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ARTICLE 9 NORTH OF 49°: THE CANADIAN PPS ACTS AND THE QUEBEC CIVIL CODE

*Ronald C.C. Cuming**

I. INTRODUCTION

The international influence of Article 9 of the Uniform Commercial Code (Article 9) has been nowhere more significant than in Canada. There are several unique and important features of Canadian developments in this respect that may have relevance for other nations. One of these features is that Canadian law reformers in common-law provinces of Canada were able to take Article 9 as a starting point and build into it refinements and other features that reflect Canadian legal traditions and public policies. Another is that the Canadian Personal Property Security Acts (PPSAs), unlike their counterparts in the United States, function in the context of modern, remote-access computerized registry systems. Article 9 also provided inspiration for modernization of secured financing law in the Canadian province of Quebec, a civil-law system with a strong French heritage. While, of course, it is much more difficult to find direct terminological and structural parallels between Article 9 and the new Quebec Civil Code (Civil Code) than it is between Article 9 and the PPSAs of the other provinces, some of the more important features of Article 9's conceptual infrastructure can be found in the Civil Code.

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In this Essay the Author has provided a brief overview of a PPSA and associated registry system, noting some of the most important differences between the Canadian legislation and Article 9. In addition, this Essay contains a brief description of the key secured financing provisions of the Civil Code with particular focus on the extent to which the concepts of Article 9 have been incorporated into it.

II. THE RAISON D'ÊTRE OF THE PPSAS

The motivation behind significant reform of personal property security law in Canada was quite different from that which induced the drafting of Article 9. For many years prior to the enactment of the first PPSA in Ontario in 1966, the personal property security laws of common-law provinces provided effective legal devices for both consumer and business financing. By the beginning of the current century, most common-law provinces had enacted legislation providing for the recognition and registration of conditional sales contracts and chattel mortgages.¹ Canadian provinces did not place legislative shackles on the equitable mortgages of after-acquired property as was done in England,² with the result that this form of mortgage was used, from an early period, for agricultural and business financing.³ Under the principle established by the House of Lords in the pivotal decisions in *Holroyd v. Marshall*⁴ and *Tailby v. Official Receiver*,⁵ secured financing on the security of existing and future accounts of businesses was frequently used in all common-law provinces prior to enactment of the PPSAs.⁶

Canadian legislators and judges welcomed and facilitated the use of the English floating charge. This device, which should not be confused with the so-called floating lien of Article 9, was never accepted by American courts. The English floating charge remains

1. The first legislation providing for the registration of chattel mortgages was enacted in 1849 by the Legislative Assembly of the Province of Canada.

2. See Bills of Sale Act (1878) Amendment Act, 1882, 45 & 46 Vict., ch. 43 (Eng.).

3. Recognition of the validity of chattel mortgages in Canada came through the courts and not, as in the United States, through legislation.

4. 11 Eng. Rep. 999 (H.L. 1862).

5. 13 App. Cas. 523 (1888) (appeal taken from Eng.).

6. Canadian courts did not have to wrestle with self-created impediments to the development of this and other forms of secured business financing such as the rulings in *Benedict v. Ratner*, 268 U.S. 353 (1925) and *Corn Exch. Bank & Trust Co. v. Klaunder*, 318 U.S. 434 (1943).

the principal device for securing business financing in most common-wealth countries—other than Canada—and countries, such as Israel, that have retained English common-law legal concepts. The floating charge is a nonspecific, suspended equitable charge that becomes specific—crystallizes—only upon default by the debtor or upon the happening of some other specified event. So long as the charge remains uncrystallized, the debtor is substantially free to deal with the charged assets as though they were unencumbered. No attempt has been made in this Essay to describe all of the intricacies and peculiarities of this device. It is sufficient to note that the floating charge is a very flexible and useful corporate financing device.

Clearly Canadians did not need more effective devices for secured financing; what was needed was a more systematic approach to this area of the law. By the 1960s personal property security law had become almost Byzantine in its complexity and lack of consistency. Each financing device had a different conceptual basis and a regulatory statute designed primarily to impose registration requirements as a precondition to secured parties' assertion of a priority status given by the common law or equity. Registration requirements were complex and little attempt was made to make them consistent.

The approach contained in Article 9 permitted the flexibility and scope of extant law in the context of a unified conceptual and legislative structure. All devices could be regulated through one regime. Not only did this dramatically simplify the law but, in addition, it permitted the use of computer technology in a new, single registry system for all security devices.

The situation in Quebec, while not fundamentally different in result from the rest of Canada, was in greater need of conceptual reform because of the contradictory features of Quebec commercial law: the refusal to recognize the possibility of a hypothec⁷ of movables, on the one hand and, on the other, the urgent need for security devices to facilitate nonpossessory business asset financing. While the civil law of Quebec, like that of many other jurisdictions with civil-law backgrounds, refused to recognize the concept of a nonpossessory security interest in movable property, it recognized a variety of title transactions—for example, a conditional sales contract or a financial lease and sale with a right of redemption—by which sellers could gain priority.

