

PPSA ISSUES IN REAL ESTATE TRANSACTIONS

Prepared by:

Jennifer Dezell

Fraser Milner Casgrain LLP
15th Floor, 1040 West Georgia Street
Vancouver, BC V6E 4H8

Telephone: 604-443-7146

Facsimile: 604-683-5214

jennifer.dezell@fmc-law.com

Lawyers in:

Montréal

Ottawa

Toronto

Edmonton

Calgary

Vancouver

New York



FRASER MILNER CASGRAIN LLP

www.fmc-law.com

Table of Contents

I.	Introduction.....	1
II.	Property Regimes – Real vs Personal	1
	A. Real Property.....	1
	B. Personal Property.....	2
	C. Intersection	3
III.	Fixtures and Growing Crops.....	3
	A. Definition of Fixtures.....	3
	B. Definition of Crops	6
	C. Security Interest in Fixtures	7
	D. Priority	10
	E. Remedies and Competing Rights.....	13
IV.	Floating Charges	16
	A. Definition.....	16
	B. Registration	17
	C. Crystallization	18
	D. Priority	19
	E. Clients' Concerns	20
V.	Conclusion.....	20

I. Introduction

In British Columbia, property is governed by two separate regimes: interests in real property are governed by the *Land Act* and the *Land Title Act* (the “LTA”), and security interests in personal property are governed by the *Personal Property Security Act* (the “PPSA”).

In certain circumstances, these two regimes overlap. When this occurs, real property can be encumbered under the PPSA.

II. Property Regimes – Real vs Personal

A. Real Property

The real property regime in effect in British Columbia is concerned with title and other interests in particular parcels of real property. Unless it is registered under the LTA, no transfer, charge or other dealing with land (other than a lease for less than three years where there is actual occupation) operates to pass a legal or equitable estate or interest in the land (LTA s. 20), except as against the person making it.

The intention is to make the register conclusive (subject to fraud), and to allow parties dealing with land to rely upon it. Except where a party has obtained title or taken a charge over land by participating in fraud, no person is affected by express, implied or constructive notice of an unregistered interest, with some exceptions (LTA s. 29).

In particular, the LTA allows holders of interests in real property to ignore registrations made under the PPSA:

- 29(3) Subject to section 49 of the *Personal Property Security Act*, a person contracting or dealing with, taking from or proposing to take from a registered owner, an estate or interest in land, or a transfer or assignment of an estate or interest in land, is not affected by a financing statement registered under that Act whether or not the person had express, constructive or implied notice or knowledge of the registration.

Furthermore, actual knowledge of a registration made under the PPSA does not constitute fraud for the purposes of the LTA:

- 29(4) The fact that the person who is contracting with, dealing with, taking from or proposing to take from a registered owner under subsection (2) had knowledge of a financing statement registered

under the *Personal Property Security Act*, or that the person could have obtained knowledge of the financing statement by searching the personal property registry established under that Act, is not evidence of fraud or bad faith for the purposes of subsection (2).

B. Personal Property

Unlike the LTA, the PPSA is concerned only with security interests, not ownership interests. The PPSA provides the framework within which secured parties can take and perfect their security interest in a debtor's personal property. It governs the relationship between the debtor granting a security interest in personal property and the secured party, and also that between or among secured parties who have taken a security interest in the same personal property of the same debtor.

The Personal Property Registry (the "PPR") is not a title registry. A debtor may grant a security interest in all of its present and after-acquired personal property, and a secured party may perfect that interest by registration. However, the PPR will do nothing to assist those parties in determining what personal property the debtor owns. Unlike registration in a Land Title Office (the "LTO"), registration in the PPR does not constitute "express, constructive or implied" notice to any party, or knowledge of the contents of the financing statement (PPSA s. 47).

Subject to certain limitations, the PPSA applies "to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral" (PPSA s. 2(1)). It does not purport to apply to "all personal property" but instead sets out the limitations of its scope (PPSA s. 4). Among these limitations are the following:

- 4(f) the creation or transfer of an interest in land, other than an interest arising under a licence [narrowly defined in the PPSA], including
 - (i) a lease,
 - (ii) a petroleum and natural gas lease under the *Petroleum and Natural Gas Act*,
 - (iii) a lease, issued under the *Coal Act*, that confers the right to produce coal, or
 - (iv) any similar interest that is prescribed for the purposes of this section;
- (g) the creation or transfer of an interest in a right to payment that arises in connection with an interest in land, including an interest in rental payments payable under a lease of land[.]

This carve-out from the personal property regime fits snugly against the boundaries of the LTA. It also serves to create certainty around the characterization of certain interests in land, such as mortgage debt and leases of land, which at common law were classified as personalty.

