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Résumé de l'article

Au Canada, il existe trois groupes principaux de systèmes de sûretés mobilières. Ces trois groupes comprennent le système de la common law de neuf provinces et deux territoires, le système de droit civil du Québec et la législation canadienne fédérale pertinente au financement des biens meubles. Le système de la common law se divise en deux groupes comprenant les juridictions qui ont adopté ou adopteront sous peu un concept unifié de sûreté mobilière inspiré de l'article 9 de l'*U.C.C.* des États-Unis, et ceux qui n'ont pas adopté et ne sont pas sur le point d'adopter un tel concept.

Le but de cet essai est de décrire les similarités et les différences entre les systèmes de sûretés mobilières au Canada. D'après cette description, il faut conclure qu'il est impossible de caractériser définitivement ce domaine de droit au Canada comme divergent ou homogène, et malgré les différences et similarités, tous les systèmes de sûretés mobilières au Canada sont commensurables.

The Nature and Diversity of Personal Property Security Systems in Canada

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ABSTRACT

In Canada, there are three natural groupings of personal property security systems. These are the Common law systems of nine provinces and two territories, the Civil law system of Québec and the Canadian federal legislation relevant to secured lending. The Common law jurisdictions subdivide into two groups consisting of those which have adopted or are about to adopt unitary personal property security legislation modelled upon Article 9 of the U.C.C. *of the United States, and those which have not and are not about to adopt such legislation.*
The purpose of this paper is to describe the common and disparate features of the systems for security on personal or moveable property in Canada. The descriptive exercise indicates that it is impossible to characterize the law in this domain

RÉSUMÉ

*Au Canada, il existe trois groupes principaux de systèmes de sûretés mobilières. Ces trois groupes comprennent le système de la common law de neuf provinces et deux territoires, le système de droit civil du Québec et la législation canadienne fédérale pertinente au financement des biens meubles. Le système de la common law se divise en deux groupes comprenant les juridictions qui ont adopté ou adopteront sous peu un concept unifié de sûreté mobilière inspiré de l'article 9 de l'*U.C.C. *des États-Unis, et ceux qui n'ont pas adopté et ne sont pas sur le point d'adopter un tel concept.*
Le but de cet essai est de décrire les similarités et les différences entre les systèmes de sûretés mobilières au Canada. D'après cette description, il faut conclure qu'il est impossible de caractériser

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as either completely divergent or homogeneous and that, despite similarities and differences, there is a substantial degree of commensurability among Canadian systems of security on personal property.

définitivement ce domaine de droit au Canada comme divergent ou homogène, et malgré les différences et similarités, tous les systèmes de sûretés mobilières au Canada sont commensurables.

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INTRODUCTION

At present, there are no two jurisdictions in Canada with completely identical rules regarding security on personal property. Diversity in this domain abounds at the level of statutory organization and wording, as well as at that of policy as reflected in substantive rules. Nonetheless, in Canada there are three obvious groupings of personal security systems, one of which can be divided into two subgroups. The three principal systems are the Common law systems of nine provinces and two territories, Civil law system of Québec and Canadian federal legislation relevant to secured lending. The Common law jurisdictions subdivide into two groups consisting of those which have adopted or are about to adopt unitary personal property security legislation modelled upon Article 9 of the *U.C.C.*[1] and those which have not adopted and are not about to adopt such legislation.[2]

By contrast, all Canadian jurisdictions share some common features in their treatment of security on personal property. As in any interjurisdictional comparison, the greater the generality or abstraction of the comparison, the more likely it is to find similarities. In the case of security on personal property, the common attributes of all systems in Canada indicate a meaningful degree of commensurability.

1. These jurisdictions are Ontario, Manitoba, Saskatchewan, Alberta, British Columbia, Prince Edward Island and the Yukon Territories.

2. Nova Scotia, Newfoundland, New Brunswick and the Northwest Territories have not adopted and do not appear to be preparing to adopt unitary personal property security legislation.

The purpose of this article is to describe the common and disparate features of security on personal property systems in Canada in a manner which is accessible to both Common and Civil law jurists. It is also intended to demonstrate that it is difficult, if not impossible, to characterize definitively the Canadian law in this domain as divergent or homogeneous. First, I will examine the features common to all systems of security on personal property in Canada. Then, I shall describe the disparate features of the Common and Civil law systems, as well as the role of the relevant federal legislation.

I. The Nature and Commonality of Security on Personal Property in Canada

The concept and formal structure of security on personal property in Canada are the same in all jurisdictions and transcend political boundaries, as well as legal systems.

From a conceptual perspective, security on personal property is a system which provides a creditor with preferred status as regards the enforcement of his claim in situations of competition among creditors of the same debtor whose assets are insufficient to cover all of the debts. The preferred status permits a secured creditor to be paid not only prior to all ordinary or non-preferred creditors, but also prior to other preferred, but lower-ranking creditors with preferred claims against identical assets of the debtor. These priorities are exclusionary in the sense that each secured creditor's claim is paid in full according to its rank and the sufficiency of a debtor's assets.

As a system which creates and regulates priorities among competing creditors, the rules of security on personal property in all Canadian jurisdictions combine various domains of law and have their philosophical roots in both corrective and distributive notions of justice. Within a traditional taxonomy of legal rules, security on personal property involves issues of contract law, property law, civil procedure, bankruptcy and insolvency, and commercial law and custom. Depending upon the specific participants and property offered as security, laws regulating corporate entities, banks and other financial institutions, negotiable instruments, securities, intellectual property and taxation may also come into play.

This multidimensional legal framework reflects the Aristotelian notions of corrective and distributive justice because it regulates the relations between an individual creditor and debtor, as well as the entitlements of all competing creditors *vis-à-vis* the assets of a particular debtor.[3] Corrective justice informs the former individualized transaction by correcting any transactional inequality between the parties who are treated as abstract agents. In this context, the parties are considered to be equal *vis-à-vis* all *ex ante* allocations of resources. Inequality resulting from a voluntary or involuntary transaction is rectified in an arithmetical sense by taking the unjust gain from the wrongdoing party and restoring the commensurate loss to the wronged party. A determination of entitlements according to corrective

3. See G. Borden, "The Law of Construction Privileges: Corrective Justice or Distributive Justice?", (1989) 2 *Can. J. L. & Jurisp.* 57; R. Posner, "The Concept of Corrective Justice in Recent Theories of Tort Law", (1981) 10 *J. Legal Studies* 189-91; A. Schwartz, "Security Interests and Bankruptcy Priorities: A Review of Current Theories", (1981) 10 *J. Legal Stud.* 30-3; E.J. Weinrib, "Liberty, Community and Corrective Justice", (1988) 1 *Can. J. L. & Jurisp.* 4-5.

justice is based solely upon the rights emanating from the transaction between the parties without reference to extraneous factors.

Distributive justice is a form of justice which determines the allocation of resources among potential recipients without reference to individual transactions. This form of justice is proportional in that its predetermined criteria of merit establish the proportionate share of each recipient of the resources to be allocated. Equality in this context is an equality of ratios resulting from the consistent application of the criteria of merit or distribution.

Accordingly, on a superficial level, distributive justice is the primary form of justice behind the rules regulating the allocation of a debtor's assets among competing creditors, while corrective justice determines the initial entitlement of a creditor to receive payment of his debt. Both forms of justice, however, combine in a more subtle and complex way as a basis for personal property security systems. In all jurisdictions in Canada, security devices are limited in scope to an identifiable asset or group of assets of a debtor. This reification of secured rights in personal property imports a corrective justice element as an inherent part of the distributive schemes regulating the priorities of secured creditors. In particular, it creates several classes of priorities which temper distributive allocations between secured creditors and unsecured creditors on one hand, and among competing secured creditors on the other hand. The reification of secured rights or their restriction to specific assets partakes of both corrective and distributive justice, as does any absence of such a restriction. The result is that both forms of justice are inextricably commingled in all systems of security on personal property in Canada, all the components of which must be justified by some external rationale or distributive criteria of merit.

The commonality of the formal philosophical bases of all Canadian personal property security systems is reflected in the structure and subject matter of their technical rules. The rules of security on personal property in Canada are divisible into four groups. First, there are rules regarding the validity and scope of the security mechanisms. These rules indicate the formalities for the initial creation of secured rights as regards a debtor and creditor, as well as the restrictions, if any, applicable to the debt, property or parties to the security agreement. Second, there are rules establishing the formalities for third-party enforceability of a creditor's secured rights most notably as regards competing unsecured creditors. In all Canadian jurisdictions, this enforceability is based upon possession of the collateral by the secured creditor or a third party, or registration as notice to third parties of the existence of secured rights. Third, every personal property security system in Canada establishes rules for determining the priorities of claims among secured creditors competing *vis-à-vis* the same assets. Finally, every system enumerates the remedies available to secured creditors in the event of default by a debtor. These four categories of rules will likely originate in both the formally structured personal property security system and related, but not formally designated, areas of law such as civil procedure and contracts. Nonetheless, all of these rules must be considered to form part of the systems of personal property security in Canada.

Another common characteristic of all personal property security systems in Canada is their physically or geographically localized nature. This does not mean that collateral security cannot be moved or relocated between jurisdictions. Nor does it refer to the fact that in a commercial enterprise, the assets used as security are usually physically proximate to the *situs* of the business which may or may not be restricted to one jurisdiction. The localized nature of personal

property security systems refers to the *nexus* between security on property and assets of the debtor, and to the fact that an asset can be in only one place at a time. The localization of security on property can arise at the creation of secured rights in the context of an initial inspection of a debtor's enterprise by a creditor or description of assets comprising the collateral security. Or it can arise during the life of the security in the context of various forms of monitoring the debtor's behaviour by a secured creditor. The localized nature of security on personal property must, however, arise at the stage of enforcement of a secured creditor's rights post-default. By definition, the procedure for enforcement depends upon the existence and location of assets to the point that enforcement is ultimately located in the jurisdiction in which the assets are found. In this sense, all security on personal property systems are conceptually localized or restricted to the location of the assets over which security is given. This localization results from the reification of personal property security systems, *i.e.* their focus upon assets of a debtor.

These common attributes powerfully support an argument that there are functionally coterminous regimes of security, if not conceptually unified systems, on personal property in Canada. These common attributes include a common practical context of insolvency and creditor competition, similarity of legal effects, common domains of law, identical formal philosophical bases, identical structure and subject matter of legal rules and the localized nature of secured rights. The commonality of this legal domain might be a consequence of the natural convergence of laws[4] or due to the nature of personal property security laws as rules for channelling behaviour.[5] Whatever its origins, the identity of the structure and function of personal property security laws in Canada implies a meaningful degree of commensurability.

II. THE DIVERSITY OF PERSONAL PROPERTY SECURITY IN CANADA

I will examine first the reformed and unreformed Common law jurisdictions in Canada, as well as important differences within each of these two groups. This will be followed by an analysis of the Civil law of Québec as it pertains to security on moveable property. Finally, the federal legislation regarding banks and bankruptcy will be examined insofar as these enactments affect provincial personal property security systems.

A. UNREFORMED COMMON LAW JURISDICTIONS

In the jurisdictions in Canada which have not or are not about to adopt legislation modelled upon Article 9 of the *U.C.C.*,[6] the regime of security on personal property is governed by a combination of statutory and Common law

4. See J.H. MERRYMAN, "On the Convergence (and Divergence) of the Civil and the Common Law", (1981) 17 *Stan. J. Int. Law* 369-71.

5. See S. LEVMORE, "Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law", (1986) 61 *Tulane L.R.* 235.

6. See jurisdictions listed, *supra*, note 2.

rules.[7] The primary Common law rules which inform the statutory personal property security mechanisms relate to security on future or after-acquired property, the floating charge, the assignment of present and future debts and the extension of secured rights in assets to the proceeds of disposition of those assets. All of these rules entail, in some degree, the application of the dichotomy between legal and equitable interests to security on future property and particularly to the priority rules which govern this form of security.