7. For a definition of "hypothec," see *infra* notes 60-61 and accompanying text.

In addition, a range of devices and techniques for secured financing—favoring specific types of creditors or debtors—developed on the periphery or outside of the Civil Code. Some of the most important of these devices were commercial pledges, trust deeds, assignments of commercial accounts, and transfers of inventory to creditors under the fiction of a negotiable document of title. Commercial pledges without dispossession were available to secured loans where commercial equipment was taken as collateral. Trust deeds, a statutory equivalent of the floating charge, were used to charge the present and future property of an incorporated debtor or a limited partnership. Assignments of commercial accounts and “transfers” of inventory to creditors under the fiction of negotiable documents of title were also available as secured financing devices.

Again Article 9 provided an approach for the drafters of the Civil Code through which much of the patchwork of security devices with their anomalies and inadequacies could be eliminated and replaced with a much more coherent system for the regulations of secured financing. However, while Article 9 provided a legislative pattern for common-law jurisdictions, it could only provide an approach for Quebec. Legislators in that province were not prepared to be seen as abandoning civil-law concepts and terminology. What was attempted was the creation of civil-law parallels to the central features of the PPSAs and Article 9.

III. THE PROCESS OF REFORM IN CANADA

Not only were the reasons for reform of personal property security law different in Canada from those in the United States, but the process of reform has been very different. Notwithstanding initial attempts, made principally through the efforts of the Canadian Bar Association,⁸ to get a uniform approach to reform among the common-law provinces, a leapfrog approach developed. Until the late 1980s the prevailing pattern was for one province to enact a PPSA

8. In 1964 the Canadian Bar Association established a committee to prepare a model PPSA to serve as the basis for reform of personal property security law throughout the country. The committee published the Uniform Personal Property Security Act in 1969. The weaknesses in the 1967 Ontario Act and the 1969 Uniform Act, along with the very substantial revisions of Article 9 that were made in 1972, induced the committee to work on a second draft of the Uniform Act which was completed in 1972. A modified version of this model was adopted by the Canadian Bar Association and the Uniform Law Conference in 1974.

and for another province thereafter to enact its own version containing new features and, sometimes, different public policy approaches.⁹

This approach, while not conducive to uniformity, was not without merit. During this period of development, computer technology was advancing at a very rapid rate and the weaknesses of Article 9 and other earlier models were being revealed through a growing body of case law. Consequently, each successive version of the PPSA was an improvement over its predecessor since it accommodated the most recent developments. This approach, for the most part, came to an end in the late 1980s after representatives from several western Canadian provinces decided to develop a model law that would be used as the basis of new Acts in each of these provinces. In 1984 the Western Canada Personal Property Security Act Committee—later renamed the Canadian Conference on Personal Property Security Law (Canadian Conference)—was formed. The committee's goal, which was quickly and largely realized, was to develop a model for adoption by jurisdictions in western Canada. The model prepared by the committee provided the basis for the British Columbia,¹⁰ Alberta,¹¹ Saskatchewan,¹² Manitoba,¹³ New Brunswick,¹⁴ and Northwest

9. The first PPSA was enacted in Ontario in 1966; however, the system established by the legislation was not fully operational until 1976. Manitoba followed in 1973, effective 1981, with a PPSA based substantially on the 1969 Canadian Bar Uniform Act. The Saskatchewan Law Reform Commission published a report in 1971 proposing a Personal Property Security Act for Saskatchewan based in part on the Uniform Act, but containing a number of significant new features. The Saskatchewan Legislature responded by enacting a PPSA in 1980. In 1989 Ontario enacted a new Act, R.S.O., ch. P-10 (1990) (Can.), which incorporated some of the innovations contained in the Saskatchewan Act and a 1974 Uniform Act sponsored by the Canadian Bar Association and the Uniform Law Conference.

10. Personal Property Security Act, S.B.C., ch. 36 (1989) (Can.), *as amended*. For a detailed analysis of this Act, see RONALD C.C. CUMING & RODERICK J. WOOD, *BRITISH COLUMBIA PERSONAL PROPERTY SECURITY ACT HANDBOOK* (1993).

11. Personal Property Security Act, R.S.A., ch. P-4.05 (1995) (Can.). For a detailed analysis of this Act, see RONALD C.C. CUMING & RODERICK J. WOOD, *ALBERTA PERSONAL PROPERTY SECURITY ACT HANDBOOK* (1993).

