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Quinquagenaries

Anthony Duggan
University of Toronto

Anthony Duggan*

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This article is part of a symposium to mark the 50th anniversary, or quinquagenary, of the Dalhousie Law Journal. The invitation to participate in the symposium asked authors to reflect on developments in their field over the past 50 years. My field is the law of secured transactions and, as it happens, the Canadian Personal Property Security Acts (PPSAs) are approaching their own quinquagenary. There have been numerous statutory and case law developments over the past 50 years, but one of the most remarkable turn of events is the influence the Canadian PPSAs have had on the reform of secured transactions laws in other countries, including New Zealand and Australia. Australia and New Zealand have already built up a substantial body of PPSA case law and literature which in part tracks Canadian learning, but in part also deals with issues that have not been as much discussed in Canada. One issue that has received a good deal of attention, particularly in Australia, is the PPSA's application to true lease agreements. In contrast to Article 9 of the United States Uniform Commercial Code, the Canadian PPSAs apply not only to security (finance) leases, but also to true leases that are for a term of more than one year. The Australian and New Zealand PPSAs take more or less the same approach. The purpose, in part, is to avoid litigation on the true lease-finance lease distinction in determining the application of the statute. This article, drawing on Canadian, Australian and New Zealand learning, aims to show that the need for drawing the distinction persists to a greater extent than is commonly supposed.

Cet article fait partie d'un symposium organisé pour marquer le 50e anniversaire du Dalhousie Law Journal. Dans l'invitation à participer au symposium, il était demandé aux auteurs de réfléchir aux développements survenus dans leur domaine au cours des 50 dernières années. Mon domaine est le droit des transactions garanties et, comme par hasard, les lois canadiennes sur les sûretés mobilières (LSM) approchent de leur propre quinquennat. Il y a eu de nombreux développements législatifs et jurisprudentiels au cours des 50 dernières années, mais l'une des tournures d'événements les plus remarquables est l'influence que les LSM canadiennes ont eue sur la réforme des lois sur les transactions garanties dans d'autres pays, notamment en Nouvelle-Zélande et en Australie. Ces deux pays ont déjà constitué un corpus substantiel de jurisprudence et de littérature sur les LSM qui suit en partie l'apprentissage canadien, mais qui traite aussi de questions qui n'ont pas été autant discutées au Canada. Une question qui a reçu beaucoup d'attention, particulièrement en Australie, est l'application de la LSM aux véritables contrats de location. Contrairement à l'article 9 du United States Uniform Commercial Code, les LSM canadiennes s'appliquent non seulement aux baux adossés à des sûretés (financement), mais aussi aux baux véritables d'une durée de plus d'un an. Les LSM de l'Australie et de la Nouvelle-Zélande adoptent plus ou moins la même approche. L'objectif, en partie, est d'éviter les litiges relatifs à la distinction entre le bail véritable et le bail financier pour déterminer l'application de la loi. Le présent article, qui s'appuie sur les enseignements du Canada, de l'Australie et de la Nouvelle-Zélande, vise à montrer que la nécessité d'établir cette distinction persiste dans une plus large mesure qu'on ne le croit généralement.

* Honourable Frank H Iacobucci Chair Emeritus and Professor Emeritus, Faculty of Law, University of Toronto.

Introduction

This article is part of a symposium to mark the 50th anniversary, or quinquagenary, of the Dalhousie Law Journal. The invitation to participate in the symposium asked authors to reflect on developments in their field over the past 50 years. My field is the law of secured transactions and, as it happens, the Canadian *Personal Property Security Acts* (PPSAs) are approaching their own quinquagenary.[1] There have been numerous statutory and case law developments over the past 50 years,[2] but one of the most remarkable turn of events is the influence the Canadian PPSAs have had on the reform of secured transactions laws in other countries. The trend started in 1999, when New Zealand enacted a statute based almost word for word on the Saskatchewan PPSA.[3] Australia followed suit in 2012,[4]

1. Measured by the date of the first Canadian PPSA which was enacted in Ontario in 1967 and came fully into force in 1976: *Personal Property Security Act*, SO 1967, c 73. The 1967 Act was replaced by the *Personal Property Security Act* 1989 (SO 1989, c 16, now RSO 1990, c P.10) [OPPSA], which is the current version. The other provinces and territories progressively enacted their own PPSAs in the period between 1988–2002. The non-Ontario PPSAs are substantially uniform. The Ontario PPSA remains outside the uniform scheme, but it is conceptually the same as the other PPSAs and, like them, it owes its origins to Article 9 of the United States *Uniform Commercial Code*. For a fuller account, see Jacob S Ziegel, David L Denomme & Anthony Duggan, The Ontario *Personal Property Security Act: Commentary and Analysis*, 3rd ed (Toronto: LexisNexis Canada, 2020) at 1-13; Ronald CC Cuming, Catherine Walsh & Roderick J Wood, Personal Property Security Law, 2nd ed (Toronto: Irwin Law, 2012) at 1-6.

2. For a summary, see Ziegel, Denomme & Duggan, *supra* note 1 at 4-20.

3. *Personal Property Securities Act 1999* (NZ), 1999/126 [New Zealand PPSA]; *Personal Property Security Act 1993*, SS 1993, c P-6.2 [Saskatchewan PPSA].

4. *Personal Property Securities Act* 2009 (Cth), [Australia PPSA], in force 30 January 2012. In

though its version is less faithful to the Saskatchewan model, containing as it does numerous homegrown features, along with measures borrowed from other sources, including Revised Article 9 of the United States *Uniform Commercial Code* and the UNCITRAL Legislative Guide on Secured Transactions.[5] Other countries to have adopted the Saskatchewan model include Brunei (2016), Jamaica (2013) and Malawi (2013), along with a number of Pacific Island nations, including Fiji (2017), Papua Niugini (2011) and Vanuatu (2008).[6]

Australia and New Zealand have already built up a substantial body of PPSA case law and literature which in part tracks Canadian learning, but in part also deals with issues that have not been as much discussed in Canada. One issue that has received a good deal of attention, particularly in Australia, is the PPSA's application to true lease agreements. As originally drafted, the Ontario PPSA applied to a lease of goods, but only if the transaction in substance secured payment or performance of an obligation (in other words, the statute applied if the transaction was a finance lease, but not if it was a true lease). The true lease-finance lease distinction gave rise to a good deal of litigation in Ontario and in 2006 the statute was amended so that, in common with the other provinces, it now applies to both types of lease provided the term is more than one year. The Australian and New Zealand PPSAs also take this approach. There has been a fair amount written about the PPSA lease provisions, but the purpose of this article is to explore some wider implications which have not previously been identified.[7]

It is probably true to say that the PPSA has been Canada's single most successful commercial law export and that Canada's international standing in the commercial law field has been significantly enhanced as a result. My aim in this article is to celebrate this achievement, while at

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contrast to Article 9 and the Canadian PPSAs, the Australian PPSA is a federal statute, the states having ceded powers to the Commonwealth to allow for its enactment.