C. Intersection

Despite their apparent isolation from one another, there are points at which the real property regime intersects with the personal property security regime. For example, s. 2(2) of the PPSA provides that “despite s. 4(g)” quoted above, the PPSA will apply to “conflicting interests” in a security or instrument unless the security or instrument has been registered under the LTA, in which case, the LTA will apply (PPSA s. 2(2)). Both the PPSA and the LTA have application with respect to fixtures, crops and floating charges.

At common law, personal property becomes real property when goods become fixtures, but security interests in fixtures are governed by s. 36 of the PPSA. Although one might intuit that crops form part of the land on which they are growing, they are included in the definition of “goods” under the PPSA and, subject to the application of the *Bank Act*, security interests in them are governed by s. 37 of the PPSA.

An uncrystallized floating charge on land is a certain kind of interest in real property. It has been created but, for one reason or another, has not yet (and may never) become registrable under the LTA. Section 203 of the LTA allows secured parties to register these interests in the PPR until such time as they can be registered under the LTA.

III. Fixtures and Growing Crops

A. Definition of Fixtures

1. PPSA

The PPSA defines “goods” as including fixtures, but “fixtures” is only defined in the negative, as not including building materials. “Building materials” are defined as materials “that are incorporated into a building” and become integral to the structure as a whole. “Building” is defined as “a structure, erection, mine or works built, constructed or opened on or in land”.

The definition of “building materials” excludes heating, air conditioning or conveyancing devices, and “machinery installed in a building or on land for use in carrying on an activity inside the building or on

the land". These excluded materials could therefore be "fixtures", provided they pass the common law test for fixtures without being caught by the definition of "building materials" under the PPSA.

2. *Common Law*

The common law of fixtures begins with the principle that whatever is affixed to the land (or a building on the land), belongs to the land. If goods are installed to improve the freehold, they become part of the realty (paralleling the first part of the definition of "building materials" in the PPSA). If a chattel is installed for the better enjoyment of the chattel itself, it does not form part of the realty and remains personal property. The common law tests for whether personal property ought to be considered a fixture are difficult to apply, and are subject to exceptions depending on the circumstances.

For example, as discussed in more detail below, it is presumed at common law that a chattel that is attached, even slightly, to the land other than by its own weight it is a fixture. Conversely, if it rests on the land merely by gravity, it is not a fixture. The degree and object of annexation, together with the intention of the affixer (insofar as it can be inferred) may be relevant in rebutting these presumptions.

In *Westshore Terminals Ltd. v. British Columbia*, [1999] B.C.J. No. 338, Saunders J. set out the test for fixtures at common law as follows, at paragraph 15:

The test for a fixture at common law is found in *Stack v. T. Eaton Co.*, [1902] 4 O.L.R. 335 (Ont.Div.Ct.) at p.338, adopted by the British Columbia Court of Appeal in *La Salle Recreations Ltd. v. Canadian Camdex Investments Ltd.* (1969), 4 D.L.R. (3d) 549 at p. 554:

I take it to be settled law:

- (1) That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as shew that they were intended to be part of the land.
- (2) That articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue chattels.
- (3) That the circumstances necessary to be shewn to alter the prima facie character of the articles are circumstances which shew the degree of annexation and object of such annexation, which are patent to all to see.
- (4) That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation.

In *Royal Bank of Canada v. Maple Ridge Farmers Market Ltd.*, [1995] B.C.J. No. 1696, Maczko J. summarized the *Stack v. T. Eaton Co.* test as follows, at paragraph 2:

Simply put, the test requires first determining whether an item is "slightly attached" and therefore presumed to be a fixture; and second, if it is slightly attached, to consider whether the presumption is defeated by the intended use of the item, ascertained by reference to the degree and object of the annexation.

Maczko J. went on to set out a series of rules for determining whether an item is a fixture or a chattel, with an aim to providing more certainty for clients, at paragraphs 12 through 23, as follows:

- 1) Any item which is unattached to the property, except by its own weight, and can be removed without damage or alterations to the fixtures or land that will need repair, is a chattel.
- 2) Any item which is plugged in and can be removed without any damage or alteration is a chattel.
- 3) Any item which is attached even minimally (i.e. it cannot simply be unplugged) is a fixture.
- 4) If a piece of equipment is attached to a structure, a part of which could be removed but which would be useless without the attached part, then the entire piece of equipment is a fixture. In other words, the item will be a fixture if it loses its essential character because it is of no use unless attached to a permanent and substantial improvement to the premises of which it formed part. The converse is also true. If an item can be detached without damage or alteration, and if the item retains its essential character without the attached part, then it will be a chattel.
- 5) Where an item is determined to be a fixture, it may nevertheless be removed if it can be shown that it is a tenant's fixture. A tenant's fixture may be removed from the premises during the currency of the tenancy provided that the tenant leaves the premises in exactly the same condition as he or she received them.
- 6) In very exceptional circumstances not covered by these rules the court should have resort to the purpose test. For example, a mobile home may be resting on the land by its own weight but it may be clearly established that it was intended to be a fixture. These circumstances should only arise rarely and in relation to very large or expensive items.

