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A Survey and Critique of the “Seller in Possession” Statutory Regimes of Common Law Canada: An ABC Prequel

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Clayton Bangsund*

A Survey and Critique of the “Seller in Possession” Statutory Regimes of Common Law Canada: An ABC Prequel

The article examines the various provincial and territorial statutory regimes that apply to resolve title disputes emanating from a “seller in possession” scenario in which an initial buyer leaves bought goods in the possession of a seller who then transfers them to a subsequent bona fide purchaser. Presently there are four distinct statutory models in force across common law Canada. Some provinces and territories incorporate modernized electronic personal property registry infrastructure into their statutory priority regimes, while others do not. The author undertakes a comparative assessment of the four models, highlights their strengths and weaknesses, and asserts that Model 2—representative of the statutory regimes of Alberta, British Columbia, Northwest Territories, Nunavut and Saskatchewan—most appropriately defines the initial buyer’s risk exposure while offering reasonable registration facilities for the protection of his or her non-possessory ownership interest.

L'article examine les divers régimes législatifs provinciaux et territoriaux qui s'appliquent au règlement des différends relatifs au titre de propriété découlant d'un scénario où un acheteur initial laisse les biens achetés en la possession d'un vendeur qui les transfère ensuite à un acheteur de bonne foi subséquent. À l'heure actuelle, quatre modèles législatifs distincts sont en vigueur dans l'ensemble du Canada sous le régime de la common law. Certaines provinces et certains territoires intègrent l'infrastructure modernisée du registre électronique des biens personnels dans leurs régimes de priorité prévus par la loi, tandis que d'autres ne le font pas. L'auteur entreprend une évaluation comparative des quatre modèles, souligne leurs forces et leurs faiblesses et affirme que le modèle no 2—représentatif des régimes législatifs de l'Alberta, de la Colombie-Britannique, des Territoires du Nord-Ouest, du Nunavut et de la Saskatchewan —définit le mieux l'exposition initiale de l'acheteur au risque tout en offrant des mesures d'enregistrement raisonnables pour protéger son titre de participation sans possession.

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It is not worth while to try to keep history from repeating itself, for man’s character will always make the preventing of the repetitions impossible.

—Mark Twain, *In Eruption*¹

Introduction

I wrote about ABCD remoteness problems in my last paper² so this one, addressing mere ABC problems, constitutes a prequel of sorts. Suppose that A sells goods to B, but A retains possession of those goods and,

1. Mark Twain, *In Eruption* (New York: Harper & Brothers, 1922) at 66.

2. Clayton Bangsund, “ABCD Remoteness Problems: *Nemo Dat* & Its Exceptions Under Subsection 26(1.2) of Saskatchewan’s *The Sale of Goods Act*” (2018) 81:2 Sask L Rev 133.

without authorization, resells them to C. A dispute between B and C erupts since, in Bridge’s words, “rogue [A] invariably disappears or turns out to be not worth suing, taking with him the purchase price. So the question normally resolves itself into an inquiry that has inspired countless judicial *cris de couer*, namely, which of two innocent persons, the owner [B] or the purchaser [C], should suffer the consequences of the rogue’s [A’s] dishonesty.”³ My object, in this paper, is to survey and critique the various statutory regimes of common law Canada that apply to resolve this kind of title dispute. Presently there are four distinct statutory models in effect among the twelve common law jurisdictions:

- Model 1—Manitoba, Ontario, Yukon
- Model 2—Alberta, British Columbia, Northwest Territories, Nunavut, Saskatchewan
- Model 3—New Brunswick, Newfoundland & Labrador, Nova Scotia
- Model 4—Prince Edward Island

As a general matter, statutory uniformity is both an aim and the norm in Canadian sale of goods law.⁴ Governance of the “seller in possession” ABC problem presents a rare and interesting exception. In Canada, depending on where these events unfold, the dispute between B and C is resolved quite differently according to unique criteria set out in a variety of statutes. Some provinces and territories resolve the matter through statutory priority rules that hinge on fact and time of registration in the personal property registry, while others do not.

In Part II of this paper, using an incremental approach, I describe the basic features of each of the four models using the legislative regimes of Ontario, Alberta, Nova Scotia and Prince Edward Island as proxies for Models 1, 2, 3 and 4 respectively.⁵ In Part III I undertake a comparative assessment of the models, highlighting their relative strengths and weaknesses. In Part IV I offer some closing remarks.

I. *Description*

1. *Nemo Dat: A Common Starting Point*

The starting point, across all jurisdictions and under each statutory model, is *nemo dat quod non habet*—“one cannot give what one does not have.” With reference to the ABC problem, B prevails over C according to a strict application of *nemo dat* because, after transferring title to B, A no longer

3. MG Bridge, *Sale of Goods* (Toronto: Butterworths, 1988) at 571 (bracketed text added).

4. Roderick J Wood, “Codification of Commercial Law” (2016) 79:2 Sask L Rev 179.

5. Details of concordance are furnished in the footnotes. Where appropriate, one of the four model proxies also serves as a pan-Canadian proxy.

has any title to transmit to C. Serving as a pan-Canadian proxy, section 24 of Nova Scotia's *Sale of Goods Act*⁶ is reproduced below.

NSSGA, section 24: Subject to this Act, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.⁷

Bridge notes that “[a] legal system concerned with the protection of private property, and not open to any countervailing interests, would assert with unabated vigour the maxim *nemo dat quod non habet*, by which the transferee's [C's] title could never exceed the title of the transferor [A] and would always be vulnerable to the claim of another whose title is superior [B].”⁸ We do not live in such a system. As suggested in the provision's opening words—“[s]ubject to this Act, ...”—Canadian legislators have seen fit to recognize various statutory exceptions to *nemo dat*.⁹

2. “Seller in Possession” Exception to Nemo Dat: More Common Ground

Ontario's *OSGA* s. 25(1), reproduced below, serves as the pan-Canadian proxy for the statutory exception to *nemo dat* potentially available to C in our “seller in possession” ABC scenario. Every Canadian common law jurisdiction has in force at least one substantive concordant to *OSGA* s. 25(1), while five such jurisdictions—Alberta, New Brunswick, Northwest Territories, Nunavut and Saskatchewan—have two (one in the *Sale of Goods Act*, the other in the *Factors Act*).

