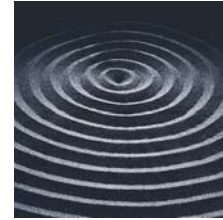


MILLER THOMSON LLP

Barristers & Solicitors
Patent & Trade-Mark Agents

Scotia Plaza
40 King St. West, Suite 5800
P.O. Box 1011
Toronto, ON Canada
M5H 3S1
Tel. 416.595.8500
Fax. 416.595.8695
www.millerthomson.com



TORONTO

VANCOUVER

WHITEHORSE

CALGARY

EDMONTON

LONDON

KITCHENER-WATERLOO

GUELPH

MARKHAM

MONTREAL

Getting Your Security Registered...Correctly

Jennifer E. Babe, Partner,
Miller Thomson LLP

2005

TABLE OF CONTENTS

1.	NAMING THE DEBTOR	1
	(a) Individuals	1
	(b) Sole Proprietors	2
	(c) Partnerships	3
	(d) Corporations	3
	(e) Bilingual Corporate Names	3
	(f) Limited Partnership Name	4
	(g) Other Kinds of Debtors	5
2.	SEARCH REMINDER FOR ACCURATELY NAMING DEBTORS.....	5
3.	“MOTOR VEHICLES”	5
	(a) What is a “Motor Vehicle”?	5
	(b) Vehicle Identification Numbers or VINs	6
	(c) Motor Vehicles as “Consumer Goods”	7
	(d) Motor Vehicles as “Equipment”	7
	(e) Motor Vehicles as “Proceeds”	7
	(f) Form 4C - The Motor Vehicle Schedule	8
	(g) The Used Vehicle Information Package.....	8
4.	TWO SEARCHES REQUIRED FOR CONSUMER VEHICLES	8
5.	ONE REGISTRATION FOR MORE THAN ONE SECURITY AGREEMENT IN COMMERCIAL DEALS.....	10
6.	DESCRIPTIONS OF COLLATERAL IN WORDS	10
7.	TRUE LEASES V. FINANCING LEASES	11
8.	MISTAKES IN REGISTRATIONS	12
9.	PMSIS IN EQUIPMENT AND CONSUMER GOODS	13
	(a) The General Priority Rule	13
	(b) What is a PMSI?.....	13
	(c) How to Get a PMSI in Collateral that is not Inventory	13
	(d) An Example of a “Consumer Goods” PMSI	13
	(e) An Example of an “Equipment” PMSI	14
	(f) Evidence of Timing	15
10.	PMSIS IN INVENTORY	15
	(a) What is “Inventory”?.....	15
	(b) Steps to Get an Inventory PMSI.....	15
	(c) Who is Entitled to Receive a PMSI Notice?	15
	(d) Sending the PMSI Notices	16
	(e) Proof that All the PMSI Steps Have Been Fulfilled.....	16
	(f) Section 427 Security under the Bank Act	17
11.	OOPS! I FORGOT TO RENEW	17
12.	OOPS! I GOT A COURTESY NOTICE.....	18

13.	OOPS! I MISSED MY PMSI DEADLINE	18
14.	OOPS! THE PPSA COMPUTER DOWNTIME.....	19
15.	REMINDERS ABOUT COMMON ERRORS.....	19
	SCHEDULE A BABE’S PPSA COMMANDMENTS	21
	SCHEDULE B PROBLEMS WITH SEARCHING ON-LINE	23

INTRODUCTION

The purpose of this paper is to assist you in correctly completing the information required for an Ontario Personal Property Security Act (“PPSA”) registration of a financing statement. The paper is focused on practical matters with some references to case law to assist in avoiding making mistakes that may leave you or your client unsecured and unperfected.

Please remember to always consult the PPSA and its related regulations for each province for which you are dealing. There is a PPSA in effect in 9 provinces and 3 territories, the exception being Quebec which has its own separate registry system under the Civil Code. The registration systems for each PPSA are slightly different. Never assume that the rules in one province are the same in the other provinces. Always consult the relevant legislation.

Since I am called in the Province of Ontario, this paper focuses on compliance with the Ontario PPSA and its regulations.

1. Naming the Debtor

Many PPSA court decisions deal with problems arising from use of the wrong debtor name, omission of middle initials and wrong birth date. Failure to use the correct debtor information on the correct lines of the financing statement may leave the secured party unperfected and subordinate to the debtor’s bankruptcy trustee, other PPSA creditors or other third parties.

This is because the PPSA database is searched by debtor name and by “VIN” for vehicles. Use of incorrect information in a registration will mislead the searching public who will not find your registration if they search against the correct name. For example, a search against “James Brown” will not reveal a registration against “Jim Brown”.

(a) Individuals

To comply with the PPSA regulations, it is necessary to have the exact first name, middle initial (if any), surname and birth date of an individual debtor. To prove this information, you should have in your file a photocopy of the person’s birth certificate, passport or Canadian citizenship papers.

Never accept the debtor’s driver’s licence as proof of his or her name, as the Ministry will use any name provided by the individual.

The following two cases highlight the continuing need for the secured party to obtain copies of the appropriate documentation to prove the correct name of the debtor for PPSA purposes. The documents to obtain are as follows

- (i) *for persons born in Ontario*, his or her birth certificate based on the *Vital Statistics Act* for registration of births and section 2 of the *Change of Name Act* which provides that “for all purposes of Ontario law”, a person is entitled to be recognized by the name appearing on the person’s birth

certificate or change of name certificate see: *Re: Haasen* (1992), O.R. (3d) 489;

- (ii) the birth certificate has also been used in Alberta see: *Millers, McClelland Ltd. v. Barrhead Savings & Credit Union Ltd.* [1993] 4 WWR 660 (Abta Q.B.); Registrar Quinn.

The Court held that where the birth certificate named the bankrupt as “Joseph Raymond Renée Gaudette”, that was his name despite the debtor calling himself “Raymond Gaudette”. The Registrar further held that the Alberta PPSA curative provision in section 43(8) was an objective test and the fact that no one was misled was irrelevant;

- (iii) for an individual born outside of Canada, a copy of his or her Canadian citizenship papers see: *CIBC v. Melnitzer* (1994) 23 CBR (3d) 161 (Ont. Ct. of Justice (Gen. Div.) in Bankruptcy; Killeen, J.)

