordinary course of mail.

(d) The notice may in any case be given by such form of substituted service as the Registrar of the land registration district within which the land is situate may direct, and for that purpose the powers vested in the Registrar by section 244 of the *Land Registry Act* apply.

(e) Every owner, purchaser, lessee, mortgagee, or other encumbrancer of the land, whether registered as such under the *Land Registry Act* or not, has the right as against the seller to pay the amount so owing within the time mentioned in the notice; and thereupon the goods shall, subject to any remaining rights of the seller under the conditional sale, remain affixed to the land.

Duty with respect to injury to the land.

(9) The seller, on becoming entitled to retake possession of and to remove the goods from the land, shall exercise his right of removal in such a manner as will cause no greater damage or injury to the land or to the other personal property situate thereon, or put the owner, lessee, or occupier of the land to any greater inconvenience than is necessarily incidental to the work of effecting the removal of the goods.

Effect of discharge of conditional sale.

(10) The Registrar in whose office a notice has been filed under this section,

(a) upon the receipt of a certificate of discharge in Form C, signed

(i) by the seller and accompanied by an affidavit of execution of an attesting witness; or

(ii) by the agent of the seller and accompanied by an affidavit of the agent verifying his signature and stating that he is the duly authorized agent of the seller in that behalf; or

(b) where a memorandum of satisfaction has been filed pursuant to section 11, upon the receipt of an office copy thereof, and upon payment of the prescribed fee,

shall, subject to the production in any case of such further evidence as he may require, cancel the entry of the notice on the register or in the conditional sales index, as the case may be.

(11) In case of a partial discharge, the form of the certificate may be varied accordingly; and the Registrar shall cancel the entry in respect only of the goods to which the partial discharge extends.

(12) Cancellation of the entry may also be made by the Registrar in any case, upon the application of the registered owner of the land, if, after such notice to the seller as the Registrar may direct, the seller fails to show cause to the satisfaction of the Registrar why the entry should not be cancelled.

(13) Upon the cancellation in whole or in part by the Registrar of the entry of a notice pursuant to this subsection, the provisions of subsections (3) and (7) cease to apply in respect of the goods to which the cancellation extends.

S.B.C. 1973, s. 19, s. 5:

Enacts  
s. 12A.

Expiration  
and renewal  
of notice.

5. The Act is further amended by adding, after section 12, the following as section 12A:

12A. (1) Every notice filed under section 12 shall, at the expiration of three years after the filing of the notice or of the last renewal statement, cease to be actual notice of the existence and provisions of the conditional sale to which the notice relates unless the notice is renewed before the expiration of the three years.

(2) A notice filed under section 12 may be renewed at any time within three years from the date of its filing, or of its last renewal by filing a renewal statement in the form prescribed by regulations made under this Act.

SCHEDULE

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CONDITIONAL SALES ACT, 1961

FORM A  
(Section 12 (4))

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NOTICE OF CONDITIONAL SALE AGREEMENT

Notice is hereby given pursuant to section 12 of the *Conditional Sales Act, 1961*, respecting a certain conditional sale agreement referred to in a writing duly signed for filing pursuant to the provisions of that Act, of which writing a true copy is attached hereto.

The following are the facts with respect to the said conditional sale agreement:—

- (a) The name and address of the seller are
- (b) The name and address of the buyer are
- (c) The following is a description of the goods:
- (d) The amount now unpaid on account of the purchase price [or under the terms and conditions of the hiring] is
- (e) The following is a description of the land to which the goods are affixed or are to be affixed:

Dated this            day of            , 19            .  
(Signature of buyer, or seller, or agent)

Witness:

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CONDITIONAL SALES ACT, 1961

FORM B  
(Section 12 (5))

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AFFIDAVIT VERIFYING NOTICE

I,            , of            , [occupation], make oath and say:—

1. I am the seller named in the notice hereto annexed [or I am the duly authorized agent in that behalf of the seller named in the notice hereto annexed, and I have a full knowledge of the facts set out therein].

2. The statement of facts set out in the said notice is true and correct.

(Signature) \_\_\_\_\_

Sworn before me, etc.

CONDITIONAL SALES ACT, 1961

FORM C  
(Section 12 (10))

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CERTIFICATE OF DISCHARGE

I hereby certify that the conditional sale agreement, of which a notice dated the            day of            , 19            , was filed under the provisions of section 12 of the *Conditional Sales Act, 1961*, in the Land Registry Office at            , in the Province of British Columbia, as No.            , against the following described land:            , is wholly discharged [or is discharged in part as follows (here state the description of goods in respect of which the conditional sale agreement is discharged, and the description of the land to which those goods are affixed)].

Dated this            day of            , 19            .  
(Signature) \_\_\_\_\_

Witness:

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## APPENDIX II

SASKATCHEWAN

## The Conditional Sales Act, R.S.S. 1965, c. 393,

## s. 19:

- Interpretation**      **19.—(1)** In this section "goods" means chattels personal capable of being affixed to land.
- Application of section**      (2) This section does not apply in respect of building materials; and, upon any goods otherwise within the scope of this section becoming affixed to land in such a manner as to constitute them building materials, this section shall cease to apply in respect of those goods.
- Rights of seller where goods affixed to land**      (3) Subject to this section, and notwithstanding *The Land Titles Act*, where possession of goods has been delivered to the buyer, and where the goods have been affixed to land, they shall remain subject to the rights of the seller as fully as they were before being affixed but those rights shall be subject to the interest of any third party in the land where the interest is acquired, and evidenced by an instrument registered or filed in the proper land titles office, after the commencement of the affixing of the goods to the land and prior to the filing of the notice mentioned in subsection (4).
- Filing of notice in land titles office**      (4) In addition to compliance with section 5, and not later than thirty days after the commencement of the affixing of the goods to the land, there shall be filed in the land titles office for the land registration district within which the land is situated a notice in form B, setting out:
- (a) the name and address of the seller;
  - (b) the name and address of the buyer;
  - (c) a description of the goods by which they may readily and easily be known and distinguished;
  - (d) the amount unpaid on account of the purchase price or under the terms and conditions of the hiring;
  - (e) a description of the land to which the goods are or are to be affixed, sufficient for the purpose of identification in the land titles office; and
  - (f) the address within Saskatchewan at which notices may be served.
- Notice to be signed**      (5) The notice shall be signed by the seller or his agent, either before or after the goods are affixed to the land.
- Documents accompanying notice**      (6) There shall be attached to the notice a copy of the writing evidencing the conditional sale, together with an affidavit of the seller or his agent in form C verifying the notice.