5. *United Nations Commission on International Trade Law (UNCITRAL)*, *Legislative Guide on Secured Transactions,* United Nations, New York, 2010, Ch X, available at <uncitral.org/uncitral/en/uncitral_texts/payments/Guide_securedtrans.html> [perma.cc/3K4U-Y333].

6. For a fuller account, see Roderick J Wood," "Identifying Borrowed Sources in Secured Transactions Law Reform" (2019) 24 Un L Rev 545. Organisations such as the Asia Development Bank (ADB) and the World Bank have been instrumental in some of these developments.

7. See e.g. Ronald CC Cuming, "True Leases and Security Leases under the Canadian Personal Property Security Acts" (1983) 7 Can Bus LJ251; Michael Bridge et al, "Formalism, Functionalism and Understanding the Law of Secured Transactions" (1999) 44 McGill LJ 567 at 598-605; Michael E Burke, "Ontario Personal Property Security Act Reform: Significant Policy Changes" (2009) 48 Can Bus LJ 289 at 290-304; Catherine Walsh, "'Functional Formalism' in the Treatment of Leases under Secured Transactions Law: Comparative Lessons from the Canadian Experience" in Spiros Bazinas & Orkun Akseli, *International and Comparative Secured Transactions Law: Essays in Honour of Roderick Macdonald* (Oxford: Hart, 2017) at 25.

the same time marking the aforementioned quinquagenaries, by exploring the Australian and New Zealand contributions to thinking about the PPSAs in their application to leases. An obvious benefit of international harmonisation is the opportunities it creates for the sharing of ideas and insights about the law from country to country. Importing countries clearly benefit in this way when they use another country's laws as the model for their own reforms. But the exporting country benefits as well when minds in the importing countries start turning to the particular issues the model law raises in their domestic context.

The balance of the article proceeds as follows. Part I provides a short summary of the true lease-finance lease distinction and the relevant PPSA provisions. Part II surveys key rulings in Canada, Australia and New Zealand on the application of the statute to leases. Part III discusses some implications of the PPSA's application to leases which have been identified in Australia and New Zealand, but which have not received the same attention in Canada to date.

I. *True leases and finance leases*

The PPSAs apply to every transaction that in substance creates a security interest, regardless of form.[8] A conditional sale agreement (where the seller supplies goods on credit but reserves title to secure payment) is subject to the statute because the transaction is in substance the same as if the seller had transferred title and taken back a security interest. For the purposes of the statute, the seller is deemed to have transacted on this basis, with the result that ownership presumptively passes to the buyer and the seller holds only a security interest. A conditional sale agreement will typically provide that property in the goods passes when the buyer pays the last instalment.

As a matter of form, leases are different from sales because, in the case of a lease, the lessor does not promise to sell the goods and the lessee does not promise to buy them. But the agreement may give the lessee an option to purchase the goods at the end of the term. The lessee will have a strong incentive to exercise the option if, for example the rental payments in total approximately equal the cash price of the goods (plus interest) and the option price is a nominal one. A transaction like this is in substance the same as a conditional sale because although the lessee is not legally obliged to buy the goods, she is financially committed to doing so. The position is the same where the term of the lease is for approximately the whole of

8. See e.g. *Personal Property Security Act*, SNS 1995–1996, c 13, s 4(2) [*Nova Scotia PPSA*]. Citations throughout this article will be to the Nova Scotia PPSA as representative of the Canadian provincial PPSAs outside Ontario, except where the context requires otherwise.

the useful life of the goods because, by implication, the lessor does not expect to get the goods back and the rentals will have been calculated to approximate the cash price. A lease structured along these lines is a finance lease. A finance lease, like a conditional sale, is a transaction that in substance creates a security interest and the PPSAs apply on that basis.

As a matter of legal form, the finance lease is indistinguishable from the true lease. In both cases, the parties are typically referred to as the lessor and lessee respectively; the lessee is given possession and use of the goods for a term while the lessor retains ownership; and the periodic payments due from the lessee are typically referred to as "rent." But despite these formal similarities, the two types of transaction serve different functions. The true lease is a species of bailment under which the lessee has possession and use of the goods for a limited term; the lessee acquires no further interest in the goods beyond that; and, as a corollary, the rental payments are in exchange for possession and use. By contrast, as explained above, the finance lease is a disguised purchase agreement where the lessee, in addition to having possession and use of the goods also has an expectation of ownership; and, correspondingly, the rental payments are, in effect, instalments of the purchase price. In both cases, the lessor retains ownership but for different reasons: in the case of a finance lease, the purpose is to secure the lessee's payment obligation, while in the case of a true lease, the lessor remains the owner because the transaction contemplates only the transfer of possession and enjoyment on a temporary basis, not ownership.[9]

Given the formal similarities between the two transactions, in borderline cases it may be hard for the courts to distinguish between them and hard for parties to predict in advance which way a court might decide. The agreement may provide expressly or by implication for an option to purchase, but this feature alone is not conclusive unless it is all but assured from the outset that the option will be exercised.[10] In *DaimlerChrysler Services Canada Inc v Cameron*,[11] the British Columbia Court of Appeal identified the following factors as being relevant to characterising the transaction:

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9. Cuming, *supra* note 7 at 263.
10. Cuming, *supra* note 7 at 272.
11. 2007 BCCA 144 at para 22, citing Cuming, *supra* note 7 at 285. See also *Smith Brothers Contracting Ltd (Re) (1998)*, 53 BCLR (3d) 264, 1998 CarswellBC 678; *843504 Alberta Ltd (Re),* 2011 ABQB 448; *Connacher Oil and Gas Ltd (Re)*, 2017 ABQB 769.

1. whether there was an option to purchase for a nominal sum;
2. whether there was a provision in the lease granting the lessee an equity or property interest in the equipment;
3. whether the nature of the lessor's business was to act as a financing agency;
4. whether the lessee paid a sales tax incident to acquisition of the equipment;
5. whether the lessee paid all other taxes incident to ownership of the equipment;
6. whether the lessee was responsible for comprehensive insurance on the equipment;
7. whether the lessee was required to pay any and all licence fees for operation of the equipment and to maintain the equipment at his expense;
8. whether the agreement placed the entire risk of loss upon the lessee;
9. whether the agreement included a clause permitting the lessor to accelerate the payment of rent upon default of the lessee and granted remedies similar to those of a mortgagee;
10. whether the equipment subject to the agreement was selected by the lessee and purchased by the lessor for this specific lease;
11. whether the lessee was required to pay a substantial security deposit in order to obtain the equipment;
12. whether there was a default provision in the lease inordinately favourable to the lessor;
13. whether there was a provision in the lease for liquidated damages;
14. whether there was a provision disclaiming warranties of fitness and/or merchantability on the part of the lessor; and
15. whether the aggregate rentals approximate the value or purchase price of the equipment.

As noted earlier, until 2006, the Ontario PPSA only applied to leases that in substance created a security interest (finance leases), and this resulted in a considerable amount of litigation over the characterisation question.[12] By contrast, in the other provinces, the statute was extended to cover also "a lease for a term of more than one year…that does not secure payment or performance of an obligation."[13] Ontario moved to this

12. See Jacob S Ziegel & David L Denomme, *The Ontario Personal Property Security Act: Commentary and Analysis*, 2nd ed (Toronto: Butterworths, 2000) at 57-58.