Hermann Julius Melnitzer was born outside of Canada. His Canadian citizenship papers gave his name as “Herman Julius Melnitzer”.

The Court held that the registration was correct where the name on the Canadian citizenship papers was used by the secured party, being the most practical and rational way to name foreign born debtors.

If you have any concerns about people whose names as used are not the name appearing on their birth certificate, passport or Canadian citizenship papers, use all combinations of the debtor’s names in the registration.

The government will not charge you any more for a multiple debtor registration and you will be more confident that the searching public will find your registration. For example, Suzanne J. Jones is known as “Sue Jones” and also as “Sue Brown”, her maiden name. She could properly be described as (i) Suzanne J. Jones, (ii) Suzanne J. Jones-Brown, (iii) Suzanne J. Brown, (iv) Sue J. Jones, (v) Sue Jones-Brown, (vi) Sue J. Brown.

Note that in the four *Personal Property Security Acts* in Atlantic Canada and more recently in Alberta, there are specific regulations that specify the name documents to use depending on where the debtor has been born.

(b) Sole Proprietors

When the individual is carrying on business under a trade name or a business style, you need to record the correct first name, middle initial (if any), surname and birth date of the individual and you may also add the trade style as a second debtor name.

Such business style or trade name should have been registered by the individual pursuant to the Business Names Act and you should have for your file a copy of both the individual's birth certificate, passport or Canadian citizenship papers and the Business Names Act registration for the business style.

Such debtor could be named in the registration as follows: (i) Guiseppe A. Smith, (ii) Joe A. Smith, (iii) Joe's Paints & Hardware.

(c) Partnerships

A partnership created by either a handshake or pursuant to a partnership agreement may have its name registered pursuant to the Partnerships Act. For your file, you should have a copy of the partnership agreement and a copy of the registration under the Partnerships Act, if any.

The regulations pursuant to the PPSA require that:

- (i) where the partnership registration was made, use the registered partnership name; and
- (ii) where the partnership was not registered, the name for the PPSA registration is the name as used in the partnership agreement and the name of one partner.

Therefore, in naming a partnership, the safest course of action is to name the partnership as it calls itself, the name of the partnership in its registration and in its agreement, and the name of each partner.

(d) Corporations

You should have in your file a copy of the articles of incorporation or articles of amalgamation or letters patent, and any amendments thereto.

Under the PPSA regulations, it is imperative to use both the English name of the corporation and the French name used by the corporation, if any.

If the corporation has a business style or trade name, such name should be entered on a separate debtor line and you should have a copy of the registration under the Business Names Act for your file.

For example: debtor no. 1 as 123456 Ontario Ltd. and debtor no. 2 as Joe's Paints & Hardware.

(e) Bilingual Corporate Names

The Ontario PPSA regulations require that where a corporation has a bilingual name, the secured party has to use both versions of the name. The problem has been trying to decide if such names were separate (e.g. (i) Acme Rentals Inc. and (ii) Locations Acme Inc.) or combined (e.g. Acme Rentals Inc./Locations Acme Inc.)

Regulation 627/93 made under the Business Corporations Act came into force on December 1, 1993 and solved this issue. Section 7 of this Regulation states the following:

22.1 If articles set out an English form and a French form for a name of a corporation, the “/” mark shall separate the two forms of the name.

This Regulation should be read together with section 17 of the Regulations passed pursuant to the PPSA, which requires that bilingual corporate names be entered into the financing statement with the English name on one business debtor line and the French name on another business debtor line.

These two Regulations should together assist the registering and searching public in ending the practice of entering and searching bilingual corporate names as follows:

- (i) English
- (ii) French
- (iii) English/French
- (iv) French/English

Note the decision in *Re Armstrong, Thomson & Tubman Leasing Ltd. et al.* (1993) 15 O.R. (3d) 292 (Ont Ct. (Gen. Div.) sitting in bankruptcy) where a secured party registered only against the English corporate name. The Court held the creditor unperfected by reason of the omission of the French corporate name as required by the PPSA Regulations. The lessor was therefore held to be unsecured and subordinate to the bankruptcy trustee of the lessee.

A corporate search should always be done to confirm the exact corporate name, in both official languages, prior to registration.

Note the problems in doing exact corporate searches as outlined in Schedule B attached.

(f) Limited Partnership Name

Bank of Montreal and Credit Lyonnais Canada v. Richter & Associates Inc., trustee of the bankruptcy estate of Valdi Société en Commandite/Valdi and Company. Limited Partnership (released June 18, 1996; Commercial List, Lederman, J.; ct. file #B346/5)

The two lenders registered their respective financing statements using the full name of the limited partnership as noted above, as registered under the Ontario *Limited Partnership Act* (“LPA”).

The trustee sought a declaration that the lenders were unperfected and subordinate, on the basis that:

- (i) by analogy the PPSA regulations require bilingual names of corporate debtors to be entered on separate lines; and
- (ii) case law and the Quebec business names legislation (this being a Quebec registered entity) would interpret the debtor's name as two separate parts, interpreting "/" as "or".

The Court held the lenders to be perfected by reason of following the PPSA regulations by naming a limited partnership exactly as registered under the LPA. The Court held that if the Legislature had intended the same rules for bilingual corporations to apply to other entities, they would have said so.

(g) Other Kinds of Debtors

In the event that you are taking security from an estate of a deceased person, a bankrupt, an unincorporated association such as a congregation of a church or a trade union, refer to the regulations passed pursuant to the PPSA for the very specific requirements of how to name these unique debtors.

2. Search Reminder for accurately naming debtors

Are you doing the following searches to ensure your registration accuracy and priority?

- (a) corporate search to check for up-to-date corporate names in both official languages? This is mandatory by the Regulations.
- (b) registered partnership and limited partnership names? By the Regulations, you must use the name as registered. If not registered, then you must use the name as it appears in the partnership agreement.
- (c) trade names of sole proprietors? While not mandatory, this information can be added on a second debtor line to assist the searching public in finding your registration.
- (d) competing section 427 Bank Act security over inventory?
- (e) executions filed by judgment creditors with certain rights ahead of future advances?

See Schedule B for searching tips.

3. “Motor Vehicles”

- (a) What is a “Motor Vehicle”?