The general rule at Common law is that proprietary interests can arise only as regards present property. Hence, a purported disposition of future property does not *per se* generate any legal title. Such a disposition will generate an equitable interest when the property comes into existence only if the property has been sufficiently described so as to permit specific performance of the disposition. Legal title would ensue if the transferor subsequently performs a contractually pre-determined act to ratify the transfer. Unless specifically modified by statute, these rules and their consequent priority rules apply to the creation of security interests in future property.

In an analogous fashion, the floating charge of Anglo-Canadian corporate law is a security device which creates an equitable interest in future property upon the occurrence of a future event known as "crystallization". This security mechanism which applies to present and future property, floats over these assets becoming fixed or crystallized only when the secured party takes steps to enforce the security upon default or when the debtor ceases to carry on business. Prior to these events, the debtor can deal with the secured assets free of any effects of the charge. Hence, the floating charge has no priority or enforceability before crystallization and merely the priority of an equitable charge upon present assets after this event.

At Common law, the third-party enforceability of an assignment of debts requires that an assignee give notice of the assignment to the account debtors. Thus, where two or more assignees are competing as regards the same debts, the first to have given this notice prevails.[8] Further, as indicated above *vis-à-vis* security on future property, the assignee of future debts or accounts receivable obtains merely an equitable interest in them.

The extension, a secured creditor's rights over assets to the proceeds of a private sale of those assets by the debtor, entails the application of the Common law rules outlined above regarding security on future property and book debts, as well as rules pertaining to the law of trusts and agency.[9] Where a debtor has

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7. The analysis which follows is based upon the following periodical literature: J.S. ZIEGEL, "Canadian Chattel Security Law: Past Experience and Current Developments", in J.G. SAUVEPLANNE (ed.), *Security Over Corporeal Moveables*, Leiden, A.W. Sijthoff, 1974, p. 71; F.M. CATZMAN *et al.*, "Chattel Security: Order out of Chaos", (1964) 6 *Can. Bar J.* 278; *ID.*, "Common Law Developments in the Personal Property Security Field", [1967] *Meredith Memorial Lectures*, Montreal, Wilson & Lafleur Ltée, 1967, p. 26; J.S. ZIEGEL, "The Legal Problems of Wholesale Financing of Durable Goods in Canada", (1963) 41 *Can. Bar R.* 54; D.W. LEE, "Secured Financing in Canada", (1970) 8 *Alta. L.R.* 389; R.M. GOODE & L.C.B. GOWER, "Is Article 9 of the Uniform Commercial Code Exportable? An English Reaction", in *Aspects of Comparative Commercial Law*, Montreal/Dobbs Ferry, McGill/Oceana, 1969, p. 298; E.I. SYKES, *The Law of Securities*, 4th ed., Sydney, Law Book, 1986.

8. This is known as the rule in *Dearle* v. *Hall*, (1828) 3 Russ. 1; 38 E.R. 475.

9. See D.W. LEE, *loc. cit.*, note 7, pp. 403-7; J.S. ZIEGEL, "The Legal Problems of Wholesale Financing of Durable Goods in Canada", *loc. cit.*, note 7, pp. 96-115.

fraudulently sold goods subject to a security interest, a secured creditor who cannot impeach the sale has a legal right to claim the proceeds as a secured creditor if they are identifiable and distinct from other funds. If the proceeds have become mixed with other funds, the secured creditor has an equitable tracing remedy which imposes a charge upon the fund or substituted asset, if the proceeds are identifiable as a generator in part or in whole of the fund or asset. If a debtor sells with the consent of a secured creditor, such as that implicit in a floating charge, the creditor is deemed to have renounced to any secured claim on the proceeds. If, however, a debtor sells with the consent of a secured creditor and the parties have agreed that the proceeds are subject to the secured rights of the creditor, the latter's ability to claim the proceeds as a secured creditor depends upon the legal relationship between the creditor and debtor. Whether or not the goods are sold by the debtor as an agent, trustee or principal, at Common law a creditor's claim upon the proceeds will be based upon the debtor's status as trustee of them. Hence, at best, a secured creditor will have an equitable interest in the proceeds enforceable *via* the above described equitable tracing remedy. An identical legal analysis applies where the proceeds agreement relates to proceeds generated from the sale of future property and to entitlement based upon accounts receivable from the sale. As regards the latter, the equitable interest might not be enforceable if the appropriate notices required for the assignment of accounts receivable are not given.

In summary, at Common law, security upon future property, be it chattels, choses in action or debts, or the proceeds of either of these, generates an equitable interest, as does security by means of a floating charge. An equitable interest has priority over a subsequent legal title with notice of it and subsequent equitable title. In other words, a prior legal interest and subsequent legal interest without notice prevail over an equitable interest.

In non-U.C.C. based Canadian jurisdictions, superimposed upon these Common law rules are two sets of statutes. The first group of statutes regulates in a mutually exclusive fashion the consensual security devices known as the chattel mortgage, conditional sale and assignment of book debts, as well as security interests issued by corporations. The primary effect of these statutes is the imposition of a registration formality for the creation of non-possessory security interests. The second set of statutes regulates non-consensual preferred claims and liens.

Within the statutory framework regarding consensual security mechanisms, chattel mortgage legislation applies to any transfer of present or future goods intended to operate as a mortgage or pledge *vis-à-vis* present or future indebtedness.[10] The conditional sales legislation applies to any transaction in which the title to goods sold and delivered to a buyer is reserved to a seller until payment of the purchase price has been made in full.[11] Statutes regulating assignments of book debts apply to any assignment — legal or equitable, absolute or as security — of present and future book debts other than *inter alia*, an assignment of book debts due at the date of the assignment or those becoming due under specified,

10. See *Bills of Sale Act*, R.S.N.B. 1973, c. B-3, ss. 2, 9(1); *The Bills of Sale Act*, R.S.N. 1970, c. 21, ss. 3, 8(1); *Bills of Sale Act*, R.S.N.S. 1964, c. 23, ss. 26, 7(1); *Bills of Sale Ordinance*, R.O.N.W.T. 1974, c. B-1, ss. 25, 8(1).

11. See *Conditional Sales Act*, R.S.N.B. 1973, c. C-15, s. 1 ("conditional sale"); *The Conditional Sales Act*, R.S.N. 1970, c. 56, s. 2(f): *Conditional Sales Act*, R.S.N.S. 1967, c. 48, s. 1(b); *Conditional Sales Ordinance*, R.O.N.W.T. 1974, c. C-9, s. 2(b).

existing contracts.[12] The corporation securities legislation regulates all forms of security interests in present and future chattels including mortgages, specific and floating charges and assignments of book debts issued by a corporation through a trust deed, bond or debenture.[13] As indicated earlier, these statutes are mutually exclusive to avoid unnecessary duplication of formal requirements.

The formal requirements imposed by statute upon conditional sales, chattel mortgages, assignments of book debts and security interests issued by corporations are different combinations of a written security agreement, registration of the agreement and registration of affidavits of execution and *bona fides*.[14] The place of registration can differ under each statute, as can the delay for registration and the delay for the renewal of registration.[15]

The effect of registration is generally stated in the statutes to be that the security interest is void, as against creditors and subsequent purchasers and mortgageees for value in good faith, without notice unless duly registered.[16]

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12. See *Assignment of Book Debts Act*, R.S.N.B. 1973, c. A-15, ss. 1 (''assignment'') and (''book debts''), 2(b) & (c); *The Assignment of Book Debts Act*, R.S.N. 1970, c. 15, ss. 2(b) & (d), 3(b) & (c); *Assignment of Book Debts Act*, R.S.N.S. 1967, c. 15, ss. 1(b) & (d), 2(b) & (c); *Assignment of Book Debts Ordinance*, R.O.N.W.T. 1974, c. A-6, ss. 2(b) & (d), 3(b) & (c).

13. See *Corporation Securities Registration Act*, R.S.N.B. 1973, c. C-25, s. 2(1); *Corporations Securities Registration Act*, R.S.N.S. 1967, c. 60, s. 2(1); *Corporation Securities Registration Ordinance*, R.O.N.W.T. 1974, c. C-17, s. 3(1).

14. See *Bills of Sale Act* (N.B.), ss. 3, 6(1), 7, 9(2), 10, 11, 25; *Conditional Sales Act* (N.B.), s. 3(1) & (2); *Assignment of Book Debts Act* (N.B.), ss. 3(1), 4(1); *Corporation Securities Registration Act* (N.B.), ss. 2(1) & (2), 3(1); *The Bills of Sale Act* (Nfld.), ss. 4, 7(1) & (3), 8(2), 9, 10, 19(6); *The Conditional Sales Act* (Nfld.), s. 4(1) & (3); *The Assignment of Book Debts Act* (Nfld.), ss. 4, 5(1); *Bills of Sale Act* (N.S.), ss. 2, 6, 7, 8, 9, 23; *Conditional Sales Act* (N.S.), s. 2(2); *Assignment of Book Debts Act* (N.S.), ss. 3(1), 4(1); *Corporations Securities Registration Act* (N.S.), ss. 2(1) & (2), 3(1); *Bills of Sale Ordinance* (N.W.T.), ss. 3, 7, 8, 9, 10, 22; *Conditional Sales Ordinance* (N.W.T.), s. 3(2); *Assignment of Book Debts Ordinance* (N.W.T.), ss. 4(1), 5; *Corporation Securities Registration Ordinance* (N.W.T.), ss. 3(1) & (2), 4(1).

15. See *Bills of Sale Act* (N.B.), ss. 6(1) & (3), 12(1); *Conditional Sales Act* (N.B.), ss. 3(2) & (3), 7; *Assignment of Book Debts Act* (N.B.), ss. 4(1), 6(1); *Corporation Securities Registration Act* (N.B.), s. 3(1); *The Bills of Sale Act* (Nfld.), ss. 7(1), 11(1); *The Conditional Sales Act* (Nfld.), ss. 4(3), 11(1); *The Assignment of Book Debts Act* (Nfld.), s. 5(1); *Bills of Sale Act* (N.S.), ss. 5(1) & (2), 10(1); *Conditional Sales Act* (N.S.), ss. 2(2) & (3), 11(1); *Assignment of Book Debts Act* (N.S.), s. 4(1); *Corporations Securities Registration Act* (N.S.), s. 3(1); *Bills of Sale Ordinance* (N.W.T.), ss. 6(1), 11(1); *Conditional Sales Ordinance* (N.W.T.), ss. 3(2), 5(1); *Assignment of Book Debts Ordinance* (N.W.T.), s. 5, 6(1); *Corporation Securities Registration Ordinance* (N.W.T.), s. 4(1). As to differences in the requirements, see, for example, *Bills of Sale Act* (N.S.), s. 5(1) and *Conditional Sales Act* (N.S.), s. 2(2) (regarding place of registration); *Bills of Sale Act* (N.S.), s. 5(1) and *Conditional Sales Act* (N.S.), s. 2(2) (regarding delay for registration); *Bills of Sale Act* (N.S.), s. 10(1) and *Conditional Sales Act* (N.S.), s. 11(1) (regarding delay for renewal).