In determining whether an item is a "fixture" for the purposes of the PPSA, the common law test must be applied in conjunction with the definitions of "fixture", "building materials" and "building" set out in the PPSA.

B. Definition of Crops

1. PPSA

Crops are defined in the PPSA as “crops, whether matured or otherwise, naturally grown or planted, attached to the land by roots or forming parts of trees or plants attached to the land...”. The definition includes only specific categories of trees: those being grown as nursery stock, those being grown for uses other than the production of lumber and wood products, and those intended to be replanted for the purpose of reforestation. Once crops are severed from the land, they are treated as goods.

The secured party should also bear in mind that a security interest in after-acquired crops is only good for one year. After that, the security agreement must be renewed in order for the security interest to attach, unless it is given in conjunction with a lease, purchase or mortgage of land (PPSA s. 13(2)).

(a) Trees Other Than Crops

Standing timber for use in the production of lumber and wood products is expressly excluded from the definition of “crops”. The PPSA defines “licence” specifically as an agreement under section 12 of the *Forest Act*. Even though such an agreement may at common law be an interest in land (a *profit à prendre*), section 7(8) of the PPSA provides that the validity, perfection and effect of perfection and non-perfection in a security interest in a “licence” is governed by the PPSA. A lender taking a security interest in a “licence” would therefore register its interest in the PPR rather than the LTO, and no notice may be registered in the LTO in respect of such interest.

Under the PPSA, trees other than “crops” become “goods” in which the debtor has rights, for the purposes of attachment, once they are severed from the land (PPSA s. 12(3)). As a consequence, a lender who takes a mortgage over private timber land must keep in mind that the value of the land will likely correlate directly to the value of the timber growing on it. To protect its collateral fully, such a lender should also take a security interest in the debtor’s personal property, sufficiently described to cover the harvested timber and all proceeds thereof, and should perfect that security interest by registering a financing statement in the PPR.

C. Security Interest in Fixtures

A security interest may be taken in fixtures either before or after they have become affixed. This constitutes a partial reversal or exception to the common law rule that fixtures are real property and interests in them are ruled by real property law. A security interest in fixtures is not treated as an interest in land. As noted above, fixtures are a category of “goods”, and goods are personal property.

1. *Fixtures Notice*

Section 49 of the PPSA permits a secured party to file a notice (referred to in this paper as a “**fixtures notice**”) in the LTO setting out its security interest in goods that are or may become fixtures or in crops that are growing or to be grown. Unlike registrations in the PPR, the fixtures notice, once filed, constitutes notice of the security interest to every person dealing with the land (PPSA s. 49(3)). The fixtures notice appears on title in the section headed “legal notations” rather than the section headed “charges”. As noted above, while a fixtures notice in crops is valid until it expires or is cancelled, a security interest in after-acquired crops may have a one-year expiry date by operation of PPSA s. 13(2).

2. *Registration*

(a) Contents of Form

The fixtures notice is registered in Form 1 under the PPSA Regulation, together with a Form 17 under the LTA. The instrument creating the security interest, such as a general security agreement, is not registered. Because the fixtures notice is merely notice of an interest under the PPSA, any party wishing to review the instrument creating the security interest will have recourse to section 18 of the PPSA to do so. A sample fixtures notice in Form 1 is attached as Appendix A.

The fixtures notice must be signed by the secured party or its agent and witnessed. It must contain the following information (PPSA Regulations s. 38(1)):

- (a) the full name and full mailing address of the secured party,
- (b) the full name and full mailing address of the debtor,
- (c) a description of the goods or crops by which they may readily and easily be known and distinguished,

- (d) the expiry date of the notice being filed at the land title office, or a statement that it is an infinite registration,
- (e) a description of the land to which the goods are or are to be affixed, or on which the crops are growing or to be grown, sufficient for the purpose of identification in the land title office, including a parcel identifier, if applicable, and
- (f) if the notice being filed in the land title office refers to a security interest concerning which another notice, filed under the *Sale of Goods on Condition Act*, is on file in that office, the words "transition filing:" followed by the date, time and filing number assigned to the other notice by the registrar of land titles.

(b) Limitations

It is not clear whether the contents of the fixtures notice would be subject to invalidity under the PPSA for being "seriously misleading" in the same way that financing statements. However, it may be that the registrar would decline to register a fixtures notice that contained insufficient information or otherwise did not meet the requirements of the PPSA regulation. Clearly, the legal description of the land must at least be that of an existing parcel.