Section 1 of the regulations passed pursuant to the PPSA defines a “motor vehicle” as follows:

“Motor vehicle” means an automobile, motor cycle, motorized snow vehicle and any other vehicle that is self-propelled but does not include:

- (i) a street car or other vehicle running only upon rails;
- (ii) a farm tractor;
- (iii) an implement of husbandry;
- (iv) machine acquired for use or used as a road building machine; or
- (v) a craft intended primarily for use in the air or in or upon the waters.

Consequently, a number of things that are self-propelled may be “motor vehicles” for purposes of PPSA registrations. Such things as fork lift trucks, motorized golf carts, motorized wheelchairs and all terrain vehicles can be “motor vehicles” for purposes of PPSA registrations.

Note that there are exclusions for “implements of husbandry” and “machines acquired for use or used as road building machinery”. If you have any doubts as to the intended or actual use of the tractor or other machine that might be an agricultural instrument or a road building item, describe it in the PPSA registration.

It is always safer to add a vehicle description that is not required than to have left out information that was mandatory see:

Re Powell (1999), 11 CBR (4th) 101 (Ont. S.C.) whether a tractor was a farm tractor for the exception for “implements of husbandry”

Central Guaranty Trust Co. v. Bruncor Leasing Inc. (1992), 3 PPSAC (2d) 298, supplemental reasons 4 PPSAC (2d) 229 (Ont. Ct. (Gen. Div.)) whether two backhoes, a tractor and an excavator were “acquired for or used” as road building machines.

The definition of “motor vehicle” is highly variable province to province. For example, aircraft are not motor vehicles in Ontario but are motor vehicles in certain provinces requiring an aircraft description in the financing statement.

(b) Vehicle Identification Numbers or VINs

The regulations pursuant to the PPSA define “vehicle identification number” as “the number that the person who constructed the motor vehicle affixed to it for identification purposes”.

Therefore, for most North American produced motor vehicles, there will be a 17-digit alphanumeric VIN attached to the machine. For motor vehicles that are not automobiles, vans or trucks, the VIN will be the serial number applied to the machine by its manufacturer, for example the serial number of a forklift truck or snowmobile.

It is very important to get the VIN correctly entered into the PPSA registration because this is a searchable field in the government's database. Errors in VINs can lead to unperfected security. The electronic PPSA software checks the algorithm of the 17-digit alphanumeric VIN for North American passenger vehicles to help you increase your registration accuracy.

(c) Motor Vehicles as "Consumer Goods"

The PPSA defines "consumer goods" as being things that are used or acquired for primarily family, personal or household purposes.

When a motor vehicle is used as "consumer goods", it is compulsory to include its description by make, model, year of manufacture and VIN in the registration.

(d) Motor Vehicles as "Equipment"

The PPSA defines "equipment" as goods that are not inventory or consumer goods. In short, these are items that are used primarily in the debtor's own business operations, such as a delivery van.

Subsection 28(5) of the PPSA provides that where the motor vehicle is sold out of the ordinary course of the debtor's business and the motor vehicle is classified as "equipment" of the debtor, any buyer of that motor vehicle will take it free and clear of the secured party's interests unless the motor vehicle has been described by its VIN in the correct place of the financing statement or financing change statement.

Therefore, it is most prudent to ensure that all vehicles being used as "equipment" are properly described in both the security agreement and in the registration.

(e) Motor Vehicles as "Proceeds"

Proceeds are generated when the debtor has dealt in the collateral or the collateral is damaged or destroyed.

For example, a trade-in vehicle can be "proceeds" to the selling dealer, being part payment for the acquisition of a new motor vehicle. As an additional example, a new vehicle, acquired with insurance money after a car accident, can also be proceeds.

Subsection 25(5) provides that where a motor vehicle is proceeds, the person who buys or leases the motor vehicle as consumer goods in good faith, takes it free and clear of any security interest unless the secured party has registered a financing change statement that sets out the VIN in the designated place.

It is therefore a very important for lenders and lessors to ensure that any trade-in or replacement vehicles have been properly recorded in a financing change statement.

(f) Form 4C - The Motor Vehicle Schedule

The Form 1C - Financing Statement provides two lines for insertion of descriptions of two motor vehicles. If more than two motor vehicles are included in the security, then a Form 4C motor vehicle schedule needs to be completed to describe the third and following vehicles.

The Form 4C is automatically created for you by PPSA electronic software without any additional work on your part, when you indicate three or more vehicles are included in your registration.

(g) The Used Vehicle Information Package

The use of the correct VIN in the financing statement is even more important given the Ontario government's "Used Vehicle Information Package" or "UVIP" programme with regard to the sale of used motor vehicles not made through licensed motor vehicle dealers.

For example, if I sell my used car to my neighbour, I need to obtain the Used Vehicle Information Package from the Ontario Ministry of Consumer and Business Services or the Ministry of Finance or the Ministry of Transportation. This package will include a form of bill of sale, an affidavit with respect to the amount of retail sales tax owing and the PPSA search against the VIN to establish that the motor vehicle was free and clear of any security interests. See s. 43.1 of the PPSA for UVIP searches.

Note that this package does not search the debtor's name. It searches the VIN to catch any security interests created by the present or prior owners.

Therefore, having the correct VIN in the registration will help stop "curb siding" in stolen vehicles and help disclose all of your liens for correct payment.

4. Two Searches Required for Consumer Vehicles

*Re: Joseph Phillipe Gilles Lambert** (1994), 7 PPSAC (2d) 240 (Ont. C.A.); 28 CBR (3d) 1

*This appeal was heard together with appeals for *Re: Woolf*, *Re: Tanzer* and *Re: Haasen*, and the *Lambert* decision applies to all four cases.

GMAC registered a financing statement against "Gilles J. Lambert" and gave his correct birth date and the correct VIN for the subject vehicle. At trial, the Court held that the debtor's bankruptcy trustee had priority ahead of GMAC for the vehicle as GMAC had failed to use Mr. Lambert's proper name as revealed by his birth certificate. GMAC appealed.

On appeal, Doherty, J. with Grange and Weiler, J.A. concurring, held in favour of GMAC as being perfected as against the trustee based on the section 46(4) curative provision for the following reasons:

- (a) the section 46(4) curative provision is an objective test providing that an error is curable unless a “reasonable person” is likely to be misled materially.