Duties of registrar

(7) Upon the deposit of the notice and affidavit in the land titles office, accompanied by the payment of the prescribed fee, the registrar shall file the notice and enter a memorandum thereof upon the certificate of title to the parcel of land to which the notice relates; or, where no certificate of title has been issued, the registrar shall enter the notice in the instrument register and when a certificate of title is issued endorse thereon a memorandum of the notice.

Filing deemed actual notice

(8) The filing of a notice in the land titles office pursuant to this section shall be deemed actual notice of the existence and provisions of the conditional sale to which the notice relates to every person who is an owner of the land described in the notice or any interest in the land, or who is a purchaser, lessee, mortgagee or other encumbrancer of the land or any interest in the land, whether or not he is registered in the records of the land titles office as such owner, purchaser, lessee, mortgagee or encumbrancer, and whether or not he became such owner, purchaser, lessee, mortgagee or encumbrancer before or after the filing of the notice.

Notice of intention to retake possession and remove goods

(9) The seller shall not be entitled to retake possession of or to remove from the land the goods so affixed unless he has given to each person who appears by the records of the land titles office to have an interest in the land a notice in writing of his intention to retake possession of and to remove the goods, and unless each person so notified has for a period of twenty days after the giving of the notice to him, or for such longer period as any judge of the Court of Queen's Bench or of the district court may fix on cause shown to his satisfaction, failed to pay the amount owing on the goods.

Contents of notice of intention to retake possession

(10) The notice mentioned in subsection (9) shall be signed by the seller or his agent and shall set out:

- (a) the name and address of the seller;
- (b) the name and address of the buyer;
- (c) a description of the goods;
- (d) the amount owing on the goods; and
- (e) a description of the land to which the goods are affixed;

and shall contain:

- (f) a demand that the amount so owing shall be paid on or before a day mentioned, not being less than twenty days after the giving of the notice; and
- (g) a statement of the intention to retake possession of and to remove the goods unless the amount owing thereon is paid within the time mentioned.

Service of notice

(11) The notice to any person of intention to retake possession of and to remove the goods may be given by the delivery of the notice to him personally or by mailing it by prepaid registered mail addressed to him at his last known address, and where the notice is so mailed it shall be deemed to be given to the person to whom it is addressed at the time when it should reach its destination in the ordinary course of mail.

Substi-  
tutional  
service

(12) The notice mentioned in subsection (11) may in any case be given by such form of substituted service as the registrar of the land registration district within which the land is situated may direct.

Right of  
owner, etc.,  
of land

(13) Every owner, purchaser, lessee, mortgagee or other encumbrancer of the land, whether registered as such under *The Land Titles Act* or not, has the right as against the seller to pay the amount so owing within the time mentioned in the notice; and thereupon the goods shall, subject to any remaining rights of the seller under the conditional sale, remain affixed to the land.

Right to  
assignment  
of contract  
upon pay-  
ment of  
balance due  
in certain  
cases

(14) Where a person, other than the buyer, having an interest in the land pays the amount unpaid on account of the purchase price or under the terms and conditions of the hiring, he may demand and thereupon shall be entitled to receive from the seller an assignment of the conditional sale.

Duty with  
respect to  
injury to  
the land

(15) The seller, on becoming entitled to retake possession of and to remove the goods from the land, shall exercise his right of removal in such a manner as will cause no greater damage or injury to the land or to the other personal property situated thereon, or put the owner, lessee or occupier of the land to any greater inconvenience than is necessarily incidental to the work of effecting the removal of the goods.

Effect of  
discharge  
of condi-  
tional sale

(16) Upon the receipt of a certificate of discharge in form D, signed by the seller and accompanied by an affidavit of execution of an attesting witness, or signed by the agent of the seller and accompanied by an affidavit of the agent verifying his signature and stating that he is the duly authorized agent of the seller in that behalf, or, where a memorandum of satisfaction has been registered pursuant to section 18, upon the receipt of an office copy thereof, and upon payment of the prescribed fee the registrar in whose office a notice has been filed under this section shall, subject to the production in any case of such further evidence as he may require, enter the certificate of discharge or copy of the memorandum of satisfaction in the instrument register and cancel the entry of the notice upon the certificate of title.

In case of a partial discharge, the form of the certificate may be varied accordingly; and the registrar shall cancel the entry in respect only of the goods to which the partial discharge extends.

Same

(17) Cancellation of the entry of the notice may also be made by the registrar in any case, upon the application of the registered owner or other person claiming an interest in the land, if, after such notice to the seller as the registrar may direct, the seller fails to show cause to the satisfaction of the registrar why the entry should not be cancelled.

Same

(18) Upon the cancellation in whole or in part by the registrar of the entry of a notice pursuant to subsection (16) or (17), the provisions of subsections (3) and (8) shall cease to apply in respect of the goods to which the cancellation extends. 1957, c. 97, s. 17; 1958, c. 84, s. 5; 1965, c. 21, s. 2.

FORM B.  
(Section 19(4) )

NOTICE OF CONDITIONAL SALE AGREEMENT.

Notice is hereby given pursuant to section 19 of *The Conditional Sales Act*, respecting a certain conditional sale evidenced by a writing executed for registration pursuant to section 5 of that Act, of which writing a copy is attached hereto.