12. Personal Property Security Act, S.S., ch. P-6.2 (1993) (Can.). For a detailed analysis of this Act, see RONALD C.C. CUMING & RODERICK J. WOOD, *SASKATCHEWAN AND MANITOBA PERSONAL PROPERTY SECURITY ACTS HANDBOOK* (1994).

13. Personal Property Security and Consequential Amendments Act, S.M., ch. 14 (1993) (Can.) (not yet in force).

14. Personal Property Security Act, S.N.B., ch. 36 (1993) (Can.). New Brunswick is located in Atlantic Canada. However, this province decided to adopt the Canadian Conference model since it was thought to be more advanced than the 1989 Ontario Act or any of the earlier models.

Territories¹⁵ Acts. The process of conversion to modern systems of personal property law has not been completed in Canada. Two PPSAs have yet to be proclaimed in force. An additional three provinces—Nova Scotia, Prince Edward Island, and Newfoundland—have yet to enact PPSAs.

Pan-Canadian uniformity of personal property security law is not likely to be realized for a long period of time. While there is a substantial degree of similarity in substantive law and among the registry systems of the jurisdictions that enacted the Canadian Conference model, there remain important interjurisdictional differences. Of particular concern is that the Ontario Act and registry system depart significantly from their counterparts in most other PPSA provinces. Although it is safe to predict that all common-law jurisdictions will ultimately enact some form of a PPSA—most likely the model prepared by the Canadian Conference—there is very little likelihood that anything more than elementary harmonization between Quebec secured financing law and that of the other provinces and territories will be achieved in the foreseeable future.

IV. A FEDERAL SYSTEM

The law dealing with the regulation of secured financing in Canada, like most other features of the Canadian legal and constitutional structures, is complex. Legislative jurisdiction over secured financing transactions is divided between the federal Parliament and the provincial legislatures. Bank financing may fall under provincial or federal regulation depending upon the type of transaction involved. All other secured financiers are subject to provincial law except to the very limited extent that bankruptcy law is involved.

The chartered banks play a very dominant role in Canadian business and consumer financing. Banks are very large, with hundreds of branches throughout the country, and they control a much greater share of the secured financing market than their counterparts in the United States. Traditionally, the banking industry has been very oligopolistic with the result that it has had considerable influence over the federal government policies and legislation in the area of secured financing and bankruptcy.

15. Personal Property Security Act, S.N.W.T., ch. 8 (1994) (Can.) (not yet in force).

The Bank Act¹⁶ provides a sui generis statutory regime—available only to banks—applicable to secured loans made by banks to business enterprises and agricultural producers.¹⁷ While on the surface the system appears very archaic, in fact it contains many of the features of a modern system for security interests in personal property. It provides for notice filing¹⁸ rather than document filing, with the result that a single notice can relate to any number of different agreements between the parties. It permits tacking of future advances¹⁹ and automatic attachment of a security in after-acquired property of the debtor.²⁰ However, it is not without deficiencies. It does not permit security for antecedent debt or the use of intangible property as collateral²¹ nor does it generally provide for security in proceeds.²²

Banks are not confined to the system of the Bank Act; they can elect to lend under security agreements regulated by provincial law. Indeed, there is some judicial support for the view that a Bank Act security agreement is also a PPSA agreement²³ and that a bank can validly hold overlapping Bank Act and PPSA security agreements covering the same collateral and securing the same debt.²⁴

There is general recognition of the need to modernize the system contained in the Bank Act. However, initial steps in this direction were totally misdirected and set back the reform process.²⁵ Revision

16. S.C., ch. 46 (1991) (Can.).

17. *Id.* §§ 425-432.

18. *Id.* § 427(4).

19. See *Royal Bank of Can. v. Bank of Montreal* [1976] 4 W.W.R. 721 (Sask.).

20. Bank Act § 427(2).

21. See *id.* §§ 427(1), 429(1).

22. See *id.* § 428(12). See generally Ronald C.C. Cuming & Roderick J. Wood, *Compatibility of Federal and Provincial Personal Property Security Law*, 65 CAN. B. REV. 267, 296-301 (1986).

23. *Bank of N.S. v. International Harvester Credit Corp.*, 74 O.R.2d 738, 743-44 (1990); *Bank of Montreal v. Pulsar Ventures Inc.*, 58 Sask. R. 224, 229-30 (1988). This is no longer possible under the PPSAs of most provinces—not including Ontario—which exclude Bank Act security agreements from the scope of the legislation. See, e.g., *Personal Property Security Act*, S.B.C., ch. 36, § 4(b) (1989) (Can.).

24. *Bank of N.S.*, 74 O.R.2d at 743-44; see Ronald C.C. Cuming, *PPSA—Section 178 Bank Act Overlap: No Closer to Solutions*, 18 CAN. BUS. L.J. 135 (1991). This is no longer possible under Saskatchewan law which treats as void any security interest held by a bank which has a Bank Act security interest in the same collateral, given by the same debtor. See *Personal Property Security Act*, S.S., ch. P-6.2, § 9(4) (1993) (Can.).