This ends the *Re: Stetsko* line of cases that considered the test to be subjective and looked at whether the person before the court was likely to be misled materially.

This reasoning is based not only on the legislative history of old section 47(5), now 46(4), but also by contrast to existing section 9 that clearly uses a subjective test because it refers to persons who were “actually misled” by the error in the security agreement. The Court also stated that the PPSA system needed certainty and priority should not depend on whether the debtor had told his/her bankruptcy trustee about the car financing.

- (b) in determining who is the “reasonable person” referred to in section 46(4), the Court held that this was a person who:
- (c) was reasonably familiar with the PPSA searching system and knew about individual debtor and VIN searches; and
- (d) was a purchaser or a financier of the collateral who needed to know if the collateral was unencumbered.

The Court concluded that such “reasonable person” would do two searches against both (1) the debtor’s name and (2) the VIN of the vehicle; and

- (e) having done both a name search and a VIN search, the trustee would have found GMAC and as such, the name error here would not have materially misled a reasonable person.

This case is extremely helpful in solving many consumer vehicle PPSA and *Repair and Storage Liens Act* debtor name problems by requiring reasonable bankruptcy trustees and others to do two searches. It is hard to name people but financiers, vendors, lessors and repairers should get the VIN correct, especially when using the CSRS registration software that checks the VIN algorithm for VIN errors.

This case does not allow us to be lax in checking debtor names. This case presupposes the searcher is dealing with “motor vehicles” that have “VINs” as defined in the Ontario Regulations. Other types of collateral and vehicles which are not “consumer goods” that must be described in the registration by VIN, will not be revealed in registrations with debtor name errors.

Therefore, the careful creditor should continue to obtain photocopies of the records discussed in this paper, for his or her file to establish the individual debtor’s correct name and birth date.

5. One Registration for More than One Security Agreement in Commercial Deals

In *Adelaide Capital Corp. v. Integrated Transportation Finance Inc.* (1994) 16 O.R. (3d) 414; Justice Blair relied in part on the Saskatchewan decision in *Royal Bank v. Agricultural Credit Corp. of Saskatchewan* (1991) 2 PPSAC (2d) 338, at pp. 346-347, to conclude that certain Greyvest transactions were not “sufficiently linked” to permit one registration to perfect more than one security agreement.

The Saskatchewan Court of Appeal (unreported; released June 7, 1994) overturned the trial court decision in *Royal Bank. et al.* and held that one registration could perfect more than one security agreement between the parties. The Court of Appeal held that the PPSA in Saskatchewan and the UCC in the United States provide notice systems and have rejected a transactional system requiring a registration per agreement. The Court of Appeal held this was also logical given a security interest can attach to after-acquired property of the debtor and perfect an obligation arising by way of fixture advances. The Court further held that the one registration could perfect security interests in non-related transactions.

Following Justice Blair’s 1994 decision, practitioners in Ontario commenced doing one registration per security agreement, to avoid having to determine when security agreements were “sufficiently linked”

Justice Blair’s decision was overridden in 2000 by the amendment of section 45(4) of the Ontario PPSA which reads:

Subsequent security agreements - Except where the collateral is consumer goods, one financing statement may perfect one or more security interests created or provided for in one or more security agreements between the parties, whether or not,

- (a) the security interests or security agreements are part of the same transaction or related transactions; or
- (b) the security agreements are signed by the debtor before the financing statement is registered.

6. Descriptions of Collateral in Words

On lines 13, 14 and 15 of the Form 1C financing statement, there is space to insert a word description of the collateral claimed by the secured party.

Prior to October 9, 1989, the day on which the revised PPSA was passed, many secured parties used word descriptions. However, upon proclamation of the new Act, this practice altered significantly.

This is because, for the first time, secured parties were entitled to make one registration for more than one security agreement where no “consumer goods” are involved. This has led to the practice of a “blanket filing” for agreements and have them perfected and relate in priority to a prior registration.

This is also because of the section 46(3) of the PPSA passed in 1989. This subsection provides that where a word description has been entered, the secured party will be limited to the collateral as described in words. The peril is therefore that the secured party forgets to describe something in words and will have a limited claim.

For example, if Acme Leasing provided the debtor with a photocopier and related accessories, it could put an “x” in the box for “equipment” (and of course “other” to protect its interest in the proceeds of that machine) and be confident that it had a perfected security interest in the machine, accessories and all proceeds thereof.

However, if Acme Leasing went on to state in lines 13, 14 and 15 “1 Acme Leasing photocopier bearing serial no. xyz”, it would be limited to just that machine. It would not be protected for the sorter, the spare parts, the manuals, the extra software and the upgraded components supplied next year.

This has led to the general Ontario practice of not completing lines 13, 14 and 15, which are entirely optional.

The down side, of course, is that the secured party will get enquiries from time to time from third parties who wish to confirm what collateral is claimed by Acme Leasing. It therefore becomes a business decision for secured parties as to whether they will avoid potential limitations on their collateral claims and accept the inconvenience of enquiries from time to time, or provide the public with the additional optional, and limiting, information.

7. True Leases v. Financing Leases

It has been a continuing problem in Ontario to determine when a lease is one which is governed by the PPSA or a “true lease” that does not require registration under the PPSA.

Since a series of cases in the late 1980’s, most lessors register in time to claim PMSI status to avoid disputes with bankruptcy trustees and prior registered creditors. One can always argue later that the registration was done out of an abundance of caution and the PPSA does not apply by section 46(5)(b).

The leading case that held that leases entered into by financial institutions must be financial transactions governed by the PPSA, was a decision of Justice Blair in *Adelaide Capital Corp. v. Integrated Transportation Finance Inc. et al.* (1994), 6 PPSAC (2d) 267; 16 O.R. (3d) 414. This case held that certain leases entered into by Greyvest Leasing Inc. (“Greyvest”) were leases that were governed by the PPSA. Justice Blair came to this conclusion based on some of the following facts:

- (a) Greyvest is a financial institution in the business of providing financing in the nature of loans;
- (b) Greyvest did not have a portfolio of goods on hand for lease to third parties. Instead, it purchased specific items when its customers are prepared to lease the same;

- (c) Greyvest did credit checks and referred matters to credit committees; and
- (d) Greyvest talked in terms of cost of money considerations such as yield, the apparent rate of the transaction and other rate of return issues that indicated such was a lending transaction as opposed to a pure lease.