OSGA, subsection 25(1): Where a person having sold goods continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for that person, of the goods or documents of title under a sale, pledge or other disposition thereof to a person receiving the goods or documents of title in good faith and without notice of the previous sale, has the same

6. *Sale of Goods Act*, RSNS 1989, c 408 [*NSSGA*].

7. *Ibid* s 24. See also Alberta—*Sale of Goods Act*, RSA 2000, c S-2, s 23(1) [*ASGA*]; British Columbia—*Sale of Goods Act*, RSBC 1996, c 410, s 26(1) [*BCSGA*]; Manitoba—*The Sale of Goods Act*, RSM 1987, c S1, s 23 [*MSGGA*]; New Brunswick—*Sale of Goods Act*, RSNB 2016, c 110, s 28 [*NBSGA*]; Newfoundland & Labrador—*Sale of Goods Act*, RSNL 1990, c S-6, s 23 [*NLSGA*]; Northwest Territories and Nunavut—*Sale of Goods Act*, RSNWT 1988, c S-2, s 25(1) [*NWTSGA*], as duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28 [*NSGA*]; Ontario—*Sale of Goods Act*, RSO 1990, c S.1, s 22 [*OSGA*]; Prince Edward Island—*Sale of Goods Act*, RSPEI 1988, c S-1, s 23 [*PEISGA*]; Saskatchewan—*The Sale of Goods Act*, RSS 1978, c S-1, s 23(1) [*SSGA*]; Yukon—*Sale of Goods Act*, RSY 2002, c 198, s 22(1) [*YSGA*].

8. Bridge, *supra* note 3 at 570 (bracketed text added).

9. See GHL Fridman, *Sale of Goods in Canada*, 6th ed (Toronto: Carswell, 2013) at 107-128.

effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the delivery or transfer.¹⁰

The provision recognizes an explicit exception to *nemo dat* where buyer B leaves goods (or documents of title¹¹) in the possession of seller A who subsequently sells, pledges or otherwise disposes of them to buyer C, an acquirer in good faith without notice of B’s interest.¹² Although A no longer owns the goods, the subsection enables her to convey title as if B had expressly authorized her to do so. Accordingly, C can rely on A’s possession of the goods as sufficient proof of her ownership and/or authority to sell. Subsection 25(1) of the *OSGA* recognizes an exception to *nemo dat* based on a policy of protecting innocent purchasers who rely on A’s possession as a badge of authority. The provision operates as a defence to B’s action in conversion against C.¹³ To the extent that it operates, C acquires title to the goods thereby defeating B’s interest under this statutory exception to *nemo dat*.¹⁴

I have written elsewhere, in considerable detail, about the history and judicial interpretation of this provision.¹⁵ I will not reproduce that effort

10. *OSGA*, *supra* note 7, s 25(1). See also Alberta—*ASGA*, *supra* note 7, s 26(1); *Factors Act*, RSA 2000, c F-1, s 9(1) [*Alberta Factors Act*]; British Columbia—*BCSGA*, *supra* note 7, s 30(1); Manitoba—*MSGA*, *supra* note 7, s 28(1); New Brunswick—*NBSGA*, *supra* note 7, s 31(2) and (4); *Factors and Agents Act*, RSNB 2011, c 153, ss 13(1) and (2) [*NB Factors Act*]; Newfoundland & Labrador—*NLSGA*, *supra* note 7, s 27(1); Nova Scotia—*NSSGA*, *supra* note 7, s 28(2); Northwest Territories—*NWTSGA*, *supra* note 7, s 27(2); *Factors Act*, RSNWT 1988, c F-1, s 8(1) [*NWT Factors Act*], as duplicated for Nunavut by s 29 of the *Nunavut Act* [*Nunavut Factors Act*]; Nunavut—*NSGA*, *supra* note 7, s 27(2); *Nunavut Factors Act*, s 8(1); Prince Edward Island—*Factors Act*, RSPEI 1988, c F-1, s 9(1) [*PEI Factors Act*]; Saskatchewan—*SSGA*, *supra* note 7, s 26(1); *The Factors Act*, RSS 1978, c F-1, s 9(1) [*Saskatchewan Factors Act*]; Yukon—*YSGA*, *supra* note 7, s 24(1). Note the slightly broader scope of the various *Factors Act* provisions in comparison with their *Sale of Goods Act* counterparts. British Columbia’s *BCSGA* presents an exception in that it adopts the broader language typically seen in the *Factors Acts*: see Bridge, *supra* note 3 at 634.

11. To avoid unnecessary convolution, this paper focuses on resolution of the dispute described in the paper’s opening paragraph, which does not involve goods embodied in a negotiable document of title. Where a warehouse receipt is involved, yet another statutory exception to *nemo dat* may be available to C in eight of Canada’s twelve common law jurisdictions: Alberta—*Warehouse Receipts Act*, RSA 2000, c W-1, s 28; British Columbia—*Warehouse Receipts Act*, RSBC 1996, c 481, s 27; Manitoba—*The Warehouse Receipts Act*, RSM 1987, c W30, s 28; New Brunswick—*Warehouse Receipts Act*, RSNB 2011, c 236, s 27; Newfoundland & Labrador—*Warehouse Receipts Act*, RSNL 1990, c W-1, s 28; Nova Scotia—*Warehouse Receipts Act*, RSNS 1989, c 498, s 28; Ontario—*Warehouse Receipts Act*, RSO 1990, c W3, s 27; Yukon—*Warehouse Receipts Act*, RSY 2002, c 227, s 27.