13. See e.g. *Nova Scotia PPSA*, *supra* note 8, s 4(2)(b). "Lease for a term of more than one year" is defined to include: (1) a lease for an indefinite term; (2) a lease for a term of less than one year where the lessee, with the lessor's consent, remains in possession of the goods for more than one year; and (3) a lease for a term of one year or less if the lease is renewable and it is possible that the original term

formulation in 2006, with the aim of stemming the flow of litigation.[14] The measure does not avoid the issue altogether because, as in the other provinces, true leases are excluded from the enforcement provisions in Part V.[15] But the underlying assumption (explored further below) is that, since the issue now arises only in that context, the potential for litigation is substantially diminished.[16] In the other provinces, the main reason for the measure was to make true leases subject to the PPSA registration system; true leases give rise to the same ostensible ownership concerns as finance leases and non-possessory security interests at large, and registration enables a third party to discover the lessor's interest in advance of any dealing with the lessee.[17]

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and the renewed term may together exceed one year. The definition excludes transactions where the lessor is not regularly engaged in the business of leasing goods and a lease of household furnishings or appliances as part of a lease of land (*ibid*, s 2(1)(y)(i)-(iv)).

14. The reform implemented recommendations made by the Canadian Bar Association–Ontario: *Submission to the Minister of Consumer and Commercial Relations Concerning the Personal Property Security Act* and the *Repair and Storage Liens Act* (June 1993) at 3-7 and *Submission to the Minister of Consumer and Commercial relations concerning the Personal Property Security Act* (October 1998) at 8-11 [CBAO 1998 Submission]. Contrast Article 9 of the United States *Uniform Commercial Code*, which does not apply to true leases: UCC § 1-201(35) (2001),"security interest"; see also the UNCITRAL, *Model Law on Secured Transactions* (New York: UN, 2016), arts 1, 2(kk), online (pdf): <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-08779_e_ebook.pdf> [perma.cc/9FSD-CFRY].

There is a subtle difference between the Ontario and non-Ontario versions of the provision. The non-Ontario version applies only to a lease *that does not* secure payment or performance of an obligation (see e.g. Nova Scotia PPSA, *supra* note 8, s 4(2)(b)), whereas the Ontario provision applies "*even though the lease may not secure* payment or performance of an obligation" (OPPSA, *supra* note 1 at s 2(c)). The difference is that the non-Ontario version excludes finance leases, whereas the Ontario version does not. Compare New Zealand PPSA, *supra* note 3, s 17(1)(b) (referring to a" "lease for a term of more than 1 year…*whether or not* the lease secures payment or performance of an obligation') and Australian PPSA, *supra* note 4, s12(3) (also adopting the "whether or not" formulation). This difference in wording has been the source of some confusion in Australia: see Anthony Duggan, *Australian Personal Property Securities Law* (3rd ed, LexisNexis Australia, Sydney 2021) at paras 13.13 and 13.15 and it is likewise a potential source of confusion when comparing the Ontario and non-Ontario PPSAs. The temptation is to assume that a" "lease for a term of more than one year', as defined (or "PPS lease" in Australia), is necessarily a true lease but that is not the case in Ontario, New Zealand and Australia.

15. Ontario PPSA, *supra* note 1, s 57.1; Nova Scotia PPSA, *supra* note 8, s 56. The reason is that the enforcement provisions presuppose an underlying debt obligation and, by definition, there is no debt obligation if the transaction is a true lease.

16. In theory, the issue may also arise in relation to leases which are for a term of one year or less, but in practice a lease with a term this short will nearly always be a true lease unless a below market value purchase or renewal option is included: see Cuming, *supra* note 7 at 260-261. The issue may arise if the lessor is not in the business of leasing but in practice, a one-off finance lease is likely to be rare. The issue also continues to arise in contexts outside the PPSA, most notably the treatment of leases in proceedings under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] and *Companies' Creditors Arrangement Act,* RSC 1985, c C-36: see Burke, *supra* note 7 at 300-303.

17. See Cuming, Walsh & Wood, *supra* note 1 at 155-156; Cuming, *supra* note 7 at 258, Burke, *supra* note 7 at 299-300.

II. *Key cases*

The extension of the PPSAs to true lease agreements means that the lessor must register a financing statement in order to perfect its "security interest." Failure to do so will cause the security interest to be ineffective in the lessee's bankruptcy[18] and also subordinate to a perfected security interest in the same collateral, a competing execution creditor and a transferee of the goods for value without knowledge of the security interest.[19] Conversely, perfection will typically protect the lessor against these competing interests so that, provided the lessor registers a financing statement, it will be at least as well protected under the statute against competing claims as it would have been at general law.[20] The key cases on the application of the statute to lease agreements in Canada, New Zealand and Australia all arose out of transactions that were entered into not long after the legislation was introduced and the common feature is the lessor's unawareness of the need to register a financing statement. This problem has diminished over time in all three jurisdictions, with lessors becoming better informed about the PPSA's application to their industry and improving their systems for ensuring compliance. But even though the litigation arose out of what was largely a transitional problem, the cases are still important for the light they shed on the conceptual underpinnings of the statute as it applies to leases.

The leading Canadian case is *Re Giffen*.[21] The dispute concerned the lease of a motor vehicle in British Columbia. The British Columbia PPSA came into force on 1 October 1990 and the lease was transacted on 27 October 1992.[22] The lease was for a term of more than one year and so the statute applied, but the lessor did not register a financing statement. The lessee subsequently made an assignment in bankruptcy and the trustee claimed the vehicle, arguing that the lessor's unperfected interest was ineffective in the bankruptcy proceedings (British Columbia PPSA, section 20(b)(i)). The lessor argued that section 20(b)(i) conflicted

18. Except in New Zealand, where failure to perfect does not have insolvency consequences.

19. Nova Scotia PPSA, *supra* note 8, ss 21, 36(1)(b). Section 22 gives the lessor a claim for damages against the lessee for the value of the goods if its interest is lost to a trustee in bankruptcy or an execution creditor.

20. At common law, the lessor's ownership interest would normally prevail over competing claims on the principle *nemo dat quod non habet.* The PPSAs replicate these outcomes subject to the lessor's compliance with the registration requirement. In particular, the lessor's interest is a purchase money security interest, with the result that it has priority over a prior perfected security interest provided the lessor registers within 15 days after the lessee obtains possession of the goods: Nova Scotia PPSA, *supra* note 8, ss 2(1), "purchase money security interest," 21(1).

21. [1998] 1 SCR 91, 155 DLR (4th) 332.

22. *Personal Property Security Act*, SBC 1989, c 36.

with the federal *Bankruptcy and Insolvency Act*[23] and the paramountcy doctrine applied to render the provision inapplicable. Specifically, it was claimed, section 20(b)(i) was in operational conflict with the fundamental bankruptcy principle, enshrined in BIA, section 67, that the trustee in bankruptcy is entitled only to the "property of the bankrupt"; since, in the present case, ownership of the vehicle was with the lessor, while the lessee had only possession and a contingent future right of purchase, the effect of section 20(b)(i), if applicable, would be to vest in the trustee greater property rights than those held by the lessee. Alternatively, it was argued that section 20(b)(i) was in conflict with the distributional scheme in BIA, section 136, which expressly makes unsecured creditor claims "subject to the rights of secured creditors."