The following are the facts with respect to the said conditional sale:

- (a) The name and address of the seller are \_\_\_\_\_
- (b) The name and address of the buyer are \_\_\_\_\_
- (c) The following is a description of the goods \_\_\_\_\_
- (d) The amount unpaid on account of the purchase price (or under the terms and conditions of the hiring) is \$\_\_\_\_\_.
- (e) The following is a description of the land to which the goods are or are to be affixed:

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

\_\_\_\_\_  
(Signature of seller or agent)

Witness:

\_\_\_\_\_

FORM C.  
(Section 19(6) )

AFFIDAVIT VERIFYING NOTICE.

I, \_\_\_\_\_, of \_\_\_\_\_, in the \_\_\_\_\_, make oath and say:  
(occupation)

1. I am the seller named in the notice hereto attached (or I am the duly authorized agent in that behalf of the seller named in the notice hereto attached, and I have a full knowledge of the facts set out therein).

2. The statement of facts set out in the said notice is true.

Sworn before me at  
in the Province of  
this \_\_\_\_\_ day of \_\_\_\_\_,  
19 \_\_\_\_\_

} \_\_\_\_\_

\_\_\_\_\_  
*A Commissioner, etc. (or as the case may be).*

FORM D.  
(Section 19(16) )

CERTIFICATE OF DISCHARGE.

I hereby certify that the conditional sale, of which a notice dated the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_, was filed under section 19 of *The Conditional Sales Act*, in the land titles office at \_\_\_\_\_, in the Province of Saskatchewan, as No. \_\_\_\_\_, against the following described land:

(Here insert description)

is wholly discharged (or is discharged in part as follows (here state the description of the goods in respect of which the conditional sale is discharged, and the description of the land to which the goods are affixed) ).

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

\_\_\_\_\_  
(Signature)

Witness:

\_\_\_\_\_

\_\_\_\_\_



## APPENDIX III

MANITOBA

The Lien Notes Act, R.S.M. 1970, c. L-140, s. 10:

**Rights of manufacturer, etc., in case of machinery, subject to receipt note, affixed to realty.**

**10** Where any machinery, the subject of, or affected by, a receipt, note, hire receipt, or order for chattels, mentioned in section 2, has been affixed to realty, it remains subject to the rights of the manufacturer, bailor, or vendor, or person claiming through or under them, as fully as it was before being so affixed; but the owner of the realty, or any purchaser or any mortgagee or other encumbrancer thereof, has the right as against the manufacturer, bailor, or vendor, or other person claiming through or under them, to retain the machinery, upon payment of the amount owing on it.

R.S.M., c. 144, s. 10; am.

The Personal Property Security Act, S.M. 1973, c. 5,  
ss. 1, 2, 36, 52:

- (z) "security agreement" means an agreement that creates or provides for a security interest;
- (aa) "security interest" means
  - (i) an interest in goods, fixtures, documents of title, instruments, securities, chattel papers or intangibles that secures payment or performance of an obligation, and
  - (ii) an interest arising from an assignment of accounts or chattel paper not intended as security,
 but does not include an assignment for the general benefit of creditors made under The Assignments Act;

**Application of Act.**

- 2** Subject to subsection (1) of section 3, this Act applies
- (a) to every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest including, without limiting the foregoing,
    - (i) a chattel mortgage, conditional sale, equipment trust, floating charge, pledge, trust deed or trust receipt, and
    - (ii) an assignment, lease or consignment intended as security;
  - (b) to every assignment of accounts not intended as security other than an assignment for the general benefit of creditors to which The Assignments Act applies; and
  - (c) to every assignment of chattel paper not intended as security.

S.M. 1973, c. 5, s. 2.

**Application of section.**

**36 (1)** This section does not apply to building materials.

**Priority of security interests, fixtures.**

**36 (2)** Subject to subsection (4) of this section and notwithstanding subsection (4) of section 34, a security interest that attached to goods before they became fixtures has priority as to the goods over the claim of any person who has an interest in the real property.

**Priority of security interests in fixtures.**

**36 (3)** Subject to subsection (4) a security interest that attached to goods after they became fixtures has priority 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 attached to the goods and who has not consented in writing to the security interest or disclaimed an interest in the goods as fixtures.

**Exceptions.**

**36 (4)** A security interest referred to in subsection (2) or (3) is subordinate to the interest of,

- (a) a subsequent purchaser or mortgagee for value of an interest in the real property; or
- (b) a creditor with a lien on the real property subsequently obtained as a result of judicial process; or
- (c) a creditor with a prior encumbrance of record on the real property in respect of subsequent advances;

If the subsequent purchase or mortgage was made or the lien was obtained or the subsequent advance under the prior encumbrance was made or contracted for, as the case may be, without knowledge of the security interest and before a financing statement in respect of the security interest is filed in the Land Titles Office as authorized under section 52.

**Removal of collateral.**

**36 (5)** If a secured party, by virtue of subsection (2) or (3) and subsection (4) has priority over the claim of a person having an interest in the real property, he may on default, subject to the provisions of this Act respecting default, remove his collateral from the real property if, unless otherwise agreed, he reimburses any encumbrancer or owner of the real property who is not the debtor for the cost of repairing any physical injury excluding diminution in the value of the real property caused by the absence of the goods removed or by the necessity for replacement, but a person so entitled to reimbursement may refuse permission to remove until the secured party has given adequate security for any reimbursement arising under this subsection.

**Retention of collateral.**

**36 (6)** A person having an interest in real property that is subordinate to a security interest by virtue of subsection (2) or (3) and subsection (4) may, before the collateral has been removed from the real property by the secured party in accordance with subsection (5), retain the collateral upon payment to the secured party of the amount owing under the security interest having priority over his claim.

**Effect of registration.**

**52 (1)** Where the collateral covered by a security agreement is other than instruments, securities, letters of credit, advices of credit or negotiable documents of title, registration under this Act

- (a) of a financing statement relating to the security agreement constitutes notice of the security agreement to all persons claiming any interest in the collateral and is effective during the period of three years following the registration of the financing statement;
- (b) of a renewal statement constitutes notice of the security agreement, to which it relates to all persons claiming any interest in the collateral and is effective during the period of three years following the registration of the renewal statement; and
- (c) of any other document constitutes notice thereof to all persons claiming any interest in the collateral and is effective during the remainder of the period for which the registration of the financing statement or renewal statement relating to the security agreement is effective.