12. Bridge, *supra* note 3 at 547.

13. See e.g. *Bartin Pipe & Piling Supply Ltd v Epscan Industries Ltd*, 2004 ABCA 52 at para 42 [*Bartin Pipe*].

14. See *Worcester Works Finance Ltd v Cooden Engineering Co Ltd*, [1971] 3 All ER 708 (CA), [1971] 3 WLR 661; *National Trust Co v Kirch* (1993), 12 OR (3d) 781 (Gen Div), [1993] OJ No 765; *Kosolofsky v Pasta D’Aurum (Canada) Inc*, 2000 SKQB 164; *Michael Gerson (Leasing) Ltd v Wilkinson and another*, [2001] QB 514.

15. Bangsund, *supra* note 2 at 142-146.

here, but instead furnish an abbreviated account of the provision's lineage. A version of the provision was originally enacted under the *Factors Act, 1877*¹⁶ as an expedited statutory response to a controversial pair of decisions¹⁷ that left the financial industry dissatisfied with the state of late nineteenth century English law.¹⁸ The provision was soon broadened and restated in England's consolidated *Factors Act, 1889*,¹⁹ then substantially replicated in slightly narrower language under the *Sale of Goods Act, 1893*,²⁰ a comprehensive codification of the common law of sales of the time.²¹ All Canadian common law jurisdictions eventually copied the English provision.²² At present day, in every jurisdiction in common law Canada, at least one version of the Victorian era statutory exception to *nemo dat*—as originally formulated in the *Factors Act, 1889* and the *Sale of Goods Act, 1893*—potentially applies to resolve “seller in possession” ABC disputes.

a. *Model 1—Manitoba, Ontario, Yukon*

Under Model 1, the analysis ends with the Victorian era provision as enacted in the legislation of the province or territory. Where B leaves bought goods in A's possession in any of Manitoba, Ontario or Yukon, the statutory exception to *nemo dat* applies and C enjoys title to the goods free and clear under a subsequent sale provided she acquires possession in good faith and without notice of B's interest.

16. *Factors Act 1877* (UK), 40 & 41 Vict, c 39, s 3 [*Factors Act 1877*].

17. *Johnson v The Credit Lyonnais and Johnson v Blumenthal* (1877), 3 CPD 32, 37 LT 657 (CA) aff'g *Johnson v The Credit Lyonnais* (1877), 2 CPD 224, 36 LT 253 (CP Div) and *Johnson v Blumenthal*, unreported.

18. *Factors Act 1877*, Preamble: “WHEREAS doubts have arisen with respect to the true meaning of certain provisions of the *Factors' Acts*, and it is expedient to remove such doubts and otherwise to amend the said Acts, for the better security of persons buying or making advances on goods, or documents of title to goods, in the usual and ordinary course of mercantile business.”

19. *Factors Act 1889* (UK), 52 & 53 Vict, c 45.

20. *Sale of Goods Act 1893* (UK), 56 & 57 Vict, c 71.

21. MD Chalmers, *The Sale of Goods, including the Factors Act, 1889*, 1st ed (London: William Clowes and Sons, 1890) at iv.

22. Royston Miles Goode & Ewan McKendrick, *Goode on Commercial Law*, 4th ed (London: Penguin Books, 2010) at 7, 205.

3. *Resurrection of Nemo Dat: Divergence*

a. *Model 2—Alberta, British Columbia, Northwest Territories, Nunavut, Saskatchewan*

Unlike Model 1, Model 2, representing the law of Alberta, British Columbia, Northwest Territories, Nunavut and Saskatchewan, offers B registration-based protection in the case of a deferred-possession sale arrangement. Consider Alberta’s *ASGA* s. 26(2),²³ which serves as proxy for Model 2 jurisdictions.

ASGA, subsection 26(2): Subsection (1) does not apply to a sale, pledge or other disposition of goods or of documents of title to goods, other than negotiable documents of title to goods, that is out of the ordinary course of business of the person having sold the goods where, prior to the sale, pledge or disposition, the interest of the owner is registered in the Personal Property Registry in accordance with the regulations made under the *Personal Property Security Act*, and Part 4 of that Act applies, with the necessary modifications, to that registration.²⁴

Subsection 26(2) of the *ASGA* adopts Part 4 (Registration) of Alberta’s *Personal Property Security Act*²⁵ and *Personal Property Security Regulation*²⁶ thereby enabling B, a buyer out of possession,²⁷ to register

23. See also *Alberta Factors Act*, *supra* note 10, s 9(2): “Subsection (1) does not apply to a sale, pledge or other disposition of goods or of documents of title to goods, other than negotiable documents of title to goods, that is out of the ordinary course of business of the person having sold the goods where, prior to the sale, pledge or disposition, the interest of the owner is registered in the Personal Property Registry in accordance with the regulations made under the *Personal Property Security Act*, and Part 4 of that Act applies to that registration.”

24. *ASGA*, *supra* note 7, s 26(2). See also Alberta—*Alberta Factors Act*, *supra* note 10, s 9(2); British Columbia—*BCSGA*, *supra* note 7, s 30(2); Northwest Territories—*NWTSGA*, *supra* note 7, s 27(2.1); *NWT Factors Act*, *supra* note 10, s 8(2); Nunavut—*NSGA*, *supra* note 10, s 27(2.1); *Nunavut Factors Act*, *supra* note 10, s 8(2); Saskatchewan—*SSGA*, *supra* note 10, s 26(1.1); *Saskatchewan Factors Act*, *supra* note 10, s 9(2).

