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A twice-monthly current awareness service reviewing recent cases on land use, marketing boards, environmental issues, creditors rights, animals, grain, import/export and other matters in an agricultural context.

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Bi-weekly issues are added on Thursdays.

**** HIGHLIGHTS ****

* The Supreme Court of Canada, in dismissing the appeal of the Bank of Montreal from a decision of the Saskatchewan Court of Appeal, has held that unregistered PPSA security granted over agricultural property by a Saskatchewan farmer had priority over subsequent registered Bank Act security , which was placed without notice of the farmer's unregistered PPSA security. The Court held, among other things, that because Bank Act security is based on the debtor's property rights to the collateral, the Bank could not take a greater security interest in the collateral than the farmer had when the Bank Act security was granted. PPSA "first-to-register" rules do not apply when considering priority between Bank Act and PPSA security. "First-in-time" applies. (Bank of Montreal v. Innovation Credit Union, CALN/2010-031, [2010] S.C.J. No. 47, Supreme Court of Canada)

* The Supreme Court of Canada, in a companion case to Bank of Montreal v. Innovation Credit Union, has held that unregistered PPSA security in after-acquired property prevails over subsequent registered Bank Act after-acquired property security, where the after-acquired property did not come into existence until after both the PPSA security and the Bank Act security had been placed. The Court concluded that the Saskatchewan Personal Property Security Act had changed the common law with respect to after-acquired property and that it created a proprietary interest in after-acquired property "in the nature of a fixed charge" which came into existence at the time the security agreement is signed, notwithstanding the fact that the property did not come into existence until a later date. (Royal Bank of

Canada v. Radius Credit Union Ltd., CALN/2010-032, [2010] S.C.J. No. 48, Supreme Court of Canada)

**** NEW CASE LAW ****

Bank of Montreal v. Innovation Credit Union; CALN/2010-031, Full text: [2010] S.C.J. No. 47; 2010 SCC 47, Supreme Court of Canada, McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella,, Charron, Rothstein and Cromwell JJ. November 5, 2010.

Personal Property Security -- Priority Issues -- Bank Act Security.

The Bank of Montreal (the "Bank") appealed to the Supreme Court of Canada from a decision of the Saskatchewan Court of Appeal.

James Buist, a Saskatchewan farmer, obtained a loan from Innovation Credit Union (the "Credit Union") in 1991. Buist granted the Credit Union security for the loan under the Saskatchewan PPSA in all of his present and after-acquired personal property. The Credit Union did not register its security until June of 2004.

The Bank subsequently also made loans to Buist. In order to secure these loans, Buist granted Bank Act security between 1998 and January of 2004. This security was taken over the same property that the Credit Union claimed a security interest in.

Although the Bank performed searches under both the PPSA and the Bank Act, the Credit Union's security interest in Buist's property was not disclosed, and the Bank was unaware that Buist had granted a security interest to the Credit Union.

Zarzeczny, J. of the Saskatchewan Court of Queen's Bench held that the Bank had priority because the Credit Union had failed to perfect its security interest by registration before the Bank Act security was granted: 2007 SKQB 471.

The Saskatchewan Court of Appeal unanimously allowed the Credit Union's appeal and held, among other things, that the Credit Union's security prevailed because the Bank could acquire no greater interest than Buist himself had at the time the Bank Act security was taken regardless of the fact that the Credit Union's security interest was unperfected: 2009 SKCA 35.

On appeal to the Supreme Court of Canada, the Bank argued that no proprietary interest in the collateral had been conveyed to the Credit Union under its PPSA security agreement. In the alternative, the Bank argued that the "first-in-time" principle should not apply to give the Credit Union priority with respect to unregistered security interests as this would expose banks to unreasonable commercial risk. The Bank argued that the rule should be modified so as to give priority only to first-to-register PPSA security.

Charron, J. (McLachlin C.J., and Binnie, LeBel, Deschamps, Fish, Abella, Rothstein and Cromwell, JJ. concurring), dismissed the Bank's appeal [at para. 70 and 71].

Charron, J. reviewed the "somewhat archaic Bank Act security scheme" and the "modern provincial regime[s] under the PPSA" [at para. 1 and 13 to 26].