The Supreme Court rejected the first version of the lessor's argument on the ground that the BIA does not itself define property, but depends on provincial law to prescribe the nature and content of property rights. PPSA, section 20(b)(i) is part of the relevant provincial law and it qualifies the lessor's property rights relative to a trustee in bankruptcy by making them contingent on perfection (registration). It is true that, in doing so, the provision departs from the principle that a trustee in bankruptcy cannot obtain larger property rights than those held by the bankrupt, but PPSA, section 20(b)(i) modifies that principle. In doing so, it does not conflict with the BIA because the BIA itself imports the provision as part of provincial property law. The court's response to the second version of the conflict argument was similar. It is true that, according to BIA, section 136(1), unsecured creditors' claims are subject to the interests of secured creditors. But the BIA depends on provincial law to give content to secured creditors' interests, and PPSA section 20(b)(i) is part of the relevant provincial law.

OneSteel Manufacturing Pty Limited[24] concerned the application of the corresponding provisions in the Australian PPSA. Australian PPSA, section 12(2)(i) provides that "security interest" includes an interest in personal property under a lease of goods if the transaction in substance secures payment or performance of an obligation. Section 12(3)(c) provides that a security interest also includes the interest of a lessor or bailor of goods under a PPS lease, whether or not the transaction in substance secures payment or performance of an obligation. "PPS lease" is defined in section 13 to mean a lease or bailment of goods for a term of more than two years.[25] Section 267 provides, in effect, that a security

23. *BIA*, *supra* note 16.
24. [2017] NSWSC 21 [*OneSteel*].
25. The period was originally one year, as in the Canadian PPSAs, but, in response to industry

interest which is unperfected at the commencement of the debtor's (or "grantor's," to use the Australian terminology) insolvency proceedings vests in the insolvency estate. *OneSteel* concerned the lease of mining equipment for a six-year term. The transaction was clearly a PPS lease and the lessor registered a financing statement. However, the financing statement misidentified the grantor (lessee) and, as a result the registration was invalid.[26] The grantor later went into administration and a dispute arose between the administrator and the lessee over the leased equipment. The administrator argued that since the lessor's security interest was unperfected at the commencement of the administration, the interest vested in the estate pursuant to section 267.

Section 51(xxxi) of the Australian Constitution gives the Commonwealth power to acquire property on just terms.[27] Australian PPSA, section 252B makes a provision of the statute inapplicable if its operation would result in the "acquisition of property" otherwise than "on just terms" in the section 51(xxxi) sense. The lessor argued that Australian PPSA, section 267 was inapplicable because it resulted in confiscation of the lessor's ownership rights in the disputed equipment. The court rejected the argument, holding that section 267 does not affect "an acquisition" at all. Rather, the provision goes to the nature and extent of the rights the secured party holds in the first place. In other words, the correct way of viewing the application of the provision is not that it detracts from rights the secured party held prior to the insolvency event but, rather, that it qualifies the secured party's initial entitlement.[28] This is essentially the same as the reasoning in *Re Giffen*. It is true that the contexts are different: in *Re Giffen*, the focus was on the interaction between provincial and

representations, it was extended to two years by the *Personal Property Securities (PPS Leases) Act* (Cth), 2017/39. The definition extends to transactions which are in substance or potentially for a term of more than two years, including a lease or bailment which is for a term of up to two years but which is automatically renewable, and a lease or bailment for a term of up to two years where the lessee or bailee remains in possession after the expiration of the formal term. The definition excludes transactions where the lessor or bailor is not in the business of leasing or bailing goods. It also excludes bailments where *the bailee* provides no value: see Duggan, *supra* note 14 at paras 3.34-3.40.

26. Australian PPSA, *supra* note 4 at ss 164-165.

27. *Commonwealth of Australia Constitution Act, 1990.*

28. The court gave two additional reasons in support of its conclusion. First, relying on earlier authorities, it held that the scope of section 51(xxxi) is limited to acquisitions for any purpose in respect of which the Parliament has power to make laws. "Where a law provides for the acquisition of property, not by the Commonwealth or one of its emanations, but by an independent third party, the acquisition is unlikely to be for [a purpose] of one of the Commonwealth powers, but rather for the private purposes of the third party" (at para 50). Second and relatedly, the court said, "a law which is not directed towards the acquisition of property as such but which is concerned with the adjustment of competing entitlements is unlikely to be characterized as 'a law with respect to the acquisition of property'" (at para 53).

federal laws (the British Columbia PPSA, section 20(1)(b) and the federal bankruptcy legislation), while in *OneSteel*, it was on the constitutional validity of PPSA, section 267 as an exercise of federal law-making power. However, the underlying issue was the same in both cases, as was the court's response.

Both cases are consistent with the PPSA basic substance over form approach. Although in form a finance lease provides for the retention of ownership in the lessor, in substance it is a security agreement and so the lessor's interest should have the same status in the lessee's insolvency proceedings as any other security interest. A true lease is, by definition, not an in substance security agreement, but if it is a lease for a term of more than one year (Canada and New Zealand) or a PPS lease (Australia), the lessor is deemed for the purposes of the statute to hold a security interest. The necessary implication is that the lessor is presumed to have transferred ownership and to have taken back or reserved a security interest to secure the lessee's obligations under the lease. The legislature's clear intention is that the statute should apply on the same footing to a deemed security interest as it does to an in-substance security interest. This point was not addressed directly in either *Re Giffen* or *OneSteel*, but it is supported by academic opinion in Canada which courts have accepted in New Zealand and Australia.[29]

Graham v. Portacom New Zealand Ltd,[30] a New Zealand case, concerned the supply of five portable buildings pursuant to a lease which was for a term of more than one year. The lessor did not perfect its "security interest." The lessee later gave a bank a security interest in all its present and after-acquired personal property and the bank registered a financing statement. The bank eventually appointed a receiver and a dispute arose over the receiver's right to sell the buildings. The receiver argued that the bank had priority because the lessor's security interest was unperfected. The lessor argued that the bank's security interest did not extend to the buildings because the PPSA requirements for attachment had not been met. One of the requirements for attachment is that the debtor must have rights in the collateral.[31] This is basic, because otherwise the security interest will have no subject matter (*nemo dat quod non habet)*. In the present case, the lessor owned the buildings while the lessee had only a right of possession and the bank's security interest was correspondingly bounded.

29. Bridge et al, *supra* note 7 at 602-603.
30. [2004] 2 NZLR 528, [2004] BCL 383 [*Graham v Portacom*].
31. New Zealand PPSA, *supra* note 3, s 40(1)(b); Nova Scotia PPSA, *supra* note 8, s 13(1)(b).