Justice Blair therefore concluded that the leases between Greyvest and its customers were “mechanisms to ensure and secure the repayment of monies together with a profitable rate of return”. As such, a creditor who was in the business of financing transactions “should be required to indicate the collateral over which they are claiming security interests and not leave matters to guesswork for the public as to whether they have truly leased the property to the debtor/lessee or not”.

Although not referred in the *Adelaide* decision, there have been two other Ontario cases which have likewise concluded that a financial institution must be engaged in leases intended as a security interest. These are the decisions of the Ontario Court of Appeal in *Canadian Commercial Bank v. Triathlon Leasing Inc., et al.* (unreported; leave to appeal to the Supreme Court of Canada refused December 5, 1993) and *Re: Cronin Fire Equipment Limited* (1993) 14 OR (3d) 269; 21 CBR (3d) 127.

Consequently, there remains little doubt in Ontario that lessors who are financial institutions (as opposed to an Acme Rental location in the neighbourhood) should be taking steps to perfect their leases to achieve PMSI status and concern themselves with section 427 security over inventory where the goods being leased are to be “inventory” in the hands of the debtor and sublet.

8. Mistakes in Registrations

The foregoing *Adelaide* case is also noteworthy for several decisions of Justice Blair regarding mistakes in completing financing statements. His decisions were as follows:

- (a) a failure to put an “x” in the box for “inventory” is seriously misleading and cannot be corrected by the subsection 46(4) curative provisions;
- (b) the omission to put an “x” in the box for “inventory” was curable where the creditor had gone on to insert in lines 13, 14 and 15, being the optional collateral description area, a sufficient indication of the nature of the collateral to put the searching public on notice to make further enquiries;
- (c) placing an “x” in each of “equipment”, “inventory”, “accounts” and “other” but also completing the optional collateral description to refer to “50 specific vehicles under a specified lease number”, limited the scope of the collateral claimed under the general floating charge over all assets, to just the 50 specific vehicles. This is in accordance with subsection 46(3) which provides that words that appear to limit the scope of the collateral will so limit the security interest; and
- (d) a financing statement registered after October 10, 1989, the date of passage of the new PPSA, is not adequate to cure mistakes in prior registrations. Justice Blair held that subsection 45(4), which permits one filing for all security agreements

between the parties, does not act retroactively but only gives notice from the date of filing of a present security interest and security interests created thereafter.

9. PMSIs in Equipment and Consumer Goods

The following is general information with regard to a purchase-money security interest or “PMSI” for secured parties dealing in all types of collateral, other than inventory.

(a) The General Priority Rule

Most people think that the priority rule in the PPSA is that the first person to the computer registration system wins. In reality, that is the fallback rule which applies only when one of the 30 or more special priority rules contained in the PPSA does not apply to the fact situation.

For example, there are specific rules for crops, bills of exchange, share certificates, motor vehicles and many other things, including PMSIs.

(b) What is a PMSI?

A PMSI is a statutory status afforded to a secured party who has properly completed all of the steps required in the PPSA for being awarded such priority status.

Generally speaking, the PPSA recognizes that secured parties who sell on terms of credit or provide money to the debtor to acquire something, should be given a first interest to the extent they have given the debtor value. If done correctly, the PMSI-holder leapfrogs ahead of a prior registered PPSA creditor with a security interest in the same collateral.

(c) How to Get a PMSI in Collateral that is not Inventory

Section 33 of the Ontario PPSA provides that to get PMSI entitlement in collateral that is anything other than “inventory” (defined as goods held for sale or lease by the debtor), the secured party must effect the following steps:

- (i) have the debtor sign the security agreement;
- (ii) register the financing statement; and
- (iii) ensure that both of the foregoing steps are done before or within 10 days of the debtor or the debtor’s agent obtaining possession of the collateral.

(d) An Example of a “Consumer Goods” PMSI

For example: Ms. Smith intends to finance her purchase of a new vehicle which she will use for personal and family purposes. She goes to her lending institution to get a car loan. She is approved for a \$10,000 loan towards her purchase of a \$15,000 vehicle.

She goes to the car dealership and trades in her old jalopy for a trade-in credit of \$1,000 towards the \$15,000 purchase price. She tells the dealer that she will have a \$10,000 amount to pay towards the balance on closing. She intends to finance the remaining \$4,000 through the auto acceptance company financing that dealership. She is approved for financing through that acceptance company.

In the foregoing situation, each of the financial institution and the auto acceptance company will be entitled to a PMSI to the extent they have each provided value (\$10,000 to the financial institution and \$4,000 to the auto acceptance company) in the same car, provided that each of them has:

- (i) had Ms. Smith sign the security agreement;
- (ii) registered the financing statement against her correct name, including middle initial and birth date, and properly describe the motor vehicle by its make, model, year and vehicle identification number in the completed Form 1C; and
- (iii) completed both steps before or within 10 days of Ms. Smith taking possession of the vehicle from the dealership.

The fact that one lender advanced funds or registered before the other is irrelevant as both qualify for a PMSI. Additional PMSI rules apply to their respective interests as between vendors and lenders.

(e) An Example of an “Equipment” PMSI

“Equipment” is defined as goods in use in the debtor’s business, that are not “inventory” held for sale or lease.

For example: Smith Brothers Construction needs a new cement mixer. It approaches a cement mixer manufacturer who agrees to sell them a cement mixer under a conditional sale contract. The factory is in another city and Smith Brothers arrange for their shipping agent to collect the cement mixer from the factory’s premises.

The cement mixer vendor is entitled to a PMSI in this equipment used by the construction company provided that it has:

- (i) had the security agreement signed; and
- (ii) the financing statement registered before or within 10 days of the construction company’s shipping agent collecting the cement mixer from the factory’s premises.

Remember the PMSI timing rules include possession by the debtor’s agent (e.g. the shipping agent).

(f) Evidence of Timing

The security agreement will bear an execution date and the financing statement will bear a registration date from the government. It is also important to have some evidence in the file as to when the debtor or its agent received the subject goods. Copies of signed delivery receipts, courier slips, bills of lading, etc. should be kept in the file to prove the requisite timing has been observed to entitle the secured party to PMSI status.