16. See *Bills of Sale Act* (N.B.), s. 3; *Conditional Sales Act* (N.B.), s. 2; *Assignment of Book Debts Act* (N.S.), s. 3(1); *Corporation Securities Registration Act* (N.B.), s. 2(1); *The Bills of Sale Act* (Nfld.), s. 4; *The Conditional Sales Act* (Nfld.), s. 3; *The Assignment of Book Debts Act* (Nfld.), s. 4(1); *Bills of Sale Act* (N.S.), s. 2; *Conditional Sales Act* (N.S.), s. 2(1); *Assignment of Book Debts Act* (N.S.), s. 3(1); *Corporations Securities Registration Act* (N.S.), s. 2(1); *Bills of Sale Ordinance* (N.W.T.), s. 3; *Conditional Sales Ordinance* (N.W.T.), s. 3(1); *Assignment of Book Debts Ordinance* (N.W.T.), s. 4(1); *Corporation Securities Registration Ordinance* (N.W.T.), s. 3(1) (c).

Canadian authorities have consistently interpreted this negatively constructed rule to mean that registration merely preserves the Common law rights of a secured creditor.[17] The result is that the Common law priority system described above applies within the statutory framework unless explicitly modified. According to the Canadian authorites, statutory registration is not constructive notice of a registered equitable security interest.[18] Hence, any subsequent legal title by way of absolute transfer or security will prevail over a prior registered equitable security interest unless the subsequent legal titleholder has actual notice of the prior equitable interest. In particular, the legal interest of a conditional seller whose security is restricted to present property prevails over the equitable interests of future property secured creditors. All Canadian conditional sales statutes, however, provide that where there is express or implied consent given by the secured creditor to the debtor to sell the collateral in the ordinary course of business, a buyer takes free of the security interest.[19] In the case of the assignment of book debts, third party enforceability requires actual notice to the account debtor.[20] All of this means that under the non-U.C.C. based system of security on personal property, future property security interests in chattels, debts and their proceeds are virtually unprotected against competing secured creditors with legal interests, *i.e.* those whose interests or rights were created after the future property became present property or those future property secured creditors for whom a debtor has ratified the initial equitable security interest thereby transforming it into a legal interest. With the possible exception of a floating charge, an equitable security interest under a registered chattel mortgage, conditional sale or assignment of book debts is enforceable against a debtor's trustee in bankruptcy and process or execution creditor.[21]

The absence of assured priority, at least as regards future property secured creditors, is compounded *vis-à-vis* all types of property by the mutually exclusive nature and diverse formal requirements of the various personal property security statutes. Fulfilment of the formalities under a particular statute based upon the mistaken identity of the nature of a security interest will not necessarily avail to validate the security under another statute.

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17. See, for example, J.S. ZIEGEL, "Canadian Chattel Security Law: Past Experience and Current Developments", *loc. cit.*, note 7, p. 90. See also, *Traders Finance Corp. Ltd.* v. *Dawson Implements Ltd.*, (1959) 15 D.L.R. (2d) 515 (B.C.). Contrast, *Kozak* v. *Ford Motor Credit Co.*, [1971] 3 W.W.R. 1 (Sask. C.A.).

18. See, for examples, J.S. ZIEGEL, "The Legal Problems of Wholesale Financing of Durable Goods in Canada", *loc. cit.*, note 7, p. 64; D.W. LEE, "Perfection by Registration", (1969) 47 *Can. Bar Rev.* 427; D.W. LEE, *loc. cit.*, note 7, p. 399. See also *Joseph* v. *Lyons*, (1884) 15 Q.B.D. 280 (C.A.).

19. See *Conditional Sales Act* (N.B.), s. 9; *The Conditional Sales Act* (Nfld.), s. 8; *Conditional Sales Act* (N.S.), s. 5; *Conditional Sales Ordinance* (N.W.T.), s. 7.

20. See text *supra* accompanying note 8.

21. See *Bills of Sale Act* (N.B.), ss. 1 ("creditor"), 3; *Conditional Sales Act* (N.B.), ss. 1 ("creditor"), 2; *Assignment of Book Debts Act* (N.B.), ss. 1 ("creditor"), 3(1); *Corporation Securities Registration Act* (N.B.), ss. 1 ("creditor"), 2(1); *The Bills of Sale Act* (Nfld.), ss. 2(c), 4; *The Conditional Sales Act* (Nfld.), ss. 2(g), 3; *The Assignment of Book Debts Act* (Nlfd.), ss. 2(e), 4(1); *Bills of Sale Act* (N.S.), ss. 1(d), 2; *Conditional Sales Act* (N.S.), s. 2(1); *Assignment of Book Debts Act* (N.S.), ss. 1(e), 3(1); *Corporations Securities Registration Act* (N.S.), ss. 1(f), 2(1); *Bills of Sale Ordinance* (N.W.T.), ss. 1(d), 3; *Conditional Sales Ordinance* (N.W.T.), ss. 2(c), 3(1); *Assignment of Book Debts Ordinance* (N.W.T.), ss. 2(e), 4(1); *Corporation Securities Registration Ordinance* (N.W.T.), ss. 2(f), 3(1) (c). See also, D.W. LEE, *loc. cit.*, note 7, p. 399; D.W. LEE, *loc. cit.*, note 18, p. 426.

The non-U.C.C. based personal property security statutes do not, as a rule, regulate the remedies available to a secured creditor upon default by a debtor.[22] The security agreement and otherwise applicable Common law and statutory rules determine the nature and means of enforcement of default remedies.

The statutes creating non-consensual preferred claims and liens upon personal property are generally restricted in their application to specified assets, creditors or debts.[23] Thus, they are not central to the conceptual structure of personal property security systems. Nonetheless, non-consensual preferred claims can reduce the effectiveness of the security mechanisms discussed above. For this reason and for completeness, the role of statutory claims and liens shall be examined briefly.[24]

Non-consensual, statutory preferred claims can take the form of liens or possessory rights accompanied by powers of sale, preferences for payment without possession or trusts. Further, they always apply to present property and can be created in favour of a government or private person. As mentioned earlier, the statutes regulating consensual security devices do not provide any priority system. Thus, the enforceability of non-consensual preferred claims as regards competing secured creditors depends upon the priority rules established in the statute which creates them and, in the absence of such rules, the Common law priority rules described previously. For example, a statutory lien which has attached to present goods takes priority over a prior and later equitable security interest. Statutes creating claims in favour of governments often accord "special liens" or "first liens". There is, however, little consistency in wording in this regard and judicial interpretation varies widely.

Of particular interest of their common occurrence are the statutory liens in favour of a landlord and unpaid seller. According to most landlord and tenant statutes in Canada,[25] a landlord's lien applies to a third party's goods if title to them is derived from the tenant in any way including absolute transfer, trust and mortgage. Consequently, a landlord's lien takes precedence over prior and later chattel mortgages granted by the tenant in favour of third parties. It is not, however, enforceable *vis-à-vis* goods sold to the tenant on conditional sale because a conditional seller does not derive title from the tenant. Most Canadian provinces accord a landlord priority over execution creditors. A landlord has a preferred claim in the event of a tenant's bankruptcy.

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22. The conditional sales statutes do, however, regulate the remedies. See *Conditional Sales Act* (N.B.), s. 15(1)-(4); *The Conditional Sales Act* (Nfld.), s. 12(1)-(4), (8); *Conditional Sales Act* (N.S.), ss. 10(3), 12(1)-(4).

23. See *Sale of Goods Act*, R.S.N.B. 1973, c. S-1; *Landlord and Tenant Act*, R.S.N.B. 1973, c. L-1; *The Sale of Goods Act*, R.S.N. 1970, c. 341; *Sale of Goods Act*, R.S.N.S. 1967, c. 274; *Tenancies and Distress for Rent Act*, R.S.N.S. 1967, c. 302; *Sale of Goods Ordinance*, R.O.N.W.T. 1974, c. S-2; *Landlord and Tenant Ordinance*, R.O.N.W.T. 1974, c. L-2.

24. See as regards non-consensual statutory claims, W.A. BOGART, "Statutory Claims and Personal Property Security Legislation: A Proposal", (1983-84) 8 *Can. Bus. L.J.* 129; D.E. BAIRD, "Priority of Non-PPSA Secured Creditors" in D.E. BAIRD & F. BENNETT (ed.) *Handbook on the Personal Property Security Act*, Toronto, Insight, 1984, p. 85; J.S. ZIEGEL, "Recent and Prospective Developments in the Personal Property Security Area", (1985) 10 *Can. Bus. L.J.* 144-6.

25. See generally *William & Rhodes Canadian Law of Landlord and Tenant*, vol. 1, 6th ed. by C. BENTLEY, J. MCNAIR & M. BUTKUS, Toronto, Carswell, 1988, ch. 8; R.A. MACDONALD & R.L. SIMMONDS, "The Financing of Moveables: Law Reform in Quebec and Ontario", [1981] *Meredith Memorial Lectures*, Don Mills, Richard DeBoo, 1982, pp. 287-90.

The non-consensual preferred rights of an unpaid seller of personal property are limited by sale of goods legislation to a possessory lien, right of stoppage in transit and right of resale which attaches to the former two rights.[26] These rights which lapse upon delivery to the buyer[27] are enforceable against a buyer's unsecured creditors and competing secured creditors. As pre-delivery remedies, however, they are of limited occurrence and use.

In summary, the system of security on personal property in non-U.C.C. based Canadian jurisdictions is a combination of Common law and statutory rules in which the classification of security interests both according to statutory taxonomy and legal and equitable interests is primordial to their validity and enforceability. The system is particularly hostile to security on future or after-acquired property which generates at best an equitable interest, the registration of which does not constitute constructive notice to third parties.

B. REFORMED COMMON LAW JURISDICTIONS

Most Common law jurisdictions in Canada are about to adopt or have adopted a personal property security statute based on Article 9 of the U.S. *Uniform Commercial Code*.[28] The broadly stated purposes of this legislation are to modernize, rationalize and integrate the system for personal property security described above. The guiding principle for rationalization and modernization is unification of the concept and regulation of security on personal property. The specific results within each jurisdiction are twofold. First, there is a generic, functional concept of security on personal property so that, unless otherwise stated, one statute applies to every transaction intended to secure performance of an obligation without regard to the transaction's form, the legal or equitable nature of the security interest, or the *locus* of title to or nature of the collateral.[29] Hence, in principle, one statute regulates security interests in present and future chattels, documents of title, debts, chattel paper, proceeds generated by the sale of collateral or new goods generated

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26. See *Sale of Goods Act* (N.B.), ss. 37(1) & (2), 40(1), 41, 42; *The Sale of Goods Act* (Nfld.), ss. 41(1) & (2), 44(1), 45, 46; *Sale of Goods Act* (N.S.), ss. 40(1) & (2), 43(1), 44, 45; *Sale of Goods Ordinance* (N.W.T.), ss. 38(1) & (2), 41(1), 42, 43.

27. See M.G. BRIDGE, *Sale of Goods*, Toronto, Butterworths, 1988, pp. 681 *et seq.*; G.H.L. FRIDMAN, *Sale of Goods in Canada*, Toronto, Carswell, 1986, p. 309 *et seq.*

28. See jurisdictions listed *supra*, note 1.

29. See *The Personal Property Security Act*, R.S.M. 1987, c. P35, s. 2 [hereinafter PPSA (Man.)]; *The Personal Property Security Act*, S.S. 1980, c. P-6.1, s. 3 [hereinafter PPSA (Sask.)]; *Personal Property Security Act*, R.S.Y.T. 1986, c. 130, s. 2 [hereinafter PPSA (Y.T.)]; *The Personal Property Security Act*, 1989, S.O. 1989, c. 16, s. 2(b) [hereinafter PPSA (Ont.)]; *The Personal Property Security Act*, S.A. 1988, c. P-4.05 (effective October 1, 1990), s. 3 [hereinafter PPSA (Alta.)] as amended by *The Personal Property Security Amendment Act, 1990*, S.A. 1990, c. 31 (effective October 1, 1990); *Personal Property Security Act*, S.P.E.I. 1990, c. 42 (effective April 26, 1990), s. 2 [hereinafter PPSA (P.E.I.)]; *Personal Property Security Act*, S.B.C. 1989, c. 36 (effective October 1, 1990 except ss. 79-148), s. 2(1) [hereinafter PPSA (B.C.).] as amended by the *Personal Property Security Amendment Act*, S.B.C. 1990, c. 36 (effective October 1, 1990 except ss. 54-112). The B.C. amending statute was unavailable. The present analysis of the B.C. legislation is based on the 1989 statute supplemented by the following articles: B. CHEFFINS, "British Columbia's Draft Personal Property Security Act: An Overview", (1989) 47 *Advocate* 67; J.S. ZIEGEL, "The Draft B.C. Personal Property Security Act", (1989) 47 *Advocate* 281; J.S. ZIEGEL, "Why B.C. Should Adopt a Personal Property Security Act", (1984) 42 *Advocate* 435.

by processing the initial collateral. Second, unless the nature of the collateral dictates otherwise, the same rules regarding the formation, enforceability, priorities and realization govern all security interests. This twofold unification process has quite naturally simplified some of the rules regulating security on personal property. In summary, subject to the differences discussed below, the *U.C.C.* based legislation in Canada is an attempt to codify within one statute the law regarding all personal property security mechanisms.