25. *Personal Property Security Act*, RSA 2000, c P-7. See also *Personal Property Security Act*, RSBC 1996, c 359; *Personal Property Security Act*, SNWT 1994, c 8, as duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28; *The Personal Property Security Act*, 1993, SS 1993, c P-6.2.

26. *Personal Property Security Regulation*, Alta Reg 95/2001 [*Alberta Regulations*]. See also *Personal Property Security Regulation*, BC Reg 227/2002 [*BC Regulations*]; *Personal Property Security Regulations*, NWT Reg R-066-2001 [*NWT Regulations*]; *Consolidation of Personal Property Security Regulations*, Nu Reg 007-2001 [*Nunavut Regulations*]; *The Personal Property Security Regulations*, RRS c P-6.2 Reg 1 [*Saskatchewan Regulations*].

27. *Alberta Regulations*, *supra* note 26, s 1(1)(w)(ii): “‘secured party’ means, with respect to registration of forms, where the registration is: ...authorized under the *Sale of Goods Act* or the *Factors Act*, a person who, having bought goods, leaves the goods or the documents of title to the goods that are the subject of the registration in the possession of the seller;” See also *BC Regulations*, *supra* note 26, s 1(1), “secured party”; *NWT Regulations*, *supra* note 26, s 1, “secured party”; *Nunavut Regulations*, *supra* note 26, s 1, “secured party”; *Saskatchewan Regulations*, *supra* note 26, s 2(1)(t)(ii).

notice of his ownership interest in the PPR against A.²⁸ The subsection resurrects *nemo dat* in favour of B, a buyer/owner out of possession, provided B registers in timely fashion in accordance with the *Alberta Regulations* by serial number in respect of serial numbered goods²⁹ or by item or kind in respect of all goods other than serial numbered goods.³⁰

Under Model 2, B is unable to prevent A from conferring title to C pursuant to an ordinary course sale. Registration offers B attenuated protection, serving as a pre-condition to the categorical application of *nemo dat* vis-à-vis C where C is a buyer outside the ordinary course. Specifically, *ASGA* s. 26(2) requires that B, the buyer/owner who occupies a position analogous to that of a secured party, register notice of his interest in the PPR if he wishes to preserve *nemo dat* and gain optimal protection against third parties, like C, who deal with A in good faith outside the ordinary course of business.³¹ B is protected against C provided he properly registers notice of his interest in the PPR; the exception to *nemo dat* in *ASGA* s. 26(1) no longer applies, and B prevails pursuant to the joint application of *ASGA* ss. 23(1) and 26(2). This registration-based system, which replaces repealed bills of sale legislation in Model 2 jurisdictions,³² is fully integrated with the PPR's electronic notice-registration system and enables C to discover B's ownership by conducting a search of A's name, thus justifying an outcome in B's favour.

To recap, Model 2 creates an attenuated title notice system under which B's registration in the PPR is a precondition to the categorical invocation of *nemo dat* against subsequent non-ordinary course buyers. The system is attenuated in the sense that a valid registration does not protect B against

28. *Alberta Regulations*, *supra* note 26, s 1(1)(j)(ii): "'debtor' means, with respect to all registration forms, where the registration is: ... authorized pursuant to the *Sale of Goods Act* or the *Factors Act*, a person who, having sold goods, continues or is in possession of the goods or of the documents of title to the goods that are the subject of the registration,"; See also *BC Regulations*, *supra* note 26, s 1(1), "debtor"; *NWT Regulations*, *supra* note 26, s 1, "debtor"; *Nunavut Regulations*, *supra* note 26, s 1, "debtor"; *Saskatchewan Regulations*, *supra* note 26, s 2(1)(h)(ii).

29. *Alberta Regulations*, *supra* note 26, s 30(a): "Where a financing statement is submitted for registration, as authorized by the *Factors Act* or *Sale of Goods Act*, (a) goods that are serial numbered goods must be described in accordance with section 35, and..."; See also *BC Regulations*, *supra* note 26, s 12(1)(a); *NWT Regulations*, *supra* note 26, s 34; *Nunavut Regulations*, *supra* note 26, s 34; *Saskatchewan Regulations*, *supra* note 26, s 18(1)(a).

30. *Alberta Regulations*, *supra* note 26, s 30(b): "Where a financing statement is submitted for registration, as authorized by the *Factors Act* or *Sale of Goods Act*, ... (b) goods other than serial numbered goods must be described in accordance with section 36(2)(a)." See also *BC Regulations*, *supra* note 26, s 12(1)(b); *NWT Regulations*, *supra* note 26, s 33; *Nunavut Regulations*, *supra* note 26, s 33; *Saskatchewan Regulations*, *supra* note 26, s 18(1)(b).

31. See *E Dehr Delivery Ltd v Dehr*, 2016 ABQB 714 at para 42.

32. For more information about bills of sale legislation, see Bangsund, *ABCD Remoteness Problems*, *supra* note 2 at 147-148.

subsequent ordinary course buyers who receive the goods in good faith without notice of B’s interest.