In the event that you have mobile chattels, such as motor vehicles that are removed to the province of New Brunswick, remember that the New Brunswick PPSA will have rules regarding re-registration of your security interest in New Brunswick, failing which you may lose your security interest already perfected in Ontario or elsewhere.

10. PMSIs in Inventory

(a) What is “Inventory”?

Inventory under the Ontario PPSA consists of goods that the debtor holds for sale or lease. “Consumer goods” and “equipment” are excluded from this definition.

(b) Steps to Get an Inventory PMSI

The following steps must all be completed before the debtor or the debtor’s agent obtains possession of the goods:

- (i) signing of the security agreement;
- (ii) registration of the financing statement, and
- (iii) sending the PMSI notice required by subsection 33(1) of the PPSA.

Remember that if you ship goods from your factory, the PMSI timing rules will come into effect immediately if the debtor has hired the freight forwarder to collect the goods from your factory door.

The best rule of thumb is to ensure that all the PMSI steps are being completed **before** releasing the goods from your possession.

(c) Who is Entitled to Receive a PMSI Notice?

Subsection 33(1) requires that a PMSI notice be given to every secured party who has an interest in the same class of collateral; in short, this is everyone who has put an “x” in the box for “inventory” in their PPSA registration.

Obviously, it is necessary to do a search against your debtor, prior to issuance of the PMSI notices to have such information.

If any doubt exists, send the third party a PMSI notice.

(d) Sending the PMSI Notices

In sending out PMSI notices, sections 68 and 69 of the PPSA have to be remembered. Section 68 provides that notices under the PPSA must be sent by personal service or registered mail.

Subsection 68(4) goes on to provide that notices are deemed to be received upon the day received by personal service or 10 days after mailing by registered mail. It has to be noted that subsection 68(4) specifically states that there is no deemed receipt after 10 days of registered mail for purposes of subsection 33(1) PMSI notices.

This means the best proof is to have double-registered mail such that you receive back from the post office a signature from the third party proving that someone has received it.

Section 68 also requires that notices have to be sent to specific people. In the case of corporations, it is to the attention of someone who has responsibility for the area.

Consequently, it is not enough to send your envelope to the following address:

Royal Bank of Canada
Royal Bank Plaza
Toronto

The better method would be to add the following:

Royal Bank of Canada
Main Floor Branch
Royal Bank Plaza
Toronto

Attn: The Manager

Note: By section 68(4) there is NO deemed receipt for PMSI notices. You must have proof of receipt by the addressee.

(e) Proof that All the PMSI Steps Have Been Fulfilled

In the event of a bankruptcy or a challenge by a third party creditor, you will want to have the following documents in your file to prove that you properly completed all of the PMSI steps:

- (i) a signed and dated security agreement;
- (ii) a registered financing statement;
- (iii) copies of the PMSI notices together with the signed cards from the post office or other evidence of personal service and receipt; and

- (iv) a delivery receipt, signed shipping order or other document that shows when the debtor or its agent received the goods.

Hopefully, this last document will bear a date that is after the dates on the other documents, such that you can clearly prove your entitlement to an inventory PMSI.

(f) Section 427 Security under the Bank Act

It is also important to remember that PMSI status only applies as against other PPSA creditors. It has no effect upon banks holding security over inventory under the Bank Act of Canada.

Consequently, at the same time that you are effecting a PPSA search, you should also effect a section 427 Bank Act search in the appropriate agency of the Bank of Canada to ensure that no other inventory security exists under that regime.

In the event that section 427 security exists, the best course of action is to have an acknowledgment of priority signed in your favour by the bank.

11. Oops! I Forgot to Renew

It happens and probably more often than you suspect.

In case you have forgotten to renew before the expiration day of your original registration, you cannot renew by filing a Form 2C – Financing Change Statement. You must now proceed to file a brand new registration on a Form 1C. The reason for this is that the government purges expired registrations so that if you endeavour to file an amendment for a registration that is already passed its expiration date, your amendment will not match with any current data in the system. It will, in short, be a nullity.

Therefore, in accordance with Ontario PPSA section 52(2), you proceed to file a financing statement restating all of the data that was included in your original registration. In addition, there is a practice of entering into Lines 13, 14 and 15, being the Optional Collateral Description section, a statement along the following lines:

Late Renewal of Registration No. [insert original registration particulars]

This is to bring to the attention of the searching public the fact that this is a late renewal.

By operation of section 30(6), a registration that ceased to be perfected will be again perfected upon re-registration and will be deemed to have been continuously perfected from the time of the first registration, except as against a person who acquired rights in all or part of the collateral during the period when a registration was unperfected.

This rule makes sense given that your mistake in being late in renewing has caused an innocent third party to make a credit decision based on a search result in which your registration failed to show. Consequently, your late renewal will be subordinate to the intervening third party.

Therefore, after effecting your late re-registration using a Form 1C, pull a search against the debtor and determine if anyone effected a registration in the period between the time your original registration lapsed and your new registration was made. If this happened, try to obtain subordination agreements from such intervening third parties. There may, however, be others who made a credit decision who did not register, such as a bona fide purchaser for value without notice.

12. Oops! I got a courtesy notice

Despite all of the features of the Canadian Security Registration System software, it is still possible to make mistakes. For example, if you insert an incorrect file number when making an amendment, you will be unable to “connect” in the government data base to the original registration. You are then likely to get a courtesy notice on your verification statement which informs you that you have failed to link to anything in the database.

There are several important features of the government’s PPSA database you must understand. First, the government takes anything offered in a registration. The government of Ontario does not do any checking of the content of the form. The province will gladly accept your registration money for registrations containing errors such as missing debtor names, missing secured party names and incorrect file reference numbers for amendments and renewals. The onus is on the registrant to ensure that they have entered the data correctly.

Therefore, if you get any courtesy notice whatsoever, be sure to investigate mistakes thoroughly and proceed to immediately register a change statement as necessary to correct any deficiency.

13. Oops! I missed my PMSI deadline

This too happens frequently. Section 33 provides very specific time frames in which certain actions must be completed in order for the secured party to obtain the statutory priority status of a purchase-money security interest or “PMSI”.