25. See Ronald C.C. Cuming, *The Position Paper on Revised Bank Act Security: Rehabilitation of Canadian Personal Property Security Law or Curing the Illness by Killing the Patient*, 20 CAN. BUS. L.J. 336 (1992).

of the Bank Act so as to bring it conceptually and administratively in line with the provincial PPSAs cannot be expected until the Canadian banking industry is prepared to put the necessary pressure on Parliament.

V. SIGNIFICANT DIFFERENCES BETWEEN THE PPSAS AND UCC ARTICLE 9

The similarities between a Canadian PPSA and Article 9 are much more numerous than the differences. A PPSA is structurally very similar to Article 9: The same technical terminology—such as attach, perfect, and financing statement—has been used and the sequence in which matters are addressed is very close to that used in the drafting of Article 9. However, significant differences do exist. The short length of this Essay precludes the possibility of doing more than pointing to a few of them. As noted above, not all PPSAs are the same. For the purposes of this Essay, the 1993 Saskatchewan Personal Property Security Act²⁶ (Act) has been used in the comparison. This Act is based on the model prepared by the Canadian Conference and, as such, is representative of personal property security legislation in four other provinces²⁷ and one territory.²⁸

A. Scope

The Act has roughly the same scope as Article 9 with the important exception that the conflict of laws, perfection, and priority provisions—but not *inter partes* enforcement provisions—apply to chattel leases for a term of more than one year²⁹ and commercial consignments.³⁰ The result is that most long-term leases and nonconsumer consignments, whether or not they secure payment or performance of an obligation, fall within the regulatory regime of the Act. In addition, the legislation applies to deposit accounts and treats them as any other account.³¹

26. S.S., ch. P-6.2 (1993) (Can.).

27. Alberta, British Columbia, Manitoba (not yet in force), and New Brunswick.

28. Northwest Territories (not yet in force).

29. Personal Property Security Act, S.S., ch. P-6.2, § 2(1)(y) (1993) (Can.).

30. *Id.* § 2(1)(h).

31. The concept of "account" is broader under the Act than under Article 9; any present or future monetary obligation can be an account so long as it is not represented by an instrument, security, or chattel paper. *Id.* § 2(1)(b). A byproduct of this approach is that, unlike Article 9, the Act applies to sales of loan obligations.

· *B. Conflict of Laws Rules*

The Act's conflict of laws rules are similar to the pre-1972 Article 9 provisions since the 1972 changes to Article 9 conflict of laws rules were not attractive to Canadian law reformers. Validity and perfection of a security interest in nonmobile goods, and possessory security interests in other types of collateral—other than pure intangibles—are governed by the *lex situs* of the collateral at the date the security interest attaches.³² The “grace period”—the period of temporary perfection—for compliance with the registration requirements of a jurisdiction into which goods are removed is sixty days or fifteen days from the date the secured party learns of the removal, whichever is less.³³ However, good faith buyers are not affected by grace periods or any other period of temporary perfection under the Act.³⁴ It is a consistent policy of the Act that buyers are not affected by temporary perfection periods and, as a result, are entitled to rely on information—or lack of it—in the registry. This feature is very important in Canada since no jurisdiction has a certificate of title system for motor vehicles or other high-value goods. It is generally accepted in most provinces which have PPSAs that buyers will obtain a search result from the Personal Property Registry before paying the purchase price and should be able to rely on the information disclosed when assessing the legal risk associated with the purchase.³⁵

The validity and perfection of a security interest in mobile goods and intangibles are determined by the law of the debtor's location at the time of attachment except where such law does not provide for the registration of security interests.³⁶ In such a case, the security interest is subordinate to an interest in an account payable in the province or an interest in tangible property—including instruments, securities, money, or chattel paper—acquired in the province.³⁷ The effect of this provision is to ensure that persons acquiring interests in personal property will have either priority or access to a public registry through which competing security interests are discoverable.

32. *Id.* § 5(1).

33. *Id.* § 5(3).

34. *Id.*; *id.* § 30(5).

35. In Ontario sellers of used cars are legally required to provide the buyer with a search result issued by the Personal Property Registry.

36. Personal Property Security Act, S.S., ch. P-6.2, § 7 (1993) (Can.).

37. *Id.* § 7(4).