Charron, J. suggested a modification to the basic rules for resolving priority disputes between PPSA and Bank Act security formulated by the Saskatchewan Court of Appeal in Royal Bank of Canada v. Agricultural Credit Corp. of Saskatchewan (1994) 115 D.L.R. (4th) 569 [at para. 27]. "Rules" (2) and (3) were not modified:

> (2) Courts must determine priority pursuant to the applicable provisions of the Bank Act to the extent it is possible to do so; and
>
> (3) Where it is appropriate, apply the first-in-time priority rule.

However, with respect to the first "rule" (set aside the PPSA and decide priority as if the PPSA did not exist) Charron, J. held that although the internal priority rules of the PPSA have no bearing on determining a priority dispute between Bank Act and PPSA security interests, the PPSA, to the extent it modifies common law rules concerning property and civil rights, retains importance in resolving priority disputes [see para. 27 to 32].

Charron, J. considered the following issues in relation to the appeal:

1. The Nature of the Security Interest Conveyed under the Bank Act:

After referring to s. 427(2) and 435(2) of the Bank Act, Charron, J. concluded that the precise nature of the rights and powers vested in a bank under these provisions was settled by the Supreme Court of Canada in Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, in which Laforest, J. held that "the effect of the interest is to vest title to the property in question in the bank when the security interest is taken out." Charron, J. concluded, [at para. 40] that:

> "As the Bank effectively acquired legal title to whatever rights the debtor held in the assigned property, it becomes necessary to determine the nature of the debtor's proprietary interest in the collateral at the time that the Bank took its security interest under s. 427. Buist owned the property, but he had already given the Credit Union a PPSA security interest in the collateral in question. He could not convey to the Bank any greater interest in the collateral in question. He could not convey to the Bank any greater interest than what he himself had left in the property. The question becomes: what is the nature of the interest already conveyed to the Credit Union by Buist under the PPSA?"

Charron, J. also stated that although the appeal in question concerned the interpretation of s. 427(2)(c) under which the Bank acquires "the same rights and powers as if the Bank had acquired a warehouse receipt or bill of lading in which that property was described", the Bank's position would be no different if its security had been granted pursuant to s. 427(2)(b), in which the security interest is described as, in addition, "a first and preferential lien and claim thereon for the sum secured and interest thereon" [at para. 36].

2. The Nature of the PPSA Security Interest:

Charron, J. observed that the PPSA does not contain any provisions which identify the nature of a PPSA security interest "in proprietary terms" [at para. 41]. Rather, the PPSA

sets out a detailed list of priority rules which are based on a "functional approach", rather than a property-based system.

Charron, J. commented [at para. 42] that ".While some of the historical forms of security created equitable rather than legal interests, the effect of the PPSA's functional approach, which covers all of these antecedent security interests, is to treat them all equally as "security interests" under the PPSA".

Relying on the decision of the Supreme Court of Canada in Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411, Charron, J. concluded that a PPSA security interest "represents a proprietary interest" which was "analogous to any proprietary right" [at para. 47 and 48].

3. Whether the Dispute Should be Resolved According to "First-to-Register" or "First-in-Time" Rules.

Charron, J. held [at para. 50] that the priority dispute should be resolved based on the common law maxim nemo dat quod non habet which gives priority to the first party to take a legal interest in the property. As the Bank Act establishes a property based security scheme, the Bank can receive no greater interest in the property than the debtor has. Charron, J. held [at para. 52 to 54] that the Court could not adopt a first-to-register rule, as this would override the provisions of the Bank Act and because it would be contrary to the provisions of PPSA legislation which excludes Bank Act security from the requirements of the PPSA and (in Saskatchewan) the benefits of PPSA legislation [at para. 57 to 61].

Royal Bank of Canada v. Radius Credit Union Ltd.; CALN/ 2010-032, Full text: [2010] S.C.J. No. 48; 2010 SCC 48, Supreme Court of Canada, McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella,, Charron, Rothstein and Cromwell JJ. November 5, 2010.

Personal Property Security -- Priority Issues -- Bank Act Security -- After-Acquired Property.

The Royal Bank of Canada (the "Bank") appealed to the Supreme Court of Canada from a decision of the Saskatchewan Court of Appeal.