4. *Statutory Bifurcation: More Diversity*

a. *Model 3—New Brunswick, Newfoundland & Labrador, Nova Scotia*
Under Model 3, representing the law of New Brunswick, Newfoundland & Labrador and Nova Scotia (the law of Nova Scotia serves as our Model 3 proxy), legal analysis of the “seller in possession” ABC problem is more complicated. To determine which statutory system applies to resolve the dispute, one must first examine the nature of the initial transaction between A and B.

b. *Deemed PPSA Security Interest*

Where the transaction between A and B occurs outside the ordinary course of A’s business, it is a “sale of goods without a change of possession” within the meaning of Nova Scotia’s *Personal Property Security Act*.³³

NSPPSA, s. 2(1)(an): “sale of goods without a change of possession” means a sale of goods that is not accompanied by an immediate delivery and an actual, apparent and continued change of possession of the goods sold, but does not include a sale of goods in the ordinary course of business of the seller, and for the purpose of this definition, “sale” includes an assignment, transfer, conveyance, declaration of trust or any other agreement or transaction, not intended to secure payment or performance of an obligation, by which an interest in goods is conferred;³⁴

Under the *NSPPSA*, a sale of goods without a change of possession creates a deemed security interest³⁵ to which the statute applies.³⁶ This means that B, a secured party,³⁷ must effect registration³⁸ to perfect³⁹ her

33. *Personal Property Security Act*, SNS 1995-96, c 13 [*NSPPSA*]. See also New Brunswick—*Personal Property Security Act*, SNB 1993, c P-7.1 [*NBPPSA*]; Newfoundland & Labrador—*Personal Property Security Act*, SNL 1998, c P-7.1 [*NLPPSA*].

34. *NSPPSA*, *supra* note 33, s 2(1)(an). See also *NBPPSA*, *supra* note 33, s 1(1), “sale of goods without a change of possession”; *NLPPSA*, *supra* note 33, s 2(1)(II).

35. *NSPPSA*, *supra* note 33, s 2(1)(ar)(ii)(D): “security interest” means...the interest of a buyer under a sale of goods without a change of possession, that does not secure payment or performance of an obligation; See also *NBPPSA*, *supra* note 33, s 1(1), “security interest”; *NLPPSA*, *supra* note 33, s 2(1)(pp)(ii)(D).

36. *NSPPSA*, *supra* note 33, s 4(2): Subject to Sections 5 and 56, this Act applies to...a sale of goods without a change of possession, that does not secure payment or performance of an obligation; See also *NBPPSA*, *supra* note 33, s 3(2)(d); *NLPPSA*, *supra* note 33, s 4(2)(d).

37. *NSPPSA*, *supra* note 33, s 2(1)(ao). See also *NBPPSA*, *supra* note 33, s 1(1), “secured party”; *NLPPSA*, *supra* note 33, s 2(1)(mm).

38. *NSPPSA*, *supra* note 33, s 26. See also *NBPPSA*, *supra* note 33, s 25; *NLPPSA*, *supra* note 33, s 26.

39. *NSPPSA*, *supra* note 33, s 20. See also *NBPPSA*, *supra* note 33, s 19; *NLPPSA*, *supra* note 33, s 20.

security interest and gain optimal protection against C. Failure to effect valid registration leaves B vulnerable to a variety of competitors including buyers like C,⁴⁰ lessees,⁴¹ secured parties⁴² and A's trustee in bankruptcy.⁴³ Even if B does effect valid registration, she remains vulnerable to C where, for example, C buys the goods from A as consumer goods for a purchase price of \$1,000 or less.⁴⁴ Under Model 3, where the initial sale from A to B occurs outside the ordinary course of business, and therefore constitutes a deemed security interest, the consequences are potentially dire if B fails to effect valid registration at the PPR. By reason of the *NSPPSA*'s cut-off rules, equally dire consequences may befall B even in cases where valid registration has been effected.

c. “*Seller in Possession*” Exception to *Nemo Dat*

In contrast, where the initial sale from A to B occurs in the ordinary course of A's business, the *NSSGA* applies to resolve the matter according to the traditional exception to *nemo dat* if C takes possession in good faith without notice of B's interest.⁴⁵ Model 3, like Model 1, affords B no formal registration-based protection against C in circumstances where the initial sale to B occurs in the ordinary course of A's business. In such circumstances, B can only hope to somehow deliver actual notice of title to C so as to disqualify her from invoking the statutory exception to *nemo dat*.

5. *Hybrid Model: Yet More Variety*

a. *Model 4—Prince Edward Island*

Canada's lone Model 4 jurisdiction, Prince Edward Island, is a hybrid system that exhibits features of Models 2 and 3. Like Model 3, Model 4 bifurcates the statutory analysis based on the nature of the initial sale transaction between A and B.

40. *NSPPSA*, *supra* note 33, s 31. See also *NBPPSA*, *supra* note 33, s 30; *NLPPSA*, *supra* note 33, s 31.

41. *Ibid.*

42. *NSPPSA*, *supra* note 33, s 36. See also *NBPPSA*, *supra* note 33, s 35; *NLPPSA*, *supra* note 33, s 36.

43. *NSPPSA*, *supra* note 33, s 21(2)(a). See also *NBPPSA*, *supra* note 33, s 20(2)(a); *NLPPSA*, *supra* note 33, s 21(1)(a).

44. *NSPPSA*, *supra* note 33, ss 31(3) and (4). See also *NBPPSA*, *supra* note 33, ss 30(3) and (4); *NLPPSA*, *supra* note 33, ss 31(3) and (4).

45. *NSSGA*, *supra* note 6, s 28(2); *NBSGA*, *supra* note 7, ss 31(2), (4); *NB Factors Act*, *supra* note 10, ss 13(1) and (2); *NLSGA*, *supra* note 7, s 27(1).

b. *Deemed PPSA Security Interest*

If the sale from A to B occurs outside the ordinary course of A’s business, it constitutes a “sale of goods without a change of possession” within the meaning of Prince Edward Island’s *Personal Property Security Act*.⁴⁶ Models 3 and 4 exhibit likeness in this respect.