The court rejected the argument, holding that the lessee's rights were not limited to possession and that, "as against the lessee's secured creditors, the lessee has *rights of ownership* in the goods sufficient to permit a secured creditor to acquire rights in priority to those of the lessor."[32] Then, quoting from a well-known Canadian article, the court went on to say: "ostensible ownership…has effectively replaced derivative title for the purpose of determining the scope of the secured debtor's estate at the priority level. *Thus, by the very act of deeming a true lease to be a PPSA security interest, ownership in the leased assets is effectively vested in the lessee as against the lessee's secured creditors and trustee in bankruptcy.*"[33]

Re Giffen suggests that the lessee's possession is sufficient for a competing security interest to attach to the goods. But *Graham v Portacom* suggests an alternative conceptual basis for attachment, namely the lessee's deemed ownership. *Graham v Portacom* was followed in the Australian case, *Maiden Civil (P&E) Pty Ltd*; *Albarran v Queensland Excavation Services Pty Ltd*,[34] where the court, after quoting extensively from the New Zealand judgment, remarked that the Australian Parliament, "in enacting legislation that was modelled on the New Zealand and Canadian legislation, should be taken to have intended the same approach."[35]

III. *Some consequential issues*

1. *Introduction*

The PPSAs subtract from a lessor's ownership rights by deeming the lessor to hold simply a security interest and subjecting it to the statutory perfection requirements and priority rules. *Re Giffen* in Canada and *OneSteel* in Australia confirm that there is no unjustified taking involved, in effect, because the PPSAs are part of the very law of property which defines the lessor's entitlement in the first place. The cases focus on the nature and extent of the lessor's interest. *Graham v Portacom* in New Zealand, and *Maiden Civil* in Australia, focus on the nature of the lessee's interest, confirming that if the lessor is deemed to hold only a security interest then, as a corollary, the lessee must be deemed to have ownership. As both cases demonstrate, the point is important in the application of the PPSA attachment rules but at least in Canada, not much attention has been given to its implications in other PPSA contexts. In particular, as discussed below in Part III.2, the PPSAs require a secured party to amend

32. *Graham v Portacom, supra* note 30 at 28 [emphasis added].
33. *Ibid* at para 28 [emphasis added]. For another New Zealand case to the same effect, see *Waller v New Zealand Bloodstock Ltd*, [2005] NZCA 254.
34. [2013] NSWSC 852 [*Maiden Civil*].
35. *Ibid* at para 32.

its registration if the debtor transfers the collateral. These provisions raise characterization issues in connection with their application to leases: (1) are the provisions limited to transfers of ownership or do they apply also to the transfer of lesser interests; (2) are the provisions limited to actual transfers, or do they apply to deemed transfers as well; and (3) is a transfer of possession sufficient for the provisions to apply?

In a similar vein, all the PPSAs provide that an unperfected security interest is ineffective against (or subordinate to) a transferee of the collateral. How do these provisions apply to a true lease which is for a term of more than one year: is the lease deemed to be a sale so that the lessee's rights are determined as if she were a buyer, or are the deeming provisions suspended in this context? More or less the same question arises in connection with the "transactions in ordinary course" provision, which states that, in certain circumstances, a buyer or lessee of goods takes free of a security interest, even if it is perfected. In the case of a lease for a term of more than one year, do the provisions apply on the basis that the lessee is a deemed buyer or is it the lessee's actual status that governs? These questions are explored in the following discussion.

2. *Registration amendment following transfer of collateral*

The PPSAs all provide for the case where a security interest is perfected by registration against the debtor's name or other details and the debtor transfers her interest in the collateral in circumstances where the security interest continues following the transfer. There is a threat to the integrity of the register in cases like this because a registry searcher dealing with the transferee will probably conduct its search against the transferee's details but, since the security interest is registered against the transferor's details, the search will not disclose the registration. To reduce the risk, the PPSAs require the secured party to amend its registration by adding or substituting the transferee's details: see, for example, Nova Scotia PPSA, section 52(1).[36]

Section 52(1) clearly applies where the debtor sells the collateral outright. However, in the absence of a statutory definition, the meaning of "transfer" is less clear in transactions other than outright sales. Take first the case of a conditional sale agreement, where the seller (secured

36. The corresponding provision in Australian PPSA, *supra* note 4, s 34 applies regardless of whether the security interest is perfected by registration or some other method. The basic scheme in all jurisdictions is that the secured party must amend its registration within a certain period after the date of the transfer or the date it learns about the transfer, otherwise the security interest becomes wholly or partly unperfected (the details vary as between Ontario, the other provincial jurisdictions and New Zealand and Australia).

party) reserves title in the goods to secure payment of the purchase price. It could be argued that such a transaction is not a "transfer" for the purposes of s. 52(1), at least until property passes to the buyer at the end of the payment period. However, this overlooks the substance over form philosophy which underpins the PPSAs; the statutes are drafted on the assumption that a conditional sale agreement is in substance an outright sale on credit terms with a security interest reserved in the collateral to secure payment. In other words, the transaction is a deemed sale and s. 52(1) should apply on that basis.[37] The analysis should be the same if the transaction takes the form of a security lease (finance lease), because a security lease is in substance the same as a conditional sale agreement.[38] In both cases, the transaction in substance involves a partial transfer resulting in the transferor and the transferee both holding interests in the collateral. It follows that to comply with the registration amendment provision, the secured party should amend its registration by identifying the transferee as an additional debtor.[39]

On the other hand, for s. 52(1) to apply, there must be a transfer of "the debtor's interest" in the collateral. A true lease for a term of one year or less is not a transfer to which s. 52(1) applies because the debtor transfers only possession and the physical transfer of possession without more is not sufficient to attract the application of the provision.[40] This must be true because otherwise all bailments would be subject to s. 52(1), for example, storage, transportation and repair agreements, and that can hardly have been the intention. Does the same analysis apply where the transaction is a true lease for a term of more than one year? The PPSA scope provisions imply that a true lease for a term of more than one year is to be treated, for the purposes of the statute, on the same footing as a conditional sale agreement and a finance lease; in other words, the lessor is deemed to have sold the goods to the lessee and to have taken a security interest in the goods to secure the lessee's obligations. In other words, the lease is presumptively a sale and so it is a transfer as defined.

Stockco Ltd v Gibson and Stiassny[41] supports this view. The facts of the case were that Stockco leased a herd of heifers to Nugen as part of a sale and leaseback transaction. At all relevant times, the herd remained

37. Ziegel, Denomme & Duggan, *supra* note 1 at para 48.2.
38. *Ibid.*
39. *Ibid.* See the definition of "debtor" in Nova Scotia PPSA, section 2(1), which includes a transferee from or a successor in title to the original debtor. There is a corresponding provision in all the other PPSAs.
40. *Ibid.*
41. *Stocko, supra* note 36.

on land owned by a group of companies which the court referred to as the 'Security Group.' Nugen subsequently entered into a bailment agreement with the Security Group which allowed Nugen to graze the cattle on the Security Group's land for a period of 21 months. One of the issues was whether Nugen had "transferred" the heifers to the Security Group so that New Zealand PPSA, s. 88 (Nova Scotia PPSA, s. 52(1)) applied. The court held that: (1) a lease for a term of more than one year is a "transfer" for the purposes of s. 88; (2) the bailment was not a lease for a term of more than one year as defined in subsection 16(1) because Nugen was not regularly engaged in the business of bailing cattle, as the definition requires; and (3) therefore, s. 88 did not apply. These conclusions are *obiter*, but they clearly suggest that a lease for a term of more than one year (or a PPS lease in the Australian context) is a "transfer" even though the lease does not in substance secure payment or performance of an obligation. They also confirm the conclusion suggested above that "transfer" does not include a true lease which is for a term of one year or less (as defined). The decision in *Stocko* is consistent with the overall scheme of the legislation and with the policy of avoiding litigation on the true lease-finance lease distinction. The meaning of "transfer" in the context of the equivalent provision in Australian PPSA s. 34 was explored in considerable detail in the Whittaker Review.[42] The Review's conclusions are in line with the *Stockco* case.

