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A Trio of Recent *PPSA* Cases From Coast to Coast in Canada

A trio of recent cases from coast to coast in Canada confirms that the Courts continue to take a very strict approach to the requirements of the *Personal Property Security Act* (the "*PPSA*") in their Provinces.

Newfoundland

The Newfoundland case of *Re: Hoskins* (2014) 2 P.P.S.A.C. (4th) 130 deals with registration against the correct legal name of an individual debtor. The debtor, Mr. Hoskins purchased a motor vehicle pursuant to a conditional sales agreement, which was assigned to Honda Canada Financing Inc. ("Honda"). The debtor provided a valid driver's licence that showed his name as "Thomas E. Hoskins" and he signed a document confirming that his full legal name was Thomas Edgar Hoskins. Honda registered a financing statement under the *PPSA* in Newfoundland that showed the debtor's name as "Hoskins, Thomas E." and that included his correct date of birth and the correct serial number (VIN) for the vehicle. Three years later, the debtor went bankrupt and the trustee in bankruptcy contested the *PPSA* registration in favour of Honda. The trustee produced a copy of the debtor's birth certificate which showed his name as "Edgar Thomas Geoffrey Hoskins". The Court held that the *PPSA* registration in favour of Honda was not perfected properly. Honda's registration was not effective as against the trustee-in-bankruptcy because it did not show the name of the debtor as stated in the debtor's birth certificate and as required pursuant to the Regulations under the *PPSA*. The decision in this case should serve as a reminder and a warning to all secured parties that they should insist upon receiving a copy of the debtor's birth certificate prior to preparing and registering a financing statement under the *PPSA*, and not rely upon a copy of the driver's licence or other information provided by the debtor regarding his or her correct legal name.

Ontario

The Ontario case of *Royal Bank of Canada v. Komtech Enterprises Ltd.* (2014) 2 P.P.S.A.C. (4th) 234, shows that secured parties also need to be careful when registering their security under the *PPSA* against

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a corporate debtor. This case involved a truck that was leased by Komtech Inc. ("Old Komtech") for five years from Surgenor National Leasing Limited ("Leaseco"). About half way through the term of the lease, Old Komtech underwent a corporate reorganization involving a vesting order pursuant to which all of the assets of Old Komtech were transferred to a new corporation called Komtech Enterprises Limited ("New Komtech"). Leaseco began receiving cheques from New Komtech and knew that its truck was being leased by a new corporate entity. At the end of the original lease, New Komtech and Leaseco extended the truck lease for two additional years. Unfortunately for Leaseco, it filed a *PPSA* Financing Statement for the lease extension against Old Komtech as the debtor, instead of New Komtech. A short time later, a receivership appointment order was made against New Komtech. Leaseco subsequently sold the truck without notice and without Court approval. The receiver claimed that Leaseco was not entitled to the proceeds of sale from the truck and the Court ruled in favour of the receiver on the basis that Leaseco had failed to perfect its *PPSA* security properly against New Komtech. The Court held that Leaseco's security was unperfected because it was not registered against the name of New Komtech. The Court found that Leaseco had consented to the transfer of Old Komtech's interest in the truck to New Komtech, and should have obtained a new security agreement from New Komtech.

The decision in the Ontario case shows that secured parties must ensure that their security documentation and *PPSA* registrations are kept up-to-date with respect to changes in a corporate debtor. The secured party should consider whether a corporate reorganization requires the new debtor to execute a new security agreement. Even though a financing statement may be registered properly against the correct name of a corporate debtor at the commencement of a secured transaction, there may be subsequent corporate changes, such as a change of name as a result of articles of amendment or an amalgamation. There may also be a subsequent corporate reorganization that results in the transfer of the collateral to a new corporate entity. The Ontario *PPSA* provides that where the secured party learns that the debtor's name has changed, the security interest will become unperfected 30 days after the secured party learns about the change of name, unless the secured party registers a financing change statement (or takes possession of the collateral) within such 30 days. Similarly, the Ontario *PPSA* provides that where the debtor transfers its interest in the collateral to another debtor, then the secured party must register a financing change statement showing the name of the new debtor within 15 days after the secured party gave its prior consent to the transfer. If the transfer of collateral took place without the prior consent of the secured party, then the secured party needs to register a financing change statement within 30 days after the secured party learns about the transfer. If the secured party fails to register a financing change statement within the applicable time period, then its security interest will become unperfected.

British Columbia

The British Columbia case of *CFI Trust (Trustee of) v. Royal Bank of Canada* [2013] B.C.J. No. 2049, deals with a priority agreement between two secured parties holding *PPSA* security against the same debtor. CFI Trust and CFI Leasing Limited (collectively, "CFI") and the Royal Bank of Canada (the "Bank") were both lenders to a car dealership named Totem Automotive Group Ford Lincoln Sales and Leasing Inc. ("Totem"). Both CFI and the Bank had security agreements with Totem and had registered their security against Totem under the *PPSA* of British Columbia. CFI and the Bank also entered into a priority agreement which provided that the security interests of the Bank would take priority over certain assets of Totem defined as the "Bank's Assets", save and except for certain assets that were not part of the Bank's Assets and which were defined as the "CFI Assets". The definition of the Bank's Assets in the priority agreement was very broad and included all

present and after-acquired personal property of Totem "or any proceeds therefrom". The definition of the "CFI Assets" in the priority agreement was restricted to the motor vehicles that were the subject of leases or contracts that were financed by CFI. Unfortunately for CFI, the definition of "CFI Assets" did not include the words "or any proceeds therefrom".

After Totem went out of business, CFI discovered that the proceeds from its terminated lease agreements for 242 motor vehicles funded by CFI had been paid into Totem's accounts with the Bank. CFI sued the Bank for these funds arguing that CFI had priority over the Bank's security interest in these funds. The Court ruled in the Bank's favour on the basis that the priority agreement failed to specifically give CFI priority with respect to any proceeds arising from dealings with the CFI Assets. Although this decision is being appealed by CFI, the ruling of the Court is another example of the strict approach that is taken by the Courts in Canada in applying the provisions of the *PPSA*. A secured party that wishes to enter into a priority agreement with another secured party should ensure that the priority agreement is drafted clearly and that it sets out the respective priorities of the two secured parties to their respective collateral and "any and all proceeds arising therefrom".

It seems that the Canadian Courts insist upon perfect performance by secured parties in perfecting their security under the *PPSA*.