PEIPPSA, s. 1(nn): “sale of goods without a change of possession” means a sale of goods that is not accompanied by an immediate delivery and an actual, apparent and continued change of possession of the goods sold, but does not include a sale of goods in the ordinary course of business of the seller, and for the purpose of this definition, “sale” includes an assignment, transfer, conveyance, declaration of trust or any other agreement or transaction, not intended to secure payment or performance or an obligation, by which an interest in goods is conferred;⁴⁷

A sale of goods without a change of possession creates a deemed security interest⁴⁸ under the *PEIPPSA*, thus making B a secured party.⁴⁹ Accordingly, B must effect registration⁵⁰ at the PPR to perfect his security interest.⁵¹ Under Model 4, failure to register leaves B’s interest unperfected and vulnerable to buyers and lessees,⁵² secured parties⁵³ and A’s trustee in bankruptcy.⁵⁴

c. *Resurrection of Nemo Dat*

If the initial sale occurs in the ordinary course of A’s business, then pursuant to *PEI Factors Act* s. 9(2) B must register notice of his interest in the PPR if he wishes to preserve *nemo dat* and gain protection against third parties, like C, who deal with A in good faith outside the ordinary course of business. B is protected against C if he properly registers notice of his interest in the PPR;⁵⁵ the exception to *nemo dat* in *PEI Factors Act* s. 9(1) no longer applies, and B prevails pursuant to the joint application of *PEISGA* s. 23 and *PEI Factors Act* s. 9(2).

PEI Factors Act, subsection 9(2): Subsection (1) does not apply to a sale, pledge or other disposition of goods or of documents of title to goods, other than negotiable documents of title to goods, that is out of

46. *Personal Property Security Act*, RSPEI 1988, c P-3.1 [*PEIPPSA*].

47. *Ibid.*, s 1(nn).

48. *Ibid.*, ss 1(r)(ii)(D), 3(2)(d).

49. *Ibid.*, s 1(oo).

50. *Ibid.*, s 25.

51. *Ibid.*, s 19.

52. *Ibid.*, s 30.

53. *Ibid.*, s 35.

54. *Ibid.*, s 20(2)(a).

55. *Personal Property Security Act Regulations*, PEI Reg EC1998-270, ss 22-24.

the ordinary course of business of the person having sold the goods where, prior to the sale, pledge or disposition, the interest of the owner is registered in the Personal Property Registry in accordance with the regulations made under the *Personal Property Security Act* and the said Act applies to such registration.⁵⁶

Like Model 2, Model 4 offers B effective registration-based protection against C as a subsequent non-ordinary course buyer. That protection, however, is not effective against a subsequent ordinary course buyer. Failure to effect valid registration leaves B vulnerable to a good faith non-ordinary course buyer who acquires the goods without notice of B's interest.

6. *Recap*

To briefly recap, Model 1 fully adopts the Victorian era "seller in possession" exception to *nemo dat* and does not furnish, under any circumstances, facilities for registration of B's interest. In stark contrast, Model 2 is fully integrated with the PPR's electronic notice-registration system, furnishing B with the option to register and protect her interest against subsequent purchasers. Model 3 partially adopts the Victorian era exception where the initial sale to B occurs in the ordinary course of A's business. In such a circumstance, Model 3 furnishes B with no statutory registration-based protection. Meanwhile, if the initial sale takes place outside the ordinary course of A's business, Model 3 imposes a registration requirement on B thereby exposing him to significant risk of loss. Finally, Model 4 gives B the option to register where the initial sale occurs in the ordinary course of A's business, but imposes a registration requirement on B where the initial sale occurs outside the ordinary course.

II. *Analysis*

1. *Model 1—Manitoba, Ontario, Yukon*

One praiseworthy feature of Model 1 is that it does not expose B to undue risk of loss to the trustee should A go bankrupt while in possession of the subject goods. This point is significant because, as a practical matter, it is far more probable (at least one hopes, for the sake of humanity) that A will (i) go bankrupt as an honest but unfortunate debtor than (ii) roguishly resell B's goods to C, an act that generally requires outright dishonesty or extreme forgetfulness. In any case, B is not a secured party pursuant to Model 1 personal property security legislation, and is therefore not at risk of losing his title to the trustee in the event of A's bankruptcy. Model 1

56. *PEI Factors Act*, *supra* note 10, s 9(2).

narrowly defines those eligible reliance parties—namely, innocent buyers (such as C), pledgees and disponees—who, in appropriate circumstances, may assert the “seller in possession” exception to *nemo dat* to defeat B’s title. Model 1 is well-tailored in this respect, unlike Models 3 and 4.

Model 1 stands alone in offering B no formal registration-based protection against C under any circumstances. While this system may be lauded for its simplicity, one wonders why Model 1 legislators have chosen not to facilitate deferred-possession sales using personal property registry infrastructure designed precisely for the facilitation of non-possessory interests in personal property. Each Model 1 jurisdiction once had in force a *Bills of Sale Act*⁵⁷ which has since been repealed.⁵⁸ This means that where there was once a centralized registration system for protection of B’s title (however crude and inefficient it may have been), there is now nothing. Model 1 can be criticized for not interacting with existing personal property registry infrastructure to facilitate sales in which deferred possession is part of a legitimate commercial arrangement.⁵⁹

It is ironic that, under Model 1, an unauthorized registration effected by a diligent and enterprising B—that is, a financing statement, unsanctioned by any statutory regime, but nonetheless registered in the PPR by a buyer out of possession posing as a secured party—may ultimately prove successful in delivering notice of B’s ownership to C thereby defeating the statutory exception to *nemo dat* that C would otherwise enjoy. If C is a diligent buyer, she is likely to check the PPR for registered interests and in so doing will discover B’s unauthorized registration. At first glance, this informal use of the PPR, and the unofficial notice delivery system it creates, may not seem objectionable because, in the above scenario, C gains crucial knowledge that enables her to avoid a clash with B. In my view, however, Model 1 is deficient because, if resort to the court system does become necessary, a judge must embark on a costly, and potentially protracted, fact-finding mission to discover whether C *actually knew* of B’s ownership. This is precisely what Model 1’s personal property security legislation is designed to avoid. Under the *OPPSA*, where B is a secured party, it is the *fact of B’s valid registration*, not C’s knowledge thereof, that is dispositive of the matter. But where the “seller in possession” ABC

57. Manitoba—*The Bills of Sale Act*, RSM 1954, c 17; Ontario—*The Bills of Sale Act*, RSO 1970, c 44; Yukon—*Bills of Sale Ordinance*, ROYT 1971, c B-1.