**Filing in Land Titles Offices.**

**52 (2)** Where the collateral is or includes fixtures, or goods that may become fixtures, or crops, a financing statement in the form prescribed for Land Titles purposes in setting forth at least

- (a) the name and address of the debtor;
- (b) the name and address of the secured party;
- (c) a description of the collateral that is fixtures or that may become fixtures or that is crops sufficient to identify it;
- (d) a description of the land affected sufficient for filing under The Real Property Act or The Registry Act, as the case may be; and
- (e) such other information, including the information referred to in clauses (a) to (d), and the mode of giving the information, as may be prescribed or required by the regulations;

may be filed in the appropriate Land Titles office, and upon being so filed the district registrar shall make a note thereof on the proper certificate of title or abstract of title; and subsection (1) applies mutatis mutandis to any financing statement filed under this subsection or any renewal statement or other document filed in the Land Titles office in respect thereof.

**Other filings in Land Titles Offices.**

**52 (3)** Where a financing statement is filed under subsection (2), a renewal statement, postponement statement, certificate of discharge, statement of assignment, notice of transfer, or release of collateral, in the appropriate form prescribed for Land Titles purposes and setting forth a description of the land affected sufficient for filing under The Real Property Act or The Registry Act, as the case may be, and such other information and the mode of giving the information as may be prescribed or required by the regulations, may be filed in the appropriate Land Titles office, and upon being so filed the district registrar shall make a note thereof on the proper certificate of title or abstract of title; and sections 50 and 53 apply mutatis mutandis in respect of documents filed under subsection (2) and this subsection.

## APPENDIX IV

ONTARIO

The Conditional Sales Act, R.S.O. 1970, c. 76, ss.  
10 and 14:

Goods  
affixed  
to realty  
subject to  
rights of  
seller

**10.—(1)** Subject to subsection 2 and section 14, where the goods, other than building material, have been affixed to realty, they remain subject to the rights of the seller as fully as they were before being so affixed, but the owner of the realty or any purchaser or any mortgagee or other encumbrancer thereof has the right, as against the seller or other person claiming through or under him, to retain the goods upon payment of the amount owing on them.

Mining  
machinery  
subject to  
rights of  
seller

(2) Where the goods consist of mining machinery or appliances on a mining claim for which the patent or lease, as the case may be, has not issued, they remain subject to the rights of the seller whether they have been affixed to the realty or otherwise as fully as they were before being so affixed, and the contract or a copy thereof may be registered with the recorder of the mining division in the same manner as a contract may be registered with the clerk of a county or district court, and the provisions of this Act with regard to registering a renewal statement and a discharge apply *mutatis mutandis*.

Registration  
to be notice  
of contract

(3) The registration of a contract as provided in subsection 2 shall be deemed to be actual notice to a creditor, subsequent purchaser or mortgagee of such goods or realty. R.S.O. 1960, c. 61, s. 10.

**14.—(1)** In addition to any other registration made under this Act, notice of a contract in Form 1 may be registered in the proper registry or land titles office, and shall set out,

Notice of contract may be registered in registry or land titles office

- (a) the name and residence of the seller and the purchaser;
- (b) a brief description of the goods sold;
- (c) the amount owing on the goods sold;
- (d) a description of the land upon which the goods are affixed or placed or are to be affixed or placed, sufficient for the purpose of registration, and, where the land is registered under *The Land Titles Act*, also a reference to the number of the parcel of the land and to the register in which the land is registered in the land titles office.

R.S.O. 1970, c. 234

(2) The notice shall be signed by the seller or his assignee, personal representative or agent, and shall be verified by the affidavit in Form 2 of the seller or his assignee, personal representative or agent having personal knowledge of the matters required to be verified, and the affidavit of the assignee, personal representative or agent shall state that he has such knowledge.

Form of notice and affidavit verifying

(3) The registration of a contract under this section shall be deemed to be actual notice to the owner of the land or an interest therein or to a subsequent purchaser, mortgagee or other encumbrancer of the land or an interest therein.

Registration to be notice to purchaser or mortgagee of land

(4) Where the goods have become affixed to the land or are fixtures and there is already registered against the land a mortgage or charge, all payments or advances made on the mortgage or charge after the goods have become affixed or have become fixtures and before registration of notice of the contract under this section have priority over the rights of the seller under the contract. R.S.O. 1960, c. 61, s. 14 (1-4).

Rights of mortgagee chargee

(5) A notice of a contract registered under this section may be discharged by a certificate in Form 4 signed by the seller or his assignee, personal representative or agent, accompanied by an affidavit of execution, except that an affidavit of execution is not necessary where the discharge is executed under the seal of a corporation. R.S.O. 1960, c. 61, s. 14 (6).

Discharge

FORM 1

The Conditional Sales Act

(Section 14 (1))

NOTICE OF CONDITIONAL SALE CONTRACT OR HIRE RECEIPT

I, ..... of the  
 (name of seller, or as the case may be)  
 ..... of .....  
 (residence) (seller, or as the case may be)  
 hereby give notice that .....  
 (brief description of goods)  
 was sold under a conditional sale contract (or hire receipt) to .....  
 (name of purchaser)  
 of the ..... of .....  
 (residence)

The amount owing thereon is \$.....

The following is a description of the land upon which the goods are affixed or placed or are to be affixed or placed:

.....  
 .....

This notice is given for the purpose of registration in the registry (or land titles) office of .....  
 (city, county or district)

Dated this ..... day of ....., 19.....

.....  
 (signature of seller, or as the case may be)

R.S.O. 1960, c. 61, Form 1.