A secured party with an interest in fixtures is limited to the remedies set out in the PPSA and in the instrument creating the security interest (see section III. E, below). A secured party cannot file a certificate of pending litigation on the basis of a fixtures notice and thereby become a registered holder of an interest in land.

3. *Amendment*

A secured party may extend, renew, assign, cancel, partially cancel or postpone a security interest in fixtures or crops. To effect any of these changes, a PPSA Form 2, signed by the secured party or its agent and witnessed, may be registered in the LTO. The Form 2 amendment must set out all the required information in accordance with s. 38(2) of the PPSA Regulation, paraphrased as follows:

- (a) the name of the secured party,
- (b) a sufficient legal description of the land,
- (c) the date the original notice was filed and the instrument number assigned to it,

- (d) in the case of a notice of renewal, the number of years or infinite registration,
- (e) in the case of a postponement,
 - (i) the full name and full mailing address of the person to whom the interest of the secured party is being postponed, and
 - (ii) the nature and instrument number of the interest to which the interest of the secured party is being postponed,
- (f) in the case of a notice of a partial cancellation releasing collateral from the security interest, the particulars of the collateral deleted from the secured party's interest,
- (g) in the case of a notice of cancellation, a statement to the effect that the notice mentioned in subsection (1) is wholly cancelled and the security interest is discharged,
- (h) in the case of a notice of cancellation relating to the release of all collateral on one parcel of land, a description of that parcel of land, and
- (i) in the case of a notice of assignment,
 - (i) a statement to the effect that the notice has been assigned, and
 - (ii) the full name and full mailing address of the person to whom the interest is being assigned[.]

Where the secured party's security interest is being released in respect of all of the collateral on one or more parcels of land, a separate Form 2 must be registered for each such parcel (PPSA Regulation s. 38(3)). Aside from that express limitation, identical changes affecting several parcels can likely be submitted on the same Form 2.

4. Rights of Other Parties

Often, expired fixtures notices will remain on title. These are of no effect. Any person with an interest (not necessarily a registered interest) in the land may apply to have an expired fixtures notice cancelled, on payment of the fee. The registrar may also cancel the entry of the notice on his or her

own initiative (PPSA s. 49(4)). Of course, one cannot be certain that the registrar will take this initiative.

If a fixtures notice is not expired, but all of the obligations owing by the debtor to the secured party under the security agreement have been performed, the debtor or any person with a registered interest in the land may make a written demand to the secured party to cancel the relevant fixtures notice. Similarly, if the secured party has agreed to release all or part of the collateral described in the fixtures notice, if the collateral description in the fixtures notice is overly broad, if the relevant security agreement no longer exists, or if the item or kind of property described in the notice is not affixed to the land to which the fixtures notice relates, the debtor or any person with a registered interest in the land may give a written demand to the secured party to cancel or amend (as appropriate) the fixtures notice (PPSA s. 49(10)).

A written demand must require that the secured party deliver to the person making the demand a signed Form 2 notice of amendment, extension or cancellation (as the case may be) not later than 40 days from the date of demand (PPSA s. 49(11)). In this way the secured party need not incur the fee to register the Form 2. The secured party is also prohibited from charging an expense or accepting a fee for complying with the demand, unless the parties agreed to the expense or fee before demand was made (PPSA s. 49(14)).

If the secured party fails to take action in response to a written demand within the 40 days allotted, the person making the demand may apply directly to the registrar to have the appropriate entry made (PPSA s. 49(12)). This application is subject to a fee. If the registrar is satisfied with the documents submitted, the registrar must make the entry unless he or she has received a court order preventing the entry from being made (PPSA s. 49(13)).

D. Priority

1. Fixtures

(a) Security Interest Attaching Before Affixation

A security interest in goods that attaches before or at the same time that the goods become fixtures has priority over a claim to the goods made by person with an interest in the land to which the goods have become affixed (PPSA s. 36(3)). Once the goods become affixed, the lines between real and personal property security become blurred and as a result are subject to very specific rules under the PPSA.

As between a secured party with an interest in the fixtures and a person acquiring an interest in the land (without fraud and for value) after the goods become fixtures, there will be a competition of legitimate claims. The PPSA provides that, unless a fixtures notice is filed in respect of any security interest in them, the secured party's interest in the fixtures is subordinate to that of the person who acquired an interest in the land (PPSA s. 36(4)(a)). The secured party's interest will also be subordinate to the interests of a registered mortgagee who makes an advance under the mortgage (to the extent of the advance) (PPSA s. 36(4)(b)(i)) or who obtains an order for sale or foreclosure after the goods become fixtures (PPSA s. 36(4)(b)(ii)), if that secured party has not filed a fixtures notice.