Under the reformed system, different statutory formalities regulate the enforceability of a security agreement as regards the parties to it and classes of third parties. A security agreement is enforceable between the parties if it is written, value has been given and the debtor has rights in the collateral.[30]

Third party enforceability requires at a minimum that the secured party be in possession of the collateral or that the debtor sign a security agreement which describes the collateral.[31] The additional formality of perfection of the security interest, however, is necessary to render it enforceable as regards an execution creditor, trustee in bankruptcy and certain non-ordinary course transferees for value and without notice.[32] More importantly, perfection enhances the priority position of a secured creditor *vis-à-vis* competing security interests. Perfection occurs when, regardless of the order of occurrence, the security interest has attached and the secured creditor has taken possession of the collateral or has registered a notice or financing statement in relation to the security interest.[33] Attachment occurs when value is given in exchange for the security interest, the debtor has rights in the collateral and the security interest has become enforceable against third parties.[34] The parties can agree to delay attachment past the time at which these requirements have been fulfilled. In Manitoba, third party enforceability is not necessary for attachment.[35]

Unlike the non-U.C.C. based registration system described above, notice filing entails registration of a financing statement containing minimal information regarding the parties and the nature of the collateral.[36] There is no requirement to register the actual security agreement or supporting affidavits. The system is intended to alert interested parties to the need to make further inquiries for more detailed information.

Priorities under *U.C.C.* based legislation in Canada are determined by chronology or timing of perfection and, in the absence of perfection, by the timing

30. See PPSA (Man.), s. 12(1); PPSA (Sask.), s. 12(1); PPSA (Y.T.), s. 11(1); PPSA (Ont.), s. 11(2); PPSA (Alta), s. 12(1); PPSA (P.E.I.), s. 11(1); PPSA (B.C.), ss. 11, 12(1).

31. See PPSA (Man.), s. 10; PPSA (Sask.), s. 10(1); PPSA (Y.T.), s. 8(1); PPSA (Ont.), s. 11; PPSA (Alta.), s. 10(1); PPSA (P.E.I.), s. 9(1); PPSA (B.C.), s. 10(1).

32. See PPSA (Man.), s. 22(1); PPSA (Sask.), s. 20(1); PPSA (Y.T.), s. 19(1); PPSA (Ont.), s. 20(1); PPSA (Alta.), s. 20(1); PPSA (P.E.I.), s. 19(1); PPSA (B.C.), s. 20.

33. See PPSA (Man.), ss. 21, 24, 25(1); PPSA (Sask.), ss. 19, 24(1), 25; PPSA (Y.T.), ss. 18, 22(1), 23; PPSA (Ont.), ss. 19, 22, 23; PPSA(Alta.), ss. 19, 24(1), 25; PPSA (P.E.I.), ss. 18, 22, 23; PPSA (B.C.), ss. 19, 24, 25.

34. See PPSA (Sask.), s. 12(1); PPSA (Y.T.), s. 11(1); PPSA (Ont.), s. 11(2); PPSA (Alta.), s. 12(1); PPSA (P.E.I.), s. 11(1); PPSA (B.C.), s. 12(1).

35. See PPSA (Man.), s. 12(1).

36. See PPSA (Man.), s. 48; PPSA (Sask.), s. 44; PPSA (Y.T.), s. 42; PPSA (Ont.), s. 45; PPSA (Alta.), s. 43; PPSA (P.E.I.), s. 43; PPSA (B.C.), s. 43. See also as regards the PPSA (B.C.), B. CHEFFINS, *loc. cit.*, note 29, pp. 69-70; J.S. ZIEGEL, "The Draft B.C. Personal Property Security Act", *loc. cit.*, note 29, p. 283.

of attachment.[37] In Ontario and Manitoba, preference is given to perfection by registration.[38] Hence, in these provinces if all the competing security interests have been perfected by registration, the first registered prevails whether or not it is the first to have been perfected. If competing interests have been perfected by different modes, the first to have been perfected prevails. Implicit in all provincial schemes is the priority of perfected security interests over those which have not been perfected.

This priority scheme is subject to two important exceptions. The first is the priority accorded the purchase money security interest. The second is the priority of the ordinary course purchaser of the collateral.

A purchase money security interest is the security available to a creditor who finances directly the acquisition of new assets by a debtor.[39] The purchase money creditor can be a seller who sells on credit to the debtor or a lender whose advance is actually used by the debtor to purchase goods from a third party. In either case, the purchase money security interest prevails against competing secured creditors, in particular those with security on future property, if certain formalities are met. If the goods are in the nature of inventory, the purchase money security interest must be perfected at the time the debtor receives possession of the collateral.[40] Further, the purchase money creditor must give notice to competing secured creditors who have registered their competing security interest. In the case of non-inventory goods, the purchase money creditor must perfect the security interest within a specified delay after the debtor has obtained possession of the collateral.[41]

The ordinary course buyer of collateral that is goods takes free of any security interest issued by the seller even if it has been perfected and the purchaser actually knows of it, unless the buyer knew that the sale constituted a breach of the prior security agreement.[42] This protection of the ordinary course purchaser, however, is limited to security interests created by the ordinary course seller and will not avail if the security interest was created by someone else in the chain of title. Ordinary and non-ordinary course buyers are protected as regards an unperfected security interest if they do not have knowledge of it.[43]

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37. See PPSA (Sask.), s. 35(1); PPSA (Y.T.), s. 34(1); PPSA (Alta.), s. 35(1); PPSA (P.E.I.), s. 33(1); PPSA (B.C.), s. 35(1).

38. See PPSA (Man.), s. 35(1); PPSA (Ont.), s. 30.

39. See PPSA (Man.), s. 1 (''purchase money security interest''); PPSA (Sask.), s. 2(gg); PPSA (Y.T.), s. 1(1) (''purchase money security interest''); PPSA (Ont.), s. 1(1) (''purchase money security interest''); PPSA (Alta.), s. 1(1) (ii); PPSA (P.E.I.), s. 1(p); PPSA (B.C.), s. 1(1) (''purchase money security interest'').

40. See PPSA (Man.), s. 34(2)(a); PPSA (Sask.), s. 34(2)(a); PPSA (Y.T.), s. 33(2)(a); PPSA (Ont.), s. 33(1)(a); PPSA (Alta.), s. 34(3)(a); PPSA (P.E.I.), s. 32(1)(a); PPSA (B.C.), s. 34(2).

41. See PPSA (Man.), s. 34(4) (10 days); PPSA (Sask.), s. 34(1)(a) (15 days); PPSA (Y.T.), s. 33(1)(b) (15 days); PPSA (Ont.), s. 33(2)(a) (10 days); PPSA (Alta.), s. 34(2)(a) (15 days); PPSA (P.E.I.), s. 32(4)(a) (10 days); PPSA (B.C.), s. 34(1) (15 days).

42. See PPSA (Man.), s. 30(1); PPSA (Sask.), s. 30(1); PPSA (Y.T.), s. 29(1); PPSA (Ont.), s. 28(1); PPSA (Alta.), s. 30(2); PPSA (P.E.I.), s. 28(1); PPSA (B.C.), s. 30(2).

43. See PPSA (Man.), s. 22(1)(b); PPSA (Sask.), s. 20(1)(e); PPSA (Y.T.), s. 19(1)(e); PPSA (Ont.), s. 20(1)(c); PPSA (Alta.), s. 20(1)(c); PPSA (P.E.I.), s. 19(1)(d); PPSA (B.C.), s. 20(c).

The uniform enforcement scheme established under the *U.C.C.* based legislation in Canada provides a series of cumulative, post-default remedies.[44] These include the right to seize the collateral, to dispose of it by public or private sale and to retain the goods. The exercise of these remedies is subject to a general standard of commercial reasonableness.[45] The statutory realization process does not exclude remedies otherwise available by law or statute, as well as those established under the parties' security agreement.

Despite its goals of rationalization, modernization and integration, *U.C.C.* based personal property security legislation in Canada does not specifically regulate non-consensual, statutory liens and preferred claims. Liens arising by statute or rule of law are excluded from the application of the legislation.[46] An exception to this exclusion is made as regards the possessory lien of a person who furnishes materials or services with respect to goods in the ordinary course of business. The lien for services and materials is given priority over a perfected security interest if the statute creating the lien gives it this priority.[47] In other cases, priorities are determined by reference to the nature of the statutory lien, wording of the statute, Common law priority rules and possibly the rules for third party enforceability of security interests under unified personal property security legislation. This area of law is at best chaotic.[48] Hence, only the statutory claims of the landlord and unpaid seller will be examined briefly.

As indicated above, under the non-U.C.C. based personal property security system a landlord's lien takes precedence over third party rights which can be characterized as chattel mortgages or other security interests, but not over the title of a conditional seller. Given the statutory exclusion, the same rule applies in *U.C.C.* based systems. The problem is that under a unified system of security on personal property, there is no legal distinction between conditional sales and chattel mortgages. Thus, it might be impossible in a given case to determine the nature of the security interest of a creditor competing with a landlord.

In Ontario and Manitoba, personal property security statutes do not affect a seller's statutory lien and right of stoppage in transit.[49] Hence, not only are these pre-delivery remedies exempt from the formalities of attachment and perfection, they are also enforceable against unperfected and perfected security interests. Of course, as pre-delivery remedies the seller's lien and right of stoppage in transit are of limited use. In the other provinces, the enforceability of a seller's pre-delivery remedies as regards personal property security interests would be subject to the chaotic scheme applicable to statutory liens described above.

In summary, the statutory reform of security on personal property in most Canadian Common law jurisdictions does not alter fundamentally the common

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44. See PPSA (Man.), ss. 57-64; PPSA (Sask.), ss. 55-63; PPSA (Y.T.), ss. 53-61; PPSA (Ont.), ss. 58-66; PPSA (Alta.), ss. 55-65; PPSA (P.E.I.), ss. 54-63; PPSA (B.C.), ss. 55-67.

45. See PPSA (Man.), ss. 58(2), 60(1), (3) & (4); PPSA (Sask.), s. 64(1); PPSA (Y.T.), s. 62(1); PPSA (Ont.), ss. 61(2), 63(1)-(3); PPSA (Alta.), s. 66(1); PPSA (P.E.I.), s. 65(1); PPSA (B.C.), s. 68(2).

46. See PPSA (Man.), s. 3(1)(a); PPSA (Sask.), s. 4(a); PPSA (Y.T.), s. 3(a); PPSA (Ont.), s. 4(1)(a); PPSA (Alta.), s. 4(a); PPSA (P.E.I.), s. 3(a); PPSA (B.C.), s. 4(a).