All the PPSAs except Ontario have a rule for determining priorities between competing security interests given by different debtors (the "double debtor priority provision"). The issue arises where the debtor transfers an interest in collateral subject to a perfected security interest and the transferee creates another security interest in favour of a second secured party.[43] In the fact situation to which the provision applies, the first secured party's security interest will become unperfected if it fails to comply in time with the requirement to amend its registration following the transfer. The double-debtor priority rule presupposes either that the first secured party has amended its registration to substitute the transferee as the new debtor or, alternatively, that the secured party's grace period under the registration amendment provision has not expired. In any event, there is a clear connection between the registration amendment provision

42. Bruce Whittaker, *Review of the Personal Property Securities Act 2009: Final Report* (Commonwealth of Australia, 2015), Annexure C ["Whittaker Report"].

43. See e.g. Nova Scotia PPSA, *supra* note 8, s 36(8). The provision is not comprehensive. It only applies where the transferee-created security interest was granted before the transfer and, subject to some exceptions, it gives priority to the transferor-created security interest: for discussion, see Cuming, Walsh & Wood, *supra* note 1 at 434-437.

and the double debtor provision, and it follows that "transfer" should have the same meaning in both contexts.

3. *Transferee of collateral versus unperfected security interest*

The Canadian PPSAs provide that an unperfected security interest is subordinate to the interest of a transferee of the collateral who gives value and has no knowledge of the security interest at the time of the transfer.[44] The provision clearly applies where the transaction between the debtor and the transferee is an outright sale. By extension, it should also apply where the transaction is a conditional sale agreement, given the statute's substance over form philosophy. In the case of a conditional sale agreement, the transfer of ownership is delayed and it could be argued that the provision does not apply if the security interest becomes perfected between the date of the transaction and the date of the ownership transfer. On the other hand, typically the transferee will have obtained possession of the collateral, along with a contingent right of ownership, on or around the date of the transaction and so the provision should apply on that basis. Otherwise, the transferee would be forced to conduct two register searches: one in advance of the transaction and the second before property passes.[45] Another way of reaching the same conclusion would be to say that, for the purposes of the statute, the transaction is deemed to be an outright sale coupled with the secured party having taken or reserved a security interest to secure payment of the price. On that basis, ownership is notionally transferred at the date of the transaction and, if the security interest is unperfected at that point, the provision applies.[46]

A related issue is whether the provision applies to a conditional sale agreement if the security interest becomes perfected after the date of the transaction but before all the payments have been made. The statute

44. See e.g. Nova Scotia PPSA, *supra* note 8, s 21(3). The Ontario PPSA provision has an additional limitation, not found elsewhere, that the transferee must have taken delivery of the collateral. The corresponding provision in Australian PPSA, section 43(1) is simpler: "a buyer or lessee of personal property, for value, takes the personal property free of an unperfected security interest." New Zealand PPSA, section 52 is similar. The Saskatchewan PPSA was amended in 2020 to bring its version of the provision into line with Australia and New Zealand: Saskatchewan *Personal Property and Securities Act*, 1993, SS 1993, c P-6.2, s 20(3) [Saskatchewan PPSA].

45. See Cuming, Walsh & Wood, *supra* note 1 at 379-380. This conclusion would be consistent with the generally accepted view that a conditional sale purchaser is a "buyer" in the context of the buyer in ordinary course provision: see Part III.4, below.

46. The provision does not apply if the transaction between the debtor and the transferee is a security agreement. But this limitation refers to cases where the *transferee* is the secured party (as where the transaction takes the form of a mortgage), not the transferor: Cuming, Walsh & Wood, *supra* note 1 at 381. Compare with the Australian PPSA, section 42, which makes the point explicitly: "[s. 43(1) and following provisions do] not apply to the acquisition of an interest in personal property…that is itself a security interest."

defines "value" to mean any consideration sufficient to support a simple contract.[47] On that basis, the transferee's promise of payment is value and if the security interest is unperfected at the date of the promise, the section applies.[48]

It has been argued that the provision also applies where the transaction is a lease, but with different consequences. In the case of a sale, the effect of the provision is that the transferee obtains ownership of the collateral free of the security interest; whereas in the case of a lease, the transferee obtains possession and use of the collateral free of the security interest, but the security interest continues in the debtor-lessor's reversionary interest and may be asserted against the debtor-lessor when the lease ends.[49] This statement presupposes a true lease agreement. It does not apply to a finance lease because a finance lease is in substance a conditional sale agreement and so it should be treated on the same footing.

The same might be said of a (true) lease that is for a term of more than one year, given that, for the purposes of the statute, the lessor is deemed to have sold the goods and retained a security interest to secure payment of the lessee's obligation. But the sale is only a deemed or notional one and it does not confer actual ownership on the lessee. If the provision applied on the basis that the lessee actually owned the goods, it would give the lessee a windfall; the lessee only ever bargained for possession and use of the goods for the term of the lease and it never expected to become the owner. The provision states that the unperfected security interest is subordinate to "the *interest* of a transferee." In the context of a lease for a term of more than one year, these words should be read as signifying that the lessee takes its rights under the lease free of the security interest, but the security interest continues in the lessor's reversionary interest. In other words, the provision applies in the same way to all true leases, whether or not they are for a term of more than one year.

One implication of this analysis is that references in the statute to a "transfer" do not always mean the same thing. A transfer of possession alone may be sufficient to attract the application of Nova Scotia PPSA,

47. See e.g. Nova Scotia PPSA, *supra* note 8, s 2(1).

48. See Cuming, Walsh & Wood, *supra* note 1 at 378-379. *Contrast Royal Bank of Canada v Dawson Motors (Guelph) Ltd* (1981), 15 BLR 83, 1981 CarswellOnt 210 (Ont Co Ct), discussed in Ziegel, Denomme & Duggan, *supra* note 1 at para 20.2.6.2. The same issue might arise if the transferee acquires actual knowledge of the security interest before completing the payments. The appropriate response in cases like this is not to deny the transferee clear title, but instead to allow them to complete the transaction by making the balance of the payments to the secured party: *ibid*. Nova Scotia PPSA, *supra* note 8, s 29(1)(b) and its counterparts in the other PPSAs is relevant in this connection (a security interest extends to the proceeds of any dealing with the collateral).