C. Perfection

Unlike Article 9, the Act provides for perfection by possession, but not by seizure, of tangible collateral.³⁸ It also provides for perfection by registration of security interests in all types of collateral, including money and negotiable securities.³⁹ A financing statement, either written or electronic,⁴⁰ may be registered before an agreement is executed and may relate to any number of separate security agreements between the parties.⁴¹ A financing statement is not signed by the debtor, but the Act contains an elaborate system protecting against unauthorized registrations.⁴² This system applies as well to situations where the secured party has overdescribed the collateral in the registration or where the obligation secured has been discharged, but a registration against the name or property of the debtor remains in the registry. Under this system, the secured party must give to the debtor a copy of the financing statement, if in written form, or a copy of the verification statement issued by the registry upon registration of a financing statement.⁴³ A person named as debtor in a registration or a person with an interest in the property described as collateral in the financing statement can demand that the secured party amend or discharge—as is appropriate under the circumstances—the registration within fifteen days from the date of delivery of the demand. If the secured party fails to respond to the demand, the person making the demand may register a financing change statement—upon proof to the registrar that the demand was delivered—amending or discharging the registration. If a secured party has a right to have the registration maintained, it must make application to a court for an order maintaining the registration. Failure to respond to the demand when legally required to do so results in a “deemed damages” penalty in the amount of \$200⁴⁴

38. *Id.* § 24.

39. *Id.* § 25.

40. All of the remote-access systems except that of New Brunswick permit the use of hard copy financing statements and search requests. The New Brunswick system is totally electronic with the result that paper is eliminated.

41. Personal Property Security Act, S.S., ch. P-6.2, § 43(4)-(5) (1993) (Can.).

42. *Id.* § 50.

43. *Id.* § 43(12). For a brief description of the role of the verification statement, see *infra* text accompanying note 51.

44. The Personal Property Security Act Regulations, R.R.S., ch. P-6.2, Reg. 1, § 33 (1995) (Can.).

payable to the person making the demand.⁴⁵ By the same token, the Act imposes a \$200 deemed damages penalty payable to the secured party where an unjustified demand is made.⁴⁶

When registering a financing statement, the registering party can choose the period of registration between one and twenty-five years or the party can choose infinity registration. The registration fees in Saskatchewan are five dollars per year or \$400 for infinity registration.

Long before PPSAs were adopted in Canada, it was recognized that a system that uses only the name of the debtor as the registration-search criterion has a fundamental weakness. Such a system works well where the collateral is present or future inventory or accounts. It works less well, however, where the collateral is a specific item that is easily identifiable. The problem with a debtor name registration-search system is that it does not give protection to a searching party who is not in the position to obtain a search of the registry based on the debtor's name because the existence or identity of the debtor is unknown to the searching party. If a unique identifier, such as the serial number of the machine, is available as a search criterion, a remote party will get the protection of the registry system.

The need for a system which offers collateral description registration-search criteria is particularly acute where collateral is property for which there is an active resale market. Motor vehicles are the most important items of collateral falling within this category. Since no province in Canada has enacted a certificate of title system for goods which provides for the issue of paper titles, it was necessary for Canadian legislators to address the problem of remote party protection through the use of collateral description registration-search criteria. Regulations to the Act provide that, where the collateral is a motor vehicle,⁴⁷ boat, aircraft, or trailer held as consumer goods,

45. Personal Property Security Act, S.S., ch. P-6.2, § 65(6) (1993) (Can.).

46. *Id.* § 65(7).

47. The regulations broadly define the term:

(o) "motor vehicle" means a mobile device that is propelled primarily by any power other than muscle power:

(i) in, on or by which a person or thing may be transported or drawn, and that is designed for use on a road or on natural terrain; or

(ii) that is used in the construction or maintenance of roads;

and includes a pedal bicycle with motor attached, a combine and a tractor, but does not include a device that runs on rails or machinery designed only for use in farming other than a combine or tractor.

Personal Property Security Act, S.S., ch. P-6.2, § 2(1)(o) (1993) (Can.).

the collateral must be described by serial number. For motor vehicles this is the vehicle identification number provided by the manufacturer. For boats and aircraft⁴⁸ it is the Ministry of Transport designation.⁴⁹ When these types of collateral are held as equipment, a generic description may be used, but such a description provides protection only against the trustee in bankruptcy and execution creditors.⁵⁰ If full protection is sought, the serial number must be provided. When the collateral is held by the debtor as inventory, there is no requirement that specific items of collateral be described on the financing statement.

Perhaps the most innovative feature of Canadian developments in this area of personal property security law reform is the computerization of personal property registries. All registrations are effected at a single central registry within the province. The registry is accessible for both registering financing statements and searching for registrations through remote computer terminals—simple personal computer equipment and a modem—which can be located anywhere. Indeed, registrations and searches can be effected by remote computer access from any place in the world where long distance telephone communication to the registries is available. Currently, large Toronto law firms conduct searches of and register financing statements in the British Columbia registry 3000 kilometers away. However, users of remote communication facilities must make prior arrangements for payment of registration and search fees. Casual users of the system can obtain access through a private service provider that has an account with the registry, through a regional government office that offers the service, or through the use of a telephone or facsimile machine.