If you have missed your PMSI deadline, proceed to register, then pull a post-registration PPSA search to determine who is registered against the debtor before your registration was made. It will then be necessary to obtain subordinations from such prior registered parties who claim the same classes of collateral that you claim for the subject matter of your PMSI interest.

For example, if you are an inventory or equipment supplier, you may have to get the bank holding the general security agreement over the debtor’s assets to provide a specific acknowledgement that you have a first interest in your products and all proceeds thereof.

The best rule of thumb is always to be registered and have all PMSI steps completed before shipping the product. Remember that releasing the product to a transport company hired by the debtor starts the PMSI clock to run.

14. Oops! The PPSA Computer Downtime

If you're being challenged on a late renewal, don't forget to double check your calendar to remember the three times so far that the Ontario government PPSA computer has been shut down either by reason of a public service strike or by reason of a large power failure.

These time periods were as follows:

- (i) February 26, 1996 to April 3, 1996 due to the 1996 OPSEU strike;
- (ii) March 13, 2002 to May 8, 2002 due to the 2002 OPSEU strike; and
- (iii) August 14, 2003 to August 24, 2003 due to the power black out throughout Ontario and New England.

There have been legislative and regulatory steps taken to deem the "downtime" not to exist for purposes of late renewals, PMSI timing, notices to debtors, etc.

For the 1996 downtime, section 30(6.1) was enacted by the 1996 statute Chapter 5 section 2(2). The 2002 downtime was handled by Ontario regulation 150/02 and the subsequent Ontario regulation 356/03.

You have to read to these sections to be able to determine the downtime period and the grandfathering after the PPSA Registrar declared the systems operative again within which to be re-registered and deemed to be continuously perfected.

15. Reminders about common errors

- (a) Do you have in your file a photocopy of the birth certificate?

For a debtor born in Canada or the Canadian citizenship papers for a debtor born outside Canada? These are the papers to use in accordance with 3 reported cases. Never rely on a driver's licence. Never record a birth date in your notes as "2/3/60". Was the person born February 3rd or March 2nd?

- (b) Do you have a corporate search from the government?

To prove the exact corporate name and is it in both official languages? Never rely on the corporate seal.

- (c) Do you have a copy of the partnership or limited partnership registration?

From the government to prove the exact name, plus copies of the information in (i) for individual partners' names or (ii) for corporate partners' names?

- (d) Do you have a signed delivery receipt?

To prove where the debtor got possession of the collateral, to be able to prove PMSI timing?

(e) Do you have signed courier slips or returned signed registered mail cards?

To prove “inventory” PMSI notices were received?

(f) Did you see the vehicle identification number?

On the machine as well as a copy of the provincial registration papers, to ensure you used the correct VIN?

(g) Did you search the vendor’s and purchaser’s names and the VIN?

When purchasing or financing a vehicle used as “consumer goods” or “equipment”, never assume the vehicle has had only one owner and remember, the Re: *Lambert* decision about name errors and correct VINs.

SCHEDULE A
BABE'S PPSA COMMANDMENTS

1. I will read sections 3 and 4 of the PPSA and ensure that the PPSA is the correct statute governing the collateral and the collateral is in fact personal property, e.g. ships, rolling stock, intellectual property, insurance policies, quotas and licences, real property leases and rents.
2. I will read sections 5, 6, 7 and 8 of the PPSA (the conflict of law rules) and check to ensure that it is the Ontario PPSA that applies.
3. I will read section 11 of the PPSA and ensure that my client's security interest has "attached" to the collateral because:
 - (a) the debtor has signed a security agreement that contains a description of the collateral sufficient to allow it to be identified;
 - (b) "value" as defined in the Act has been given by my client; and
 - (c) the debtor has rights in the collateral.
4. I will read section 33 of the PPSA and ensure I have done the necessary PMSI steps and timing based on the debtor's use of the collateral (watching out for ineligible sales and lease backs).
5. I will ensure that I have properly registered the financing statement to "perfect" my client's security interest by checking the regulations every time I register to ensure:
 - (a) I have named the debtor(s) as specified in the regulations with a copy of the necessary document in my file to confirm I have the required name and;
 - (b) I have described "motor vehicles" used by the debtor as "consumer goods" or "equipment" as required in the Act and regulations.
6. I have not limited the scope of my client's security interest by placing words in the optional collateral description area without first warning my client about section 46(3).
7. I will always remember that the PPSA computer runs in arrears of real time and plan my closings accordingly. I will register as soon as I can (nothing no registration before signing the agreement for "consumer goods" by section 45(2) so that I may obtain a post registration certified search before advancing funds.
8. I will ensure a copy of each registration I do is sent to the debtor as required by the Act (section 46(6)).
9. I will report the registration to my client noting the client must file a financing change statements to:
 - (a) renew before the registration expiry date;

- (b) record changes of debtor names within 15 days;
 - (c) record transfers of collateral to third parties within 30 days; and
 - (d) re-register elsewhere if the collateral leaves Ontario or the debtor moves out of Ontario.
10. I will double check myself by reading the commentary to the *CAB-O Personal Property Security Opinion Report* or calling the LUSC practice advisory hotline.

SCHEDULE B PROBLEMS WITH SEARCHING ON-LINE

On-Line Corporate Searches - Generally¹

1. Accuracy of the information in the database depends on the accuracy of the information going into the system; it also depends on the manner of inputting the data which can affect the search; data filed electronically is generally more accurate.
2. NB: it is important to verify the accuracy of the database by checking your search against with the actual documents filed:
 - (a) minute book review;
 - (b) obtain copies from the federal file in Ottawa; and
 - (c) microfiche of the Ontario file.
3. if you are instructed to not do the additional verification work or can not because of time constraints ensure your client is aware that the information may be inaccurate; confirm these instructions and limitations in writing.
4. this is critical in “search-review” opinions² since accurate searches require knowing the correct present and former names of the target corporation, failing which not all encumbrances may be located by your searches against wrong names or not all names.
5. search accuracy depends largely on the training of the searcher, especially for the federal Strategis database; e.g. differing results will appear with or without “the” at the start of a name or inserting periods or spaces between initials.