FORM 2

The Conditioned Sales Act

(Section 14 (2))

AFFIDAVIT VERIFYING NOTICE

I, ..... named in the  
 (name of seller, or as the case may be)  
 above (or attached) notice, make oath and say:

1. That the facts set out in such notice are true.

(Where the affidavit is made by the assignee, personal representative or agent, or by an officer of a corporation, a clause to the following effect must be added:)

2. That I have full knowledge of the facts set forth in such notice.

Sworn, etc.

.....  
 (signature of seller, or as the case may be)

R.S.O. 1960, c. 61, Form 2.

**FORM 3**

*The Conditional Sales Act*

*(Section 15)*

**DISCHARGE**

I certify that.....  
has paid all money payable to me under a conditional sale agreement (or hire  
receipt) dated the.....day of.....  
19....., signed by him and registered on the.....day of  
....., 19....., as No. ....

*(NOTE:—The signature of the seller, or as the case may be, must be proved  
by the affidavit of a subscribing witness.)*

.....  
*(signature of the seller, or as the case may be)*

.....  
*(witness)*

R.S.O. 1960, c. 61, Form 3.

**FORM 4**

*The Conditional Sales Act*

*(Section 14 (5) )*

**CERTIFICATE OF DISCHARGE**

The lien registered by.....  
*(name of seller, or as the case may be)*

of the.....of.....  
*(residence) (occupation)*

upon the following lands: .....  
.....  
*(description of lands)*

dated the.....day of....., 19....., and  
registered the.....day of....., 19.....,  
as No. .... in the registry (or land titles) office for the  
..... is discharged.  
*(city, county or district)*

.....  
*(signature of seller, or as the case may be)*

R.S.O. 1960, c. 61, Form 4.

Personal Property Security Act, R.S.O. 1970, c. 344,  
ss. 1(x)(y), 2, 36 and 53:

- (x) "security agreement" means an agreement that creates or provides for a security interest;
- (y) "security interest" means an interest in goods, other than building materials that have been affixed to the realty, fixtures, documents of title, instruments, securities, chattel papers or intangibles that secures payment or performance of an obligation, and includes an interest arising from an assignment of book debts;

2. Subject to subsection 1 of section 3, this Act applies,

- (a) to every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest, including, without limiting the foregoing,
  - (i) a chattel mortgage, conditional sale, equipment trust, floating charge, pledge, trust deed or trust receipt, and
  - (ii) an assignment, lease or consignment intended as security; and
- (b) to every assignment of book debts not intended as security, but not to an assignment for the general benefit of creditors to which *The Assignments and Preferences Act* applies. 1967, c. 73, s. 2.

Application  
of Act

R.S.O. 1970,  
c. 34

36.—(1) Subject to subsection 3 of this section and notwithstanding subsection 3 of section 34, a security interest that attached to goods before they became fixtures has priority as to the goods over the claim of any person who has an interest in the real property.

Priority  
of security  
interests,  
fixtures

(2) Subject to subsection 3, a security interest that attached to goods after they became fixtures has priority 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 attached to the goods and who has not consented in writing to the security interest or disclaimed an interest in the goods as fixtures.

Idem

(3) The security interest referred to in subsections 1 and 2 are subordinate to the interest of,

Exceptio

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



(b) a creditor with a lien on the real property subsequently obtained as a result of judicial process; or

(c) a creditor with a prior encumbrance of record on the real property in respect of subsequent advances,

if the subsequent purchase or mortgage was made or the lien was obtained or the subsequent advance under the prior encumbrance was made or contracted for, as the case may be, without actual notice of the security interest.

(4) If a secured party, by virtue of subsection 1 or 2 and subsection 3, has priority over the claim of a person having an interest in the real property, he may on default, subject to the provisions of this Act respecting default, remove his collateral from the real property if, unless otherwise agreed, he reimburses any encumbrancer or owner of the real property who is not the debtor for the cost of repairing any physical injury excluding diminution in the value of the real property caused by the absence of the goods removed or by the necessity for replacement, but a person so entitled to reimbursement may refuse permission to remove until the secured party has given adequate security for any reimbursement arising under this subsection. Removal  
collateral

Retention of  
collateral

(5) A person having an interest in real property that is subordinate to a security interest by virtue of subsection 1 or 2 and subsection 3 may, before the collateral has been removed from the real property by the secured party in accordance with subsection 4, retain the collateral upon payment to the secured party of the amount owing under the security interest having priority over his claim. 1967, c. 73, s. 36.

Effect of  
registration

53.—(1) Where the collateral covered by a security agreement is other than instruments, securities, letters of credit, advices of credit or negotiable documents of title, registration under this Act,

(a) of a security agreement, notice of intention or caution constitutes notice thereof to all persons claiming any interest in such collateral during the period of three years following such registration;

(b) of a renewal statement constitutes notice of the security agreement, notice of intention or caution to which it relates to all persons claiming any interest in such collateral during the period of three years following such registration; and

(c) of any other document constitutes notice thereof to all persons claiming any interest in such collateral during the remainder of the period for which the registration of the security agreement, notice of intention or caution is effective.

Fixtures

(2) Where the collateral is or includes fixtures or goods that may become fixtures, or crops, or oil, gas or other minerals to be extracted, or timber to be cut, the security agreement or any other document that may be registered under this Act containing a description of the land affected sufficient for registration under *The Land Titles Act* or *The Registry Act*, as the case may be, may, whether or not it is registered under this Act, be registered under *The Land Titles Act* or *The Registry Act*. 1967, c. 73, s. 53.

R.S.O. 1970,  
cc. 234, 409

## APPENDIX V

NEW BRUNSWICK

## The Conditional Sales Act, R.S.N.B. 1952, c. 34, s. 16:

Goods affixed  
to realty.

16. (1) In this section "goods" means chattels personal capable of being affixed to land.

(2) This section does not apply in respect of building materials, and ceases to apply in respect of other goods upon their becoming affixed to land in such a manner as to constitute them building materials.

(3) Subject to this section and notwithstanding the *Registry Act*, where possession of goods is delivered to the buyer, and the goods are affixed to land, they remain subject to the rights of the seller as fully as they were before being affixed.