47. There is some doubt as to whether any such statutory provisions exist. See D.E. BAIRD & F. BENNETT, *op. cit.*, note 24, p. 91.

48. See W.A. BOGART, *loc. cit.*, note 24, p. 130; J.S. ZIEGEL, *loc. cit.*, note 24, p. 145.

49. See PPSA (Man.), s. 3(2); PPSA (Ont.), s. 4(2).

conceptual structure of personal property security systems described above. Except as regards non-consensual statutory preferences which are excluded, the reform does, however, unify and simplify the regulation of this domain. The radical change under *U.C.C.* based legislation is the removal of the distinction between legal and equitable security interests and the creation of a purely statutory priority system. This modification to a regime based on diverse statutes and Common law rules makes the new system hospitable to and effective for security on all types of present and future property.

The differences which arise in *U.C.C.* based legislation among different jurisdictions in Canada result from a staggered, cumulative improvement process and divergent policy objectives. The development of *U.C.C.* based personal property security legislation in Canada has occurred and is occurring in a piecemeal fashion. Each jurisdiction relies upon the experience of its predecessors in order to identify lacuna and problem areas, and to elucidate policy options. While the basic *U.C.C.* model for unified personal property security legislation in Canada remains unchanged, there are and will likely continue to be meaningful differences in the scope of the legislation and substantive rules governing formation, enforceability, priorities and remedies. Several examples of these differences will be discussed to illustrate this continuous process of law reform. A complete and current comparative account of the *U.C.C.* based legislation in Canada, however, is beyond the scope of this essay.[50]

Of particular interest in the development of unified personal property security legislation in Canada is the scope of application of the various statutes as regards *inter alia* securities issued by corporations and non-security transactions such as absolute assignments of debts, leases and consignments. As indicated above, corporate securities legislation in non-U.C.C. based jurisdictions applies to all forms of personal property security interests issued by a corporation in the context of a trust deed, bond or debenture.[51] This specific form of security is appropriate to long-term and large scale corporate indebtedness. It was excluded from the ambit of the former Ontario *Personal Property Security Act*[52] for fear that breach of the newly adopted formalities and, in particular, the requirement for renewal of registration of security interests would have catastrophic consequences for corporate bondholders. The exclusion, however, generated confusion as to how to reconcile the various rules of the two systems of personal property security which could apply to corporate financing. In jurisdictions such as Manitoba and Saskatchewan, which adopted *U.C.C.* based legislation after Ontario, corporate securities were included in the unified personal property security statute. The Manitoba legislation, however, recognizes corporate securities as a distinct

50. As to differences among the reformed Common law systems see R.C.C. CUMING, "Secured Commercial Financing in Ontario and Saskatchewan—A Comparison", [1981] *Meredith Memorial Lectures*, Don Mills, Richard DeBoo, 1982, 167; P.D. WENDLING, "Specific Problem Areas under the PPSA", [1981] *Meredith Memorial Lectures*, Don Mills, Richard DeBoo, 1982, 191; R.C.C. CUMING, "Second Generation Personal Property Security Legislation in Canada", (1981-82) 46 *Sask. L.R.* 5; J.S. ZIEGEL & R.C.C. CUMING, "The Modernization of Canadian Personal Property Security Law", (1981) 31 *U.of T.L.J.* 249; R.C.C. CUMING, "Judicial Treatment of the Saskatchewan Personal Property Security Act", (1987) 51 *Sask. L.R.* 129; J.S. ZIEGEL, "The Draft B.C. Personal Property Security Act", *loc. cit.*, note 29; B. CHEFFINS, *op. cit.*, note 29; R.C.C. CUMING, "Alberta Moves Toward Enactment of a Personal Property Security Act", (1985-86) 11 *Can. Bus. L.J.* 82.

51. See text *supra* accompanying note 13.

52. See R.S.O. 1980, c. 375, s. 3(1)(c).

category of security interest which can be registered in perpetuity.[53] The Saskatchewan statute includes corporate securities without distinction and permits flexible registration periods for all types of security interests, as does the Yukon statute.[54] The unified personal property security statutes in British Columbia and Alberta, and new Ontario statute follow the Saskatchewan model.[55]

The inclusion of non-security agreements in unified personal property security statutes is intended to protect third parties who deal with an ostensible owner from prior, undisclosed interests by requiring public registration of them. In essence, the priority rules of the legislation are expanded to apply to transactions which are difficult to distinguish as regards their security or non-security purposes and which create potential priority problems similar to those arising in the context of secured financing. For example, the Manitoba statute applies to transfers of accounts and chattel paper not intended as security as does the Ontario statute.[56] In Saskatchewan, non-security transfers of accounts and chattel paper, commercial consignments and leases for a term of more than one year are included.[57] The same non-security transactions are included under the legislation in British Columbia, Alberta and the Yukon Territories.[58]

Other significant differences arise among the *U.C.C.* based Canadian legislation as regards *inter alia* the status of the Common law floating charge, the extent to which collateral must be described in a financing statement, the availability of registration and possession as methods of perfecting security interests, the effects of lapse of a security interest due to late or non-renewal of registration, the protection of buyers who acquire the collateral during grace periods for perfection, the extent, if any, to which courts have discretion to permit deviations from the statutory enforcement scheme and the status of receivers and receiver-managers.[59] Further, the efficacy of each unified system of personal property security varies according to the technical sophistication of its registration system. The diversity among unified personal property security systems based upon differences in statutory rules becomes even greater when judicial interpretation of these rules is considered.[60]

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53. See PPSA (Man.), ss. 1 (''corporate security''), 2(a), 53(6).

54. See PPSA (Sask.), ss. 3, 48(2); PPSA (Y.T.), ss. 2, 52.

55. See PPSA (Alta.), ss. 3, 44; PPSA (Ont.), ss. 2, 51; PPSA (B.C.), ss. 2(1)(b), 44(1).

56. See PPSA (Man.), s. 2(b) & (c); PPSA (Ont.), s. 2(b).

57. See PPSA (Sask.), ss. 1(g), (y), (gg) & (nn), 3(b).

58. See PPSA (Alta.), ss. 1(g), (y), (ii) & (gg), 3(2); PPSA (Y.T.), ss. 1 (''consignment'', ''lease for a term of one year or more'', ''purchase-money security interest'', ''security interest''), 2(b); PPSA (B.C.), ss. 1 (''commercial consignment'', ''lease for a term of one year or more'', ''purchase-money security interest'', ''security interest''), ss. 3.

59. See R.C.C. CUMING, ''Second Generation Personal Property Security Legislation in Canada'', *loc. cit.*, note 50, pp. 21-4, pp. 25-8, pp. 30-3, pp. 33-6, p. 41; B. CHEFFINS, *loc. cit.*, note 29, pp. 69-70; R.C.C. CUMING, ''Alberta Moves toward Enactment of a Personal Property Security Act'', *loc. cit.*, note 50, p. 87, pp. 88-9; J.S. ZIEGEL & R.C.C. CUMING, *loc. cit.*, note 50, pp. 270-1.

60. See for example R.C.C. CUMING, ''Judicial Treatment of the Saskatchewan Personal Property Security Act'', *loc. cit.*, note 70.

C. SECURITY ON MOVEABLES IN QUÉBEC

Unlike most Common law jurisdictions in Canada and the United States, Québec has never adopted comprehensive personal property security legislation.[61] The present system of security on moveable property in Québec is a composite of principles and security devices dating from the codification in 1866, and security mechanisms and procedures developed in a piecemeal fashion since that time to meet modern financing needs.

In the Civil law of Québec, the system of security on moveable property emerges from two principles which regulate debtor-creditor relations. These principles are, first, universal patrimonial liability, *i.e.* that all of one's property is liable for fulfilment of one's personal obligations[62] and, second equality among creditors, *i.e.* that all of one's property is the common pledge of one's creditors and where they claim together they share its price rateably, unless there are among them legal causes of preference.[63] These two principles give rise to the major classifications of moveable security mechanisms in the law of Québec — title transactions and legal causes of preference.

The principle of universal patrimonial liability has ben interpreted to permit the manipulation of title to property in favour of a particular creditor in order to take that property out of the patrimony of the debtor, thereby insulating it from the claims of other creditors. These security mechanisms, commonly referred to as "title transactions", include the conditional sale, sale with a right of redemption, leaseback, financial lease, double sale, etc.[64] In Québec, title transactions are not subject to any special formalities relating to their role as security mechanisms. They are unregulated as security devices in that their validity and enforceability depend solely upon the general and special rules of contract applicable to the particular form of the transaction. The result of this formal, as opposed to functional, approach is the existence in Québec of non-possessory and unregistered security mechanisms based on title, *i.e.*, in Common law terminology, secret liens.

The absence of a requirement of either possession or registration as third-party notice mechanisms does, however, reduce the scope of enforceability of title transactions in Québec. The rules of sale and acquisitive prescription of moveables permit a good faith purchaser in possession who has purchased from

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61. Within the context of reform of the *Civil Code of Québec*, security on property has been unified in the spirit of Common law personal property security statutory reform. The new regime for security on property in Québec was adopted by the Québec legislature on December 18, 1991 as part of the *Civil Code of Québec*. It is not yet in force. See *Civil Code of Québec*, L.Q. 1991, c. 64, art. 2629 to 2789 regarding preferences and hypothecs, and art. 2918 to 3052 regarding the publicity of rights. For an analysis of the new regime see text *infra* accompanying notes 110-135.

62. See art. 1980 C.C.L.C., para. 1.

63. See art. 1981 C.C.L.C.

64. See E.E. SAUNDERS, "Pledge, Commercial Pledge, Sale with a Right of Redemption and Similar Security Devices", [1967] *Meredith Memorial Lectures*, Montreal, Wilson & Lafleur Ltée, 1967, pp. 21-5; G.E. LEDAIN, "Security over Moveable Property in the Province of Quebec", (1956) 2 *McGill L.J.*, pp. 89-95; R.A. MACDONALD, "Privileges and other Preferences upon Moveable Property in Quebec: Their Impact upon the Rights and Recourses of Execution Creditors", in M.A. SPINGMAN & E. GERTNER (eds.), *Debtor-Creditor Law : Practice and Doctrine*, Toronto, Richard DeBoo, 1982, pp. 286-7, pp. 324-37; R.A. MACDONALD & R.L. SIMMONDS, *loc. cit.*, note 25, p. 249, pp. 264-5.

a dealer or in a commercial sale to enforce his title *vis-à-vis* the true owner of the goods.[65] Further, the rules protecting a good faith purchaser also protect by analogy a good faith secured creditor whose security is regulated by the *Civil Code of Lower Canada*, *i.e.* pledgee, commercial pledgee and agricultural pledgee of assets not belonging to the pledgor.[66] Security based on title is enforceable nonetheless as regards competing creditors with secured rights based on non-codal, statutory mechanisms such as section 178 of the *Bank Act*,[67] trust deed security under the *Special Corporate Powers Act*[68] and transfer of property in stock,[69] the primary future property security devices, as well as documentary pledge of moveables.[70] A title transaction is also enforceable against a debtor's trustee in bankruptcy.

The second major type of security mechanism in Québec is the legal cause of preference which is stated explicitly in article 1981 C.C.L.C. to be an exception to the principle of equality among creditors. The legal causes of preference include privileges or priorities for payment and the rights arising by virtue of various consensual and non-consensual security devices. All of the legal causes of preference are created by law and are limited in number to those specifically enunciated in a codal or statutory provision.

