

PPSA Registrations Against Corporate Debtors with English/French Names

INTRODUCTION

In order for a secured party to perfect its security interest under the Ontario *Personal Property Security Act*, R.S.O. 1990 c.P.10, as amended (the "Ontario PPSA"), it is essential that the secured party register a financing statement against the proper name of the debtor. According to paragraph 2 of Section 16(4) of the Minister's Order made under the Ontario PPSA (the "Minister's Order"), if the debtor is a corporation, then the incorporated name of the debtor shall be set out in the financing statement. Section 17 of the Minister's Order goes on to provide that, if the debtor has an English form of name and a French form of name, then:

- (a) the English form of the name shall be set out on the appropriate line for the name of a business debtor; and
- (b) the French form of the name shall be set out on another appropriate line for the name of a business debtor.

What is the proper way for a secured party to register a financing statement when a corporate debtor has a combined English form and

French form of name? Darrell J. Stephenson J. of the New Brunswick Court of Queen's Bench considered this situation in the recent case of *HarbourEdge Mortgage Investment Corp. v. Powell Associates Ltd.* (2016), 6 P.P.S.A.C. (4th) 266, 42 C.B.R. (6th) 149. Although this case was decided on the basis of the New Brunswick *Personal Property Security Act*, S.N.B. 1993, c.P-7.1 (the "New Brunswick PPSA"), the reasoning of the Court is helpful to secured parties and their legal counsel in the Province of Ontario for determining the proper registration procedures under the Ontario PPSA.

THE FACTS

The relevant facts were as follows:

1. Mall Centre-Ville Ltd. Mall Centre-Ville Ltee. (the "Debtor") borrowed money from HarbourEdge Mortgage Investment Corporation ("HarbourEdge") pursuant to a loan agreement dated March 6, 2013.
2. As security for the loan, the Debtor granted security in favour of HarbourEdge against all of its real and personal property by way of a collateral mortgage,



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assignment of rents, and general security agreement.

3. HarbourEdge registered a financing statement against the Debtor under the New Brunswick PPSA (the "Financing Statement").

4. The Financing Statement inadvertently identified the Debtor as "Mall Centre-Ville Ltd. Mall Centreville Ltee."

5. The Debtor's name as reflected in the records of the New Brunswick Corporate Affairs Registry Data Base and in its Articles of Amendment was "Mall Centre-Ville Ltd. Mall Centre-Ville Ltee."

6. A search under the New Brunswick Personal Property Registry under the separate names "Mall Centre-Ville Ltd." or "Mall Centre-Ville Ltee." disclosed the existence of the Financing Statement in favour of HarbourEdge, but a search against the name "Mall Centre-Ville Ltd. Mall Centre-Ville Ltee." did not disclose this registration.

7. The Debtor defaulted under its loan agreement and, in July 2015, HarbourEdge demanded payment of its loan.

8. On August 15, 2015, the Debtor filed a Notice of Intention To Make A Proposal under the *Bankruptcy and Insolvency Act* (Canada) (the "BIA").

9. The Debtor made a proposal to its creditors which was rejected at a meeting of creditors held on

February 26, 2016, resulting in the Debtor's deemed assignment into bankruptcy on that date as provided by the BIA.

10. HarbourEdge tried to assert a secured claim against the proceeds of the rental cheques and/or the proceeds of commercial rents paid by the Debtor's tenants up to February 26, 2016 (the "Rental Proceeds").

11. HarbourEdge submitted a secured proof of claim in the bankruptcy, which was rejected by the Debtor's trustee-in-bankruptcy on the basis that the Financing Statement contained a seriously misleading error, did not perfect the security interests against the Debtor's personal property, and consequently, such security interests were ineffectual in relation to the Rental Proceeds.

12. HarbourEdge brought a motion seeking an order that the trustee-in-bankruptcy be directed to accept its proof of claim as a secured claim and that the Rental Proceeds held by the trustee-in-bankruptcy be paid over to HarbourEdge.

13. The Court dismissed HarbourEdge's application and denied its claim to the Rental Proceeds.

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The Court held that the registration of the Financing Statement was

invalid pursuant to Section 43(8) of the New Brunswick PPSA which states:

"A registration is invalid if a search of the records of the Registry using the name, as prescribed, of any of the debtors required to be included in the financing statement other than a debtor who does not own or have rights in the collateral does not disclose the registration."