(4) In addition to complying with section 3, and not later than twenty days after the commencement of the affixing of the goods to the land, the seller or his agent shall sign and file in the Registry Office of the County within which the land is situate a notice in Form 2, setting out,

- (a) the name and address of the seller;
- (b) the name and address of the buyer;
- (c) a description of the goods by which they may readily and easily be known and distinguished;
- (d) a description of the land to which the goods are or are to be affixed, sufficient for the purpose of identification in the office; and
- (e) the amount unpaid on account of the purchase price or under the terms and conditions of the hiring.

(5) There shall be attached to the notice a copy of the writing evidencing the conditional sale, together with an affidavit of the seller or his agent in Form 3 verifying the notice.

(6) Upon the deposit of the notice and affidavit in the office accompanied by the payment of the prescribed fee, the proper officer shall record notice in the books of record and make appropriate entries in the index book.

(7) The recording of a notice in the office pursuant to this section shall be deemed actual notice of the existence of the conditional sale, and of the provisions thereof, to every person who is an owner of the land described in the notice, or of any interest in the land, or who is a purchaser, lessee, mortgagee, or other encumbrancer of the land, or of any interest in the land.

(8) The seller may not retake possession of the goods so affixed, or remove them from the land, unless he has given to each person who appears by the records of the Registry Office

to have an interest in the land a notice in writing of his intention to retake possession of and to remove the goods, and unless each person so notified fails to pay the amount due and payable on the goods for a period of twenty days after the giving of the notice to him or for such longer period as a judge of the County Court may fix on cause shown to his satisfaction.

(9) The notice specified in subsection (8) shall be signed by the seller or his agent and shall set out

- (a) the name and address of the seller;
- (b) the name and address of the buyer;
- (c) a description of the goods;
- (d) a description of the land to which the goods are affixed; and
- (e) the total amount owing and the amount presently due and payable thereon;

and shall contain a demand that the amount so due and payable shall be paid on or before a day mentioned, not being less than twenty days after the giving of the notice pursuant to subsection (8), and a statement of the intention to take possession of and to remove the goods, unless the amount due and payable thereon is paid within the time mentioned.

(10) Notice to any person for the purposes of this section may be given by delivering the notice to him personally or by mailing it by registered mail addressed to him at his last known address, and where the notice is so mailed it shall be deemed to be given at the time when it would reach its destination in the ordinary course of mail.

(11) Notice may be given by any form of substituted service as a judge of a County Court may direct.

(12) Each person having an interest in the land, whether registered or not, has the right as against the seller to pay the amount so due and payable within the time mentioned in the notice; and thereupon the goods shall, subject to any remaining rights of the seller under the conditional sale, remain affixed to the land.

(13) Where a person other than the buyer, having an interest in the land pays the amount presently due and payable under the conditional sale he may demand and receive from the seller an assignment of the conditional sale.

(14) The seller on becoming entitled to remove the goods from the land shall exercise his right of removal in such a manner as will cause no unnecessary damage or injury to the

land or to personal property situated thereon, or put the owner, lessee, or occupier of the land to any greater inconvenience than is necessarily incidental to the work of effecting the removal of the goods.

(15) Upon receipt of the prescribed fee, and

- (a) upon receipt of a certificate of discharge in Form 4 signed by the seller and accompanied by an affidavit of execution of an attesting witness or signed by the agent of the seller and accompanied by an affidavit of the agent verifying his signature and stating that he is the duly authorized agent of the seller; or
- (b) where a memorandum of satisfaction has been filed pursuant to section 15, upon receipt of a copy thereof certified by the proper officer in whose office the memorandum was filed;

the proper officer in whose office a notice has been filed under this section shall make the appropriate entries.

(16) In case of a partial discharge, the form of the certificate may be varied accordingly; and the proper officer shall, on receipt of the prescribed fee, make an entry in respect only of the goods and land to which the partial discharge extends.

(17) The proper officer may cancel the entry upon the application of the registered owner of the land if, after such notice to the seller as the proper officer directs, the seller fails to show cause to the satisfaction of the proper officer why the entry should not be cancelled.

(18) Upon the cancellation in whole or in part by the proper officer of the entry of a notice pursuant to subsection (15), then subsections (3) and (7) cease to apply in respect of the goods and land to which the cancellation extends. R. S. c. 152, s. 12. *am.*

FORM 2

NOTICE OF CONDITIONAL SALE AGREEMENT

(Section 16 (4) )

Notice is hereby given pursuant to section 16 of the *Conditional Sales Act* respecting a certain conditional sale agreement referred to in a writing duly signed for filing pursuant to section 3 of that Act, of which writing a copy is attached hereto.

The following are the facts with respect to the said conditional sale agreement:

- (a) The name and address of the seller are; —
- (b) The name and address of the buyer are; —
- (c) The following is a description of the goods; —
- (d) The amount now unpaid on account of the purchase price (or under the terms and conditions of the hiring) is; —
- (e) The following is a description of the land to which the goods are or are to be affixed; —

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_ .

.....  
*Signature of seller or agent.*

.....  
*Witness.*

FORM 3

AFFIDAVIT VERIFYING NOTICE

(Section 16 (4) )

I, \_\_\_\_\_, of \_\_\_\_\_  
(*occupation*), make oath and say:

1. I am the seller named in the notice hereto annexed (or I am the duly authorized agent of the seller named in the notice hereto annexed, and I have a full knowledge of the facts set out therein).

2. The statement of facts set out in the said notice is true and correct.

.....  
*Signature.*

Sworn to before me, etc.

FORM 4

CERTIFICATE OF DISCHARGE

(Section 16 (15) )

I hereby certify that the conditional sale agreement of which a notice dated the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, was filed under section 16 of the *Conditional Sales Act* in the Registry Office at \_\_\_\_\_ in the Province of New Brunswick as No. \_\_\_\_\_, against the following described land, \_\_\_\_\_ is wholly discharged (or is discharged in part as follows (here state the description of the goods in respect of which the conditional sale agreement is discharged, and the description of the land to which the goods are affixed.)