A privilege is the right of a creditor to be paid by preference out of the proceeds of a judicial sale of the assets of a debtor.[71] Privileges are awarded to specific creditors based on either the nature of the activity which gives rise to

65. See art. 1488, 1489 and 2268 C.C.L.C.; Y. CARON, "La vente et le nantissement de la chose d'autrui", (1977) 23 *McGill L.J.*, p. 1 and p. 380; R.A. MACDONALD & R.L. SIMMONDS, *id.*, pp. 265-7; M. POURCELET, *La vente*, 5th ed., Montreal, Thémis, 1987, pp. 55-72; G.C. CHALLIES, "The Sale of a Thing Not Belonging to the Seller in the law of Quebec", (1936) 14 *Can. Bar R.* 801; A. MAYRAND, "Nantissement de la chose d'autrui", (1943) 3 *R. du B.* 313.

66. See art. 1966a C.C.L.C.; A. MAYRAND, *ibid.*; Y. CARON, *ibid.*; C. DEMERS, *Traité de Droit Civil du Québec*, vol. 14, Montreal, Wilson & Lafleur Ltée, 1950, pp. 15-7; R.A. MACDONALD, "Exploiting the Pledge as a Security Device", (1985) 15 *R.D.U.S.* 588; Y. GOLDSTEIN, "A Bird's Eye View of Conflicting Claims", [1981] *Meredith Memorial Lectures*, Toronto, Richard DeBoo, 1982, pp. 102-3; P. CIOTOLA, *Droit des sûretés*, 2nd ed., Montreal, Éditions Thémis, 1987, pp. 72-3, pp. 128-9; *Productions Michel Desrosiers Inc.* v. *Bourbeau*, [1983] C.S. 522; *Pétroles Irving Inc.* v. *Machineries B.D.M. Inc.*, [1984] C.S. 511.

67. See *Bank Act*, R.S.C. 1985, c. B-1, s. 178(2); R.A. MACDONALD, "Security under Section 178 of the Bank Act: A Civil Law Analysis", (1983) 43 *R. du B.*, pp. 1019-20, pp. 1051-2; Y. CARON, *id.*, pp. 412-3; G.E. LEDAIN, *loc. cit.*, note 64, p. 104; R.A. MACDONALD & R.L. SIMMONDS, *loc. cit.*, note 25, p. 266; L. PAYETTE, "Nantissement commercial — chose d'autrui", (1980) 40 *R. du B.* 680; J. AUGER, "Les sûretés mobilières sans dépossesion sur des biens en stock en vertu de la loi sur les banques et du droit québécois", (1983) 14 *R.D.U.S.* 235-7.

68. See *Special Corporate Powers Act*, R.S.Q. 1977, c. P.-16, ss. 27-30; J. AUGER, *id.*, pp. 236-7; R.A. MACDONALD & R.L. SIMMONDS, *id.*, p. 1066.

69. See *Bills of Lading Act*, R.S.Q. 1977, c. C-53, s. 13; J. AUGER, *id.*, 235, 237; R.A. MACDONALD, "Inventory Financing in Quebec after Bill 97", (1984) 9 *Can. Bus. L.J.* 159; Y. RENAUD, "La cession de biens en stock: deux régimes, deux sûretés de même nature", (1984) 86 *R. du N.* 286.

70. See Y. CARON, *loc. cit.*, note 65, pp. 412-3; R.A. MACDONALD & R.L. SIMMONDS, *loc. cit.*, note 25, p. 266; G.E. LEDAIN, *loc. cit.*, note 64, p. 97.

71. See art. 1983 C.C.L.C.; Y. GOLDSTEIN, "The Quebec Law of Privileges", (1977) 22 *C.B.R.* 2-3; R.A. MACDONALD in M.A. SPRINGMAN & E. GERTNER, *op. cit.*, note 64, p. 287; G.E. LEDAIN, *loc. cit.*, note 64, p. 79; P. CIOTOLA, *op. cit.*, note 66, p. 221.

the debt[72] or the secured status of the creditor as a beneficiary of a consensual or non-consensual security device[73]. Besides providing a secured creditor with a privilege, consensual and non-consensual security devices may also give rise to various preferred rights of possession and custody of the collateral, with or without rights of private realization.[74]

The primary consensual security devices in the law of Québec are the pledge, documentary pledge, assignment of book debts, agricultural and commercial pledge, trust deed security under the *Special Corporate Powers Act*[75] and transfer of property in stock. The Québec system of security on moveables is completed by the non-consensual remedies of an unpaid seller, protection accorded a buyer of collateral and statutory or codal non-consensual preferences and liens, particularly that of a lessor. Each of these shall be described briefly after which the priority systems governing security on moveables in Québec shall be discussed.

Historically, pledge[76], a possessory security device, is the archetype for security on moveable property in the Civil law of Québec in that it is consistent with the principles that moveables cannot be hypothecated[77] and that possession creates a presumption of lawful title.[78] Pledge can be used to secure the performance of any obligation and applies to present, corporeal or tangible moveable property. It gives the creditor or pledgee the right to withhold restitution of the thing pledged until the debt secured is paid in full. In the event of default by the debtor, a pledgee has a preferred claim on the proceeds of the judicial sale of the pledge property. Further, the parties can stipulate that a pledgee obtain ownership of the collateral upon default and that the transfer of title will extinguish the principal debt only up to the value of the collateral.

Documentary pledge is a subset of possessory pledge applied to documents of title such as bills of lading, warehouse receipts, etc.[79] Through a legal fiction, documents of title are the legal embodiment of the goods which they describe. Thus, the endorsement of the document by way of pledge constitutes a

72. See for example the privileges for law costs (art. 1994(1) C.C.L.C.), tithes (art. 1994(2) C.C.L.C.), funeral expenses (art. 1994(5) C.C.L.C.), expenses of a last illness (art. 1994(6) C.C.L.C.) and municipal taxes (art. 1994(7) C.C.L.C.).

73. See for example the privileges of the vendor (art. 1994(3) C.C.L.C.), pledge and retention creditor (art. 1994(4) C.C.L.C.) and lessor (art. 1994(8) C.C.L.C.).

74. See the possessory rights accorded the unpaid seller (arts. 1496, 1497, 1998, 1999 C.C.L.C.), pledgee (art. 1975 C.C.L.C.), commercial pledgee (art. 1979i C.C.L.C.), agricultural pledgee (art. 1979c C.C.L.C.) and trustee for bondholders (*Special Corporate Powers Act*, *supra*, note 68, s. 30. Private realization rights are available to a commercial pledgee (art. 1979i C.C.L.C.), agricultural pledgee (art. 1979c C.C.L.C.), trustee for bondholders (*Special Corporate Powers Act*, *ibid.*) and bank with s. 178 security (*Bank Act*, *supra*, note 67, ss. 179(7) to (11)). See also R.A. MACDONALD in M.A. SPRINGMAN & E. GERTNER, *op. cit.* note 64, pp. 337-49.

75. *Ibid.*

76. See arts. 1966 C.C.L.C. ff.; G.E. LEDAIN, *loc. cit.*, note 64, pp. 78-9; P. CIOTOLA, *op. cit.*, note 66, p. 63 ff.; E.E. SAUNDERS, *loc. cit.*, note 64, pp. 17-8; C. DEMERS, *op. cit.*, note 66, p. 11 ff.; R.A. MACDONALD, *loc. cit.*, note 66.

77. See art. 2022 C.C.L.C.

78. See art. 2268, para. 1 C.C.L.C.

79. See G.E. LEDAIN, *loc. cit.*, note 64, pp. 95-103; R.A. MACDONALD & R.L. SIMMONDS, *loc. cit.*, note 25, pp. 260-1; R.A. MACDONALD, *loc. cit.*, note 66, pp. 580-1; R.A. MACDONALD in M.A. SPRINGMAN & E. GERTNER, *op. cit.*, note 64, pp. 302-5; P. CIOTOLA, *op. cit.*, note 66, pp. 75-6; E.E. SAUNDERS, *loc. cit.*, note 64, p. 21.

pledge of the good themselves giving the pledgee constructive possession of them. The custody of the goods remains with the carrier, warehouseman, etc. However, the duration of this form of pledge is limited to six months, given the relatively short-term nature of documents of title. Within this time framework, documentary pledge gives the pledgee a right to retain the document and thereby control the goods represented by it until payment and upon default to realize upon the assets by means of a private or public sale. The documentary pledgee has a priority for payment on the proceeds of the sale.

As in Common law systems, it is difficult in Québec law, if not impossible, to distinguish between the absolute transfer of book debts and their transfer by way of security. This is reflected in the fact that both mechanisms are subject to the same formalities.[80] An assignment of book debts is valid between assignor and assignee if it is in writing. Its enforceability as regards third parties is subject to notice to the account debtor. In the case of an assignment of multiple, present or future book debts of a commercial business, registration of the assignment can replace the notice requirement.[81] In this case, registration preserves priority, but account debtors can validly pay the assignor and receive a discharge until newspaper notices have been published, after which time they must pay the assignee. This system which is analogous to the layered Common law system of attachment and perfection permits accounts receivable as collateral to fluctuate until their precise scope is determined by the newspaper notices published upon default, without affecting the priority of the registered assignee. Upon default and after publication of the notices, the assignee can enforce payment of the receivables against the account debtor.[82]

Agricultural and commercial pledge are specialized non-possessory, registered security mechanisms.[83] Agricultural pledge permits a person who derives revenue from agricultural or forest operations to pledge present and future livestock and produce, and present machinery and equipment as security for a loan or line of credit granted to the pledgor or another person who derives revenue from such operations.[84] Commercial pledge permits a person carrying on a commercial business to pledge present machinery and equipment pertaining to the business as security for a loan or line of credit not exceeding ten years.[85] Each pledge must

80. See arts. 1571-1578, 1966, para. 3 C.C.L.C.; L. PAYETTE, "Nantissement de comptes à recevoir et de créances commerciales", (1968-69) 71 *Can. Bar R.* 399; R.A. MACDONALD, *id.*, 578-80, pp. 593-4; R. DEMERS, "Cession de créances et affacturage", (1980) 21 *C. de D.* 201; L. MILLER & L. SARNA, "Assignment of Book Debts: Protection of Third Parties in Quebec", (1981) 99 *Can. Bar R.* 638; R.A. MACDONALD & R.L. SIMMONDS, *id.*, pp. 268-71; J. RHÉAUME, "La cession générale de créances commerciales à titre de garantie comme contrat de 'fiducie' en droit québécois, français et anglais", (1987) 28 *C. de D.* 137.

81. See art. 1571d C.C.L.C.

82. This is accomplished through stipulations of mandate and trust in the assignment, and by the intervention of the assignor in the suit against the account debtor. See for example *Place Québec Inc.* v. *Desmarais*, [1975] C.A. 910; *Stone Electric Inc.* v. *Community Development Ltd.*, [1972] C.S. 397.

83. See art. 1979a-1979k C.C.L.C.; R. COMTOIS, "Une nouvelle législation: Le nantissement commercial", (1963) *McGill L.J.* 261; R.A. MACDONALD & R.L. SIMMONDS, *loc. cit.*, note 25, pp. 257-60; P. CIOTOLA, *op. cit.*, note 66, pp. 123-148; J. AUGER, *loc. cit.*, note 67; DESJARDINS, "Du nantissement commercial à l'hypothèque mobilière", (1968-69) 71 *R. du N.* 87.

84. See art. 1979a C.C.L.C.

85. See art. 1979e C.C.L.C.

be in writing and registered in a separate register for agricultural and commercial pledges.[86] Upon default, agricultural and commercial pledgees can take possession of the collateral and sell it by public auction.[87] Each has a priority for payment upon the proceeds of the sale. Neither form of pledge can include a stipulation that ownership of the collateral will transfer to the pledgee upon default.