Absent a fixtures notice, the secured party's interest will also be subordinate to the interest of the holder of a judgment under the *Court Order Enforcement Act* that is registered against the real property after the goods become fixtures (PPSA s. 36(6)). An exception is made for secured parties holding a purchase money security interest ("PMSI") in goods who files a fixtures notice within 15 days of the goods becoming affixed to the land (PPSA s. 36(7)). Note that this grace period for PMSI holders does not extend to competitions between secured parties and persons who, after affixation, acquire an interest in land (without fraud and for value), are registered mortgagees or obtained an order for sale or foreclosure.

The moral of the story is that a secured party can avoid having its interests subordinated in each of these circumstances by filing a fixtures notice.

(b) Security Interest Attaching After Affixation

A security interest that attaches after the goods become fixtures is subordinate to the interest (the PPSA does not specify that this must be a registered interest) of a person in the land at the time the goods become fixtures. The filing of a fixtures notice will not alter this fact. However, the secured party's priority may be regained in any of the following circumstances (PPSA s. 36(5)(a)):

- (a) the person with the land interest (the "land party") described above has consented to the security interest;
- (b) the land party has disclaimed any interest in the goods or fixtures;
- (c) the land party has entered into an agreement by which another person may remove the goods; or

- (d) the land party, for whatever reason, is not entitled to prevent the debtor from removing the goods.

If the security interest and the competing interest in land both arise after the goods become fixtures, priority will go (absent fraud) to the first to file under the LTA. That is, the secured party will take priority if it has filed a fixtures notice prior to the land party's interest in the land arising (PPSA s. 36(5)(b)).

2. *Crops*

Section 37 largely parallels section 36. It provides that a security interest in crops has priority with respect to the crops over an interest in the crops claimed by a person with an interest in the land on which the crops are growing. The same subordination provisions described above will apply to the secured party's interest in crops with respect to the interest of another party in the land arising while the crops are growing. Similarly, the filing of a fixtures notice in the LTO prior to the other party's interest arising will ensure priority in favour of the secured party (assuming the secured party's interest is properly attached – see discussion above).

A party seeking to take an interest in crops or land on which crops are growing should also ascertain whether any bank has taken a security interest in the crops under the *Bank Act*, as there is no requirement that a bank register its *Bank Act* security in the LTO or the PPR. Any transfer of title to the land would not dislodge such security.

3. *Effect of Not Filing*

There is no requirement in the PPSA (although the PPSA Regulations are somewhat less clear) to file a fixtures notice in respect of a security interest in goods that are, or are to become, fixtures. Neither is there a requirement to register a financing statement in the PPR, although it would be highly imprudent to rely on a fixtures notice in respect of an unperfected security interest. However, if no fixtures notice is filed, the secured party's priority may be adversely affected, as it would if no financing statement were registered. It is therefore prudent practice for secured parties with a security interest in fixtures (who do not hold a registered mortgage in respect of the land on which the fixtures are located) to file a financing statement in the PPR and a fixtures notice in the LTO as soon as possible, and preferably before the goods have become affixed to the land.

Where a secured party has perfected its security interest in fixtures by registering a financing statement in the PPR and is also the holder of a registered mortgage, there would seem to be no

need to file a fixtures notice. This is particularly true if the secured party holds a first mortgage and a first registration under the PPSA. A later secured party who fails to register a fixtures notice in respect of goods before they become affixed will remain subordinate to the mortgagee, even if the mortgagee has not registered a financing statement. That secured party may otherwise have PMSI “super-priority” under the PPSA if they registered in time, but in a competition between the mortgagee and the secured party, the mortgagee will take priority. If that secured party’s interest attached after the goods had become affixed, failure to file a fixtures notice would leave the security interest in the fixtures subordinate even to the interests of those persons acquiring an interest in the land, without fraud, after the fixtures notice had been filed.

The effect of not filing a fixtures notice can be described this way: absent a fixtures notice, the security interest in fixtures will be treated as though it were an interest in land, for the purposes of determining priority as among the secured party and those persons with interests in the land. Once the fixtures notice is filed, the fixtures will be treated as personal property as against the persons with interests in the land. It should be stressed that, as between persons with security interests in personal property only, priority with respect to fixtures will be governed by the priority rules found elsewhere in the PPSA.

E. Remedies and Competing Rights

Section 55(6) of the PPSA provides that a secured party, who has taken security in respect of the same obligations by both an interest in land and an interest to which the PPSA applies, may choose whether to proceed under the PPSA as to the personal property or to proceed as to both the land and the personal property as if the personal property were land. In the latter case, the PPSA would not apply and the secured party’s rights, remedies and duties in respect of the land would apply to the personal property.