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

.....  
*Signature.*

.....  
*Witness.*

*(to be accompanied by affidavit of execution)*

## APPENDIX VI

NEWFOUNDLAND

The Conditional Sales Act, R.S.Nfld. 1970, c. 56,  
s. 14:

14.—(1) In this section "goods" means chattels personal capable of being affixed to land. Interpretation.

(2) This section does not apply in respect of building materials and ceases to apply in respect of other goods upon their becoming affixed to land in such manner as to constitute them building materials. Application of section.

(3) Subject to this section and notwithstanding The Registration of Deeds Act, where possession of goods is delivered to the buyer and the goods are affixed to land, they remain subject to the rights of the seller as fully as they were before being affixed. Goods affixed to land.

(4) In addition to complying with Section 4, and not later than thirty days after the commencement of the affixing of the goods to the land, the seller or his agent shall sign and file in the registry a notice in Form 3 setting out Notice to be filed.

(a) the name and address of the seller;

(b) the name and address of the buyer;

(c) a description of the goods by which they may readily and easily be known and distinguished;

(d) a description of the land to which the goods are or are to be affixed, sufficient for the purpose of identification in the registry; and

(e) the amount unpaid on account of the purchase price or under the terms and conditions of the hiring.

Idem.

(5) There shall be attached to the notice filed pursuant to subsection (4) a copy of the writing evidencing the conditional sale together with an affidavit of the seller or his agent in Form 4 verifying the notice.

Entry.

(6) Upon the filing of the notice pursuant to subsection (4) and the affidavit pursuant to subsection (5) the registrar shall make an entry of the notice in the books of record against the land affected.

**Effect of filing.**

(7) The filing of a notice pursuant to subsection (4) shall be deemed actual notice of the existence of the conditional sale and of the provisions thereof to every person who is an owner of the land described in the notice or of any interest in the land or who is a purchaser, lessee, mortgagee, or other encumbrancer of the land or of any interest in the land.

**Retaking possession.**

(8) The seller is not entitled to retake possession of the goods so affixed or remove them from the land unless he has given to each person who appears by the records of the registry to have an interest in the land a notice in writing of the intention to retake possession of and to remove the goods and unless each person so notified fails to pay the amount due and payable on the goods for a period of one month after the giving of the notice to him or for such longer period as a judge of the Supreme Court or a judge of a District Court may fix on cause shown to his satisfaction.

(9) The notice specified in subsection (8) shall be signed by the seller or his agent and shall set out

Contents of notice.

- (a) the name and address of the seller;
- (b) the name and address of the buyer;
- (c) a description of the goods;
- (d) a description of the land to which the goods are affixed; and
- (e) the amount unpaid on account of the purchase price or under the terms and conditions of the hiring and the amount presently due and payable thereon,

and shall contain a demand that the amount so due and payable shall be paid on or before a day mentioned, not being less than one month after the giving of the notice, and a statement of the intention to take possession of and to remove the goods unless the amount due and payable thereon is paid within the time mentioned.

(10) Notice to any person pursuant to subsection (8) may be given by personal delivery to him or by mailing it by registered mail addressed to him at his last known address and where the notice is so mailed it shall be deemed to be given at the time when it would reach its destination in the ordinary course of mail.

Service of notice.

(11) Notice pursuant to subsection (8) may be given by such form of substituted service as a judge of the Supreme Court or a judge of a District Court may direct.

Idem.



- Payment.**
- (12) Each person having an interest in the land, whether registered or not, has a right as against the seller to pay the amount so due and payable within the time mentioned in the notice and thereupon the goods shall, subject to any remaining rights of the seller under the conditional sale, remain affixed to the land.
- Idem.**
- (13) Where a person, other than the buyer, having an interest in the land pays the amount unpaid on account of the purchase price or under the terms and conditions of the hiring he may demand and receive from the seller an assignment of the conditional sale.
- Removal of goods.**
- (14) The seller on becoming entitled to remove the goods from the land shall exercise his right of removal in such a manner as will cause no unnecessary damage to the land or to personal property situated thereon or put the owner, lessee or occupier of the land to no greater inconvenience than is necessarily incidental to the work of effecting the removal of the goods.
- Entry.**
- (15) Upon receipt of a certificate of discharge in Form 2 signed by the seller and accompanied by an affidavit of execution of an attesting witness or, where a certificate of discharge has been filed under Section 13, upon receipt of a copy thereof certified by the registrar, the registrar shall make an entry of the discharge in the books of records against the land affected.
- Partial discharge.**
- (16) In the case of a partial discharge, the form of the certificate may be varied accordingly and the registrar shall make an entry of the discharge in respect only of the goods and land to which the partial discharge extends.
- Cancellation of entry.**
- (17) The registrar may cancel an entry of a notice filed pursuant to subsection (4) upon the application of the registered owner of the land if, after such notice to the seller as the registrar directs, the seller fails to show cause to the satisfaction of the registrar why the entry should not be cancelled.
- Effect of cancellation.**
- (18) Upon the entry of a discharge under subsection (15) or (16) or the cancellation of an entry under subsection (17), subsections (3) and (7) cease to apply in respect of the goods and land to which the discharge or cancellation extends.

## FORM 3

(Section 14)

*Notice of Conditional Sale*

Notice is hereby given under Section 14 of The Conditional Sales Act respecting a certain conditional sale evidenced by a writing executed for filing pursuant to Section 4 of that Act, of which writing a copy is attached hereto.

The following are the facts with respect to the said conditional sale:

- (a) The name and address of the seller are .
- (b) The name and address of the buyer are .
- (c) The following is a description of the goods .
- (d) The following is a description of the land to which the goods are or are to be affixed:
- (e) The amount unpaid on account of the purchase price (or under the terms and conditions of the hiring) is \$ .

Dated this                      day of                      , 19 .

