

PERSONAL PROPERTY SECURITY ACT

PART 1



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In financing transactions, it is common for the party lending money to secure the obligations of the debtor through creating legal interest in the debtor's real or personal property. If the debtor then fails to meet his or her obligations to the lender, the lender may enforce the obligations by proceeding against the property. Establishing security through the creation of legal interest in a debtor's property is referred to as taking security, and a lender who establishes such an interest is called a secured party.

On October 1, 1990, B.C.'s Personal Property Security Act (PPSA) came into force. It covers all commercial and consumer financing transactions that involve taking security in personal property. The PPSA introduced a single registration system, set of priority rules and set of rules regarding the rights and remedies of secured parties and debtors when the security is enforced. Although the application of the PPSA can be quite complex, the PPSA is a great improvement over the many statutes that it replaced.

The PPSA is encountered frequently by businesses and others who borrow or lend money. So we thought it appropriate to introduce you to how the PPSA works and will do so in two parts. In this first part, I will explain the PPSA's scope and some of its terminology and will describe the taking of security under the PPSA. I will discuss the PPSA's priority rules and the rights and remedies of secured parties should a debtor default in a second article, to be published in a subsequent issue of this newsletter.

Please note that the following merely highlights the PPSA's more significant aspects, and is qualified in its entirety by the full provisions of the PPSA. For more details about the PPSA, consult the PPSA or contact our firm.

Scope of the PPSA

The PPSA generally applies to any transaction where one party takes an interest in the personal property of another to secure payment or performance of an obligation of the debtor. The PPSA also applies to certain transactions involving the transfer of an account, chattel paper, commercial consignments, and certain leases even if the transaction does not secure payment or performance of an obligation. It should be noted, however, that the PPSA usually does not apply to liens and never applies to secured transactions governed by federal statutes, such as Canada's Bank Act.

Terminology in the PPSA

Familiarity with several key terms in the PPSA is essential to understanding how this statute works. A security interest, in general, is an interest in personal property that secures the payment or performance of an obligation. Personal property subject to a security interest is collateral. A party holding a security interest, even on behalf of another party, is a secured party. The party granting a security interest is a debtor. A security agreement is an agreement that provides for the creation of a security interest.

Establishing a Security Interest under the PPSA

Under the PPSA, establishing a security interest involves the fundamental concepts of attachment and perfection. Attachment occurs when the security interest is created between the secured party and the debtor—generally when value is given by the secured party to the debtor by way of a loan or an agreement to advance a loan and when the debtor has rights in the collateral.

Between the secured party and the debtor, the security interest is attached and enforceable when it is created. However, to enforce a security interest against other parties with interests in the collateral the secured party must take an additional step to achieve attachment. The secured party must either take possession of the collateral or have the debtor sign a security agreement that describes the collateral in a way that meets the requirements of the PPSA.

Once the security interest is attached, further steps must be taken to create a priority position for the secured party in relation to other secured parties with security interests in the same collateral. This is referred to as the perfection of the security interest.

There are two general methods of perfection. First, perfection for certain types of collateral can be achieved by the secured party taking possession of the collateral. Note, though, that perfection by possession is not possible for some collateral, such as accounts of the debtor, because the secured party cannot take possession of collateral in the hands of a third party. Second, perfection can be achieved by registering a financing statement in the Personal Property Registry in Victoria. When the PPSA came into force, the Personal Property Registry replaced all previous registries for security interests in personal property. Perfection by registration is available for all types of collateral.

Only two types of documents can be registered in the Personal Property Registry. The first, a financing statement, provides notice of the security interest held by the secured party. However, the financing statement does not provide any details about the security agreement other than to state the type of collateral. Under the PPSA, other secured parties and the debtor can request security agreements and other documentation relating to the security interest from a secured party upon discovering in the registry that party has an interest relating to the same debtor or collateral.

A financing change statement is the second type of document that can be registered in the Personal Property Registry. This statement is a secured party's notice of changes and amendments to the security agreement between the secured party and the debtor. These changes include renewals, transfers of the rights of the secured party to a third party or of the collateral of the debtor to a third party, the release or discharge of the debtor under the security agreement, and the redefinition of collateral under the security agreement.

In summary, establishing a security interest under the PPSA involves a series of steps. A secured party must first attach the security interest, usually through the signing of a security agreement once the secured party has given value and the debtor is confirmed to have rights in the collateral. Then, the secured party must perfect the security interest, usually through the registration of a financing statement. The secured party must thereafter maintain the security interest by registering a financing change statement as needed. The first step is usually the registration of the financing statement, since the priority position of the secured party in relation to other secured parties will generally be determined by the first to register.

To learn more about Todd Harvey, his areas of practice and view other articles written by lawyers at our firm, visit us online at www.bakernewby.com.