58. Manitoba—*An Act to Amend the Bills of Sale Act*, SM 1973, c 7; Ontario—*The Personal Property Security Act, 1989*, SO 1989, c 16; Yukon—*The Personal Property Security Ordinance*, OYT 1980, c 20.

59. For cases illustrating deferred possession as a typical aspect of commercial arrangements see e.g., *Bartin Pipe*, *supra* note 13; *Alberta Treasury Branches v Cam Holdings LP*, 2016 ABQB 33.

problem presents itself and an enterprising B registers an unauthorized financing statement in the PPR claiming ownership of the goods, the situation is reversed in Ontario, and the title dispute is resolved under the *OSGA* according to the state of C's actual knowledge. This statutory asymmetry is bothersome.

As I have argued elsewhere, there is no convincing reason why sales legislation cannot and should not accommodate B as a buyer/owner to at least the same extent personal property security legislation accommodates her as a secured party.⁶⁰ If a modern registration-based system facilitates secured transactions involving goods, protecting secured parties against subsequent competitors like C, then surely it should facilitate sales of those same goods on equally robust terms.

2. *Model 2—Alberta, British Columbia, Northwest Territories, Nunavut, Saskatchewan*

Model 2 exposes B to risk of loss against only certain parties who advance value in reliance on A's possession. Under Model 2, B is not at risk of losing his title to A's trustee in bankruptcy or, for example, a subsequent non-possessory secured party. Like Model 1, Model 2 is well-tailored in this respect.

By offering B formal, yet attenuated, registration-based protection in the case of a deferred-possession sale, Model 2 addresses the deficiency in Model 1. B may effect registration at the PPR and in so doing deprive a non-ordinary course buyer, C, of the statutory exception to *nemo dat* to which he would otherwise be entitled. Under Model 2, B receives statutory protection roughly equivalent to that he would receive were he a non-possessory secured party governed by the *PPSA*.⁶¹ One must emphasize, however, that under Model 2, registration is a mere *option*, not a requirement. A diligent buyer without possession may avail himself of this registration option in appropriate circumstances. However, his failure to effect a valid registration (including if he simply chooses not to register) does not necessarily place him at undue risk of loss, and still leaves him with *nemo dat* as a fallback position. In my view, this characteristic of Model 2 makes it markedly superior to Models 3 and 4.

3. *Model 3—New Brunswick, Newfoundland & Labrador, Nova Scotia*

Model 3 exposes B to material risk of loss against a variety of competitors in an array of arguably unwarranted circumstances. To appreciate this risk, one must first understand an extremely complicated statutory system. My

60. Bangsund, *supra* note 2 at 155.

61. *Ibid* at 149.

first criticism of Model 3 is that it is far more complex than Models 1 and 2 on account of its confusing and unnecessary bifurcation of the statutory governance of “seller in possession” ABC problems. It is not entirely clear why the statutory system that applies to resolve a “seller in possession” ABC dispute between B and C should vary depending on the nature of the initial transaction between A and B. From C’s perspective (the party against whom B’s rights will ultimately be measured), this distinction is arbitrary and meaningless, and in my view should not play a role in resolving the title dispute. Yet, under Model 3, the distinction is *critical*.

Recall that, under Model 3, if the sale from A to B occurs in the ordinary course of A’s business, then B is not expected, nor is she given any statutory authorization, to register notice of her ownership in the PPR.⁶² The matter is resolved by sales legislation: *nemo dat* and its knowledge-based exceptions. Yet, if that same sale were to occur under slightly different circumstances, outside the ordinary course of A’s business, then pursuant to personal property security legislation B is *required*—not merely given the option—to effect registration at the PPR in order to gain optimal protection against C and others. It is difficult to rationalize this Jekyll & Hyde-like character of Model 3—offering B no registration-based protection in situations that arguably warrant it while simultaneously imposing stringent registration requirements in other unwarranted circumstances.

One might argue, in support of Model 3 bifurcation, that where B enters into an initial deferred-sale transaction with A outside the ordinary course of business, and is therefore expected to *search* the PPR for competing interests, it is sensible that B should also be expected to *register* if the bought goods are left in A’s possession. There is certainly a logical connection between searching and registering, but this connection does not justify the Model 3 approach. If a dispute erupts between B and C due to an unauthorized resale by A, it is the nature of and details surrounding the *subsequent* transaction between A and C, not the initial transaction between A and B, that should be determinative. C played no role in creating the circumstances surrounding the transaction between A and B, and therefore should not be affected by them. But the reverse is not true. B did play a key role in creating the circumstances under which an unauthorized resale from A to C could take place. As such, if the subsequent sale to C occurs in the ordinary course of A’s business, then C must be protected against B whether or not B’s interest is discoverable via PPR debtor name search. If, however, that sale to C occurs outside the ordinary course of business,

62. Model 3 emulates Model 1 in this respect, and can be criticized on the same grounds.

then regardless of the nature of the initial transaction, B should be entitled to registration-based protection.