Witness:

*Signature of seller or agent.*

## FORM 4

(Section 14)

*Affidavit Verifying Notice*

I,                      , of the                      of  
in the                      of                      , make oath and say:

1. I am the seller in the attached notice.
2. The statement of facts set out in the said notice is true.

SWORN BEFORE ME, etc.

## APPENDIX VII

UNITED STATES

## Section 9-313 of The Uniform Commercial Code

**§ 9—313. Priority of Security Interests in Fixtures**

(1) The rules of this section do not apply to goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal work and the like and no security interest in them exists under this Article unless the structure remains personal property under applicable law. The law of this state other than this Act determines whether and when other goods become fixtures. This Act does not prevent creation of an encumbrance upon fixtures or real estate pursuant to the law applicable to real estate.

(2) A security interest which attaches to goods before they become fixtures takes priority as to the goods over the claims of all persons who have an interest in the real estate except as stated in subsection (4).

(3) A security interest which attaches to goods after they become fixtures is valid against all persons subsequently acquiring interests in the real estate except as stated in subsection (4) but is invalid against any person with an interest in the real estate at the time the security interest attaches to the goods who has not in writing consented to the security interest or disclaimed an interest in the goods as fixtures.

(4) The security interests described in subsections (2) and (3) do not take priority over

- (a) a subsequent purchaser for value of any interest in the real estate; or
- (b) a creditor with a lien on the real estate subsequently obtained by judicial proceedings; or
- (c) a creditor with a prior encumbrance of record on the real estate to the extent that he makes subsequent advances

if the subsequent purchase is made, the lien by judicial proceedings is obtained, or the subsequent advance under the prior encumbrance is made or contracted for without knowledge of the security interest and before it is perfected. A purchaser of the real estate at a foreclosure sale other than an encumbrancer purchasing at his own foreclosure sale is a subsequent purchaser within this section.

(5) When under subsections (2) or (3) and (4) a secured party has priority over the claims of all persons who have interests in the real estate, he may, on default, subject to the provisions of Part 5, remove his collateral from the real estate but he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.

### Official Comment

**Prior Uniform Statutory Provision:** Section 7, Uniform Conditional Sales Act.

*For text of prior provision, see Appendix in this volume.*

**Changes:** Changed in substance.

#### Purposes of Changes:

1. To state when a secured party claiming an interest in goods as fixtures under this Act is entitled to priority over a person claiming an interest in the same goods by reason of the law applicable to real estate.

2. This Section, like Section 7 of the Uniform Conditional Sales Act, leaves it to other law to determine when chattels become realty by affixation except to the extent that the first sentence of subsection (1) makes clear that the Section does not apply to structural materials.

3. Where a security interest in the goods as chattels has attached before affixation, subsection (2) gives the secured party priority over all prior claims based on an interest in the realty. If the secured party perfects his

interest by filing, which he may do in advance of affixation, he takes priority over subsequent realty claims as well. So long as he fails to perfect his interest he may, however, be subordinated to the subsequent claimants described in subsections (4) (a), (b) and (c). The last sentence of subsection (4) on purchasers at foreclosure sales clarifies a point on which prior decisions have been in conflict.

4. Subsection (3) permits a chattel interest to be taken in goods after they have become fixtures. In this case the secured party has the same rights against *subsequent* real estate interests as when his interest was taken before affixation. However the post-affixation security interest is invalid against *prior* real estate claims unless they agree in writing to a subordinate status. The reason for the distinction taken, as to prior real estate claims, between the pre-affixation and post-affixation security interest is that in the former case the value of the real estate is presumably being increased by the addition of the fixture, while in the latter case value, on which the real estate encumbrancer may have counted, is being in a sense deducted from the real estate by the separate financing of a part of it as a fixture.

5. Subsection (5) is an important departure from Section 7 of the Uniform Conditional Sales Act and from much other conditional sales legislation. Under the Uniform Conditional Sales Act a conditional vendor could not sever and remove the affixed chattel if a "material injury to the freehold" would result. The courts of various jurisdictions were in sharp disagreement on the meaning of "material injury": some held that only physical injury was

meant; others adopted the so-called "institutional theory" and denied removal whenever the "going value" of the structure would be materially diminished by the removal. Under these rules the conditional vendor either could not remove at all, or, if he could, could damage the structure on removal without becoming accountable to the real estate claimant. The situation was complicated by the fact that it became increasingly difficult to predict what types of goods the courts in a given jurisdiction would hold not subject to removal.

Subsection (5) abandons the "material injury to the freehold" rule. Instead a secured party entitled to priority may in all cases sever and remove his collateral, subject, however, to a duty to reimburse any real estate claimant (other than the debtor himself) for any physical injury caused by the removal. The right to reimbursement is implemented by the last sentence of subsection (5) which gives the real estate claimant a statutory right to security or indemnity, failing which he may refuse permission to remove. The subsection (5) rule thus accomplishes two things: it puts an end to the uncertainty which has grown up under the "material injury" rule, while at the same time it protects the real estate claimant under the reimbursement provisions.

6. Under this Article as under the Uniform Conditional Sales Act the place of filing with respect to goods affixed or to be affixed to realty is with the real estate records and not with the chattel records. See Section 9—

401 on the place of filing and Section 9—402 on the form of financing statement.

**Cross References:**

Sections 9—102(1), 9—104(j) and 9—312(1).

Point 3: Sections 9—204(1), 9—302 and 9—402(1).

Point 5: Part 5.

Point 6: Sections 9—401(1) (b) and 9—402.

**Definitional Cross References:**

“Collateral”. Section 9—105.

“Contract”. Section 1—201.

“Creditor”. Section 1—201.

“Debtor”. Section 9—105.

“Goods”. Section 9—105.

“Knowledge”. Section 1—201.

“Person”. Section 1—201.

“Purchase”. Section 1—201.

“Purchaser”. Section 1—201.

“Secured party”. Section 9—105.

“Security interest”. Section 1—201.

“Value”. Section 1—201.

“Writing”. Section 1—201.