Section 55(7) provides that the interests of another secured party who has taken a security interest in personal property before or after the interest described above are not limited by the decision of a secured party to proceed as though the personal property were land. That ‘personal property secured party’ has standing in proceedings taken by the ‘land secured party’ and may apply to court for conduct of a judicially supervised sale of the land and personal property.

The following discussion applies only to secured parties’ remedies under the PPSA.

1. *Removal*

If a debtor fails to pay or otherwise perform its obligations under a security agreement, the secured party will have the rights and remedies set out in Part 5 of the PPSA as well as those set out in the security agreement. In respect of goods, the right of seizure or repossession is provided in section 58 of the PPSA, and is subject to, in the case of fixtures and growing crops, sections 36 and 37. Each of those sections imposes obligations in circumstances where the secured party has the right to remove goods from the land.

The sections quoted below pertain to fixtures; however, sections 36(8) to 36(15) also apply to the seizure and removal of growing crops from land (PPSA s. 37(7)).

(a) Notice

At least 15 days before the removal of any goods from the land, the secured party who has the right to do so must give a written notice of intention to each party who has a registered interest in the land. The notice of intention may be served on the debtor in accordance with section 72 of the PPSA, or may be sent by registered mail to the address of the interested party as it appears in the records of the LTO.

The notice of intention to remove goods from land must contain certain specific information (PPSA s. 36(13)):

- (a) the name and address of the secured party,
- (b) a description of the goods to be removed,
- (c) the amount required to satisfy the obligation secured by the security interest,
- (d) the market value of the goods,
- (e) a description of the land to which the goods are affixed, and
- (f) a statement of intention to remove the goods unless the amount required to retain the goods (described more fully below) is paid on or before a specified date that is not less than 15 days after the notice is given.

When giving a notice of intention by registered mail, extra time may need to be allotted before proceeding to seize the goods. Section 36(14) sets a minimum of 15 days for notice to be given before the goods are removed. Section 72(2) of the PPSA provides that a notice sent by registered

mail is deemed to be “given” on the earlier of actual receipt of the notice by the addressee and the expiry of 10 days after the date of registration (except when postal services are not functioning). Assuming registration took place on Day 1, it may be necessary to wait until Day 11 before beginning to count the 15-day notice period.

If a secured party fails, without reasonable excuse, to discharge any duty or perform any obligation imposed by the PPSA, the person to whom the duty or obligation is owed will have a cause of action against the secured party (PPSA s. 69).

(b) Minimal Damage and Reimbursement

A secured party exercising its right of removal must do so in a manner that does not cause any greater damage or injury to the land, or other property located on it, than is necessarily incidental to the removal of the goods. The occupier of the land (whether the debtor or otherwise) must be put to no greater inconvenience than is necessarily incidental to the removal of the goods (PPSA s. 36(8)).

To the extent that a person’s interest in the land has been damaged as a result of the removal of the goods, that person is entitled to be reimbursed for any such damage. This right does not extend to the debtor, and is limited to those persons who had an interest in the land at the time that the goods in question became fixtures. No party is entitled to be reimbursed for the diminished value of the land resulting from the absence of the fixture, or for the cost of replacing the fixture (PPSA s. 36(9)).

If a person is entitled to be reimbursed as described above, that person may refuse the secured party permission to remove the goods until adequate security for reimbursement has been given (PPSA s. 36(10)). Application may be made to court for a number of determinations with respect to reimbursement and security therefor (PPSA s. 36(11)).

There is no prerequisite that the secured party must have filed a fixtures notice in order to seize the goods that have become fixtures. In theory, therefore, a secured party with a security interest in fixtures, who has not filed a fixtures notice, could seize goods in respect of which another party had priority. However, in practice, the default under the security agreement or the action taken by the secured party to seize would likely trigger a default under the prior ranking charge, to the detriment of the secured party. Despite this practice, in the absence of a fixtures notice, persons whose interests in the land are to arise after all goods have been affixed will want to satisfy themselves that no fixtures are subject to any security agreement to which they have not consented.

(c) Consumer Goods

Where the goods in question are consumer goods, a secured party may either seize the goods or sue the debtor, but may not do both (PPSA s. 67). The secured party is precluded from seizing consumer goods if the debtor has repaid at least two thirds of the total amount of the obligation secured (PPSA s. 58(3)), although a secured party may apply to court for an order that section 58(3) does not apply.

These provisions are particularly relevant in the case of a security interest taken in a manufactured home.

3. *Retention*

One of the purposes of giving a notice of intention to other interested parties is to allow a person having a subordinate interest in the land an opportunity to retain the goods (and to allow a party with a prior interest to take such action to which it may be entitled, before the goods are removed). Such a person may do this by paying out the entire amount secured by the secured party's prior security interest, or the market value of the goods calculated as though the goods were already removed from the land, (whichever is less) before the goods are removed by the secured party (PPSA s. 36(12)).