Under the *Special Corporate Powers Act*,[88] an incorporated company or limited partnership can give security over present and future, moveable and immoveable property to guarantee payment of bonds or debentures issued by it. The security agreement takes the form of a trust deed in which pre-default monitoring of the debtor company's activities and enforcement of post-default remedies of the bond or debenture holders are delegated to a third party trustee. The trust deed which must be registered usually imposes a fixed charge on fixed or capital assets and a floating charge on fluctuating assets such as inventory. The effect of the floating charge is twofold. It permits the debtor to sell collateral subject to the charge in the ordinary course of business. It also indicates that the precise scope of the collateral is determined by those assets owned by the debtor upon default. Upon default, the trustee can take possession of, administer and sell the collateral for the benefit of the bondholders who are also accorded a preference for payment on the proceeds of sale.

The *Special Corporate Powers Act*[89] also permits a trust deed to effect an assignment of present and future book debts. This assignment is enforceable against third parties only if the trust deed is registered and newspaper notices have been published. In other words, unlike an assignment of book debts under article 1571d C.C.L.C., registration alone does not preserve the priority of an assignee.

The most recent addition to the Québec system of security on moveable property is the transfer of property in stock, a non-possessory, registered inventory financing mechanism which came into force in 1984.[90] The security mechanism is modelled upon, unified Common law personal property security statutes and security under section 178 of the *Bank Act*.[91] It permits a person with an undertaking or business enterprise to give security upon present and future moveable property in reserve or inventory such as raw materials, property being processed, finished products and wares to guarantee a loan or authorized credit. The collateral automatically includes replacement property and insurance proceeds. A transfer of property in stock must be in writing and registered. The registration is valid for five years after which time it must be renewed. Upon default, a transferee can obtain possession of the collateral, terminate processing of it and sell it privately

86. See art. 1979b, 1979f, 1979g C.C.L.C.

87. See art. 1979c, 1979d, 1979i, 1979j, 1979k C.C.L.C.

88. *Supra*, note 68, ss. 27-31 and art. 1883.1 C.C.L.C. See K.F. MCNAMEE, "Security under the Special Corporate Powers Act", [1967] *Meredith Memorial Lectures*, Montreal, Wilson & Lafleur Ltée, 1967, 34; L. PAYETTE, "La charge flottante", [1976] *Meredith Memorial Lectures*, Toronto, Richard DeBoo, 1978, 43; J. AUGER, *loc. cit.*, note 67; Y. RENAUD, "Loi des pouvoirs spéciaux des corporations; deux régimes de sûretés?", (1972) 74 *R. du N.* 383; P. CIOTOLA, *op. cit.*, note 66, pp. 149-68; R.A. MACDONALD & R.L. SIMMONDS, *loc. cit.*, note 25, pp. 271-4.

89. *Supra*, note 68, s. 31.

90. See *Bills of Lading Act*, *op. cit.*, note 69, ss. 11 *et seq.* added by L.Q. 1982, c. 55, s. 26. See also R.A. MACDONALD, *loc. cit.*, note 69; J. AUGER, *loc. cit.*, note 67; Y. RENAUD, *loc. cit.*, note 69; P. CIOTOLA, *op. cit.*, note 66, pp. 169-83.

91. *Supra*, note 67. See text *infra* accompanying notes 112-119.

or publicly. While a transferee has a preference over sale proceeds, there is a statutory duty to pay all higher ranking claims.

In addition to these consensual security devices, it is necessary to consider the status of the unpaid seller, buyer of the collateral and certain statutory preferences.

In Québec, the unpaid seller of moveables has a status analogous to that of a secured creditor by virtue of pre- and post-delivery, non-consensual remedies.[92] Prior to delivery, an unpaid seller has a right of retention which permits him to withhold delivery to the buyer if there is reason to believe that the purchase price will not be paid upon delivery or upon the expiry of any term granted for payment.[93] This remedy is the Civil law equivalent to the Common law unpaid vendor's lien. If a buyer refuses to receive delivery and the price has not been paid, a seller can dissolve the sale with retroactive effect without any court intervention.[94]

After delivery, if the buyer does not pay the purchase price and the goods have not been sold and delivered by him to a third party, a seller can dissolve the sale with retroactive effect with court intervention.[95] In the same circumstances, the seller's right of revendication is intended to extend the right of retention beyond delivery by permitting a seller to retake possession.[96] Finally, the seller has a preference on the judicial sale proceeds of the goods where the conditions for the revendication remedy are not met or a third party enforces a claim against the goods.[97] The post-delivery remedies of the unpaid seller must, in the case of the buyer's bankruptcy or insolvency, be exercised within thirty days of delivery.[98]

Both the rights of retention and revendication are possessory, conservatory remedies which neither terminate the contractual relations of the parties, nor entail full or partial payment of the purchase price. The pre- and post-delivery dissolution remedies are title-based recourses, the effect of which is to remove the goods from the buyer's patrimony retroactively to the date of the contract of sale.

As regards the buyer of the collateral, a distinction must be made between an ordinary course and non-ordinary course buyer with and without possession. An ordinary course buyer in good faith with possession will generally

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92. See M. POURCELET, *op. cit.*, note 65, pp. 125-6, pp. 171-6; T. ROUSSEAU-HOULE, *Précis du droit de la vente et du louage*, Québec, Université Laval, 1986, pp. 89-90, pp. 200-208, pp. 216-18; L. FARIBAULT, *Traité de droit civil du Québec*, vol. 11, Montreal, Wilson & Lafleur Ltée, 1961, pp. 196-9, pp. 351-61; C. DEMERS, *op. cit.*, note 66, pp. 125-35; Y. GOLDSTEIN, *loc. cit.*, note 66, pp. 91-101; R.A. MACDONALD & R.L. SIMMONDS, *loc. cit.*, note 25, pp. 261-3; P.-B. MIGNAULT, *Droit civil canadien*, vol. 7, Montreal, Wilson & Lafleur Ltée, 1906, pp. 72-4, pp. 141-52; K.A. ATLAS, "The Vendor of Moveables in Quebec: His Protection and Privileges", (1982) 42 *R. du B.* 597; M. BOODMAN, "The Prepaying Buyer of Corporeal Moveables in Quebec", (1987) 47 *R. du B.*, pp. 896-8, pp. 918-22; M. BOODMAN, "The Right of Retention of the Seller of Moveables in Quebec", (1988) 67 *Can. Bar R.* 658; M. BOODMAN, "The Seller's Revendication Remedy as a Fossil", (1989) 35 *McGill L.J.* 19; P. CIOTOLA, *op. cit.*, note 66, pp. 245-53.

93. See art. 1496, 1497 C.C.L.C.

94. See art. 1544 C.C.L.C.

95. See art. 1543 C.C.L.C.

96. See art. 1998(1), 1999 C.C.L.C. The legal viability of the seller's revendication remedy is doubtful and it is rarely used. See M. BOODMAN, "The Seller's Revendication Remedy as a Fossil", *loc. cit.*, note 92.

97. See art. 2000 C.C.L.C.

98. See art. 1543, 1998 C.C.L.C.

take free of pre-existing secured rights.[99] A good faith ordinary course buyer without possession will take subject to the rights of a pledgee, documentary pledgee and agricultural and commercial pledgee.[100] Trust deed security under the *Special Corporate Powers Act*[101] and the transfer of property in stock implicitly or explicitly permit the debtor to sell the collateral in the ordinary course of business thereby giving the buyer with or without possession clear title.[102] Non-ordinary course buyers of the collateral will take subject to pre-existing rights.

As in Common law, there are many statutory and codal liens and preferred claims in the law of Québec. Their priority is specified in the relevant statute or codal provision and they are generally limited to assets belonging to the preferred claimant's debtor. Exceptional in this regard is the landlord's preference[103] which applies to moveable effects found on the leased premises belonging to the lessee as well as those belonging to third persons for rent due before the lessor was aware of the third person's rights.

The priority system applicable to consensual and non-consensual secured and preferred rights in Québec is an amalgam of rules based on title, the nature of the claim and timing of the claim. Unlike Common law systems, Québec law makes no distinction between legal and equitable title.

The scope of enforceability of the ownership of a creditor with security by way of a title transaction and that of a purchaser or other non-debtor owner of the collateral has been discussed above.[104] Other than rules regarding title, the primary priority system applicable to security on moveable property in Québec is based on the nature of the claim and regulated by articles 1994 C.C.L.C. *et seq.* These provisions order competing preferred claims according to their classification or source without reference to chronology. According to articles 1994 C.C.L.C. *et seq.* competing preferred claims are paid in the following order: law costs, tithes, unpaid vendor, pledgees and retention creditors including agricultural and commercial pledgees, funeral expenses, etc. Statutory preferred claims are ranked within the codal scheme according to the statute creating them. For example, the claim of a documentary pledgee under the *Bills of Lading Act*[105] ranks immediately above that of an unpaid vendor. The claim of a trustee for bondholders under the *Special Corporate Powers Act*[106] ranks after the claims in articles 1994, 1994a, 1994b and 1994c C.C.L.C.

The timing or chronology of claims is an element of the Québec priority system in several respects. First, timing determines the rank of competing assignees of book debts. Second, Québec cases have held that the rank of competing com-

99. See text *supra* accompanying notes 64-70 regarding title transactions.

100. In practical terms, an ordinary course buyer will compete with these secured creditors only if the buyer acquires the goods from a third party and not directly from the debtor.

101. *Supra*, note 68.

102. See *Bills of Lading Act*, *supra*, note 69, s. 26 which gives an ordinary course buyer priority over a transferee of property in stock. See also R.A. MACDONALD, *loc. cit.*, note 69, p. 173; J. AUGER, *loc. cit.*, note 67, p. 321; Y. RENAUD, *loc. cit.*, note 69, pp. 433-40. Trust deeds issued under the *Special Corporate Powers Act* usually stipulate a power to dispose in the ordinary course of business. See in this regard the authorities cited *supra*, note 88.

103. See art. 1637-1640, 1994(8), 2005 C.C.L.C.

104. See text regarding title transactions *supra* accompanying notes 64-70.

105. *Supra*, note 69, s. 4.

106. *Supra*, note 68, s. 29.

mercial pledgees is based on the timing of registration of their rights.[107] Third, the statutory priority system regulating the transfer of property in stock is based upon the timing of claims.[108] Consequently, if one of several competing preferred creditors is a transferee of property in stock both the timing and nature of the claims might determine priorities, possibly with paradoxical results. The incursion of timing-based priorities in a system initially based on the nature of the claim is the result of a proliferation non-possessory, registered security devices in Québec. The difficulties of integrating two priority systems are compounded by uncertainty in Québec as to the precise timing of secured rights on after-acquired or future property.[109]

In summary, the present Québec moveable security model consists of legislatively assigned privileges or priorities for payment, the various preferred rights arising from a finite list of consensual and non-consensual security mechanisms, and title transactions. Priorities within this system are determined either by rules regarding the enforceability of title or those based on the nature or timing of the preferred claim. The registration of secured rights is not centralized in that separate registration books or records are kept for each non-possessory security device. The non-possessory mechanisms, however, are specialized as regards the nature of the collateral or the debtor's activities.

The most recent proposal for reform of the law of security on moveables in Québec is included in the new *Civil Code of Québec*, recently adopted by the Québec legislature.[110] The new Code is not yet in force. Nonetheless, the reform as it affects security on moveables will be examined briefly here to give some idea of future developments in this domain.

The Québec reform of security on property is an attempt to unify the regulation of security on moveable property in the spirit of *U.C.C.* based Common law statutory reform. According to the reform, the legal causes of preference available to creditors *vis-à-vis* all property, moveable and immoveable, corporeal and incorporeal, are hypothecs and preferred claims.[111] A preferred claim is a non-consensual, unregistered priority for payment upon the proceeds of realization of hypothecary rights privately or through court ordered sales.[112] It is limited to the following claims and ranked in the following order : legal costs and expenses in the common interest of creditors, claims of persons having the right to retain property, claims of the state under fiscal laws, and municipal and school board tax claims on immoveables.[113] All preferred claims have priority over hypothecs.[114]

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107. See for example *Re Bertrand : Trans-Canada Credit Corp.* v. *Savage*, [1967] C.S. 596.