Ontario Corporate Searches On-Line

1. the electronic database was started July 1992.
2. Form 1s have not been microfiched since late 1995, so unless the Form 1 was filed electronically, there is no copy to verify the accuracy of the data input.
3. **not all prior names are in the database**; corporations that changed their names in articles of amendment filed prior to July 1992 were not entered into the database.
4. NB: you must order and read the microfiche to ensure you find all prior corporate names.

¹ Thanks to Elizabeth Gillis, senior corporate paralegal at Miller Thomson LLP and to Donna Kubota of Solutions Corporate Law Clerk Services Inc. for their input on corporate search problems.

² Cameron, J. et al, Personal Property Security Opinion Report: Commentary and Illustrative Opinion (1997, CBA-O, Toronto) at pp 80-92.

5. NB: Personal Property Security Act (“PPSA”) regulations³ require that registrations for corporations with bilingual names must give the English name on one debtor line and the French name on a second business debtor line. Failure to use the bilingual name leaves the secured party unperfected⁴; this also means you must search the English and French names separately.
6. a full corporate history can not be searched on-line; you need to read the microfiche and order further searches; this takes time.

Federal Corporate Searches On-Line

1. the information in the Strategis database is not complete.
2. former names drop off the database after about 10 years.
3. doing a federal “continuous” existence search not possible [e.g. evidence that the corporation was not dissolved and revived for proof that its assets did not escheat to the Crown]; this information is not shown.
4. until about a year ago, a person could search the paper file in Ottawa; that is no longer permitted; you must order copies of the articles and all amendments to verify the on-line data.

Bank Act Searches

1. in 1999 the federal government hired Canadian Securities Registration Systems (“CSRS”) to automate the data from notices of intention to take security under section 427 of the Bank Act.
2. CSRS entered the data into one database.
3. NB: the database CANNOT be searched on a national basis.
4. the Bank Act has not been revised and still requires that the notice of intention be filed with the “appropriate agency” of the Bank of Canada.
5. section 427(5) of the Bank Act defines this as:

“Appropriate agency” means:

- (a) the agency for the province in which is located the place of business of the person by whom or on whose behalf a notice of intention is signed;

³ Ontario Regulation 912, section 17.

⁴ Re: *Armstrong, Thomson & Tubman Leasing Ltd., et al.* (1993) 15 OR (3d) 292; 5 PPSAC (2d) 231; conversely a bilingual partnership name is to be entered exactly as filed under the *Business Names Act* (see: Re: *Valdi Société en Commandite/Valdi & Company Limited Partnership* (1996) 11 PPSAC (2d) 170.

- (b) if that person has more than one place of business in Canada and the places of business are not in the same province, the agency for the province in which is located the principal place of business of that person, or
- (c) if that person has no place of business, the agency for the province in which the person resides.

“Principal place of business” means:

- (a) in the case of a body corporate incorporated by or under an Act of Parliament or the legislature of a province, the place where, according to the body corporate’s charter, memorandum of association or by-laws, the head office of the body corporate in Canada is situated, and
- (b) in the case of any other body corporate, the place at which a civil process in the province in which the loans or advances will be made can be served on the body corporate. For example, a search of the Toronto agency will NOT reveal a notice of intention filed with the Halifax agency where the debtor’s principal place of business is in Nova Scotia.

Execution Searches⁵

- 1. all executions filed in Ontario are now searchable on-line via “Teraview” software provided by Teranet Land Information Services Inc.
- 2. errors usually arise from the searcher making a mistake such as:
 - (a) misspelling the name to be searched; and
 - (b) searching the wrong county.
- 3. an execution filed today is not effective until tomorrow; conversely a search certificate is good for the whole day it is issued.
- 4. very lengthy executions will not fully print out on the search; e.g. Attorney General sometimes files executions running 20 to 30 pages.

PPSA Searches

- 1. PPSA searches are very accurate, but what is key to remember is what these searches will not tell you.
- 2. Order of registration is not determinative of priority (e.g. purchase-money security interests (“PMSIs”)).
- 3. Whether there are security interests perfected by possession.

⁵ With thanks to Richard Blundell, real estate clerk at Miller Thomson LLP for his input.

4. The file currency is in arrears of real time; there can be more recent filings; time your deal closings accordingly.
5. One registration may perfect a number of security agreements, from different times⁶.
6. Trustees under trust deeds do not have to update an old CSRA registration to reflect a change of name of the debtor, unless the trust indenture was amended after October 10, 1989⁷; i.e. search all prior names to be sure no old trust deeds exist which are still valid under a prior name.
7. If you need to rely on the insurance fund for government errors, you must order a certified search⁸ and not just a “verbal” print; insurance fund claims in relation to one security agreement are capped at \$1,000,000⁹
8. If you are involved with a “motor vehicle” used as “consumer goods”, remember that Justice Doherty held in Re: Lambert¹⁰ that a reasonable purchaser or financier of such vehicle would search both the debtor’s name and the vehicle identification number; a Used Vehicle Information Package (“UVIP”) gives only a printout on the “VIN”, not both.
9. A purchaser or financier of a “motor vehicle” used as “equipment” may well be wise to search both the debtor name and VIN as well.
10. Remember the conflict of law rules¹¹; are you searching in the correct province?

N:\corp\jbabe\PAPERS\LSUC realty, personalty overlaps Oct 2005\October 2005 registration paper v.1.doc

⁶ To deal with the problem of transactions being “sufficiently linked” from Justice Blair’s decision in Re: Adelaide Capital, section 45(4) was repealed by the “red tape bill” proclaimed on December 6, 2000, S.O.c.26, at section 16(6), and replaced with:

(4) Except where the collateral is consumer goods, one financing statement may perfect one or more security interests created or provided for in one or more security agreements between the parties, whether or not,

(a) the security interests or security agreements are part of the same transaction or related transactions; or

(b) the security agreements are signed by the debtor before the financing statement is registered.

⁷ PPSA, RSO 1990, c.P.10, as amended, section 78(14).

⁸ PPSA, RSO 1990, c.P.10, as amended, section 44(4).

⁹ PPSA, RSA 1990, c.P.10, as amended, section 44(20).

¹⁰ Re: Lambert (1994), 7 PPSAC (2d) 240; 20 OR (3d) 108 (OCA).

¹¹ PPSA sections 5, 6, 7 and 8.