If a person is entitled to receive a notice of intention from the secured party, that person may apply to court for an order postponing the removal of the goods from the land (PPSA s. 36(15)). Note that the person need not actually have received the notice; they must merely be entitled to receive it.

IV. Floating Charges

A. Definition

1. *Common Law*

A floating charge at common law is a charge on the assets of a company that allows the company to deal freely with the collateral until such time as the secured party intervenes to enforce its security. In *British Columbia v. Federal Business Development Bank* (1987), 17 B.C.L.R. (2d) 273, McLachlin J.A. (as she then was) described the genesis of the floating charge:

The concept of the floating charge emerged in the late nineteenth century. It permitted corporations to raise capital by charging their entire undertakings while at the same time continuing to deal with the encumbered assets. The courts were concerned, however, that the floating charge should not prejudice those dealing with the debtor in the ordinary course of business. For this reason, they took the view that the floating charge conferred no priority until it became

crystallized or "fixed", with the result that third parties dealing with the mortgagor prior to crystallization took priority over the debenture holder.

2. *LTA*

Section 203 of the LTA deals with floating charges on land, and their crystallization. Under that section:

"floating charge" means a charge that secures the payment or performance of an obligation and that does not become a fixed charge on specific land until the occurrence of an event, stipulated in the instrument that created the floating charge.

and

"crystallized", with reference to a floating charge, means a charge that has fixed on specific land in accordance with the applicable law and the terms of the instrument in which the charge is created.

3. *PPSA*

The PPSA does not define "floating charge", but does specify that a security interest in the nature of a floating charge attaches in the same way as any other personal property security interest. That is, as between the debtor and the secured party, when value is given and the debtor has rights in the collateral (PPSA s. 12(1)).

B. Registration

1. *Before Crystallization*

Registration of an uncrystallized floating charge on land can only be made in the PPR (LTA s. 203(2)). There is no mechanism by which an uncrystallized floating charge on land can be made in the LTO.

Although an uncrystallized floating charge on land is technically an interest in land, the LTA in effect delegates to the PPSA all functions relating to the charge until such time that it is crystallized. Those sections of the PPSA dealing with registration and the acquisition of information from a secured party apply to uncrystallized floating charges that are registered in the PPR (LTA s. 203(5)).

It is important to remember that, in certain circumstances, registration in the PPR need not explicitly refer to the floating charge. The LTA states that, where a security interest in personal property and a

floating charge are created by the same instrument, registration under the PPSA with respect to the personal property also constitutes registration of the floating charge (LTA s. 203(4)). Section 12(2) of the PPSA Regulation parallels the LTA provision, stating that no entry is required respecting the uncrystallized floating charge on land if the registration also relates to a security interest in personal property. A search of the PPR will therefore not be conclusive of the absence of an uncrystallized floating charge. To satisfy oneself, one must review the security agreement itself.

2. *After Crystallization*

After a floating charge has crystallized (see discussion below), application may be made to register the crystallized charge in respect of specific land in the LTO. Such an application must be accompanied by a sworn declaration, satisfactory to the registrar, that the charge has crystallized and the circumstances under which crystallization occurred (LTA s. 203(6)). The registrar is precluded from registering a floating charge on any other grounds (LTA s. 203(8)).

If a crystallized floating charge appears on title, it is not evidence that crystallization has actually occurred. The registrar is not required to determine that the facts set out in the sworn declaration are true in order to register the charge (LTA s. 203(7)).

C. **Crystallization**

Crystallization of a floating charge on land occurs in accordance with the definition of “crystallization”, quoted above. The instrument creating the floating charge must specify the circumstances under which the charge is crystallized.

Secured parties will wish to consider whether they wish crystallization to occur automatically, or if they wish crystallization to be contingent on some further action taken by the secured party at its discretion.

If a floating charge automatically crystallizes on the occurrence of certain events outside of the secured party’s control, land acquired after the crystallization date may not be subject to the floating charge. It appears to be common ground that “[o]nce the floating interest has been said to crystallize, that interest is transformed into a fixed and specific charge....” (*Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] S.C.J. No. 25, at paragraph 45, in relation to a floating charge over inventory). It is not clear, however, that the fixed and specific charge would extend to after-acquired real property.

On the other hand, if crystallization does occur automatically, the secured party will not have to monitor the activities of the debtor for the purpose of determining if crystallization has taken place. This may be useful in certain priority battles. For example, in *664847 B.C. Ltd. v. TT Land Development Inc.* 2004 BCSC 356, Groberman J. considered the issue of whether a crystallized floating charge over land, registered in the personal property registry but not registered against title to the land, took priority over a judgment registered against title (at paragraph 30):

In the case at bar, Milverton's floating charges had crystallized prior to the registration of Aerzen's judgment against the land. While the crystallized charges were not registered in the Land Title Office, they were valid charges against the judgment debtor's interest in the property and the registration of the judgment did not serve to give Aerzen any greater interest in the land than the judgment debtor had. Accordingly, Milverton's security ranks ahead of Aerzen's in attaching the proceeds of sale.