In 1992, a Saskatchewan farmer, Wayne Hingtgen, borrowed money from Radius Credit Union Limited (the "Credit Union"). To secure the loan, Hingtgen executed a PPSA security agreement which gave the Credit Union a security interest in all of Hingtgen's current and after-acquired property. The Credit Union did not register a financing statement at Personal Property Registry until September, 1998.

After the Credit Union's loan, but before the Credit Union registered at PPR, the Bank made a loan to Hingtgen, which was secured with Bank Act security on June 10, 1997. The Bank's security covered both present and after-acquired property. The Credit Union and the Bank both claimed collateral that Hingtgen did not acquire until after both the Credit Union and the Bank had taken security interests.

The Chamber's Justice, Zarzeczny, J. held the Bank had priority because the Credit Union had not perfected its security interest through registration before the Bank took and registered its Bank Act security: 2007 SKQB 472.

The Saskatchewan Court of Appeal allowed the Credit Union's appeal. The Court of Appeal concluded that both after-acquired property interests attached simultaneously but because the Bank Act does not contain a rule to address the priority in dispute, the common law priority rule that "first-in-time is first-in-right" should apply and that because the Credit Union's security was signed first, it should have priority notwithstanding the Credit Union's failure to perfect its security interest: 2009 SKCA 36.

Decision: Charron, J. (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Rothstein and Cromwell JJ. concurring) dismissed the Bank's appeal, but for different reasons than those of the Court of Appeal [at para. 6 and 37].

Charron, J. relied, in part, on the analysis in the Court's companion decision in Bank of Montreal v. Innovation Credit Union, 2010 SCC 47 [at para. 12 to 13] and held that the framework analysis set out in the Bank of Montreal decision required that the Court first examine the nature of the security interest conveyed to the Bank under the Bank Act, and to compare it to the prior competing PPSA interest to consider whether the Credit Union acquired any interest that would derogate from the debtor's title [at para. 14]. Charron, J. considered the following issues:

1. Security Interest under the Bank Act in After-Acquired Property:

Charron, J. reviewed the provisions of s. 427 and 435 of the Bank Act [at para. 15 to 16] and concluded [at para. 21] that:

> Thus, in creating an interest which comes into existence immediately upon the delivery of a security document, but only attaches to the collateral at the time the debtor actually has an interest in the property, the Bank Act simply gives statutory recognition to this notion of "inchoate interest from the date of execution" that had long been recognized by courts of equity. In my view, this interpretation is the only one that gives effect to all the words contained in ss. 427(2) and 435(2).

and at para. 26 to 27:

> Consequently, one can only read in ss. 427(2) and 435(2) the intention to statutorily vest in the bank a proprietary, albeit inchoate, interest in the after-acquired property enforceable against third parties from the time of execution of the security agreement, provided proper notice of intention was registered as required by the statute.
>
> I therefore conclude that from the time the Bank first took Bank Act security on June 10, 1997, it acquired an inchoate proprietary interest in the assigned after-acquired property in the nature of a fixed charge, which interest subsequently attached to the various items of collateral at the time they were each purchased by Hingtgen.

2. Security Interest under the PPSA in After-Acquired Property:

Charron J. concluded, after reviewing the Saskatchewan PPSA and the decision of the Supreme Court of Canada in Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411, that the PPSA had altered the law that relates to property and civil rights in the Province of Saskatchewan. The PPSA had created a statutory interest in after-acquired property which was "correlative to an inchoate proprietary interest" that was enforceable against third parties and which came into existence "on the signing of the security agreement" [at para. 33]. Charron, J. concluded [at para. 34]:

> I therefore conclude that, at the time of execution of its security agreement, the Credit Union acquired a statutory interest in the nature of a fixed charge over the debtor's assigned after- acquired property, which effectively derogated from the title Mr. Hingtgen had available to assign to the Bank. This interest was in existence at the time the Bank took its Bank Act security interest, although it attached to the collateral in question only subsequently.

As the Bank could receive no greater interest in the property than the debtor had, at the time the Bank took its Bank Act security, the Credit Union already held a proprietary interest in the collateral "in the nature of a fixed charge". The failure to register did not affect the nature or validity of the Credit Union's prior interest [at para. 35].

** CREDITS **

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