108. See *Bills of Lading Act*, *supra*, note 69, s. 27, para. 2.

109. See J. AUGER, *loc. cit.*, note 67, pp. 276-86; Y. RENAUD, *loc. cit.*, note 69, pp. 426-7; R.A. MACDONALD, *loc cit.*, note 69, p. 154, p. 159; M. BOODMAN, "The Prepaying Buyer of Corporeal Moveables in Quebec", *loc. cit.*, note 92, p. 917.

110. See *Civil Code of Québec*, *supra*, note 61, art. 2629 to 2789 regarding preferences and hypothecs, and art. 2918 to 3052 regarding the publicity of rights. The analysis which follows is based upon the provisions of *Civil Code of Québec*, Bill 125 (1st reading), 1st Sess., 34th Legislature (Qué.) because at the time of writing this manuscript the final version of the *Civil Code of Québec* was not available.

111. *Id.*, art. 2635, 2644, 2651.

112. *Id.*, art. 2643, 2636-2643.

113. *Id.*, art. 2367.

114. *Id.*, art. 2642.

The *Civil Code of Québec* defines a hypothec as a real right over moveable or immoveable property charged with the performance of an obligation, under which a creditor may exercise certain possessory and realization remedies.[115] A hypothec can apply to corporeal and incorporeal property, as well as present and future property.[116] Hypothecs can be conventional or legal,[117] the latter being restricted to specified claims including that of the unpaid vendor.[118] Conventional moveable hypothecs can be created by written agreement or delivery.[119] Those created by written agreement are enforceable against third parties only if they fulfill the appropriate registration formalities.[120] As regards hypothecs created by delivery, a creditor's possession fulfills the publicity requirement.[121] The third party enforceability of a hypothec on book debts is subject to registration and an individual or general notice of the registration to the account debtors.[122] Hypothecs *vis-à-vis* future property take effect when the grantor acquires rights in the collateral.[123] Those established by floating charge take effect when a notice of crystallization has been registered.[124]

The reform establishes a priority system based on the chronology of publication of rights through registration or delivery.[125] This system applies to all hypothecs, including those on book debts and future property. However, the vendor's hypothec and floating hypothec are exceptions to this rule. The former has priority over all competing hypothecary creditors if it is published within fifteen days of the sale.[126] The floating hypothec ranks according to the date of registration of a notice of crystallization.[127]

The primary remedy available to a preferred creditor is a preference on the proceeds realized through a sale by judicial authority. A preferred creditor can exercise the preference after having initiated the judicial realization process or when the judicial or private realization process has been commenced by another creditor.[128] Hypothecary creditors have, in addition to a preference on the proceeds of a court ordered sale, the right to take possession of the charged property, take it in payment and sell it by private agreement, a call for tenders or public auction.[129] All hypothecary remedies must be preceded by service of a notice of intention on the debtor or holder of the charged property.[130] Within a certain period of receipt of the notice, a debtor can remedy the default thereby defeating the

115. *Id.*, art. 2644.
116. *Id.*, art. 2651, 2655.
117. *Id.*, art. 2648, para. 2.
118. *Id.*, art. 2707.
119. *Id.*, art. 2649, para. 2, 2681, 2685.
120. *Id.*, art. 2647.
121. *Id.*, art. 2686.
122. *Id.*, art. 1639, 1640 (assignment of claims), 2693, para. 2, 2694.
123. *Id.*, art. 2655.
124. *Id.*, art. 2699.
125. *Id.*, art. 2733, 2929-2940.
126. *Id.*, art. 2935.
127. *Id.*, art. 2940.
128. *Id.*, art. 2636-2643, 2776, 2779.
129. *Id.*, art. 2731, 2732 *et seq.*
130. *Id.*, art. 2732, 2740-2744.

exercise of the hypothecary right.[131] Competition among hypothecary creditors as regards remedies is determined on the basis of ranking of priority.[132]

While the Québec reform emulates *U.C.C.* based Common law reform, it generates one important anomaly. This is the uncertainty as regards unification of the concept of security on moveable property. According to article 2648, hypothecation can take place "only in the cases and according to the formalities authorized by law". Further, article 2922 which identifies the rights requiring publication differentiates between immoveable and moveable rights. The creation, transfer and extinction of the former must be published in all cases. Moveable rights require publication only to the extent prescribed or expressly authorized by law. According to article 2923, clauses of resolution, resiliation and the conditional extinction of a right requires publication only if the right modified initially required publication. The result of these provisions is that legal form or technique, as opposed to purpose or substance, determines the application of the rules for the publication and third party enforcement of security on moveable property. For example, title transactions by way of sale or lease used as moveable security devices are subject to publication only insofar as they are specifically regulated. Instalment sale and sale with a right of redemption of moveables must be published.[133] It is uncertain to what degree instalment sale includes title transactions such as conditional sale in which the transfer of ownership is subject to a resolutory or suspensive condition of payment, or double sale. By contrast, the dissolution remedies of the unpaid seller of moveables are not subject to publication[134] unlike the legal hypothec of the unpaid seller of moveables.[135]

D. FEDERAL LEGISLATION REGARDING SECURITY ON MOVEABLES

The Canadian provincial Common and Civil law systems for security on personal or moveable property are profoundly affected by two federal statutes : the *Bankruptcy Act*[136] and the *Bank Act*.[137] The *Bank Act* under sections 178 *et seq.* makes available to banks a consensual, non-possessory security device over specified types of collateral for loans to specified categories of borrowers.[138] As regards commercial wholesalers and retailers, and manufacturers the collateral can include all types of present and future tangible moveable property.[139] Narrower categories are established for farmers, fishermen and forestry producers. The creation of the security is subject to several requirements. It must be preceded by a notice of intention to take security filed at a local office of the Bank of Canada within three years prior to the granting of security.[140] Security under section 178

131. *Id.*, art. 2745.
132. *Id.*, art. 2733.
133. *Id.*, art. 1736-1739, 1740-1746. Art. 1746 states that the sale with a right of redemption made for the object of securing a loan is null. This provision illustrates the division between form and substance.
134. *Id.*, art. 1731, 1732.
135. *Id.*, art. 2707(3), 2712, 2935. See also G. GOLDSTEIN, "La vente dans le nouveau Code civil du Québec : quelques observations sur le projet de loi 125", (1991) 51 *R. du B.* 375-376.
136. See *Bankruptcy Act*, R.S.C. 1985, c. B-3.
137. See *Bank Act*, *op. cit.*, note 67.
138. See *Bank Act*, *id.*, s. 178(1)(a)-(j).
139. *Id.*, s. 178(a) & (b).
140. *Id.*, s. 178(4)(a).

must be granted by written instrument. The loan must coincide with the granting of security or a written promise of security.[141] The security applies to assets owned by the debtor at the time it is granted or acquired during the life of the security interest.[142] The priority system applied under the *Bank Act* is a chronological or temporal scheme.[143] Hence, a bank with section 178 security takes precedence over all subsequent, competing secured creditors. A bank has priority over prior unpaid seller's liens of which it had no notice.[144]

The substantial impact of section 178 security upon provincial moveable security systems results from several factors. First, banks are a major source of secured financing in Canada. Second, because section 178 security is based on pre-reform Common law rules, it is not easily integrated into provincial *U.C.C.* based Common law systems or the Civil law system of Québec.[145] Its notice of intention registration requirement provides little useful information and is not linked to provincial registration systems. Consequently, uncertainty exists as to priorities between a bank and competing provincially secured creditors regarding *inter alia* after-acquired property and purchase money security interests. The *Bank Act* also differs from provincial systems as regards remedies available to secured creditors.

The substantive incompatibility of provincial systems with that of the *Bank Act* is compounded by the constitutional law principle of federal paramountcy which dictates that within the sphere of federal legislative power any conflict between federal and provincial legislation will be resolved by reference to the federal enactment. Therefore, despite its paucity of rules and asystematic nature as regards secured transactions, the *Bank Act* alone governs conflicts between it and provincial personal property security legislation. The ultimate result of the doctrine of paramountcy in this instance is the impossibility of integrating section 178 security and provincial systems of security on personal property.

The federal *Bankruptcy Act*[146] establishes for all provincial jurisdictions a collective or unified debt realization process for creditors of a bankrupt debtor under the administration of a trustee in bankruptcy. While the general rule is that the exercise of a secured creditor's rights is not impeded by a debtor's bankruptcy, this federally imposed realization process does modify provincial personal property security systems. The most important modification is the potential re-ordering of the provincial ranking of preferred and secured creditors. Section 136 of the *Bankruptcy Act* states that certain creditors are to be paid by preference in a particular order subject to the rights of secured creditors. This means that secured creditors as defined under the statute are accorded priority status *vis-à-vis* preferred creditors as listed in section 136. Neither the definition of secured or preferred creditors, nor the order of ranking imposed by the provision necessarily coincides with their provincial counterparts.

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141. *Id.*, s. 180(1).
142. *Id.*, s. 178(2).
143. *Id.*, ss. 178(2), 179(1).
144. *Id.*, s. 179(2).
145. For a detailed discussion of these difficulties see R.A. MACDONALD, *loc. cit.*, note 67; R.C.C. CUMING & R.J. WOOD, "Compatibility of Federal and Provincial Personal Property Security Law", (1986) 65 *Can. Bar R.* 267; R.A. MACDONALD, "Atomic Slipper Co. v. Banque Nationale du Canada: Commercial Practice Meets Constitutional Law", (1989) 73 *C.B.R.n.s.* 1.
146. *Supra*, note 136.

Other effects upon provincial systems for security on personal property result from the powers and position of a trustee in bankruptcy. As a representative of the bankrupt debtor and mass of creditors, a trustee in bankruptcy verifies and, if necessary, challenges the validity of creditors' security devices. A debtor alone does not have the resources or incentive to do so, in particular given its effect on the debtor-creditor relationship. A trustee in bankruptcy can delay a secured creditor's realization process by court order[147] or by exercising a power to inspect assets held as security.[148] A trustee can also force the sale of secured assets if a creditor is reluctant to realize upon security[149] or redeem the security at a value assessed by the creditor.[150] While these powers may be justified as a means of ensuring the timely and equitable collective realization of a bankrupt estate, they impose procedural rules which can modify provincial realization processes.

The *Bank Act* and *Bankruptcy Act* establish a fourth system of security on personal property in that, if applicable, they modify each of the pre- and post-reform Common law systems and Civil law system of Québec. While these federal statutes apply uniformly to all provincial jurisdictions, their substantive impact differs according to the differences in provincial systems. In other words, insofar as they do have an impact, the *Bank Act* and *Bankruptcy Act* merely reflect the degree of diversity among provincial systems for security on personal or moveable property.

Conclusion

The systems of security on personal or moveable property in Canada have both divergent and convergent characteristics. The differences result from different jurisdictional processes for law reform, systemic differences in fundamental concepts of property and contract law, and from divergent commercial practices and legislative policies, all of which are related. The similarities occur because within a modern Canadian perspective the concept and goals of secured financing as regards personal property are unified.

It is impossible to characterize security on personal property in Canada as either completely divergent or homogeneous. Any such characterization will ultimately reflect its own purpose or analytical context. The present description of the nature and diversity of personal property security in Canada demonstrates that there is a meaningful degree of commensurability in this domain among Canadian jurisdictions. In other words, merely understanding the nature and diversity of personal property security systems in Canada entails acknowledging not only the intelligibility of each system, but also the unavoidable impact each system will have upon the others.

147. *Id.*, s. 69(2).
148. *Id.*, s. 79.
149. *id.*, s. 129(1).
150. *Id.*, s. 128(3).