Had the floating charge not crystallized until Milverton had taken some further action, the judgment might have been registered before Milverton had had sufficient time or notice to take action.

D. Priority

The PPSA provides that, where PPSA and LTA priority rules conflict, the LTA rules will govern (PPSA s. 74).

As against other charges, the priority of a crystallized floating charge that is registered in the LTO will be determined on the basis of date and time of application to register, as with any other charge (LTA s. 203(9)). In accordance with s. 203(5), section 47 of the PPSA applies to uncrystallized floating charges, such that registration of the uncrystallized floating charge in the PPR is not notice, actual, constructive or otherwise, to any party. However, as seen above, registration in the PPR of a floating charge that has crystallized may affect priority as against certain other registered interests in the land.

Notwithstanding section 203(9), as between registered crystallized floating charges affecting the same parcel of land, priority is determined by the earlier of the date of registration in the PPR and the date of application to register in the LTO (LTA s. 203(10)).

Where a circular priority arises, section 203(11) of the LTA operates to ensure that the person with an earlier registration in the PPR has effective priority: that person must be allowed to pursue that person's claim "as if the person were subrogated to the claim of the person otherwise having priority" by virtue of the earlier registration under the LTA.

E. Clients' Concerns

In many cases, purchasers of real property need not be concerned about uncrystallized floating charges on land affecting the land they propose to purchase. As a PPR registration, the uncrystallized floating charge is registered against the debtor and does not "run with the land". The very nature of the floating charge permits the debtor to deal freely with his or her property until such time as the charge is crystallized. Furthermore, section 29 of the LTA (quoted above) protects persons dealing with land (without fraud) from the existence of charges not registered under the LTA.

V. Conclusion

Real estate practitioners should be aware of security interests in land that may be affected the PPSA. Whether their clients' interests are those of purchasers, vendors, landlords, tenants or secured lenders, each will have an interest in knowing whether the real property in question is encumbered under the PPSA by way of a security interest in fixtures or an uncrystallized floating charge.

APPENDIX A

FORM 1
PERSONAL PROPERTY SECURITY ACT
(Section 38(1) Personal Property Security Regulations)
(Section 49(2) Personal Property Security Act)

NOTICE OF A SECURITY INTEREST
IN FIXTURES OR GROWING CROPS

TO: The Registrar of Titles
New Westminster Land Title District

Filing Fee \$ 20.00

TAKE NOTICE that a security interest in collateral that is or may become a fixture or crop attaching to land has been created and that the particulars of the security interest are set out as follows:

Debtor:

[Debtor name]
[Debtor address]
(Incorporation No. [____])

Parcel Identifier Number and Legal Description of Land Upon Which the Collateral is Located or Affixed:

Parcel Identifier [____]
[legal description]

Secured Party:

[Secured Party name]
[Secured Party address]
(Incorporation No. [____])

Description of Collateral:

All the debtor's:

- (a) present and after acquired personal property;
- (b) present and after acquired goods, securities, instruments, documents of title, chattel paper, intangibles, money and licences (each as defined in the British Columbia *Personal Property Security Act* and regulations made thereunder); and
- (c) heating, ventilating and air conditioning equipment, hot water tanks, interior doors and partitions, light fixtures, suspended ceiling tile, wall to wall carpeting, built-in furniture, plumbing fixtures, communication systems, control equipment, escalators and elevators, air filtering devices, awnings, window blinds, curtain runners, sprinkler equipment, firefighting equipment, and all other fixtures;

now or hereafter situate on those lands hereinbefore referred to or used (exclusively or primarily) in connection therewith (whether the same form part of the realty or not).

AND that this notice will expire on [expiry date].

OR: AND that this notice is an infinite registration.

DATED this ____ day of _____, 20 ____.

SIGNED in the presence of:

Signature

Address

Occupation

[SECURED PARTY]
by its authorized signatories **[or agent]:**

By: _____
Print Name: _____
Title: _____

By: _____
Print Name: _____
Title: _____

Prepared by:

Jennifer Dezell

Fraser Milner Casgrain LLP
15th Floor, 1040 West Georgia Street
Vancouver, BC V6E 4H8

Telephone: 604-443-7146

Facsimile: 604-683-5214

jennifer.dezell@fmc-law.com

Lawyers in:

Montréal

Ottawa

Toronto

Edmonton

Calgary

Vancouver

New York



FRASER MILNER CASGRAIN LLP

www.fmc-law.com