It is important to note that Model 3 personal property security legislation characterizes *all* buyers who enter into a sale of goods without a change of possession, not merely a special class of them, as deemed secured parties bound by the *PPSA*'s registration requirements. This is problematic since deemed secured parties under the *NSPPSA* are typically specialized, highly sophisticated parties who regularly engage with the PPR and its statutory trappings, and therefore can reasonably be expected to understand the technical legal system within which they operate. Examples include commercial consignors,⁶³ leasing companies,⁶⁴ accounts factors⁶⁵ and chattel paper financiers.⁶⁶ In juxtaposition, buyers represent a far more generalized class. Under Model 3, all buyers—multinational corporations, lawyers, retired teachers, unemployed musicians, etc.—are subject to the strict registration requirements of the *NSPPSA* and the severe consequences that attend failure to register.⁶⁷ Indeed, where the sale from A to B happens to occur outside the ordinary course of A's business, Model 3 has the potential to impose a harsh outcome on an unwitting B.

Model 3 incentivizes A's trustee in bankruptcy to challenge the ownership of any person whose purchased property is left in A's possession at the time of bankruptcy. If successful, the trustee in bankruptcy may claim the goods for the benefit of the bankrupt estate and its general creditors. For example, a trustee in bankruptcy might argue that what may have initially appeared to be an ordinary course sale from A to B in fact constituted a sale outside the ordinary course of A's business, thereby triggering the *NSPPSA*'s registration requirement, which invariably will be unsatisfied in such circumstances. The dearth of case law on this point is surprising.⁶⁸ In any case, I can think of no compelling reason why a

63. *NSPPSA*, *supra* note 33, ss 2(1)(h), "commercial consignment" and 2(1)(ar)(ii)(A), "security interest". See also *NBPPSA*, *supra* note 33, s 1(1), "commercial consignment" and "security interest"; *NLPPSA*, *supra* note 33, ss 2(1)(h), 2(1)(pp)(2)(A).

64. *NSPPSA*, *supra* note 33, ss 2(1)(y), "lease for a term of more than one year," and 2(1)(ar)(ii)(B), "security interest." See also *NBPPSA*, *supra* note 33, s 1(1), "lease for a term of more than one year," "security interest"; *NLPPSA*, *supra* note 33, ss 2(1)(y), 2(1)(pp)(2)(B).

65. *NSPPSA*, *supra* note 33, s 2(1)(ar)(ii)(C), "security interest." See also *NBPPSA*, *supra* note 33, s 1(1)(b)(iii), "security interest"; *NLPPSA*, *supra* note 33, 2(1)(pp)(2)(C), "security interest."

66. *Ibid.*

67. Anecdotally, just in the last year alone I can recall at least three instances in which I have purchased goods and temporarily left them in the sellers' possession. On each occasion I accepted the risks associated with not registering under Saskatchewan law, but that is only because the stakes were quite low. Had I been making larger purchases of, say, mining equipment, a crane or a drilling rig, I definitely would have availed myself of the *SSGA*'s optional registration-based protection.

68. A recent case law search reveals that the term "sale of goods without a change of possession" has never received any substantive consideration by a court.

trustee in bankruptcy should be in a position to negate B’s ownership of the goods. A’s unsecured creditors cannot nullify B’s ownership of the goods prior to A’s bankruptcy, so there is no logical basis to confer such an extraordinary power on the trustee in bankruptcy.

While intricate (aesthetically appealing, from a law professor’s perspective) and internally coherent, Model 3 is needlessly complex and imposes excessive risk on buyers out of possession in too broad an array of circumstances. In other barely distinguishable circumstances, Model 3 does not offer formal registration-based protection to B, instead resolving the matter exclusively with reference to a statutory provision drafted in England in the late nineteenth century.

4. *Model 4—Prince Edward Island*

An evaluation of Prince Edward Island’s regime yields mixed results given the hybrid nature of Model 4. Where the initial sale from A to B occurs in the ordinary course of A’s business, Model 4 offers B sensible, though attenuated, registration-based protection against C. To this extent, Model 4 can be commended on the same grounds as Model 2.

However, where the initial sale from A to B occurs outside the ordinary course of A’s business, Model 4 exhibits the same flaws as Model 3, imposing harsh consequences on B if she fails to effect registration in relation to her deemed security interest. While Model 4 can be commended for offering B registration-based protection in all circumstances, this strength is offset by its partial adoption of the Model 3 system.

Conclusion

The “seller in possession” ABC problem presents an interesting example of diversity in Canadian sales law. Some jurisdictions have opted to incorporate modernized electronic PPR infrastructure (designed for registration of notice of non-possessory interests in personal property) into their statutory priority governance structures for resolution of the problem, while other jurisdictions have not. Some have gone the full distance and brought such transactions under *PPSA* governance, while other jurisdictions have refrained from going that far. In my view, for the reasons given above, Model 2 jurisdictions most appropriately define B’s risk exposure while offering reasonable facilities for the protection of his or her non-possessory ownership interest. In my view, Model 2 is most consonant with and responsive to legitimate commercial expectations and needs. Model 2 best balances the competing interests at stake and furnishes buyers with registration-based protection should they ever find themselves unable to take immediate possession of bought goods.

I will close with some words of wisdom for buyers across common law Canada. One who buys goods without taking possession thereof places himself at risk—in some circumstances, significant risk—of loss of the proprietary claim. In jurisdictions where registration-based protection is permissible or mandatory, B should register notice of ownership in the PPR to gain optimal protection against third party competitors. Failure to register may prove fatal to the proprietary claim. Even in those jurisdictions where registration is not statutorily sanctioned, B should consider registering as a means of delivering notice to C. Finally, in addition to whatever registration-based protection is available under the applicable statutory scheme, B should ensure, where possible, that a mark or tag is fastened to goods left in A's possession, thereby placing any prospective buyer, C, on notice of B's ownership interest and defeating his claim to a *nemo dat* exception. Sometimes the best technology is old technology.