When a registration is effected in the registry, the computer automatically prints out a verification statement containing the information that has been entered into the database relating to that registration. The statement is immediately sent to the registering party. A verification statement has two principal functions. It provides a fail-safe measure permitting a registering party to deter-

48. There is no federal registry for security interests in aircraft with the result that Canada is not a party to the 1948 Geneva Convention on the International Recognition of Rights in Aircraft.

49. The Personal Property Security Act Regulations, R.R.S., ch. P-6.2, Reg. 1, § 13(1)(b) (1995) (Can.).

50. Personal Property Security Act, S.S., ch. P-6.2, §§ 30(5)-(6), 35(4) (1993) (Can.).

mine whether or not the information contained in the database of the registry relating to its registration is accurate. Errors on the part of the registering party can be immediately identified and corrected. In addition, verification statements are part of a scheme to encourage early discharge of unnecessary registrations. The verification statement has a second page that contains the registered information. When a secured party wishes to discharge a registration, all it needs to do is send the discharge verification form to the registry. No clerical costs are incurred in preparing the discharge and no fee for discharge of the registration is charged by the registry. A discharge verification statement is sent to the registering and secured party when a registration is discharged. This measure is designed to reduce the effect of fraudulent discharges. Inadvertently or fraudulently discharged registrations or lapsed registrations can be reinstated within thirty days of discharge or lapse without loss of priority status vis-à-vis anyone other than the holder of an intervening interest.⁵¹

Canadian experience has revealed the important differences between a computerized registry and a manually operated registry. A primary source of these differences is the fact that the actual searching in a computerized registry is done electronically with the result that ad hoc application of human discretion and judgment is not possible. It is a fundamental rule of computer technology that close is not good enough. In other words, as a general rule, the criteria for registration must be the same criteria for searching. To take a simple example: If the debtor's name is registered as John P Smith, but the correct name, which is used by a third party as a search criterion, is John P Smyth, the registration and search criteria do not match and, unless special features are built into the computer program of the registry, disclosure of the registration will not result. If no disclosure occurs, the question arises as to legal sufficiency of the registration. A simplistic approach is to conclude that, since the debtor's name was not correctly registered, the registration is invalid. However, this approach is commercially and politically unacceptable. The consequences associated with invalid registrations can be significant in commercial terms. As a practical matter, errors in recording debtors' names or the serial numbers of goods collateral cannot be eliminated. Refusal or failure to accommodate these realities will result in public rejection of computerized registries. The drafters of the PPSAs and

51. *Id.* § 35(7).

the designers of the computer programs for the Canadian personal property registries were quite aware of these realities. As a result they attempted to design systems that, given the profile of the users of the systems, accommodate a level of human error that can reasonably be expected.

The Act provides that the validity of a registration is not affected by a defect, omission, or error unless the defect, omission, or error results in the registration being "seriously misleading."⁵² Clearly, strict compliance with registration requirements is not a prerequisite to the validity of a registration. The test of validity contained in the Act is necessarily an objective one. Application of it involves the determination as to whether or not a reasonable person who obtains a search result using the correct name of the debtor, or the correct serial number of the collateral, would be misled by an error on the part of the registering party in recording on the financing statement the debtor's name or the serial number of the collateral. Of course, if the computer program of the registry system were to demand perfect compliance on the part of a registering party, a reasonable person would be misled because the registration would not be disclosed when the debtor's name or serial number of the collateral is used as the search criterion. However, if, as is the case in most provinces, a search using one or other of these criteria reveals one or more registrations that are "close similar matches" to the search criterion used, it is a matter to determine in each case whether a reasonable person who obtains the search result disclosing the registration in the list as a close similar match would be seriously misled by the differences between the information in the disclosed registration and the search criterion used by the searcher.

D. Enforcement

There are two significant differences between the enforcement provisions of the Act and their counterparts in Article 9. One of these is the extent of statutory prescription of default right remedies and the other is recognition of the use of document-appointed receivers.

Canadian legislators were not as convinced as were the drafters of Article 9 that the need for balance between the interests of the secured party and the debtor could best be addressed by application

52. *Id.* § 43(6).

of a general standard of commercial reasonableness without more detailed guidance as to what is legally required. Consequently, Canadian legislation provides detailed rules regulating enforcement of security interests. However, the Act gives a court broad discretionary power of relief from compliance with these rules and power to give directions or issue orders affecting the rights of secured parties and debtors.⁵³ Debtors are given extensive rights of redemption and reinstatement, thereby avoiding the effects of acceleration clauses.⁵⁴ Noncompliance by a secured party does not result in automatic loss of the right to a deficiency but can result in deemed damages and give rise to an onus on the secured party to prove that the noncompliance did not result in full realization of the value of the property or did not interfere with the debtor's right to redeem or reinstate.⁵⁵