49. Cuming, Walsh & Wood, *supra* note 1 at 377.

section 21(3) and its equivalents elsewhere, whereas in other contexts the transfer must involve something more. A second implication is that in applying section 21(3) and its equivalents to leases, the courts may be called upon to determine whether the transaction is a true lease or an in-substance security agreement and the considerations identified in Part I, above, will be relevant in this connection. This conclusion runs counter to the generally received wisdom, which is that "a characterization problem involving leases for a term of more than one year can arise only in the context of Part V [the enforcement provisions]."[50]

4. *The transactions in ordinary course provision*

Nova Scotia PPSA, section 31(2) provides that a buyer or lessee of goods sold in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest unless the buyer or lessee knows that the transaction is in breach of the security agreement (the "transactions in ordinary course provision"). There is a corresponding provision in all the other PPSAs, though in Ontario buyers and lessees are provided for separately, in section 28(1) and (2) respectively. The two Ontario provisions are in parallel terms, except that subsection (1) refers to the buyer taking the goods free of a security interest, while subsection (2) refers to the lessee holding the goods, "to the extent of the lessee's rights under the lease," free of the security interest. The main purpose of the provisions is to protect retail purchasers against restrictions in the security agreement on the debtor-seller's (lessor's) freedom to deal with the goods which may be hard to discover without conducting a PPS register search and making follow-up inquiries.

In *Royal Bank of Canada v 216200 Alberta Ltd*,[51] an inventory financer seized goods from a retailer, including items that were on order from various customers. At the time of the seizure, the items had not been appropriated to the individual orders so that property in them had not passed to the customers in accordance with the sale of goods legislation.[52] The court held that the customers could not rely on the transactions in ordinary course provision because until the passing of property there was no sale, but only an agreement to sell, and it made no difference that the customer may have pre-paid some or all of the purchase price.[53] The

50. Cuming, *supra* note 7 at 260-261. See also: Burke, *supra* note 7 at 300 ("only if default occurs under a lease will the characterisation of the lease possibly be relevant for relevant purposes of Part V of the OPPSA"); Cuming, Walsh & Wood, *supra* note 1 at 155; Ziegel, Denomme & Duggan, *supra* note 1 at para 2.5.

51. (1986), 33 DLR (4th) 80, 1986 CarswellSask 264 (Sask CA).

52. *Sale of Goods Act*, RSS 1978, c S-1, ss 19-20.

53. For a fuller account, see Ziegel, Denomme & Duggan, *supra* note 1 at para 28.2.2.3; Cuming,

decision was hard on the prepaying customers, but it is generally accepted as correct; the proper approach to protecting pre-paying buyers in these situations is *via* amendments to the passing of property rules in the sale of goods legislation, not by expansively interpreting the PPSA.[54]

The decision in the *Royal Bank* case suggests that the transactions in ordinary course provision may not apply if the transaction is a conditional sale, where property is reserved in the seller until the buyer has paid all the instalments, because until property passes there is no sale. But that would run counter to the PPSA's substance over form philosophy: as a matter of substance, there is no difference between the case where the customer finances the transaction on conditional sale terms and the case where the customer buys the goods outright with loan finance obtained from a third-party source. *Spittlehouse v Northshore Marine Inc (Receiver of)*[55] concerned a contract for the construction and supply of a yacht on reservation of title terms. The buyer had paid around ninety per cent of the price when the yacht was seized by a financer holding a perfected security interest in the yacht builder's inventory. The question was whether OPPSA, s. 28(1) applied, given that property in the yacht had not passed to the buyer. The Ontario Court of Appeal refused to follow the *Royal Bank* case, holding that: (1) the provision should be read as applying to sales in a non-technical sense; and (2) on that basis it was immaterial that property had not passed to the buyer before the yacht was seized. The problem with *Spittlehouse* is that, while it reached the right result on the facts, it is at odds with the *Royal Bank* case which, as noted above, was also correctly decided.

The court in *Spittlehouse* might have reached the same result without contradicting the *Royal Bank* case if it had taken a substance over form approach. This would have involved recognizing that, for PPSA purposes, a conditional sale is in substance an outright sale under which property passes immediately to the buyer with the seller taking or reserving a security interest to secure payment of the price.[56] The courts themselves

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Walsh & Wood, *supra* note 1 at 387-388.

54. I.e., the problem requires a comprehensive response, not a piecemeal one. For example, it does the customer no good to have the protection of the PPSA transactions in ordinary course provision if the sale of goods rules on the passing of property continue to apply in the bankruptcy context: see Ziegel, Denomme & Duggan, *supra* note 1 at para 28.2.2.3; Cuming, Walsh & Wood, *supra* note 1 at 389-390; Ronald CC Cuming, "A Facelift for the Saskatchewan (and Other) PPS Acts" (2020) 63 Can Bus LJ at 36-37.

55. (1994) 18 OR (3d) 60, 114 DLR (4th) 500 [*Spittlehouse*].

56. See Jacob S Ziegel, "To What Types of Sale Does Section 28(1) of the OPPSA Apply?" (1995) 24 Can Business LJ 457. Compare UCC § 2-401 (2002): "[a]ny retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest."

might have arrived at that solution eventually, but the Ontario legislature decided not to leave matters to chance. The Ontario PPSA was amended in 2006 by the addition of subsections 28(1.1)–(1.3).[57] These provisions are designed to make it clear that subsection (1): (1) applies whether or not property in the goods has passed to the buyer; but (2) does not apply unless the goods have been 'identified' to the contract. The provisions effect a statutory reconciliation of the *Royal Bank* and *Spittlehouse* cases: in a *Royal Bank* scenario, subsection 28(1) would not apply because the disputed goods were not identified; while in a *Spittlehouse* scenario, subsection (1) would apply because, even though property had not passed, the goods were identified.

Saskatchewan enacted comparable reforms in 2020 when parallel amendments were made to the PPSA and *Sale of Goods Act* stating, in effect, that: (1) a buyer who has paid all or substantially all of the contract price, acquires an equitable interest in the goods immediately on the seller acquiring the goods; and (2) a retention of title provision in the sale agreement does not affect the outcome.[58] The results are that in a *Spittlehouse* scenario, the buyer has the protection of the PPSA transactions in ordinary course provision and, provided they have pre-paid "all or substantially all of the contract price," protection also in the debtor's bankruptcy.[59] In December 2020, the Alberta Law Reform Institute released a report for discussion on personal property security law reform.[60] The report recommends addressing the *Spittlehouse* issue by the addition of a new subsection (1.1) to the Alberta PPSA, section 30 (the transactions in ordinary course provision),[61] stating that: "any retention of or reservation by the seller of title or property in goods that are delivered to the buyer is limited in effect to a reservation of a security interest."[62] The provision is based on section 2-401 of the United States *Uniform Commercial Code.*[63] In summary, as a result of the above reforms, the Ontario and Saskatchewan transactions in ordinary course provision extends to buyers under conditional sale agreements and the same is prospectively true in

57. And also subsubsections 28(2.1)–(2.3), which are parallel provisions applicable to the lessee in ordinary course provision (subsection 28(2)). The amendments were recommended in the CBAO Submission 1998, *supra* note 14 at 14-16.
58. *Saskatchewan PPSA, supra* note 3, s 30(2.1)-(2.2); *Sale of Goods Act, supra* note 52, s 20, rule V, (1.1)-(1.2).
59. See Cuming, s*upra* note 54 at 37-38.
60. Alberta Law Reform Institute, *Personal Property Security Law: Report for Discussion*, 35 (2020) ["ALRI Report"].
61. *Personal Property Security Act*, RSA 2000, c P-7, s 30.
62. "ALRI Report," *supra* note 60 at paras 125-128 (including Recommendation 16).
63. *Supra* note 57.