In reaching this decision, the Court referred to Section 21(2) of the General Regulation under the New Brunswick PPSA which requires the entry of "all forms of the name of the debtor that is a body corporate if the name of the debtor is in more than one of the following forms:

- (a) an English Form;
- (b) a French Form;
- (c) a combined English – French form."

The Court noted that there was no hyphen or other punctuation between the English and French component parts of the Debtor's name. Furthermore, there was simply no way to view it as a standalone English name or a standalone French name, without disregarding what appeared plainly in the Data Base of the New Brunswick Corporate Affairs Branch. Whether the name of the Debtor was viewed either as a single unitary name or a combined English – French name, Section 21(2) of the General Regulation required that the

Financing Statement be registered against either:

1. "Mall Centre-Ville Ltd. Mall Centre-Ville Ltee." alone; or
 2. each of "Mall Centre-Ville Ltd. Mall Centre-Ville Ltee.", "Mall Centre-Ville Ltd.", and "Mall Centre-Ville Ltee." separately.
- The Court noted that this second method of registration would be the accepted commercial practice in Provinces with PPSA regimes similar to New Brunswick when confronted with this type of corporate debtor name.

Since a search on one of the debtor names required to be included (that is, "Mall Centre-Ville Ltd. Mall Centre-Ville Ltee.") did not disclose HarbourEdge's registration, the Court ruled this registration invalid pursuant to Section 43(8) of the New Brunswick PPSA. In coming to this conclusion, Stephenson J. stated:

"I acknowledge this is a harsh outcome for the inadvertent admission of a dash in a financing statement. However, that outcome is mandated by the operation of Section 43(8) of the PPSA . . . It must be recognized that avoidance of these type of over-sights is the reason why post-registration confirmatory searches are conducted against debtor names as a matter of usual commercial practice, and included in closing books, to confirm that a search against the correct names will turn up the relevant registrations. . . . Bottom line, the desire for efficiency

and certainty, in a system where priority generally turns on time of registration, necessitates accuracy and precision, which in turn gives rise to the need for statutory provisions such as Section 43(8) to address the consequences of non-compliance with the prescribed registration requirements."

CONCLUSIONS

The decision in the HarbourEdge case has important implications for lenders who wish to take security over personal property. This case serves as another warning that the Courts usually follow a "zero tolerance" policy when it comes to mistakes in registering against the name of a debtor under the PPSA. Although the registration requirements for English/French corporate names under the Ontario PPSA are worded differently than the requirements under the New Brunswick PPSA, the result of the registration mistake in the HarbourEdge case would probably be the same under the Ontario PPSA. The Ontario Courts also take a strict approach to compliance with the name registration requirements under the Ontario PPSA. For example, in *Armstrong, Thomson & Tubman Leasing Ltd. v. McGill Agency Inc. (Trustee of)*, (1993) 5 P.P.S.A.C. (2d) 231, 21 C.B.R. (3d) 295 (Ont. Bkcty.), the Court held that the Ontario PPSA required both the French and English versions of the debtor's corporate name to be set out in the financing statement. It was decided that the omission of the French

form of the name invalidated the registration of the security interest and, as a result, the unperfected security interest was subordinate to a trustee-in-bankruptcy.

When a debtor is an incorporated company, the secured party must ensure that its registered financing statement shows the debtor's name as required by the PPSA. After a secured party has registered its financing statement, it should also search against the debtor's correct name, in order to make sure that its financing statement appears on the search. In the HarbourEdge case, the secured party's financing statement included the hyphen in the English version of the Debtor's name, but it inadvertently omitted the hyphen in the French version. If the secured party had done a post-registration search against the Debtor's name with hyphens in both the English and French versions of the name, the search would have failed to disclose their financing statement. As a result, the secured party would have realized that something was wrong and would have been able to correct this mistake by amending its financing statement to show the proper name with both hyphens.

In the case of a corporation in Ontario with English and French forms of name, the safest course of action is to register and search against the bilingual corporate names as follows:

- (i) English name;
- (ii) French name;
- (iii) English name/French name;

and

(iv) French name/English name.

Although these registration requirements may seem onerous, it is necessary to follow this procedure, because the Courts insist on accuracy and absolute compliance with the PPSA. While the harsh result of omitting a hyphen in the French version of a debtor's name may seem unfair, it is an example of the judicial preference for commercial certainty over fairness in resolving priority disputes under the PPSA. The Courts take the position that the need for the efficient operation of the PPSA registration system is more important than the loss suffered by a party who makes an inadvertent mistake in registering against the name of the debtor.