A feature of Canadian personal property security law not found in the United States is the extensive use of privately-appointed receivers. The Act provides that the parties may include in the security agreement the power to appoint a receiver or receiver-manager in the event of default.⁵⁶ Generally, a receiver-manager has the power to take control of the business—a receivership is used principally in cases where the secured party has a broadly-based security interest—and run it⁵⁷ or liquidate it either as an ongoing concern or on a piece-by-piece basis. All aspects of a receiver's or receiver-manager's activities are subject to the same standard of commercial reasonableness that are applicable to the secured party appointing the receiver or receiver-manager. In addition, receivers or receiver-managers are subject to the scrutiny of the court. This scrutiny can be invoked in a summary manner by the debtor or by other persons who have interests in the collateral.⁵⁸ In addition, receivers or receiver-managers are obligated to provide information concerning the conduct of the receivership to such persons.⁵⁹

53. *Id.* § 63(2).

54. *Id.* § 62.

55. *Id.* § 65.

56. Canadian insolvency law is not as readily available in cases of business insolvency as is Chapter 11 of the United States Bankruptcy Code in comparable situations in the United States.

57. Receivers with this power are referred to as "receiver-managers." Almost all security agreements providing for receivership give management powers to an appointed receiver.

58. Personal Property Security Act, S.S., ch. P-6.2, § 64(8) (1993) (Can.).

59. *Id.* § 64(4)-(7).

VI. THE QUEBEC CIVIL CODE—BOOK SIX, TITLE THREE

The hypothec of the Civil Code⁶⁰ is the conceptual and functional equivalent of the security interest of the PPSAs and Article 9. A hypothec is a "real right" and a charge on either corporeal or incorporeal property, whether movable or immovable, that secures debt obligations. It confers on the creditor the right to follow the property charged into the hands of transferees, to take possession of it, to take it in payment or to sell it, or cause it to be sold and to have a preference on the proceeds of the sale.⁶¹

The hypothec displaces most, but not all, other types of financing devices used in Quebec prior to the implementation of the 1991 Civil Code—the hypothec provisions of which came into force on January 1, 1994. Its drafters refused to follow Article 9 and the PPSAs when it came to recharacterizing leases and title retention sales contracts as security devices. These transactions remain separate and are subject to regimes that prescribe different legal relationships between the parties than those applicable to transactions that create hypothecs. For example, the seller of movables under a title retention agreement must elect between taking back the movables or bringing an action against the buyer for the balance of the purchase price.⁶² A vendor who has financed the purchase of movables under a hypothec arrangement can have the movables sold without losing the right to recover the balance owed by the buyer.⁶³ Similar rigidity is applied to leasing arrangements. The Civil Code treats operating leases and financing leases separately from hypothecs,⁶⁴ and there appears to be no basis on which a Quebec court could conclude that a lease of the kind that would be characterized as a security agreement under Article 9 or as a hypothec under the PPSAs.

A hypothec can charge future property and automatically extends to property acquired by the debtor as replacement for charged property sold in the ordinary course of business.⁶⁵ The Civil Code recognizes what it terms a "hypothec on a universality," which is a

60. QUEBEC CIVIL CODE [QUE. CIV. C.] arts. 2660-2802 (Can.).

61. *Id.* arts. 2660, 2666, 2667.

62. *Id.* arts. 1745-1749. However, a sale with a right to redeem which is used to secure a loan is treated as creating a hypothec. *Id.* art. 1756.

63. *Id.* arts. 2784-2790 (applicable to a hypothec on the property of an enterprise).

64. *Id.* arts. 1842-1891.

65. *Id.* arts. 2666, 2670, 2673-2675, 2677, 2684.

charge on all property of a specified kind or kinds.⁶⁶ In addition, and somewhat anomalously, it perpetuates the pre-reform Quebec version of the English floating charge which is referred to as a "floating hypothec."⁶⁷ Given the rather weak position that the creditor acquires under this form of hypothec, it is most unlikely that it will be frequently used. Most of the security rights of the creditor are suspended until the charge is crystallized. Priority, except as against another floating charge, dates from the registration of a notice of crystallization.⁶⁸

Where the creditor has a hypothec on a universality and no replacement property is acquired by the debtor, the hypothec extends to the proceeds of the alienated property so long as they can be identified.⁶⁹ However, there is no definition of "proceeds" in the Civil Code and Quebec law does not have an equivalent to the equity rules of tracing;⁷⁰ thus, it is difficult to see how this feature can be effective in situations where a direct transactional link cannot be established between the charged property and property claimed as proceeds.