Alberta. In provinces which have not enacted corresponding reforms, the outcome depends on the willingness of the courts to treat conditional sale agreements on a substance over form basis.

The effect of the transactions in ordinary course provision in its application to conditional sale agreements is that the buyer takes their interest in the goods free of the security interest. The buyer's interest comprises a right of possession and a right of ownership contingent on completing the payments. The transactions in ordinary course provision prevents the secured party from interfering with the buyer's possession during the currency of the agreement and it gives the buyer title free of the security interest when property passes.[64]

As indicated earlier, Ontario PPSA, section 28 provides separately for sales and leases in subsections (1) and (2) respectively. This approach has the benefit of making it clear that "taking free of the security interest" means different things in the two contexts. But the statute does not address the question as to which subsection applies in the case of a finance lease. In principle, the answer should be that subsection (1) applies, because a finance lease is in substance the same as a conditional sale agreement. In the absence of the 2006 amendments, this would have been an easy enough conclusion to reach. But the amendments muddy the waters by at least suggesting that the deemed sale argument may not apply (because if it did, the amendments would not have been necessary). On the other hand, the point may not particularly matter. Section 28(2) refers to the lessor holding the goods free of any security interest "to the extent of the lessor's rights under the lease." In the case of a finance lease, the lessee has a right of possession coupled with a least de facto right of ownership contingent on completing the payments and, on this basis, subsections (1) and (2) produce the same result.

The analysis is simpler in the case of a true lease, where subsection (2) clearly applies. The result is that the lessee holds free of the security interest, but only to the extent of its possessory rights under the lease. The provision does not affect the secured party's claim to the lessor's reversionary interest and so it may assert its security interest against the lessor once the lease comes to an end. In the other provinces, and also in Australia and New Zealand, the transactions in ordinary course provision do not separate out sales and leases, but says simply that a "buyer or lessee" takes the goods free of any security interest. On the other hand, it

64. But the security interest extends to the buyer's payments as proceeds of the original collateral, and so the secured party can claim the payments from the debtor-seller assuming they remain traceable: see e.g. Nova Scotia PPSA, *supra* note 8, s 29(1)(b).

is clear by implication that the provisions apply to leases in the same way as the Ontario version.[65]

The position should be the same regardless of whether the lease is for a term of more than one year. It is true that if the lease is for a term of more than one year, the lessor is deemed for the purposes of the statute to hold a security interest and, by implication, the lessee is deemed to have acquired ownership. But, as with Nova Scotia PPSA, section 21(3) and its equivalents elsewhere, the transactions in ordinary course provision could only work on that basis by giving the lessee actual ownership free of the security interest, which would be a windfall. In summary, the transactions in ordinary course provision applies to a finance lease on the same basis that it applies to a conditional sale, but it applies differently to a true lease, even if the term is more than one year. This is another context, then, apart from the PPSA enforcement provisions, where the true lease-finance lease distinction continues to matter.

Conclusion

The influence of the Canadian PPSAs has spread internationally over the past decade or so, with various countries, including New Zealand and Australia, relying heavily on the Canadian model to reform their own secured transactions laws. These importing countries have benefited in the process because reliance on a tried and tested model avoids the costs of reinventing the wheel and it enables courts and commentators in the importing country to key into the exporting country's learning. As this article has demonstrated, Australian and New Zealand courts have relied to a considerable extent on Canadian case law and literature in developing their own jurisprudence, but in the process they are giving back by offering their own perspective on issues that have not received as much attention in Canada.

The article's focus is on the application of the statute to lease agreements. In Canada, the non-Ontario provinces took the initiative of collapsing the true lease-finance lease distinction in their PPSAs, for the purposes both of avoiding litigation on the question and addressing the ostensible ownership problem which is common to both kinds of lease and Ontario eventually moved to this model as well. The New Zealand and Australian PPSAs both followed suit, but their courts and commentators have brought to light some features of the measure which have not been systematically explored in Canada. These include, as discussed above, the implications of the deemed security interest provisions in contexts outside

65. See Cuming, Walsh & Wood, *supra* note 1 at 377.

PPSA, Part V (enforcement of security interests), namely, the provisions governing: registration amendments following the transfer of collateral; priorities between competing security interests given by different debtors; the priority status of an unperfected security interest relative to a transferee of the collateral; and the rights of a buyer or lessee of collateral sold or leased in the ordinary course of business. The conventional wisdom in Canada is that the true lease-finance lease distinction has been successfully confined to enforcement issues, but the New Zealand and Australian contributions indicate that the distinction remains relevant in quite a number of other contexts as well. It is true that there has been no litigation to date on the issue in these other contexts, but the prospect is clearly there. The bottom line is that while collapsing the true lease-finance lease distinction for PPSA purposes has doubtlessly reduced both litigation and information costs, the cost savings at least on the litigation front may be somewhat less than was originally supposed.

The discussion in this article has focused on cases where there are only two relevant dealings: the security agreement and the lease. But in Australia, a good deal of attention has also been given to the more difficult issues that arise where there are three or more transactions involved: for example, where a secured party holds a security interest in goods which the debtor subsequently leases to a lessee who in turn either becomes bankrupt or consensually transfers, sub-leases or gives a security interest in the goods to a fourth party.[66] To date, this issue has barely been addressed in the Canadian case law and literature.[67] But it is bound to surface at some point. When it does, Canadian courts and commentators will no doubt draw on the Australian contributions, in a further manifestation of the international knowledge-sharing that the spread of the PPSAs has made possible.

66. See "Whittaker Report," *supra* note 42, Annexure C; Craig Wappett & Anthony Duggan, "Rights in Collateral Under the PPSA: Rebutting the Minimalist Approach" (2019) 30 J Banking & Finance L & Practice 151; Diccon Loxton, Sheelagh McCracken & Andrew Boxall, "PPSA Models: A Minimalist Approach" (2018) Commercial L Quarterly 3; Diccon Loxton, Sheelagh McCracken & Andrew Boxall, "Chains of Leases: Aligning PPSA Models with Commercial Expectations" (2018) Commercial L Quarterly 3; Diccon Loxton, Sheelagh McCracken & Andrew Boxall, "PPSA Models: Easy as ABCD?" (2018) Commercial L Quarterly 52; Linda Widdup, "Operating Leases as Second -Tier Security Interests: A Continuing Case for Nemo Dat Under the Personal Property Securities Act 2009 (Cth)" (2013) 22 Austl Prop LJ 114; Duggan, *supra* note 14 at paras 5.54-5.60.

67. But see *Perimeter Transportation Ltd, Re*, 2010 BCCA 509; Ziegel, Denomme & Duggan, *supra* note 1 at para 20.2.5.