The priority structure of the Code is similar in function to that of the PPSAs and Article 9. It provides for a first-to-register or -publish priority rule;⁷¹ however, unlike its counterparts elsewhere in North America, the Civil Code does not permit preagreement publication. It does, however, permit publication before the debtor acquires ownership in the property charged.⁷² The Civil Code provides for a special priority status for vendors' hypothecs equivalent to that of a purchase money security interest under the PPSAs and Article 9;⁷³ however, this status does not extend to lenders who provide purchase money financing and take a hypothec on the property purchased with

66. *Id.*

67. *Id.* arts. 2715-2723. None of the common-law jurisdictions that have enacted PPSAs have retained anything that approximates conceptually the floating charge. All PPSAs provide that a security interest can be taken in all of a debtor's present and after-acquired personal property, but this results in a fixed charge, not a nonspecific charge.

68. *Id.* arts. 2716, 2755, 2955.

69. *Id.* art. 2674.

70. Courts in common-law provinces have taken equity tracing rules and modified them to reflect the policies of the PPSAs. See Ronald C.C. Cumming, *Protecting Interests in Proceeds: Equity and Canadian Personal Property Security Acts*, in *EQUITY, FIDUCIARIES AND TRUSTS* 423 (Donovan W.M. Waters ed., 1993).

71. QUE. CIV. C. arts. 2941, 2945.

72. *Id.* arts. 2950, 2954.

73. *Id.* art. 2954.

the loans. A hypothec may be granted to secure any obligation, even though the debtor has not received the value in consideration of which the debtor has undertaken the obligation.⁷⁴ Further, a hypothec is not necessarily extinguished because the debtor has paid down a line of credit to zero. However, the amount secured by the hypothec must be specified in the agreement providing for it.⁷⁵

The Civil Code provides an elaborate enforcement regime. A preseizure notice is generally required⁷⁶ and full redemption rights are given to debtors.⁷⁷ A creditor who has seized hypothecated property of a business enterprise may proceed to sell it. A set of regulatory rules is prescribed in order to ensure that the interests of the debtor are protected.⁷⁸ The creditor can elect to take the property in payment of the debt.⁷⁹ However, there are limitations on this right designed to protect the interests of the debtor and subordinate hypothecatory creditors.⁸⁰

A rough equivalent of common-law receivership is contained in the Civil Code. "A creditor who holds a hypothec on the property of an enterprise may . . . take possession"⁸¹ and administer it or may delegate the power of administration to someone else. Administration is subject to rules prescribed by the Civil Code for the regulation of administrators of property of others.⁸²

The private international law rules of the Civil Code applicable to hypothecs roughly parallel those of the PPSAs. The validity, publication, and effects of publication of a movable security are governed by the *lex situs* at the date of creation of the movable.⁸³ Property subject to a published security that is brought into Quebec is deemed to be published in Quebec if it is actually published in the province before the earliest of (1) thirty days from the date the property reaches Quebec, (2) fifteen days from the date the creditor is advised that the property has arrived in Quebec, or (3) the cessation of the effect of publication in the jurisdiction where the

74. *Id.* arts. 2687-2688.

75. *Id.* arts. 2689-2690.

76. *Id.* arts. 2749, 2757-2759.

77. *Id.* art. 2761.

78. *Id.* arts. 2784-2788.

79. *Id.* arts. 2778, 2781-2783.

80. *Id.* arts. 2779-2780.

81. *Id.* art. 2773.

82. *Id.* arts. 2773-2774.

83. *Id.* art. 3102.

property was situated at the time of creation of the security.⁸⁴ However, a security that is deemed to be registered in Quebec may not be set up against a buyer who has acquired the property in the ordinary course of the activities of the grantor of the security.⁸⁵ The validity of a security charged on a corporeal movable—other than a document-based security—ordinarily used in more than one jurisdiction or charged on an incorporeal movable is governed by the law of the domicile of the debtor at the date of creation of the security.⁸⁶ Domiciliary law also governs publication and effect of publication.⁸⁷ A change of domicile by the debtor requires publication of the security in the new domicile, but only if it is within Quebec.⁸⁸

VII. SUMMARY

The genius of Article 9 lies in the fact that it reflects the needs of modern business financing and, as such, its basic concepts are universal. This universality was early recognized in common-law provinces of Canada and more recently in Quebec. It would be unreasonable to expect that every aspect of Article 9 will find acceptance in jurisdictions that have legal traditions and public policy choices that differ from those of the United States. Nor could it be expected that registry concepts and related structures that were current in the 1950s would be given much consideration by Canadian law reformers of the 1980s and 1990s. However, given the clearly established trends in the reform of personal property security law in Canadian jurisdictions, the already considerable level of harmonization between the substantive secured financing laws of the individual states of the United States and the provinces of Canada can be expected to be augmented in the immediate future.

84. *Id.* art. 3104.

85. *Id.*

86. *Id.* art. 3105.

87. *Id.*

88. *Id.* art. 3106.

